

DATE: April 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00926

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq. Department Counsel

FOR APPLICANT

Nina J. Ginsberg, Esq.

SYNOPSIS

Applicant is a naturalized US citizen who escaped Vietnam's communist oppression, leaving behind impoverished family members who relied upon his financial assistance to meet basic needs, then to build a stable life. Despite these close family ties, Applicant presents convincing evidence he is not subject to coercion or duress that might result in a compromise of classified information. Clearance is granted.

STATEMENT OF THE CASE

On July 10, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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 Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

The Applicant responded to the SOR in a written answer dated July 26, 2002, in which he requested a hearing. The case was assigned to me on October 24, 2002. On November 5, 2002, a Notice of Hearing was issued scheduling the hearing on December 12, 2002. At the hearing the Government submitted two documentary exhibits (Gov. Exs.1-2). Applicant presented testimony from himself and three witnesses, and he submitted five documentary exhibits (App. Exs. A-E). The transcript was received by DOHA on December 20, 2002.

FINDINGS OF FACT

Paragraph 1 (Guideline B - Foreign Influence). Applicant is 44 years old and married, and he is employed by a defense contractor as a computer specialist. He was born in former South Vietnam, and in 1978 he came to the US as an escaped refugee. In 1985 he became a naturalized US citizen, and he later married. His Vietnamese-born wife is also a naturalized US citizen. At the hearing, Applicant's testimony was convincing, forthright, and worthy of belief, and his

two character witnesses also provided credible testimony.

Applicant fled from Vietnam at the age of 20, after his country was taken over by a communist regime. Applicant's father was an upper middle class farmer who owned property and had a formal education.⁽¹⁾ The father was a prominent member of the community and a leader in his Buddhist temple's congregation. One of Applicant's brothers was a South Vietnamese military officer killed in the war.⁽²⁾ Due to these circumstances, Applicant's family was marked for harsh treatment by the new regime. All their property was confiscated, the father was periodically imprisoned, and the family became destitute.

As communist oppression worsened, Applicant made a decision to escape to the west in order to pursue a life of freedom and opportunity. This was a most serious decision because detection by the regime would place Applicant and his family at risk of reprisal, possibly execution.⁽³⁾ To protect his family, Applicant did not tell them of his escape plans. He joined a group of 40 refugees who fled by boat and reached a safe haven in Malaysia. Applicant was later sponsored by a religious organization for immigration to America.

Applicant has a sister in the US who is also a naturalized citizen, married to a former South Vietnam military officer. However, Applicant left in Vietnam his mother, father, three brothers and four other sisters. Not wanting to jeopardize their safety he had no personal contact with them for many years after he escaped. Applicant sometimes sent aid parcels but deliberately omitted a return address or any identification that would reveal his US residence.⁽⁴⁾ (He never knew whether the parcels arrived.)

Applicant concedes communist authorities once asked his father to provide information about him, and Applicant also believes they can eavesdrop on the family telephone. For this reason, Applicant is circumspect in contacts with his family, and he has told them no details of his US employment.

In 1993, US-Vietnam relations were stabilized, and pressures on Vietnamese citizens with American relatives were decreased. During the last ten years, Applicant has felt secure enough to openly communicate with his family and to provide monetary relief. He believes current authorities now value the contributions made by Vietnamese expatriates, and his visits are not subject to official interference or inquiries.

As discussed further below, Applicant and his wife slowly established a secure financial position in the US through hard work and sacrifice. By 1993, Applicant was able to give some of his saved funds to his family in Vietnam. Guided by his cultural and religious heritage, Applicant was a generous and dutiful family member, regarding it as an honor. Between 1994 and 1999, he sent to his family approximately \$4,000 per year, all earmarked for various purposes. Applicant's priority was to provide funds for "food to eat, a place to live, clothes to wear and education."⁽⁵⁾ Applicant testified this assistance was in keeping with his cultural and spiritual beliefs. "What I did was a duty [as] a member of the family. That is a very basic and honest thing to do."⁽⁶⁾

Applicant also provided money for his family to obtain costly telephone service. After reliable communications were established, Applicant visited Vietnam in 1993, and he returned in 1994 when his father died.⁽⁷⁾ He made a third visit in 1999. Applicant furnished funds for his father's medical costs and later for his funeral and tomb. His sister lived in hovel-type housing, and Applicant provided money for a new home.

He sent funds to help his brothers develop small businesses, and he assisted with his mother's medical bills. He also made charitable contributions to local schools to provide poor students with pencils and papers. By 1999, his family was financially stable, but he continues to send them about \$500 per year.⁽⁸⁾

Applicant and his wife have a high-school age son, born in the US. Applicant learned sufficient English to gain productive employment, and he owns fully-paid residential and rental properties, acreage, and three automobiles. He is a member of a national political party, and he is very aware of his responsibilities as a US citizen. When asked if he is prepared to choose between the protection of his family in Vietnam and the protection of US classified information, Applicant was not hesitant in declaring "If my mom had to die or my brother or sister, I'm sorry I can not protect them."⁽⁹⁾ Applicant's testimony was credible and convincing on this issue.

Applicant's character witnesses confirm he is an honest and responsible citizen with a strong belief in the values of democracy. His first-level supervisor, a retired military officer, attests that Applicant is "very much a citizen in this country, and he acts that way."⁽¹⁰⁾ His contract supervisor, a federal employee, says about Applicant "He has my trust." When asked if Applicant is a loyal US citizen, the federal supervisor answered "There's no question."⁽¹¹⁾

POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions, hereafter DC) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions, hereafter MC).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline B - Foreign Influence. *The concern:* 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 not citizens of the United States 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 to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Disqualifying Conditions applicable:

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

Mitigating Conditions applicable:

(None have application.)

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard it twenty-four hours a day. The Government is appropriately concerned where reliable information indicates an Applicant for clearance may have relations, connections or attachments with non-US citizens under circumstances that could lead to a security vulnerability on the applicant's part.

Concerning burden of proof, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "Any doubt as to whether access to classified information is

clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Paragraph 1 (Foreign Influence) To summarize the facts, Applicant is a Vietnam-born US citizen who decided at age 20 to escape communist oppression. He successfully avoided capture, and he ultimately entered the US as a refugee. Subsequently, he attended school, developed employment skills, obtained naturalization, and married a Vietnam citizen who is also naturalized. The couple worked hard to establish themselves financially in America, and they succeeded. Using his disposable income, Applicant contributed generously to his impoverished family members remaining in Vietnam until they became self-sufficient. Applicant's dedication to principles of democracy and American values is clear and unequivocal.

The SOR alleges Applicant is strongly devoted to his family members in Vietnam, and the Government meets its burden of proof in this regard. Applicant maintains frequent contact with his family, and he has provided substantial monetary support for their benefit since 1993. It is logical to conclude Applicant's attachment and loyalty to his family might place him at risk for duress or coercion, thus providing a valid concern as to his ability to safeguard classified information. DC1 and DC6 therefore have application.

Department Counsel relies on three Appeal Board decisions involving security concerns where foreign ties or attachments are present. ⁽¹²⁾ These are cases where the Applicants' attachments to foreign countries are evidenced by possession of foreign passports and holding dual citizenship. Circumstances will vary, but as the Appeal Board makes clear "Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties." ⁽¹³⁾ Therefore, the general rules of security adjudication may be applied in this case, despite the absence of specific itigating Conditions (MC).

It is clear that Applicant's devotion to his family gives rise to a close attachment arising out strong cultural, spiritual, and family traditions. Applicant regards himself as replacement for his deceased father, and in this role he has taken special care to lift his family from poverty wilfully imposed by communist rulers. Such a close devotion might make Applicant a target for duress or coercion should the present regime force Applicant to choose between the safety of his family and US security interests. The burden of proving his dedication to US security interests is therefore placed upon Applicant, and, as stated above, it is a heavy burden.

Applicant escaped Vietnam at the risk of his life and the lives of his family members as well.

While he is doubtless a loyal son, he has once before chosen freedom over the prospect of harsh treatment for his family. As to his present dedication to US values, goals, and interests, Applicant has taken firm steps to declare his devotion to this nation. Applicant is a good citizen devoted to the principles of American democracy and political freedom.

Evidence of Applicant's belief in the US democratic and capitalist system is seen in his personal hard work to become independent of initial government subsidies. Applicant gained an education, learned computer skills, worked diligently for various employers, and he and his wife have accumulated substantial assets through sacrifice and hard work. Applicant is politically aware, and he takes part in the selection of US leaders.

Independent evidence of Applicant's dedication to US values is provided by reliable character witnesses who know him well. His two supervisors, both with long records of federal employment and military service, attest that Applicant is not only a productive employee but a trusted citizen as well. Each supervisor gave persuasive testimony at the hearing, and they were forthright in their assessment of Applicant's honesty and personal reliability, aware that Applicant has a family in Vietnam and has taken steps to help them.

Applicant has demonstrated a strong sense of personal ethics and a clear understanding of his security responsibilities that supports a conclusion he would report and resist any attempts at pressure by foreign authorities. However, the most persuasive evidence of Applicant's loyalty to America was presented through his personal testimony. Applicant makes clear he would accept the deaths of his family members at the hands of foreign agents, if necessary, before he would betray US defense secrets.

With respect to the "whole person concept" I have considered all the evidence, to include Applicant's dedication to American values, his strong personal ethics, and his deep appreciation for the democratic way of life. I have further considered sacrifices he made to live in freedom and to become an independent and productive citizen. Judging by the entirety of the evidence, Applicant brings himself favorably within the factors of the whole person concept.

On balance, it is concluded the Government has met its burden of proving facts necessary to support allegations under Paragraph 1 of the SOR. For his part, the Applicant has met his burden of overcoming the Government's case with persuasive evidence in mitigation.

FORMAL FINDINGS

Formal findings For or Against the 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. Foreign Influence: For the Applicant.

Subparas. 1.a.-1.b.: 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge

1. Tr. 71.
2. Tr. 42; 94.
3. Tr. 58-59.
4. Tr. 81.
5. Tr. 52.
6. *Id.*
7. "I replaced my father." (Tr. 70.)
8. Tr. 53-55; 79-80.
9. Tr. 60-61.
10. Tr. 27.
11. Tr. 37-38.
12. Appeal Board Case Nos. 98-0507, May 17, 1999 (dual citizenship); 99-0511, December 19, 2000 (dual citizenship); and 99-0295, October 20, 2000 (foreign passport).
13. Appeal Board Case No. 98-0507, May 17, 1999, at p. 8.