



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



In the matter of:)
)
) ISCR Case No. 07-16052
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

November 10, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP) on November 2, 2006. On May 27, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) for Applicant detailing security concerns for foreign influence under Guideline B and foreign preference under Guideline C. 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 answered the SOR in writing on June 9, 2008. She admitted the factual allegations in the SOR but denied that the facts created security concerns. She elected to have the matter decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on August 27, 2008. Applicant received a complete file of relevant material (FORM) on September 12, 2008, and was provided the opportunity to file objections, and submit material to refute,

extenuate, or mitigate the disqualifying conditions. Applicant did not submit additional information. The case was assigned to me on October 24, 2008. Based on a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Procedural Issues

Department Counsel in the FORM asked that administrative notice be taken of certain facts concerning Nigeria (Item 5). I have considered the request and the documents provided by Department Counsel. Administrative notice is taken of the facts as noted below in the Findings of Fact.

Findings of Fact

After a thorough review of the pleadings and exhibits, I make the following essential findings of fact. Applicant admitted the factual allegations in the SOR with explanation.

Applicant is 34 years old and has been a consultant for a defense contractor for over two years. For the two years before working for the defense contractor, she worked as a project administrator for another defense contractor. She received her undergraduate degree from a Nigerian university and a master's degree from a United States university. She is divorced with no children. Applicant admits her mother and father are citizens and residents of Nigeria. Applicant admits one of her sisters is a citizen of Nigeria but a resident of the Netherlands. It is noted that in her e-QIP Applicant stated that this sister is a citizen of the Netherlands. Since Applicant admitted to the SOR allegation that her sister was a citizen of Nigeria and a resident of the Netherlands, I find that the sister is a citizen of Nigeria residing in the Netherlands. Another sister is a citizen of Nigeria but a resident of the United States (Item 3, e-QIP, dated November 2, 2006; Item 2, Response to SOR, dated June 27, 2008).

There is no direct information when Applicant came to the United States. She reports that she graduated with an undergraduate degree from a Nigerian university in December 1997. She reports living in the United States commencing in January 1998. I find that she arrived in the United States in January 1998. Applicant became a United States citizen on March 23, 2004. Applicant also admits she has dual citizenship with Nigeria (See Item 3, e-QIP, dated November 2, 2006).

Applicant admits that her mother and sisters "mean the world to her" and that she keeps in contact with them. She feels that she is doing only what a responsible daughter and sister would do. Her family in Nigeria raised her and gave her the opportunity to come to the United States for an education and a career. She maintains her Nigerian citizenship because her mother is still alive and as the oldest daughter she has the responsibility to settle her affairs in the future. Neither of her parents are members of political organizations nor do they own property in Nigeria. Applicant has

been in the United States for over 11 years and has not returned to Nigeria since she left (Case File, Response to SOR, dated June 9, 2008).

Applicant admits she still has a Nigerian passport. The passport was issued to her in July 15, 1999, and expired on July 24, 2004. Applicant admits that she still has possession of this Nigerian passport even though it has expired. She wants to retain the Nigerian passport so she can go to Nigeria to resolve her mother's affairs upon her death. She will use the passport to prove she was a Nigerian citizen and to ease the administrative requirements for her to enter Nigeria. She last used it in November 2003 when she visited her sister in the Netherlands. She is not willing to destroy or otherwise return the passport (Item 4, Interrogatories, dated March 10, 2008).

Applicant feels she has not indicated a preference for Nigeria over the United States. She holds the United States in high esteem. She has gained from being a resident and citizen of the United States. Her ties to Nigeria merely show that she has a past. Applicant points out that she has a good background investigation, her finances are in order, and she has no criminal record. She has a graduate degree and owns her own house in the United States. She is a law abiding citizen that just happens to have family ties to Nigeria. Her mother has obtained a United States residency card and anticipates relocating to the United States soon (Case file, Response to SOR, dated June 9, 2008).

Applicant takes great pride in working in and being a citizen of the United States. She learned a lot working with military and civilian personnel. She sees the great pride citizens have in the United States and what military personnel give up for this country. She is proud Americans are usually the first to respond to disasters. She does not believe her dual citizenship should prevent her from having access to classified information (Case File, Response to SOR, dated June 9, 2008).

Nigeria is Africa's most populated country. Nigeria became independent from Great Britain in 1960, and has a constitutional parliamentary government. The country was ruled by the military until 1999 when there was a democratic election bringing back civilian rule. (Item 5, FORM Exhibit 1, Background Note: Nigeria, United States Department of State, dated July 2008) The Department of State continuously issues travel warnings because of chaos and lawlessness in Nigeria. Lawlessness in Nigeria leads to car bombings, kidnapping of foreigners, and violent crimes. Violence is particularly acute in the Niger Delta region. Religious tension between Muslims and Christians results in occasional acts of communal violence. Al-Qaida leadership has expressed interest in overthrowing the government. Road and air travel are dangerous. (Item 5, Travel Warning Nigeria, dated October 30, 2007) An additional warning concerning militant activities was recently issued by the United States Embassy in Nigeria. It noted that militant groups are expanding their target areas with possible targets being expatriate personnel, western businesses or facilities, and areas visited by tourists and foreigners. Personnel were advised to increase security and remain vigilant (Item 5, Warden Message, dated June 26, 2008).

The government's human rights record is poor and government officials commit serious human rights abuses. These include the abridgment of rights to change government, politically motivated killings by security forces, use of excessive force and torture, restriction on free speech and press, and other physical human rights abuses. (Item 5, Country Reports on Human Rights Practices-2007, Nigeria, dated March 11, 2008)

Nigeria has made progress in a fragile democracy. Nigeria is one of the United States' key strategic partners in Africa. It became a major player in Africa helping to negotiate settlements with other countries and plays a vital role in peacekeeping operations. Nigeria remains relatively stable although ethnic and religious clashes in part of the country are common. (Item 5, CRS Report to Congress, Nigeria: Current Issues, January 30, 2008)

There have been improved and strong ties between Nigeria and the United State since June 1998. Bilateral relationships have continued to improve and there is good cooperation on many important foreign policy goals. The Nigerian government has lent strong support to the United States government's counter-terrorism efforts since September 11, 2001. Nigeria has played a leading role in forging an anti-terrorism consensus among states in Sub-Saharan Africa. (Item 5, Background Notes on Nigeria, dated July 2008, at 11-12) There is no evidence Nigeria has exploited its citizens to obtain classified information from United States citizens.

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(c), the entire process is a conscientious scrutiny 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 "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters 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 B: Foreign Influence

There is a security concern because foreign contacts and interests may indicate the individual has divided loyalties, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in the U.S. interests, or is vulnerable to pressure or coercion by any foreign interests. 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 consideration 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 ¶ 6)

Applicant's parents are citizens and residents of Nigeria. Her sisters are citizens of Nigeria but one resides in the United States and the other in the Netherlands. There is no direct evidence of the extent and frequency of Applicant's contact with her parents or sisters but she does state that the family is very close. Since they are close, there must be contact between them. The government has established that there is a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion in Nigeria because Nigeria is a country with a poor human rights record and much lawlessness in the country necessitating a continuous and increased travel warning issued by the United States Government. There have been kidnappings and killings of foreigners in Nigeria, particularly oil industry workers. Applicant's parents in Nigeria raise security concerns under Foreign Influence Disqualifying Conditions (FI DC) AG ¶ 79(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 FI DC AG ¶ 7(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". There is no security concern for her sisters who are citizens of Nigeria but live in the United States and the Netherlands. There is no heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion since they are not located in Nigeria.

I have considered Foreign Influence Mitigating Conditions AG ¶ 8(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 interest of the U.S."; AG ¶ 8(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". I have not considered AG ¶ 8(c) "Contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation". There is no evidence presented by Applicant that contact with her parents is casual or infrequent. This mitigating condition has not been raised by Applicant. In fact because of Applicant's concern and feeling for her mother, it is assumed that the contact is frequent and not casual.

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not "in a position to be exploited." The Appeal Board consistently applied this mitigating condition narrowly, holding that its underlying premise was that an applicant should not be placed in a position where she is forced to make a choice between the interest of her family member and the interest of the United States. (See, ISCR Case No. 03-17620, App. Bd., Apr. 17, 2006; ISCR Case No. 03-24933, App. Bd. Jul. 28, 2005; ISCR Case No. 03-02382, App. Bd. Feb. 15, 2005; and ISCR Case No. 03-15205, App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant can be expected to resolve any conflict in favor of the United States interest.

In determining if Applicant's family in Nigeria causes security concerns, I considered that Nigeria is an ally of the United States, has a defense agreement with the United States, and is one of the United States' substantial trading partners. While Nigeria has had a poor human rights record, I considered that Nigeria is improving its human rights position and its people enjoy basic freedoms. There are no indications the government of Nigeria or any group of terrorists or lawless entities in Nigeria have targeted United States citizens or relatives of United States citizens to provide economic or other sensitive information. While Nigeria is a country friendly to the United States, it could engage in espionage against United States interests. Friendly countries may have profound disagreements with the United States or have engaged in espionage

against United States economic, scientific, or technical interest. A friendly relationship is not determinative, but it makes it less likely that a foreign government would attempt to exploit a United States citizen through relatives or associates in that country. Nigeria is not a hostile country, nor is its interests inimical to the United States. The United States and Nigeria are large democracies, enjoy good relations, and are trading partners. It is reasonable to consider that Nigeria would not take any action to jeopardize their friendly position with the United States because of their need for trade and defense assistance from the United States. It would be considered an act unfriendly to the Nigerian interest with the United States to coerce its citizens with relatives in the United States to pressure their United States relatives to provide economic or other espionage information against the interest of the United States. While none of the considerations by themselves dispose of the issue, they are all factors to be considered in determining Applicant's vulnerability to pressure or coercion from her family members in Nigeria.

Applicant has raised Foreign Influence Mitigating Conditions (FI MC) ¶ 8(a). Applicant states that her parents are not members of any political organization and do not own property in Nigeria. There is no information presented by Applicant to establish where her parents live in Nigeria, their occupations, or what benefits are received from the Nigerian government. She has not established her family members in Nigeria are ordinary citizens leading normal lives or that her family members' living conditions, life style, and professions will likely not place her in a position to choose between the interests of her family and the interests of the United States. FI MC ¶ 8(a) does not apply.

Applicant has raised FI MC ¶ 8(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 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". Applicant's vulnerability to duress is important. Applicant has been in the United States for over 11 years and a United States citizen for about four years. Applicant's assets are in the United States including her house, and she has no financial interest in Nigeria. Applicant has not returned to Nigeria since she left the country. However, Applicant has not demonstrated that she is not vulnerable to duress. Applicant has a strong sense of loyalty or obligation to his parents in Nigeria. She has a connection and relationship to the United States, but she has not established that it is not stronger than the parent/child bond and sense of obligation she has to her parents in Nigeria. She has not demonstrated that her feeling of loyalty to the United States will overcome her strong feelings and relationship with her parents in Nigeria. FI MC ¶ 8(b) does not apply. Applicant has not met her heavy burden to mitigate that her parents in Nigeria do not cause a security concern.

Guideline C, Foreign Preference

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then she may be prone to provide information or make

decisions that are harmful to the interests of the United States (AG ¶ 9). Applicant has an expired Nigerian passport in her possession that she refuses to relinquish or destroy. She will use the passport to facilitate her entry into Nigeria to settle her mother's affairs. She claims to be a dual citizen of Nigeria and the United States. These actions raise Foreign Preference Disqualifying Condition (FP DC) AG ¶ 10(a) "Exercise of any right, privilege, or obligation of foreign citizenship after becoming a United States citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport." This security concern applies even though the passport is not current because Applicant intends to use the passport to facilitate her entry into Nigeria.

Applicant is a dual citizen of Nigeria because she was born in Nigeria. Foreign Preference Mitigating Condition (FP MC) AG 11(a) "Dual citizenship is based solely on parents' citizenship or birth in a foreign country" applies. The United States Supreme Court has recognized a right under the United States Constitution for United States citizens to have a dual citizenship with another country (*Afroyim v. Rusk*, 387 U.S. 253 (1967)). Eligibility for a security clearance must be determined by application of the disqualifying conditions for foreign preference to the factual circumstances. The President in promulgating the disqualifying conditions could have specified that dual citizenship by itself was a security concern, but he did not. The rule promulgated is for a security concern based on an exercise of dual citizenship. Applicant has exercised her dual citizenship. She maintains a foreign passport for future use to facilitate her actions to settle her mother's affairs. Applicant also raised Foreign Preference Mitigating Conditions (FP MC) AG ¶ 11(b) "The individual has expressed a willingness to renounce dual citizenship", and FP MC AG ¶ 11(e) "The passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." These mitigating conditions do not apply. Even though Applicant's Nigerian citizen is based on her birth in Nigeria, she is not willing to renounce her dual citizenship but affirmatively acknowledges that she is a dual citizen of Nigeria. She retains possession of her Nigerian passport even though it has expired, and she affirmatively states she will not relinquish or destroy the passport. Applicant has not mitigated security concerns for foreign preference raised by her exercise of foreign citizenship based on her possession of a Nigerian passport.

“Whole Person” Analysis

Under the whole person concept, the Administrative Judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered that Applicant came to the United States to enhance her education and that she has worked with defense contractors in support of the United States. I considered that she has never returned to her native Nigeria since leaving and arriving in the United States over 11 years ago. I considered the security situation in Nigeria created by terrorist groups requiring expanded travel warnings. Applicant failed to present information that her contacts with her foreign citizen and resident parents do not create a security concern. Access to classified information is denied.

Formal Findings

Paragraph 1, Guideline C: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant
 Subparagraph 1.b: Against Applicant
 Subparagraph 1.c: Against Applicant

Paragraph 2, Guideline B: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant
 Subparagraph 1.b: Against Applicant
 Subparagraph 1.c: For Applicant
 Subparagraph 1.d: For Applicant
 Subparagraph 1.e: Against Applicant (as to mother only)

Conclusion

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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge