

DATE: June 18, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08127

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

SYNOPSIS

The facts and circumstances show that Applicant's family ties to Vietnam do not pose an unacceptable security concern or risk of foreign influence under Guideline B. Clearance is granted.

STATEMENT OF THE CASE

On September 6, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence.

Applicant's Answer to SOR, dated September 25, 2002, admits to the factual allegations under Guideline B (subparagraphs 1.a. - 1.c). In addition, Applicant provided an explanation concerning his family ties to Vietnam, and he requested a clearance decision based on a hearing record.

On October 30, 2002, this case was assigned to another administrative judge from DOHA's Western Hearing Office. That judge issued a notice of hearing on November 18, 2002, scheduling the hearing for December 13, 2002. The hearing was cancelled December 4, 2002, when the judge granted Applicant's request for a continuance based on Applicant's planned family vacation to Vietnam from December 7, 2002, to January 13, 2003.

Thereafter, DOHA reassigned the case to me on December 16, 2002, to conduct a hearing and issue a written decision. On January 16, 2003, a notice of hearing was issued to the parties scheduling the hearing for Thursday, February 27, 2003, at a location near Applicant's place of employment. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the hearing transcript March 7, 2003.

On April 25, 2003, I issued a memorandum order directing the parties to submit argument or additional documentary

evidence or both on the following issue:

Is Applicant entitled--as a matter of law--to a favorable clearance decision based on Section 2-203 of the National Industrial Security Program Operating annual (NISPOM), the so-called reciprocity provision?⁽²⁾

The deadline to respond was close-of-business Friday, May 30, 2003. On May 13, 2003, Department counsel filed their response. Although Applicant has not filed a written response, I understand his company's security officer spoke with Department Counsel and that information is included in Department Counsel's response. The record closed May 30, 2003.

PROCEDURAL MATTERS

Consistent with the record evidence, SOR subparagraph 1.a. was amended to show Applicant has four (not three) brothers who are citizens of and residents in Vietnam.⁽³⁾

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

In general, I find that the record evidence as a whole is sufficient to establish, by substantial evidence, the occurrence of all the factual events alleged in SOR subparagraphs 1.a., 1.b., and 1.c.

Applicant is a 34-year-old married man. He is employed by a major aerospace company as a software engineer developing software requirements for various projects. In addition, Applicant does "liaison engineering" between organizations within the company and with the government customer. He's worked for this company since April 2001. Applicant's manager, who testified on his behalf, is aware of no security issues concerning Applicant. The manager regards Applicant as hard-working, honest, and an excellent employee.

In conjunction with his current employment, Applicant completed a security-clearance application (SF 86)⁽⁴⁾ in July 2001 disclosing that he was born in Vietnam, has immediate family members in both Vietnam and the U.S., obtained U.S. citizenship in 1988, possesses a U.S. passport, registered with the U.S. Selective Service System, earned a college degree in electrical engineering in 1992, and worked as a civilian employee for several years for the U.S. Air Force (USAF). He also disclosed traveling to Vietnam in 1995, 2000, and 2001; his fourth and most recent trip to Vietnam was from December 2002 to January 2003.

Applicant was born into a large Vietnamese family consisting of his parents, six brothers, two sisters, and himself. His parents, four brothers, and one sister are citizens of and residents in Vietnam. His other sister is deceased. The other two brothers reside in the U.S. where one is a U.S. citizen and the other is a resident alien.

In March 1981, at the age of 14, Applicant fled Vietnam when his parents bought him a place on a fishing boat. The boat was at sea for six days and five nights before landing in Indonesia. Applicant, an unaccompanied minor at the time, resided in Indonesia until he was allowed to enter the U.S. via a refugee program. He arrived here in 1982.

Applicant graduated from an American high school. Thereafter, from August 1988 to May 1992, he attended a state university where he studied electrical engineering. He graduated in May 1992 with a bachelor's degree. After graduation, Applicant went to work in June 1992 taking a job as a pharmacy technician through February 1993.

His first job in the engineering field started in March 1993 when he started employment as a civilian employee with the USAF. He worked as an electronics engineer at an air base, working himself up from a GS-7 position to a GS-12 position. In conjunction with his employment, Applicant held a secret-level security clearance, without an adverse incident, issued by the USAF in December 1994. He worked for the USAF until April 2001 when he started his current employment.

A few months after starting work for the USAF, Applicant married in July 1993. His spouse was also born in Vietnam

and her family immigrated to the U.S. in 1975. Her mother and father are now deceased, and she no longer has immediate family members in Vietnam. His spouse obtained U.S. citizenship in 1989. He and his spouse have one child, a daughter, born in the U.S. in 1998. His spouse is a doctor who specializes in internal medicine and also serves as an associate professor of internal medicine for a state university medical center. She was present at the hearing, but did not testify.

While working for the USAF, Applicant traveled to Vietnam three times, as he revealed in his security-clearance application. The purpose of the trips was to visit his family as he had not seen them since 1981. He experienced no problems or difficulties with Vietnamese governmental officials during the trips. He used his U.S. passport, which is the only passport he possesses. Before each trip, Applicant reported his intention to the appropriate USAF officials and he received a security briefing before his departure and upon his return. Before his most recent trip to Vietnam, he reported his intention to the company security officer, but did not receive a formal security briefing.

Applicant believes he has a duty or obligation as a son to visit and assist his parents. He supports his parents financially in the amount of about \$500 annually. He also hopes to visit them on a regular basis (no more often than annually) as they are more than 70-years-old and not in the best of health. Other than these periodic trips, Applicant's contact is limited to telephone calls to his father as he is the only one who has a telephone. Applicant will speak to other family members if they are present when he calls, which happens about once a month or so.

His father and four brothers are farmers, and his mother and sister housewives. I specifically find that Applicant's parents and siblings, who are citizens of and residents in Vietnam, are not connected to Vietnamese law enforcement, the military, or a governmental agency. Likewise, I find these family members are not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security or defense information.

Applicant's oldest brother served in the South Vietnamese military. After the war was over, this brother was sent to a reeducation camp for perhaps three years. That brother is now living in the U.S. as a legal resident alien. Applicant's sister, along with her husband, two children, and an unborn child, died at sea when trying to flee Vietnam. (5)

Applicant understands the potential security concerns based on his family ties or connections to Vietnam. His understanding has been gleaned from his USAF employment, the travel briefings he received before and after his trips to Vietnam, and his knowledge as a clearance holder. Applicant testified credibly that he will resist and report any potential foreign influence or pressure as demonstrated by the following testimony:

[W]e paid too much to come here and, you know, we paid too much to come here to get to this point of my life. You know, I will not give it up for - - anything like that. I will report it to the authority and get some help from them. (6)

His willingness to resist and report any potential foreign influence or pressure is also confirmed by the following statement:

I consider the United States of America to be my country. I will never betray or become disloyal to this great nation. I have sacrificed much to achieve what I have today. Nothing will and can influence me that would result in the compromise of classified information for any foreign country. I swear and promise to keep all the classified information that I have access to safe and confidential. (7)

Since July 1976, Vietnam has been officially known as the Socialist Republic of Vietnam. The government is a constitutional republic, and the controlling political party is the Vietnamese Communist Party. After a 20-year hiatus of severed ties, the U.S. Government normalized diplomatic relations with Vietnam in 1995. (8)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the

presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following adjudicative guidelines are most pertinent here: Guideline B for foreign influence.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹¹⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹²⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹³⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁴⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁵⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁶⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Concerning the reciprocity issue, I conclude that Section 2-203 of the NISPOM does not apply here. In particular, it appears Applicant was granted a secret-level security clearance in 1994 by the USAF. The present case is based on a new security clearance application⁽¹⁷⁾ and the resulting investigation. Accordingly, the investigation used by the USAF in granting Applicant a security clearance in 1994 is no longer current, and so, the reciprocity provision of the NISPOM does not apply in Applicant's favor.

Under Guideline B for foreign influence, a security concern 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 U.S. 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 if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. And in every security-clearance case an applicant's ties or connections to any foreign country deserve careful examination.⁽¹⁸⁾ Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on an applicant's family ties in a foreign country.⁽¹⁹⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern or risk under Guideline B.⁽²⁰⁾

Here, based on the record as a whole, the government has established a *prima facie* case under Guideline B. In particular, Disqualifying Condition (DC) 1⁽²¹⁾ applies given Applicant has close relationships with immediate family members who are citizens of and residents in Vietnam, and he believes he has a duty or obligation to his parents.⁽²²⁾ The strength of those relationships is evidenced by, among other things, Applicant's travel to Vietnam and his sending of money to his parents. His family ties raise security concerns due to the potential for foreign influence.⁽²³⁾ The remaining seven disqualifying conditions of Guideline B do not apply given the record evidence.⁽²⁴⁾

In mitigation, Applicant's immediate family members in Vietnam are not employed by or connected with the Vietnamese military, law enforcement, or a governmental agency. They are not involved in political, scientific,

commercial, or other activities where they might benefit from obtaining U.S. national security information. Given the record evidence as a whole, I conclude Applicant's immediate family members (who work as farmers and housewives) are not agents of a foreign power, and under these circumstances, mitigating condition (MC) 1 ⁽²⁵⁾ applies in Applicant's favor. The remaining mitigating conditions of Guideline B do not apply given the record evidence.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concerns. First, little has changed since Applicant was granted a clearance by the USAF in 1994. Other than Applicant's travel to Vietnam that started in 1995, the essential facts (his family ties) are unchanged. And the USAF was aware of his travel to Vietnam and apparently attached little or no security significance to it. What has changed is Applicant's commitment to the U.S., which has grown stronger over the years and is, in my view, high. It's difficult to fully appreciate the gravity of his situation--leaving his family at the age of 14--to flee a communist-controlled country for a possibility of becoming an American citizen. It was a potential life-or-death decision as demonstrated by his sister's death at sea. Applicant's high-level of commitment to the U.S. is a relevant and material fact that weighs in his favor.

Second, Applicant's ties or connections to the U.S. are substantial. Since his arrival here, he can fairly be described as a model immigrant. He registered with the selective service, obtained a good education in a profession, possessed and used a U.S. passport, and worked for several years--while holding a security clearance without incident--as a civilian employee for the USAF. His wife and daughter (both U.S. citizens), his wife's medical career, and his professional career are in the U.S., and these circumstances are unlikely to change. Moreover, Applicant has resided in the U.S. since 1982, more than 20 years, which includes all of his adult life. These are examples of ties that bind and these ties are firmly rooted in the U.S. These ties or connections to the U.S. are relevant and material facts that weigh in Applicant's favor.

To sum up, based on the record as a whole, it is my predictive judgment that Applicant has the necessary strength of character to resist and report any potential foreign influence or pressure by either coercive or non-coercive means. Likewise, after weighing the record evidence as a whole, it is my commonsense determination that the facts and circumstances show that Applicant's family ties to Vietnam do not pose an unacceptable security concern or risk of foreign influence. Applicant has overcome the case against him and satisfied his ultimate burden of persuasion as to obtaining a favorable clearance decision. Guideline B is decided for Applicant, and formal findings concerning the SOR allegations are entered below.

FORMAL FINDINGS

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. See ISCR Case No. 98-0320 (April 8, 1999) at pp. 3-4.

3. Transcript at pp. 54-56.
4. Exhibit 1.
5. Answer at p. 1.
6. Transcript at p. 79.
7. Answer at p. 2.
8. Although I was not asked to take administrative or official notice, these are matters known to this agency through its expertise in deciding security-clearance cases involving foreign influence or preference. *See* ISCR Case No. 99-0451 (March 21, 2000) at p. 4.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
11. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
13. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
14. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
15. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
16. *Egan*, 484 U.S. at 528, 531.
17. Exhibit 1.
18. *See* ISCR Case No. 97-0699 (November 24, 1998) at p. 3 (Nothing in Guidelines B or C "requires that the foreign country in question have interests that are inimical to the interests of the United States.").
19. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
20. *Id.*
21. "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."
22. *See* ISCR Case No. 98-0507 (May 17, 1999) at pp. 10-11 (discussing various facets of security significance of family ties in a foreign country).
23. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to non-coercive means of influence).
24. This conclusion is consistent with Department Counsel's concession. Transcript at p. 85.
25. "A determination that the immediate family member(s), (spouse, father, 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."