



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-00160
)
 Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*
10/28/2019

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 6, 2016. On February 25, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent her a Statement of Reasons (SOR) alleging security concerns under Guidelines B and F. The DOD CAF acted under Executive Order (EO) 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on March 31, 2019, and requested a decision on the written record without a hearing. On July 3, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 7. She was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or

explanation to the Government's evidence. She received the FORM on August 5, 2019, and did not respond. Items 1 and 2 contain the pleadings in the case. Items 3, 5, 6, and 7 are admitted into evidence. Item 4 is addressed in the "Administrative Notice" section below. Applicant's SOR answer included a document that is marked and admitted into evidence as Applicant Exhibit (AE) A. The case was assigned to me on October 3, 2019.

Procedural Matter

I extracted the below findings of facts from Applicant's SOR Answer (Item 2), her SCA (Item 3), and a summary of her security clearance interview (SI) (Item 7). Item 7 was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 7. The Government included in the FORM a prominent notice advising Applicant of her right to object to the admissibility of Item 7 on the ground that it was not authenticated. Applicant was also notified that if he did not raise any objection to Item 7 in her response to the FORM, or if she did not respond to the FORM, she could be considered to have waived any such objection, and that Item 7 could be considered as evidence in his case. Applicant received the FORM, including a copy of Item 7. She did not respond to the FORM or otherwise object to Item 7.

Findings of Fact

Applicant, age 36, is a Kenyan citizen by birth. She entered the United States in 2003. She was married to a U.S. citizen in 2004 and became a U.S. citizen in 2014. She has no children. She filed for divorce in 2017, the status of which was not specified in the record. She earned an associate degree in 2010 and a bachelor's degree in 2014 from U.S. institutions. Applicant has been employed as a design engineer by a U.S. defense contractor since 2015. This is her first application for a DOD security clearance.

Guideline B

Applicant's mother (age 59) and father (age 69) are Kenyan citizens and residents (SOR ¶¶ 1.a and 1.b). They reside in Nairobi, the capital and largest city of Kenya. Her father is a retired journalist with former affiliations with the Kenyan parliament and magistrate courts. Her mother runs a non-government organization (NGO). Without specifying which entities fund the NGO, Applicant claimed that her mother is not affiliated with any foreign government. She communicates with each of her parents weekly. (Item 3 at 25-28; Item 7 at 4)

Applicant has four siblings. Sister 1 (age 34) and Brother 1 (age 31) are Kenyan citizens and residents (SOR ¶¶ 1.c and 1.d). They also reside in Nairobi. Sister 2 (age 31) and Brother 2 (age 27) are Kenyan citizens residing in the United States. Sister 1 is a legal counsel in the office of the Attorney General of Kenya. Her other siblings are students. She communicates with Sister 1 and Brother 1 monthly. (Item 3 at 28-33; Item 7 at 4-5, 11)

Applicant has close and continuing contact with three friends who are Kenyan citizens and residents. (SOR ¶ 1.e). The record did not specify in which city these friends reside. Friend 1 is employed as a manager by a British multinational investment bank and financial services company. Friend 2 is a member of the clergy at a church in Nairobi. Neither Friend 3's employment status nor job title was specified in the record. She communicates with her friends monthly. (Item 3 at 36-37, 41-42; Item 7 at 6-8)

Applicant travelled to visit family and friends in Kenya in 2011, 2012, and 2017. She reported "in person" communications with her parents, Sister 1, Brother 1, and Friend 1 but did not specify whether they occurred outside of Kenya. Her one in-person visit with Friend 3 occurred in the United States in 2016. (Item 3 at 9, 25-31, 36-37, 47-48; Item 7 at 8)

Applicant has owned a home in the United States since 2010. She is now renting a home in another state, while Sister 2 and Brother 2 reside there. The record did not specify what, if any, equity Applicant has in the home, or whether she owns any other U.S. assets. She co-owns with her mother a dormant bank account, with a \$0 balance, in Kenya. She does not maintain any other foreign financial interests. (Item 3 at 10, 43-44; Item 7 at 3, 10-11)

Applicant sent approximately \$500 per month to her mother over an unspecified number of years for her financial support and to assist in paying school fees for her siblings. As of 2017, she sent a total amount of approximately \$10,000. It was unspecified in the record whether, in what amount, and for how long she intended to continue sending money to her mother. (Item 3 at 44-45; Item 7 at 11)

Guideline F

Applicant has nine unresolved delinquent debts totaling approximately \$32,010 (SOR ¶¶ 2.a through 2.i). She denied all but one of them in her SOR answer, without explanation. Applicant claimed that her one admitted debt (SOR ¶ 2.c/\$461) would be settled by April 2019, without providing any documentary proof. While one debt (SOR ¶ 2.g/\$3,003) showed a \$0 balance on her January 2019 credit report, it was not reported therein as paid. (Item 5 and 6)

Applicant stated, without further explanation, that she fell behind on payments to certain creditors during an unspecified period due to being "overwhelmed with debt." She also stated that during her last two years of college, she fell behind on her home mortgage payment and it went into collections. That mortgage is now in good standing and was not alleged in the SOR. In November 2018, Applicant described her overall financial situation as "okay" and averred that she was meeting her financial obligations on time "for the most part." (AE A; Item 7 at 11-12)

Administrative Notice (Kenya)

I have taken administrative notice of the U.S. Government's pronouncements concerning Kenya, as outlined in its Request for Administrative Notice (Item 4) and the documents appended thereto, including the following:

- Kenya is a republic with three branches of government: an executive branch, led by a directly elected president; a bicameral parliament consisting of the Senate and the National Assembly; and a judiciary. (Item 4: Item I at 1)
- There is considerable risk from terrorism in Nairobi. Terrorism remains a high priority concern. The U.S. government continues to receive information regarding potential terrorist threats aimed at U.S., Western, and Kenyan interests in the Nairobi area, counties bordering Somalia, and in the coastal areas including Mombasa and Malindi. (HE I at 2)
- Kenya is a strong U.S. partner in counterterrorism investigation, prosecution, and incident response, and continued to play an important role in regional counterterrorism cooperation. Reports of human rights violations by security forces during counterterrorism operations continued, including allegations of extra-judicial killings, disappearances, and torture. Coordination among the Kenyan governmental agencies with counterterrorism functions was uneven, with improved information sharing in some cases and failure to appropriately pass threat information in others. Overall, resource constraints, insufficient training, corruption, and unclear command and control hindered effectiveness. (Item 4: Item IV at 24-25, 26)
- Despite public progress in fighting corruption, the Kenyan government does not implement relevant laws effectively, and officials frequently engaged in alleged corrupt practices with impunity. Bribery is the most commonly reported type of corruption. Police corruption remains a significant problem. (Item 4: Item I at 29-30)
- Human rights issues with the Kenyan government include: unlawful and politically motivated killings; forced disappearances; torture; harsh and life-threatening prison conditions; arbitrary arrest and detention; an inefficient judiciary; arbitrary infringement of citizens' privacy rights; censorship; lack of accountability in many cases involving violence against women, including rape and female genital mutilation/cutting; and criminalization of same-sex sexual conduct. (Item 4: Item I at 1)

I *sua sponte* admitted to the record, as HE I, the following updated source document cited in Item 4: Item III, updated March 14, 2019. The updated website address is <https://www.osac.gov/Country/Kenya/Content/Detail/Report/03c822af-2922-4a4c-ba8b-15f4aead1599> (note that this document was available at the time Item 4 was submitted in June 2019). I also *sua sponte* amended page 5 of Item 4 to correct a typographical error in the list of source documents, thereby changing the date from March 29, 2018 to April 9, 2019. Because these *sua sponte* actions did not affect either the relative positions of the parties or my decision, prior notice to the parties was not required.

Policies

“[N]o one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (EO 10865 § 2)

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*Egan*, 484 U.S. at 531). “Substantial evidence” is “more than a scintilla but less than a preponderance.” (See *v.*

Washington Metro. Area Transit Auth., 36 F.3d 375, 380 (4th Cir. 1994)). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (Directive ¶ E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). "[S]ecurity clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531; AG ¶ 2(b))

Analysis

Guideline B: Foreign Influence

The security concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The following are potentially relevant disqualifying conditions under this guideline:

AG ¶ 7(a): contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant's ties to family and friends, who are Kenyan citizens and residents, establish AG ¶¶ 7(a) and 7(b). A heightened risk is associated with Kenya given the terrorism, human rights issues, and government corruption existent there. Applicant bears the burden of persuasion to mitigate these concerns. ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 15, 2000). Applicant's ties to Sister 2 and Brother 2, who do not reside in Kenya, and her dormant bank account in Kenya, do not establish any disqualifying condition under Guideline B.

Application of the guidelines is not a comment on an applicant's patriotism 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). Family relationships can involve matters of influence or obligation. ISCR Case No. 02-04786 (App. Bd. Jun. 27, 2003)

The following are potentially relevant mitigating conditions under this guideline:

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 United States;

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, 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.

Applicant maintains strong familial ties with her parents, Sister 1, and Brother 1; and close and continuing contact with her Friends 1, 2, and 3. Her father's former affiliation and her sister's current affiliation with the Kenyan government create additional vulnerabilities. Regardless of any such affiliations, there remains a heightened risk associated with Kenya. Under these circumstances, I cannot conclude that it is unlikely that Applicant will be placed in a position of having to choose between the interests of her family and close friends and that of the United States, or that Applicant has met her burden to mitigate the Guideline B concern. AG ¶ 8(a) is not established.

Applicant has established strong ties to the United States, where she has resided for 16 years. She earned two degrees from U.S. institutions, and has owned a home in the United States for 10 years. Two of her siblings reside in the United States. However,

the record contains insufficient facts to overcome the equally strong ties that she has to her family and friends in Kenya, who are vulnerable to a foreign government known for problems with terrorism and for its corruption and human rights violations. Under these circumstances, I cannot conclude that Applicant could be expected to resolve any conflict of interest in favor of the U.S. interest. AG ¶ 8(b) is not established.

None of Applicant's familial or close-friend relationships are casual; nor is her contact with them infrequent. There remains a potential risk for foreign influence or exploitation. AG ¶ 8(c) is not established.

Guideline F: Financial Considerations

The security concern under Guideline F (Financial Considerations) is set out in AG ¶ 18, as follows:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. (ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012))

Applicant's significant unresolved delinquent debts, corroborated by the credit reports, establish two disqualifying conditions under this guideline: AG ¶ 19(a) (inability to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations).

Applicant has not provided sufficient evidence to support any of the following potentially applicable mitigating factors: AG ¶ 20(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); AG ¶ 20(b) (the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances); and AG ¶ 20(d) (the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts). Therefore, I conclude

that Applicant has not mitigated the security concerns raised by her financial indebtedness.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

I have incorporated my comments under Guidelines B and F in my whole-person analysis, and I have considered the factors AG ¶ 2(d). I weighed the disqualifying and mitigating conditions under Guideline B and F, and evaluated all the evidence in the context of the whole person and the heightened risk associated with Kenya. Applicant has not mitigated the security concerns raised by her ties to citizens and residents of Kenya, or her financial indebtedness. Accordingly, I conclude that she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a – 2.i:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge