

DATE: January 30, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-12892

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Henry Lazzaro, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 35-year-old married man who at the age of 18, along with a brother, escaped Vietnam in 1985, and he was subsequently allowed to immigrate to the U.S. as a refugee. Since his arrival here in February 1987, Applicant has registered for the selective service, obtained U.S. citizenship, earned a college degree in mechanical engineering, and worked as a software engineer in the private sector. He recently married a Vietnamese woman who is now a permanent resident alien who intends to apply for U.S. citizenship. Their daughter is a native-born U.S. citizen. Although he has ties to Vietnam via travel, sending money, and family members, Applicant's commitment and ties to the U.S. are so substantial that he can be expected to resist and report any potential foreign influence or pressure. Clearance granted.

**STATEMENT OF THE CASE**

On June 20, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) On June 28, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record.

On August 8, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, on August 21, 2002, a notice of hearing was issued to the parties scheduling the hearing for September 12, 2002, at a location near Applicant's place of employment.

At the hearing, Department Counsel offered one documentary exhibit (Applicant's security-clearance application) admitted without objections; no witnesses were called. Applicant appeared, offered his own testimony and that of two witnesses, and offered 18 documentary exhibits (Exhibits A - R) admitted without objections. DOHA received the transcript on September 20, 2002.

The SOR alleges security concerns under Guideline B for foreign influence. In his Answer, Applicant admits to the

SOR allegations, and he provides explanations intended to mitigate the security concerns. In addition, he enclosed two documents with his Answer, which subsequently were marked and admitted as part of Exhibit Q.

## FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

1. Applicant is a 35-year-old married man seeking to obtain access to classified information in conjunction with his employment as a software engineer for a defense contractor. In September 2000, Applicant completed a security-clearance application (SF 86) disclosing that he was born in Saigon, Vietnam, obtained U.S. citizenship in January 1993, has immediate family members (mother, father, brother and sister) who are Vietnamese citizens residing in what is now called Ho Chi Minh City, Vietnam, with the exception of one brother who escaped Vietnam with him in 1985 and is now a U.S. citizen. He also disclosed traveling to Vietnam in 1996, 1997, 1998, 1999, and 2000, for a total of five trips.
2. Applicant testified during the hearing, and I accept his testimony as credible and true.<sup>(2)</sup>
3. In 1985, the then 18-year-old Applicant, along with his older brother, decided to leave behind their family and flee Vietnam. They escaped the country by "a little old boat."<sup>(3)</sup> The brothers were picked up by a Norwegian vessel and delivered to Japan where they lived for about 18 months. They applied for refugee status under a U.S. Government program. In May 1986 while still in Japan, Applicant made a sworn statement to the INS for his refugee application denying military service with the North Vietnamese Army or Viet Cong.<sup>(4)</sup> The brothers were sent to a refugee processing center in the Philippines for orientation and English-language study. The brothers were accepted for resettlement in the U.S. in December 1986. They arrived here in February 1987 and they initially lived with a sponsoring relative.<sup>(5)</sup>
4. The then 20-year-old Applicant quickly became a college student by enrolling in a local community college in August 1987. A few months later in November 1987, he registered with the U.S. Selective Service as required by federal law.<sup>(6)</sup> He earned an A.A. degree in May 1991 and went on to study at a local university. He completed his studies in December 1993 when he was awarded a B.A. degree in mechanical engineering; Applicant is a member of a national honorary mechanical engineering fraternity based on his academic performance.<sup>(7)</sup>
5. Since graduating from college, Applicant has worked for several private sector companies working in computer programming or software engineering or both until joining his current employer as a software engineer in August 1999. His work performance has been very good.<sup>(8)</sup> His current supervisor, who has worked with Applicant for the last two years on a project for the Army, is very pleased with Applicant's performance. The supervisor describes Applicant as "very capable, reliable, resourceful, dedicated, persistent, and trustworthy individual."<sup>(9)</sup>
6. Applicant is a homeowner, and he pays local property taxes and federal income taxes.<sup>(10)</sup> In addition, Applicant has accumulated more than \$50,000 in cash savings, which appears to be conservatively invested.<sup>(11)</sup> He's also a registered voter.<sup>(12)</sup>
7. In 1996, Applicant and his brother decided to travel to Vietnam to visit their parents and brother and sister. Subsequently, Applicant has made about five additional trips, the most recent in December 2000 to escort his wife to the U.S. Previously, during a trip to Vietnam in 1998, Applicant met his future wife. Since then, Applicant traveled to Vietnam to visit his parents and his future bride. In 1999, he traveled to Vietnam for the formal marriage engagement celebration. Since working for the defense contractor, Applicant has reported his trips to his employer.<sup>(13)</sup> When making these trips, Applicant carried a U.S. passport and has not experienced any problems or confrontations with Vietnamese officials. If asked by Vietnamese authorities to describe his occupation, he lists "worker" on the form.<sup>(14)</sup> He has not traveled to Vietnam since his wife's arrival in the U.S. on or about January 1, 2001.
8. Applicant's spouse also grew up in Saigon where her parents and siblings remain. Her U.S. immigration status is permanent resident alien since January 2002. She has a social-security account number and a state's driver's license. She gave birth to a daughter named Jennifer in April 2002, and so the child is a native-born U.S. citizen.<sup>(15)</sup> Her intent is to obtain U.S. citizenship as soon as she is eligible.
9. Applicant's parents and one brother and sister are citizens of and residents in Vietnam. Consistent with Vietnamese culture, Applicant's immediate family is a close-knit family. Applicant believes he has a duty or obligation to assist his parents who are retired, old, and in poor health. Over the years he has sent money to his parents in various amounts totaling no more than \$400 annually. In total, he has sent his parents no more than \$1,500. Applicant's top priority now is taking care of his wife and daughter.
10. Neither his nor his spouse's immediate family members are connected to Vietnamese law enforcement, military, or a national governmental

agency.<sup>(16)</sup> Likewise, his family members are not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security information. And none of Applicant's immediate family members have been approached or questioned about Applicant's employment or living situation.

11. Applicant's father served in the South Vietnamese military, but he left active duty before the South fell to the North in 1975. He received military training in the U.S. in 1962 and worked for the Army and Air Force Exchange Service (AAFES) from 1967 to 1973. After the South fell, Applicant's father was sent to a re-education camp to study socialist doctrine. He was there about three months until his release. Applicant believes his father was released relatively quickly because he was no longer on active military duty.

12. Applicant understands the potential security concern based on his ties or connections to Vietnam and he "guarantees" he would protect classified information.<sup>(17)</sup> Despite any pressure via his

immediate family members in Vietnam, Applicant pledges that he would not reveal classified information and would report any attempts to U.S. authorities or his supervisor.<sup>(18)</sup>

13. Since July 1976, Vietnam has been officially known as the Socialist Republic of Vietnam. The government is a Communist Party-dominated constitutional republic. The controlling political party is the Vietnamese Communist Party. After a 20-year hiatus of severed ties, the U.S. Government normalized diplomatic relations with Vietnam in 1995.<sup>(19)</sup>

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline B for foreign influence,<sup>(20)</sup> with its disqualifying and mitigating conditions, is most relevant here.

## **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(21)</sup> The government has

the burden of proving controverted facts.<sup>(22)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.<sup>(23)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(24)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(25)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.<sup>(26)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(27)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(28)</sup> Accordingly, under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## **CONCLUSIONS**

Under Guideline B for foreign influence, a security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

In addition to the above concerns, the foreign country at issue is Vietnam, a communist-controlled country. Of course, in every security-clearance case an applicant's ties or connections to any foreign country deserve careful examination.<sup>(29)</sup> Common sense suggests that such connections do not deserve the same level of scrutiny, however, as a foreign country whose interests are hostile or inimical to the U.S., or a foreign country with an authoritarian or totalitarian government. Accordingly, I have reviewed Applicant's ties or connections to Vietnam with additional scrutiny.

Here, based on the record as a whole, the government has established its case under Guideline B. In particular, Disqualifying Condition (DC) 1<sup>(30)</sup> applies given that Applicant has close relationships with immediate family members who are citizens of, or residents in, Vietnam, and he believes he has a duty or obligation to his parents.<sup>(31)</sup> In addition, DC 6<sup>(32)</sup> applies based on Applicant's travel to Vietnam and his sending of money to his parents. The travel and money have the potential to make Applicant vulnerable to foreign influence. Those actions, coupled with Applicant's family members in Vietnam (including the father who attended the re-education camp), raise security concerns due to the potential for foreign influence.<sup>(33)</sup> The remaining disqualifying conditions of Guideline B do not apply given the record evidence.

In mitigation, Applicant's spouse is an insignificant security concern. She immigrated to the U.S., is a permanent resident alien, intends to obtain U.S. citizenship, and her child is a native-born U.S. citizen. In addition, Applicant's spouse and immediate family members are not employed by or connected with the Vietnamese military, law enforcement, or a governmental agency. They are not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security information. Given the record evidence, I conclude Applicant's immediate family members are not agents of a foreign power, and under these circumstances, mitigating condition (MC) 1<sup>(34)</sup> applies in Applicant's favor. This is also the case for Applicant's spouse's immediate family members. The remaining mitigating conditions of Guideline B do not apply given the record evidence.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concerns. First, Applicant's commitment to the U.S. is extraordinarily high. It's difficult to fully appreciate the gravity of his decision, at the age of 18, to leave his family and escape a communist-controlled country for a possibility of becoming an American citizen. Indeed, it was a potential life-and-death decision. Second, Applicant's ties or connections to the U.S. are substantial. Since his arrival here in 1987, Applicant can fairly be described as a model immigrant. He registered with the selective service, registered to vote, graduated from college, worked, carried a U.S. passport, bought a house, and paid taxes. Moreover, his wife and daughter, professional career, and financial interests are in the U.S., and that situation is unlikely to change. These are examples of ties that bind most members of a participatory democracy such as the U.S. Accordingly, based on the record as a whole, I conclude Applicant is a self-reliant, responsible, and trustworthy individual. And it is my predictive judgment, also based on the record as a whole, that Applicant has the necessary strength of character so that he can be expected to resist and report any potential foreign influence or pressure by either coercive or non-coercive means.

To conclude, after weighing the record evidence, the foreign influence security concerns raised by Applicant's ties or connections to Vietnam are mitigated. Applicant has overcome the case against him and satisfied his ultimate burden of persuasion as to obtaining a favorable clearance decision. Guideline B is decided for Applicant.

## FORMAL FINDINGS

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph a : For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

## DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. I have given due consideration to the fact that English is Applicant's second language and some allowances have been made for potential communication problems. *See* ISCR 97-0356 (April 21, 1998) at p. 3.
  3. Exhibit K.
  4. Exhibit C.
  5. Exhibits A and L.
  6. Exhibit D at p. 2.
  7. Exhibit E.
  8. Exhibits H, N, and O.
  9. Exhibit O.
  10. Exhibit F.
  11. Exhibit F at p. 4.
  12. Exhibit G.
  13. Exhibit R.
  14. Transcript at p. 68.
  15. Exhibit P at p. 2.
16. These findings are consistent with Department Counsel's view of the record evidence that none of Applicant's Vietnamese relatives are connected with the government. Transcript at pp. 115-16.
  17. Transcript at pp. 61-64.
  18. Transcript at p. 71.
19. Although I was not asked to take administrative notice, these are matters known to the agency through its expertise in deciding security-clearance cases involving foreign influence or preference. *See* ISCR Case No. 99-0452 (March 21, 2000) at p. 4.
  20. Directive, Enclosure 2, Attachment 2.
  21. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
  22. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
  23. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
  24. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
  25. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
  26. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
  27. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
  28. *Egan*, 484 U.S. at 528, 531.
29. *See* ISCR Case No. 97-0699 (November 24, 1998) at p. 3 (Nothing in Guidelines B or C "requires that the foreign country in question have interests that are inimical to the interests of the United States.").
30. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."
31. *See* ISCR Case No. 98-0507 (May 17, 1999) at pp. 10-11 (discussing various facets of security significance of family ties in a foreign country).

32. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government."

33. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to non-coercive means of influence).

34. "A determination that the immediate family member(s), (spouse, father, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."