



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



In the matter of:)
)
) ISCR Case No. 15-02310
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

06/28/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence, and Guideline C, foreign preference, but failed to mitigate them under Guideline F, financial considerations. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On September 25, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence, Guideline C, foreign preference, and Guideline F, financial considerations. 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 within the DOD on September 1, 2006.

Applicant answered the SOR on November 16, 2015, and requested a hearing before an administrative judge. The case was assigned to me on March 31, 2016. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 21, 2016. I convened the hearing as scheduled on May 10, 2016. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through G, which were admitted into evidence without objection. The record was held open until May 24, 2016, to allow Applicant to submit additional documents, which he did. They were marked AE H through L and admitted into evidence without objections.¹ DOHA received the hearing transcript (Tr.) on May 18, 2016.

Procedural Issues

Department Counsel moved to amend the SOR requesting ¶ 1.c be added to read: “Your mother is a dual citizen of Nigeria and the United States, residing in Nigeria.”

Department Counsel also moved to amend SOR ¶ 3.d to accurately conform to the evidence, adding tax years 2008, 2012, and 2013. SOR ¶ 3.d would then read “tax years 2008 through 2013.” There was no objection to the motion and it was granted.²

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.c, 2.a, 3.a, 3.e, and 3.f. He denied the allegations in SOR ¶ 1.b, 3.b, 3.c, 3.d, and 3.g. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 49 years old. He earned a bachelor’s degree in 1990. He was born in Nigeria and lived there until he immigrated to the United States in 1981. He became a naturalized citizen of the United States in 1995. He married in 1994 and divorced in 2011. He has three children, ages 21, 19 and 10. They were all born in the United States. The two older children attend college and the youngest child lives with his mother. Applicant pays \$700 monthly for child support for the youngest child and his other children attend college on scholarships. He provides them with spending money.³

Applicant holds a Nigerian passport that he renewed in 2014. In the past, he used it for convenience to travel to Nigeria. He estimated he made annual trips to Nigeria using his Nigerian passport. He last traveled there in 2014. Applicant believed that when he became a U.S. citizen it meant that he renounced his Nigerian citizenship. Applicant surrendered his valid passport to his facility security officer (FSO) for

¹ Hearing Exhibits I and II are Department Counsel Memoranda. Although there were no objections, Department Counsel commented on some of the exhibits.

² Tr. 116-119.

³ Tr. 23-26, 87-90; GE 1.

safeguarding while he is employed with the company. If Applicant requests access to the passport, the FSO will notify the DOD prior to releasing the passport.⁴

Applicant's mother is a dual citizen of Nigeria and the United States. She immigrated to the United States in 1970 and retired in about 2007. She moved back to Nigeria in about 2010 or 2011. She spends more than half the year in the United States and the remainder of the year in Nigeria. Applicant had an uncle who was a tribal king in Nigeria with whom he maintained contact. His uncle has since passed away and left Applicant a plot of undeveloped land in Nigeria. Applicant testified that when a tribal king owns land and gifts it to another it is not to be sold, but to be developed for the benefit of the community. It is not acceptable to sell a gift. Applicant estimated the land is about two acres, and he is unsure of its value. He has not yet decided what to do with the land. His mother also received land and she is using it for a school. Applicant's father is deceased and he has no other immediate family members in Nigeria. He stays with his mother when he visits Nigeria.⁵

Applicant failed to timely file his 2008 through 2013 federal and state income tax returns. Tax liens were entered against him in 2012 (SOR ¶ 3.e, \$68,011) and 2013 (SOR ¶ 1.f, \$28,347) by the federal government. Applicant testified that two years ago his federal tax debt was about \$120,000. A letter he sent to the Internal Revenue Service (IRS) in January 2016 indicated he and his wife owed \$102,000 for delinquent taxes for tax years 2008, 2009 and 2010. As of March 2016, he believes the debt is about \$97,000. He testified that his last payment was in January 2013 for \$300. It is unclear how the tax debt was reduced based on the information he provided. He did not provide corroborating documents regarding the current amount owed.⁶

When Applicant married in 1994, his wife owned house A. They built house B in 1998. They had two children and one income. They purchased three rental properties. In 2006 their debts began to increase due to unreliable tenants. They sold the rental properties before Applicant's tax problems arose. Applicant's wife used credit cards to pay expenses. Applicant wanted his wife to return to work. She did not.⁷

In 2008, Applicant decided if he withheld paying his taxes for one year he could reduce his other debts. Before 2008, he was working for an employer who withheld taxes from his pay. After 2008, he was working as a contractor and taxes were not being withheld from his pay, and he decided not to pay them as required. His reasoning was that he could use the two houses he and his wife owned to pay the taxes later because of the amount of equity they had in the houses. He was more concerned about their credit card debts. Applicant testified he told his wife they needed to downsize. She

⁴ Tr. 26-29, 91-101; GE 1; AE A, H.

⁵ Tr. 101-112, 119.

⁶ Tr. 43-45, 52-54, 69-75.

⁷ Tr. 30-35, 66-67.

refused, and he filed for divorce in 2011. He did not timely file or pay his federal and state income taxes from 2008 to 2013. He stated that he paid second mortgages and other credit card bills.⁸

Applicant testified that he and his ex-wife had an agreement to sell house B, but she changed her mind. The divorce decree awarded Applicant house A and his wife house B. Applicant stated that the houses remain in both of their names and he cannot refinance them. He stated that he contacted the IRS and the state tax office and asked them to place liens on the houses. He explained that by doing this it ensured that the IRS would receive the amount of tax owed when the properties were sold. Applicant's January 2016 letter to the IRS states that the properties are still held jointly in both Applicant and his wife's name, but they each have signed "over our respective quid pro quo claim rights to each other."⁹

Applicant testified that he filed his delinquent federal and state income tax returns. In 2011, he entered into an installment agreement with the IRS to pay \$1,600 monthly. He stated he made 15 payments from 2011 to 2016. He could not afford to make regular payments. Another agreement was entered in 2014 to pay \$1,950 a month. He has not made regular payments. His last payment to the IRS was in January 2016 for \$300. Applicant provided documents showing some installment payments to the IRS. Applicant provided copies of an IRS application for discharge of lien for house A, but it is unsigned and unexecuted. It is his intention that once he sells the property he can use the money to pay the lien and have it released. Applicant has not listed the property for sale because it needs repairs. He has ceased payments to the IRS so he can use the money for repairs. Applicant admitted he did not understand how tax liens worked. He underestimated how long it would take him to pay the IRS.¹⁰

Applicant provided one-page copies of federal and state income tax worksheets for 2008, 2009, 2010, 2011, 2012 and 2013. These worksheets included personal information for Applicant and his spouse, dependency status, whether he was going to file married filing jointly or single, and information for the dependent earned income credit. Additional pages of the worksheet were not provided. No other information was provided.¹¹

Applicant also provided letters from his accountants and tax preparers for 2011, 2012, and 2013, and an undated letter that refers to his 2013 federal and state income tax return. It appears from the July 2011 letter that the accountants prepared Applicant's 2008, 2009, and 2010 state and federal tax returns. The letter indicated that Applicant paid the fee for the tax preparation. Applicant used the same accountants for his 2011

⁸ Tr. 35-37, 56-58, 62-65.

⁹ Tr. 37-41, 76-77AE C, F, G. Applicant's letter is unsigned.

¹⁰ Tr. 46-55, 70-75; AE D, E, J, K.

¹¹ AE K.

tax returns. Their letter is dated September 2012.¹² Applicant used different accountants to prepare his 2012 federal and state tax returns. The letters are confusing as they refer to tax liabilities owed and refunds, but the total amounts indicated are not reflective of the amounts listed. The letters do not confirm whether the returns were filed electronically for Applicant or whether Applicant filed them on his own. Applicant admitted he has had a lackadaisical attitude regarding filing his income tax returns in the past because he always got a refund before 2008.¹³

The debt in SOR ¶ 1.a (\$7,783) is a credit card debt. Applicant testified he cannot afford to pay this debt until he resolves his tax debt with the IRS. It has been delinquent since 2011. He is unfamiliar with the medical debt in SOR ¶ 1.b (\$316) and he has not contacted the creditor to pay it or dispute it. He denies he owes the debt in SOR ¶ 1.c (\$159), but has not provided information regarding his actions to dispute the debt. Applicant testified that in 2014 he paid the judgment alleged in SOR ¶ 1.g (\$2,671), but did not provide corroborating documents to verify it is paid. The debts in the SOR are supported by credit reports from August 2013 and February 2015.¹⁴

Nigeria

The United States has had diplomatic relations with Nigeria since 1960, following its independence from the United Kingdom. After years of military coups and civil wars, a civilian president was inaugurated in 1999 and relations with the United States improved. Although it has had successful elections, it faces formidable challenges in consolidating democratic order, including terrorist activities, sectarian conflicts, and public mistrust of the government. Nigeria has yet to develop effective measures to address corruption, poverty, and to mitigate the violence. It is plagued with the terrorist activity of Boko Haram that continues to carry out kidnappings, killings, bombings, and attacks on civilian and military targets, resulting in thousands of deaths and injuries, and significant destruction of property. Boko Haram has pledged allegiance to the Islamic State of Iraq and the Levant (ISIL).¹⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

¹² AE L.

¹³ Tr. 56-61.

¹⁴ Tr. 78-85; GE 2, 4.

¹⁵ <http://www.state.gov/j/ct/rls/crt/2015/257514/htm#>; <http://www.state.gov/r/pa/ei/bgn/2836.htm>.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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 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 not drawn 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. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

The security concern for foreign preference is set out in AG ¶ 9:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. The following are potentially applicable 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; and

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant applied for and was issued a Nigerian passport after becoming a naturalized citizen of the United States. He repeatedly used his Nigerian passport to travel to Nigeria. He has a current Nigerian passport. The above disqualifying conditions apply.

AG ¶ 11 provides conditions that could mitigate security concerns. The following is potentially applicable:

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

Applicant believed that when he became a citizen of the United States it was a renunciation of his Nigerian citizenship. He surrendered his Nigerian passport to his FSO who will hold it, and if Applicant requests its return, the FSO will notify the DOD. The above mitigating condition applies.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them. The following conditions potentially apply:

(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

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

AG ¶¶ 7(a) and 7(e) require evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. 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.¹⁶

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.”¹⁷ Finally, we know 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 United States, 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 United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue.¹⁸

¹⁶ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

¹⁷ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **16-16 (App. Bd. Mar. 29, 2002).

¹⁸ 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 activities in area where family members resided.

Applicant's mother is a dual citizen of the United States and Nigeria and a part-time resident of Nigeria. Applicant inherited a parcel of land in Nigeria from his uncle that is to be used for the benefit of the community. I find that these factors marginally rise to the level of creating a heightened risk. The above disqualifying conditions apply.

I have analyzed all of the facts and considered all of the mitigating conditions for this security determination under AG ¶ 8. The following are potentially applicable:

(a) the nature of the relationship 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 and 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 interests in favor of the U.S. interests; and

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

Applicant's mother is a dual U.S. and Nigerian citizen. She resides part-time in Nigeria. She is retired and works with a school. Applicant visits infrequently as his mother also lives part-time in the United States. There is no evidence that she has contact with the government more than any other resident. She has strong ties to her family in the United States. It is unlikely Applicant will be placed in a position of having to choose between the interests of his mother and the United States. Applicant has lived in the United States since 1981 and has been a citizen since 1995. There is no conflict of interest because Applicant's mother is also a U.S. citizen and all of Applicant's immediate family were born in the United States and are citizens. There is sufficient evidence to conclude Applicant would be expected to resolve any conflict of interest in favor of the United States. AG ¶¶ 8(a) and 8(b) apply.

Applicant inherited a small parcel of land in Nigeria. He does not know its value, but explained that culturally he is required to use it for the benefit of the community. Applicant's family and assets are located in the United States. I find that the property interest is such that it is unlikely to result in a conflict of interest and could not be used effectively to influence, manipulate, or pressure Applicant. AG ¶ 8(f) applies.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to timely file his federal and state income tax returns from 2008 through 2013. He intentionally decided to withhold paying his taxes because he wanted to pay other debts first. He has two federal tax liens totaling \$96,358. He has other delinquent debts. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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

(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 has tax liens and other delinquent debts that are unpaid. His tax problems were the result of him deciding not to timely file or pay his federal and state taxes so he could use the money to pay other debts. His behavior casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant's decision to repeatedly not timely file or pay his federal and state taxes was within his control. His wife's overuse of credit cards was somewhat beyond his control. For the full application of AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. Applicant decided to not file and pay his taxes because he had other debts he wanted to pay, and his intention to use the equity in his houses to eventually pay the IRS is not acting responsibly. Although he has made some inconsistent payments to the IRS, his tax debts are not resolved and he has not provided proof that he has addressed any of the other debts alleged in the SOR. I find AG ¶ 20(b) marginally applies.

Applicant provided letters from accountants that apparently prepared his delinquent federal and state tax returns, but did not provide evidence that all of his delinquent state and federal returns have been filed. He has had an installment agreement with the IRS to pay his delinquent taxes, but repeatedly failed to make consistent payments. It is unknown if his installment agreement is still in effect because his last payment was in January 2016, and was for considerably less than the agreement required. There is no evidence that Applicant received financial counseling. The evidence is insufficient to conclude Applicant's financial problems are under control. He has not provided evidence of his actions to resolve or dispute the remaining debts alleged in the SOR. Applicant's inconsistent payments to the IRS cannot be construed as good-faith efforts to resolve his debts. AG ¶¶ 20(c), 20(d) and 20(e) do not apply.

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 relevant 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. I have incorporated my comments under Guidelines B, C, and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 49-year-old educated man. He mitigated the security concerns raised under the foreign preference guideline by surrendering his Nigerian passport to the FSO. The foreign influence guideline is also mitigated because of his loyalty and ties to the United States. He has not mitigated the security concerns under the financial considerations guidelines because he repeatedly failed to timely file his state and federal tax returns and has failed to pay these taxes. He has made inconsistent payments towards his tax debts and owes large tax liens. He has other delinquent debts that remain unresolved. Applicant's conduct raises serious questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the financial considerations guideline. The security concerns raised under the foreign preference and foreign influence guidelines are mitigated.

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 B:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a-3.g:	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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge