



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



In the matter of:)
)
) ISCR Case No. 08-04359
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel,
For Applicant: Lucia E. Casale, Esquire

January 21, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant immigrated to the United States at age 16, became a naturalized U.S. citizen in 2000, and has lived in the United States for 26 years. He invalidated his Nigerian passport and mitigated the foreign preference and foreign influence security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on July 17, 2006. On August 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline C (Foreign Preference) and B (Foreign Influence).¹

¹ 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 on September 15, 2008, and requested a hearing before an administrative judge. The case was assigned to me on October 31, 2008. DOHA issued a notice of hearing on November 13, 2008, and I convened the hearing as scheduled on December 10, 2008. The government offered exhibits (GE) 1 through 7, which were received without objection (Tr. 19). GE 7 was not admitted, but considered for administrative notice purposes only.² Applicant testified on his own behalf and submitted 16 exhibits, marked AE 1 through 16, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on December 18, 2008.

Findings of Fact

In his answer to the SOR, Applicant admitted all of the SOR allegations (with explanations), except for SOR ¶ 1.a, which he denied. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is a 42-year-old civil engineer. He was born and raised in Nigeria in one of the most stable cities in the country (Tr. 40, 42, 52, GE 1). In 1982, at age 16, he entered the United States under a student visa. While attending college, he stayed with his uncle, who was a U.S. citizen (Tr. 77). In May 1987, he received a degree in civil engineering from a U.S. university (Tr. 53). He became a naturalized U.S. citizen in August 2000 and received his U.S. passport shortly thereafter (Tr. 53-54).

After college, Applicant worked for two private U.S. companies (Tr. 55). In 1989, he formed his own engineering design company (Tr. 56). Applicant is the sole owner of his company, and is the company's facility security officer. In 1998, his company became a construction-oriented company, building roads, bridges, and other structures. Through the years, Applicant has worked in numerous government construction projects in the United States and overseas. After working in over 20 overseas construction projects for U.S. government agencies, in 2005 Applicant bid on several overseas construction projects that required Applicant and his company to have access to classified information (Tr. 39-40, 56-60). Two of the construction projects were to be performed in Nigeria.

A U.S. government agency sponsored Applicant and his company for a facility security clearance at the secret level. He applied for his security clearance in July 2006. Applicant was issued an interim security clearance that allowed him access to classified information. His interim clearance was revoked as a result of the security concerns outlined in the SOR and he was disqualified from one of the construction projects (Tr. 40). Applicant's business travel to Nigeria in 2005 and during the following years was in

² Department Counsel's October 23, 2008, motion asked that I take administrative notice of certain facts concerning the government of Nigeria. The request and the attached documents were not admitted into evidence but were considered and included in the record as GE 7 for identification.

preparation for bidding on the contracts, or as a result of his winning the U.S. contracts in Nigeria.

In 2005, Applicant renewed his Nigerian passport. It was easier for him to travel to Nigeria with it than having to secure a Visa every time he traveled. He only used the Nigerian passport to travel to Nigeria, and most of his travel was related to his construction projects there. From 1982 to 2005, Applicant traveled twice to Nigeria: in 2001 to bury his father, and in 2005, to evaluate business opportunities (Tr. 84-85). In 2006, he travelled three times to Nigeria: in February to bury his uncle, and in June and December 2006 for business related matters. During 2007, Applicant traveled twice to Nigeria on business related matters. In 2008, Applicant traveled to Nigeria to bury his mother, and for business related matters in June 2008. He intends to travel to Nigeria frequently in the future to comply with his contractual obligations. Since he invalidated his Nigerian passport, Applicant received a long-term visitor's visa to travel from the United States to Nigeria (Tr. 45).

Applicant claimed he did not know his possession and use of the Nigerian passport would raise security concerns until after he received the pending SOR. As soon as he was made aware of the concerns, he stopped using his Nigerian passport (Tr. 45). On September 22, 2008, Applicant attempted to surrender his Nigerian passport by mailing it to DOHA (Appellate Exhibit 1). DOHA returned the passport to him. At his hearing, Applicant presented his invalidated Nigerian passport (with holes punched on it and the picture page cut in half) (AE 16, Tr. 60-61). When asked whether he was willing to surrender his Nigerian citizenship, Applicant answered that he had renounced it when he swore allegiance to the United States during his naturalization ceremony. He strongly averred he is only a U.S. citizen and his loyalty is only to the United States.

In November 2006, Applicant opened a bank account in Nigeria and transferred \$170,000 from the United States into his Nigerian account (Tr. 88). Applicant transferred the money to support the day-to-day operations of his construction project for a U.S. agency. Applicant's evidence shows that he had won a bid for a construction project for a U.S. agency in Nigeria. As of his hearing, he still had the Nigerian bank account. He maintains a monthly balance of approximately \$100,000 in the account to cover his construction company's expenses in Nigeria. In 2007-2008, Applicant bid on three additional construction contracts offered by a U.S. government agency to be performed in South America and Africa (Tr. 59-60).

When Applicant's father died in 2001, he inherited approximately $\frac{1}{4}$ of an acre of land in Nigeria. Applicant claimed he is not sure where the property is located, or its current estimated value. He averred he is not interested in the property and does not intend to claim it (Tr. 48).

Applicant married his 35-year-old Nigerian-born wife in 1998 in the United States (Tr. 54, 76). She entered the United States under a student visa in 1997. She attended a preeminent U.S. university and received a physician's degree (Tr. 78, 93). They have

two children born in the United States: a 10-year-old son and a six-year-old daughter. She is a permanent resident alien and has applied for U.S. citizenship (Tr. 55). She works as a physician at a preeminent U.S. hospital.

Applicant and his wife own a residence in the United States, worth approximately \$750,000. They also own a U.S. undeveloped track of land, worth approximately \$750,000 (Tr. 69-71). Additionally, they have U.S. investments worth approximately \$10,000. Applicant's receives a yearly salary from his company of \$150,000. His current U.S. government construction project in Nigeria is worth approximately \$22 million. His expected profit from this contract is around 5% or \$1.1 million (Tr. 91). Applicant and his wife have no financial assets, and own no property (other than the ¼ acre of land) or investments in Nigeria.

Applicant's 74-year-old mother-in-law is a citizen and part time resident of Nigeria (Tr. 66-67). According to Applicant, she is independently wealthy, and owns numerous real estate rental properties in Nigeria. She is the only one of his wife's immediate relatives living in Nigeria (Tr. 90). Applicant testified his mother-in-law lives approximately nine to 10 months of the year in the United States and two months in Nigeria. She is a U.S. permanent legal resident, and is applying for citizenship (Tr. 66). While she is living in Nigeria, Applicant has contact with her approximately once a month. He is not aware of the frequency of his wife's contact with her mother when she is in Nigeria.

Applicant claimed that neither he nor his wife or any of their immediate relatives ever served in the Nigerian military forces. They have never worked for the Nigerian government or for any government affiliated company (Tr. 77).

All of Applicant's aunts and uncles live in the United States and are either U.S. citizens or in the process of applying for citizenship (Tr. 81-82). He has four siblings, two sisters and two brothers. One of his sisters is a U.S. naturalized citizen, and one of his brothers is a U.S. permanent resident alien. His second brother is a Nigerian citizen and currently lives with his family in the United States (Tr. 41). He is working as an engineer for a French company, and was assigned to a three-year tour of work with a subsidiary of his company in the United States. His second sister is a Nigerian citizen and resident (Tr. 51). She owns a clothing business in Nigeria and travels frequently to visit with her family living in the United States (Tr. 41, 64).

Applicant strongly averred he is a proud American citizen. He has been in the United States for the last 26 years and almost all of his relatives live in the United States. He believes there is no way any of his relatives, or foreign government, can influence him in a way contrary to his immediate family's interest or the interest of the United States (Tr. 40).

I take administrative notice of the following facts. Nigeria is a federal republic composed of 36 states and a capital territory. The government's human rights record is poor, and government officials at all levels commit serious human rights abuses. Areas

of the country are marked by serious political instability and outbreaks of armed conflict between religious, political, and ethnic factions. The lack of law and order in the country poses considerable risks to travelers.

The Nigerian government provides strong diplomatic support to U.S. government counter-terrorism efforts. It has condemned terrorist attacks against the United States and supported military actions against the Taliban and Al-Qaida. It also has played a leading role in forging an anti-terrorism consensus among states in their region. The United States provides the people of Nigeria with substantial financial assistance in areas such as public health, education, and in their efforts of developing effective institutions of democratic governance. Nigeria is an important trading partner of the United States. There is no evidence of economic competition with the United States, or that Nigeria has or ever had an intelligence gathering program targeting U.S. economic, industrial, or military critical technologies.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.³

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 controlling 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 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."⁴ 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.

³ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ *Egan, supra*, at 528, 531.

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.

Section 7 of Executive Order 10865 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

Under Guideline C the government’s concern is “when 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.” AG ¶ 9.

Applicant’s 2005 renewal and use of his Nigerian passport, his opening of a Nigerian bank account, and his inheritance of a ¼ acre of land in Nigeria raise foreign preference security concerns. AG ¶ 10: “(a) exercise of any right, privilege, or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport,” and “(5) using foreign citizenship to protect financial or business interests in another country,” apply.

After considering all the foreign preference mitigating condition under AG ¶ 11, I find that AG ¶¶ 11(b): “The individual has expressed a willingness to renounce dual citizenship,” and 11(e): “the passport has been destroyed,” apply.

Applicant became a naturalized U.S. citizen in 2000 and was issued a U.S. passport shortly thereafter. He renewed his Nigerian passport in 2005 and used it, in preference to his U.S. passport, to travel to Nigeria numerous times between 2005 and 2008. He used the Nigerian passport because of convenience, i.e., he did not have to

go through the process of requesting a visa. He did not know that his renewal of the Nigerian passport would raise security concerns. As soon as he was made aware of the security concerns raised by his use and possession of his Nigerian passport, Applicant attempted to surrender and later destroyed his Nigerian passport.

I considered that Applicant has a Nigerian bank account (with a substantial deposit of money) that he opened in 2006 to run the day-to-day operations of his construction projects in Nigeria. Considering the totality of the circumstances of his case, his foreign bank account does not raise serious security concerns. Applicant has established a *bona fide* record of performing construction projects for U.S. government agencies in the United States and abroad. In 2005-2006, Applicant won a bid for a construction project for a U.S. agency in Nigeria. The bank account and the money were incidental to his performance of the construction project. But for the construction project, I conclude Applicant would not have opened the bank account in Nigeria.

I also considered Applicant's inheritance of a ¼ acre of land in Nigeria. Considering the totality of the circumstances of his case, I conclude that the possible value of such property is greatly outweighed by Applicant's long and well rooted connections to the United States, his business in the United States, and the net worth value of his assets in the United States.

Guideline B, Foreign Influence

Under Guideline B, the government's concern is:

"foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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 ¶ 6.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

(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;

(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; and

(e) a substantial business, financial, or property interest in a foreign country, or in a foreign-owned or foreign-operated business, which could subject the individual to heightened risk or foreign influence or exploitation.

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. However, if only one relative lives in a foreign country and an applicant has contacts 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.⁵ Applicant has frequent contacts (at least once a month) and a close relationship of affection and/or obligation with his mother-in-law and siblings, who are residents and citizens of Nigeria. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Nigerian agents or criminals may exploit the opportunity to obtain information about the United States. His connection to his family members also create a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help them by providing sensitive or classified information.

The government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the government.

Four Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(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;

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

(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; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that mitigating condition AG ¶¶ 8(b) and (f) apply. Applicant has strong feelings of affection and a strong sense of obligation to his mother-in-law and siblings. The closeness of the relationship is shown by Applicant's telephone contacts with his siblings and wife's mother, their travels to the United States to visit Applicant and his family, and his travels to Nigeria. Notwithstanding, Applicant established it is unlikely he will be placed in a position of having to choose between the interests of his family and the interests of the United States. Applicant's family members in Nigeria live routine lives, they are not involved in politics, employed by the Nigerian government or its military forces.

Applicant's contact with his family in Nigeria has been for the most part telephonic, with occasional reciprocal visits. From 1982 to 2005, he traveled once on family related matters (to bury his father), and from 2005 to 2008 he traveled twice to bury his uncle and mother. Applicant's all other travel to Nigeria has been business related and resulted from his winning of construction contracts in the United States for work to be performed in Nigeria for a U.S. government agency. I do not believe Applicant's relationship with his family in Nigeria creates a heightened risk for foreign influence or exploitation.

In deciding whether Applicant's family members are in a position to be exploited, I considered Nigeria's form of government.⁶ Nigeria is a developing country that, so far, possesses no intelligence, economic, or industrial threat to the United States. Notwithstanding Nigeria's poor human rights record, there is no evidence its government seeks classified and industrial/economic information from the United States. Nor is there evidence of the Nigerian government mistreating relatives of U.S. citizens or U.S. citizens to obtain such information. Additionally, given the existing relationship between the governments of the United States and Nigeria, it is unlikely Nigeria would risk losing an important trading partner and the financial support of the United States.

AG ¶ 8(b) applies because Applicant has developed a sufficient relationship and loyalty to the United States, that he can be expected to resolve any conflict of interest in favor of the United States' interests. He has lived in the United States for over 26 years.

⁶ The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

He came to the United States at age 16 and is now a naturalized U.S. citizen. His wife is in the process of becoming a U.S. citizen and their children were born in the United States. All of their financial and business interests are in the United States. Applicant has established himself as an American citizen. He is a successful entrepreneur with an established reputation as a reliable government contractor. He continues this track record of diligent labor in his current construction contracts with Government agencies.

AG ¶ 8(f) applies because Applicant's business is based in the United States, not in Nigeria. Applicant has established a *bona fide* record of performing over 20 construction projects for U.S. government agencies in the United States and abroad. In 2006, Applicant won a bid for a \$22 million construction project for a U.S. agency in Nigeria. The bank account and the money deposited there were incidental to his performance of the construction project. But for the construction project, I conclude Applicant would not have opened the bank account in Nigeria.

Applicant has continued to bid (in the United States) on additional multimillion dollar construction projects for U.S. agencies abroad. Applicant has a substantial amount of money in a Nigerian bank (\$100,000). Notwithstanding, balancing the value of his Nigerian bank account against the value of his current and future U.S. contracts, and the expected profits from those contracts, I conclude Applicant's financial and property interests in Nigeria could not be used effectively to influence, manipulate, or pressure him.

Considering the totality of the circumstances, the evidence shows it is unlikely Applicant will be placed in a position of having to choose between the interests of his siblings or mother-in-law and the interests of the United States. He has mitigated the Guideline B security concerns.

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) the 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 commonsense 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 has been in the United States for over 26 years and a naturalized U.S. citizen for around eight years. He attended college and received his civil engineering degree in the United States. His wife became a physician in the United States and is employed by a well known hospital. She is in the process of completing her U.S. naturalization process, and their children were born in the United States. His only close relatives living in Nigeria are his mother-in-law (who lives most of the year in the United States) and two of his siblings (one of which will reside in the United States with his family for the next three years). He and his wife own property and have financial interests mainly in the United States (except for the ¼ acre land he inherited), and they have embraced the United States way of life. Applicant has established himself as a reliable defense contractor and there is no evidence that he has failed to comply with rules and regulations concerning the protection of classified information.

After carefully considering Applicant's circumstances, I conclude he is not in a position where he may be induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests. He is not vulnerable to pressure or coercion by his mother-in-law, siblings, or the government of Nigeria.

For all these reasons, I conclude Applicant mitigated the concerns arising from his foreign influence and foreign preference security concerns.

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.g:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge