



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-05527
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/21/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the security concerns raised by his connections and contacts in Nigeria. Clearance is denied.

History of the Case

On February 9, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the foreign influence guideline.¹ Applicant answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On November 10, 2015, a hearing was held. Applicant and his current manager testified. Both sides offered exhibits for admission into the record. Department Counsel offered exhibits (Ex.) 1 and 2 and Applicant offered Ex. A – H. Post-hearing, Applicant

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by DOD on September 1, 2006.

submitted additional exhibits, Ex. I – K. All exhibits were admitted into the record without objection.² The hearing transcript (Tr.) was received by the Defense Office of Hearings and Appeals (DOHA) on November 20, 2015, and the record closed on the same day.

Federal Republic of Nigeria (Nigeria)

Administrative notice may be taken of uncontroverted, easily verifiable facts regarding a foreign country set forth in a U.S. Government report. Additionally, the official position of relevant federal agencies or the pertinent statements of key U.S. Government officials may be appropriate for administrative notice. Generally, the party requesting administrative notice of a particular matter must provide the source document, either the full document or the relevant portion of the source document, to allow an administrative judge to assess the reliability, accuracy, and relevancy of any matter requested for administrative notice.³

The parties requested that I take administrative notice of certain matters regarding Nigeria. The following pertinent facts are accepted for administrative notice:⁴

Nigeria, a federal republic, gained its independence from Britain in 1960. Since gaining its independence, Nigeria has faced many challenges, including terrorist activity, sectarian conflicts, entrenched corruption, and widespread mistrust of the government. Nigerian security forces, particularly the police, have been accused of serious human rights abuses.

Boko Haram, a U.S.-designated Foreign Terrorist Organization, is a violent Islamist movement in northern Nigeria. It has grown increasingly active and deadly in its attacks against state and civilian targets in recent years. In 2014, the group's abduction of almost 300 schoolgirls drew international attention. The United States has established a strategic dialogue with Nigeria to address issues of mutual concern.

In general, the security situation in Nigeria remains fluid and unpredictable. The U.S. State Department warns U.S. citizens to avoid travel to a number of Nigerian states because of the risk of kidnapping, robberies, and other armed attacks.

² Applicant's exhibits were remarked to remain consecutive with those previously offered and admitted. Scheduling correspondence with the parties and the case management order (CMO) are attached to the record as Hearing Exhibit (Hx.) I. Department Counsel's legal brief, Applicant's list of exhibits, the notice of hearing, and post-hearing correspondence are attached to the record as Hx. II – V, respectively.

³ See ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

⁴ Department Counsel and Applicant submitted summaries of the facts regarding Nigeria contained in their cited source documents. The summaries, Ex. 2, Ex. H, and Ex. I, were admitted without objection as accurate summaries of the facts contained in the source documents. See Tr. at 10-12. See also, Directive, Enclosure 3, ¶ E3.1.19 (Federal Rules of Evidence (F.R.E.) shall serve as a guide in DOHA proceedings and technical rules of evidence may be relaxed to permit the development of a full and complete record); F.R.E. 201; F.R.E. 1006.

Findings of Fact

After a thorough review of the pleadings, evidence, and transcript, I make the following findings of fact:

Applicant, 35, was born in Nigeria. He earned an undergraduate degree and worked for a time in Nigeria before immigrating to the United States in 2010 to join his then fiancée, now wife. He and his wife have three children who were born in the United States. He became a naturalized U.S. citizen in 2013, the same year he graduated with a dual master's degree from a U.S. university. They own a home in the United States, and are deeply involved in their community through their church.

Applicant is a cybersecurity engineer, working for a federal contractor. His wife, who is also originally from Nigeria and a naturalized U.S. citizen, also works as a cyber security specialist with the same federal contractor. Combined, they make approximately \$145,000 annually. Applicant's employer and numerous references have a high opinion of his character. He was recently promoted following a mid-year review. His manager testified that Applicant is one of his top performers and is highly regarded by coworkers and clients alike. (Tr. at 12-19; Ex. F)

Applicant's parents and sibling are residents and citizens of Nigeria. Both his parents are retired, and are in their late fifties or early sixties. Applicant's mother worked as a nurse, while his father worked as a forester for a Nigerian government agency. Applicant does not provide his parents or sibling financial support. (The record is silent as to whether either of Applicant's parents receives a pension or retirement benefits from the Nigerian government, or how they support themselves in retirement.) His sibling works as an administrative assistant for the director of a foreign company located and doing business in Nigeria.

Applicant speaks with his family in Nigeria on a somewhat regular basis, i.e., at least twice a month by phone. He also communicates with his sibling through the internet. Applicant's parents and sibling are unaware what he does for a living or that he is applying for a U.S. security clearance. Applicant has not traveled back to Nigeria since immigrating to the United States. His parents have traveled to visit him in the United States, and he is sponsoring their applications to immigrate to the United States. Applicant disclosed his foreign connections and contacts on his security clearance application. This is his first application for a clearance.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865, § 2.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

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

Administrative Judges are responsible for ensuring that due process proceedings are conducted "in a fair, timely and orderly manner." Directive ¶ E3.1.10. Judges make certain that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline B, Foreign Influence

The foreign influence security concern is explained at AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, 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.⁵

Applicant's relationship with his family in Nigeria, as alleged in the SOR, raises the foreign influence security concern and requires further analysis. An individual is not automatically disqualified from holding a security clearance because they have connections and contacts in a foreign country. Instead, in assessing an individual's vulnerability to foreign influence, an administrative judge must take into account the foreign government involved; the intelligence-gathering history of that government; the country's human rights record; and other pertinent factors.⁶

The relationship between the United States and Nigeria can generally be categorized as friendly. However, foreign influence security concerns are not limited to countries hostile to the United States. The Appeal Board has cautioned DOHA administrative judge's against overreliance on "simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B," because such "ignores the historical reality that (i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage against the United States have involved nations that were hostile to the United States." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

Applicant's relationship with his parents and sibling in Nigeria, coupled with the facts administratively noticed regarding Nigeria, notably, the threat of terrorism, serious human rights issues, and the government's inability to stem corruption, raise a

⁵ ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) ("As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant's close relatives.*") (emphasis added) (internal citation omitted).

⁶ ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

heightened security concern. The record evidence also raises the following foreign influence disqualifying conditions:

AG ¶ 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; and

AG ¶ 7(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.

Guideline B also sets forth a number of conditions that may mitigate the foreign influence security concern. I have considered all the mitigating conditions in assessing the security concerns in the present case, including the following:

AG ¶ 8(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.;

AG ¶ 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 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

AG ¶ 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.

An individual with family members and other connections in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign ties. An applicant is not required "to sever all ties with a foreign country before he or she can be granted access to classified information."⁷ However, what factor or combination of factors will mitigate security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable.⁸

⁷ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

⁸ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

In a relatively short period of time Applicant has developed some strong ties to the United States. He has not traveled back to Nigeria since arriving in the United States six years ago, and his communication with his family in Nigeria is commensurate with what one would expect from a busy, working parent of three young children. However, Applicant's relationship with his family in Nigeria is not so minimal that, in light of the matters administratively noticed, such relationship could not pose a potential conflict of interest with his obligations to safeguard the nation's vital secrets.

Furthermore, in weighing Applicant's ties to the United States with his familial connections in Nigeria, it is insufficient to fully mitigate the potential security concern at issue. Applicant was born and spent the first 29 years of his life in Nigeria. After arriving in the United States, he earned a graduate degree, started a professional career and family, bought a home, and became a naturalized U.S. citizen, as well as having become a pillar of his community. Notwithstanding, it would run counter to common sense and a basic understanding of human nature, as well as the evidence in this case, to expect Applicant to resolve potential attempts to coerce or influence him through his family in Nigeria in favor of U.S. national security based on his recently developed ties to the United States.

Accordingly, I find that AG ¶¶ 8(a), 8(b), and 8(c) have some applicability but are insufficient, at this time, to fully mitigate the foreign influence security concerns.

Whole-Person Concept

An administrative judge's predictive judgment in the security clearance context must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive.⁹ A judge's ultimate determination must also take into account the overarching standard in all security clearance cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of national security. AG ¶ 2(b). I hereby incorporate my comments under Guideline B and highlight some additional whole-person factors.

Applicant is a trustworthy, reliable, dependent employee, who is dedicated to his wife and children and heavily involved in his community through his church. He immigrated to the United States six years ago and, while going to school to earn a dual master's degree, worked full time. All of which raise favorable inferences regarding his security clearance eligibility. However, after weighing the favorable and unfavorable evidence and considering the legal requirement that close cases must be resolved in favor of national security, I find that the favorable record evidence is insufficient, at this

⁹ The non-exhaustive list of factors are: (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.

time, to mitigate the foreign influence security concerns. Consequently, the record evidence leaves me with doubts about Applicant's present eligibility for access to classified information. This adverse finding, however, is *not* a comment on Applicant's patriotism, loyalty, or any other essential character trait expected of potential clearance holders, but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member. ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

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 B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant

Conclusion

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

Francisco Mendez
Administrative Judge