

DATE: March 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26920

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised regarding a 32-year old Vietnam-born naturalized U.S. citizen Applicant--who managed to escape from the Communist regime in the Socialist Republic of Vietnam (SRVN) on his 10th attempt in 1980--but who has several family members who remain either citizens or residents of foreign countries. His wife is a French citizen residing in the U.S.; one of his half-sisters (married to a U.S. citizen) and a sister-in-law are SRVN citizen-residents; two other half-sisters are SRVN citizens residing in the U.S.; and his wife's parents are French citizens residing in SRVN. None of them are agents of SRVN or France or in a position to be exploited by those governments. Applicant's mother is a naturalized U.S. citizen residing in the U.S., and his son was born in the U.S. The security concerns have been mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On November 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 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 determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated December 5, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, me on February 20, 2004. A notice of hearing was issued that same day, with a corrected notice issued on February 23, 2004, and the hearing was held before me via video-conference on March 12, 2004. During the course of the hearing, one joint exhibit (a stipulation), one government exhibit, and the testimony of three Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on March 22, 2004.

RULINGS ON PROCEDURE

During the proceeding, under Rule 201(b)(2), Federal Rules of Evidence, Department Counsel requested that official notice be taken of certain adjudicative facts as set forth in a document furnished for consideration. There being no objection interposed by Applicant, I took official notice of the U.S. Department of State, Bureau of Consular Affairs, *Consular Information Sheet: Vietnam*, dated January 13, 2004, consisting of 10 pages.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. through 1.f.). Those admissions are incorporated herein as findings of fact.

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

Applicant is a 32-year-old employee of a defense contractor seeking to obtain a security clearance the level of which was not divulged.

Applicant was born in 1971 in what was then the Republic of Vietnam (RVN).⁽¹⁾ He resided with his parents and younger brother. Upon the collapse of RVN in 1975, Applicant's uncle (his mother's brother), a member of the defeated RVN military, escaped and fled to the U.S.⁽²⁾

Wishing to escape the tyranny of the Communist regime, Applicant's family split into two separate units with his father and brother in one unit and he and his mother in another so they would all not be captured together.⁽³⁾ They made nine attempts to escape to freedom⁽⁴⁾ by small boat, but were caught by the authorities and returned home on three of those occasions.⁽⁵⁾ On six other attempts they evaded capture but missed the larger boat that would have taken them to freedom.⁽⁶⁾ Applicant and his mother were finally successful, and in 1980, when he was 9-years-old, they made their way to Singapore from where they contacted an uncle in the U.S. who had previously escaped in 1975.⁽⁷⁾ That uncle sponsored them for immigration into the U.S.⁽⁸⁾

Applicant and his uncle petitioned for his father and brother to come to the U.S., and in 1991, under their sponsorship, his father and brother were permitted to immigrate to the U.S. as well.⁽⁹⁾ Applicant's mother became a naturalized U.S. citizen in May 1993,⁽¹⁰⁾ and Applicant was naturalized in August 1993.⁽¹¹⁾ Applicant's father was also naturalized,⁽¹²⁾ but the date of that action has not been specified. He passed away in 1999.⁽¹³⁾ Applicant's brother eventually obtained his permanent residency, but he is not yet a naturalized U.S. citizen.⁽¹⁴⁾

Applicant's father also had three daughters from a previous marriage.⁽¹⁵⁾ They were initially left behind in SRVN when the family emigrated. The oldest half-sister (about 42-years-old)⁽¹⁶⁾ is a housewife, a SRVN citizen,⁽¹⁷⁾ married to a U.S. citizen residing in the U.S.,⁽¹⁸⁾ and is currently in the process of immigrating to the U.S. through the sponsorship of her husband.⁽¹⁹⁾ Before her marriage, Applicant generally sent her about \$200.00 every few months⁽²⁰⁾ or a maximum of about \$500.00 per year.⁽²¹⁾ His second half-sister (about 40-41-years-old)⁽²²⁾ is a single factory worker who is a citizen of SRVN⁽²³⁾ and a permanent resident of the U.S.⁽²⁴⁾ The youngest half-sister (about 36-years-old)⁽²⁵⁾ is a housewife residing in the U.S.⁽²⁶⁾

When he arrived in the U.S., Applicant attended local schools⁽²⁷⁾ and completed two years of college and university.⁽²⁸⁾ When his employer stopped funding his education Applicant was unable to continue his education.⁽²⁹⁾ He intends to continue his education on his own.⁽³⁰⁾

For a variety of reasons, Applicant returned to SRVN on five occasions since escaping the country. In 1995, he returned⁽³¹⁾

to visit with his ill grandmother, staying for a period less than one month with his half-sister. He returned in January 1997, when his grandmother passed away and remained there again for less than one month.⁽³²⁾ It was during that trip that he met the woman who eventually became his wife.⁽³³⁾ In June 1997, he returned to SRVN to visit with her for 10 days and discussed a potential engagement.⁽³⁴⁾ In September or October 1997 she came to the U.S. and they were married.⁽³⁵⁾ They returned to SRVN in early 2001, along with their respective relatives to have a family wedding banquet, and remained there for less than one month.⁽³⁶⁾ In November 2001, after getting laid off from his job, and feeling depressed, he returned to SRVN to see his sick half-sister.⁽³⁷⁾ He has no further plans to return to SRVN for a long time.⁽³⁸⁾ At no time during any of his visits to SRVN was Applicant ever approached or questioned by anyone as to what he considered to be inappropriate inquiries.⁽³⁹⁾

Applicant's wife, a French citizen, was born in RVN to French citizens.⁽⁴⁰⁾ Her grandmother was half French and half Vietnamese.⁽⁴¹⁾ Her grandfather was a wealthy businessman in RVN before the collapse of the government to the Communists in 1975, when he lost everything.⁽⁴²⁾ Her father (born in 1930)⁽⁴³⁾ was a property manager in SRVN unaffiliated with the governments of France or SRVN.⁽⁴⁴⁾ Her mother (born in 1936)⁽⁴⁵⁾ worked in a factory.⁽⁴⁶⁾ In 1981, after completing the appropriate paperwork, most of her family, consisting of her parents, two sisters, as well as herself, were permitted to leave SRVN and flew to France by plane.⁽⁴⁷⁾ One sister, a housewife, remained in SRVN with her family.⁽⁴⁸⁾ Applicant's wife has two uncles, both of whom had served with the RVN Army (ARVN), and who were sent to re-indoctrination and re-education camps by the Communist regime of the victorious SRVN.⁽⁴⁹⁾ One uncle (an enlisted man) remained for two years, and the other (an officer) remained for 10 years, before they were released.⁽⁵⁰⁾ The enlisted uncle has remained in SRVN as a farmer,⁽⁵¹⁾ but the officer uncle was sponsored by a U.S. government program for immigration to the U.S.⁽⁵²⁾

Applicant's father-in-law and mother-in-law both retired in France and in 1997-98, seeking warmer weather, moved back to SRVN where they now reside supported by French pensions.⁽⁵³⁾ His mother-in-law visits him in the U.S. every two years and remains three to six months per visit.⁽⁵⁴⁾ One sister is still in SRVN and the other two reside in France.

Applicant renounced his Vietnamese citizenship when he became a naturalized citizen of the United States and pledged his loyalty to protect and defend the interests of the U.S. Applicant is not a dual citizen and considers himself to be a citizen of only the U.S.⁽⁵⁵⁾ The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

No member of Applicant's immediate family is an employee of any SRVN governmental agency or department or affiliated with any intelligence organization or with the Communist Party.⁽⁵⁶⁾

Applicant's wife was granted permanent U.S. residency and is in the process of applying for U.S. citizenship.⁽⁵⁷⁾ Their son was born in the U.S. about one year ago.⁽⁵⁸⁾

Applicant has been employed by the same government contractor since February 2002.⁽⁵⁹⁾ He was initially hired as a security officer,⁽⁶⁰⁾ but was recently promoted to logistics specialist.⁽⁶¹⁾ His supervisor supports his application and has characterized him as a trustworthy and dedicated individual whose work has been outstanding.⁽⁶²⁾

The government of RVN collapsed in 1975, coinciding with the establishment of the Communist SRVN. Full diplomatic relations were established between the U.S. and SRVN in 1995, and, in 2001, a bilateral trade agreement between the two countries finally commenced. Under that agreement, *temporary*--later modified to *conditional*--normal trade relations (formerly known as most-favored nation status) were extended by the U.S. SRVN has also given the U.S. modest support in the war against terrorism. While SRVN has a Communist totalitarian government which seemingly encourages technology transfers from the Vietnamese expatriate intellectuals abroad, the Department Counsel has offered no evidence to indicate SRVN conducts intelligence operations or economic espionage against the United States.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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.

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: 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: (1) not citizens of the United States or (2) 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽⁶³⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect

or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline B. Applicant has been portrayed as a person who is a potential security risk because members of his immediate family or persons to whom he is bound by affection, influence, or are either not citizens or residents of the United States or may be subject to duress. These situations raise the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B: [\(64\)](#)

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

In this instance, the government's concerns are as follows: one half-sister and one sister-in-law are both citizens and residents of SRVN; a brother and two half-sisters are SRVN citizens residing in the U.S.; a wife is a French citizen residing in the U.S.; wife's parents are French citizens residing in SRVN; and two sisters-in-law are French citizens residing in France. Those facts raise Foreign Influence Disqualifying Condition (FI DC) E2.A2.1.2.1. (*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*). However, considering the totality of the circumstances, much of the government's concerns seem unwarranted.

Obviously, there is significant concern because of the foreign governments involved. SRVN is a Communist totalitarian country that is no longer involved in open military hostilities with the United States. Its interests are not necessarily inimical to the United States, and SRVN currently is engaged in normal trade relations with the U.S. It does, however, encourage technology transfers from Vietnamese expatriate intellectuals abroad.

Similarly, France is a somewhat *friendly* democracy and founding member of the North Atlantic Treaty Organization (NATO) with which the U.S. has had some disagreements but whose background and interests are not inimical to the United States. France has been known to conduct espionage operations against the U.S. especially in the economic or scientific or technical fields.

The SRVN citizenship status of Applicant's brother--already a U.S. resident and in the process of becoming a naturalized U.S. citizen--and his oldest half-sister--married to a U.S. citizen and in the process of immigrating to the U.S.--minimizes any security concerns regarding them. Likewise, the French citizenship status of Applicant's wife--already a U.S. resident and in the process of becoming a naturalized U.S. citizen--and two of his sisters-in-law--already U.S. residents--minimizes any security concerns regarding them.

With the number of individuals, about whom there might be security concerns, reduced, I turn to focus on the remaining family members. Applicant's mother-in-law and father-in-law, both of whom are French citizens, immigrated to France in 1981, but upon their retirement in 1997-98, seeking a warmer climate, moved back to SRVN. Their French

citizenship and SRVN residency raise the issue of potential foreign influence.

However, also applicable, in this instance, is Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1. (*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*). After an examination of the evidence, and cognizant of Applicant's wife's grandfather's economic losses and her two uncles' experiences with re-indoctrination and re-education camps, all at the hands of the victorious Communist regime in SRVN, I determine that Applicant's family members and his wife's family members, including her parents who now reside in SRVN, do not constitute an unacceptable security risk. The totality of circumstances, as well as common sense, lead me to resolve the risks are minimal.

The family is not Communist-to the contrary, they apparently hate the Communists-and with the rapidly improving relations between the two countries, there is no indication they are targets of any intelligence gathering. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline B. Accordingly, allegations 1.a. through 1.f. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: 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. Clearance is granted.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application (SF 86), dated April 26, 2002), at 1.
2. Tr., at 46, 48-49.
3. Tr., at 47.

4. Tr., at 18.
5. Tr., at 45.
6. Tr., at 45-46.
7. Tr., at 46.
8. Tr., at 46.
9. Tr., at 47.
10. Government Exhibit 1, *supra* note 1, at 5.
11. *Id.*, at 1.
12. *Id.*, at 4.
13. *Id.*; Tr., at 44.
14. Response to SOR, dated December 5, 2003), at 1; Tr., at 18.
15. Tr., at 22.
16. Tr., at 42.
17. Tr., at 43.
18. Tr., at 23.
19. Tr., at 23, 41.
20. Response to SOR, *supra* note 14, at 1.
21. Tr., at 24.
22. Tr., at 42.
23. Tr., at 42-43.
24. Tr., at 43.
25. Tr., at 43.
26. Tr., at 43.
27. Tr., at 20.
28. Government Exhibit 1, *supra* note 1, at 2.
29. Tr., at 20.
30. Tr., at 20.
31. Tr., at 30-31.
32. Tr., at 31.

33. Tr., at 31.
34. Tr., at 32.
35. Tr., at 32.
36. Tr., at 33.
37. Tr., at 33.
38. Tr., at 33.
39. Tr., at 37.
40. Government Exhibit 1, *supra* note 1, at 4.
41. Tr., at 69.
42. Tr., at 59.
43. Government Exhibit 1, *supra* note 1, at 4.
44. Tr., at 57-58.
45. Government Exhibit 1, *supra* note 1, at 4.
46. Tr., at 63.
47. Tr., at 69.
48. Tr., at 34.
49. Tr., at 67.
50. Tr., at 67-68.
51. Tr., at 68.
52. Tr., at 68.
53. Tr., at 62-63; Response to SOR, *supra* note 14, at 1.
54. Tr., at 36-37.
55. Tr., at 49-50.
56. Response to SOR, *supra* note 14, at 1; Tr., at 24, 27, 29, 36.
57. Tr., at 17.
58. Tr., at 34.
59. Government Exhibit 1, *supra* note 1, at 2.
60. *Id.*

61. Tr., at 52.

62. Tr., at 53.

63. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

64. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.