

DATE: June 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03364

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Alan J. Sherwood, Esquire

Phuc Dinh Do, Esquire

SYNOPSIS

The Applicant and his wife are naturalized American citizens. He has been in the United States for 20 years. He and his wife have relatives who are Vietnamese citizens and either live in Vietnam, or the United States. Contact with those relatives who still live in Vietnam is infrequent, and he has persuasively shown that his relatives do not work for the Vietnamese government. The Applicant has also shown that he is not subject to coercion because of his foreign connections. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On December 20, 2002, 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 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 January 15, 2003, and requested a hearing. The case was received by the undersigned on February 11, 2003, and a Notice of Hearing was issued on March 3, 2003.

A hearing was held on March 25, 2003, at which the Government presented two documentary exhibits. Testimony was taken from the Applicant, who called two additional witnesses. The transcript was received on April 15, 2003.

FINDINGS OF FACT

The Applicant is 36, married and a high school graduate. He is employed by a defense contractor as an electronic

technician, and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the 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. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has immediate family members who are not citizens of the United States, or may be subject to duress.

The Applicant was born in Vietnam. He became an American citizen in 2000. His wife is also an American citizen. His mother is not an American citizen, but lives in the United States. He has five brothers and six sisters. Four of his brothers live in the United States, three of them being American citizens. Three of his sisters live in the United States, one of them being an American citizen.

In 1982 the Applicant escaped from Vietnam along with two of his brothers. (Transcript at 20-21.) He moved to the United States in 1983. After reaching the United States he went to high school, married an American citizen, and went to work for his current employer in 2000.

The Applicant's wife's mother and father still resides in Vietnam. Presently they are retired, but in 2001, "They are in the clothing dye business, are not wealthy and not associated with the Communist Party." (Government Exhibit 2 at 1.) The father was in the South Vietnamese Army during the Vietnam War.

The Applicant's brother who remains in Vietnam currently works as a small business owner. (Transcript at 23-24.) Two of his sisters who live in Vietnam are widows. One sells cigarettes and the other works as a babysitter. (Transcript at 30-33.) The third sister is married and she and her husband repair bicycles. (Transcript at 32.) None of his relatives who live in Vietnam are members of the Communist Party or connected with the Vietnamese government. The Applicant has no financial interests in Vietnam.

The Applicant and his wife have visited Vietnam twice, in 1997 and 2002. The Applicant credibly testifies that he was not questioned by the Vietnamese government and that his relatives, both in Vietnam and the United States, exhibit no undue interest in what he does for a living. (Transcript at 25-27.)

The Applicant calls his older sister in Vietnam once a year on lunar new year, she transmits his news to his other siblings who still reside there. (Transcript at 28, 36.) "I send used clothes to my sisters occasionally, and at Christmas and New Years, I send small gifts to family members in Vietnam altogether adding up to about \$400 to \$500 for all of them put together." (Government Exhibit 2 at 2. *See, also*, Transcript at 36.)

As stated earlier, the Applicant has several siblings who live in the United States, but are not citizens. All of them intend on applying for American citizenship as soon as they are able to do so. The Applicant's mother has applied for citizenship, and is waiting to take her citizenship examination.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. 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:

Guideline B (Foreign influence)

Condition that could raise a security concern:

(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.

Conditions that could mitigate security concerns include:

(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 loyalty to the person(s) involved and the United States;

(3) Contact and correspondence with foreign citizens are casual and infrequent;

(5) Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

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 factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- 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 guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have foreign connections that demonstrates untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a 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."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant and his wife have immediate family members who are not American citizens and either live in Vietnam, or the United States.

The Applicant, on the other hand, has successfully mitigated the Government's case. The families of both the Applicant and his wife are small business people in Vietnam. None of those living in Vietnam are in the Communist Party, or involved with the Vietnamese government. All the available evidence indicates that they are not in a position to be exploited by a foreign government. As for his relatives in the United States, all of them desire to become American citizens and they shall apply for citizenship at the earliest possible moment.

The Applicant and his wife have visited Vietnam twice in 20 years. He calls his one sister on an annual basis, and sends small presents to his family members in Vietnam. While it is difficult to call any family relationship "casual," this one is infrequent.

The Applicant and his wife are mature and understanding people. At the hearing, they both showed an understanding of his security responsibilities and a credible intention of fulfilling them. The Applicant has persuasively shown that he is not subject to coercion or pressure because of his foreign connections.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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.

Subparagraphs 1.a. through 1.e.: 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 the Applicant.

Wilford H. Ross

Administrative Judge