

KEYWORD: Foreign Influence; Foreign Preference; Personal Conduct; Criminal Conduct

DIGEST: Applicant emigrated to the United States in 1988. He was born and grew up in Nigeria. He became a naturalized U.S. citizen in 2003, and received his U.S. passport shortly thereafter. Applicant's use, renewal, and possession of a current Nigerian passport pose an unacceptable security concern. Moreover, he deliberately falsified his security clearance application. His favorable information is not sufficient to mitigate the security concerns. Clearance is denied.

CASENO: 06-12972.h1

DATE: 08/03/2007

DATE: August 3, 2007

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In re:
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 ISCR Case No. 06-12972
 SSN: -----
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Applicant for Security Clearance
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**DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA**

APPEARANCES
FOR GOVERNMENT

Francisco Mendez, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant emigrated to the United States in 1988. He was born and grew up in Nigeria. He became a naturalized U.S. citizen in 2003, and received his U.S. passport shortly thereafter. Applicant's use, renewal, and possession of a current Nigerian passport pose an unacceptable security concern. Moreover, he deliberately falsified his security clearance application. His favorable information is not sufficient to mitigate the security concerns. Clearance is denied.

STATEMENT OF THE CASE

On September 21, 2005, Applicant submitted a security clearance application (GE 1, Electronic Questionnaires for Investigations Processing). On October 11, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a statement of reasons (SOR) alleging facts and security concerns under Guideline B (Foreign Influence), Guideline C (Foreign Preference), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.¹ On December 20, 2006, Applicant answered the SOR and requested a hearing.

The case was assigned to me on May 2, 2007. On June 4, 2007, I convened a hearing at which the government presented five exhibits, marked GE 1-5, to support the SOR. Applicant testified on his own behalf, and presented two witnesses and five exhibits, marked AE 1-5. DOHA received the transcript (Tr.) on June 14, 2007.

FINDINGS OF FACT

Applicant admitted the factual allegations in SOR ¶¶ 1.a – 1.b, and 2.a – 2.c, with explanations. He denied that he deliberately falsified his security clearance application as alleged in SOR ¶¶ 3.a – 3.b, and ¶ 4.a. His admissions are

¹ See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended), and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended and revised. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact:

Applicant is a 47-year-old security officer, working for a government contractor. He was born, raised, and educated in Nigeria (GE 1). He has never been married and has no children. He completed primary and secondary education in a small town in Nigeria. At around age 20, he moved to a large city in Nigeria, and from approximately 1980 to 1986, worked for a private bank and played soccer. In 1988, at the age of 29, he emigrated to the United States (Tr. 32).

From 1988 to 2005, Applicant worked at an American Christian academy teaching English, mathematics, social studies, science, physical education, and bible studies to children in first to eight grades. In 1994, he began attending an American university and received a bachelor's degree in English in 2002. Applicant became a naturalized U.S. citizen in October 2003, and received his U.S. passport shortly thereafter. He completed a master's degree in business administration (human resources) in 2005. In September 2005, he was hired by his current employer, a government contractor, and issued an interim security clearance. His company provides security to a sensitive U.S. agency. He requires access to classified information to retain his job (Tr. 8).

Applicant has one brother and one sister who are citizens and residents of Nigeria. His brother is 67 years old, and he is a widow. Applicant's brother is retired. He served as a medic in the Nigerian armed forces for more than 10 years prior to his retirement (Tr. 42-43). Applicant did not know whether his brother was an officer. He only remembered his brother worked as a health care provider. Applicant claimed he did not know what is his brother's current occupation, if any.

Applicant's sister is 57 years old, and a widow. She retired from her job at a private television station. He calls his siblings once or twice a month, and provides financial support to both. Applicant believes it is his obligation as a brother and as a Christian to help his siblings. He has been sending his siblings \$100-\$200 every two to three months for many years. They divide the money among themselves based on their needs (Tr. 44-47).

Section 17.d of Applicant's September 2005 security clearance application, required him to disclose whether within the preceding seven years he had an active passport issued to him by a foreign government. Applicant answered "No," and failed to disclose that he was in possession of a valid Nigerian passport. He renewed his passport in August 2000, and the new passport had an expiration date of August 2005. Applicant again renewed his Nigerian passport on or about August 2005, and it now has an expiration date in August 2010. He brought his active Nigerian passport to the hearing. Consistent with his prior statements, Applicant testified he was willing and ready to surrender his Nigerian passport.

Applicant explained he answered "No" to Section 17.d, because he mistakenly believed his country of birth, Nigeria, was not a foreign country. Because he was born in Nigeria, to him Nigeria is not a foreign country. He did not know that for

purposes of the security clearance application, any passport from any nation except the United States is considered a foreign passport (Tr. 54).

Section 18 of Applicant's September 2005 security clearance application, required him to list any foreign countries he had visited during the preceding seven years. He disclosed his travel to Germany from April 2004 to May 2005; to Germany and Poland during August 2004; and to the United Kingdom during August 2002. Applicant failed to disclose he traveled to Nigeria in August 2000, July 2001, and April 2004.

In January 2006, Applicant was interviewed by a government investigator concerning the possession of an active Nigerian passport and his foreign travel. Following that interview, he sent an e-mail (dated January 2006) to the investigator clarifying his foreign travel (AE 1). The e-mail shows Applicant traveled to Finland and Nigeria during July-August 2001; to Denmark and Germany during July 2002; to Nigeria during April-May 2004; and to Germany and Poland during August 2004. His last foreign travel was to Poland in June 2006 (GE 2). In a letter to DOHA, dated September 12, 2006, Applicant disclosed that in 2002 he traveled through London to Nigeria for a family visit (GE 3).

Applicant testified that the information in his security clearance application had several mistakes that he tried to correct. Specifically, he meant to write 2004 as the year he traveled to Nigeria to attend his mother's funeral. He also explained that he did not disclose any trips to Nigeria because, since he was born in Nigeria, he did not consider Nigeria a foreign country (Tr. 58). In 2004, Applicant's mother passed away. In April 2004, he traveled to Nigeria using both his U.S. passport and his Nigerian passport. He explained he did not have the time to go through the process of requesting a visa in order to attend his mother's funeral.

While holding his interim clearance, Applicant had access to classified information. There is no evidence to show Applicant failed to comply with the rules and procedures for handling classified information (Tr. 158). His interim clearance was withdrawn as a result of the security concerns under adjudication. The government has not alleged, and the evidence does not show, Applicant is anything other than a loyal U.S. citizen.

Applicant strongly averred he is a loyal U.S. citizen with personal, professional, and financial commitments in the United States. He promised to defend and take arms for the United States against any enemies. He emigrated to the United States seeking the many opportunities offered and a better quality of life. He is a law-abiding person, and would not knowingly violate the laws of the United States. He was improved his lifestyle while in the United States by attending college and advanced education. Additionally, he has made positive contributions to the community through his services with a Christian church. He participated in the church's outreach program visiting the needy, the elderly, and State prisons (Tr. 31).

Applicant's witnesses and references, most of them pastors and members of his Church, have known him for 10 to 15 years. They consider Applicant an excellent teacher, a model citizen, and role model. Applicant has established a reputation for

being trustworthy, honest, caring, and for having high moral standards. He is not considered the type of person who would falsify a security clearance application or violate the law.

I take administrative notice of the following facts. Nigeria is a federal republic composed of 36 states and a capital territory. The government's human rights record is poor, and government officials at all levels commit serious abuses including politically motivated and extrajudicial killings, torture, arbitrary arrest and detention, infringement on privacy rights, freedom of speech, and press. Areas of the country are marked by serious instability and outbreaks of armed conflict between religious, political, and ethnic factions. The lack of law and order in the country poses considerable risks to travelers.

The Nigerian government provides strong diplomatic support to U.S. government counter-terrorism efforts. It has condemned terrorist attacks against the United States and supported military actions against the Taliban and Al-Qaida. It also has played a leading role in forging an anti-terrorism consensus among states in their region. The United States provides the people of Nigeria with substantial financial assistance in areas such as public health, education, and in their efforts of developing effective institutions of democratic governance. Nigeria is an important trading partner of the United States. There is no evidence of economic competition with the United States, or that Nigeria has or ever had an intelligence gathering program targeting U.S. economic, industrial, or military critical technologies.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,² and the whole person concept.³ Having considered the record evidence as a whole, I conclude Guideline B (Foreign Influence), Guideline C (Foreign Preference), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

² Directive, Section 6.3. states, "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 . . ."

³ AG ¶ 2(a). states, ". . . The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁴ The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.⁵ The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁷

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Under Guideline B (Foreign Influence), the government's concern is that foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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. AG ¶ 6.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁵ Directive, ¶ E3.1.32.1; ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.).

⁶ *Egan*, *supra* n. 4, at 528, 531.

⁷ See *Id.*; AG ¶ 2(b).

(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;

(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;

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.⁸ Applicant has frequent contacts and a close relationship of affection and/or obligation with his siblings, who are residents and citizens of Nigeria. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Nigerian agents or criminals may exploit the opportunity to obtain information about the United States. His connection to his family members also create a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help them by providing sensitive or classified information.

The government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the government.

Three Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(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.;

(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

(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.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that mitigating condition AG ¶¶ 8(a) and (b) apply. Applicant has strong feelings of affection and a strong sense of obligation to his siblings. The closeness of the relationship is shown by Applicant's telephone contacts with his siblings, the financial support provided to them, and his travels to Nigeria. Notwithstanding, Applicant established it is unlikely he will be placed in a position of having to choose between the interests of his family and the interests of the United States. I do not

⁸ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

believe Applicant's relationship with his family in Nigeria creates a heightened risk for foreign influence or exploitation.

In deciding whether Applicant's family members are in a position to be exploited, I considered Nigeria's form of government.⁹ Nigeria is a developing country that, so far, poses no intelligence, economic, or industrial threat to the United States. Notwithstanding Nigeria's poor human rights record, there is no evidence its government seeks classified and industrial/economic information from the United States. Nor is there evidence of the Nigerian government mistreating relatives of U.S. citizens or U.S. citizens to obtain such information. Additionally, given the existing relationship between the governments of the United States and Nigeria, it is unlikely Nigeria would risk losing an important trading partner and the financial support of the United States.

AG ¶ 8(b) applies because Applicant has developed a sufficient relationship and loyalty to the United States, that he can be expected to resolve any conflict of interest in favor of the United States' interest. He has lived in the United States for approximately 19 years. He is a naturalized U.S. citizen and all of his financial and business interests are in the United States. Applicant has established himself as an American. He worked hard as a teacher at the Christian school, and at the university completing his bachelor's and master's degrees. He continues this track record of diligent labor in his current employment.

Under Guideline C (Foreign Preference), when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interest of the United States. AG ¶ 9.

Applicant became a naturalized U.S. citizen in 2003 and was issued a U.S. passport shortly thereafter. He used his Nigerian passport to travel to Nigeria in 2004, because he did not have the time to go through the process of requesting a visa. He also renewed his Nigerian passport in 2005. At his hearing, he was in possession of a current Nigerian passport that does not expire until 2010.

Foreign preference disqualifying condition AG ¶ 10: *(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,* applies.

After considering all the foreign preference mitigating condition under AG ¶ 11, I find that none of the mitigating conditions apply. Applicant used and renewed his foreign passport after becoming a U.S. citizen, and receiving his U.S. passport. At his hearing, he was still in possession of his foreign passport. He presented no evidence to show that his use of the foreign passport was approved by a cognizant security authority, that he has expressed a willingness to renounce his dual citizenship, or that his passport has been destroyed, surrendered, or otherwise invalidated.

Applicant's testimony (and his prior statements) indicated that he has been willing to relinquish his Nigerian passport, that nobody told him to surrender his Nigerian passport, or that there was a problem with him using his Nigerian passport. Notwithstanding his assertions, Applicant was confronted about his possession and use of a foreign passport at least three times, i.e., by a government investigator (GE 2), through the DOHA interrogatories, and by the SOR allegations. Applicant is 47 years old, and holds a bachelor's in English and a master's degree in business administration. He was provided a copy of the Directive outlining the government's security concerns. He knew or should have known of the government's security concerns raised by his use

⁹ The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

and possession of a current foreign passport and how to mitigate them. He has failed to mitigate the security concerns raised under Guideline C.

Under Guideline E (Personal Conduct), conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

Regarding SOR ¶ 3.a, Applicant admitted he failed to disclose that during the seven years preceding his security clearance application he traveled to Nigeria (in 2000), to Finland and Nigeria (during July-August 2001); to Denmark, Germany, and Nigeria (in 2002), and Nigeria (in 2004). Applicant testified he failed to disclose his travels to Nigeria because he believed Nigeria was not a foreign country and the United States was aware of his country of origin and that he had a Nigerian passport.

Concerning SOR ¶ 3.b, Applicant admitted he failed to disclose that he had a valid Nigerian passport during the seven years preceding his security clearance application. He vehemently denied, however, that his omission was deliberate or with the intent to mislead the government. Applicant testified he mistakenly did not consider his country of birth a foreign country and failed to disclose he had a valid Nigerian passport. He believed the United States government was aware of his possession of a Nigerian passport because it was stamped numerous times by immigration authorities when he departed and entered the United States.

Considering Applicant's age, maturity, work history, level of education, travel history, and his demeanor and testimony, I find his omissions were deliberate. Analyzing the evidence as a whole, Applicant's explanations concerning his failure to disclose the foreign countries visited and his possession of a Nigerian passport are not credible.

Under Guideline J (Criminal Conduct), criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.¹⁰ As discussed under Guideline E, above, Applicant deliberately falsified his security clearance application. His falsification is material and a violation of 18 U.S.C. § 1001, a felony.¹¹ Disqualifying Condition (DC) ¶ 31(a): *a single serious crime or multiple lesser offenses* and DC ¶ 31(c): *allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted*, apply.

¹⁰ AG ¶ 30.

¹¹ I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation. *See* ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

After considering all the Criminal Conduct Mitigating Conditions under AG ¶ 32, I find they are not applicable to Applicant’s case. Applicant misconduct is recent, and not enough time has transpired for him to establish sufficient evidence of successful rehabilitation.

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under AG ¶ 2(a). “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”¹² The directive lists nine adjudicative process factors (factors) which are used for “whole person” analysis. Additionally, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” AG ¶ 2(a). Ultimately, the clearance decision is “an overall common sense determination.” AG ¶ 2(c).

Applicant’s testimony and his character reference statements show Applicant is a loyal U.S. citizen. There is no evidence he has ever taken any action which could cause potential harm to the United States. He takes pride in being an American citizen and would take up arms against those who try to harm the United States. He has worked diligently for his Christian church and for a defense contractor.

Notwithstanding his favorable evidence, considering the totality of the facts and circumstances, including his background, education, maturity, work history, and outstanding character, Applicant failed to mitigate the security concerns raised by his behavior.

“Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government’s compelling interest in security by denying or revoking [a] clearance.”¹³ After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the foreign preference, personal conduct, and criminal conduct security concerns.

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 C:
Subparagraphs 1.a – 1.b

AGAINST APPLICANT
Against Applicant

¹² ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

¹³ *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

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| Paragraph 2, Guideline B: Subparagraphs 2.a – 2.c | FOR APPLICANT For Applicant |
| Paragraph 3, Guideline E: Subparagraphs 3.a – 1.b | AGAINST APPLICANT Against Applicant |
| Paragraph 4, Guideline J: Subparagraph 4.a | AGAINST APPLICANT Against Applicant |

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Juan J. Rivera
Administrative Judge