

KEYWORD: Foreign Influence

DIGEST: Security concerns were raised regarding a 28-year-old Vietnam-born naturalized U.S. citizen Applicant who managed to depart the Socialist Republic of Vietnam (SRVN) in 1995 with his parents and younger brother--now all naturalized U.S. citizens residing in the U.S. His three older siblings were not permitted to accompany the family because the Orderly Departure Program denied children 21 and older preference category eligibility from their parents' immigrant visa petitions, and they remain citizens and residents of SRVN, with approved U.S. immigration visa status awaiting their visas. None of his foreign relatives are agents of SRVN or in a position to be exploited by that government. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

CASE NO: 02-26961.h1

DATE: 06/14/2004

DATE: June 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26961

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT ROBINSON GALES**

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esquire, Department Counsel

FOR APPLICANT*Pro Se***SYNOPSIS**

Security concerns were raised regarding a 28-year-old Vietnam-born naturalized U.S. citizen Applicant who managed to depart the Socialist Republic of Vietnam (SRVN) in 1995 with his parents and younger brother--now all naturalized U.S. citizens residing in the U.S. His three older siblings were not permitted to accompany the family because the Orderly Departure Program denied children 21 and older preference category eligibility from their parents' immigrant visa petitions, and they remain citizens and residents of SRVN, with approved U.S. immigration visa status awaiting their visas. None of his foreign relatives are agents of SRVN or in a position to be exploited by that government. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On October 2, 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 October 29, 2003, Applicant responded to the SOR allegations, and requested a hearing. The case was assigned to me on May 11, 2004. A notice of hearing was issued May 12, 2004, scheduling the hearing for May 27, 2004. It was held as scheduled. During the hearing, one government exhibit, nine Applicant Exhibits, and the testimony of two Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on June 14, 2004.

RULINGS ON PROCEDURE

During the proceeding, Department Counsel announced the government would not present evidence pertaining to the allegations in subparagraphs 1.c. and 1.d. of the SOR and conceded the allegations were mitigated.⁽¹⁾ Also, 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 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 eight pages.

FINDINGS OF FACT

Applicant has admitted one of the two remaining factual allegations pertaining to foreign influence under Guideline B (subparagraph 1.a.). Those admissions are incorporated herein as findings of fact. He denied the other factual allegation (subparagraph 1.b.).

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

Applicant is a 28-year-old employee of a defense contractor seeking to obtain a SECRET security clearance. He previously held an interim security clearance for over two years until October 2003 when it was revoked in connection with this security clearance review process.⁽²⁾

Applicant was born in July 1975 in what had, only months before, become known as the Socialist Republic of Vietnam (SRVN).⁽³⁾ He lived there with his parents and four siblings--three brothers and one sister.⁽⁴⁾ After the fall of the non-communist Republic of Vietnam (RVN), Applicant's father (born in 1944)⁽⁵⁾--a former enlisted member of the Army of RVN (ARVN)⁽⁶⁾--was required to attend re-indoctrination and re-education classes for one or two months.⁽⁷⁾ Upon his father's release, the family was forced to relocate to an isolated rural area of the country,⁽⁸⁾ where there was no clean water or electricity.⁽⁹⁾ His father was a farmer and his mother (born in 1948)⁽¹⁰⁾ operated a grocery store in the mornings and was a homemaker during the evenings.⁽¹¹⁾ Applicant attended local schools, but when he was 15-years-
⁽¹²⁾ ⁽¹³⁾

old, he was sent away to attend high school. He attended a local college for two years.

Applicant's mother's side of the family was able to flee RVN for the U.S. during the final days of RVN in April 1975. (14) One remaining member managed to immigrate to the U.S. in 1990. (15) Applicant rarely saw his father's side of the family because they resided in a town very far from his own and there were severe travel restrictions in SRVN when Applicant was young. (16) They remained in SRVN, but Applicant has no contact with them at all. (17) In the early 1990s, Applicant's maternal grandfather sponsored Applicant, his parents, and a younger brother for entry into the U.S. under the United Nation's Orderly Departure Program (ODP) for Vietnam citizens with relatives who had resettled abroad. (18) They were permitted to emigrate and arrived in the U.S. in 1995. (19) Applicant was 20 years old at that time. (20) Under the ODP program, as administered by the U.S., children age 21 and older, may not derive eligibility from their parents' immigrant visa petitions in a preference category. (21) A direct result of this U.S. immigration priority policy was to divide families such as Applicant's, for while Applicant, his parents, and his younger brother were allowed to immigrate to the U.S., his two older brothers (born in 1971 and 1973, respectively), (22) and sister (born in 1967), (23) were not permitted to join their family. (24)

Applicant attended a high school in the U.S., (25) a community college where he was awarded an associate in science degree in engineering science (with highest honor), (26) and a major U.S. university where, in December 2000, he was granted a bachelor of science degree in computer engineering. (27) He has continued his education, and is now a candidate for a masters degree in electrical engineering. (28)

Applicant became a naturalized U.S. citizen in March 2001. (29) He renounced his Vietnamese citizenship when he took the oath of allegiance and 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. (30) The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

Applicant's father became a naturalized U.S. citizen in 2001, and resides in the U.S. with his wife and Applicant. (31) His mother (born in 1948) (32) became a naturalized U.S. citizen in 2000, (33) and resides with her husband and Applicant. (34) His younger brother (born in 1982) (35) became a naturalized U.S. citizen in 2002, (36) and resides in the U.S. with Applicant and their parents. (37)

As noted above, when Applicant departed SRVN, he left two older brothers and a sister behind. They are all citizens of SRVN. Applicant's sister is a high school geometry teacher (38) residing in SRVN with her husband--also a teacher at the same school (39)--and young daughter. (40) Applicant rarely communicates with his sister because she does not have a computer for e-mail and regular mail is too time consuming. (41) While his parents may speak with her by telephone, he very rarely does so. (42) Since Applicant departed SRVN in 1995, he has seen his sister only once, during a visit to

SRVN which he made in 2001. (43) They do not exchange gifts. (44) Applicant's mother petitioned the U.S. Immigration and Naturalization Service (INS) for immigrant status for her daughter, and in July 2001, that petition was approved. (45) As a result, processing of her immigrant visa is underway with a priority date already established. (46)

Applicant's oldest brother--with a degree in physics (47)--is an unmarried businessman and officer of a private company owned by their uncle in SRVN. (48) The company does not do business with the government of SRVN. (49) Applicant used to communicate with this brother approximately once each month and exchange e-mails about two times per month. (50) That frequency has diminished now that Applicant is back in school and working full-time and his brother is busy running a company. (51) Since Applicant departed SRVN in 1995, he has seen this brother on only one occasion, during a visit to SRVN which he made in 2001. (52) They do not exchange gifts. (53) Applicant's father petitioned the INS for immigrant status for his oldest son, and in December 1996, that petition was approved. (54) As a result, processing of his immigrant visa is underway with a priority date already established. (55) He is expected to arrive in the U.S. in "a couple of years." (56)

Applicant's middle brother--with a degree in electronic engineering (57)--is an electronic engineer for the same company owned by their uncle in SRVN. (58) This brother is married to one of Applicant's high school classmates. (59) She works for a bank as an accountant or teller. (60) Applicant's communications with this brother are the same as they are with his oldest brother, for the same reasons. (61) Since Applicant departed SRVN in 1995, he has seen this brother on only one occasion, during a visit to SRVN which he made in 2001. (62) They do not exchange gifts. (63) Applicant's father also petitioned the INS for immigrant status for this son, and in December 1996, that petition was approved. (64) As a result, processing of his immigrant visa is underway with a priority date already established. (65) He too is expected to arrive in the U.S. in "a couple of years." (66)

Applicant's siblings are not members of the communist party and are not affiliated with the government of SRVN. (67)

Since he departed SRVN in 1995, Applicant has returned there to visit his family on only one occasion, for five weeks, in 2001. (68)

Applicant has been employed by the same government contractor since 2001 where he now serves as a software engineer. (69) His work performance is such that he has been awarded an employee excellence award and promoted, effective May 2003. His mentor at the company strongly supports his application, and has characterized his performance and character in the following favorable terms: enthusiastic to perform assigned tasks, an effective team-player, truthful, trustworthy, honest, and determined. (70)

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," [\(71\)](#) 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 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 obligation--in this instance, two of his three brothers and his sister, as well as other extended family members (aunt, uncle, sister-in-law, brother-in-law, and niece) are citizens and residents of SRVN--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: [\(72\)](#)

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.

The citizenship status of Applicant's two brothers and sister, when considered in light of the nature of the government in SRVN--a Communist totalitarian country that is no longer involved in open military hostilities with the U.S., whose interests are not necessarily inimical to the U.S., and currently is engaged in normal trade relations with the U.S.--facilitates an analysis involving the adjudicative guidelines and the various applicable conditions set forth therein. Of Applicant's immediate family, his parents and youngest brother are already naturalized U.S. citizens residing in the U.S. Of his extended family, all of his mother's relatives are already naturalized U.S. citizens residing in the U.S., but those relatives on his father's side remain citizens and residents of SRVN. As to those family members remaining in SRVN, the issue of potential foreign influence is raised. It should be remembered, however, this situation was in large measure caused by the U.S. policies pertaining to the ODP program, where children age 21 and older, could not derive eligibility from their parents' immigrant visa petitions in a preference category. But for the restrictions of that policy, Applicant's two brothers and sister would already be in the U.S. Nevertheless, these facts activate 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, 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). Moreover, as to Applicant's extended family members remaining in SRVN, especially those from his father's side of the family, FI MC E2.A2.1.3.3. applies (*contact and correspondence with foreign citizens are casual and infrequent*). Department Counsel concurred in this analysis and has conceded the relationships are sufficiently casual and infrequent to alleviate government concerns in this regard. ⁽⁷³⁾ After an examination of the evidence, I determine that Applicant's two older brothers and sister, considering their citizenship, residency, and visa status, as well as their respective occupations, do not constitute an unacceptable security risk.

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.d. 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

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. Tr., at 9-10.
2. Tr., at 6, 40-41.
3. Government Exhibit 1 (Security Clearance Application (SF 86), dated April 18, 2001), at 1.
4. Response to SOR, dated October 29, 2003, at 1.
5. Government Exhibit 1, *supra* note 3, at 4.
6. Tr., at 54.
7. Tr., at 56.
8. Response to SOR, *supra* note 4, at 1.
9. *Id.*, at 2.
10. Government Exhibit 1, *supra* note 3, at 3.
11. Tr., at 43.
12. Tr., at 43.
13. Tr., at 44.
14. Tr., at 59.
15. Tr., at 59.
16. Tr., at 52.
17. Tr., at 26, 59.
18. Response to SOR, *supra* note 4, at 2.
19. Tr., at 42, 57.

20. Tr., at 42.

21. Letter from U.S. Embassy, Bangkok, Thailand, dated March 3, 1994, attached to Response to SOR, *id.*

22. Government Exhibit 1, *supra* note 3, at 4.

23. *Id.*

24. Response to SOR, *supra* note 4, at 2.

25. Tr., at 19.

26. Diploma, dated May 3, 1998, attached to Response to SOR, *supra* note 4.

27. Degree, dated June 9, 2001, attached to SOR, *id.*

28. Enrollment verification for fall term 03-04, dated October 22, 2003, attached to Response to SOR, *id.*

29. Government Exhibit 1, *supra* note, at 1.

30. *Id.*

31. *Id.*, at 4-5.

32. *Id.*, at 4.

33. *Id.*

34. *Id.*, at 3.

35. Government Exhibit 1, *supra* note 3, at 4.

36. U.S. Department of Justice Certificate of Naturalization, dated May 1, 2002, attached to Response to SOR, *supra* note 4.

37. Government Exhibit 1, *supra* note 3, at 4.

38. Tr., at 45.

39. Tr., at 53.

40. Tr., at 46.

41. Tr., at 46.

42. Tr., at 46.

43. Tr., at 60.

44. Tr., at 46.

45. Applicant Exhibit G (U.S. INS Notice of Action, dated July 20, 2001).

46. *Id.*

47. Tr., at 48; Applicant Exhibit C (Letter from company owner, dated March 12, 2004)..

48. Tr., at 48.

49. Applicant Exhibit C, *supra* note 47.

50. Tr., at 49-50.

51. Tr., at 49-50.

52. Tr., at 49.

53. Tr., at 51.

54. Applicant Exhibit E (U.S. INS Notice of Action, dated December 12, 1996).

55. *Id.*

56. Tr., at 37.

57. Tr., at 48; Applicant Exhibit C (Letter from company owner, dated March 12, 2004).

58. *Id.*

59. Tr., at 50.

60. Tr., at 53.

61. Tr., at 49-50.

62. Tr., at 49.

63. Tr., at 51.

64. Applicant Exhibit F (U.S. INS Notice of Action, dated December 12, 1996).

65. *Id.*

66. Tr., at 37.

67. Response to SOR, *supra* note 4, at 3.

68. Tr., at 60.

69. Response to SOR, *supra* note 4, at 2.

70. Letter from mentor/co-worker, dated October 20, 2003, attached to *id.*

71. 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).

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

73. Tr., at 66.