

DATE: June 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23747

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Han Hershman, Attorney At Law

SYNOPSIS

Applicant's foreign contacts, specifically his mother and nine siblings who are citizens of and reside in Viet Nam, and his brothers who are citizens of and reside in Australia, do not pose a security risk. Clearance is granted.

STATEMENT OF THE CASE

On January 8, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 4, 2003, and requested a hearing before a DOHA Administrative Judge. This case was transferred to the undersigned Administrative Judge on April 9, 2003. A notice of hearing was issued that same day. The hearing was rescheduled and held on May 8, 2003, at which the Government presented three exhibits. The Applicant presented no exhibits. The Applicant called four witnesses and testified on his own behalf. The official transcript was received on May 28, 2003.

FINDINGS OF FACT

The Applicant is 60 years old and married. He is employed by a defense contractor as a Test Technician, and is seeking to retain his security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence that could result in the compromise of classified information.

The Applicant was born in Viet Nam in 1943. He grew up there and became an officer in the South Vietnamese Army. At some point, he was captured by the Communist regime and became a prisoner. He eventually escaped from the Communist regime, and was granted immigration status by the United States on a humanitarian basis because he was a prisoner. In October 1991, he came to the United States. He became a United States citizen in November 1998. Since coming to the United States, he has never returned to Viet Nam, and states that he has no intention of ever returning. He does not hold a valid Vietnamese passport.

The Applicant's mother and nine siblings are citizens of and reside in Viet Nam. The Applicant's father passed away last year. The Applicant has no contact with any of his family in Viet Nam except his twin sisters that take care of his mother. He contacts them by telephone about once or twice a year during the lunar new year. Since 1991, when the Applicant came to the United States, he has only corresponded with his family by letter about five or six times.

None of the Applicant's family in Viet Nam work for the Vietnamese government. They are all laborers. Some of them own child care businesses. Several of the men served in the South Vietnamese Army. Some of his siblings have also tried to escape Viet Nam, but were captured and imprisoned.

The Applicant has another brother who is a citizen of and resides in the United States. The Applicant has contact with them by telephone about once or twice a year.

Two other brothers of the Applicant are citizens of and reside in Australia. The Applicant contacts them by telephone about once or twice a month.

The Applicant's wife, son, daughter and stepson, who are all United States citizens and reside here, testified and corroborated the Applicant's testimony concerning his casual and infrequent contact with his family members in Viet Nam.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Foreign Influence

A security risk 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: (1) not citizens of the United States or (2) 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 to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Condition that could raise a security concern:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Conditions that could mitigate security concerns:

1. A determination that the immediate family member(s), (spouse, father, mother, 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 the loyalty of the person(s) involved and the United States.
3. Contacts and correspondence with foreign citizens are casual and infrequent.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . 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."

The Government must make out a case under Guideline B (foreign influence) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who has foreign connections may be prone to provide information or make decisions that are harmful to the interests of the United States. Foreign influence can raise questions as to whether the Applicant can be counted upon

to place the interests of the United States paramount to that of another nation. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's foreign contacts have a direct and negative impact on his suitability for access to classified information.

With respect to Guideline B, the evidence establishes that the Applicant's foreign ties do not subject him to foreign influence. The Applicant left Viet Nam in 1991, and came to the United States because he hated the Communist regime. Since then, he has had very little contact with his family in Viet Nam. Mitigating condition 3, "contact and correspondence with foreign citizens are casual and infrequent" clearly applies in this case. The Applicant's mother and nine siblings who are citizens of, and reside in Viet Nam, are also against the Communist regime, and would also like to come to the United States if they could. None of his family are associated with the Vietnamese Communist government in any way, nor are they in a position to be exploited that could force the Applicant to choose between loyalty to them and loyalty to the United States. Mitigating condition 1, "a determination that the immediate family members 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 and the United States", also applies in this case. Based on the foregoing, Guideline B is found for the Applicant.

Considering all the evidence, the Applicant has met the mitigating conditions of Guideline B of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline B.

FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

DECISION

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

Darlene Lokey Anderson

Administrative Judge