April 11, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] A[redacted]

On Motion for Reconsideration

On October 25, 1988, the Board of Appellate Review (the "Board") remanded to the Department of State (the "Department") for further proceedings the appeal taken by appellant, [redacted] A[redacted], from the decision of the Assistant Secretary of State for Consular Affairs, dated February 10, 1988, sustaining the denial of appellant's application for a passport. We found the record of proceedings on which the Assistant Secretary's decision was based incomplete and defective, and, therefore, remanded the appeal to the Department for further action to develop an adequate record.

On November 23, 1988, the Department moved the Board to reconsider and reverse the decision to remand the appeal on the ground that the Board overlooked or misapprehended certain points of law. The principal basis for the motion, the Department states, is that the Board made certain errors concerning the burden of proof, "which so colored the Board's decision as to require reversal." Should the Board deny the Department's motion for reconsideration, the Department requests, in the alternative, that the Board explain more fully how the Department should proceed in order to comply "with the Board's construction" of the regulations. 1/

The Department argues that [redacted] has the burden of showing that a change of circumstances has occurred since the revocation of his previous passport to warrant issuance of a passport; 2/ that [redacted] also bears the burden of going forward to establish a prima facie case before the Department is required to produce any evidence; that [redacted] has failed to establish a prima facie case to shift the burden of going forward to the Department; and

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1/ The Board has not engaged in "construction" of the regulations. We find the relevant passport regulations, 22 C.F.R. 51.70, 51.71, 51.75, and 51.80-51.89, to be clear and unambiguous. In our view, these regulations do not require extrinsic considerations to determine their meaning.

2/ 22 C.F.R. 51.70(b)(5).

that [redacted] has failed to satisfy his burden of showing a change in circumstances to warrant issuance of a passport.

Further, the Department contends that [redacted] had the opportunity in the proceedings before the hearing officer to confront the evidence against him and to deny or rebut the twelve citations of his conduct that allegedly warrant the denial of a passport, but did not do so. 3/ With respect to [redacted] right to confront and cross-examine any adverse witness, the Department believes that the regulations affording such right "should be irrelevant" in this case since there were no witnesses at the hearing.

We appreciate that the proper allocation of the burden of proof, that is, the burden of establishing the case and the burden of going forward with the evidence, must be observed in administrative proceedings, Nor do we dispute that [redacted] has the burden of showing that a change in circumstances since the earlier revocation of his passport warrants issuance of a passport. However, having presented some evidence regarding pre-publication review by the Central Intelligence Agency, and with the Department responding thereto with allegations of twelve citations of conduct to refute [redacted] claim of a change in circumstances, we are of the view that the Department had the burden of going forward on that issue with the presentation of evidence. Under 22 C.F.R. **51.85,** [redacted] is entitled to be informed of the source of such evidence and to confront and cross-examine any adverse witness. We do not consider the regulations affecting such right to be "irrelevant" in this case.

3/ The twelve citations of conduct attributed t[redacted] were enumerated in an attachment to a letter of [redacted] Director, Central Intelligence Agency, to [redacted] Deputy Assistant Secretary, Passport Services, Department of State, dated June 20, **1987.** The letter of the Director of the Central Intelligence Agency and its attachment listing the citations of Agee's conduct were attached to the Action Memorandum of June 26, **1987,** from the Assistant Secretary for Consular Affairs to the Secretary of State recommending denial of [redacted] application for a passport on the grounds he had not shown "a material change of circumstances since **1979,"** when his passport was revoked because his activities abroad were causing or are likely to cause serious damage to the national security or the foreign policy of the United States, to warrant issuance of a passport. 22 C.F.R. 51.70(b)(4).

The crux of the Board's decision to remand this case to the Department is that we were presented with an inadequate record to review, [redacted] did not present witnesses or offer evidence other than that regarding pre-publication review by the Central Intelligence Agency to support his claim of a change in circumstances. The Department failed to inform appellant of the sources of all the evidence before the hearing officer and to accord him the opportunity to confront and cross-examine adverse witnesses regarding the sources and accuracy of the citations of appellant's alleged activities that justify denial of his passport application. 4/ We, therefore, remanded the case to the Department for development of an adequate record and to cure the defects of the hearing proceedings in light of the provisions of 22 C.F.R. 51.85. 5/

After careful examination of the Department's arguments in support of its motion that the Board reconsider and reverse its decision, we are of the view that the motion does not reveal any points of law that the Board may have overlooked or misapprehended in reaching its decision to remand the appeal or any new matters that would warrant reconsideration of the remand,

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4/ See supra, n.3.

5/ 22 C.F.R. 51-85 reads:

> See. 51.85 Proceedings before the hearing officer.
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> The person adversely affected may appear and testify in his or her own behalf and may himself, or by his or her attorney, present witnesses and offer other evidence and make argument. If any witness whom the person adversely affected wishes to call is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit by the witness or other evidence to be taken by deposition. The person adversely affected shall be entitled to be informed of all the evidence before the hearing officer and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness. The person shall, upon request by the hearing officer, confirm his or her oral statements in an affidavit for the record.

The Department's motion for reconsideration is hereby denied.

As to the Department's request, in the alternative, that the Board explain how the Department should now proceed in order to comply with the Board's decision, we believe that the governing regulations regarding procedures for review of adverse passport actions, set forth in 22 C.F.R. 51.80-51.89, and, in particular 22 C.F.R. 51.85, provide sufficient guidance for development of an adequate record for review. We do not consider it appropriate to "give a detailed recitation of steps [that] both parties should follow in order to comply" with the Board's decision, as the Department requested.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member