

DATE: February 12, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04012

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Deputy Chief Department Counsel

#### **FOR APPLICANT**

Edward Carlston, Personal Representative

### **SYNOPSIS**

Applicant, a 28-year-old naturalized U.S. citizen, emigrated from Vietnam to the U.S. with all of his immediate family, except his brother. Because of the length of time it took for the emigration process, Applicant's brother turned 21 years of age and was no longer eligible to immigrate to the U.S. on his parents' visa. The rest of Applicant's immediate family have become U.S. citizens, have U.S. passports, and reside in the U.S. Applicant does not possess a valid Vietnamese passport and the foreign influence security concern of his brother being a resident and citizen of Vietnam has been mitigated. Applicant established that it was clearly in the national interest to grant him a security clearance. Security clearance is granted.

### **STATEMENT OF THE CASE**

Applicant, an employee of a defense contractor, applied for a security clearance so he could work with classified information. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant the Applicant a clearance. In accordance with the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) on 1 November 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign preference (Guideline C) and foreign influence (Guideline B) personnel security guidelines.

Applicant answered the SOR in writing on 15 November 2002. The case was originally assigned to Administrative Judge John Erck on 17 December 2002, but was transferred to me that same date because of Judge Erck's rotation out of the region in which Applicant was located. On 21 January 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant testified on his own behalf and submitted 11 exhibits at the hearing in addition to the 5 exhibits attached to his answer. A transcript (Tr.) of the proceeding was received on 29 January 2003.

## FINDINGS OF FACT

Applicant is a 28-year-old naturalized U.S. citizen employed as an engineer by a defense contractor. Exs. 1, A, F. He was born in what was formerly known as South Vietnam (Republic of Vietnam) shortly before it was overrun by the forces of North Vietnam (Democratic Republic of Vietnam) in 1975. Although his maternal grandmother and some of his aunts and uncles escaped to the United States, Applicant and his immediate family were unsuccessful in their attempts to escape.

In 1989, Applicant and other members of his family obtained Vietnamese passports so they could emigrate from Vietnam to the U.S. The family was unable to leave Vietnam and Applicant's passport expired in 1992. He renewed the passport in 1995 when his family made another attempt to get to the United States. In 1995, when Applicant was 20 years old, he entered the U.S. with the rest of his immediate family, except his older brother, under the U.S. Orderly Departure Program. Applicant's Vietnamese passport expired on 15 December 1995. Ex. P. Applicant never served in the Vietnamese military. Tr. 25.

During the long process of trying to emigrate, Applicant's older brother turned 21 years of age. As a result, he was no longer eligible to enter the U.S. on his parent's immigration visa, so was denied an interview with the U.S. Orderly Departure Program. Tr. 16; Ex. H. Applicant's older brother is now a physician and currently resides in Ho Chi Minh City (Saigon) with his wife and child. Applicant believes his brother works for the Red Cross. Applicant's brother apparently has no current plans to emigrate from Vietnam. Applicant speaks to his brother via telephone three or four times a year, but does not keep in touch with other relatives in Vietnam. Tr. 24. Applicant does not support his brother financially. Tr. 27.

Since his arrival in the U.S., Applicant was graduated from college and is working on a master's degree. He became a naturalized U.S. citizen on 14 March 2001. He registered to vote and has voted in every election since. His parents and younger brother also became naturalized U.S. citizens. On 23 May 2001, Applicant obtained a U.S. passport. In March 2002, Applicant and the rest of his immediate family living in the U.S., traveled on their U.S. passports to visit his older brother in Vietnam. Applicant and his family returned to the U.S. on 21 April 2002. Tr. 27.

Applicant would not reveal classified information to foreign agents even if they threatened the safety of his brother and his brother's family.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional

history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. May 9, 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See Directive*, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "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*, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See Exec. Or. 12968* § 3.1(b).

Under Guideline C of the Directive, a security risk may exist when an individual acts in such a way as to indicate his preference for a foreign government over the U.S. because the individual may be prone to provide information or make decisions that are harmful to the interests of the U.S. *Directive*, ¶ E2.A3.1.1. The possession and/or use of a foreign passport is a security concern under Guideline C. *Directive*, ¶ E2.A3.1.2.2. It is a mitigating factor that the indicator of possible foreign preference occurred before the applicant obtained U.S. citizenship. *Directive*, ¶ E2.A3.1.3.2.

Under Guideline B of the Directive, a security risk may exist when a member of an applicant's immediate family is not a citizen 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. *Directive*, ¶ E2.A2.1.1. Applicable conditions that could raise a security concern and may be disqualifying include the fact that 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. *Directive*, ¶ E2.A2.1.2.1.

Conditions that may be applicable and could mitigate such security concerns are as follows:

- (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. *Directive*, ¶ E2.A2.1.3.1.
- (2) Contact and correspondence with foreign citizens are casual and infrequent. *Directive*, ¶ E2.A2.1.3.3.
- (3) The individual has promptly reported to proper authorities all contacts from persons or organizations from a foreign country, as required. *Directive*, ¶ E2.A2.1.3.4.

## CONCLUSIONS

In the SOR, the Government alleged, as a disqualifying condition under Guideline C, Applicant possessed a valid Vietnamese passport as of 9 January 2002. Applicant obtained and renewed a Vietnamese passport for the sole purpose of emigrating from Vietnam to the U.S. The passport expired on 15 December 1995, shortly after he arrived in the U.S. As Applicant has refuted the allegation under Guideline C, the finding must be for Applicant.

The Government alleged in the SOR, as a disqualifying condition under Guideline B, that Applicant's older brother is a citizen of and resides in Vietnam, and the rest of his immediate family are citizens of Vietnam who reside in the U.S. Applicant admits that his brother is a citizen and resident of Vietnam. Tr. 23-24; Answer, ¶ 2. The rest of Applicant's immediate family are naturalized citizens of the U.S. residing in the U.S. Exs. B, C, D.

Since 1976, Vietnam has been officially known as the Socialist Republic of Vietnam. The government is dominated by the Communist Party, although it claims to be a constitutional republic. Although, the U.S. Government normalized relations with Vietnam in 1995, because of the totalitarian nature of the regime, an applicant with connections to Vietnam deserves more than routine scrutiny.

After several failed attempts, Applicant and his family fled Vietnam to join relatives in a search for freedom and a new way of life. He earned a college degree and began work on a master's degree. He obtained his citizenship and has involved himself in the civil and political affairs of his new country by exercising his right to vote. His contacts with his brother are infrequent. Based on the relevant evidence, I conclude that Applicant's brother is not an agent of a foreign power.

Applicant is not alone here in the U.S. His entire family is here with the exception of his brother. He is a proud American who spent a considerable portion of his young life seeking admission to the U.S. He and his family are committed to the American way of life. He understands his duty to report his contacts with foreigners to the appropriate security officials and has voluntarily reported his contacts in the past. I am convinced he will resist any attempt from foreign sources to influence his conduct. Tr. 25-26; Ex. F. Applicant has established that it is in the interest of the U.S. to grant him a clearance.

#### FORMAL FINDINGS

Formal Findings as required by Executive Order No. 10865 § 3, ¶ 7 and Directive, ¶ E3.1.25, are as follows:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

#### **DECISION**

In light of all of 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.

James A. Young

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.