

DATE: August 22, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-17942

## DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

### APPEARANCES

#### FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant was born in the United Kingdom (U.K.) to parents who were citizens of Nigeria. From early childhood through adolescence, he resided in Nigeria with his parents, who are citizens and residents of Nigeria. After becoming a U.S. citizen in 2002, Applicant retained dual citizenship with the U.K. and possessed a valid U.K. passport. At his hearing Applicant testified he was willing to renounce his U.K. citizenship, and he presented evidence that he had surrendered his U.K. passport to responsible officials at the U.K. embassy. While Applicant mitigated Guideline C security concerns, he failed to mitigate Guideline B security concerns. Clearance is denied.

### STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On February 2, 2006, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision—security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Directive. Applicant filed his answer to the SOR on February 16, 2006, and elected to have a hearing before an administrative judge. On May 12, 2006, the case was assigned to me. I convened a hearing on July 26, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced two exhibits, and offered six documents for administrative notice. Applicant called no witnesses and introduced three exhibits, which were identified as Applicant's exhibits (Ex.) A, B, and C. The Government's exhibits (Ex.) were numbered 1 and 2, and the Government's documents offered for administrative notice were numbered I through VI. All exhibits were admitted into evidence without objection. The documents identified for administrative notice were admitted to the record of the proceeding without objection. DOHA received the transcript (Tr.) of the proceeding on August 4, 2006.

### FINDINGS OF FACT

The SOR contains six allegations under Guideline B, Foreign Influence, and two allegations of disqualifying conduct

under Guideline C, Foreign Preference. In his answer to the SOR, Applicant admitted five of the six Guideline B allegations and the two Guideline C allegations. He denied one Guideline B allegation. Applicant's admissions are incorporated as findings of fact.

Applicant is 41 years old, never married, and employed as a software maintenance engineer by a government contractor. (Ex. 1; Tr. 50.) He has not previously held a security clearance. (Tr.51.)

Applicant was born in the United Kingdom (UK) to citizens of Nigeria. When he was three years old, he returned to Nigeria with his parents, where he lived until he was eighteen. In 1983, when he was eighteen years old, Applicant came to the U.S. for his higher education. He earned a bachelor of science degree in mechanical engineering and a master of science degree in operations research in the U.S. (Ex. 1; Tr. 46-48.)

Applicant obtained a U.K. passport in December 1983. In December 1999, he was issued a valid U.K. passport, which had an expiration date of December 2009. Applicant's most recent visit to the U.K. occurred in 1994. (Tr. 64-65.) In 2002, Applicant became a U.S. citizen; he obtained a U.S. passport in 2004. Applicant has never had a Nigerian passport, and he does not consider himself to be a citizen of Nigeria. (Ex. 1; Tr. 47-49.) When he completed his security clearance application in September 2004, Applicant identified himself as a dual citizen of the U.S. and the U.K. (Ex. 1.)

Applicant's father and mother are citizens and residents of Nigeria. They have resided continuously in Nigeria since 1967. Applicant's mother, who is 66 years old, is retired from a position as a vice principal of a school. Applicant's father is 69 years old and retired from a career as a senior executive in a business that was a wholly-owned entity of the Nigerian government. He currently works as a consultant and receives a pension and health care benefits from the government of Nigeria. (Ex. 2 at 2; Tr. 52-57.)

Applicant last saw his father when he visited Nigeria in 1994. Applicant's mother visited him in the U.S. in 2000 and 2004. While Applicant is closer to his mother than to his father, he speaks with both parents by telephone approximately once a month. (Tr. 60-61.)

Applicant's parents are considered wealthy. They own several homes, as well as buildings and land in Nigeria. Applicant will inherit a portion of his parents' property some day. (Tr. 62-63.) At present, he owns no property in Nigeria (Tr. 66.)

Applicant has four sisters. Three of the sisters are citizens of Nigeria and reside in the U.S. on work visas. Applicant's fourth sister has been residing in Canada and recently became a citizen of Canada. Applicant visited his sister in Canada in approximately May 2006. He is close to each of his sisters and speaks with them by telephone every week or two. (Tr. 63-64.)

Applicant's last visit to Nigeria occurred in 1994. When he arrived at the airport in Nigeria, Applicant made his way through the government-controlled customs and immigration section. An official asked Applicant if had anything to declare. When Applicant said he did not, the official pressured Applicant to give him money so that his luggage and belongings would not be seized as contraband, rifled, or damaged. When Applicant did not give him any money, the official helped himself to \$20 he found in Applicant's wallet. Applicant concluded he had been shaken down by a corrupt official. He said such conduct was common practice in Nigeria. (Tr. 43-45.)

At his hearing, Applicant presented evidence showing he had surrendered his U.K. passport to responsible officials at the U.K. embassy on May 16, 2006. (Ex. C) Applicant stated he was willing to renounce his U.K. citizenship and did not intend to return to live in the U.K. in the future. (Tr. 41; 65.)

Applicant submitted a memorandum from his manager and a letter from his employer's director of sector security. Applicant's manager praised his work ethic, excellent attitude, and thoroughness in carrying out his professional responsibilities. The director of sector security attested to his security worthiness. (Ex. A; Ex. B.)

I take administrative notice that Nigeria is a federal republic, composed of 36 states and a capital territory, which was granted full independence from the United Kingdom in October 1960. Since that time, Nigeria has suffered a civil war, several military coups, and continuing political instability. (Government Document IV for Administrative Notice.)

I also take administrative notice that the U.S. Department of State issued a travel warning for Nigeria on February 17, 2006. The travel warning stated that because law and order have broken down in Nigeria, travelers are at risk and could become victims of violent crime committed by ordinary criminals as well as individuals in police and military uniforms. Additionally, the travel warning stated that al-Qaida leadership has expressed an interest in overthrowing the government of Nigeria. (Government Document V for Administrative Notice.) A State Department report on the human rights practices in Nigeria notes that many Nigerians live in poverty, the judiciary at the state and local levels of government suffers from corruption, and members of the security forces in the country committed numerous human rights abuses, including unlawful killings. (Government Document I for Administrative Notice.)

## **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. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

In addition to the guidelines in the Directive, official DoD policy guidance must also be considered. Of particular relevance in this case is an August 16, 2000, memorandum from Assistant Secretary of Defense Arthur L. Money (Money Memorandum) clarifying the application of Guideline C, Foreign Preference, to cases involving an applicant's possession or use of a foreign passport.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## **CONCLUSIONS**

### **Guideline B - Foreign Influence**

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's mother and father are citizens and residents of Nigeria (¶ 1.a.); that his father is retired from a business owned by the Nigerian government (¶ 1.b.); that he maintains telephone contact at least every few weeks with his mother and father in Nigeria (¶ 1.c.); that three of Applicant's sisters are citizens of Nigeria and reside in the U.S. on work visas (¶ 1.d.); that Applicant has a sister who is a citizen of Nigeria and a resident of Canada (¶ 1.e.); and that Applicant paid a Nigerian immigration official about \$20

in about 1994, while visiting friends and family in Nigeria, to assist him with immigration processing (§ 1.f.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that Nigeria is a country in chaos, without the benefit of a stable lawful government, a situation that threatens U.S. security interests. American citizens with immediate family members who are citizens or residents of Nigeria could be vulnerable to coercion, exploitation, or pressure.

Applicant admitted five allegations under Guideline B. His admissions raise security concerns under Disqualifying Conditions (DC) E2.A2.1.2.1., E2.A2.1.2.3., and E2.A2.1.2.6.

At the hearing, Applicant testified in response to SOR allegation 1.e. that his sister residing in Canada was no longer a citizen of Nigeria but had become a citizen of Canada. In response to SOR allegation 1.f., he testified credibly that he had not bribed a Nigerian immigration official in about 1994 but that the official had taken his \$20 without his permission. While the facts derived from Applicant's testimony about his sister's recent Canadian citizenship do not rebut the security concerns identified in allegation 1.e., his credible testimony about the nature of his encounter with the immigration official rebuts the security concern under DC E2.A2.1.2.6. as expressed in allegation 1.f. of the SOR. Accordingly, allegation 1.f. is concluded for the Applicant.

However, additional security concerns remain. Applicant's father and mother are citizens and residents of Nigeria. The presence of these immediate family members in Nigeria raises security concerns under E2.A2.1.2.1. of Guideline B. Additionally, three of Applicant's sisters are citizens of Nigeria and a fourth sister is a citizen and resident of Canada. These facts also raises security concerns under E2.A2.1.2.1. of Guideline B. Applicant's father is at present a consultant and a retired high-level executive of a business wholly owned by the Nigerian government. This raises a concern under DC E2.A2.1.2.3.

An applicant may mitigate foreign influence security concerns by demonstrating that 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 an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. Mitigating Condition (MC) E2.A2.1.3.1. While the evidence does not establish that Applicant's father, mother, and three of his sisters are agents of a foreign power, they are citizens of a state where individuals with interests antithetical to the United States operate with few legal constraints. Applicant offered no evidence to rebut the Government's assertion that his family members who are Nigerian citizens could be exploited by these groups in a way that could force him to choose between loyalty to his family and the security interests of the United States. (ISCR Case No. 03-15485, at 4-6 (App. Bd. June 2, 2005) Additionally, Applicant's sister who was until recently a resident of Nigeria and who is now a citizen and resident of Canada may not be an agent of a foreign power, but she remains in a position to be exploited by a foreign power in a way that could challenge Applicant's capacity to protect classified information. Accordingly, MC E2.A2.1.3.1. does not apply to Applicant's case.

An applicant may also mitigate foreign influence security concerns if he shows his contacts and correspondence with foreign citizens are casual and infrequent. MC E2.A2.1.3.3. Applicant's contacts with his sister who is a citizen and resident of Canada and with his family members who are citizens of Nigeria are based on ties of familial affection or obligation. Applicant's communications with his parents and sisters are frequent and based on close ties of affection and obligation. Accordingly, mitigating condition E2.A2.1.3.3. does not apply to Applicant's relationships with his father, mother, and sisters.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal American citizen and a credit to his adopted country. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms

of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

However, Applicant failed to put forward evidence that could mitigate security concerns alleged in the SOR and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, the allegations in subparagraphs 1.a., 1.b., 1.c., 1.d., and 1.e. under Guideline B of the SOR are concluded against the Applicant.

### **Guideline C - Foreign Preference**

In the SOR, DOHA alleged Applicant exercised dual citizenship with the United Kingdom and the United States (¶ 2.a.); and that he possessed a U.K. passport issued in December 1999 which would not expire until December 2009 (¶ 2.b.).

A Guideline C security concern exists when an individual's conduct indicates a preference for a foreign country over the United States. A preference for another country could lead a person to provide information or make decisions that are harmful to the interests of the United States.

Applicant's admitted conduct raises security concerns under Disqualifying Conditions (DC) E2.A3.1.2.1. and E2.A3.1.2.2. of Guideline C. Applicant, who held U.S. citizenship by naturalization and was in possession of an active U.S. passport, possessed a U.K. passport to comply with requirements of U.K. nationality.

We turn to an examination of applicable mitigating conditions under Guideline C that pertain to the exercise of dual citizenship. An applicant may mitigate DC E2.A3.1.2.1. under Guideline C if he shows his dual citizenship is based solely on his parents' citizenship or birth in a foreign country. Mitigating Condition (MC) E2.A3.1.3.1. Applicant was a U.K. citizen by birth and a naturalized U.S. citizen. As a U.S. citizen, he exercised his U.K. citizenship by continuing to possess his U.K. passport after acquiring U.S. citizenship and a U.S. passport. Thus, MC E2.A3.3.1. is inapplicable.

Under MC E2.A3.1.3.4. an applicant can mitigate the exercise of dual citizenship by expressing a willingness to renounce dual citizenship. At his hearing, Applicant expressed a willingness to renounce his U.K. citizenship. Accordingly, MC E2.A3.1.3.4. applies.

Possession and use of a foreign passport may be a disqualifying condition under E2.A.3.1.2.2. of Guideline C. In a memorandum (Money Memorandum), dated August 16, 2000, Assistant Secretary of Defense Arthur L. Money stated, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The Guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline 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.

Applicant presented no evidence that he had been granted approval by the U.S. government to acquire and use a U.K. passport. However, he did present credible evidence to demonstrate he had surrendered his U.K. passport. Accordingly, Applicant's actions demonstrate compliance with the policy guidance articulated in the Money Memorandum.

I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2. of the Directive (whole person analysis). After weighing the applicable Guideline C disqualifying and mitigating conditions, the policy guidance of the Money Memorandum, and the factors in the whole person analysis, I conclude allegations 2.a. and 2.b.

of the SOR for the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2. Guideline C: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.