

KEYWORD: Foreign Influence

DIGEST: The Applicant is a naturalized American citizen from Vietnam. She has lived in the United States since 1979 and been an American citizen since 1985. Her connections with her remaining family members in Vietnam is infrequent. The relatives are not agents of a foreign power or in a position to be exploited by Vietnam. Adverse inference is overcome. Clearance is granted.

CASENO: 02-28307.h1

DATE: 01/27/2005

DATE: January 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28307

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Thomas M. Abbot, Esquire
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SYNOPSIS

The Applicant is a naturalized American citizen from Vietnam. She has lived in the United States since 1979 and been an American citizen since 1985. Her connections with her remaining family members in Vietnam is infrequent. The relatives are not agents of a foreign power or in a position to be exploited by Vietnam. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On January 8, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on January 23, 2003 and requested the decision be made without a hearing. On July 20, 2004, the Applicant requested a hearing. The case was received by another Administrative Judge on October 4, 2004, and a Notice of Hearing was issued on October 4, 2004. The case was reassigned to me on October 18, 2004.

A hearing was held on October 18, 2004, at which the Government presented six documentary. Testimony was taken from the Applicant, who also submitted 21 exhibits. The transcript was received on November 2, 2004.

FINDINGS OF FACT

The Applicant is 50, married and has a Bachelor of Science degree in Engineering. She is employed by a defense contractor as a Principal Engineer, and she seeks to obtain a DoD security clearance in connection with her employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Connections). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has relatives who are citizens of, and resident in, a foreign country. These relatives may be subject to duress and create the potential for foreign influence that could result in the compromise of classified material.

The Applicant was born in what was then South Vietnam. She left Vietnam as a refugee in 1979 at the urging of her parents. (Transcript at 33-37.) She became an American citizen in 1985. Her husband is also a naturalized American citizen from Vietnam. (Applicant's Exhibit U.) They have two children who are native born Americans.

Her parents, now in their 90s, are still alive and live in Vietnam. The Applicant has five siblings. One brother lives in the United States and is an American citizen. Two sisters and two brothers continue to live in Vietnam. None of her family members have any connection to the current Vietnamese government, the Vietnamese military or the Communist Party. Two brothers served in the South Vietnamese military 30 years ago.

The Applicant has visited her family in Vietnam three times since she left in 1979. These visits occurred in 1993, 1998 and 2004. From 1979 until 1993 she had no direct contact with her family at all. The Applicant is unsure whether she will ever travel to Vietnam again. (Transcript at 40-41.)

The Applicant contacts her family by telephone less than six times a year. All of her family are financially secure in

Vietnam. She does give small financial gifts to her parents on an annual basis. The total value of the gifts is less than \$1000 a year. (Transcript at 43-44.)

The Applicant has a niece who now resides in Iowa with her husband. In 2002 she communicated with this relative by email to discuss living conditions in the United States. (Transcript at 44-45.)

She adamantly stated that she is a loyal U.S. citizen, "I came to this country, and this country is (*sic*) open the door for me and gave me the opportunity to study, to be success, so I choose this country as my home and because I want to stay in here so I want to be part of the country." (Transcript at 37.)

With regards to responding to pressure from the Vietnamese government:

If I choose that path betray this country, means I destroy everything I worked so hard to build in this country so far. And the important thing is I would be disloyal to this country. I owe this country a great deal, Your Honor. This country has accept me and I'm not that crazy to be disloyal to betray this country, to bring harm or do anything jeopardize this country, Your Honor, because this is my country and my children's country. Moreover, I don't have any obligation or anything to do with Vietnam Government. So, I'm not going to help them if they ask me for anything. (Transcript at 47-48.)

Mitigation.

The record shows that the Applicant and her husband have substantial financial assets in the United States. (Applicant's Exhibits E through K.) She is well respected at work, as shown by statements of work colleagues (Applicant's Exhibits A through D) and performance reviews and awards (Applicant's Exhibits L through P).

The Applicant submitted several news articles which discuss the growing trade, diplomatic and military ties between the United States and Vietnam. (Applicant's Exhibits Q through T.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline B (Foreign influence)

Conditions that could raise a security concern:

(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;

Conditions that could mitigate security concerns include:

(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;

(3) Contact and correspondence with foreign citizens are casual and infrequent;

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct

- b. The circumstances surrounding the conduct, to include knowledgeable participation

- c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct

- e. The voluntariness of participation

- f. The presence or absence of rehabilitation and other pertinent behavior changes

- g. The motivation for the conduct

- h. The potential for pressure, coercion, exploitation or duress

- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have foreign connections that demonstrates untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has several close family members, specifically her parents and four siblings, who are citizens of and reside in Vietnam.

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that the Applicant left Vietnam at the urging of her family in 1979 and came to the United States as a refugee. Since that time she has become an American citizen, married an American citizen, achieved her education and a good job. She has a successful career, is financially secure and has two native born American children. Her roots in the United States are deep.

She has occasional contact with her family in Vietnam - three visits in 25 years and occasional phone calls. While it is difficult to call any family relationship casual, it is certainly true that this one is infrequent. By her own testimony, she and her husband found Vietnam a strange place on their last visit. Her family has no connections to the Vietnamese government, and it is obvious from their history that her family cannot be intimidated by a foreign power. It is also obvious that the Applicant also cannot be coerced by a foreign power to act in a way contrary to the best interests of the United States.

After a thorough review of the evidence, I find that Disqualifying Condition 1 applies (*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, that condition is overcome by the application of mitigating Conditions 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*) and 3 (*Contact and correspondence with foreign citizens are casual and infrequent*).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 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 the Applicant.

Wilford H. Ross
Administrative Judge