

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Security concerns were raised regarding a 53-year-old Vietnam-born naturalized U.S. citizen Applicant--who, with his mother (now deceased), managed to escape the communist forces in April 1975 by fleeing Saigon aboard his Vietnamese Navy small boat. His Vietnam-born wife and her entire family are naturalized U.S. citizens residing in the U.S. They have three U.S.-born children. His brother--a permanent U.S. alien--is a citizen of SRVN who resides in the U.S. Applicant traveled to SRVN on three occasions in the past 11 years. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

CASE NO: 02-27719.h1

DATE: 06/16/2004

DATE: June 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27719

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised regarding a 53-year-old Vietnam-born naturalized U.S. citizen Applicant--who, with his mother (now deceased), managed to escape the communist forces in April 1975 by fleeing Saigon aboard his Vietnamese Navy small boat. His Vietnam-born wife and her entire family are naturalized U.S. citizens residing in the U.S. They have three U.S.-born children. His brother--a permanent U.S. alien--is a citizen of SRVN who resides in the U.S. Applicant traveled to SRVN on three occasions in the past 11 years. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On November 5, 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 November 20, 2003, Applicant responded to the SOR allegations, and requested a hearing. The case was assigned to me on March 30, 2004. A notice of hearing was issued that same day scheduling the hearing for April 20, 2004. It was held as scheduled. During the hearing, two government exhibits, one Applicant exhibit, and the testimony of three Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on May 17, 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 two documents 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 six pages; and U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Background Note: Vietnam*, dated July 2003, 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.d.), as well as the factual allegation pertaining to Personal Conduct under Guideline E (Subparagraph 2.a.). 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 53-year-old employee of a defense contractor seeking to obtain a security clearance the level of which has not been divulged.

Applicant was born in 1950 in what was then the Democratic Republic of Vietnam (DRVN)--otherwise known as North Vietnam. ⁽¹⁾ His father (born in 1929) ⁽²⁾ was a soldier with the French Army ⁽³⁾ fighting the communist-led Viet Minh forces. With his father's death and the collapse of French colonial rule in Vietnam in 1954, ⁽⁴⁾ Applicant and the remaining members of his family fled south to Saigon in what eventually became the Republic of Vietnam (RVN). ⁽⁵⁾ He resided there with his widowed mother and brother. Applicant served in the Vietnamese Navy from September 1968 until the fall of RVN in April 1975. ⁽⁶⁾ His brother (born in 1953) ⁽⁷⁾ was employed by the telephone company. ⁽⁸⁾

In April 1975, Applicant was a technical sergeant in the Vietnamese Navy serving aboard what he characterized as a "small boat" with a crew of seven.⁽⁹⁾ With the collapse of Saigon, Applicant and his mother managed to escape the communist forces by fleeing to a U.S. Navy ship in the area in his Vietnamese Navy boat.⁽¹⁰⁾ His brother chose to remain in Saigon.⁽¹¹⁾ Applicant and his mother were transported first to Guam where they were granted permission to immigrate to the U.S., and then to the U.S. that same year.⁽¹²⁾ While at the refugee camp in Guam, Applicant met the woman--another fleeing Vietnamese refugee--who eventually became his wife.⁽¹³⁾ She and her entire immediate family escaped aboard her father's fishing boat from which they boarded a U.S. Navy ship bound for Guam.⁽¹⁴⁾ After a brief stay in Guam her family departed for the U.S.⁽¹⁵⁾ Applicant and his wife were married in 1978.⁽¹⁶⁾ They have three sons, all of whom were born in the U.S. and are U.S. citizens residing here.⁽¹⁷⁾

Applicant became a naturalized U.S. citizen in September 1984.⁽¹⁸⁾ He intended to renounce 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.⁽¹⁹⁾ His wife became a naturalized U.S. citizen that same day.⁽²⁰⁾ She has been granted a security clearance.⁽²¹⁾ Applicant's mother became a naturalized U.S. citizen in 1993,⁽²²⁾ and she passed away earlier this year.⁽²³⁾ Applicant's brother managed to immigrate to the U.S. in 1997,⁽²⁴⁾ currently has permanent U.S. resident status, and hopes to become a U.S. citizen.⁽²⁵⁾

Since he fled SRVN in 1975, Applicant has returned there to visit on three occasions. His first trip occurred in 1993 when he, his wife, and their three children visited his brother and grandmother, as well as the areas where he grew up.⁽²⁶⁾ He and his mother returned in 1998 to attend his grandmother's funeral.⁽²⁷⁾ In 2000, Applicant accompanied his wife's parents to SRVN to visit some of their extended family members.⁽²⁸⁾ His wife did not go with them.⁽²⁹⁾ He has no plans to return to SRVN.⁽³⁰⁾

Applicant does not have any foreign investments or financial interests, including bank accounts or real estate, in SRVN.⁽³¹⁾ His holdings in the U.S. include two houses worth an estimated \$400,000.00 each,⁽³²⁾ five automobiles,⁽³³⁾ and a combined annual salary with his wife of about \$70,000.00.⁽³⁴⁾ One son has graduated from a U.S. university and the other two are currently attending college.⁽³⁵⁾

Applicant's English proficiency has been described by a co-worker/project manager/security manager as "not the best,"⁽³⁶⁾ and he is considered administratively disadvantaged.⁽³⁷⁾ During the hearing, Applicant's English language abilities were such that most of his testimony was received through an interpreter.

On February 14, 2002, in an effort to assist him, Applicant's wife completed his Security Clearance Application (SF 86),⁽³⁸⁾ and in response to an inquiry pertaining to traveling outside the U.S. on other than official U.S. government orders in the last seven years,⁽³⁹⁾ she responded "no."⁽⁴⁰⁾ Applicant signed the SF 86, and in so doing, certified that his

response was true, complete, and accurate. It was false. Applicant had actually traveled to SRVN on three occasions, in 1993--a trip which was outside the seven year window of the inquiry--as well as in 1998 and 2000. His wife acknowledged that she had forgotten the travel and did not intend to hide the truth.⁽⁴¹⁾ Applicant also acknowledged the error and denied intending to hide his foreign travel.⁽⁴²⁾ He simply failed to catch the error his wife had made.⁽⁴³⁾ He does not believe his travel to SRVN would harm his chances of obtaining a security clearance.⁽⁴⁴⁾

Applicant has been employed by the same government contractor since May 2001 where he now serves as a warehouseman.⁽⁴⁵⁾ He worked for a variety of employers on the same military facility for over 20 years.⁽⁴⁶⁾ He has also held a second job with another employer as a mobile equipment metal worker since 1984.⁽⁴⁷⁾ Applicant's co-worker/project manager/security manager has worked with him for over 20 years and considers Applicant to be truthful and highly respected.⁽⁴⁸⁾

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.

GUIDELINE E - PERSONAL CONDUCT: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to both adjudicative guidelines 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," [\(49\)](#) 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 his brother is a citizen of SRVN residing in the U.S. and may be subject to duress. This situation raises the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. The citizenship status of Applicant's brother, 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 United States, and whose interests are not necessarily inimical to the United States, 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. Only the continuing SRVN citizenship of his brother raises the issue of potential foreign influence. 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*). After an examination of the evidence, I determine that Applicant's brother, considering his citizenship and residency status, does not constitute an unacceptable security risk. His brother has been a permanent resident alien of the U.S. since 1997, and appears to be a risk to no one.

The government's only other alleged foreign influence concern relates to Applicant's having taken three trips to SRVN in the past 11 years--actions which it asserts raises FI DC E2.A2.1.2.6. (*conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government*). By the very nature of the investigative inquiry into Applicant's background, the government is unconcerned about travel to foreign countries which occurred over seven years ago. Thus, Applicant's 1993 trip to SRVN was clearly unimportant in the overall scheme of things. An analysis of the potential vulnerability to Applicant because of any of his two other trips reveals little such vulnerability as he has no immediate family in SRVN through whom coercion, exploitation, or pressure could be exerted.

Applicant's absence of foreign investments or financial interests, including bank accounts or real estate, in SRVN, raises FI MC E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). Applicant did not simply casually relocate from his home in Saigon, but managed to escape the communist forces by fleeing the city in his Vietnamese Navy boat. His "financial interests" were worn on his back when he fled the country, not invested there. On the other hand, his diligence and hard work have enabled him to reach the plateau where his U.S. holdings are significant and he has educated his three sons.

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.

At first glance it appears the government has established its case under Guideline E. On February 14, 2002, Applicant signed an SF 86 and denied having traveled outside the U.S. during the preceding seven years. In fact, he had traveled to SRVN on two occasions within that seven year window. The guideline addresses omissions, concealment, or falsification which is deliberate. In this instance, I conclude that Applicant neither intentionally nor willfully lied, falsified, omitted, or concealed his overseas travel. None of the Personal Conduct Disqualifying Conditions apply.

The evidence before me clearly indicates Applicant's wife completed the SF 86 and he merely signed it. She forgot Applicant's overseas travel and he neglected to check the accuracy of the responses. Considering Applicant's difficulty with English proficiency, and the fact that his security manager was aware of his overseas travel, Applicant would have nothing to gain by deliberately omitting the correct information on his SF 86. Under these circumstances, I believe Applicant has, through evidence of extenuation and explanation, successfully rebutted and overcome the government's case with respect to Guideline E. Accordingly, allegation 2.a. of the SOR is 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

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: 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 February 14, 2002), at 1; Tr., at 29.
2. *Id.*, Government Exhibit 1, at 3.
3. Tr., at 56.
4. Tr., at 57.
5. Tr., at 57.
6. Government Exhibit 2 (Statement, dated July 1, 2002), at 1.
7. Government Exhibit 1, *supra* note 1, at 4.
8. Tr., at 58.
9. Government Exhibit 2, *supra* note 6, at 1; Tr., at 58.
10. *Id.*, Government Exhibit 2.
11. Tr., at 59.
12. Government Exhibit 2, *supra* note 6, at 1.
13. *Id.*
14. Tr., at 74-75.
15. Tr., at 75.
16. Government Exhibit 1, *supra* note 1, at 2.
17. *Id.*, at 3.
18. *Id.*, at 1.
19. *Id.*
20. *Id.*, at 4.
21. Tr., at 82.

22. Government Exhibit 1, *supra* note 1, at 4.
23. Tr., at 39; Applicant Exhibit A (Applicant's corrections to Government Exhibit 2), at 3.
24. Tr., at 39.
25. Tr., at 39-40.
26. Tr., at 34; Government Exhibit 2, *supra* note 6, at 2.
27. *Id.*, Government Exhibit 2.
28. Tr., at 42.
29. Tr., at 42-43, 54, 78.
30. Tr., at 45.
31. Tr., at 60; Government Exhibit 2, *supra* note 6, at 2.
32. Tr., at 60-61.
33. Tr., at 61.
34. Tr., at 63.
35. Tr., at 62.
36. Tr., at 95-96.
37. Tr., at 96.
38. Government Exhibit 1.
39. Question 16.
40. Tr., at 85.
41. Tr., at 89-91.
42. Government Exhibit 2, *supra* note 6, at 2.
43. Response to SOR, dated November 20, 2003, at 2.
44. Tr., at 54-55.
45. Government Exhibit 1, *supra* note 1, at 2.
46. Tr., at 65.
47. Government Exhibit 1, *supra* note 1, at 2.
48. Tr., at 95.
49. 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).