



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



In the matter of:

Applicant for Security Clearance

)  
)  
)  
)  
)

ISCR Case No. 14-06257

**Appearances**

For Government: Caroline E. Heintzelman, Department Counsel  
For Applicant: *Pro se*

08/11/2016

**Decision**

DAM, Shari, Administrative Judge:

Applicant was born in Kenya and became a U.S. citizen in 2011. He holds a current Kenyan passport. He failed to present sufficient evidence to mitigate foreign preference security concerns. Eligibility for access to classified information is denied.

**History of the Case**

On April 25, 2014, Applicant submitted a security clearance application (SF-86). On May 20, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), alleging security concerns under the guideline for foreign preference. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective after September 1, 2006.

Applicant answered the SOR in writing on June 17, 2015 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on March 17, 2016. It issued a Notice of Hearing on April 18, 2016, scheduling the hearing for May 12, 2016. The hearing convened as scheduled. Department Counsel offered Government Exhibits (GE) 1, 2, and 3 into evidence, which were admitted without objection. Applicant testified. He did

not offer any exhibits. DOHA received the transcript of the hearing (Tr.) on May 23, 2016. The record remained open until May 31, 2016, to give Applicant an opportunity to submit exhibits. He did not do so.

### **Findings of Fact**

In his Answer Applicant admitted the sole allegation contained in the SOR. That admission is incorporated herein.

Applicant is 40 years old. He was born in Kenya. He attended high school and college there, but did not complete a degree. On July 3, 2001, a few days prior to leaving for the United States, Applicant married a woman, who is a citizen and resident of Kenya. He arrived in the United States on July 25, 2001. From May 2006 to July 2006, he attended a U.S. college. He became a U.S. citizen in May 2011. In October 2013 he started working for his current employer. (GE 2.)

In his April 2014 SF-86, Applicant stated that he and his wife divorced in March 2010. (GE 1.) During a June 2014 investigative interview, he told the investigator that he was divorced from his wife. (GE 2.) However, while testifying he said that he is married to her and is in the process of obtaining a Kenyan divorce.<sup>1</sup> (Tr. 15, 18-19.) He has a six-year-old child from a prior relationship with a woman, a U.S. citizen, with whom he lived after arriving in the United States. Applicant also has a daughter with his fiancée, who is a resident citizen of Kenya. That child was born in Kenya in 2014, and is a U.S. citizen. (Tr. 19, 22.)

Applicant returned to Kenya in 2006, 2008, 2011, 2013, 2014, and 2016. He has a Kenyan passport that was issued in July 2007 and is valid until July 2017. As a Kenyan citizen, he used that passport for travel there in 2006, 2008 and 2011. (Tr. 26-27; GE 2.) He used the Kenyan passport in 2013 at the point of entry into the country in order to avoid paying an entrance fee. (Tr. 28.) He visited Kenya twice in 2014, and once in 2016. (Tr. 29.) He said he used his U.S. passport for those visits. (Tr. 30.)

During the June 2014 interview, Applicant stated that he would relinquish his Kenyan passport. (GE 2.) In February 2015 a Department Counsel emailed Applicant to advise him that he could surrender the Kenyan passport to his facility security officer (FSO), or destroy it himself in the presence of the FSO. She informed Applicant that possession of a foreign passport will result in a denial of a security clearance. (GE 3.) In September 2015 a different Department Counsel emailed Applicant to follow-up on his willingness to relinquish the Kenyan passport. Again, Applicant was informed of the obstacles a foreign passport posed in securing a security clearance and the steps he should take in order to surrender it, if he desired to do so. (GE 3.) Applicant acknowledged receipt of that email, and said he subsequently took the passport to his FSO, who refused to accept it. (Tr. 32.) He did not present any evidence verifying that his FSO was unwilling to accept the passport for surrender.

---

<sup>1</sup> This discrepancy of facts raises an issue of credibility, which will not be considered in the analysis of disqualifying conditions, but may be considered in the analysis of mitigating conditions and whole-person concept.

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs list potentially disqualifying conditions and mitigating conditions, which are to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for access to classified information seeks to enter 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. Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Guideline C, Foreign Preference**

AG ¶ 9 sets forth the security concerns involving foreign preference:

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 ¶ 10 describes a condition that could raise a security concern and may be disqualifying in this case:

(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.

Applicant was born in Kenya. He came to the United States in 2001 and became a U.S. citizen in 2011. He holds a valid Kenyan passport that expires in July 2017. He used it in 2013 in order to avoid paying an entry fee into Kenya. The evidence raises the above disqualifying condition and shifts the burden to Applicant to rebut, extenuate, or mitigate the security concern.

AG ¶ 11 provides one condition that could mitigate security concerns arising under this guideline:

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant's Kenyan passport has not been destroyed or surrendered to his security authority or otherwise invalidated. The evidence does not establish mitigation under AG ¶ 11(e).

### **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 relevant circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has been a naturalized U.S. citizen since May 2011. He has a Kenyan passport that expires in 2017. He used that passport to enter Kenya in 2013 in order to avoid an entry fee. After being interviewed in 2014 about the status of his foreign passport, the Government, in February and September 2015, gave him information regarding the process for surrendering his foreign passport. To date, he has not destroyed, surrendered or otherwise invalidated the Kenyan passport. He insists that he has been unable to do so, but provided no evidence to corroborate that assertion. After listening to his testimony, including statements that he is in the process of obtaining a divorce from his wife, which contradict statements he made to an investigator and disclosed in an SF-86 in which he asserted that he was already divorced, I find that Applicant lacks credibility and the qualities of trustworthiness necessary for holding a security clearance. After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, Applicant has not mitigated the security concerns pertaining to foreign preference. Overall, the record evidence leaves doubt as to Applicant's eligibility and suitability for a security clearance.

### **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:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

---

Shari Dam  
Administrative Judge