

DATE: October 10, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-05827

## **DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 40 years old. He is married. His family members are citizens of Vietnam and reside there, except for his one brother who lives in the United States but is a citizen of Vietnam. His wife is a citizen of Vietnam and lives in the United States as a registered alien. Applicant became a United States citizen in 1994. Applicant did not present any evidence to mitigate the grave concerns about foreign influence under Guideline B. Clearance is denied.

### **STATEMENT OF THE CASE**

On March 12, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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. The SOR detailed reasons under Guideline B (Foreign Influence) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn Answer, dated May 2, 2003, Applicant responded to the SOR allegations. He requested his case be decided on the written record in lieu of a hearing. On July 9, 2003, Applicant was given a complete copy of the file of relevant material (FORM) [\(1\)](#). He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Nothing in the record indicates Applicant filed a response to the FORM by the August 30, 2003, due date. This case was assigned to me on September 25, 2003.

### **FINDINGS OF FACT**

Applicant admitted to the allegations in the SOR. Those admissions are incorporated herein as findings of fact. After a complete review of the record evidence, I make additional findings of fact:

Applicant is 40 years old. He is married and has two children. His wife is a citizen of Vietnam, but is a registered alien living in the United States with Applicant and their children. (Exhibit 5 at 1, 4-6)

Applicant works for a defense contractor. He became a naturalized United States citizen in 1994. There is no evidence showing when or how he came to the United States. (Exhibit 5 at 3 and 4)

Applicant has a mother and stepfather in Vietnam, and they are citizens of Vietnam. Applicant has two sisters who are citizens of Vietnam also living there. His one brother is a citizen of Vietnam, and lives in the United States. (Answer; Exhibit 5 at 3 and 4)

Vietnam is a communist governed country with a poor record of respect for human rights and democratic institutions. Free elections are not conducted, and all candidates belong to one party. The United States has diplomatic relations with Vietnam. (Items 6 and 7)

### 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 judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, ¶ E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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. 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 Para E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 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 Para. 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 Section 3.1(b).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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**

The Concern: 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 not citizens 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.

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

(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. Directive ¶ E2.A2.1.2.1.

Conditions that could mitigate security concerns include:

None

**CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Applicant has relatives by birth and marriage in Vietnam. He has his mother and stepfather living in Vietnam, and are citizens of Vietnam. His two sisters live in Vietnam, and they are citizens of Vietnam. His brother lives in the United States, but is a citizen of Vietnam. He visited Vietnam for a total of ten months between 1995 and 1998. There is no evidence Applicant has traveled there since 1998. He is in telephone contact with his relatives in Vietnam every one or two weeks. Disqualifying Condition (DC)1 applies.

There are no Mitigating Conditions (MC) applicable here. Applicant did not submit a statement or any statements from relative, friends, employers, or co-workers. There is no evidence to demonstrate he has mitigated the DC. With the frequency of contact with his relatives in Vietnam, it would be difficult to overcome the presumption that he has a close and frequent connection with his relatives in Vietnam. For these reasons, there are no MC applicable in this case.

**FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B: Against the Applicant

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

**DECISION**

In light of all the circumstances and facts presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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Philip S. Howe

## Administrative Judge

1. The Government submitted six items in support of the SOR.