

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-12542

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's two older brothers are citizens and residents of Vietnam. His previous contact with them was limited and is now nonexistent. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his foreign relatives. Clearance is granted.

STATEMENT OF THE CASE

On November 23, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Security concerns were alleged under Guideline B (Foreign Influence). DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 16, 2004, Applicant answered the SOR and requested a hearing. On June 13, 2005, I was assigned the case. On June 22, 2005, a Notice of Hearing was issued scheduling the hearing, which was held on June 30, 2005. On July 12, 2005, DOHA received a copy of the transcript (Tr.).

FINDINGS OF FACT

In his response to the SOR, Applicant admits his two brothers are citizens of and reside in Vietnam and that he traveled to Vietnam in 2001. His admissions are incorporated herein as findings of fact. After a thorough review of the entire record, I make the following additional findings of fact:

Applicant is a 34-year-old software engineer who has worked for a defense contractor since January 2002, and is seeking to obtain a security clearance.

Applicant's father was a South Vietnamese infantry officer, and was put in a reform camp following the fall of Saigon in

1975. Applicant was four years old in 1975. In 1981, his father was released from the camp after more than five years imprisonment. Following his release, he was unable to find work, then worked as a farmer. Applicant's family was very poor. Applicant describes his life in Vietnam as "very terrible, bottom of society" (Tr. 26). In 1989, a law was passed allowing members of the prior South Vietnamese military and their families to immigrate to the U.S. In 1994, Applicant's father immigrated to the U.S. with as much of his family as possible. Applicant, at age 23, accompanied his father, mother, sisters, and brother to the U.S.

Applicant's two older brothers, one who is 45 years old and the other who is 46 years old, were not allowed to immigrate because they were married. The U.S. prohibited married individuals from immigrating to the U.S. Applicant's two brothers remained in Vietnam. One is a farmer and the other produces bowls for dining. They have a ninth grade education. As of July 2002, prior to obtaining his current job, Applicant would contact his brothers once or twice a year, usually to wish them "Happy New Year." His last contact with his brothers was by telephone in 2002. Applicant's parents would contact his brothers, and if Applicant happened to be at his parent's home when the call was made, he would talk with his brothers (Tr. 41). Since Applicant's parents became aware that contact with his siblings in Vietnam might be a problem for Applicant, they have stopped calling his brothers (Tr. 33, 42).

Applicant mother and father are registered aliens, living in the U.S., and citizens of Vietnam. His parent's intend to become U.S. citizens, but have had trouble with the English language portion of the citizenship test. Both his parents live in the same local as Applicant, are retired, and depend on him and his siblings for support. Applicant's brother and sisters have become U.S. citizens.

Since coming to the U.S., Applicant has completed his bachelor of science degree and is working on his master's degree. He loves America. He believes if his parents had not left Vietnam when they did, they would be dead by now (Tr. 26).

In March 2001, Applicant became a naturalized U.S. citizen. In April 2001, Applicant was laid off his job. In July 2001, Applicant accompanied his mother, sister, and brother to Vietnam to visit his brothers. They stayed for a month at his brother's house. Applicant traveled on his U.S. passport. On his return to the U.S., Applicant pursued a Master of Science in Computer Science and Engineering. Applicant has no plans for additional travel abroad. In January 2002, six months after his return from Vietnam, he started his current job with a defense contractor.

In June 2003, Applicant married a woman he had known since high school. She is not a citizen. Her mother, father, brothers, and sisters reside in Vietnam. Her parents are retired. His wife attends college. She has her green card and must wait two more years before she is eligible for citizenship. Because contacting her relatives could possibly cause a problem for Applicant, his wife has stopped contacting her relatives (Tr. 36).

Applicant's brothers were ten to twelve years older than him. Even when Applicant lived in Vietnam, he was not close to them. By age 18 or 19 his brothers were married and had moved out of the family home (Tr. 43).

If approached and asked for classified information, Applicant would immediately report it to his company's security officer.

Vietnam is a communist country. The government's human rights record remains poor, and it continues to commit serious abuses (Gov Ex 2). The Government restricts citizens' privacy rights, although the trend toward reduced government interference in the daily lives of most citizens continues. The government significantly restricts freedom of speech, freedom of the press, freedom of assembly, and freedom of association. The government continues its longstanding policy of not tolerating most types of public dissent and increases efforts to monitor and control citizens' access and use of the internet. The government continues to deny citizens the right to change their government and denies some citizens the right to fair and expeditious trials. The government continues to hold political and religious prisoners. The government continues to arrest and detain citizens for the peaceful expression of their political and religious views. The right of assembly is restricted by law.

POLICIES

The Directive sets forth adjudicative guidelines to be considered when evaluating a person's eligibility to hold a security clearance. Disqualifying Conditions (DC) and Mitigating Conditions (MC) are set forth for each applicable guideline.

Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guideline to be applied here is Guideline B (Foreign Influence).

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. 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, an applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Additionally, the government must prove controverted facts alleged in the SOR. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate the government's case. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. [\(2\)](#)

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information to be resolved in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he may be bound by affection, influence or obligation are not citizens of the United States 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.

Applicant's two brothers are resident citizens of Vietnam. Disqualifying condition 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*, applies because of the foreign residency and citizenship of his brothers.

In determining whether an applicant's family ties in a foreign country pose an unacceptable security risk, the administrative judge must consider the record evidence as a whole. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is improperly influenced, brought under control, or even used as a hostage by a foreign intelligence or security service.

Under the Directive, the foreign influence concerns raised by the foreign citizenship and foreign residency of these family members may be mitigated where it can be determined they are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to them and the United States (*see* E2.A2.1.3.1.). Applicant's one brother is a farmer and his other brother produces bowls. They are not agents of a foreign power.

The inquiry in a foreign influence case is not limited to consideration whether the foreign family members are agents of a foreign power. Rather, the foreign 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. (*See* ISCR Case No. 00-0628, February 24, 2003) The Vietnamese government's human rights record remains poor and the government continues to hold political and religious prisoners, restricts citizens' privacy rights, and continues its longstanding policy of not tolerating most types of public dissent. Notwithstanding Vietnam's poor human rights record and history of hostility to the U.S.,⁽³⁾ the risk of undue foreign influence is very minimal.

Applicant has been a resident of the United States for ten years, and a citizen for four years. He has traveled to Vietnam only once since coming to the U.S. Applicant's ties to the U.S. is relevant in assessing whether he is in a position to be forced to choose between his family members and his obligations to the United States. Applicant's father was a South Vietnamese army officer who was imprisoned for five years following the fall of the South. His father was able to immigrate to the U.S. and bring most of his family with him. Since coming to the U.S., Applicant has obtained his BS and is working on his MS degree. In arch 2001, he voluntarily acquired U.S. citizenship. Applicant's life in Vietnam was terrible. His love for the U.S. is strong. In light of the entire record, I conclude Applicant is not likely to succumb to any undue foreign influence placed on his siblings with whom he has no direct contact. Considering all those factors, I am satisfied that MC 1 applies.

There is a rebuttable presumption that contacts with immediate family members are not casual.⁽⁴⁾ However, Applicant does not have a close relationship with his brothers in Vietnam. They were ten to twelve years older than himself and moved out of the home at age 18 or 19, when they married. Applicant would have been between six to eight years old when they moved out of the home. With his brothers ten to twelve years older than himself and only seeing them one time during the last ten years, he has not developed the personal bonds with his siblings that come from shared experiences and attitudes.

Since leaving Vietnam, he has returned one time in 2002 before getting his defense job. This was the last time he saw his brothers. The last time he talked with his brothers was also in 2002. Previously Applicant would periodically--once or twice a year--talk with his brothers if he happened to be at his parents home when his parents called his brothers. Because Applicant believes talking with his brothers might cause him difficulties with his job, both he and his parents have stopped communicating with his brothers. Contact with his two brothers was limited and is now non existent. Contact with foreign citizens is mitigated where it is casual and infrequent (*see* E2.A2.1.3.3.).

Applicant bears the burden of demonstrating his family ties with relatives living in Vietnam do not pose a security risk. To that end, he has introduced evidence of his extremely minimal contacts with his relatives in Vietnam and his strong ties to the U.S.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For 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.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended.
2. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
3. ⁰In its *Background Note: Vietnam*, the U.S. State Department reports that although Vietnam remains a Communist state, economic development has taken priority over adherence to ideological orthodoxy. Since the U.S. normalized diplomatic relations with Vietnam in July 1995, U.S. and Vietnam have broadened political exchanges and economic trade.
4. ⁰See DOHA Appeal Board's decision in ISCR Case No. 02-15339, dated April 29, 2004.