



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: _____

Applicant for Security Clearance

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ISCR Case No. 07-07266

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

March 11, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on December 15, 2005. On September 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F and B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 5, 2007. He answered the SOR in writing on October 26, 2007, and requested that his case be adjudicated without a hearing. In November, Applicant was notified in writing that, pursuant to Directive ¶ E3.1.8, Department Counsel requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on November 29, 2007, and the case was assigned to me on December 11, 2007.

Pursuant to initial agreement by the parties, DOHA issued a notice of hearing on January 8, 2008, scheduling the hearing for January 24, 2008. On January 10, 2008, after receipt of the Government's documentary discovery, Applicant requested a continuance for further preparation. Department Counsel did not object. After the parties agreed to a new hearing date, an Amended Notice of Hearing was issued on January 17, 2008, and I convened the hearing as rescheduled on February 7, 2008. The government offered exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf, and submitted exhibits (AE) A through F, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on February 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Department Counsel submitted a request for administrative notice, of certain facts concerning Nigeria, that was marked as Hearing Exhibit (HE) I. Department Counsel submitted five U.S. Government source documents in support of this request, which were admitted for purposes of administrative notice, and marked Administrative Notice (AN) exhibits I through V. (Tr. at 27-28.) Applicant introduced the Nigeria chapter from the CIA World Fact Book (AE A), to further describe current conditions in Nigeria. The facts administratively noticed are set out in the Findings of Fact, below.

Department Counsel's exhibit list was marked HE II. Department Counsel also offered an Equifax training brochure, not previously provided to Applicant, into evidence. Upon objection by Applicant, Department Counsel withdrew the offered exhibit. It was marked HE III and attached to ensure a complete record, but not otherwise considered. (Tr. at 42-47.)

Findings of Fact

In his Answer to the SOR, dated October 26, 2007, (hereinafter "Answer") Applicant denied the factual allegations in SOR ¶¶ 1.a through 1.d, 2.b, and 2.c, with explanations. He admitted the allegations in ¶¶ 2.a, 2.d, and 2.e. Applicant's admissions and explanations are incorporated in the following findings of fact.

Applicant is a 53-year-old senior system engineer for a defense contractor. He was born in Nigeria, came to the U.S. in 1976 as a student, and became a naturalized U.S. citizen in 1986. His Nigerian passport expired in 1986, and was officially cancelled. (Tr. at 120-121.) He mistakenly reported that he is a dual citizen on his SF 86, and considers himself solely a U.S. citizen. (Tr. at 95-96.)

Applicant's parents are deceased. His 55-year-old sister is a citizen of Nigeria and resides there with her husband and family. (GE 1 at 32, 35; Answer at 2.) She is retired and lives comfortably, supported by her family in their ancestral home, located about 100 miles from the Niger Delta area of Port Harcourt. She receives no form of assistance from the government. (Tr. at 93-95, 136-137.) Applicant has not visited

Nigeria just to see her, but she visited him when he was there for other purposes in 2001, 2005, 2006, and 2007. His visits there were purely private and social visits, and he had no contact with representatives of the Nigerian government or other foreign interests.

Applicant married a U.S. citizen in 1979, while he was in the U.S. as a student. They were divorced just over a year later. In 1981, he entered an arranged marriage with a woman from Nigeria, who moved to the U.S. with him. They were married for over 11 years, and had four children, now ages 21 to 25. They divorced in 1993. Four months later, Applicant married another Nigerian citizen who he met in the U.S. This marriage ended in divorce in November 1996. In June 1997, he married another Nigerian citizen who he met while she was working at the Nigerian embassy in either England or France. She also moved to the U.S. to live as a resident alien. They divorced in August 2005.

Applicant married his current wife in December 2005 in Nigeria. Their son was born in January 2006, in Nigeria, where she remained while waiting to receive her spouse visa to move to the U.S. Their son is a dual citizen of Nigeria (by birth) and the U.S. (by paternity). Applicant's wife, now 22 years old, is expecting their second child this month. Her immigrant visa was recently approved, but U.S. embassy personnel advised her not to travel to the U.S. until after the baby is born and can travel. Applicant hopes his wife and two children will come to the U.S. within a month or two. In the meantime, they continue to reside in Nigeria's capital city, Abuja, and he continues to provide them financial support. (GE 1 at 27-31, 33-35; Answer at 2 and Encl. 3; AE B; Tr. at 94, 98, 112-119, 137-138.)

From February 2001 to June 2004, Applicant suffered a period of involuntary unemployment and temporary, low-paying work. (GE 1 at 15-21; AE E; Tr. at 68-69, 76-77.) During this time, he was unable to pay all his bills, and incurred some delinquent debts. This coincided with his most recent separation and divorce. He began his current, lucrative employment in September 2005, and has substantially reduced his debts. He earns about \$97,000 per year with a substantial monthly surplus of income over expenses. He has about \$9,000 in a company investment plan. (GE 2 at 98; AE D; Tr. at 66.)

The \$80 medical debt alleged in SOR ¶ 1.a, arose during his current employment. The bill, for an insurance deductible co-pay, was not delivered due to a mail-forwarding mix-up while he was visiting Nigeria. He became aware of the debt when he received the SOR, and claimed in his Answer that he had paid it in October 2007. He actually paid the debt in full by check in November 2007. (Answer at 1; AE F at 1; Tr. at 79-80, 103-106.)

The \$585 mobile phone debt alleged in SOR ¶ 1.b arose from a contract Applicant signed for his former wife's cell phone. She kept the phone and was supposed to pay the bills for service, but did not and the account became delinquent in June 2002. (GE 4 at 1-2.) Applicant unsuccessfully tried to get her to pay. He wrote a letter to the

creditor in November 2007, and another on January 25, 2008, without response. He enclosed a \$50 check with the second letter, that has not yet been cashed. He said he intends to negotiate a settlement with the creditor, and has the means to pay the debt once that is resolved. (AE F at 9, 11-13; Tr. at 81-83, 106-108.)

The \$2,110 debt alleged in SOR ¶ 1.c originated from the purchase of a refrigerator and freezer, which his former wife kept upon their separation and divorce. She did not pay the remaining debt, as agreed, and the account became delinquent in May 2004. (GE 4 at 2.) Applicant negotiated resolution of this debt with the collection agency for a total of \$738 in October 2007, but did not pay it off. He sent them a letter in November 2007 seeking to make payments in installments. After receiving no reply, he sent another copy of the letter to them on January 25, 2008, with a check for \$50 that was deposited. He says he plans to repay the remaining debt on the most favorable terms he can negotiate. (AE F at 2-5; Answer at 1; Tr. at 84-86, 108-109.)

The \$9,899 debt alleged in SOR ¶ 1.d is for a credit card account that became delinquent in October 2003 with a balance of \$6,242. (GE 3 at 8, 10; GE 4 at 2.) The collection agency that purchased the account was seeking \$10,136 as of November 2007. (GE 5 at 2.) Applicant acknowledges that this is his debt. He sent a letter to the creditor in November 2007, and another on January 25, 2008, with a check for \$100. This check was not negotiated by the creditor, and no further progress in resolving this debt was shown. Applicant expressed willingness to settle this debt for a reasonable amount, but is waiting for an explanation from the creditor to justify the increased amount due over the four years the debt has been delinquent. (AE F at 6-8; Answer at 1; Tr. at 86-92.)

Applicant submitted seven letters attesting to his good character. He also submitted his performance evaluations showing that he met or exceeded all expectations during 2006, and met some expectations during 2007. (AE C.) His testimony during the hearing was sincere and credible.

The facts set forth in HE I, Department Counsel's request for administrative notice, are substantiated by the supporting Government documents (AN I through V), and are not contradicted by AE A. Those facts are incorporated herein by reference. Specifically material to this determination are the continuing abuse of human rights by elements of Nigeria's government, and lawlessness including kidnapping and other violent crime throughout the country committed by civilians and people in police and military uniforms. Ethnic and religious strife is ongoing and occasionally violent.

Contrary to Applicant's assertion, this lawlessness is not confined to the Niger River Delta area. (Tr. at 32-33, 35-38, 51.) While conditions are particularly bad in the Delta region, the danger exists throughout the country including the capital city of Abuja where his wife and child reside. (See AN III at 1, AN IV at 1, 2, 6.) Senior Al-Qaida leadership has expressed interest publicly in overthrowing the government of Nigeria. Nigeria is a federal republic that returned to civilian rule in 1999 after being under military rule for 28 of its 43 years since independence from Britain. Although not

requested to do so, I also take administrative notice that relations between Nigeria and the U.S. have continuously improved since 1999, with excellent cooperation on important foreign policy, peacekeeping and anti-terrorism goals. (AN I at 11-12.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Of these nine different disqualifying conditions, the Government asserted that two were raised by Applicant's financial circumstances (Tr. at 123.): "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations."

The evidence shows that Applicant still owes all or most of the three largest of four delinquent debts alleged in the SOR. One creditor offered to settle his \$2,110 debt for a lump-sum payment of \$738 in October 2007. He did not accept that offer, however, so the full amount, less one \$50 payment that was accepted, remains unresolved. On January 25, 2008, he sent a \$50 check to the creditor claiming \$585, and a \$100 check to the creditor listed in the SOR as claiming \$9,899 (a figure that rose to \$10,136 by November 2007). Applicant did pay the \$80 medical bill alleged in SOR ¶ 1.a, but still has more than \$12,500 in unresolved delinquent debts. These delinquencies arose in 2002 through 2004, and remain unresolved even though Applicant began earning more than \$95,000 per year in September 2005 and has the assets to resolve them. Security concerns are raised under both AG ¶¶ 19(a) and 19(c).

AG ¶ 20 provides conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and,

(f) the affluence resulted from a legal source of income.

AG ¶ 20(a) does not mitigate the financial security concerns because the history of delinquent debt is ongoing, despite a significant improvement in Applicant's income and his apparent present ability to resolve the debts. His expression of willingness to resolve the debts at some indefinite point in the future is not corroborated by substantial action in that direction, and is insufficient mitigation standing alone.

Potential concerns over the origin of these debts is mitigated by his involuntary loss of gainful employment during a time he was also undergoing separation and divorce. However, these conditions were alleviated more than two years ago, and Applicant did not act responsibly to resolve these issues since then. Despite an apparent financial ability to address these matters, Applicant made only token efforts some four months after he was formally notified of the security implications of his conduct. Accordingly, AG ¶ 20(b) also does not mitigate concerns arising from his present financial considerations.

Applicant did not demonstrate either a good-faith effort or clear indications that these debts are being resolved. His last-minute efforts to initiate negotiations with his creditors, offering token payments of less than 2% of the unresolved debt, are insufficient to carry his burden to show mitigation. Nor is there any evidence of counseling. Accordingly, AG ¶¶ 20(c) and 20(d) are not established. Applicant acknowledged the three remaining debts are his, and showed no documented proof to substantiate the basis for questioning any of the claimed amounts. AG ¶ 20(e) does not apply, and the final mitigating condition is not relevant because no unexplained affluence is of security concern.

On balance, despite his apparent present ability to clear these matters up, Applicant presented insufficient evidence to fully mitigate reliability and trustworthiness security concerns arising from his inability or unwillingness to satisfy debts and history of not meeting financial obligations.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, 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 ¶ 7 describes conditions that could raise a security concern and may be disqualifying. Department counsel represented that Applicant's relatives in Nigeria raised security concerns under two of them (Tr. at 126, 130.):

- (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; [and]
- (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.

Applicant's pregnant wife and young son are citizens of, and presently reside in, Nigeria. They have received permission to travel to the U.S. to join Applicant, but have not yet done so and remain in the capital, Abuja. He provides them financial support and visited them as often as he could. His sister is also a resident citizen in Nigeria, and lives within 100 miles of the especially volatile and dangerous Niger Delta. Lawlessness and human rights violations, including kidnaping and extortion, by civilians and even government personnel present significant danger throughout the country. There is no evidence of the Nigerian government targeting U.S. citizens to obtain protected information. However, criminals, internal insurgents and international terrorists are active there, with little effective government control over their activity.

Applicant has a close and loving relationship with his wife, son, and sister. Their presence in Nigeria and the conditions existing in that country, create a heightened risk of foreign exploitation, inducement, pressure or coercion by lawless factions acting against the official interests of the Nigerian and U.S. governments. Applicant's close connections to these relatives creates the potential for conflict of interest between his obligation to protect sensitive information and his natural desire to assist and protect

them by providing that information to unauthorized persons should they be threatened or coerced. Accordingly, Department Counsel established potential foreign influence security concerns under AG ¶¶ 7(a) and 7(b).

AG ¶ 8 provides conditions that could mitigate security concerns. The three which could potentially apply in mitigation of the security concerns discussed above are:

(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.

Applicant proposed that the pending departure of his wife and children from Nigeria, and his sister's status as "retired," "very elderly," "elderly lady" (Tr. at 93, 119, 136.) demonstrate mitigation under AG ¶ 8(a). If and when his wife and children do move permanently to the U.S., that will substantially mitigate foreign influence concerns about them. However, his sister will remain in Nigeria, and lives close to the most dangerous and lawless areas of that country. She is only two years older than Applicant himself, and reliant on her extended family in Nigeria for all her needs. It is possible that Applicant could produce further evidence about the positions and activities of his sister, and the extended family upon whom she is reliant, to demonstrate that it is unlikely he would be placed in a position of having to choose between her interests and those of the U.S. While he did mitigate such concerns to some extent, on balance the showing did not demonstrate that such conflict is unlikely.

Applicant produced evidence that his relationships and loyalties in the U.S. are substantial. However, his obligations to his wife, children, and sister in Nigeria are also substantial. On balance, as things stand today, he did not demonstrate that he could be expected to resolve ANY (emphasis added) conflict of interest in favor of the U.S. interest, particularly should his wife's or children's well being be threatened. Longstanding precedent holds that an Applicant need not, and should not, be placed in a position to have to make such a choice. Applicant has not established mitigation under AG ¶ 8(b).

Applicant's contact and communication with his wife and child is neither casual nor infrequent. The evidence is less clear on whether his contact with his sister would meet that standard. However, the presumption is that relations with immediate family members is not casual and infrequent, and Applicant provided insufficient evidence to overcome that presumption. Accordingly, he did not establish mitigation under AG ¶ 8(c) with respect to any of his family members in Nigeria.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of potential concern involves delinquent debts that were incurred due to circumstances beyond his control. More than two years ago, however, he resumed lucrative employment and has regained the means to resolve these issues. He has not yet done so, and his delinquent indebtedness is ongoing. He is a mature and established individual who is responsible for the results of his recent financial choices. Since his pregnant wife and child, and his sister, remain in Nigeria, his close relations with them continue to create potential for pressure, coercion, exploitation or duress which will continue until circumstances substantially change.

Overall, the record evidence leaves questions and doubts as to Applicant's present eligibility and suitability for a security clearance. He has initiated several courses of action that may substantially strengthen mitigation of all the security concerns addressed above in the future. However, he did not meet his burden of showing mitigation as things stand today, and any doubt must be resolved in favor of the national security. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from foreign influence and financial considerations.

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 F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge