

DATE: November 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04713

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was born in Nigeria 50 years ago; his parents, three sisters and two brothers are residents and citizens of Nigeria; his wife is a citizen of Nigeria and resides in the United States; another sister is a citizen of Nigeria and resides in England. In addition to the security concern raised by foreign influence, additional security concerns are raised by Applicant's more than \$9,000.00 in delinquent debts, and by his failure to disclose this debt on the SF 86 he completed in September 1998. Clearance is denied.

STATEMENT OF THE CASE

On November 29, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR in writing on January 17, 2002, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on July 9, 2002. On August 28, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant relied on his own testimony and on one exhibit--submitted after the time allotted following the conclusion of his hearing. Department Counsel's objection to the admission of Applicant's exhibit because of its late submission has been considered and overruled. A transcript (Tr.) of the proceeding was received on September 6, 2002.

AMENDMENT OF STATEMENT OF REASONS

The Government moved to amend the SOR at the conclusion of its evidence presentation by substituting question 23(f) for question 23(a)(1) in the subparagraph 2.c. allegation. Applicant did not object to the proposed amendment and the SOR was amended as proposed.

FINDINGS OF FACT

The SOR alleges a security concern is raised by Applicant's failing to satisfy four financial obligations in accordance with the terms originally agreed upon, by his falsifying his security questionnaire by not listing two arrests and his delinquent financial obligations, and by foreign influence--his wife is a citizen of Nigeria (residing in the U.S.), his parents, four sisters, and two brothers are citizens and residents of Nigeria. In his answer to the SOR, Applicant "disagreed" with the alleged balances on two delinquent debts and provided an explanation for his disagreement; he "agreed" with the remaining allegations, explaining he did not intend to omit information about his arrests and delinquent debts in response to pertinent questions. After a complete and thorough review of Applicant's admissions and the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant was born in Nigeria 50 years ago. He immigrated to the United States in late 1975 and became a United States citizen in September 1994. As noted above, his current wife (2) is a Nigerian citizen who resides with him in the United States; his parents, three sisters and two brothers are citizens and residents of Nigeria. A fourth sister moved to England two years ago. (3) Applicant visited his family in Nigeria during the summer of 2002 after having visited them 3 ½ years ago (Tr. 91-92). When questioned about his family during the hearing, he was unable to provide information as to the vocations and whereabouts of each of his siblings (Tr. 91-92). Applicant has not previously applied for a security clearance.

Since arriving in the United States, Applicant has incurred, for assorted reasons, debt that he has not been able to satisfy in accordance with the terms initially agreed upon. These debts are as follows:

- An indebtedness of \$8,742.53 (4) to Creditor A, a government agency in State X. Applicant borrowed this money to obtain an education. He completed his studies for an associates degree in 1993 and has made minimal progress since then in paying off this obligation. Creditor A obtained a judgment against Applicant on this debt in February 1994.
- An indebtedness to Creditor B, a financial subsidiary of a major U.S. automobile manufacturer. Applicant admits financing an automobile with Creditor B, but denies being indebted by the amount (\$30,352.00) alleged.
- An indebtedness of \$698.00 to Creditor C, a bank; this indebtedness appears to have been incurred on a credit card account opened in 1987.
- An indebtedness of \$1,200.00 to Creditor D (a bank and travel company). Creditor D obtained a judgment against Applicant in October 1992.

In May 1992, Applicant was arrested and charged with obstruction of justice. And in January 1993, he was arrested and charged with "terrorist threat" in violation of a state statute. Both matters were dismissed before going to trial. The only information of these arrests in the record is contained in a very brief description in Applicant's FBI record (Govt. Exh 4). There are no police reports in the file prepared near in time to when the incidents occurred.

Applicant was hired by his current employer in May 1995. In September 1998, his employer requested him to complete an SF 86 (*Questionnaire for National Security Positions*). He completed this form and certified:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 23.f., which asked if he had been arrested for or charged in the last 7 years with any offense not listed in response to the previous five questions, Applicant answered "no". He also answered "no" to question 27.d., which asked if had any unpaid judgments in the last 7 years, and to question 28.a., which asked if he had been more than

180 days delinquent on any debt in the last 7 years.

When Applicant was questioned by the Defense Security Service (DSS) in September 1999, he asserted in his signed, sworn statement he had never been delinquent on his account with Creditor C. This indebtedness had been paid in full, and the account had been closed in 1989. At his administrative hearing, he testified that he called Creditor C and been advised they did not have an account in his name (Tr. 57). He has not presented any written corroboration of this conversation.

Concerning his indebtedness to Creditor B, Applicant stated he had purchased a new car in 1990 and had been making payments on it for four years when his ex-wife drove the car to another state where it was stolen and written off as a total loss (Govt. Exh. 2). He notified the insurance company of the loss and believed the matter had been settled between Creditor B and the insurer. He was not aware of this debt until he was questioned by the DSS in September 1999. Because he had made all of his monthly payments on time, he does not believe he could have owed more than \$5,000.00 on the vehicle. Applicant's testimony concerning the theft of this vehicle is corroborated by a copy of the police report (attached to his SOR answer). However, he was unable to proffer any correspondence corroborating conversations he had with either Creditor B or the insurance company.

Applicant's explanation that he did not list this on account of his SF 86, because he did not know about it, is credible. The insurance proceeds from a 4-year-old car, written off as a total loss, should have more than covered the balance Applicant owed creditor B.

In his signed, sworn statement (Govt. Exh. 2) to the DSS, Applicant asserted he had "absolutely no knowledge of any judgments being filed against my spouse or me at any time" by Creditors A and D. Government Exhibit 2 does not reflect that he was questioned about his indebtedness to these creditors. A personal financial statement (PFS) completed at the time of the DSS interview (September 1999) indicated Applicant had a net remainder each month after paying recurring household living expense of \$78.00 (Govt. Exh. 2).

At his administrative hearing, Applicant admitted being indebted to Creditor D, but again denied knowing a judgment in the amount of the indebtedness had been obtained against him in October 1992 (Tr.65-66). Applicant also admitted being indebted to Creditor A, and attached copies of 3 money order receipts (\$50.00 each) to his SOR answer, documenting payments on this debt. Applicant testified he had been unable to make regular payments on this loan for several years because of being unemployed between 1992 and 1995 (Tr. 69). He submitted an additional copy of a \$50.00 receipt of payment to Creditor A after his hearing. During the time he was unemployed, Applicant lived at several different addresses (Tr. 66-68).

Applicant was not questioned about the two arrests (dated 1992 and 1993) reported on his FBI records during the September 1999 DSS interview. At his administrative hearing, he credibly testified he did not list the arrests because he did not know he had been arrested on either occasion:

Then the second time when we met, that's when he says "Okay, if I agree with this it would down - download, or whatever they call that, I don't - - downgraded and I say "How can I agree to something I didn't do", I say "In the first place, you come to my station, you ask me for something, then I come with you, you tell me you want to show me a picture, I follow you honestly and then you turn and I go this way" and then he says "Well, I don't have nothing to say with you, you have everything to say with the court". Then my lawyer says "Don't say anything with Jim" and I say "Okay" so that's how that went and then after I get to the Judge, I explain myself to the Judge and he explaining himself and the Judge questions several things, he explained and I explained mine and the he just says "The case is dismissed" and that's it.

So, to my knowledge, I wasn't taken in as an arrest of as a criminal, you know to my knowledge. So, when I was fill in the form, I take it that's I didn't do that..

The record does not include any evidence or information about Applicant's job skills or professional reputation.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the national interest. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

FOREIGN INFLUENCE

(Guideline B)

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligations are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or present in, a foreign country;

Conditions that could mitigate security concerns include:

None Applicable

FINANCIAL CONSIDERATIONS

(Guideline F)

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations;

E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);

PERSONAL CONDUCT

(Guideline E)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns include:

None Applicable

CRIMINAL CONDUCT**(Guideline J)**

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness:

Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSIONS

Having considered the record evidence under the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guidelines B, E, F, and J. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by Applicant's failing to satisfy his financial obligations in a timely manner. The SOR alleged Applicant was behind in financial obligations totaling more than \$40,000.00. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's testimony and documentary submissions credibly refute the SOR allegation concerning the amount of his indebtedness to Creditor B. Whether he owes Creditor B any money at this point is an unresolved issue; he certainly does not owe the amount (\$30,352.00) alleged in the SOR. Applicant claims he first became aware of this indebtedness being on his credit report when he was interviewed by the DSS in September 1999. He could have done more than he has in the past 3 years to resolve any question of residual liability on this debt. The same is true with respect to

Applicant's indebtedness (\$698.00) to Creditor C. Applicant has known for three years, this indebtedness, which he claims to have satisfied, is still on his credit report. He has not taken any steps to obtain written confirmation of information--supposedly received during a telephone call--he is not indebted to this creditor.

Applicant's testimony that he was unemployed for three years following the completion of his associates degree is a circumstance beyond his control, and a mitigating consideration with respect to the remaining delinquent debts. However, Applicant has worked for his current employer for more than five years. His efforts toward debt repayment during this time have been limited to occasional \$50.00 payments to Creditor A. Since his September 1999 PFS indicates most of his income is devoted to recurring monthly expenses, it is doubtful he will be able to meaningfully address his delinquent obligations in the foreseeable future. Guideline F is concluded against Applicant.

A security concern is raised by Applicant's failure to disclose his delinquent financial obligations and his arrests in 1992 and 1993 on the SF 86 he completed in September 1998. His failure to provide honest and truthful answers to some of the questions on the security questionnaire suggests questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. Such conduct could indicate Applicant may not properly safeguard classified information.

Applicant's testimony explaining the circumstances of the "arrests" in 1992 and 1993 suggests he may have been confused about whether or not he had been arrested on those occasions. This confusion, attributable to language and/or cultural barriers and differences, and the time that has passed since the events themselves cause me to conclude Applicant was not deliberately lying to the Government when he answered "no" to the question asking him if he had been arrested in the last seven years. With respect to the judgments entered against him by Creditors A and D, it is probable, given his numerous addresses during the relevant time frame, Applicant was never notified of the legal proceedings when they were initiated, or informed of these judgments at the time they were entered.

It is more difficult to believe Applicant did not know he was 180 days delinquent in his payments to the above creditors. He admitted he had spoken with Creditor A, and reached an agreement to defer payments for a period of time. After reaching this agreement, Applicant was unemployed for three years and did not make any payments. It is likewise not credible Applicant would have forgotten his indebtedness to Creditor D. This indebtedness was also significantly more than 180 days delinquent. Applicant's explanation that he misread this question or was rushed when he completed the questionnaire is also not credible. He knew or should have known "yes" was the correct answer to question 27.d. Guideline E is concluded against Applicant.

An additional security concern is raised by the members of Applicant's family who reside and are citizens of Nigeria. A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress.

Applicant's testimony disclosing his knowledge about day-to-day lives of his parents and siblings is not sufficiently detailed to rule out the possibility one or more of them may be in a situation or live in circumstances where they may be subject to duress. All that is known for certain is that Applicant has visited Nigeria two times in the past four years. Given his financial circumstances (see above) and the considerable distance to be traveled, this is a significant affirmation of his affection toward his family. The DOHA Appeal Board has recently ruled an Administrative Judge "must consider whether the applicant's relatives are in a position that poses a risk that they could be exploited by a foreign power," ISCR Case No. 01-017496 (October 28, 2002). The Government is not required to prove Applicant is at risk because of family ties; rather Applicant has the burden of demonstrating that--notwithstanding family bonds--he is not at risk to being vulnerable because of these connections. Guideline B is concluded against Applicant.

Finally, a security concern is raised by Applicant's criminal conduct--his willfully withholding information from the DoD on his 1998 SF 86 in violation of 18 U.S.C. §1001. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Applicant's omission of important financial information had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD. Guideline J is concluded against the Applicant.

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7, of enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Guideline F) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Paragraph 2 (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2c. For the Applicant.

Paragraph 3 (Guideline B) AGAINST THE APPLICANT

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. Against the Applicant

Subparagraph 3.c. Against the Applicant

Paragraph 4 (Guideline J) AGAINST THE APPLICANT

Subparagraph 4.a. Against the 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Both questions are from the Standard Form 83 (Questionnaire for National Security Positions) completed by Applicant on September 21, 1998 (Govt. Exh. 1).
2. Applicant's first wife--whom he married in 1979 and divorced in June 1996--appears to have been a U.S. citizen; according to information on Applicant's SF 83 (Govt. Exh. 1), she was born in the U.S. in 1948.
3. There is no information or indication his sister has applied for British citizenship.
4. According to Applicant's Exhibit A, Applicant made a \$50.00 payment on this indebtedness in August 2002, leaving the balance at \$8,742.53--\$600.00 more than the amount alleged in the SOR.