

DATE: February 6, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02944

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Robert Gregory, Esquire

SYNOPSIS

This 41-year-old technician was born in South Vietnam in 1961, moved to the U.S. in 1980, and became a U.S. citizen in 1986. He was arrested in 1992 for Possession of Drugs, but the charges were dismissed because of a lack of evidence tying Applicant to the drugs. He was issued a misdemeanor citation in 1996 for operating a business without a proper permit, but the matter was subsequently dismissed by the court. He had three delinquent debts, but these have either been paid off or brought to a current status. All of the relatives in Vietnam cited in the SOR have now moved to the U.S. and have become citizens or applied for citizenship. The omission from his security clearance application of any mention of the 1992 and 1996 criminal matters was not done with any intent to deceive. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On February 14, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

In an undated but timely response to the allegations set forth in the SOR, Applicant elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on August 7, 2003. On September 28, 2003, a Notice of Hearing was issued, setting the hearing for September 25, 2003. Prior to the hearing, Applicant retained counsel, who asked for a continuance. Good cause being shown, the matter was rescheduled. A

second Notice of Hearing was issued on September 30, 2003, setting the matter for October 17, 2003, on which date the hearing was conducted. At the hearing, the Government did not present any witnesses but offered 15 exhibits, Government Exhibits (GX) 1 - 15. Applicant testified and offered 12 exhibits, which were marked as Applicant's Exhibits (AX) A - L. All exhibits were admitted into evidence. The transcript (Tr) was received at DOHA on October 28, 2003.

FINDINGS OF FACT

The SOR contains two allegations, 1.a. and 1.b. under Guideline J (Criminal Conduct); two allegations, 2.a. and 2.b., under Guideline F (Financial Considerations); three allegations, 3.a. - 3.c., under Guideline B (Foreign Influence); and three allegations, 4.a. - 4.c., under Guideline E (Personal Conduct). In his response to the SOR, Applicant admitted allegations 1.a., 1.b., 2.a., 2.b., and 3.a., with explanations. He specifically denied 2.c., 3.b., and 3.c. He did not specifically admit or deny the three allegations under Guideline E, but he did explain the alleged omissions. His admissions are accepted and deemed findings of fact.

After considering the totality of the evidence derived from the hearing testimony and all evidence of record, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on October 15, 1992, for Possession of Narcotics/Controlled Substance. The police report on which the allegation is based establishes the presence of the drug in a location in a house in which \$10,700 in currency also was found. Other individuals in the house also had access to the location. Applicant admitted that \$6,000 of the money was his, but he denied any knowledge of the drugs. The case was dismissed for lack of evidence tying Applicant to the drugs. (GX 1, GX 5, GX 6, GX 7, Applicant's Response to SOR, Tr at 29-32, 48-52).

1.b. - Applicant was given a Notice to Appear on May 6, 1996, for Business Activity without Registration and Outdoor Storage Operation. (GX 2 at page 6). A bench warrant was issued on August 26, 1996, in the amount of \$250. This matter involves a misdemeanor complaint alleging (1) that Applicant caused a building to be occupied without a certificate of occupancy and; (2) that he failed to conduct a business *within* the building, apparently operating *outside* the building, which violated a city code. (GX 2 and Tr at 35-38). Applicant was never arrested. After learning from the Defense Security Service agent about the warrant, Applicant returned to court on October 9, 2001. The warrant was recalled and the matter dismissed by the court. (AX M).

Guideline F Financial Considerations)

2.a. - As of February 3, 2003, Applicant was indebted to Bank A in the approximate amount of \$4,739. (GX 4, GX 9, GX 10, GX 11, GX12, and GX 13). However, this debt has been paid off, as of August 28, 2003 (AX A).

2.b. -As of February 20, 2000, Applicant was indebted to Loan Agency B in the approximate amount of \$12,601. As of June 21, 2003, the account owed had risen to \$30,537. Applicant began making payments of \$133.50 per month. The billing statement treats the account as current, with no amount past due and no late charges due. (AX C and AX I)

2.c. - Applicant was indebted to Electric Company C in the approximate amount of \$67.00.

However, this debt has been resolved. The creditor informed Applicant that the debt had been paid, and the creditor informed the credit reporting bureaus to remove the charge from the Applicant's credit report. (Applicant's Response to the SOR and AX B, dated April 24, 2003).

Guideline B (Foreign Influence)

3.a. - Applicant's sister X was a citizen of Vietnam, but became a naturalized U.S. citizen on June 20, 2003. She resides in the United States. (AX J). A second sister, Y, entered the U.S. as a legal resident in 1997, and became a naturalized citizen on May 24, 2001. (AX E)

3.b. - Applicant's mother entered the United States in 1993, as a citizen of Vietnam, was granted legal resident status, and became a naturalized citizen on December 14, 2000. (AX K).

3.b. - Applicant's parents-in-law were citizens of and residents in Vietnam, but both moved to the United States in 2002. (Tr at 62).

Applicant's now deceased father was an officer in the South Vietnamese Army prior to the Communist takeover, and worked in close cooperation with U.S. forces in that country. (GX 8).

Guideline E (Personal Conduct)

Applicant omitted material information from his September 2, 1999 Questionnaire for National Security Positions (SF 86) when he answered "No" to Questions:

4.a. - **21. Your Police Record - Felony Offenses**, when he failed to disclose the 1992 arrest cite in SOR 1.a., above. However, the omission was not deliberate.

4.b. - **24. Your Police Record - Alcohol/Drug Offenses**, when he failed to disclose the 1992 arrest alleged in SOR 1.a. However, the omission was not deliberate.

4.c. - **26 - Your Police Record - Other Offenses**, when he failed to disclose the offense cited in SOR 1.b. However, the omission was not deliberate.

Applicant is a hard-working, dedicated, honest, and trustworthy, as stated by numerous coworkers and friends. (AX F, AX G, and AX I)

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

Guideline J (Criminal Conduct)

The Concern: A history of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying:

1. any criminal conduct, regardless of whether the person was formally charged.
2. a serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

1. the criminal behavior was not recent.
2. the crime was an isolated incident.
4. the factors leading to the violation are not likely to recur.
5. there is clear evidence of rehabilitation.

Guideline F (Financial Considerations)

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying:

1. a history of not meeting financial obligations.
3. inability or unwillingness to satisfy debts.

Conditions that mitigate security concerns include:

3. the conditions that resulted in the behavior [delinquent debts] were largely beyond the person's control.
6. the individual initiated a good-faith effort to repay overdue creditor or otherwise resolve debts.

Guideline B (Foreign Influence)

The Concern: A security risk may exist when members of an individual's immediate family (1) are not citizens of the United States or (2) may be subject to duress.

Conditions that could raise a security concern and may be disqualifying:

1. an immediate family member . . . is a citizen of, or resident, in a foreign county.

Conditions that could mitigate a security concern include:

1. a determination that the immediate family member(s) would not constitute an unacceptable security risk.

Guideline E (Personal Conduct)

The Concern: Conduct involving questionable judgment, unreliability, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying:

None established by the record.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Criminal Conduct - The 1992 criminal matter arose when police, tracing a drug shipment, saw it delivered to a house in which Applicant lived. Applicant was not yet home when the police found the drugs, along with more than \$10,000 in a safe in a room to which other persons had access. Applicant was arrested when he returned to the house. He admitted that \$6,000 of the money was his but denied any knowledge of the remaining \$4,000 or the drugs. Charges were dismissed by the court because of a lack of evidence tying the drugs to Applicant. His wife was convicted and served some jail time. There is no other mention of drugs in the case file. The totality of the record does not establish that Applicant was aware of the presence of the drugs or that he had any legal culpability for the presence of the drugs in the house. I find for Applicant as to SOR 1.a.

The 1996 matter involves Applicant's operating a business without a city permit and then doing business outside the building rather than inside it. He was not arrested but was given a Notice to Appear in court. He did not appear, and a bench warrant was issued for \$250. No more was heard about this matter until 2001, when an agent of the Defense Security Service mentioned the outstanding warrant to Applicant. Applicant thereupon went to court, spoke to a judge, the bench warrant was withdrawn, and the case was dismissed.

Disqualifying Condition (DC) 1 applies to the degree that Applicant's 1996 violation of a city business code was a misdemeanor offense, but it is far outweighed by Mitigating Conditions (MC) 1 (not recent); 2 (an isolated incident); 4 (the factors leading to the violation are not likely to recur); and 5 (clear evidence of successful rehabilitation).

Based on the totality of the record, including the unusual nature of the violations, the lack of any arrest, the manner in which the matter was handled, and what I perceived at the hearing as Applicant's limited understanding of the American judicial system, I find it plausible that he did not think of the 1996 incident as a criminal matter that had to be reported on his 1999 SF 86. I find for Applicant as to SOR 1.b.

Financial Considerations - All three debts cited in paragraph 2 have been paid off or made current. (Tr at 38-41). Since there are no delinquent debts at present, the risk involving "excessive debt no longer exists. I also find that neither the way in which the debts were incurred (mostly student loans) nor the way in which Applicant eventually resolved them indicates questionable judgment to the degree that there is a current security concern.

DC 1 (a [short] history of not meeting financial obligations) is applicable, but that is outweighed by MC 6 (the paying off and/or bring current all three of the cited debts). Based on the totality of the record, I find for Applicant as to SOR 2.a, 2.b., and 2.c.

Foreign Influence - All of the individuals cited in paragraph 3 currently reside in the U.S. and are now citizens of the U.S. or in the process of becoming citizens. (Tr at 41-47). Applicant has strong feelings in favor of the United States and has no personal, financial, or other ties to Vietnam. Under these circumstances, I do not believe that DC 1 is applicable. If it is arguably applicable as to his parents-in-law, now in the United States, MC 1 is also applicable. I find, in context, that they do not create an unacceptable risk that Applicant might be forced to choose between them and the U.S. I find for Applicant as to SOR 3.a., 3.b., and 3.c.

Personal Conduct - These three allegations relate to the omission of any mention of the three allegations in paragraph 4. Since Applicant reasonably did not think, believe, or understand that the 1992 and 1996 matters were required to be reported on his 1999 SF 86, he did not omit them deliberately, with any intent to deceive. (Tr at 32-37). In the absence of any deliberate omissions, neither DC 2 nor any other disqualifying conditions are applicable. I find for Applicant as to SOR 4.a., 4.b., and 4.c.

Overall, I conclude that Applicant has shown himself to be a man of integrity and one who takes his obligations

seriously. Considering the evidence as a whole, I conclude that the evidence does not show that any risk exists that Applicant would ever act against U.S. security interests.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) For the Applicant

Subparagraphs 1.a.-1.b. For the Applicant

Guideline F (Financial Considerations) For the Applicant

Subparagraph 1.a.-1.c. For the Applicant

Guideline B (Foreign Influence) For the Applicant

Subparagraph 1.a.-1.c. For the Applicant

Guideline E (Personal Conduct) For the Applicant

Subparagraph 1.a.-1.c. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE