

DATE: May 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29840

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised regarding a 29-year-old Vietnam-born naturalized U.S. citizen Applicant--who managed to flee the Socialist Republic of Vietnam (SRVN) in 1979--whose four sisters remain citizens and residents of SRVN, and whose mother--a permanent U.S. alien--is a citizen of SRVN who resides part-time in the U.S. and in SRVN. None of them are agents of SRVN or in a position to be exploited by that government. Applicant's brother and other sister are naturalized U.S. citizens residing in the U.S. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On November 7, 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 17, 2003, Applicant responded to the SOR allegations, and requested a hearing. The case was assigned to, and received by, me on March 30, 2004. A notice of hearing was issued that same day scheduling the hearing for April 22, 2004. It was held as scheduled. During the hearing, two government exhibits and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on May 4, 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 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 10 pages. Also, Department Counsel moved to amend subparagraph 1.a of the SOR. Specifically, she sought to amend subparagraph 1.a. thereof, to conform to the evidence and correct a typing error, by deleting the word "father," from the first line of the sentence and substituting therefor the word "mother." There being no objection by Applicant, I granted the motion. ⁽¹⁾

FINDINGS OF FACT

Applicant has admitted all of the three factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. through 1.c.). 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 29-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 1975 in what was then the Republic of Vietnam (RVN). ⁽²⁾ He resided with his parents and six siblings--a brother and five sisters. ⁽³⁾ In 1979, four years after the collapse of RVN, Applicant, his brother, oldest sister, aunt, and some cousins, fled RVN by boat. ⁽⁴⁾ They spent an unspecified period of time in a refugee camp in Singapore ⁽⁵⁾ before being sponsored for entry into the United States by an uncle and aunt who were already U.S. citizens and residents. ⁽⁶⁾ Applicant attended a high school in the U.S. ⁽⁷⁾ and subsequently a state university where, in December 2000, he was granted a degree in information technology. ⁽⁸⁾

Applicant became a naturalized U.S. citizen in May 1995. ⁽⁹⁾ He renounced 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. ⁽¹⁰⁾ The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

The citizenship and residency status of Applicant's immediate family is as follows: Applicant's father--formerly a soy sauce maker ⁽¹¹⁾--is deceased, having passed away in about 1989-90 while residing in SRVN. ⁽¹²⁾ His mother--born in 1940 ⁽¹³⁾ and the owner of the soy sauce business ⁽¹⁴⁾--and unable to leave SRVN until about 2001-02, ⁽¹⁵⁾ is a citizen of SRVN who splits her residency. During the summer months, she resides with either Applicant or two of his siblings in the U.S., ⁽¹⁶⁾ and during the winter months she returns to SRVN to reside with one daughter ⁽¹⁷⁾ while tending to her business. Applicant's mother is a U.S. registered alien ⁽¹⁸⁾ who has not yet taken steps to obtain a U.S. citizenship. ⁽¹⁹⁾ Applicant's brother--born in 1966 ⁽²⁰⁾ and an information systems consultant ⁽²¹⁾--is a naturalized U.S. citizen residing in the U.S. with his wife. ⁽²²⁾ Applicant's oldest sister--born in 1964 ⁽²³⁾ and the sister who accompanied him eventually to the U.S. from RVN--is a housewife married to a U.S. citizen and she too is a naturalized U.S. citizen residing in the U.S. ⁽²⁴⁾

When Applicant fled RVN, he left four sisters behind. They are all citizens of SRVN. Applicant's brother has spent the past 10 years completing the necessary paperwork in an effort to sponsor their immigration to the U.S. ⁽²⁵⁾ One sister--born about 35 years ago--resides with her husband and child. ⁽²⁶⁾ They are in the shrimp business and have no connection with the government of SRVN. ⁽²⁷⁾ Applicant rarely communicates with them, but may do so by Internet instant messenger about two times per year. ⁽²⁸⁾ Another sister--born about 33 years ago--resides with her husband and child. ⁽²⁹⁾ They, too, are in the shrimp business and have no connection with the government of SRVN. ⁽³⁰⁾ Applicant rarely communicates with this sister because she is rather shy, but he does communicate with her husband by Internet instant messenger about one time per month. ⁽³¹⁾ Another sister--born about 28 years ago--resides with her husband. ⁽³²⁾

⁽³³⁾

They, too, are in the shrimp business and have no connection with the government of SRVN. Applicant rarely communicates with them, but may do so by Internet instant messenger about two times per year.⁽³⁴⁾ Applicant's youngest sister--born about 26 years ago--is unmarried. She is an accountant with a U.S. company and starting in the shrimp business.⁽³⁵⁾ Applicant regularly communicates with her by Internet instant messenger on a monthly basis.⁽³⁶⁾ Although Applicant tries to be close to his four sisters, he regrets that they are not because they rarely communicate with each other.⁽³⁷⁾

Applicant does not give financial support to his four sisters.⁽³⁸⁾ However, on the occasions of his visits to SRVN he has offered them \$200.00-\$300.00 which they sometimes accept.⁽³⁹⁾

Since he fled SRVN in 1979, Applicant has returned there to visit his family on several occasions. He went there during the summers of 1993 and 1996, as well as in May 2000.⁽⁴⁰⁾ Since receiving his college degree, he has returned two times each year in 2002, 2003, was there one time so far earlier this year.⁽⁴¹⁾ During his most recent trips he generally resides with his mother in her house.⁽⁴²⁾

Applicant does not have any foreign investments or financial interests, including bank accounts or land, in SRVN.⁽⁴³⁾ While he does not yet own a residence or car in the U.S., he is currently co-signing a note with his cousin to purchase a mobile home.⁽⁴⁴⁾ His future goals are to advance in his career, get married, and raise a family in the U.S.⁽⁴⁵⁾

Applicant has been employed by the same government contractor since November 2000 where he now serves as an infrastructure associate.⁽⁴⁶⁾ The quality of his work performance has not been developed.

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,"⁽⁴⁷⁾ 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 members of his immediate family or persons to whom he is bound by affection, influence, or obligation--in this instance, four of his five sisters are citizens and residents of SRVN and his mother is a citizen 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: [\(48\)](#)

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 four sisters and mother, 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. Applicant's brother and one of his five sisters are already naturalized U.S. citizens, and only the continuing SRVN citizenship of his mother and the citizenship and residency of his other four sisters raise 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 mother and four sisters, considering their citizenship and residency status, do not constitute an unacceptable security risk. His mother has been a permanent resident alien of the U.S. since 2001-02 and, while she may return to SRVN during the winter months, she routinely returns to her permanent residence in the U.S. where she has three children residing, all of whom are already naturalized U.S. citizens. Considering her age and part-time occupation, she appears to be a risk to none. Likewise, considering the occupations of his four sisters in SRVN, as well as their intentions to immigrate with their brother's assistance, they appear to be a risk to none as well.

Furthermore, Applicant's absence of foreign investments or financial interests, including bank accounts or land, 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*).

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.c. 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

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 41-42.
2. Government Exhibit 1 (Security Clearance Application (SF 86), dated June 11, 2002), at 1.
3. Tr., at 22.
4. Government Exhibit 2 (Statement, dated August 16, 2002), at 1; Tr., at 17-18, 20.
5. *Id.*, Government Exhibit 2.
6. *Id.*
7. Tr., at 19.
8. Tr., at 19; Government Exhibit 1, *supra* note 2, at 2.
9. *Id.*, Government Exhibit 1, at 1.
10. *Id.*
11. Tr., at 22.
12. Response to SOR, dated November 17, 2003; Tr., at 22.
13. Government Exhibit 1, *supra* note 2, at 5.
14. Tr., at 35-36.
15. Tr., at 20-21.
16. Government Exhibit 2, *supra* note 4, at 1.
17. Tr., at 36.
18. Government Exhibit 1, *supra* note 2, at 5.
19. Tr., at 21.
20. Government Exhibit 1, *supra* note 2, at 5.
21. Government Exhibit 2, *supra* note 4, at 1.
22. *Id.*
23. Government Exhibit 1, *supra* note 2, at 5.
24. Government Exhibit 2, *supra* note 4, at 1.
25. Tr., at 31.

26. Tr., at 24-25.

27. Tr., at 24-25.

28. Tr., at 25-26.

29. Tr., at 26.

30. Tr., at 26.

31. Tr., at 27.

32. Tr., at 27.

33. Tr., at 28.

34. Tr., at 28-29.

35. Tr., at 29.

36. Tr., at 29.

37. Tr., at 30-31.

38. Tr., at 30.

39. Tr., at 30.

40. Tr., at 31-32.

41. Tr., at 32.

42. Tr., at 33.

43. Tr., at 31; Government Exhibit 2, *supra* note 4, at 2.

44. Tr., at 34.

45. Tr., at 38.

46. Government Exhibit 1, *supra* note 2, at 2.

47. 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).

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