



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



In the matter of:)
)
) ISCR Case No. 11-08281
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2012

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 11, 2011. On July 23, 2012, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR, and requested a hearing before an administrative judge. The case was assigned to me on September 20, 2012. DOHA issued a notice of hearing on September 27, 2012, scheduling the hearing for November 1, 2012.

Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified. I kept the record open for Applicant to submit exhibits, and he timely submitted a packet of documents which was marked as (AX) A. DOHA received the transcript (Tr.) on November 8, 2012.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Nigeria. The request and supporting documents are attached to the record as HX. Applicant did not object to documents. (Tr. 12) I took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR under Guideline B (Foreign Influence) and offered explanations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a native of Nigeria. In 1986, he received his undergraduate degree (engineering) in Nigeria. Applicant taught in a university in Nigeria from 1986 until 1990. Applicant received a scholarship from the British government and studied in London. He earned a PhD in 1994. He was recruited by an American company while in England. He came to the United States in 1994 to accept a position. He worked as a consultant for approximately 13 years. (Tr. 16) His professional life in the United States has been in engineering and research. He has been with his current employer since May 2007. Applicant has not held a security clearance, but he has worked with sensitive information in his work. Applicant became a naturalized U.S. citizen in May 2006. (GX 1) He renounced his Nigerian citizenship. (Tr. 21) He holds a U.S. passport.

Applicant is married and has three children. His wife is a naturalized U.S. citizen. Her mother who is a citizen and resident of Nigeria is disabled. (Tr. 51) Applicant's wife's brother and sister are residents and citizens of Nigeria. Applicant's mother-in-law lives with his wife's brother and sister. Applicant's wife speaks to them on the phone to inquire about her mother's health about once a week. Applicant does not usually speak to them on the phone.

Applicant has four brothers and one sister who are citizens and residents of Nigeria. Three brothers have been retired for a number of years. They were never involved with the government. His sister is a nurse for a nongovernmental agency (NGO) in a rural area of Nigeria. Applicant speaks to his sister about four times a year. (Tr. 50) One brother works in real estate for a private enterprise. (Tr. 43) Applicant speaks to his brothers on the phone. Applicant speaks to his brother (B) once every three months. (Tr. 44) He speaks to the other brothers once or twice a month. Applicant believes it is usually for a holiday or special occasion. Applicant reports that he emails

one brother (M). His brother M has studied in the United States but now resides in Nigeria. (Tr. 49)

Applicant travelled to Nigeria in 2011 and saw his family. He has visited Nigeria about every two to three years. He stays with one of his brothers. Applicant has no other relatives in Nigeria. He stated that his family knows that he is an electrical engineer who works for an international company. They do not know the specifics of his work. (Tr. 55) They do not know about Applicant's current employer.

Applicant explained at the hearing that he came to the United States to establish a career. His professional career includes serving public safety systems. He has written many publications, and has done consulting work for his previous company in various parts of the world. He has roots in the United States both professionally and personally. Applicant has worked his entire adult life in the United States and has deep and long-term relationships with his U.S. family. He has not held a clearance, but has been involved with sensitive information, providing service to the U.S. Government through his work with sensitive research. Applicant was credible when he explained that if in the unlikely situation that there would be pressure on him or his family, he would immediately contact his facility security officer. He would respond to questions concerning his current work as a transition from academia to a high-tech company consistent with his life-long research.

Applicant expressed his love for the United States. He contributes to the community in various ways. He has a strong commitment to public service. He wants to help society in the United States since he lives a comfortable life. He promised to protect the United States with honor and distinction. He realizes that he cannot "divorce" his relatives, but during his years in the United States, he has not contacted any friends or other contacts in Nigeria except for his family living in Nigeria. He is a law-abiding citizen. He and his wife own a home and have property in the United States. He has no financial ties to Nigeria.

Applicant stated that it is a matter of being able to do his best to serve the United States in the capacity that he has as a member of a team for a defense contractor. He has worked for only two companies during his time in the United States. He has shown loyalty to them. He also does not deny that his family is in Nigeria. They helped him through school. However, it has been almost 22 years since he lived in Nigeria. He affirms that they would not put pressure on him even if they needed help financially. They will not ask him to abuse a trust that has been given to him by the U.S. government to which he is loyal. (Tr. 70)

Applicant submitted a letter of recommendation from the President of a contracting company with whom he worked. The President has known Applicant since 1997. He describes Applicant as a person of integrity, strong character, and extraordinary vision. (AX A) The President has held a clearance for many years, and is familiar with the security concerns.

A professional colleague who has known Applicant for 16 years describes him as very talented, respectful and honest. He has seen Applicant working with U.S. federal agencies and vouches for his expertise and leadership skills.

Applicant's current employer praises him for his research skills and his exceptional ability to provide for customers. Applicant is ethical and demonstrates trustworthiness and a commitment to proper business practices. He strongly endorses Applicant for a clearance.

Another colleague describes Applicant as an outstanding performer for the company. She has worked closely with Applicant on various projects. He produces high quality work and she has no reservations endorsing Applicant for a person who works with sensitive or classified information.

The University of Liverpool Chancellor knew Applicant in 1994 when he was working on his PhD. He describes Applicant as a hardworking and talented person who had a pleasant personality.

A neighbor of Applicant's who has known him for about eight years describes him as dedicated to his work and as a family man. He is well regarded in the community.
(AX A)

I take administrative notice of the following facts. Nigeria is a federal republic in western Africa. It gained its independence from Britain in 1960. Since then it has faced intermittent political turmoil and economic crisis. There is conflict along ethnic and geographical lines, and there have been military coups and long military-imposed transition programs rather than civilian rule. Since its independence the military has ruled Nigeria for approximately 28 of the 51 years.

Nigeria is Africa's most populous country, and there is pervasive poverty. Ethnic and religious clashes are common. The dominant ethnic group in the northern two-thirds of the country is Hausa-Fulani, most of whom are Muslims, and the Yoruba people, about half of whom are Christian and half Muslim, predominate the Southwest. Nigeria pursues a policy of developing military production capabilities. Before the lifting of sanctions by many Western nations, Nigeria turned to China, Russia, North Korea, and India for the purchase of military equipment and training.

The United States is Nigeria's largest trading partner. Oil imports from Nigeria to the United States account for 11percent of U.S. oil imports. The United States is the largest foreign investor in Nigeria, and U.S. investment is mostly in mining and petroleum.

Nigeria has provided strong diplomatic support to U.S. Government counter-terrorism efforts. An estimated one million Nigerians and Nigerian-Americans live, study, and work in the United States, and another 25,000 Americans live and work in Nigeria.

The U.S. Department of State Travel Warning recommends avoiding travel to certain areas of Nigeria due to the risk of kidnapping, robbery, and other armed attacks. In 2010, the U.S. Embassy issued a warning informing government personnel to defer travel to states experiencing violence in the aftermath of the presidential election. There have been more frequent attacks in Nigeria's northern states. In 2009, there were numerous warnings regarding the threat of violence and potential attacks against U.S. citizens and in the vicinity of the U.S. Consulate General.

The Nigerian government human rights record is poor, and the government at all levels continues to commit serious human rights abuses, to include: extrajudicial killings and impunity of abuses by security forces, torture, arbitrary arrest, and judicial corruption. In addition, police raid homes without warrants, and security forces have beaten, detained, and harassed journalists. Nigerian police and other law enforcement do not always inform the U.S. Embassy or Consulate immediately of the arrest or detention of a U.S. citizen.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the

applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

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.

Three disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “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.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “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.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.” AG ¶ 7(d).

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant has lived and worked in the United States since 1994. He is a naturalized U.S. citizen. Applicant’s children are U.S. citizens. His wife is a naturalized U.S. citizen. He holds a U.S. passport and has renounced his Nigerian citizenship. (GX 2)

Applicant’s four brothers and a sister live in Nigeria. He speaks to his brothers on a regular basis. He also speaks to his sister. He has emailed one brother. He does not usually speak to his in-laws. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant has not rebutted this presumption.

After considering the totality of Applicant’s family ties to Nigeria as well as each individual tie, I conclude that Applicant’s family ties are sufficient to raise an issue of a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

Applicant speaks to his brother once or twice a year on the phone. He saw his brother in 2008. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised.

Security concerns under this guideline can be mitigated by showing that “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.” AG ¶ 8(a).

Security concerns under this guideline can be mitigated by showing “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.” AG ¶ 8(b).

Applicant maintains a relationship with his brothers and sister who live in Nigeria. He stays with his brother when he visits Nigeria. I find AG ¶ 8(c) does not apply because his familial relationships in Nigeria are more than casual.

The United States maintains close relations with Nigeria. There are problems with threats in Nigeria and its human rights record is poor. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence operations against the United States. Applicant was born in Nigeria but chose the United States as his home country. His children are in the United States. He has been a citizen of the United States since 2006. He has built a career in the United States. He has no assets in Nigeria. There is no indication that Applicant’s relatives are in positions or are involved in activities that would place Applicant in a position of having to choose between his family and the interests of the United States. There is no indication that Nigeria targets or exploits its own citizens to obtain intelligence. Based on Nigeria’s relationship to the United States, it is unlikely that intelligence officials would attempt to pressure Applicant’s relatives in Nigeria to gather valuable or classified information from the United States through Applicant. It is highly unlikely, considering Nigeria’s relationship with the United States and Applicant’s close ties to the United States, that he would choose his family in Nigeria over his life and children in the United States. I find mitigating AG 8(a) and 8(b) apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant 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) 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 have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a naturalized U.S. citizen who has lived in the United States since 1994. He, his wife, and his children reside in the United States, and he and his spouse are both naturalized U.S. citizens. He was articulate, candid, sincere, and credible at the hearing. Applicant's home is in the United States. Applicant has been successful in academia and research. His current employer recommends him for his professionalism and integrity.

Applicant chose to leave his home and pursue his academic career in the United States. He is firmly entrenched in the United States. All of his assets are located in the United States. Although Applicant has some familial ties to Nigeria, I am convinced that he will resolve any conflicts in favor of the United States.

There is no evidence any of the individuals at issue are involved with, or under scrutiny, by interests antithetical to the United States. His family members in Nigeria do not know the specifics of his work.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He is admired by his peers. His academic career has blossomed in the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest. He credibly stated he would report any attempts to influence him to security. In light of these facts and the country at issue, I find that Applicant successfully mitigated foreign influence concerns.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegation in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1e: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge