

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant is a design engineer for a defense contractor. When the South Vietnam government fell, Applicant fled Vietnam in a boat and came to the United States. He is a naturalized United States citizen. His father and brother are grocers in Vietnam and he talks to them every two months by telephone. He had a traffic accident and the other party to the accident made a citizen's arrest of Applicant for battery. He appeared in court, pled guilty because he did not want to return to court another day, and paid a fine. He did not believe he was arrested so his failure to list this offense on his security clearance application is not deliberate. Clearance is granted.

CASENO: 02-27797.h1

DATE: 01/11/2005

DATE: January 11, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27797

**DECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a design engineer for a defense contractor. When the South Vietnam government fell, Applicant fled Vietnam in a boat and came to the United States. He is a naturalized United States citizen. His father and brother are grocers in Vietnam and he talks to them every two months by telephone. He had a traffic accident and the other party to the accident made a citizen's arrest of Applicant for battery. He appeared in court, pled guilty because he did not want to return to court another day, and paid a fine. He did not believe he was arrested so his failure to list this offense on his security clearance application is not deliberate. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 27, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on August 5, 2004. The SOR alleges security concerns under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on August 10, 2004. He admitted to all of the allegations under both Guideline B and Guideline E. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on October 22, 2004. Applicant received a complete file of relevant material (FORM) on November 5, 2004, and provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. His response was due on December 6, 2004. As of December 20, 2004, he had not responded. The case was assigned to me on December 29, 2004.

## **FINDINGS OF FACT**

Applicant is a 54-year-old design engineer for a defense contractor. He was born in Vietnam and came to this country in 1978 after escaping from Vietnam in a boat. He and his wife are naturalized United States citizens. They have two children who are United States citizens. Applicant's mother-in-law resides in California and is also a naturalized United States citizen.

Applicant's father and brother are citizens of and reside in Vietnam. His father is a retired grocery salesman and his brother is also in grocery sales. His brother served in the South Vietnam Army before its defeat in 1975 by North Vietnam. Appellant talks to them approximately every other month by telephone. He made a pleasure trip to Vietnam in 1999.

The relationship between Vietnam and the United States has improved recently. The President of the United States announced the formal normalization of diplomatic relations with Vietnam on July 11, 1995. U.S. relations with Vietnam have become deeper and more diverse in the years since political normalization. The two countries have broadened political exchanges through regular dialogues on human rights and regional stability. Economic relations have also vastly improved in the past decade.

Applicant in May 2000, was involved in an automobile accident when a car backed into his car. The other driver admitted fault and offered to pay damages. Applicant wanted to call the police and have a report filed. The other driver walked away and Appellant aggressively grabbed her arm and purse to stop her. When police arrived, they informed the other driver they would not arrest Applicant but she could make a citizen's arrest for battery. She did so and Applicant was issued a citation. Applicant did not appear in court when required. A warrant was issued and Applicant voluntarily went to the police and was placed on bail. He was present for the second trial date but the other driver did not appear. Applicant had the option to plead guilty or return to court for trial on another day. Applicant chose to plead guilty, pay a fine, and be placed on probation. Applicant failed to note this event when submitting his security clearance application in July 2001. Question 26 of the application asks whether in the last 7 years the applicant had been arrested for, charged with, or convicted of any offense not already reported in the application. Applicant told a special agent of the Defense Security Service (DSS) all of the facts concerning the incident and stated he did not consider he had been arrested for the offense.

## **POLICIES**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to ... control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position ... that will give that person access to such information." *Id.* At 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1 (b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (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 applicant'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 of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶

E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶E2.2.2.

## CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Under Guideline B (Foreign Influence), a security concern exists when an individual has contacts with citizens of other countries or financial interests in other countries that make an individual vulnerable to coercion, exploitation, or pressure. Directive ¶ E2.A2.1.1. Applicant's father and brother in Vietnam brings this matter under Foreign Influence Disqualifying Condition Directive ¶ 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*). An immediate family member is a *spouse, father, mother, sons, daughters, brothers, sisters*. Directive ¶ E2.A2.1.3.1. Applicant's father and brother are immediate family members who reside in Vietnam. I conclude the disqualifying condition under Guideline B has been established.

The Foreign Influence Mitigating Conditions that may apply to Applicant are Directive ¶ E.2.A2.1.3.1. (*a determination that the immediate family member(s) 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 involved and the United States*); and Directive E2.A2.1.3.3. (*contacts and correspondence with foreign citizens are casual and infrequent*). Applicant's father and brother are not agents of a foreign power and not in a position to be exploited by the foreign power so as to force Applicant to choose between them and the United States. Applicant already chose between his family in Vietnam and the United States when he left his family and birth country in a boat for an uncertain future in the United States. His telephone contacts with his father and brother are not frequent and he has only visited them once in the almost 28 years since he fled Vietnam. I conclude Applicant has mitigated the disqualifying condition under Guideline B.

Under Guideline E (Personal Conduct), a security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules or regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1. Applicant's failure to list his arrest and conviction for battery in response to question 26 on the security clearance application brings the matter under Personal Conduct Disqualifying Condition Directive ¶ E2.A5.1.2.2. (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire*). The police did not arrest Applicant but the other person initiated a citizen's arrest. It is reasonable for Applicant to believe he had not been arrested for battery when completing the security clearance application. He thought he was not guilty of the offense and only pled guilty so he did not have to return to court another day. Applicant readily discuss the incident with the DSS special agent when asked. I conclude Applicant did not

deliberate omit the offense in response to Question 26 and the Disqualifying Condition is not established.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is eligible 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 APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2, Guideline E FOR APPLICANT

Subparagraph 2.a.: For Applicant

### **DECISION**

In light of all of the circumstances presented in 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.

Thomas M. Crean  
Administrative Judge