



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



In the matter of:)
)
) ISCR Case No. 20-01227
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

05/05/2021

Decision

Curry, Marc, Administrative Judge:

Applicant failed to mitigate the foreign influence security concern generated by his relationship with his brother, a Nigerian citizen and resident. Clearance is denied.

Statement of the Case

On November 6, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR), alleging security concerns under Guideline B (foreign influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the DOD on June 8, 2017.

The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the affirmative finding that it was clearly consistent with the national interest to grant or continue Applicant’s security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On November 19, 2020, Applicant answered the SOR, admitting the allegation, and requesting a hearing. On March 11, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On March 25, 2021, DOHA scheduled the hearing for March 29, 2021. Applicant's counsel waived the right to 15-days notice of hearing. The hearing was held as scheduled. I received three Government exhibits (GE 1 - GE 3), eighteen Applicant exhibits (AE A - AE R), and the testimony of Applicant. In addition, at Department Counsel's request, I took administrative notice of the facts set forth in four documents (Hearing Exhibits (HE) I through HE IV). At the close of the hearing, I left the record open to allow Applicant to submit additional exhibits. Within the time allotted, he submitted one exhibit which I marked and admitted as AE S. I received the transcript of the hearing on April 7, 2021.

Findings of Fact

Applicant is a 41-year-old married man with three pre-teen children. Applicant grew up in Nigeria, attending and finishing college there, before immigrating to the United States in 2011. (Tr. 21) He has been a naturalized U.S. citizen since 2018. (AE A) After immigrating to the United States, Applicant returned to school, earning a master's degree of business administration in 2014. (GE 1 at 17; Tr. 16)

Applicant is a certified information systems auditor. (AE L at 4) He has been working in this field for the past five years, and has been working for his current employer, a government contractor, since April 2019. (AE N at 1)

Applicant is highly respected on the job. According to his supervisor, he is a meticulous and proactive auditor who demonstrates impressive knowledge of the audit program. (AE P)

Applicant's wife is Nigerian by birth. She is a naturalized U.S. citizen who has been living in the United States for 20 years. (Tr. 27) Applicant and his wife married after he immigrated to the United States. (GE 1 at 57) All of their children were born here. Applicant's father-in-law is deceased, and his mother-in-law lives in the United States. (Tr. 34)

Applicant's parents are deceased. They were farmers. (Tr. 34) Applicant has a brother who is a Nigerian citizen and resident. Applicant communicates with him approximately three times per year. (Tr. 25) He does not know what his brother does for a living, nor does he support his brother financially. (Tr. 25) Applicant has a sister who lives in the United Kingdom. (Tr. 35)

Applicant neither owns property in Nigeria, nor has any Nigerian bank accounts (Tr. 34) He traveled to Nigeria nine times between 2011 and 2019. (Tr. 31) Applicant earns \$132,000 per year. His wife earns \$122,000 annually. In 2017, they purchased their home for \$290,000. (AE J)

Before immigrating to the United States, Applicant worked in a state government aid office in Nigeria. (Tr. 36) He has no pension from this job. (Tr. 36)

Between 2012 and 2014, Applicant periodically bought automobiles for friends and family and shipped them to Nigeria. (Tr. 38) Applicant's friends who were interested in purchasing cars in the United States would wire him the money, whereupon, he would then purchase the car and arrange for its shipment to Nigeria. (Tr. 43; GE 3 at 6). Between October 2012 and January 2013, there were multiple electronic transactions to Applicant's bank account in the United States that originated from Nigeria for the purchase and shipment of these vehicles, totaling \$49,586. (GE 3 at 6) Applicant testified that he did not charge a fee to the buyers, nor earn a profit from this endeavor. (Tr. 42, 51)

Applicant disclosed the information about the car purchase arrangements to an investigator during an interview in July 2018. (GE 2 at 6) When initially asked on cross-examination whether he ever bought cars in the United States and shipped them to Nigeria, Applicant responded, "No, I can't remember doing that." (Tr. 38) Also, when asked at the hearing whether he ever discussed this matter with an investigative agent, Applicant could not remember the discussion until after he was presented with a copy of the investigative report. After Applicant acknowledged shipping these vehicles to friends and family members, later during his testimony, he stated that he could not remember the names of any of the people whom he shipped the cars. (Tr. 45)

Applicant is active in the community. He worked in a recent election as an election judge. (Tr. 20) His duties included facilitating the processing of votes, auditing them, and ensuring that votes are properly counted. (Tr. 20, 69)

Administrative Notice

Nigeria is a federal republic composed of 36 states. (HE I at 1) Authorities do not always hold the police, military, or other security force personnel accountable for the use of excessive or deadly force for the death of people in custody. (HE I at 2). Although the Nigerian government has taken steps to root out public corruption, it remains endemic to all levels of government in Nigeria. (HE I at 1-2)

Terrorism and banditry are major problems in parts of Nigeria. There have been episodes of hostage taking and kidnappings for ransom targeting dual nationals who have returned to Nigeria for a visit, or U.S. citizens with perceived wealth. (HE II at 2) Terrorist actions by groups such as Boko Haram and ISIS have contributed to the internal displacement of approximately two million people in northeastern Nigeria. (HE IV at 3) Nigeria is committed to countering extremism, organizing programs to re-integrate lower-level extremists into society, and participating on international anti-terrorism conferences. (HE IV at 5)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

Under this guideline, “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.” (AG ¶ 6) Although the Nigerian government is committed to countering terrorism and banditry, these problems remain pervasive in many parts of the country. Of particular concern is the propensity of criminals to target Nigerian expatriates who return to the country for visits. Under these circumstances, Applicant’s relationship with his brother, a Nigerian citizen and resident, triggers the application of 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 county if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion,”

The relevant, potentially mitigating conditions are set forth in AG ¶ 8 as follows:

- (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;

(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

(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 contends that his contact and communication with his brother is casual and infrequent. In addition, Applicant contends, in essence, that his longstanding relationships in the United States and the financial and familial ties cultivated since living here, mitigate any foreign influence security concern posed by his relationship with his brother. While sibling relationships may not be close, as with Applicant and his brother, they cannot be considered casual. There is a presumption of bonds of obligation, if not affection, imputed to sibling bonds. Application of the foreign influence mitigating conditions requires consideration of the brother's location as well as his professional activities and personal associations in Nigeria. There is nothing in the record to suggest that Applicant could not obtain this information, only that he did not. Without this information, the government cannot fully assess the potential risks of this relationship. The absence of information about Applicant's brother prevents application of any of the foreign influence mitigating conditions to this relationship.

Applicants have the ultimate burden of persuasion to obtain a favorable clearance decision. To meet this burden, applicants, at minimum, must testify credibly. Here, Applicant's testimony was not credible, given his evasive, contradictory testimony about the cars that he bought and shipped to Nigeria between 2012 and 2013. This lack of credibility fatally undercuts the probative value of his remaining testimony, and ultimately, generates doubt about his security worthiness. Given this lack of credibility and the mandate in the Directive that any doubt about an applicant's security interest must be resolved in favor of the national security, I conclude that none of the mitigating conditions apply, and that Applicant has failed to mitigate the security concern. (AG ¶ 2(a))

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(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 considered the whole-person factors when I evaluated Applicant's credibility under the foreign influence section of the Decision, above. Given my conclusion that he was not credible, the analysis of the whole-person concept does not warrant a favorable conclusion.

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

Conclusion

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

Marc Curry
Administrative Judge