

DATE: August 11, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31602

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Joel S. Mayer, Esq.

SYNOPSIS

Forty-year-old Applicant has six siblings who are residents and citizens of Vietnam. Applicant, his mother, and brother, all naturalized U.S. citizens, are working to bring the six siblings to the U.S. to live. Applicant failed to overcome the foreign influence security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 21 February 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign influence (Guideline B) personnel security guideline of the Directive.

Applicant answered the SOR in a writing dated 7 March 2003 and notarized on 10 March 2003. The case was assigned to me on 2 May 2003. A hearing was originally scheduled for 20 June 2003, but was delayed when Applicant sought legal counsel. On 11 July 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant testified on his own behalf but did not submit any exhibits. DOHA received the transcript (Tr.) of the proceeding on 21 July 2003.

FINDINGS OF FACT

Applicant was born of Vietnamese parents in Saigon, Vietnam, in 1963. Ex. 1 at 1, 4. When Applicant reached the age of 17, his parents, fearing he would be forced into the Vietnamese army, asked him to leave the country. Tr. 41, 49. He walked and bicycled from Saigon, across the southern part of Cambodia, and on to a refugee camp in Thailand. Tr. 49-51. Applicant was allowed to emigrate from the refugee camp to the U.S. in 1981. Tr. 14. When he arrived in the U.S., Applicant lived with assigned foster parents. Tr. 51. He spent two years in high school and then went on to college,

where he received a degree in computer science. He became a U.S. citizen in 1988. Ex. 1 at 1.

Applicant became a software engineer and went to work for a defense contractor. He applied for a security clearance, but was laid off before it became final. He is subject to being rehired and currently holds a firm offer of a job from another defense contractor, contingent upon him being granted a security clearance. Tr. 20-21; 35-36.

Applicant has been married for about five years and has two children born in the U.S. His wife emigrated from Vietnam, is a permanent U.S. resident, and is applying for U.S. citizenship. Tr. 13, 27, 47; Ex. 1 at 4; Answer. One of her sisters lives in Germany, another in Canada. She also has a brother who is a citizen and resident of Vietnam. Answer.

Applicant's mother, who became a U.S. citizen in 1999, lives with him. His father is deceased. Ex. 1 at 6; Tr. 23. Applicant has six sisters and three brothers. Two of the sisters and one brother are naturalized U.S. citizens. *Id.* at 6-7. Applicant, his mother, and his U.S. citizen brother are trying to sponsor the remaining four sisters and two brothers, who are all citizens and residents of Vietnam, into the U.S. One of the six received a tentative visa and another received a letter saying she had been accepted, but has not as yet received a visa. There is no word on the others' applications. Tr. 25.

None of Applicant's family members work for the Vietnamese government. One of his sisters works at a consulate of a foreign government in Vietnam helping business entities from that foreign country invest in Vietnam.

Applicant visited Vietnam only once since he arrived in the U.S. in 1981. He traveled on his U.S. passport to Vietnam in 1993 or 1994 for two weeks to visit one of his sisters who was seriously ill. Answer; Tr. 28, 39. Applicant provided his ill sister a couple of hundred dollars when he visited, but does not support any of his siblings in Vietnam. Tr. 41. He has not spoken with any of his family in Vietnam in the past two years, but receives information about them from his mother and U.S. citizen brother. Now that she is a U.S. citizen, Applicant's mother is spearheading the effort to bring the rest of the family to the U.S. Tr. 42. Applicant does exchange occasional e-mails with his sister who works for the foreign consulate. Tr. 47.

Applicant understands the requirement to report his foreign contacts and any attempt to get him to reveal classified information to his company security officer. Tr. 46.

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 judgment, 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at

2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

In the SOR, DOHA alleged under Guideline B that (a) Applicant's wife is a citizen of Vietnam who resides in the U.S.; (b) his two brothers and four sisters are citizens and residents of Vietnam; (c) Applicant is sponsoring his siblings for admission to the U.S. and has received tentative approval for a sister and a brother; (d) his sister works for the embassy of a foreign government in Vietnam; Applicant traveled to Vietnam in 1993 or 1994; and (f) Applicant has a sister-in-law residing in Germany, a sister-in-law residing in Canada, and a brother-in-law residing in Vietnam.

A security risk may exist when members of an applicant's immediate family or persons to whom the applicant may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

Through the admission of evidence and Applicant's admissions, the Government established by substantial evidence that Applicant has immediate family members-six siblings-and in-laws who are citizens and/or residents of a foreign country. DC 1. This shifted the burden to Applicant to rebut, explain, extenuate or mitigate the security concern.

Applicant presented evidence that his siblings living in Vietnam are not agents of a foreign power. A determination that the immediate family members or associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the family member or associate and loyalty to the U.S. is a mitigating condition under Guideline B. MC 1. The inquiry in a foreign influence case is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a *position of vulnerability* to be influenced by coercive or noncoercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003).

Vietnam is a one-party state with a human rights record that has continued to deteriorate. "[P]roponents of multi-party democracy, human rights and religious freedom were arrested or closely monitored." Ex. 3 at 1. "The government continued to stifle free expression and restrict the exercise of other basic human rights." *Id.* Applicant has not demonstrated that his siblings in Vietnam do not place him in a position of vulnerability. The emigration status of his siblings is in limbo. The Vietnamese government is in a position to hold his siblings hostage to Applicant's cooperation. Applicant is in a position of vulnerability that could force him to choose between loyalty to his siblings and loyalty to the U.S. Therefore, MC 1 does not apply to his six siblings or to his brother-in-law in Vietnam. It does apply to his sisters-in-law who live in Canada and Germany.

Applicant suggests his contacts with his siblings in Vietnam are casual and infrequent. MC 3. In this context, "casual" means "not close or intimate; passing." *American Heritage Dictionary of the English Language* 299 (3d ed. 1992). "Infrequent" means "not occurring regularly; occasional or rare." *Id.* at 927. The closer the relationship the less contact is necessary to conclude this mitigating condition fails. Similarly, the greater the contact the less close the relationship needs to be to cause the mitigating condition to fail. Although Applicant denies contact with his siblings in Vietnam, except for an e-mail or two with one sister, the evidence does not establish that his relationship to these siblings is casual-he is actively working with his mother and brother to sponsor the siblings into the U.S.

The Government also established that Applicant's brother-in-law is a citizen and resident of Vietnam. There is a rebuttable presumption that Applicant has ties of affection for, or at least obligation to, his wife's immediate family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). That is because an applicant's wife is in a position to influence him concerning her family. Applicant failed to overcome the presumption. MC 3 does not apply to Applicant's brother-in-law.

Applicant understands the reporting requirements and has promptly reported his contacts with foreign citizens. MC 4. Applicant has no overseas financial interests. MC 5.

Considering all the circumstances, Applicant failed to demonstrate that his siblings and brother-in-law in Vietnam do not place him in a *position of vulnerability* to coercion or influence. Findings are against Applicant for SOR ¶¶ 1.b. and 1.f. The decision to find against Applicant is not based on a conclusion that Applicant has done anything wrong or is not a loyal U.S. citizen. *See* Exec. Or. 10865 § 7. The decision is merely an indication that because his siblings are residents and citizens of Vietnam and are stuck in limbo over their emigration status, Applicant is in a position of vulnerability to foreign influence.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.