

KEYWORD: Foreign Influence

DIGEST: Applicant is a test engineer for a defense contractor. He was an officer in the South Vietnam Army who left South Vietnam on a derelict ship on the day it fell to North Vietnam leaving his family behind. He immigrated as a refugee to the United States and his family eventually joined him. All are naturalized citizens of the United States. A brother and sister immigrated to the United States and are still citizens of Vietnam but permanent resident aliens of the United States. He has a sister in Vietnam who is a nun and a brother-in-law and his family in Vietnam. Applicant has only casual and infrequent contact with family members in Vietnam and they are not in such a position to be exploited forcing Applicant to chose between loyalty to them and the United States. His family members in the United States are also not in a position to be exploited. Clearance is granted.

CASENO: 02-30718.h1

DATE: 01/24/2005

DATE: January 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30718

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a test engineer for a defense contractor. He was an officer in the South Vietnam Army who left South Vietnam on a derelict ship on the day it fell to North Vietnam leaving his family behind. He immigrated as a refugee to the United States and his family eventually joined him. All are naturalized citizens of the United States. A brother and sister immigrated to the United States and are still citizens of Vietnam but permanent resident aliens of the United States. He has a sister in Vietnam who is a nun and a brother-in-law and his family in Vietnam. Applicant has only casual and infrequent contact with family members in Vietnam and they are not in such a position to be exploited forcing Applicant to chose between loyalty to them and the United States. His family members in the United States are also not in a position to be exploited. Clearance is granted.

STATEMENT OF THE CASE

On March 8, 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 March 15, 2004. The SOR alleges security concerns under Guideline B (Foreign Influence), of the Directive.

Applicant answered the SOR in writing on March 15, 2004. He filed a further explanation of his answer on April 1, 2004. He admitted all except one of the allegations under Guideline B. He requested a hearing before an administrative judge. The request for a hearing was received by DOHA on April 2, 2004. Department Counsel was prepared to proceed with the case on June 22, 2004. The case was assigned to another administrative judge on August 25, 2004, and transferred to me on November 10, 2004. A notice of hearing was issued on November 10, 2004, and amended on November 17, 2004. The hearing was held on December 15, 2004. Four government exhibits and four Applicant exhibits and the testimony of the Applicant were received during the hearing. The transcript was received on January 4, 2005.

FINDINGS OF FACT

Applicant is a 57-year-old test engineer for a defense contractor. In 1975 when North Vietnam defeated South Vietnam, Applicant was a maintenance officer in the South Vietnam Army. He escaped in a derelict boat from South Vietnam on the day it fell to North Vietnam with his sister and brother-in-law who both worked for the United States government in South Vietnam. They were eventually picked up, taken to Hong Kong, and came to the United States as refugees. Applicant left his wife and three children behind but they joined him in the United States in 1985. Applicant's father, a colonel in the South Vietnam Army, and his father-in-law, a high ranking South Vietnam police official, died in a re-education camp run by North Vietnam. Applicant's only visit back to Vietnam was in 2000, when he and his wife returned on a pleasure trip. Applicant has one sister residing in Vietnam and three sisters and a brother residing in the United States. His parents and his father-in-law are deceased and his mother-in-law lives with Applicant and his wife in the United States. He has a brother-in-law residing in Vietnam with his family. He has no contact with any other relatives in Vietnam.

Applicant, his sister, and brother-in-law came to the United States in 1975. Applicant attended school in the United States and obtained employment. Applicant, his wife, and his children are naturalized United States citizens. Applicant's sister and brother-in-law who came with him to the United States are also naturalized United States citizens. Applicant's mother-in-law lives with him in the United States and she is now a naturalized United States citizen.

Applicant has an older sister who is a nun living in a convent in Vietnam. She left the family for the convent when Applicant was very young. She continues to be a nun and to work within the community even though the present Vietnam government does not recognize their religious activities. He speaks to her only occasionally on the telephone. He visited her in the convent on his trip to Vietnam in 2000. His sister came to the United States in 1998, to visit their mother. His visiting sister stayed with his other sister and not with him. Over the years, Applicant has sent his sister some gifts like shoes and socks. He and his siblings in the United States pool their money to send her cash gifts which she mostly spends on poor people in Vietnam.

Another of Applicant's sisters came to the United States with her family and she is now a naturalized United States citizen. Another sister came with her family to the United States in 2000, and they are permanent resident aliens (refugee status). His brother also immigrated to the United States as a refugee and is a permanent resident alien. All are working to become naturalized United States citizens.

Applicant's brother-in-law did not leave Vietnam with the rest of his in-laws and is a musician in Vietnam. His sister-in-law is a caterer in Vietnam. He has infrequent contact with his brother-in-law but his mother-in-law and wife have monthly telephone contact with him. Applicant and his wife did visit the brother-in-law on his trip in 2000.

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.

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's immediate family and other persons to whom the Applicant may be bound by affection, influence, or obligation are not citizens of the United State or 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. Directive ¶ E2.A2.1.1. Applicant's sister and the brother-in-law and his family residing in Vietnam and the brother and sister in the United States who are still citizens of Vietnam bring 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 includes *spouse, father, mother, sons, daughters, brothers, sisters*. Directive ¶ E2.A2.1.3.1. Applicant's sisters and brother are immediate family members. His brother-in-law and his family are not immediate family members to Applicant. However, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 01-03120 at 8 (App. Bd. Feb 20, 2002). It is reasonable to consider the Appellant's wife's ties to her family in Vietnam and the possible effects on Applicant's conduct under Guideline B. ISCR Case No. 01-02452 at 8 (App. Bd. Nov 21, 2002). I conclude that Applicant's sister and his brother-in-law in Vietnam are immediate family members and reside in Vietnam under the disqualifying conditions of Guideline B. Applicant's brother and sister in the United States, who are permanent resident aliens but citizens of Vietnam, are immediate family members and citizens of a foreign country under Guideline B. I conclude Foreign Influence Disqualifying Condition 1 has been established.

The Foreign Influence Mitigating Conditions that my apply are Directive E2.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(s) involved and the United States*); and Directive E2.A2.1.3.3. (*contact and correspondence with foreign citizens are casual and infrequent*). None of Applicant's immediate family members are agents of a foreign power. Applicant's sister, the nun, is not in a position to be exploited by a foreign power. She is quietly working against the government wishes now. Since she left the family when Applicant was very young and their contacts are casual and infrequent, the ties of affection to applicant are not such that Applicant would have to chose between loyalty to her and loyalty to the United States. Similarly, Applicant's immediate family members in the United States are not in a position to be exploited by a foreign power in a way to force Applicant to choose between them and his loyalty to the United States. Applicant's brother-in-law and his family in Vietnam as a musician and caterer are not in a position to be exploited by Vietnam. Vietnam does not appear to be inclined to gather United States secrets through exploitation of its citizen's relationships with family members in the United States. Also, Applicant's relationship with the brother-in-law is not so great that Applicant would be forced to chose between him and his loyalty to the United States. I conclude Applicant has mitigated any security concerns under Guideline B.

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

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: 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