



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



In the matter of:)
)
-----) ISCR Case No. 07-04539
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: Michelle L. Perry, Esquire

April 25, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on April 23, 2007. On October 15, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under foreign influence (Guideline B) and foreign preference (Guideline C). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his answer to the SOR on December 6, 2007. DOHA issued a notice of hearing on February 26, 2008, and the hearing was held on March 25, 2008. The transcript was received on April 2, 2008.

At the hearing, the government submitted four exhibits (GE). The fourth exhibit (administrative notice exhibit) contains facts from United States Government agency

publications that describe the government of Nigeria, its human rights record, and various problems U.S. citizens face in traveling to the country. At the hearing, testimony was taken from the Vice President (VP) of Applicant's employer and Applicant. He also submitted two exhibits (AE). The first exhibit (AE A) represents Applicant's request to take administrative notice of the factual representations set forth at nine locations of the government's administrative source material. (GE 4)

Findings of Fact

Foreign Influence

The SOR alleges in paragraph 1 that Applicant's ties and travel to Nigeria raise foreign influence concerns under Guideline B. Paragraph 2 alleges that Applicant's valid Nigerian passport, his use of that passport in February 2007, and his equal loyalty to the U.S. and Nigeria indicates a foreign preference that may influence him to make decisions harmful to the U.S. He admitted all allegations under paragraph 1 except for subparagraph 1.e. He denied SOR 1.e. because his mother-in-law and father-in-law are also citizens of the U.S., and have lived in the U.S. for the past 23 years. Applicant also admitted subparagraphs 2.a. and 2.b., but denied 2.c., claiming he could not recall telling the investigator his loyalties were equally split between the two countries.

Applicant is 36 years old. He was born in Nigeria and came to the U.S. in 1993 for educational reasons. According to his security clearance application (SCA, GE 1), he attended a university from January 1994 to December 1995. He transferred to a technical institute in August 1997, where he was enrolled until December 1998. He entered another university in this region in August 2002, and was awarded a Master's of Business degree in May 2005.

GE 1 shows that between May 1996 and January 1998, Applicant was employed as an applications engineer with a private company; Applicant was apparently promoted to a software engineer position (at the same company) in January 1998, and worked in that position until January 2000. From January 2000 to December 2005, he was employed by a leading software company as a senior software engineer. Since December 2005, Applicant has been employed in same position with his current employer.

Applicant's mother, 77 years old, is a resident citizen of Nigeria. (SOR 1.a.) Since 1977, she has been living in the southwestern part of Nigeria that is politically calm and stable; the area is not part of the Niger Delta region. (Tr. 34-36; GE 4). She still oversees a private kindergarten school she owns, although she has relinquished the day-to-day operations to the principal. Her continuing association with the school keeps her mind challenged. Applicant's mother has never worked for the Nigerian government. Even though she owns the school, Applicant does not expect to inherit the property.

Applicant's father passed away in February 2007 at the age of 73 (GE 1), after a lengthy illness. The record does not disclose his father's employment, but he was

retired when Applicant provided an interview to a federal investigator in September 2006. (GE 3)

Applicant contacts his mother by telephone about twice a month. He has been sending her about \$300.00 every three months since 1996. The money symbolizes Applicant's respect for her efforts in properly raising him during his formative years. (Tr. 59)

Applicant's 40-year-old brother (SOR 1.b.) is a resident citizen of Nigeria. He lives in the same city as Applicant's mother. He is employed as an architect and owns his own firm. Although Applicant's brother is licensed by the Nigerian government, he has never worked on any government projects. (Tr. 41) Applicant contacts him about once every two or three months.

Applicant's sister is a resident citizen of Nigeria. (SOR 1.b.) She is 42 years old, and lives in the same region as Applicant's mother. She teaches pharmacy at a local university that receives public and private funds. Applicant is uncertain whether his sister's position makes her an employee of the Nigerian government. (Tr. 42) Applicant maintains contact with his sister at a frequency of about once every three months.

Applicant's has three remaining brothers who reside in the U.S. One is 34 years old, a permanent resident (SOR 1.c.), who has been living in the U.S. since 1998. The other two brothers were born in the United Kingdom and are naturalized U.S. citizens. One is 56 years old and received his U.S. citizenship in September 2004. He has been living in the U.S. since 1988. (Tr. 43) The last brother is 46 years old, and has lived in the U.S. since 1995. He received his U.S. citizenship in 2004. (Tr. 43; GE 1) Applicant's three brothers living in the U.S. are married with children. None of Applicant's brothers have ever worked for the Nigerian government. (Tr. 45) Applicant last saw his three brothers at their father's funeral in February 2007. (Tr. 52-54)

Applicant's mother-in-law and father-in-law were born in Nigeria (SOR 1.e.), but became naturalized citizens of the U.S. They have lived and worked in the U.S. since 1983. (Tr. 45; AE B)

Applicant's wife is a dual citizen of the U.S. and Nigeria (SOR 1.f.), and resides in the U.S. with Applicant. He testified that they were married in September 1999,¹ and have three children, six, four, and three months. The three children were born in the U.S.

Applicant has traveled to Nigeria (SOR 1.g.) in 2001, 2003, 2006, and 2007. In 2001, he spent two weeks visiting his family in Nigeria. In 2003, he spent two weeks in Nigeria visiting his mother and father for their birthdays. In 2006, he returned to Nigeria to comfort his sick father. Applicant's last trip to the country was to bury his father in 2007. (Tr. 49) He used his Nigerian passport on all trips.

¹ According to Applicant's SCA (GE 1), they married in July 1998.

The only financial interest Applicant and his wife have in Nigeria is approximately \$25,000.00 in stock. They have no other financial interest in the country. Applicant has lived in the same house in the U.S. since March 2001. (GE 1) He believes the house is worth about \$750,000.00.

Applicant indicated he would report any efforts to pressure him to the Federal Bureau of Investigation (FBI) because U.S. security and his family's security are paramount. Applicant's loyalty is only to the U.S., and that is why he emigrated to the U.S. in 1993.

Applicant has not voted in a foreign election since becoming a U.S. citizen in 2003 (Tr. 32), but has voted in three U.S. national or regional elections. In his position as the sound supervisor at his church since 1999, Applicant has directed a team in video taping the church sermons and music. (Tr. 57)

Foreign Preference

Until early March 2008, Applicant had a Nigerian passport scheduled to expire in 2011. (SOR 2.a.) He used his Nigerian passport to travel to Nigeria in 2007. (SOR 2.b.) Applicant denied (in his answer to the SOR) telling the Office of Personnel Management investigator that he had divided loyalties to the U.S. and Nigeria. (SOR 2.c.) Applicant is mistaken as the second interview he had with the investigator in September 2006 (GE 3), Applicant referred to his split loyalties. However, in his one-page attachment of corrections to his interviews in 2006, dated August 2, 2007 (GE 3), Applicant stated:

Regarding my loyalty to the United States: My loyalty lies with the United States. The only reason why my wife and I kept our Nigerian passports is for the ease of travel back and forth from US to Nigeria. However, our unquestioned loyalty lies with the US. In my security processing with NSA, I have submitted a Foreign Citizenship Renunciation Certification. I have included a copy of this certificate. (GE 3)

Because Applicant did not know his use of his Nigerian passport was a potential security problem (Tr. 28), he continued to use it after becoming a U.S. citizen in July 2003, and after receiving a U.S. passport in August 2003. Since receiving the SOR in October 2007, Applicant has not used his Nigerian passport, and has no intention of renewing it. (Tr. 31)

In an attachment to GE 3, there is a form (Form G6411) entitled "FOREIGN CITIZENSHIP RENUNCIATION CERTIFICATION," signed by Applicant and a security officer on June 28, 2007. Just underneath the title of the form is a space for identification of the "COUNTRY FORMERLY A CITIZEN OF." That space is blank. The purpose of the form is to verify the loyalty of an applicant who seeks sensitive compartmented information (SCI). The form includes instructions to return a foreign passport and forego any other privileges of foreign citizenship.

At the hearing, Applicant referred to the renunciation form he signed in June 2007 in explaining the measures he had taken to renounce his citizenship. (Tr. 23) In addition to signing the form, he surrendered his passport to the security officer for destruction in early March 2008. (Tr. 51) The VP of Applicant's employer displayed an envelope containing the shredded passport. (Tr. 71) The VP testified that Applicant's wife transferred her Nigerian passport to the FSO for destruction on March 25, 2008. (*Id.*)

When asked about the delay between signing the form in June 2007 and destroying his Nigerian passport, Applicant testified, "Well, I - - I - - I didn't see any urgency in doing it. I just kind of left it behind, you know. Not that I needed it. I didn't need it any way." (Tr. 51, 52) When asked again to explain his answer he had just provided concerning his delay in destroying his passport, Applicant stated, "I said I didn't see any urgency in destroying the passport. I - - I thought it was, you know, that this was given up for the time being and I - - just kept the passport."(*Id.*)

Applicant has not voted in a Nigerian election since becoming a U.S. citizen. (Tr. 31, 32) He has voted in U.S. elections in 2004, November 2006, and January 2008. Since 1999, he has directed a video reproduction team for his church. (Tr 57, 58)

Character Evidence

The VP has been working for Applicant's employer since 2002, and recalls that Applicant was hired in December 2005. The VP is not familiar with Applicant's job performance because he does not work on classified projects. The VP believes Applicant is security conscious and has no security violations. He recommends him for a position of trust. Finally, the VP is aware Applicant destroyed his passport (Tr. 70), and is aware his wife's Nigerian passport was turned over for destruction on the day of the hearing.

Administrative Notice

I have taken administrative notice GE 4 that consists of the following government documents:

U.S. Department of State, Bureau of African Affairs, *Background Note: Nigeria*, dated October 2007;

U.S. Department of State, *Consular Information Sheet, Nigeria*, dated April 16, 2007;

U.S. Department of State, *Travel Warning: Nigeria*, dated October 30, 2007

U.S. Department of State, *Nigeria: Country Reports of Human Rights Practices-2006*, dated March 6, 2007; and,

Congressional Research Service, CRS Report for Congress, *Nigeria: Current Issues*, dated April 12, 2007 (Congressional Research Service Report) at 1;

Nigeria, since gaining its independence in 1960, has been controlled more by military rulers than democratically elected civilian rulers. Even though the government returned to civilian rule in 1999, the government continues to have a poor human rights record. The lack of law and order in various areas of the country results in internal, periodic armed conflicts between religious, political and ethnic factions, and external conflicts with travelers to the country, particularly in the Niger Delta region. Recognizing the troubling problems in the Niger Delta region, the current president, elected in May 2007, has pledged to restore peace and security to the region, while instilling long-term, electoral reform throughout the country. President Bush considers Nigeria an important partner in the war on terror.

Policies

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

These guidelines are flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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 the national security is the paramount consideration. AG ¶ 2b. requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." 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

is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Foreign Influence (FI)

The security issues connected to foreign influence are familial ties, contacts, and/or proprietary/financial interests that could be used to generate a heightened risk of forcing an applicant into a position of having to choose between the foreign entity and the U.S.

Foreign Preference (FP)

When an individual acts in a way that indicates a preference for a foreign country over the U.S., then he or she may be disposed to provide information or make decisions harmful to the U.S.

Analysis

Foreign Influence

Foreign contacts and interests result in security concerns where those contacts and interests create divided loyalties, or may be manipulated or induced by a foreign entity that is harmful to U.S., or is vulnerable to pressure or coercion by any foreign entity. Decisions under this guideline should include the foreign country where the contact or financial interest is located, including, but not limited to whether the foreign government targets U.S. citizens to obtain protected information and/or is associated with the risk of terrorism.

The mere possession of family ties in foreign country is not automatically disqualifying under the foreign influence guideline. When assessing the family ties, it is important to weigh the totality of these ties in a foreign country, rather than trying to weigh them in isolation. ISCR Case No. 01-22693 at 7 (App. Bd. Sept. 22, 2003) Considering the record as a whole, the government has established its case under the FI guideline. FI disqualifying condition (DC) 7.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*) applies. Applicant's family ties to his relatives, who are resident citizens of Nigeria, require him to present evidence in mitigation to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.

Applicant's mother, sister and brother are resident citizens of Nigeria. While they require licenses from the Nigerian government, they have never been agents/employees of the government. Applicant's second brother is a citizen of Nigeria, and a permanent resident alien of the U.S. Applicant's two other brothers are citizens of the United Kingdom and the U.S. Applicant's mother-in-law and father-in-law are citizens and residents of Nigeria and the U.S. Applicant's wife is a citizen of Nigeria and the U.S., and lives with Applicant. Applicant has traveled to Nigeria in 2001, 2003, 2006, and 2007. His contact with his mother (about twice a month) and his sister and brother (about once every two or three months) create a heightened risk of foreign exploitation or manipulation within the scope of FI DC 7.a.

I have concluded that FI DC 7.e. (*a substantial business, financial , or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to a heightened risk of foreign influence or exploitation*) does not apply. Given the approximate value (approximately \$750,00.00) of Applicant's home in the U.S., the \$25,000.00 Applicant has in Nigerian stock is not "substantial" financial interest that could expose Applicant to a heightened risk of foreign influence.

Three of the six mitigating conditions (MC) under the FI guideline may apply to the facts and circumstances of this case:

FC MC 8.a. (*the nature of the relationships with foreign persons, the country in which these persons are located, or the position 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.*);

FI MC 8.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 minimal, or the individual has such deep and long lasting 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*);

FI MC 8.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*).

Applicant's mother, brother, and sister have never been employed or agents of the Nigerian Government. While there are law and order problems in Nigeria, they are not in the politically stable area where Applicant's mother, brother and sister reside. Given the good relations this country has with the U.S., it is highly unlikely the Nigerian

government would attempt to target the family members of a U.S. citizen.² FI MC 8.a. applies.

FC MC 8.b. also applies in Applicant's favor based on his loyalty to the U.S. Though a person's statements of how he would act or react to a potential future event cannot be given much weight, Applicant's statements regarding coercion from foreign sources are entitled to some favorable consideration. ISCR Case No. 02-26826 (November 12, 2003). Applicant has stated he would resist and report any attempt at pressure to the appropriate authorities because of his concern for the security of the U.S., as well as his family.

There are a number of other reasons why I believe Applicant will not yield to foreign efforts to influence or exploit him through his family members. He has lived continuously in the U.S. since he turned 21 years old in 1993. He owns his home and has lived there since 2001. While he and wife still own about \$25,000.00 worth of stock in Nigeria, the stock cannot be considered "substantial," and pales in comparison to the value of his U.S. home. He married his wife (a naturalized U.S. citizen) in 1999. His children, ages 6, 4, and three months, were born in the U.S. After receiving continuing education at a university and a technical institute in the late 1990s, he received his Masters of Business degree in May 2005. Applicant has continuously worked for American employers since 1996. He and his wife have been U.S. citizens since 2003. Applicant has participated in American democracy by voting. He has been active in his church since 1999. Two of Applicant's three remaining brothers are naturalized U.S. citizens that have lived in the U.S. for at least nine years. Applicant's last brother is not a citizen of the U.S., but is a permanent resident, and has lived in the U.S. since 1998. Finally, his VP at his employer recommends him for a position of trust. Considering his education accomplishments, his U.S. employment, and his family ties in this country, I expect Applicant to resolve any potential conflict in favor of the U.S. His travel to Nigeria in 2001, 2003, 2006, and 2007 to visit or bury a member of his family are the reasonable actions of immigrants with relatives in a foreign country.

Foreign Preference (FP)

When a person demonstrates by his actions that he prefers a foreign country over the U.S., then he may be prone to provide information or make decisions that are harmful to the U.S. The record reflects before Applicant's FSO destroyed the passport in early March 2008, he had a Nigerian passport that was valid until 2011. He used his Nigerian passport in February 2007 to participate in the burial of his father. FP DC 10.a.(1) (*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 - possession of a current passport*) applies. Applicant's possession of a valid passport until March 2008 after he used the passport in February 2007 constitutes proscribed conduct under FP DC 10.a.(1) While a person may describe himself as a dual citizen

² I recognize relations between friendly nations can change, and not all cases of espionage against the U.S. are committed by countries hostile to U.S. interests. ISCR Case No. 00-0317 (App. Bd. Mar.29, 2002)

based on his feelings for the country where he was born, Applicant's use of his Nigerian passport before and after his September 2006 statement of divided loyalties is clearly evidence of his actions of foreign preference that occurred after he became a U.S. citizen. Possession and/or use of the foreign passport after being naturalized as a U.S. citizen constitutes the exercise of a privilege of his Nigerian citizenship that he was not entitled to.

Though Applicant filled out a renouncement declaration in June 2007 (one-page attachment to GE 3), purportedly evidencing his willingness to renounce his Nigerian citizenship, very little weight can be assigned to the document as probative evidence of Applicant's intent to renounce his Nigerian citizenship at the time. There is no evidence the document was supplied to Nigeria or a U.S. agency, although Applicant believed his company was about to enter a contract with a U.S. security agency. Furthermore, the declaration (within the document) also directs the signer to destroy his passport, yet, Applicant waffled a bit when asked why he waited until March 2008 to destroy his passport. The delay strongly suggests Applicant had not resolved his intentions about renouncing his citizenship in June 2007.

A careful reading of his August 2007, attached corrections to his September 2006 interview (GE 3), and his testimony regarding his willingness to renounce his Nigerian citizenship weigh in his favor under FP MC 11.b. (*the individual has expressed a willingness to renounce dual citizenship*), but are inadequate to satisfy his burden of persuasion under the FP guideline. Applicant's destruction of his Nigerian passport in March 2008 invokes the application of FP MC 11.e. (*the passport has been destroyed, surrendered to the cognizant authority, or otherwise invalidated*) Considering all the evidence under FP MC 11.b. and 11.e, I conclude Applicant has met his burden of persuasion under the FP guideline.

Whole Person Concept (WPC)

My finding for Applicant under the FI and FP guidelines must still be evaluated in the context of nine variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors: (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 the participation was 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. Applicant's regular contact with his three resident, citizen family members in Nigeria is overcome by his strong ties to the U.S. that began when he emigrated from Nigeria to the U.S. almost 15 years ago. Having viewed the evidence in its entirety, I am confident he will resist and report any effort at coercion from a foreign nation while continuing to demonstrate that his preference for U.S. interests is paramount.

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 (Foreign Influence, Guideline B):	FOR APPLICANT
Subparagraph 1.a.	For Applicant
Subparagraph 1.b.	For Applicant
Subparagraph 1.c.	For Applicant
Subparagraph 1.d.	For Applicant
Subparagraph 1.e.	For Applicant
Subparagraph 1.f.	For Applicant
Subparagraph 1.g.	For Applicant
Paragraph 2 (Foreign Preference, Guideline C):	FOR APPLICANT
Subparagraph 2.a.	For Applicant
Subparagraph 2.b.	For Applicant
Subparagraph 2.c.	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge