



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-03102
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel,
For Applicant: *Pro Se*

March 12, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant became a naturalized U.S. citizen in 2003, and received his U.S. passport shortly thereafter. His renewal, use, and current possession of a valid Nigerian passport pose an unacceptable security concern. He mitigated the foreign influence security concerns arising from his family in Nigeria, but failed to mitigate the foreign preference security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SF 86) on June 2, 2005. On October 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline C (Foreign Preference) and B (Foreign Influence).¹

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on October 15 and 31, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on December 19, 2007. DOHA issued a notice of hearing on December 24, 2007, and I convened the hearing as scheduled on January 16, 2008. The government offered exhibits (GE) 1 through 3, which were received without objection. GE 3 was not admitted, but considered for administrative notice purposes only.² Applicant testified on his own behalf and submitted one exhibit, marked AE 1. DOHA received the transcript of the hearing (Tr.) on January 30, 2008.

Findings of Fact

In his Answers to the SOR, Applicant admitted SOR ¶¶ 1.a, 2.a, and 2.b with explanations. He denied SOR ¶¶ 1.b and 1.c. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is a 37-year-old information security engineer, working for a government contractor. He was born, raised, and educated in Nigeria (Tr. 28, GE 1). In 1994, at age 24, he completed a Nigerian “higher national diploma,” which is the equivalent of a bachelor’s degree (Tr. 31). From 1994 to 1997, he worked for two Nigerian private companies as a quality surveyor estimating building construction costs (Tr. 33).

In 1997, Applicant won a lottery for a U.S. visa and immigrated to the United States (Tr. 29). After his arrival, he enlisted and served in the U.S. Army from August 1998 to March 1999. He was medically discharged due to health problems. His service was characterized as honorable. Applicant then worked for several U.S. companies as a physical security officer, and at a group home where he cared for mentally retarded people (Tr. 31). From 1998 to 2000, he attended college while working full time “to prepare himself to fit in the U.S. environment and accomplish his dream.” From 2002 to 2003, he earned a master’s degree in network security, which was awarded in August 2004 (Tr. 42). Applicant became a naturalized U.S. citizen in February 2003, and received his U.S. passport the following month (GE 1).

Since his release from the Army in 1999, Applicant worked for several information technology and computer business related companies. In May 2005, he started working for his current employer, a federal contractor, as an information security engineer. He ensures clients’ compliance with security requirements, and conducts vulnerability assessments, certifications, and accreditations of clients’ information technology systems (Tr. 44).

² Department Counsel’s December 14, 2007 motion asked that I take administrative notice of certain facts concerning the government of Nigeria. The request and the attached documents were not admitted into evidence but were considered and included in the record as GE 3 for Identification.

Applicant married his Nigerian wife in 1996, before he immigrated to the United States. While in Nigeria, she worked as a secretary for a privately owned company. She immigrated to the United States in April 2001, and is currently employed as a nurse (Tr. 36-37). They have a three-and-one-half-year-old son born in the United States. She has applied for U.S. citizenship and is waiting to be called for the swearing in ceremony to complete her naturalization process.

Applicant and his wife own their residence and three other investment properties in the United States, with an equity value of around \$200,000. Additionally, he has a 401(k) investment plan. Applicant and his wife have no financial assets, and own no property or investments in Nigeria (Tr. 39, 69).

Applicant claimed that neither he nor his wife ever served in the Nigerian military forces, and that they never worked for the Nigerian government or for any government affiliated company (Tr. 38). Since leaving Nigeria, he has had no contact with any friends and coworkers in Nigeria, except those he visited with during his trips back to Nigeria.

In February 2004, December 2004, and in November 2007 (Tr. 65), Applicant traveled to Nigeria for pleasure, and stayed for approximately two weeks during each trip. He renewed his Nigerian passport during his February 2004 trip to Nigeria at the instance of Nigerian border officials. Since then, he has used both passports, his Nigerian passport and his U.S. passport to enter and exit Nigeria (Tr. 63-65). As of the day of his hearing, Applicant was in possession of a valid Nigerian passport, which will not expire until February 2009.

Applicant stayed with his older brother whenever he travelled to Nigeria. His mother, siblings, other relatives, and friends came to visit him at his brother's home while he was in Nigeria. Applicant's mother, his 13 siblings, his wife's three siblings and her mother, as well as all of their extended families are citizens and residents of Nigeria. Applicant claimed that none of his or his wife's family members are or have been members of the Nigerian military forces, or employed by the Nigerian government (Tr. 55-58).

While in the United States, he contacts his mother and his older brother approximately once a month to ask about his mother's and siblings' health (GE 2). He contacts his other siblings through his older brother (Tr. 59). Applicant has a close relationship with his mother and provides support for her occasionally (Tr. 51). She came twice to visit him in the United States after Applicant's son was born. He believes all of his siblings and wife's family support the general policies and interests of the United States.

In December 2005, Applicant was interviewed by a government investigator concerning possible foreign preference issues (GE 2). At that time, he became aware of possible security concerns arising out of his dual citizenship and possession of a

Nigerian passport. In his December 2005 statement, his answers to the SOR, and numerous times during his hearing, Applicant offered to surrender his Nigerian passport and to renounce his Nigerian citizenship. Applicant explained he was not under any obligation to Nigeria, and claimed the only reason he had not surrendered his passport or renounced his Nigerian citizenship was because no one had explained to him the process to do so.

He claimed he asked several times to both personnel at the Nigerian embassy in Nigeria and in the Nigerian embassy in the United States for information on how to surrender his passport and renounce his Nigerian citizenship and received no help. He also claimed he asked his employers' facility security officers and DOHA personnel for the same information, and that he performed Internet searches looking for such information to no avail (Tr. 68-69; 76-89). Other than his testimony, he presented no evidence of efforts he has taken to surrender his passport or renounce his Nigerian citizenship.

I take administrative notice of the following facts. Nigeria is a federal republic composed of 36 states and a capital territory. The government's human rights record is poor, and government officials at all levels commit serious human rights abuses. Areas of the country are marked by serious instability and outbreaks of armed conflict between religious, political, and ethnic factions. The lack of law and order in the country poses considerable risks to travelers.

The Nigerian government provides strong diplomatic support to U.S. government counter-terrorism efforts. It has condemned terrorist attacks against the United States and supported military actions against the Taliban and Al-Qaida. It also has played a leading role in forging an anti-terrorism consensus among states in their region. The United States provides the people of Nigeria with substantial financial assistance in areas such as public health, education, and in their efforts of developing effective institutions of democratic governance. Nigeria is an important trading partner of the United States. There is no evidence of economic competition with the United States, or that Nigeria has or ever had an intelligence gathering program targeting U.S. economic, industrial, or military critical technologies.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.³

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

³ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's controlling adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."⁴ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

⁴ *Egan, supra*, at 528, 531.

Analysis

Guideline C, Foreign Preference

Under Guideline C the government's concern is "when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States." AG ¶ 9.

Applicant became a naturalized U.S. citizen in 2003 and was issued a U.S. passport shortly thereafter. He renewed his Nigerian passport in February 2004, apparently at the instance of Nigerian border officials. He used both his Nigerian passport and U.S. passport to travel to Nigeria twice in 2004 and once in 2007 because of convenience, i.e., he did not have to go through the process of requesting a visa. At his hearing, he was in possession of a current Nigerian passport that does not expire until 2009.

Foreign preference disqualifying condition AG ¶ 10 provides: "(a) exercise of any right, privilege, or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport," applies.

After considering all the foreign preference mitigating condition under AG ¶ 11, I find that only AG ¶ 11(b): "The individual has expressed a willingness to renounce dual citizenship," applies. Applicant renewed and used his foreign passport after becoming a U.S. citizen, and receiving his U.S. passport. As of the day of his hearing, he was still in possession of his valid foreign passport. He presented no evidence to show that his use of the foreign passport was approved by a cognizant security authority.

Notwithstanding Applicant's expressed willingness to renounce his dual citizenship and to surrender his passport, two years after he was confronted with the security concerns raised by his possession of a valid passport and his exercise of dual citizenship he was still in possession of a valid Nigerian passport. Applicant's claims, i.e., that he asked Nigerian embassy officials, a government investigator, his employer's facility security officers, DOHA personnel, and that he researched the Internet looking for information about to how to renounce his foreign citizenship and to surrender his passport, are not credible.

Applicant was confronted about his possession and use of a foreign passport at least three times, i.e., by a government investigator (GE 2), through the DOHA interrogatories, and by the SOR allegations. Applicant is 37 years old, and holds a master's degree in computer management and information systems with a concentration on networks security. He was provided a copy of the Directive outlining the government's security concerns. With a little diligence, Applicant would have been able to mitigate the government's security concerns raised by his use and possession of a current foreign passport. He did not provide copies of any correspondence sent to

security officials, DOHA, or the Nigerian government offering to relinquish his clearance. Considering the totality of the circumstances presented by Applicant's case, he has failed to mitigate the security concerns raised under Guideline C.

Guideline B, Foreign Influence

Under Guideline B, the government's concern is:

"foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism." AG ¶ 6.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.⁵ Applicant has frequent contacts (at least once a month) and a close relationship of affection and/or obligation with his mother and siblings, who are residents and citizens of Nigeria. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Nigerian agents or criminals may exploit the opportunity to obtain information about the United States. His connection to his family members also create a potential conflict of

⁵ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

interest because his relationships are sufficiently close to raise a security concern about his desire to help them by providing sensitive or classified information.

The government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the government.

Three Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that mitigating condition AG ¶¶ 8(a) and (b) apply. Applicant has strong feelings of affection and a strong sense of obligation to his siblings. The closeness of the relationship is shown by Applicant's telephone contacts with his siblings, the financial support provided to his mother, and his travels to Nigeria. Notwithstanding, Applicant established it is unlikely he will be placed in a position of having to choose between the interests of his family and the interests of the United States. Applicant's family members in Nigeria live routine lives, they are not involved in politics, employed by the Nigerian government or its military forces. Applicant's contact with his family is primarily through his older brother, who then relays family information back and forth. I do not believe Applicant's relationship with his family in Nigeria creates a heightened risk for foreign influence or exploitation.

In deciding whether Applicant's family members are in a position to be exploited, I considered Nigeria's form of government.⁶ Nigeria is a developing country that, so far,

⁶ The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

possess no intelligence, economic, or industrial threat to the United States. Notwithstanding Nigeria's poor human rights record, there is no evidence its government seeks classified and industrial/economic information from the United States. Nor is there evidence of the Nigerian government mistreating relatives of U.S. citizens or U.S. citizens to obtain such information. Additionally, given the existing relationship between the governments of the United States and Nigeria, it is unlikely Nigeria would risk losing an important trading partner and the financial support of the United States.

AG ¶ 8(b) applies because Applicant has developed a sufficient relationship and loyalty to the United States, that he can be expected to resolve any conflict of interest in favor of the United States' interests. He has lived in the United States for approximately 11 years. He is a naturalized U.S. citizen and all of his financial and business interests are in the United States. Applicant has established himself as an American citizen. He has worked hard for several government contractors, and at the university earning a master's degree. He continues this track record of diligent labor in his current employment.

Considering the totality of the circumstances, the evidence shows it is unlikely Applicant will be placed in a position of having to choose between the interests of his mother, siblings, or in-laws and the interests of the United States. He has mitigated the Guideline B security concerns.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

“(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.” Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has been in the United

States for about 11 years and a naturalized U.S. citizen for around five years. He attended college courses and received his master's degree in the United States. His wife needs only to be sworn in to complete her U.S. naturalization process, and their son was born in the United States. He has many close relatives living in Nigeria with whom he has close ties of affection and or obligation. He and his wife own property and have financial interest only in the United States, and they have embraced the United States way of life. Applicant has worked for several defense contractors and there is no evidence that he has failed to comply with rules and regulations concerning the protection of classified information.

After carefully considering Applicant's circumstances, I conclude he is not in a position where he may be induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests. He is not vulnerable to pressure or coercion by his mother, siblings, or the government of Nigeria.

For all these reasons, I conclude Applicant mitigated the concerns arising from his foreign influence security concerns, but failed to mitigate the foreign preference security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge