

DATE: August 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27459

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's father is a citizen of Vietnam and resides in Vietnam. He is long retired and not in a position to be exploited by Vietnam in a way that could force Applicant to choose between loyalty to this family member and his loyalty to the United States. Applicant has given some money to his father in Vietnam, but the amount is not significant. Applicant's strong attachment to the United States and minimal ties to Vietnam makes it unlikely that he would respond favorably to any efforts to act against United States interests. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

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, issued an undated Statement of Reasons (SOR) to Applicant which 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 clearance should be denied or revoked.

On October 14, 2003, Applicant submitted a signed and sworn response to the SOR. Applicant initially requested that his case be decided on the written record in lieu of a hearing. On January 27, 2004, Applicant requested a clearance decision based on a hearing record.

On January 29, 2004, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on May 7, 2004, and the hearing was held on June 1, 2004.

At the hearing, Department Counsel offered two documentary exhibits (Exhibits 1 and 2), and no witnesses were called. Applicant offered no documentary exhibit and offered his own testimony. The record was held open subsequent to the hearing, and Applicant offered five documents. These consisted of four letters of reference (Exhibits A- D) and one evaluation (Exhibit E), which were entered into evidence without objection. The transcript (TR) was received on July 1, 2004.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive because Applicant's father is not a United States citizen and resides in Vietnam, and Applicant has traveled to his native Vietnam on five occasions. The SOR contains four allegations, 1.a. through 1.d., under Guideline B (Foreign Influence). In his response to the SOR, Applicant admits all four allegations. These allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents and the live testimony, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 46 year old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. He received a Bachelor of science degree in electrical engineering from a United States university in 1975 and a graduate degree in 1979.

Applicant was born in Vietnam. In 1975, during the fall of South Vietnam, Applicant's father, who held the rank of Lieutenant Colonel in the South Vietnamese army, arranged transportation, by a United States military plane, for Applicant, his grandmother, mother, brother,

and sister to evacuate Vietnam. When they left Vietnam, they were taken to the United States, where they remained (Tr at 17-19). His mother and grandmother are now deceased.

Applicant became a naturalized United States citizen in 1983. His wife was born in Vietnam, and, like her husband, she became a naturalized United States citizen in 1983. They have two children, who were born in the United States and are United States citizens (Tr at 21- 22). Applicant's brother and sister, and their spouses and children, are all United States citizens.

After the fall of Saigon in 1975, because of his position with the South Vietnamese army, Applicant's father was placed in what was essentially a prison for 13 years, and he was not released until 1988. He has remained a citizen of Vietnam and continues to reside in Vietnam. He planned to move to the United States, but after Applicant's mother died he decided not to move. He is retired and has no contact with the Vietnamese government. Applicant last saw his father approximately 4 years ago, and he speaks to him by telephone once a month. Applicant has never been contacted by the government of Vietnam regarding his father, either during the years he was imprisoned or since his release (Tr at 18-20). Applicant and his brother and sister each contribute approximately \$100 a month to his father.

Applicant has traveled to Vietnam on five occasions, since he first moved to the United States in 1975. They were all casual trips, either to see his father or to show his children the country in which he was born (Tr at 30-31).

Applicant has no financial interest or property in Vietnam. He testified that he considers himself to be only an American, since he has live here since he was seventeen years of age, and that he would never do anything to compromise the United States. If his father was ever threatened by the government of Vietnam, he would report it to the proper United States authorities (Tr at 34-35).

Applicant submitted a number of letters of reference on his behalf, from coworkers, a relative, and a supervisor on his behalf. The letters spoke highly about his honesty and trustworthiness (Exhibits A- D).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

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, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant's father is a citizen of Vietnam and resides in Vietnam. The Vietnam citizenship and residency of a member of Applicant's immediate family creates the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such a tie raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him. This Applicant has done.

The evidence of a father, who is a citizen of resides in Vietnam, comes within Disqualifying Condition (DC) E2.A2.1.2.1. The fact that the foreign country in question is Vietnam, a country under Communist rule, is also a concern, but that fact is not automatically controlling. Based on the nature of the overall record and the totality of the evidence, including: the age and lack of government involvement of Applicant's father, Applicant's long history since coming to the United States, his ties to all of his family members who are United States citizens, and his testimony about his feelings concerning the United States, I have determined that his father in Vietnam does not constitute an unacceptable security risk, and Mitigating Conditions (MC) E2.A2.1.3.1. applies.

Applicant does contribute some funds to his father under DC E2.A2.1.2.8., but the amount is small. I conclude that MC E2.A2.1.3.5. applies because the financial interests are not significant enough to cause Applicant to do anything which would be contrary to the interests of the United States.

After considering all of the evidence of record on these issues, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR, and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it, and would report the incident to the proper authorities.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For 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.

Martin H. Mogul

Administrative Judge