



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



In the matter of:)
)
) ISCR Case No. 07-00320
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel

For Applicant: John O. Iweanoge II, Esquire

October 30, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that while Applicant mitigated the Government’s security concerns under the Foreign Preference adjudicative guideline, he failed to mitigate security concerns under the Foreign Influence adjudicative guideline. His eligibility for a security clearance is denied.

On March 25, 2004, Applicant signed and certified a Security Clearance Application (SF-86). On April 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline B, Foreign Influence and Guideline C, Foreign Preference. 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.

On May 12, 2008, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. On August 7, 2008, the case was assigned to me. Prior to the hearing, on September 17, 2008, Applicant filed an objection to the Government's proposed exhibits. (HE A.) I convened a hearing on September 18, 2008, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced four exhibits (Ex.), and offered facts in six official documents of the U.S. Government for administrative notice. (HE I.) Ex. 1 through 3 were admitted without objection. Ex. 4 was admitted over Applicant's objections. Applicant introduced ten exhibits, which were marked as Ex. A through J and admitted to the record without objection. He called one witness and testified on this own behalf.

At the conclusion of the hearing, I left the record open until close of business September 25, 2008 so that Applicant could, if he wished, submit additional information. Applicant timely filed two additional documents. The first document was an original document, prepared by the Embassy of Nigeria, memorializing its receipt, on September 16, 2008, of Applicant's Nigerian passport. This document was offered as a substitute for a photocopy of the same, previously identified as Applicant's Ex. J. Applicant also offered another exhibit, identified as Ex. K. The substitute Ex. J and Ex. K were admitted to the record without objection. DOHA received the transcript (Tr.) of the hearing on September 30, 2008.

Findings of Fact

The SOR contains six allegations that raise security concerns under AG B, Foreign Influence (SOR ¶¶ 1.a. through 1.f.) and two allegations that raise security concerns under AG C, Foreign Preference (SOR ¶¶ 2.a. and 2.b.). In his Answer to the SOR, Applicant admitted all allegations under adjudicative guidelines B and C, with explanations. Applicant's admissions are admitted herein as findings of fact.

After a thorough review of the record in the case, including witness testimony, exhibits, relevant policies, and applicable adjudicative guidelines, I make the following findings of fact:

Applicant is 44 years old and employed as a senior systems analyst by a government contractor. He was first granted a government clearance in 2000. (Ex. 1; Tr. 74-76.)

Applicant was born in Nigeria and immigrated to the U.S. in 1987. In 1991, he earned an undergraduate degree in political science and in 1995 he earned a master's degree in public administration. Both degrees were conferred by U.S. universities. He became a U.S. citizen in 2000. (Ex. 1; Ex. 2; Tr. 73-74, 88.)

Before becoming a U.S. citizen, Applicant maintained an active Nigerian passport. After he became a U.S. citizen, he renewed his Nigerian passport in 2005. When Applicant traveled to Nigeria in December 2003, September 2004, May 2005, and

December 2006, he presented his Nigerian passport to enter and exit Nigeria. Applicant used his Nigerian passport to enter and exit Nigeria because he found it more convenient than applying for a visa and presenting his U.S. passport. In a statement he signed May 12, 2008, Applicant said he did not intend to travel to Nigeria on a Nigerian passport as long as he maintained an active secret clearance. (Tr. 87-89; Ex. 3; Ex. A.)

On September 16, 2008, Applicant surrendered his active Nigerian passport, which had an expiration date in November 2010, to an authorized official of the Nigerian government. The authorized official acknowledged in writing the receipt of Applicant's active passport and stated that by surrendering his Nigerian passport, Applicant renounced Nigerian citizenship. Applicant stated his allegiance to the United States. (Tr. 108-109; Ex. 3; Ex. J.)

Applicant was married to a U.S. citizen from 1992 to 1996, when they divorced. Applicant and his former wife are the parents of three children, ages 12, 14, and 16. (Ex. 1; Ex. I; Tr. I, 174-177, 181-182.)

Applicant is the youngest of five children. He does not remember when his father died. He was orphaned when his mother died in 1973. At various times, he resided with two sets of aunts and uncles. When he was in high school, he resided with one of his sisters and her family. One of the uncles who helped raise Applicant is recently deceased. The deceased uncle's wife, Applicant's aunt, is a citizen and resident of Nigeria. The sister who helped raise Applicant is deceased, as is her husband. They are survived by eight children, all of whom are citizens and residents of Nigeria. Most of these children are now young adults. Applicant has another sister who is a citizen and resident of Nigeria. Her three children are also citizens and residents of Nigeria. (Tr. 46, 48-50, 56, 87, 115-117.)

In 1990, Applicant opened a bank account in Nigeria. He deposited \$40 in the account. He did not make any other deposits to the account. Recently, when Applicant inquired as to the status of the account, he was told that the account had been closed. On September 8, 2008, Applicant granted one of his nephews power of attorney to act on his behalf, close the account, and provide him with documentation that the account had been closed. (Ex. C; Tr. 77-79.)

Applicant and his older brother, who is also a U.S. citizen, send money to the nephews in Nigeria who are the sons of their deceased sister. Applicant speaks on the telephone with some of his nephews once or twice a month. He feels a moral obligation to provide for his deceased sister's children because she took care of him after their mother died and he was orphaned. In September 2004, Applicant purchased two plots of land in Nigeria for approximately \$10,000. He purchased the land for the use of his nephews. (Tr. 47, 83-84, 86, 101-102, 106-107, 119.)

In May and June of 2005, Applicant and his brother sent approximately \$15,000 to the husband of their sister (both now deceased) so that a family house could be built on some ancestral land in the Nigerian town where they had grown up. The house was

to be for the benefit of the children of Applicant's sister. Applicant's land was not the situs of the proposed ancestral home. Because title to the ancestral property is held by all members of the extended family in Nigeria, it cannot be sold. (51-56.)

On September 17, 2008, Applicant assigned his interest in the two plots of land he owned in Nigeria to his older brother for \$10,000. (Ex. D; Tr. 42-45, 64-65.)

Applicant owns a home in the U.S. He purchased the home in 2005 for approximately \$200,000, and, at his hearing, he asserted that the property had a current market value of \$450,000. He also has two bank accounts in the U.S. His annual salary is approximately \$80,000. (Ex.E; Ex. K; Tr.80, 99-101.)

Applicant's manager provided a letter of character reference. He stated that Applicant was responsible, had pleasing manners, and was well-liked by his superiors and his colleagues. (Ex. B.)

I take administrative notice of the following facts about Nigeria, drawn from official US government documents:¹

Nigeria is a federal republic in western Africa composed of 36 states and a capital territory. It has a population of approximately 140 million, making it the most populous nation in Africa, accounting for half of West Africa's people. Since gaining independence from Britain in 1960, Nigeria has experienced periods of political instability and turmoil, as well as economic crisis. Nigerian political life has been scarred by conflict along both ethnic and geographic lines and dominated by military coups and long military-imposed transition programs rather than civilian rule. The military has ruled Nigeria for approximately 28 of its 47 years since independence, and in May 1999, Nigeria returned to civilian rule.

Nigeria is home to over 250 ethnic groups. A majority of the people suffer from extreme poverty. Nigeria is divided along ethnic and religious lines between Muslims in the northern two-thirds of the country and Christians mixed with Muslims in the southern third. In the eight years since the end of military rule, Nigeria has suffered from serious ethnic/religious conflicts. Areas of Nigeria are marked by serious instability and outbreaks of armed conflicts between religious, political, and ethnic factions.

¹ See U.S. Department of State, *Background Note: Nigeria*, dated July 2008; U.S. Department of State, *Travel Warning: Nigeria*, dated October 30, 2007; U.S. Department of State, *Nigeria: Country Reports on Human Rights Practices – 2007*, dated March 11, 2008; Congressional Research Service, *CRS Report for Congress, Nigeria: Current Issues*, dated January 30, 2008; U.S. Department of State, *Country Specific Information, Nigeria*, dated June 2, 2008; and U.S. Diplomatic Mission to Nigeria, *Warden Message, Attention all American Citizens*, June 26, 2008. The Government's summary of these documents is marked HE 1.

The Nigerian government's human rights record is poor, and the government continues to commit serious human rights abuses. The State Department's *Report on Human Rights Practices* notes that Nigerian government officials at all levels committed serious abuses, including: politically motivated and extrajudicial killings by security forces, torture, arbitrary arrest, and judicial corruption. Police raid homes without warrants. U.S. citizens have experienced harassment and shakedowns at checkpoints and during encounters with Nigerian officials.

The lack of law and order in Nigeria poses considerable risks to travelers, including the risk of armed robbery or kidnapping. Violent crime, committed by ordinary criminals, as well as by persons in police and military uniforms, can occur throughout the country. The U.S. Department of State warns U.S. citizens of the dangers of travel to Nigeria and of continued deteriorations of the security situation in the oil rich Niger Delta region in the south western part of the country. Kidnapping for ransom of persons associated with the petroleum sector, including U.S. citizens, remains common in the Niger Delta area. The U.S. Embassy in Nigeria has issued a warning to American citizens that there is a risk that Niger Delta militants could escalate their activities and target expatriate personnel, Western businesses, and facilities and locales visited by tourists and foreigners in other regions of Nigeria. U.S. citizens and other expatriates have experienced harassment and shakedowns at checkpoints and during encounters with Nigerian officials.

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 not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching 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 the 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." 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).

Analysis

Guideline B, Foreign Influence

Under Guideline B, Foreign Influence, “[f]oreign 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.” AG ¶6.

Additionally, adjudications under Guideline B “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 U.S. citizens to obtain protected information and/or is associated with the risk of terrorism.” AG ¶6.

I have considered all of the disqualifying conditions under the Foreign Influence guideline. The following facts raise security concerns under disqualifying conditions AG ¶¶ 7(a), 7(b), and 7(e):²

Nigeria is a country subject to turmoil and poverty, without the benefit of a stable lawful government, a situation that threatens U.S. security interests. American citizens with immediate family members who are citizens or residents of Nigeria could be vulnerable to coercion, exploitation, or pressure.

Applicant's sister and aunt are citizens and residents of Nigeria.³ Additionally, Applicant has eleven nieces and nephews who are citizens and residents of Nigeria. He traveled to Nigeria to visit these and other Nigerian relatives in 2003, 2004, 2005, and 2006.

Applicant feels a special moral obligation to eight of his nieces and nephews who are the children of his deceased sister, who helped to raise him. He has sent these young people unspecified amounts of money to aid in their support, and he communicates by telephone with some of his nephews once or twice a month.

In 1990, he opened a bank account at a bank in Nigeria. In 2004, he purchased, for approximately \$10,000, two plots of land in Nigeria for the benefit of his nephews, and he, with his brother, he contributed approximately \$15,000 to pay for building an ancestral home in Nigeria. Applicant's foreign contacts and interests raise security concerns under the foreign influence adjudicative guideline.

Several mitigating conditions under AG ¶ 8 might be applicable to Applicant's case. If "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.," then AG ¶ 8(a) might apply. If "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," then AG ¶ 8(b) might apply. If "contact or communication with foreign citizens is so casual and infrequent that

² AG ¶ 7(a) reads: "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." AG ¶ 7(b) reads: "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." AG ¶ 7(e) reads: "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 heightened risk of foreign influence or exploitation."

³ SOR ¶ 1.e. alleges that Applicant's "uncle and aunt are citizens of and reside in Nigeria." Applicant's uncle is deceased. The language in the allegation relative to Applicant's uncle is concluded for Applicant.

there is little likelihood that it could create a risk for foreign influence or exploitation,” then AG ¶ 8(c) might apply. If “the value or routine nature of the foreign business, financial, or property interest is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual,” then AG ¶ 8(f) might apply.

Applicant’s relationship with Nigerian family members is strong and charged with emotion. He feels a moral obligation to care for and provide support to the eight children of his sister, now deceased, who cared for him after he was orphaned by the deaths of his parents. These children are now young adults. Applicant has provided them with support and he has purchased land for their use in Nigeria. His relationship with his Nigerian relatives is avuncular and based on long-standing family ties of affection and obligation. Applicant is a dutiful brother, uncle, and nephew who looks after the welfare of his many family members in Nigeria. He maintains frequent telephone contact with some of his nephews and speaks with them once or twice a month. Applicant’s relatives’ citizenship and residency in Nigeria create a heightened risk that he could be targeted for exploitation, pressure, or coercion by individuals or groups operating outside of the law in Nigeria. These groups might also threaten U.S. security interests. Applicant failed to provide sufficient information to rebut or mitigate these security concerns. I conclude that the mitigating conditions under AG ¶¶ 8(a), 8(b), and 8(c) are inapplicable.

Applicant testified that his bank account in Nigeria, which he opened in 1990 with a deposit of \$40 and had never used, was defunct. He provided documentation at his hearing showing that he had sold his interest in the two lots in Nigeria to his brother for \$10,000. I found Applicant’s testimony about his bank account in Nigeria to be credible. However, I found that Applicant’s assertion that he no longer had an interest in the two lots to lack credibility. By selling the lots to his brother on the day before his hearing, Applicant had not divested himself of the land in an arm’s length transaction. His assertions that he no longer held a redeemable interest in the land were not persuasive.

Applicant’s financial interest in the land in Nigeria was not substantial. However, his property interest in the two lots in Nigeria was not routine. He had acquired and held the land for the use of his nephews. His desire to assist his nephews in this way arose from a sense of moral obligation to them in return for their mother’s care of him when he was orphaned as a child. It was not clear whether the nephews knew of his intention to hold the land for their interest and use. His assignment of the land would appear to run contrary to his intent to carry out a perceived moral duty to his nephews and poses a potential for conflict that could be used to influence, manipulate, or pressure him. I conclude that AG ¶ 8(d) does not apply to the facts of Applicant’s case.

Nothing in Applicant’s answers to the Guideline B allegations in the SOR suggested he was not a loyal U.S. citizen. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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.”

Guideline C, Foreign Preference

Under AG ¶ 9, the security concern involving foreign preference arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes several conditions that could raise a security concern and may be disqualifying. These disqualifying conditions are as follows:

(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;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial or business interests in another country;
- (6) seeking or holding political office in a foreign country; and
- (7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Before becoming a U.S. citizen, Applicant held a Nigerian passport. After becoming a U.S. citizen in 2000, Applicant acquired a U.S. passport. In 2005, he renewed his Nigerian passport. His Nigerian passport was scheduled to expire in November 2010.

Applicant used his Nigerian passport to enter and exit Nigeria in 2003, 2004, 2005, and 2006. Applicant's acquisition of a Nigerian passport after becoming a U.S. citizen raises a concern that he actively exercised dual citizenship with Nigeria. These actions showed an allegiance to a country other than the U.S.

I have carefully reviewed the facts of Applicant's case and the Foreign Preference AG. I conclude that Applicant's conduct raises potentially disqualifying security concerns under AG ¶10 (a)(1).

Under AG ¶11(a), dual citizenship might be mitigated if it is based solely on an applicant's parents' citizenship or birth in a foreign country. Under AG ¶ 11(b), an individual's dual citizenship might be mitigated if he or she has expressed a willingness to renounce dual citizenship. Under AG ¶11(c), an individual's exercise of the rights, privileges, or obligations of foreign citizenship might be mitigated if it occurred before becoming a U.S. citizen or when the individual was a minor. Under AG ¶11(d), an individual's use of a foreign passport might be mitigated if it were approved by his cognizant security authority. Under AG ¶ 11(e), an individual's use of a foreign passport might be mitigated if he presented credible evidence that the passport had been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

At his hearing, Applicant provided documentation to corroborate his assertion that he had surrendered his active Nigerian passport to a responsible official at the Nigerian embassy. He also confirmed his allegiance to the United States. Thus, AG ¶ 11(e) applies in mitigation. I conclude that the other remaining mitigating conditions are inapplicable.

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) 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of the whole person concept and all the facts and circumstances surrounding this case. Applicant is an adult of 44 years of age. He is deeply grateful to his aunts, uncles, and sister who provided him with a home when he was orphaned as a young child. He feels morally obligated to the children of the sister, now deceased, who helped to raise him. He has attempted to repay the obligation he feels to his sister by sending money to her children and by purchasing land in Nigeria for their use. His deep sense of obligation suggests he may also be vulnerable to exploitation or manipulation.

Nigeria is a country split by ethnic and religious division and handicapped by poverty, widespread corruption, and lawlessness. U.S. citizens who travel to Nigeria on business or as tourists have been advised that militants may target them. U.S. citizens traveling to Nigeria have also been harassed by Nigerian officials. Under these circumstances, Applicant's willingness to provide support to his Nigerian nieces and nephews and his sense of obligation, while honorable, also expose him to the possibility of pressure and inducement. His sense of obligation and desire to help his Nigerian relatives could make him vulnerable to exploitation and create a conflict of interest with his obligation to protect classified information.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude that while Applicant mitigated security concerns arising under the foreign preference adjudicative guideline, he failed to mitigate security concerns arising under the foreign interest adjudicative guideline.

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	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

Paragraph 2, Guideline C: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Conclusion

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

Joan Caton Anthony
Administrative Judge