

DATE: September 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04022

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 49-year-old software engineer, whose family fled from Vietnam in 1975, after the Communist takeover. He attended a U.S. university, married and raised a family here, and considers himself to only an American. He has worked for the same defense contractor since 1982 and has held a DoD security clearance since 1983, with no evidence of any problems. His contacts with the few relatives still in Vietnam is minimal and infrequent and Applicant strongly avers he would immediately report any improper contacts. He has worked in the defense sector, and held a DoD security clearance, for many years, without any problems. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On January 6, 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.

On January 28, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me on April 26, 2003. A Notice of Hearing was issued on May 5, 2003, and the hearing was conducted on ay 27, 2003. At the hearing, Applicant testified and did not offer any exhibits. The Government did not call any witnesses, but offered three exhibits, which were marked and admitted as Government Exhibits (GX) 1, 2, and 3. The transcript (Tr) was received at DOHA on June 10, 2003.

FINDINGS OF FACT

Applicant is a 49-year-old software engineer. The SOR contains two allegations, 1.a. and 1.b., under Guideline B (Foreign Influence) in the Directive. In Applicant's response, as to 1.a., he denied that he has two sisters who are both citizens of Vietnam, on the basis that they "now reside in the U.S." He admits that he does have a sister who is a citizen of France. The admission is incorporated herein as a finding of fact.

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

Guideline B (Foreign Influence)

1.a. - Applicant has two sisters who now live in the United States as "legal residents (Tr at 17). Applicant sponsored their entry into the U.S. in 1992 (Tr at 21). He has a brother who is a legal resident of the U.S., but Applicant has not spoken to him for about 15 years because of a family dispute and does not know whether or not the brother is still a citizen of Vietnam (Tr at 23). He has not corresponded with any relatives he may still have in Vietnam since 1992 (Tr at 24). He does not think that any of his relatives in the U.S. consider themselves to be citizens of Vietnam (Tr at 30).

1.b. - Applicant also has a sister (and brother-in-law) who are citizens of France and reside in that country (Tr at 17). After the fall of Saigon in 1975, they fled to France rather than the U.S. because they spoke fluent French and felt more comfortable with French culture and society (Tr at 25). Applicant corresponds with this branch of his family about once a year (Tr at 26). They have exchanged visits only once, more than five years ago (Tr at 26). Only one brother has had any contact with the Vietnamese government, and that was by serving in the South Vietnamese army, before 1975, when South Vietnam was an ally of the United States.

Applicant came to the U.S. after the Communist conquest of South Vietnam in 1975. He attended a U.S. university from 1978 to 1981, and graduated with an engineering degree. He became a U.S. citizen in 1982. He considers himself to be a citizen of the U.S. and no other country, since fleeing Vietnam in 1975 (Tr at 30). He holds and uses only a U.S. passport. He has been employed by the same major defense contractor since 1983, and has held a DoD security clearance since 1984, with no apparent problems (GX 1).

If asked to betray U.S. security interests, Applicant would "report it to the FBI at once" (Tr at 28 and GX 2).

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 B (Foreign Influence)

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

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.

Condition that could mitigate security concerns include:

1. A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk.

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

Applicant has not considered himself to be a citizen of Vietnam since fleeing that country in 1975. He has since made his life in the United States. He married here in 1985 and has three U.S. born children. He has contributed to the U.S. defense effort since 1983 and has had his security clearance renewed at least once since then. There is nothing in the record indicating he has ever had any problems relating to classified information.

The concerns stated in the SOR are cited under Guideline B and are based on the risk of foreign influence by family members in Vietnam. The presence of an applicant's close relatives who are citizens of and/or resident in a foreign country is certainly a matter of security concern. Just as clearly, however, not all foreign countries create the same level of risk. In the present case, I take official notice that Vietnam has a communist government, which though seeking closer ties with the U.S., certainly cannot be categorized a friendly power.

The lack of any effort to blackmail Applicant in the past is a positive factor, but does not necessarily mean that there will be no such effort in the future. At the same time, there is probably less likelihood than in the past. I have considered this point in the context of the overall record, which includes Applicant's testimony about the current residence and citizenship status of his relatives, their lack of contact with the government of Vietnam, and Applicant's clear statement as to what he would do if asked to disclose classified information. Based on the totality of the record, I conclude that Applicant is sincere as to his commitment to U.S. security interests, and that he would respond to any efforts against those interests by relatives or anyone else by promptly contacting the FBI.

While the language in Disqualifying Condition (DC) 1 indicates that the presence of close family in a foreign country is of concern, that concern can be mitigated by evidence that the risk of pressure being applied is not unacceptable *and* that the applicant is not likely to feel "forced to choose between loyalty to the persons involved and the United States."

There is always a chance that Applicant might be asked to act improperly in the future, even though he not been asked to do so in the past. Although this is a reality, it is also speculative since there is no direct or indirect evidence that it has occurred, or is likely to occur. I find the risk that he would be asked to act improperly to be minimal. Even more importantly, I conclude he would act immediately to report the contact and not feel; that he was being *forced* to choose between his relatives and his country. As to Mitigating Condition (MC) 1, and based on all of the available evidence, I have determined that the family members in question do not constitute an unacceptable security risk. As to MC 3, I

conclude that Applicant's contacts and correspondence with his foreign relatives is casual and infrequent. The mitigating evidence substantially outweighs the evidence supporting the SOR.

Overall, Applicant's explanations as to his relationships with his family members, the lack of any problems in the past, and his clear recognition of his security responsibilities, lead me to conclude that there is minimal risk of Applicant acting against U.S. interests. In summary, Applicant has demonstrated by the way he has led his life that he considers himself to be an American and committed to U.S. interests.

FORMAL FINDINGS

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

Guideline B (Foreign Influence) For the Applicant

Subparagraph 1.a.. For the Applicant

Subparagraph 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 or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE