



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 12-05512

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

10/14/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's foreign family contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, and an unacceptable security risk. The mitigating information is insufficient to fully overcome the foreign influence security concerns. He mitigated the financial considerations security concerns. Clearance denied.

Statement of the Case

On February 22, 2012, Applicant submitted a security clearance application. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant eligibility for a security clearance. On April 22, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations) and Guideline B (foreign influence).¹ Applicant answered the SOR on May 22, 2015, and requested a hearing

¹ The DOD acted under Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines

before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to another administrative judge on March 3, 2016, and reassigned to me on March 16 2016. DOHA issued a notice of hearing on April 14, 2016, scheduling a hearing for May 11, 2016. At the hearing, Department Counsel offered nine exhibits (Government Exhibits (GE) 1 through 9), and Applicant offered one exhibit (Applicant Exhibit (AE) 1) comprised of Tabs A through N. Tabs L through N were received post-hearing. All exhibits were admitted into the record without objection. GE 9 (Request for Administrative Notice of facts concerning Nigeria) was made part of the record but it is not evidence. DOHA received the transcript of the hearing on May 25, 2016.

Procedural and Evidentiary Rulings

The Government requested that I take administrative notice of facts concerning the government of Nigeria based on documents published by the federal government. Applicant did not object, and I took administrative notice as requested.

Findings of Fact

Applicant denied the allegations in SOR ¶¶ 1.a through 1.d, 1.f, 1.h, and 1.i, with explanations. He admitted the factual allegations in SOR ¶¶ 1.e, 1.g, 1.j, and 2.a through 2.d, also with explanations. His SOR and hearing admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and having observed Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 49-year-old employee of a defense contractor. He and his four siblings were born in Nigeria to Nigerian parents. He was raised and educated in Nigeria. Applicant completed a bachelor's degree and was working on his graduate program in Nigeria when he immigrated to the United States in October 2000 after winning a diversity visa sponsored by the U.S. State Department. He became a naturalized U.S. citizen in 2006.

Applicant married in December 2002, and has a 10-year-old son, born in 2006. He separated from his wife in 2006, and as of the hearing date, their divorce was still pending. Applicant's work history shows he was employed as a security guard with several defense contractors between 2001 and 2011. In 2011, he was fired because of timeliness issues, he missed a work day, and was insubordinate. He explained he had problems coming back from Nigeria after attending his father's funeral, and that he was the subject of discrimination because he is an immigrant. He was unemployed for about seven months. Applicant was hired by his current employer, a defense contractor, in August 2011.

for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant testified that between 2001 and 2011, he worked two and sometimes three jobs to make money to get married, to pay for his son's education, and to pay for his real estate properties.

The SOR alleged several delinquent accounts related to Applicant's real estate properties. He explained that when he married his wife, she owned a home and he moved in with her. Apparently, he was not contributing to pay his wife's mortgage and he was asked to leave. In 2004, Applicant purchased a townhouse for \$180,000 (\$1,500 mortgage payments) and his wife refused to move in with him. She bought a single family house, and he moved in with her and rented his townhouse. Applicant was asked to leave again, and he refinanced his townhouse, taking \$25,000 out of the equity, and purchased a two-bedroom condominium in November 2005 for \$200,000. His mortgage payment with condominium fees totaled \$1,650 monthly. Additionally, he took a \$20,000 second mortgage on the condominium.

Applicant's renters failed to pay rent, and he had to take them to court repeatedly. He obtained judgments against them, and ultimately they abandoned the rental property. Applicant averred that even though he had three jobs, he could not afford to pay both properties' mortgages, his debts, and living expenses. At the time the rental property was foreclosed in 2011, Applicant owed over \$20,000 in mortgage payments. He claimed the mortgage debt was extinguished through the rental property foreclosure.

Applicant tried to sell the townhouse and asked for a loan modification, but was unsuccessful and the rental property was foreclosed in 2011. His home (condominium) went through foreclosure proceedings also, and Applicant was evicted in 2011. He claimed that after two years living with his brother he was told the loan modification was approved and he moved back into his condominium.

The status of the delinquent debts alleged in the SOR follow:

SOR ¶ 1.a – \$8,126 judgment filed against Applicant in 2008. Applicant initially claimed that this judgment was extinguished through the foreclosure of the property. He presented no documentary evidence to show that the foreclosure extinguished the judgment. He then claimed that he satisfied the judgment in 2007, and that it was being illegally collected by the plaintiff. Applicant's documentary evidence shows that he made a \$1,531 payment towards the judgment in 2007, and that a state court determined that Applicant had satisfied the judgment via a garnishment of wages on October 16, 2015. (AE 1, Tab L) Applicant's documentary evidence shows that the alleged judgment was paid.

SOR ¶ 1.b – \$3,500 judgment filed against Applicant in 2010 resulting from a car accident. Applicant's documentary evidence shows the judgment was vacated in 2011. (AE 1, Tab B)

SOR ¶ 1.c – \$1,359 judgment filed against Applicant in 2015. Applicant's documentary evidence shows the judgment was satisfied in 2015. (AE 1, Tab C)

SOR ¶ 1.d – \$1,240 judgment filed against Applicant in 2006. Applicant's documentary evidence shows the judgment was satisfied in 2015. (AE 1, Tab D)

SOR ¶ 1.e – \$4,129 charged-off credit card account. Applicant explained he used the credit card to pay for his living expenses while unemployed. He has been making payments since 2013, albeit with some inconsistency. As of April 2016, he had reduced his debt to \$1,050. (AE 1, Tab M)

SOR ¶ 1.f – \$618 returned check. Applicant claimed he mistakenly issued a check on a closed account in June 2014. When the bank notified him about the returned check, he issued another check from another checking account (for the original amount plus the returned check fee) and sent the check to the creditor in May 2015. (AE 1, Tab F)

SOR ¶ 1.g – alleges a \$25,073 charged-off second mortgage. Applicant purchased a condominium in 2006 and financed it with a first and second mortgages. In 2011, he failed to pay the mortgages and was evicted pending foreclosure. Before the eviction, he had requested a loan modification that was approved in 2013. Applicant did not pay his second mortgage during the foreclosure-to-loan-modification period and accumulated the alleged debt.

In May 2015, Applicant entered into a temporary monthly payment agreement with the creditor. The creditor was withdrawing the monthly payments out of Applicant's bank account at the end of every month. (Tr. 59) Applicant testified that to pay his legal fees, he stopped paying the creditor in November 2015, and that he "just resumed paying again." (Tr. 80-81) From May 2015 to May 2016, he reduced his debt by about \$1,500. (AE 1, Tab G and N)

SOR ¶ 1.h – \$1,219 college tuition charges in collection. Applicant's documentary evidence shows he paid the debt in October 2015. (AE 1, Tab H)

SOR ¶ 1.i – \$1,029 credit card debt in collection. Applicant explained that while he was unemployed in 2011, he used his credit card to pay his debts and living expenses. Applicant's documentary evidence shows he paid the debt in July 2015. (AE 1, Tab I)

SOR ¶ 1.j – \$2,071 college tuition charges in collection. Applicant's documentary evidence shows that he started making payments in 2013, and the debt was paid in full in August 2015. (AE 1, Tab J)

Applicant testified his current income is \$100,000 a year, and he only works one job. In addition to his living expenses and existing debts, he owes legal expenses for his divorce and for his security clearance hearing. He depleted his savings, but has a small retirement account. Applicant believes that at the end of the month he does not have any money left over after paying his creditors. He anticipated that after paying more of his delinquent debts he will have sufficient money to live comfortably.

Applicant's mother is a Nigerian citizen who has been living with Applicant in the United States since 2014. Her application for permanent residence was approved in March 2016. (AE 1, Tab K)

Applicant has a brother and sister who are citizens and residents of Nigeria. He testified his brother is mentally handicapped and lives from the income of rental properties his father left when he passed away. His sister works for a bank, manages the rental properties, and takes care of their handicapped brother. She attempted to enter the United States in 2014, but was denied entry by immigration. Applicant testified that when his sister was getting married (2013-2014), he sent her \$3,000 over a period of six months. (Tr. 75) Applicant has a history of providing financial support to family and friends in Nigeria. (GE 2)

Applicant also has an uncle (his mother's younger sibling) who is a resident and citizen of Nigeria. His mother supported his uncle and paid for his college education. He lent Applicant money to immigrate to the United States in 2000, and purchased a car for his mother. Applicant considers his uncle to be loyal and supportive of his mother. Applicant claimed he is not close to his uncle and that they communicate only two or three times a year.

Applicant's visited Nigeria in February 2011 to attend his father's funeral. That was his only visit to Nigeria since he immigrated the United States in 2000. Applicant claimed he does not have any financial or property interests in Nigeria, and that he has no significant contact with any other relatives or friends in Nigeria. Notwithstanding, Applicant admitted that his father had two real estate properties that now belong to his succession. One of the properties is a five-apartment building – his brother lives in one and rents the other four apartments. The second property (four apartments) his father built for his relatives. Applicant claimed he has no idea of the value of these properties. Applicant has two younger brothers living in the United States. One of his brothers is a member of the U.S. Army Reserve and a pastor. The other brother works for a phone services company.

Applicant does not intend to return to live in Nigeria. His priority is his son's well-being and education in the United States. Applicant, his mother, and his two brothers living in the United States are planning to bring his two siblings residing in Nigeria to the United States.

I take administrative notice of the following pertinent facts regarding Nigeria: Nigeria, a federal republic, gained its independence from Britain in 1960. Since gaining its independence, Nigeria has faced many challenges, including terrorist activity, sectarian conflicts (including ethnic, regional, and religious violence), entrenched corruption, and widespread mistrust of the government. Nigerian security forces, particularly the police, have been accused of serious human rights abuses.

Boko Haram, a U.S.-designated Foreign Terrorist Organization, is a violent Islamist movement in northern Nigeria with ties to Al Qaeda and other terrorist organizations. It has grown increasingly active and deadly in its attacks against state

and civilian targets in recent years. In 2014, the group's abduction of almost 300 schoolgirls drew international attention. The United States has established a strategic dialogue with Nigeria to address issues of mutual concern.

In general, the security situation in Nigeria remains fluid and unpredictable. The U.S. State Department warns U.S. citizens to avoid travel to a number of Nigerian states because of the risk of kidnapping, robberies, and other armed attacks. U.S. citizens, foreign nationals, and Nigerians experienced harassment and shakedowns at checkpoints and during encounters with Nigerian law enforcement.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

Under Guideline F, the security concern is that failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (AG ¶ 18)

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.²

Applicant's history of financial problems is documented in his credit reports, statements, SOR response, and hearing record. AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

² See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

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

Applicant's documentary evidence established that he resolved eight of the ten delinquent accounts alleged in the SOR, albeit some were resolved after receipt of the SOR. He has been making payments to the creditors of SOR ¶¶ 1.e and 1.g, and has reduced his debt by \$3,000 and \$1,500, respectively.

Applicant's finances were adversely affected to some extent by circumstances beyond his control, including his separation and pending divorce, and the passing of his father and the expenses associated with his trip back to Nigeria for his funeral. He was terminated from his job and was unemployed for a period for being late to work, reporting a day late to work from his trip to Nigeria, and for insubordination. Because his termination involved misconduct, I did not consider it a circumstance beyond his control.

Additionally, Applicant became financially overextended by purchasing two real estate properties that he could not afford even after working two or three different jobs. He displayed a lack of financial responsibility in the acquisition of his properties and related debts.

Notwithstanding, Applicant resolved eight of the ten accounts alleged in the SOR, and has been making good progress paying the remaining two debts. Based on Applicant's actions addressing and paying his debts, his promise to timely pay his debts in the future, and his understanding that he has to demonstrate financial responsibility to be eligible for a clearance, I find that future delinquent debt is unlikely to recur. His past financial problems do not cast doubt on his current reliability, trustworthiness, or good judgment. I find there are clear indications that his financial problem is being resolved and is under control. His payments of some of his debts showed good faith. He has sufficient income to keep his debts in current status and to continue making progress paying his remaining delinquent debts. His efforts are sufficient to fully mitigate financial considerations security concerns.

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

[I]f 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.

The guideline indicates conditions that could raise a security concern and may be disqualifying under AG ¶ 7 in this case:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's sister, brother and uncle are citizens and residents of Nigeria. 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.³

Applicant, directly or through his mother and siblings, has frequent contacts and a close relationship of affection and obligation with his relatives living in Nigeria. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Nigerian agents or individuals operating in Nigeria may exploit the opportunity to obtain sensitive or classified information about the United States. Applicant's relatives in Nigeria create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly or through his family members in Nigeria.

The Government produced substantial evidence raising these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns including:

(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

³ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant's mother has permanent residency in the United States, and she has been living with Applicant since 2014. Thus, the Guideline B security concerns raised by her are mitigated.

Applicant was born, raised, and educated in Nigeria by his Nigerian parents and relatives. He immigrated to the United States in 2000, at age 33. He became a naturalized U.S. citizen in 2006.

Applicant has been working for government contractors from 2001 to present, except for a seven-month period in 2011 when he was unemployed. He was hired by his current employer in 2011.

Applicant testified that all of his financial and property interests are in the United States, including a condominium he purchased in 2006, bank accounts, and his retirement account. Applicant denied having any financial or property interest in any other foreign country including Nigeria, except for his share on his father's succession. He failed to provide the estimated value of his father's succession properties in Nigeria.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with family members living in Nigeria. Although there is no evidence that Nigerian government agents, or other entities, have approached or threatened Applicant or his family living in Nigeria, he is nevertheless potentially vulnerable to threats, coercion, inducement, and manipulation made against him when he visits Nigeria, or through his family members living in Nigeria.

Considering Nigeria's government, its relationship with the United States, and its ongoing pervasive terrorist activity, sectarian conflicts (including ethnic, regional, and religious violence), and entrenched corruption, Applicant is not able to fully meet his burden of showing there is "little likelihood that [his relationships with his relatives who are Nigerian citizens and residents] could create a risk for foreign influence or exploitation." AG ¶¶ 8(a) and (b) have limited applicability and do not mitigate the foreign influence concerns.

Applicant has been living in the United States for about 16 years. He became a naturalized U.S. citizen in 2006, considers himself an American and the United States his home. This is where his career and professional opportunities are. He credibly testified that his foremost concern is the well-being and education of his son. Applicant has visited Nigeria once (to attend his father's funeral) since immigrating to the United States in 2000. He believes that his contact with his relatives in Nigeria is infrequent because he does not visit them often and has infrequent communication with them. Notwithstanding, the risk of coercion, persuasion, or duress are significant because Nigeria has an extensive history of terrorist activity, sectarian conflicts (including ethnic, regional, and religious violence), and entrenched government corruption.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

I have incorporated my comments under Guidelines F and B in my whole-person analysis. I considered that Applicant has lived in Nigeria most of his life and in the United States during the last 16 years. He has worked for government contractors since 2001. Applicant considers the United States his home and he considers himself an American.

Notwithstanding, Applicant's foreign family contacts and financial and property interests in Nigeria create a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, and an unacceptable security risk. The mitigating information taken together is insufficient to fully overcome the foreign influence security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant mitigated the financial considerations security concerns. However, he has not carried his burden of persuasion concerning the foreign influence security concerns. Eligibility for access to classified information is denied.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.j:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraphs 2.b - 2.d:

Against Applicant

Conclusion

In light of all of the circumstances, 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.

JUAN J. RIVERA
Administrative Judge