

DATE: June 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11742

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Michael A. Weiss, Esquire, Applicant's Counsel

SYNOPSIS

The Applicant's father is a citizen of and resides in Vietnam. He was a policeman in the former South Vietnam. After Saigon fell, he was placed in a re-education camp for eight to ten years. He is 82 years of age, and his spouse, the Applicant's mother, is deceased. One of the Applicant's sisters is a citizen of and resides in Vietnam. She is a high school teacher. The other sister is a citizen of and resides in the U.S. One of the Applicant's brothers is a citizen of and resides in Germany. He is a restaurateur. The other brother is a citizen of Norway, but resides in the U.S. as a permanent resident. There is no evidence that any member of the Applicant's family has any connection with a foreign government or is in a position to be exploited by any government. He also owns \$15,000 worth of land in Fiji, but has a U.S. net worth of \$700,000. Clearance is granted.

STATEMENT OF THE CASE

On February 6, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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.

Applicant filed an Answer to the SOR on April 2, 2003.

The case was received by the undersigned on April 22, 2003. A notice of hearing was issued on April 26, 2003, and the case was heard on May 16, 2003. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence and called a witness to testify on his behalf. The transcript was received on June 2, 2003. The issue raised here is whether the Applicant's perceived foreign influence militates against the granting of a security clearance. [The Applicant admits the underlying factual basis for all of the allegations, except for allegation 1.e. as it pertains to his American sister.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 44 years of age, has a Bachelor of Science Degree, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline B - Foreign Influence

The Applicant was born in the former South Vietnam; but after the fall of Saigon, he fled the country by boat in 1975 (Transcript (TR) at page 48 line 15 to page 49 line 15). He ended up in the United States in 1976, where he attended college and subsequently became a U.S. citizen in 1983 (*id.*, and at page 67 lines 2~17).

1.a.~1.e. The Applicant's 82 year old father was a policeman in the former South Vietnam (TR at page 53 line 2 to page 54 line 22, *see also* Applicant's Exhibit (AppX R). After the fall of Saigon, he was placed in a re-education camp for "about eight to 10 years" (*id.*). He is considered a traitor by the new Communist government, as "he worked for the South Vietnamese Government" (*ibid.*). The Applicant's mother is deceased (TR at page 53 line 2 to page 54 line 22). One of the Applicant's sisters is a citizen of and resides in Vietnam (TR at page 54 line 23 to page 56 line 1, *see also* AppX Q). She is a high school teacher (*id.*). His other sister is a citizen of and resides in the U.S. (TR at page 58 line 5 to page 59 line 12, *see also* AppX M). One of the Applicant's brothers is a citizen of and resides in Germany (TR at page 56 line 3 to page 57 line 11, *see also* AppX P). He is a restaurateur (*id.*). His other brother also fled Vietnam by boat (TR at page 57 line

12 to page 58 line 4, *see also* AppX B). He ended up in Norway; and as such, became a Norwegian citizen (*id.*). He now resides in the U.S. as a permanent resident (*ibid.*).

1.f. The Applicant purchases land in Fiji worth about \$15,000 (TR at page 59 line 13 to page 60 line 7, at page 64 line 25 to page 65 line 13, at page 76 line 20 to page 77 line 24, and AppX L). His net worth in the U.S. is about \$700,000, and he currently earns about \$90,000 each year (TR at page 59 line 13 to page 60 line 7, and at page 76 line 20 to page 77 line 24).

Mitigation

The Applicant's manager [who is also his first line supervisor] testified in only the most laudable terms about the Applicant (TR at page 42 line 15 to page 46 line 25). His previous manager, those who work with, and those who know the Applicant also regard the Applicant most highly (AppXs H, I, J and K).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Foreign Influence

Condition that could raise a security concern:

1. An immediate family member . . . is a citizen of . . . a foreign country;

Condition that could mitigate security concerns:

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;

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, 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.

The Government must make out a case under Guideline B (foreign influence), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who is subject to a foreign influence, may be prone to provide information or make decisions that are harmful to the interests of the United States. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

The Applicant's 82 year old father is a citizen of and resides in Vietnam. As a former policeman in the former South Vietnam, he was sent to a re-education camp for eight to ten years. He has absolutely no connection with any government, and there is no evidence that their presence in Vietnam can be exploited by any government. He has a sister who resides in Vietnam and a brother who resides in Germany. They are citizens of their respective countries. His sister is a high school teacher, and his brother is a restaurateur. They have no connection with any government, nor is there any evidence that their presence in Vietnam and Germany can be exploited by any government. The remaining brother and sister reside in the U.S., one a permanent resident and the other is an U.S. citizen. There is also no evidence of connection with or exploitation by any government as to these U.S. residents. In addition, I conclude that it would be unlikely that the Applicant would even countenance any such attempt at exploitation of any of his relatives.

As to the land he owns in Fiji, its \$15,000 value is not substantial when compared to his net worth and income in the U.S. The last disqualifying condition is therefore not applicable. Guideline B is thus found in the Applicant's favor.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his alleged foreign influence. The Applicant has thus met the mitigating conditions of Guideline B, and of Section E.2.2. of the Directive.

Accordingly, he has met his ultimate burden of persuasion under Guideline B.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge