

KEYWORD: Foreign Influence

DIGEST: Security concerns were raised regarding a 34-year old Vietnam-born naturalized American Applicant whose parents and siblings remain citizens and residents of Vietnam. Neither his parents nor his siblings ever worked for any Communist government agency, military, or intelligence service. They are all working in private industry or foreign business, or teach, or are still students, and are not in a position to be exploited. Furthermore, Applicant's wife is a U.S. citizen residing in the U.S. The security concerns have been mitigated by the evidence developed herein. Clearance is granted.

CASENO: 02-12521.h1

DATE: 08/05/2004

DATE: August 5, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12521

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised regarding a 34-year old Vietnam-born naturalized American Applicant whose parents and siblings remain citizens and residents of Vietnam. Neither his parents nor his siblings ever worked for any Communist government agency, military, or intelligence service. They are all working in private industry or foreign business, or teach, or are still students, and are not in a position to be exploited. Furthermore, Applicant's wife is a U.S. citizen residing in the U.S. The security concerns have been mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On August 27, 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 September 11, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on June 7, 2004. A notice of hearing was issued on June 7, 2004, and the hearing was held before me on June 24, 2004. During the hearing, two Government exhibits, five Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on July 7, 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, Official Notice was taken of the U.S. Department of State, Bureau of Consular Affairs, Consular Information Sheet on Vietnam, dated February 3, 2003, consisting of 11 pages.

FINDINGS OF FACT

Applicant has admitted all of the 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 34-year-old employee of a defense contractor seeking to obtain a security clearance.

Applicant was born in 1969 in what was then the Republic of Vietnam (RVN).⁽¹⁾ He resided with his parents and siblings and attended school in RVN and the successor Socialist Republic of Vietnam (SRVN) until about May 1990, when he was married.⁽²⁾ Applicant's wife is Amerasian, with a Vietnamese mother and American serviceman father.⁽³⁾ They continued to reside in SRVN until February 1991, when they immigrated to the United States.⁽⁴⁾ Applicant attended a U.S. university and received a B.S. degree in mathematics in December 1996.⁽⁵⁾

Applicant renounced his Vietnamese citizenship when he became a naturalized citizen of the United States in February 1998.⁽⁶⁾ He is not a dual citizen and considers himself to be a citizen of only the U.S.⁽⁷⁾ The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

Applicant's parents are citizens of, and reside in, SRVN. Because of a physical disability, his father (born in 1944)⁽⁸⁾ was not called to serve in the RVN military during the war.⁽⁹⁾ Instead, he held a position with a U.S. company dealing

with fire suppression. ⁽¹⁰⁾ After the war, he was sent to prison for three months because of his wartime employment. ⁽¹¹⁾ He now tutors English to children. ⁽¹²⁾ Applicant's mother (born in 1948) ⁽¹³⁾ sells coffee. ⁽¹⁴⁾

Applicant is the oldest of eight siblings, ⁽¹⁵⁾ with one brother and six sisters, all of whom are citizens of, and reside in, SRVN. None of his siblings ever worked for any SRVN government agency, military, or intelligence service. ⁽¹⁶⁾ His brother is a computer teacher and works with computers in private industry. ⁽¹⁷⁾ One sister has a private computer business; ⁽¹⁸⁾ three sisters work for foreign companies; ⁽¹⁹⁾ one sister teaches at a local university; ⁽²⁰⁾ and his youngest sister is still in school. ⁽²¹⁾

After the war, because they had served in the RVN military, two of Applicant's relatives were imprisoned by the new government. One uncle--an enlisted soldier--went to a re-education and indoctrination camp for three months. ⁽²²⁾ Another relative--an officer--was sent to a camp for 13 or 14 years. ⁽²³⁾ To Applicant's knowledge, none of his relatives were ever members of the North Vietnamese army or the Vietcong. ⁽²⁴⁾

Applicant's contact with his immediate family in SRVN has varied. He used to write letters but it is now more convenient to use the telephone. ⁽²⁵⁾ He uses e-mail only once in a while. ⁽²⁶⁾ He speaks with his parents and whichever siblings are present every one or two months. ⁽²⁷⁾ In the past, while his siblings were still in school, Applicant would send his parents about \$50.00-\$100.00 per month, ⁽²⁸⁾ but now sends them, as well as his mother-in-law, about \$200.00-\$300.00 every new year. ⁽²⁹⁾

Since Applicant arrived in the U.S., he has never returned to SRVN ⁽³⁰⁾ and none of his siblings ever came to the U.S. ⁽³¹⁾ He would like to return to SRVN to see his father sometime in the future. ⁽³²⁾ Applicant's wife returned on one occasion in 1996 to attend to her sick mother. ⁽³³⁾ Applicant would like to sponsor both his family and his wife's mother for immigration to the U.S., but it is a costly process costing at least \$10,000.00 per person. ⁽³⁴⁾

Applicant does not have any foreign investments or financial interests in SRVN, ⁽³⁵⁾ and does not anticipate receiving any inheritance. ⁽³⁶⁾ He routinely invests in his 401k retirement plan and currently has about \$50,000.00 in that plan. ⁽³⁷⁾ He also has about \$50,000.00 in stocks as well as in his bank accounts. ⁽³⁸⁾

Applicant has been employed as a software engineer by the same government contractor, or its successor, since June 1998. ⁽³⁹⁾ His supervisors and coworkers have characterized him in glowing terms, including: a dedicated and valued contributor, positive and upbeat, focused, loyal, trusted, reliable, and punctual.

After the terrorist attack on the U.S. on September 11, 2001, Applicant decided to "do more for the people of Vietnam and [his] family back there to defend American values and to promote freedom and to make Vietnam more livable and more friendly to America."⁽⁴⁰⁾ He started translating various articles and treatises from English into Vietnamese and, using an alias to disguise his true identity,⁽⁴¹⁾ had them posted on a website popular among the Vietnamese.⁽⁴²⁾ He focused on articles that "denounce totalitarianism, communism, terrorism and Nazism, and promote the idea of freedom and type of society America started 200 years ago."⁽⁴³⁾ Among his translations was *On Liberty* by John Stuart Mill because "it shows that liberty is not for only the majority, but it's also to protect the minority too."⁽⁴⁴⁾

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, 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," [\(45\)](#) 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, his parents and seven siblings are citizens and residents 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:

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. [\(46\)](#)

The citizenship status of Applicant's parents and siblings, 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 wife is already a U.S. citizen by virtue of her father's U.S. citizenship, and only the continuing SRVN citizenship and residency of his parents and siblings raise the issue of potential foreign influence. In this regard, see 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 it is highly unlikely that Applicant can be forced to choose between loyalty to those family members and the U.S. simply because of the potential vulnerability occasioned by the locus of their residence. As noted above, shortly after the downfall of RVN in 1975, some of Applicant's family members were relocated to re-education and indoctrination camps for terms from three months to 13 or 14 years. The family was not broken by those events and Applicant's resolve to make the world a better place through his translation efforts support my conclusion as to minimized vulnerability.

The government's position is that the potential vulnerability of Applicant is too great for him to be granted a security clearance. To the contrary, based on the evidence presented by Applicant, the government's contention in this regard is simply too tenuous and calls for too much speculation. As recently stated by the Appeal Board: "An applicant does not have the burden of disproving a controverted fact; rather the burden of proving controverted facts falls on Department Counsel."⁽⁴⁷⁾ Moreover, since "suspicions and doubts, on their own, cannot support findings and conclusions that disregard the burdens of proof set by the Directive,"⁽⁴⁸⁾ I conclude that such suspicions and doubts, as presented by the government are insufficient to support the government's position.

Neither Applicant's parents nor his siblings ever worked for any SRVN or Communist government agency, military, or intelligence service. They are all working in private industry or foreign business, or teach, or are still students. Additionally, because Applicant's father worked for a U.S. company and relatives served honorably alongside U.S. military forces during the Vietnam War, they were later forced to undergo postwar re-education. The family is not Communist, and with the rapidly improving relations between the two countries, there is no indication they are targets of any intelligence gathering. Applicant has been extremely cautious about having his identity known because of his writings on behalf of democracy, but that caution is not unreasonable.

In analyzing Applicant's financial interests, it is noted that he has none in SRVN while building a substantial financial holding in the U.S. In this regard, see FI C E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). Considering all of the above, 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. Government Exhibit 1 (Security Clearance Application (SF 86), dated October 23, 2000), at 1.
2. *Id.*, at 4.
3. Tr., at 37-38.

4. Tr., at 22.
5. Tr., at 22.
6. Government Exhibit 1, *supra* note 1, at 1.
7. Tr., at 32, 42.
8. Government Exhibit 1, *supra* note 1, at 4.
9. Tr., at 36.
10. Tr., at 36.
11. Tr., at 39.
12. Tr., at 24.
13. Government Exhibit 1, *supra* note 1, at 4.
14. Tr., at 24.
15. Tr., at 40.
16. Tr., at 40.
17. Tr., at 25.
18. Tr., at 25-26.
19. Tr., at 26-28.
20. Tr., at 28.
21. Tr., at 28.
22. Tr., at 38-39.
23. Tr., at 38-39.
24. Tr., at 38.
25. Tr., at 23.
26. Tr., at 23.
27. Tr., at 23, 29.
28. Tr., at 29.
29. Tr., at 30.
30. Tr., at 32.
31. Tr., at 43.
32. Tr., at 32.

33. Tr., at 43.
34. Tr., at 32, 40.
35. Tr. at 35.
36. Tr., at 35.
37. Tr., at 20; Applicant Exhibit D (various financial records).
38. Tr., at 20.
39. Government Exhibit 1, *supra* note 1, at 2; Tr., at 22..
40. Tr., at 20-21.
41. The alias was used to protect his family in SRVN from any possible government retaliation against them because of what Applicant had written. Response to SOR, dated September 11, 2003, at 2.
42. Tr., at 20-21.
43. Response to SOR *supra* note 41, at 2.
44. Tr., at 21; Applicant Exhibit E (original and translation).
45. 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).
46. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.
47. ISCR Case No. 02-24452 (August 4, 2004), at 4.
48. *Id.*