

DATE: January 16, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-03635

## REMAND DECISION OF ADMINISTRATIVE JUDGE

**CHARLES D. ABLARD**

### APPEARANCES

#### FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant, a 20-year emigrant from Nigeria with U.S. military service and a U.S. engineering degree, mitigated the foreign influence security concern relating to his mother in Nigeria by showing he had not had a close relationship with her since leaving her home 20 years ago. and only communicating with her by e-mail a few times a year with the last telephone contact in 2003. This concern is mitigated under the whole person doctrine based on the totality of his life for the past 20 years. Clearance is granted.

### STATEMENT OF THE CASE

On July 29, 2005, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry* 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 affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated August 15, 2005, Applicant responded to the allegations set forth in the SOR, and requested a decision without a hearing. On September 14, 2005, he requested a hearing. The case was assigned to me on October 25, 2005. A Notice of Hearing was issued on November 18, 2005, and the hearing was held on December 6, 2005. The Government introduced six exhibits at the hearing and requested that administrative notice be taken of four exhibits. Applicant introduced seven and all were accepted into evidence and testified on his own behalf. The transcript was received on December 16, 2005. The record was left open until January 6, 2006, for submission by Applicant of additional evidence and six additional items were introduced without objection (Exh. I).

I decided the case on March 30, 2006, and found in favor of Applicant for Guidelines B, F and E. The government appealed the decision. On December 20, 2006, the Appeal Board affirmed my decision regarding Guidelines F and E

but remanded the case to consider the record evidence on the security situation in Nigeria relating to security concerns about Applicant's mother under Guideline B. This remand decision is limited to that issue as ordered by the Appeal Board.

### FINDINGS OF FACT

Applicant admitted the factual allegation pertaining to foreign influence under Guideline B, the child support payment allegations relating to financial considerations under Guideline F. He denied the remainder of the financial allegations and the two personal conduct allegations under Guideline E with explanatory information. The admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record, I make the following additional findings of fact.

Applicant is a 37-year-old employee of a defense contractor working as a mechanical engineer in a shipyard. He came to the U.S. in 1989 at age 20 from Nigeria. He received his GED that same year and then joined the Navy in 1990. He served for four years and became a U.S. citizen in 1995 (Exh. B). He joined the National Guard and served six years ending in 2003. After Applicant's discharge from the Navy he worked as a security guard and other miscellaneous employments from 1997 to 2002 while attending a major U.S. university from which he received an engineering degree in 2002.

He has worked for his present employer since graduation from university. His monthly salary before deductions is approximately \$3,000.00. He provides child support for his two children. He is not married but is engaged.

His father is a U.S. citizen as are his two brothers who came to the U.S. with his father in 1976. While living in Nigeria, Applicant left his mother's home at age 17 because of family financial problems. He then lived with his uncle until coming to the U.S. He has not returned to Nigeria since he emigrated to the U.S.

Applicant's mother is his only close relative living in Nigeria. She is a citizen of and lives in a suburb of Lagos, Nigeria, the former capital and largest city with a population of over 13 million. She owns a small shop in Lagos. He communicates with his mother infrequently by e-mail no more than four times a year. The last time he spoke to her by phone was in 2003 concerning an immigration problem in the U.S. relating to his brother (Exh. C). He has affection for his mother but has had very limited contact with her for the past 20 years since leaving the family home.

I take administrative notice of the following facts: Nigeria is friendly with the U.S. with which it has good relations and is an active trading partner. While Nigeria is a country that has many opportunities from its great oil wealth, it had a civil war in the 1960's and has experienced occasional incidents of terrorism and political violence directed against opposition parties (Exh. IV). There have been incidents of civil and labor unrest and violence in the southern part of the country where the oil producing facilities are located both on and off-shore. Most of those acts have been directed against U.S. citizens who are working in the oil industry (Exh. I). Travel can also be dangerous particularly for foreigners (Exh. II). In the last election there were allegations of irregularities, but new elections are scheduled for 2006 with participation by multiple political parties. The country is largely divided along religious lines with Muslims in the north near the cities of Kano and Kaduna and the Christian and animist south in Lagos and the delta of the Niger river. There have been religious tensions and conflict in the country. Incidents of terrorism have been primarily in the northern states and have possible links to Al Qaeda. However, Nigeria has been a leader in Africa in the war against terror and in developing efforts to build counter terrorism capabilities in collaboration with the U.S., the African Union, and the Economic Committee of West African States (Exh. III).

### 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 occupy a position that will give that person access to such information." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and

recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence

of rehabilitation and other 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

"A security risk may exist when an individual's immediate family 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. These situations could create the potential for foreign influence that could result in the compromise of classified information." Directive, ¶ E2.A2.1.1. Having immediate family members who are citizens of, and residing in a foreign country, may raise a disqualifying security concern. Directive, ¶ E2.A2.1.2.1.

### CONCLUSION

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

The applicable Guidelines in the SOR concerning Foreign Influence-Guideline B provides as a Disqualifying Conditions (DC) that a security risk may exist when an individual's immediate family are not citizens of the United States or may be subject to duress. Such facts could create the potential for foreign influence that could result in the compromise of classified information.

Conditions that could raise a security concern and may be disqualifying include an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in a foreign country. (E2.A2.1.2.1) Based on Applicant's admission that his mother lives in Nigeria, the Government raised its security concerns because of foreign influence. Thus, Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Possible mitigating conditions (MC) that might be applicable are a determination that the immediate family members would not constitute an unacceptable security risk. (E2.A2.1.3.1) Such security concerns could be mitigated by a determination "that the immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." (E2.A2.1.3)

Applicant has had very limited contact with his mother since leaving Nigeria 17 years ago. He has not seen her since then and has not spoken to her by phone for almost three years. He is a participant in the American dream with a U.S. education, service in the U.S. Navy, employment in the U.S., a fiancé in the U.S., and all the rest of his family in the U.S. He rejects credibly any loyalty to his former country as shown by the absence of contact with that country, his lack of any travel to Nigeria since his departure 20 years ago, and his lack of any desire to return. All this attests to the unlikelihood of possible pressure being successful. His testimony was highly credible. Applicant's limited contact with the country and lack of contact with his single remaining relative living there, indicates little likelihood of security concern as it relates to his security clearance. He has sufficiently mitigated this allegation.

In its remand order the Appeal Board specifically referenced three areas of concern that should be addressed. The first is the nature of the foreign government involved. Here the government is a democracy friendly to the U.S. Although there have been allegations of election irregularities and hostility between political parties, relations between the two countries remain friendly and cooperative. An example is collaboration on anti-terrorism. The second is the intelligence gathering history of the government. There is nothing in the record of which appellant requested me to take official notice, that indicates that Nigeria has undertaken such efforts. The third is the presence of terrorist activities in the country. There has been random terrorist activities in Nigeria and the State Department reports exhibit concern about possible links to terrorist organizations outside the country and that Nigeria may be a target area. But the information is speculative and there is no evidence of any state-sponsored terrorist activity by the Government of Nigeria.

An important factor for consideration is the character of the foreign power, including the government and entities controlled by the government, within the relevant foreign country. This factor is not determinative; it is merely one of many factors which must be considered. Of course, nothing in Guideline B suggests it is limited to countries that are hostile to the United States. *See* ISCR Case No. 00-317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002). The Appeal Board repeatedly warns against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002). It is well understood that "[t]he United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Distinctions between friendly and unfriendly governments must be made with extreme caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Moreover, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Friendly nations have engaged in espionage against the United States, especially in economic, scientific, military, and technical fields. ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\* 15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to against the U.S. through the applicant.

The nature of the foreign government might also relate to the question of whether the foreign government or an entity it controls would risk jeopardizing its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray this country. The Appeal Board has specifically held that it is error for an administrative judge to fail to consider a hostile relationship between the U.S. and a foreign country. ISCR Case No. 02-13595 at 4 (App. Bd. May 10, 2005). The Appeal Board has held that "a country's poor human rights record and its differences with the United States on important security issues such as terrorism are factors" that a judge must consider. ISCR Case No. 04-05317 at 5 (App. Bd. June 3, 2005). A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country. Applicant's employment in a U.S. shipyard bears little relationship to any possible efforts to disrupt the oil industry in Nigeria or religious conflict.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Applicant has successfully integrated into the American community through his education, military service, current employment, and family relationships. He has a good job and has no loyalty to his country of origin. He is acting responsibly for his children's welfare and continues to have strong affection for the military from his Navy service and his present work in a shipyard. He manifests total loyalty to the U.S. in his statements and his conduct. There is no potential for pressure against him.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I

conclude that it is clearly consistent with the national interest to grant clearance to Applicant.

**FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

**DECISION**

After full consideration of all the facts and documents presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Charles D. Ablard

Administrative Judge