

DATE: July 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02181

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The security concerns raised by a 36-year old Vietnam-born naturalized American Applicant whose parents and siblings remain citizens and residents of Vietnam, none of whom are agents of Vietnam or in a position to be exploited by that government, and whose wife, children, and in-laws are all U.S. citizens residing in the U.S., have been mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On February 28, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated March 17, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to another Administrative Judge on April 14, 2003, but, due to caseload considerations, was reassigned to, and received by, this Administrative Judge on May 8, 2003. A notice of hearing was issued on May 8, 2003, and the hearing was held before me on May 29, 2003. During the course of the hearing, one Government exhibit, two Applicant exhibits, a joint stipulation pertaining to the contents and significance of two documents and one photograph, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on June 9, 2003.

RULINGS ON PROCEDURE

During the proceeding, under Rule 201(b)(2), Federal Rules of Evidence, Department Counsel requested that Official

Notice be taken of certain adjudicative facts as set forth in a document furnished for consideration. There being no objection interposed by Applicant, Official Notice was taken of the U.S. Department of State, Bureau of Consular Affairs, Consular Information Sheet on Vietnam, dated May 23, 2003, consisting of 12 pages.

FINDINGS OF FACT

Applicant has admitted all but one of the factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. through 1.d., and 1.f.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 36-year-old employee of a defense contractor seeking to obtain a security clearance.

Applicant was born in 1967 in what was then the Republic of Vietnam (RVN).⁽¹⁾ He resided with his parents and siblings and attended school in RVN and the successor Socialist Republic of Vietnam (SRVN) until about 1978, when at the age of 11, his parents sent him to the United States to seek "a better life" and "have a better future."⁽²⁾ He departed SRVN by boat and was initially sent to a refugee camp in Thailand where he remained for about one year.⁽³⁾ At the age of 12, Applicant was sent to the U.S. under the sponsorship of an individual affiliated with church sponsorship organization. He initially resided in the U.S. with his sponsor's family for a year, and then moved in seriatim with two other foster families.

When he was 18-years-old, Applicant became independent and, while residing with friends, attended the state university for about one year.⁽⁴⁾ He worked as a test technician for about three years, relocated to another state and attended a junior college for a year, and returned to full-time student status at another university from August 1998 to May 2000, when he earned and received a B.S. degree in Computer Science.⁽⁵⁾ He has been employed as an associate software engineer by a government contractor since May 2000.⁽⁶⁾

Applicant renounced his Vietnamese citizenship when he became a naturalized citizen of the United States in October 1995.⁽⁷⁾ Applicant is not a dual citizen and considers himself to be a citizen of only the U.S.⁽⁸⁾ The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

In March 1997, Applicant married a woman who was born in RVN and became a naturalized citizen of the U.S. in 1993.⁽⁹⁾ They have two children, both of whom were born in the U.S. Applicant's parents are citizens of, and reside in, SRVN. They are both in their 60s. His father is a retired Captain in the RVN Army who, upon the Communist takeover, was sent to a re-education camp and eventually released to return home.⁽¹⁰⁾ Applicant's parents own an export-import business which they run with the assistance of his two sisters and their respective husbands.⁽¹¹⁾ A brother, who had resided in New Zealand, returned to SRVN to attend college.⁽¹²⁾ No member of his immediate family (parents, sisters, and brother) is an employee of any governmental agency or department or affiliated with any intelligence organization or with the Communist Party.⁽¹³⁾ Applicant's parents-in-law were both born in RVN and both became naturalized citizens of the U.S. in 2001.⁽¹⁴⁾

Applicant's contact with his immediate family overseas has varied, but is generally infrequent, because he no longer feels very close to them, having been geographically separated from them for about 26 years.⁽¹⁵⁾ Initially there was no communication and then it was solely by letter one time per year. Eventually, with the improvement in communication technology, he has been able to use the telephone every six months and e-mail every four to six months.⁽¹⁶⁾ He has no contact with any of his former school friends.⁽¹⁷⁾

Since Applicant arrived in the U.S. as a refugee, he has returned to SRVN on three occasions. Two of those trips occurred in 1990 (for three weeks) and 1994 (for six months), respectively, before he became a U.S. citizen.⁽¹⁸⁾ The third, and most recent, trip occurred in June 1997, shortly after he was married, when he and his new bride returned to

SRVN for a one-month honeymoon and traditional ceremony before his family and about 200 guests.⁽¹⁹⁾ His parents have visited his home in the U.S., separately, in 2000 (his father) and 2002 (his mother).⁽²⁰⁾

Applicant does not have any foreign investments or financial interests in SRVN,⁽²¹⁾ and does not anticipate receiving any inheritance.⁽²²⁾ He does not send money or presents to his parents.⁽²³⁾

The government of RVN collapsed in 1975, coinciding with the establishment of the Communist SRVN. Full diplomatic relations were established between the U.S. and SRVN in 1995, and, in 2001, a bilateral trade agreement between the two countries finally commenced. Under that agreement, *temporary*--later modified to *conditional*--normal trade relations (formerly known as most-favored nation status) were extended by the U.S. SRVN has also given the U.S. modest support in the war against terrorism. While SRVN has a Communist totalitarian government, the Department Counsel has offered no evidence to indicate SRVN conducts intelligence operations or economic espionage against the United States.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

GUIDELINE B - 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽²⁴⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. 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 that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an 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.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline B, the government has established its case. Applicant has been portrayed as a person who is a potential security risk because members of his immediate family or persons to whom he is bound by affection, influence, or obligation--in this instance, his parents, two sisters, and one brother are citizens and residents of SRVN--are either not citizens or residents of the United States or may be subject to duress. These situations raise the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B: [\(25\)](#)

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. 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. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

The citizenship status of Applicant's parents, sisters, and brother, when considered in light of the nature of the government in SRVN--a Communist totalitarian country that is no longer involved in open military hostilities with the United States, and whose interests are not necessarily inimical to the United States, and currently is engaged in normal trade relations with the U.S.--facilitates an analysis involving the adjudicative guidelines and the various applicable conditions set forth therein. Applicant's wife, two children, and his wife's parents are already either native-born or naturalized U.S. citizens, and only the continuing SRVN citizenship and residency of his parents, two sisters, and brother raise the issue of potential foreign influence. In this regard, see Foreign Influence Disqualifying Condition (DC) E2.A2.1.2.1. (*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*).

However, also applicable, in this instance, is Foreign Influence Mitigating Condition (MC) E2.A2.1.3.1. (*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 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). After an examination of the evidence, I determine that Applicant's parents and siblings, considering their citizenship and residency status, do not constitute an unacceptable security risk. Furthermore, their continuing, but apparently distant, personal relationship has no security significance. During the early years of the Communist take-over of all of Vietnam, Applicant's parents sent him off at an early age to seek the benefits of a better life in the U.S., and the hardships they had to endure, both psychologically and physically, while remaining behind in SRVN, should not now be viewed in negative terms. Additionally, because Applicant's father served honorably alongside U.S. military forces during the Vietnam War, he was later forced to undergo postwar re-education. The family is not Communist, and with the rapidly improving relations between the two countries, there is no indication they are targets of any intelligence gathering. Also, Applicant's wife, children, and in-laws are all U.S. citizens residing in the U.S. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline B. Accordingly, allegation 1.a. through 1.f. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

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 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

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application (SF 86), dated June 12, 2001), at 1.
2. Tr. at 27.
3. *Id.*, at 27-29.
4. *Id.*, at 32.
5. Government Exhibit 1, *supra* note 1, at 2.

6. Applicant Exhibit A (Employer letter, dated August 8, 2001), at 3.
7. Government Exhibit 1, *supra* note 1, at 1.
8. Tr., at 39.
9. Government Exhibit 1, *supra* note 1, at 4, 6.
10. Tr. at 44-45.
11. *Id.*, at 45-47.
12. *Id.*, at 47.
13. *Id.*, at 45.
14. Stipulation discussed in Tr. at 21-23.
15. Tr., at 53.
16. *Id.*, at 35.
17. *Id.*, at 32.
18. *Id.*, at 39-40.
19. *Id.*, at 40-41.
20. *See* Applicant Exhibit A (Visa Package), *supra* note 6, and Applicant Exhibit B (Visa Package); *Id.*, at 51.
21. Tr. at 46.
22. *Id.*, at 52.
23. *Id.*, at 51.
24. *See* Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see* Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see* Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).
25. *See* ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.