



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-02260
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: David P. Price, Esq.

January 9, 2009

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order, DoD Directive, and Revised Guidelines,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on July 3, 2008. The SOR is

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition to the Executive Order and Directive, this case is adjudicated under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter. The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline C for foreign preference and Guideline B for foreign influence.

Applicant's response to the SOR was received by DOHA on August 11, 2008, and he requested a hearing. It took place as scheduled pursuant to written notice on November 20, 2008. The transcript (Tr.) was received November 26, 2008. For the reasons discussed below, this case is decided for Applicant.

Findings of Fact

The SOR alleged that Applicant may have acted in a way to indicate a preference for Nigeria over the United States by exercising dual citizenship. Also, the SOR alleged Applicant may be subject to foreign influence due to his family ties or connections to Nigeria. In his Answer, Applicant admitted, with explanations, the factual allegations in SOR. In addition, the following facts are established by substantial evidence.

Applicant is a 42-year-old engineer employed by a federal contractor. He has worked for this company since January 2006. This is the first time he has applied for a security clearance.

Applicant is a native-born U.S. citizen. He was born to Nigerian parents who were then in the U.S. because his father was a university student. The family departed the U.S. about two years later and lived in the United Kingdom for a short period. The family then returned to Nigeria where Applicant was raised and educated until 1988 when he decided to leave Nigeria. Applicant explained his decision to come to the U.S. as follows:

I went to the U.S. embassy to ask them questions about coming to the United States. And they told me at that time that I could, and within a few months, I got a passport, and to be honest with you, I wanted to leave Nigeria anyway, so I bought a one-way ticket and came to American and never planned to go back (Tr. 91).

Applicant traveled to the U.S. in 1988 using a U.S. passport, and he has since used a U.S. passport for all foreign travel.

He had been a university student in Nigeria during 1986–1988. He resumed his studies in the U.S. and was a student during 1988–1994. He holds a bachelor's degree in electronics engineering technology (BSEET) from an institute of technology. He has since worked in his profession for a series of companies. His current job title is principal systems engineer working in the area of future combat systems (FCS). His annual salary is about \$85,000. With a performance bonus and award fees, his total annual income could be up to \$100,000. He is a productive, successful, and valued employee who has a good reputation in his company (See Exhibits B and C and relevant witness

testimony). His on-the-job training includes the completion of security courses in the subjects of OPSEC in 2007 and COMSEC in 2008 (Exhibit B, parts 6 and 7). Applicant's employment history does not include military service, but he did register with the U.S. Selective Service (Exhibit 1).

Applicant met his future wife, who is a native-born U.S. citizen, in 1993 at church. They married in 1994, and they have two school-aged children. His wife has a college degree in business management, and she is currently working as a night auditor in the IT department of a financial firm. She has had limited contact and interaction with Applicant's family members in Nigeria. None of Applicant's family from Nigeria attended the wedding in 1994, and she did not meet any of them until 2004 when she, along with Applicant and the children, traveled to Nigeria.

Applicant's December 2004 trip to Nigeria is the first and only time he has returned to Nigeria since departing there in 1988. For the trip, he used a U.S. passport after he obtained a visa from the Nigerian Embassy in the U.S. He made the trip for two reasons: (1) he had recently learned that his grandfather was dying; and (2) he wanted his wife and children to visit his family in Nigeria as they had never met (Tr. 94). The trip was for about two weeks and spilled over into January 2005. While there, he decided to obtain a Nigerian passport, as he had never had one before. He obtained the passport for two reasons: (1) he thought future travel would be easier (no visa requirement) should he need to travel for a family emergency; and (2) he thought it would facilitate inheritance should his father pass away. The Nigeria passport was issued to him on January 4, 2005, but he used his U.S. passport to depart Nigeria and enter the U.S. on the return trip.

Applicant was not working for his current employer when he traveled to Nigeria and obtained the passport in 2004. Since applying for a security clearance in 2007 (Exhibit 1), and being made aware of the security significance of dual citizenship and a foreign passport, Applicant took action to address the concerns. He first delivered his Nigerian passport to DOHA, but the agency returned it to him (Exhibit A, part 3). Then in November 2008, Applicant completed and submitted the necessary paperwork to renounce his Nigerian citizenship (Exhibit A, parts 1, 2, and 5). Along with the renunciation application, he submitted his Nigerian passport, which he had defaced (Tr. 121–122; Exhibit A, part 4). Renouncing his Nigerian citizenship was not a difficult decision for Applicant (Tr. 113).

Applicant has multiple family members who are citizens of and residents in Nigeria. Applicant has three siblings, an older sister and two younger brothers. His three siblings were born in Nigeria where they reside today. None of his siblings have been employed by the Nigerian government or served in the military. None of his siblings work in a capacity related to the U.S. defense industry. As the eldest son, Applicant understood that he stood to inherit his father's estate, which he estimated its value at less than U.S. \$50,000 (Tr. 97). Since applying to renounce his citizenship, Applicant now understands he will no longer inherit his father's estate (Tr. 122–123), and he has notified the next oldest brother.

Applicant's mother, who divorced his father some years ago, recently immigrated to the U.S. Applicant served as her sponsor for immigration purposes. She moved into Applicant's household in 2008 and she has permanent resident alien status (Exhibit A, part 6). She is now attending school to become a medical assistant so she can become self-sufficient (Tr. 87–88). Applicant's father worked in the brewery industry for many years, he is self-supporting, and he is now essentially retired (Tr. 88).

After the divorce, Applicant's father married a series of five women. The multiple marriages produced multiple children (Tr. 84). Applicant has had little contact with his half-siblings and the contact, aside from the 2004 trip, is limited to e-mail (Tr. 85). The most frequent e-mail contact is about once every two to three months with one of the half-siblings.

Applicant's mother remarried after the divorce and had three more sons, two of whom passed away. The third is a citizen and resident of Nigeria. He is 31 years old and Applicant has limited contact with him (Tr. 84). Their relationship is strained as Applicant has declined to help him financially.

Applicant has no business, financial, or property interests in Nigeria. Other than a bank account he established during the 2004 trip, his financial affairs are all in the U.S. He opened the bank account for the benefit of his mother to pay expenses associated with immigrating to the U.S. Applicant believes the account now has a balance of about \$20.

Administrative notice is taken of certain facts about Nigeria as described in the government's written request (Appellant Exhibit I). In summary, the government of Nigeria has been relatively unstable since gaining independence from Britain in 1960 as reflected by military rule for approximately 28 years since independence, although Nigeria returned to civilian rule in 1999. The Nigerian government's human-rights record is poor and it continues to commit serious abuses. The U.S. State Department has warned U.S. citizens of the dangers of travel in Nigeria and of the difficult security situation in the oil rich Niger Delta region of the country.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.² As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."³ A favorable decision establishes eligibility of an

² *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

³ *Egan*, 484 U.S. at 531.

applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁴ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.⁵ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁶ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁰ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹¹

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹² Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

⁴ Directive, ¶ 3.2.

⁵ Directive, ¶ 3.2.

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ Directive, Enclosure 3, ¶ E3.1.14.

⁸ Directive, Enclosure 3, ¶ E3.1.15.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ *Egan*, 484 U.S. at 531.

¹¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹² Executive Order 10865, § 7.

Analysis

Under Guideline C for foreign preference,¹³ a security concern may arise “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.”¹⁴

The most pertinent disqualifying condition here is DC 1, which provides that a security concern may exist and be disqualifying based on the “exercise of any right, privilege, or obligation or foreign citizenship after becoming a U.S. citizen or through foreign citizenship of a family member.”¹⁵ DC 1 applies to Applicant based on his active exercise of Nigerian citizenship by obtaining a Nigerian passport in 2004 and possessing it until 2008. The fact that he did not use the passport for travel is irrelevant, as the actions of obtaining and possessing it raise security concerns within the meaning of the guideline.

The guideline also contains conditions that may mitigate the security concern.¹⁶ I reviewed the MC under the guideline and conclude that two apply in Applicant’s favor. First, MC 2 applies because Applicant completed and submitted the necessary paperwork to renounce his Nigerian citizenship.¹⁷ Although he has not yet received a response to his renunciation application, Applicant went beyond what is required by MC 2, which only requires an expression of willingness to renounce. In doing so, Applicant has likely negated any right to inherit property from his father, which is a circumstance full of possibilities (for example, there may be nothing to inherit or Applicant may predecease his father or some other contingency). Second, MC 5 applies because Applicant defaced his Nigerian passport and returned it to the Nigerian government.¹⁸ Taken together, his actions reflect his true intent and preference and are more than sufficient to overcome the security concerns under Guideline C.

Under Guideline B for foreign influence,¹⁹ security concerns may arise due to foreign contacts and interests “if the individual has divided loyalties or foreign financial

¹³ Revised Guidelines at 7–8 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁴ Revised Guidelines at 7.

¹⁵ Revised Guidelines at 7.

¹⁶ Revised Guidelines at 7–8.

¹⁷ MC 2 is “the individual has expressed a willingness to renounce dual citizenship.”

¹⁸ MC 5 is “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

¹⁹ Revised Guidelines at 5–6 (setting forth the security concern and the disqualifying and mitigating conditions).

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.”²⁰ There are two disqualifying conditions ²¹ that could raise security concerns and may be disqualifying in this case:

DC 1. [C]ontact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

DC 2. [C]onnections 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.

Of course, the mere possession of close family ties with a person in a foreign country is not—as a matter of law—disqualifying under Guideline B. But if only one relative resides in a foreign country and an applicant has contact with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.²²

Here, the two disqualifying conditions apply because Applicant has contacts with and connections to his family members in Nigeria. He comes from a large family, most of whom live in Nigeria. He has ties of affection or emotion to his father, sister, and two brothers. As the eldest son, he probably feels a sense of obligation to these people. These circumstances create the potential for a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion because of his ties to immediate family members in Nigeria. His ties to extended family members (the half-siblings) are not nearly so strong and any security concerns stemming from these ties are minimal or marginal or both.

Three of the six mitigating conditions²³ under the guideline may apply to the facts and circumstances of this case:

MC 1. [T]he 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

²⁰ Revised Guidelines at 5.

²¹ Revised Guidelines at 5.

²² See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

²³ Revised Guidelines at 6.

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.;

MC 2. [T]here 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

MC 3. [C]ontact or communications with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

The first and third MC do not apply because Applicant's relationships with his nuclear-family members in Nigeria are of sufficient magnitude or strength to negate these two MCs. In the post-9/11 world, there is at least a remote or slight possibility that dangerous elements within Nigeria could attempt to use his family members to coerce or pressure Applicant.

But the second MC applies in Applicant's favor. The record evidence supports a conclusion that Applicant has a depth of loyalty to the U.S., so that he can be expected to resolve any conflict in favor of the U.S. interest. Applicant is a native-born U.S. citizen by virtue of his parents' temporary residence in the U.S.; however, he demonstrated his loyalty to the U.S. by leaving Nigeria and his family in 1988 with a one-way ticket. Since then, he has completed his education and worked in his profession as a systems engineer for U.S. companies. In addition, he is married to a native-born U.S. citizen and they have two children who were born here. And, not to be overlooked, is Applicant's mother with whom he has strong ties of affection and obligation. She is now living with him because he sponsored her immigration to the U.S. Taken together, these circumstances show that Applicant's strongest family ties are to the U.S. and also demonstrate the depth of his commitment to the U.S.

To sum up under the whole-person concept,²⁴ this is not a case of "divided loyalties"²⁵ with an applicant who has one foot in the U.S. and one foot in his native country. On the contrary, the evidence shows Applicant has both feet firmly rooted in the U.S. and that he has significant contacts and ties to the U.S. Applicant, a dual citizen by birth, has made the U.S. his home by choice. Looking forward, it is highly unlikely that Applicant will change course. Taken together, these circumstances, along with the highly favorable character evidence (See Exhibit C and relevant witness testimony), support a conclusion that Applicant can be expected to resolve any potential

²⁴ Revised Guidelines at 1–2.

²⁵ Revised Guidelines at 5.

foreign influence or pressure by either coercive or non-coercive means in favor of the U.S. interest.

After weighing the record evidence as a whole, Applicant did present sufficient evidence to explain, extenuate, or mitigate the security concerns. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

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 C:	For Applicant
Subparagraphs 1.a–1.e:	For Applicant
Paragraph 2, Guideline B:	For Applicant
Subparagraphs 2.a–2.d:	For Applicant

Conclusion

In light of all the circumstances, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge