

DATE: November 6, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-08484

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

Peregrine D. Russell-Hunter, Esquire, Department Counsel

FOR APPLICANT

Robert E. Deso, Esquire

SYNOPSIS

Applicant's possession and use of a foreign passport after becoming a U.S. citizen demonstrated a foreign preference and was not mitigated where Applicant had neither surrendered the passport nor obtained formal approval for its use, and intended to renew and continue to use his foreign passport. Applicant's falsification of his security clearance questionnaire suggested he could not be relied upon to tell the truth if the truth presented potential adverse consequences to his personal interests. Clearance denied.

STATEMENT OF THE CASE

On 6 February 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 27 arch 2002 and 12 May 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 1 August 2002, and I received the case the same day. I issued a notice of hearing on 3 October 2002 for a hearing on 24 October 2002.

At the hearing, the Government presented one exhibit--admitted without objection--and no witnesses; Applicant presented no exhibits, and the testimony of one witness, himself. DOHA received the transcript on 4 November 2002.

FINDINGS OF FACT

Applicant admitted the foreign preference allegations of the SOR⁽²⁾; accordingly I incorporate those admissions as findings of fact. He denied falsifying his security clearance application.

Applicant--a 36-year old employee of a defense contractor--seeks access to classified information. He has not

previously held a clearance.

Applicant was born in Nigeria in 1966, making him a citizen of Nigeria.⁽³⁾ He emigrated to the U.S. in 1979, when he was twelve, and lived with his older brother. He became a naturalized citizen of the U.S. in July 1994.

Applicant is a native speaker of English, the official language of Nigeria (Tr. 37), and Nigerian. Although he speaks with an accent indicative of his birth country, his education in grade school in Nigeria included instruction in both English and Nigerian. His education in the U.S.--junior high, high school, and college--was all conducted in English, and included instruction in the subject of English (Tr. 51-55). Applicant successfully completed each level of his U.S. education, obtaining an undergraduate degree in electrical engineering in 1990 (G.E. 1, Tr. 34-35, 54).

Applicant possesses a Nigerian passport. He used this passport to travel to Nigeria after becoming a U.S. citizen (in July 1994, November 1997, and November 1998). He renewed his Nigerian passport after becoming a U.S. citizen (Answer, 12 May 2002; Tr. 40). He considers himself a dual citizen of Nigeria and the U.S. (Tr. 36-37). He has not expressed a willingness to renounce his dual citizenship or surrender his foreign passport.

On 27 August 2002, Applicant falsified a Security Clearance Application (SCA)(SF 86)(G.E. 1) by answering "no" to question 15, which asked Applicant if he had possessed a foreign passport within the last seven years,⁽⁴⁾ and "no" to question 16, which asked Applicant if he had traveled outside the U.S. within the last seven years.⁽⁵⁾ In fact, Applicant possessed a valid Nigerian passport and had used it to travel to Nigeria in at least July 1994, November 1997, and November 1998.⁽⁶⁾

On 27 March 2002, Applicant answered the falsification allegations of the SOR:

Question #15: I do admit that I answered "NO" to question number 15: Your Foreign Activities-- Passport. in the last 7 years, have you had an active passport that was issued by a foreign government?

Initially or at the time I was filling the form (*ESPQ Security Clearance Application, Standard Form 86*), I did not interpret Nigeria as a foreign country since I was born and grew up from Nigeria and both my parents and all relatives are from Nigeria. I misread or misunderstood the word foreign country. I thought that foreign country referred to other countries like England, Russia, and Germany etc., that Nigeria was not included. That was why I answered **NO** to question number 15. I honestly did not intend to deny or falsify my response to the questions.

Since Nigeria by Law permits dual citizenship to all her citizens, I still maintain Nigeria Citizens like most Nigerians that are American citizens who by default have dual citizenship. This may also be applicable to other countries of the world that permit their citizens to have dual citizenship, they all may not claim their country of origin as a foreign country, rather, and they maintain dual citizenship. If Nigeria does not permit dual citizenship, then I will see Nigeria as a foreign country to me since I have become American citizen by naturalization. But I am Nigeria citizen by birth. Based on the above reasons, that was why when I was filling the form, I misread or misunderstood the work "foreign country" I did not interpret my Nigeria Passport as a foreign passport; hence, I answered **NO** to Question #16. Furthermore, if my answer were **NO** on question #3 of the *ESPQ Security Clearance Application, Standard Form 86* that I do not have dual citizenship, then it would mean that I intentionally meant to falsify on having a foreign passport, rather, I answered **YES**, that I do have dual citizenship and the country is Nigeria.

Question #16: I do admit that I answered "NO" to question number 16: Foreign Countries You Have Visited Have you traveled outside the United States on other than official U.S. Government orders in the last 7 years? (Travel as a dependent contractor must be listed.) Do not repeat travel covered in modules 4, 5, & 6."

I answered **NO** in question number 16 because I did not interpret Nigeria to be foreign to me; and in this question #16, a section illustrated that, "**do not repeat travels covered in modules 4,5 and 6**" and that was why I did not repeat again my travels to Nigeria here. All the travels I made were destined to Nigeria only. I do recollect that the issue was addressed when the special agent interviewed me, and I said to him that the only time I stopped at other countries was within the airport when the airplane stopped because of mechanical fault, or to either refuel and for connection flight. Other than these, I have not visited any other country. My response on these modules (**4,5 and 6**) must disclose my

traveling statistics to Nigeria. Again, since the form stated that, "**do not repeat travels covered in modules 4, 5 and 6**", it made me to think or interpret that the question #15 did not reference to the travels I made to Nigeria. Hence I answered **NO**.

Please, I did not intentionally falsify any material facts on the ESPQ Security Clearance Application, Standard Form 86; neither did I deliberately fail to disclose that I visited Nigeria. When the Special Agent interviewed me, I recall that I made clear my travels with him, because this issue was addressed. I also do recall that I explained the purpose of my travels that it was for pleasure or visiting my relatives in Nigeria. I also do recall that the issue about my dual citizenship was addressed. He asked me to explain to him what I meant by dual citizenship, I did and we addressed it. In summary, I honestly did not intend to falsify or deliberately fail to disclose information requested on my travels to the best of my knowledge. There is a reason why most Nigerian citizens who are American citizen prefer and like to maintain both their Nigerian passport and American Passport. The reason is the ease of searching and harassment in the airport when one travels. The reason why it appeared as if I falsified or deliberately fail to disclose the information was that I initially misinterpreted the word "foreign country" and did not interpret Nigeria as one of the foreign countries referenced by the form. Again my being a citizen of Nigeria by birth and Nigeria permitting her citizens' dual citizenship contributed to why I misinterpreted the form. With this Statement of Reasons, I now know that the form included Nigeria as a foreign country to me. I also was mislead when the form said that, "do not repeat the travels covered in module 4, 5 & 6, hence I did not repeat my travels to Nigeria in the question #16. (Emphases in original).

Applicant's testimony repeated his assertion that he answered both questions truthfully because Nigeria is not a "foreign" country as to him. He maintained this position despite acknowledging that the form he was completing was a U.S. Government form (Tr. 38, 48-49). He maintained this position despite acknowledging that he understood that "foreign" included Nigeria when he took his naturalization oath and renounced "all allegiance and fidelity to any foreign potentate, state, or sovereignty of whom or which you had been a subject"(Tr. 36). He maintained this position despite acknowledging that the travel question specifically asks for "travel outside the U.S. (Tr. 55), that Nigeria is a country in Africa--a different continent than the U.S.-- and certainly is outside the U.S. (Tr. 55-56), and that he had not disclosed being in Nigeria in response to questions 4, 5, or 6 (Tr. 56-59).⁽⁷⁾

The record contains no character references or information on Applicant's work performance.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FOREIGN PREFERENCE (GUIDELINE C)

E2.A3.1.1 The Concern: 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 interests of the United States.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.1. The exercise of dual citizenship:

E2.A3.1.2.2. Possession and/or use of a foreign passport;

E2.A.1.3. Conditions that could mitigate security concerns include:

None.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C³I) issued a memorandum to clarify the application of Guideline C., Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C³I memorandum **"requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."**(Emphasis added).

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. 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. . .

E2. A5.1.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Although Applicant has been a dual citizen of a foreign country and the United States since his naturalization in 1994, Applicant's foreign citizenship possesses little security significance if based solely on his birth in a foreign country. For Applicant's conduct to fall within the security concerns of Guideline C, Foreign Preference, he must have acted in a way to indicate a preference for a foreign nation over the United States. However, inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under Guideline C. The Government has a compelling interest in ensuring those entrusted with this Nation's secrets will make decisions free of concerns for the foreign country of which they may also be a citizen. Under this assessment, I conclude the Government has established its case under Guideline C.

Applicant makes no claim to prefer his U.S. citizenship to his foreign citizenship, and his conduct confirms that

assessment. Although Applicant may be proud of his U.S. citizenship, he has maintained significant aspects of his foreign citizenship. While his oath of allegiance to the U.S. and his rejection of allegiance to any foreign government in the citizenship oath is powerful evidence of a preference for U.S. citizenship, the citizenship oath does not automatically operate to terminate his citizenship rights in his birth country. His native country permits, perhaps even encourages dual citizenship. The fact that his native country permits dual citizenship would ordinarily not affect the analysis of Applicant's preference. However, in this case Applicant reasserted his foreign citizenship and his preference for that citizenship when he used his Nigerian passport to arrange travel to Nigeria and renewed his Nigerian passport, after his naturalization. He remains in possession of that passport, and does not intend to surrender it.

Regarding possession and use of his Nigerian passport, Applicant meets none of the mitigating conditions (MC) for foreign preference. (8) His dual citizenship is not based solely on his birth in a foreign country, but on his active assertion of his citizenship rights in that country. Applicant's voluntary assertion of his foreign citizenship rights occurred after he became a naturalized U.S. citizen. Although his conduct is lawful, there is no evidence that the conduct was formally sanctioned by the United States. Applicant has expressed no willingness to renounce his foreign citizenship; indeed he essentially insists that he will maintain and exercise active dual citizenship.

The ASD, C³I Memorandum only complicates matters for Applicant. The Memorandum states that Applicant's past possession and use of his foreign passport can be mitigated only if Applicant surrenders the foreign passport or obtains U.S. Government approval for its use. Applicant has undertaken neither action, and gives no indication that he will surrender his Nigerian passport. Further, his demonstrated conduct in reasserting his foreign citizenship so soon after acquiring U.S. citizenship casts serious doubt on his fitness for access to classified information, and presents an unacceptable level of risk that he has a foreign preference. I resolve Guideline C against Applicant.

The Government has established its case under Guideline E. Applicant's explanation for his omission defies credibility. If accepted, the Government would surrender any meaningful assessment of plain language questions to any applicant's subjective--and nonsensical--interpretation. The omissions had the potential to influence the course of the background investigation. Because Applicant had resided in the U.S. for many years, the fact that he truthfully disclosed his dual citizenship status in question 3 of the SCA and the foreign background of his spouse, relatives, and associates in questions 8, 9, and 10, does not operate to disclose either his valid foreign passport or his travel outside the U.S. His disclosure of his foreign passport and foreign travel to the DSS agent does not constitute a good faith disclosure of the omitted information. Applicant's I find Guideline E. against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline C: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: 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 or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).
2. Applicant's counsel proffered that Applicant did not contest the foreign preference allegations because he was unwilling to surrender his foreign passport for personal reasons (Tr. 10-11, 17-18, 74).
3. Applicant's clearance application (G.E. 1) contains a typographical error indicating he was born in the United States. I conclude this to be a typographical error because the application clearly indicates that Applicant is a naturalized citizen of the U.S. (with certificate number) and a dual citizen of Nigeria.
4. **15. Your Foreign Activities - Passport** In the last 7 years, have you had an active passport that was issued by a foreign government?
5. **16. Foreign Countries you Have Visited** Have you traveled *outside the United States* on other than official U.S. Government orders in the last seven years? (Travel as a dependent or contractor must be listed.) Do not repeat travel covered in modules 4 [past addresses], 5 [past schooling], and 6 [employment activities].
6. Applicant's clearance application contains other substantial misrepresentations which were not alleged in the SOR--and thus not part of my assessment of the merits of this case--but which I have considered on the general issue of Applicant's credibility. For example, He listed as father and stepmother the brother and his spouse whom Applicant lived with as a boy. Applicant did this to be consistent with the false information placed on his application for U.S. citizenship (Tr. 41-43, 49). As noted above, I conclude that Applicant's erroneous place of birth is merely a typographical error.
7. Applicant's Answer and testimony assert that he disclosed his foreign connections and travel when he was interviewed by the DSS. However, this disclosure did not occur until well after Applicant's execution of the clearance application.
8. Although any acceptance of educational or other benefits and obligations of foreign citizenship before becoming a U.S. citizen are mitigated as occurring before his naturalization.