

DATE: March 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14245

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised by a 29-year-old Vietnam-born naturalized U.S. citizen Applicant with an aunt (a housewife) and uncle (a retired doctor, teacher, and pedicab driver) who remain citizens and residents of Vietnam, neither of whom is an agent of Socialist Republic of Vietnam (SRVN) or in a position to be exploited by that government. Applicant's husband, father (who spent years in a re-indoctrination and re-education camp), stepmother, and half-siblings are either naturalized or native-born U.S. citizens residing in the U.S. Her mother is a Vietnam-born citizen, permanent U.S. resident, applying for U.S. citizenship. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On November 17, 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 December 2, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, me on February 20, 2004. A notice of hearing was issued that same day, and the hearing was held before me via video-teleconference on March 10, 2004. During the hearing, one joint exhibit (a stipulation), three government exhibits, 10 Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on March 22, 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: Vietnam*, dated January 28, 2004, consisting of nine pages.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. through 1.d.). 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 29-year-old employee of a defense contractor seeking to obtain a SECRET security clearance.

She was born in 1974 in what was then the Republic of Vietnam (RVN).⁽¹⁾ Applicant resided with her parents for a short period and then with her mother and paternal grandparents and attended school in the successor Socialist Republic of Vietnam (SRVN).⁽²⁾ During the Vietnamese Conflict, Applicant's father served as an officer with the Army of RVN (ARVN).⁽³⁾ Upon the collapse of RVN in 1975, he was sent to a re-indoctrination and re-education camp, referred to by Applicant as a concentration camp, where he remained for about seven years.⁽⁴⁾ Her relocation to her grandparent's home coincided with the family home being taken and her father being taken into custody.⁽⁵⁾ During her father's incarceration, Applicant and other members of the family visited him in the camp about one time each year after taking a lengthy boat trip to the location of the camp.⁽⁶⁾ When her father was eventually released in about 1982, her parents divorced.⁽⁷⁾ She continued to reside with her father and paternal grandmother (her grandfather had passed away in about 1984) for the next 10 years.⁽⁸⁾

In 1992, when she was 17 years old, her father and other members of his new family were sponsored by his half-brother, a former ARVN officer who had managed to escape the country in 1975 when the RVN government fell to the Communists, as well as under the sponsorship of a humanitarian operation, and they immigrated to the United States to seek a better life.⁽⁹⁾

After attending a local U.S. college during 1994-97, and obtaining a general education diploma, Applicant subsequently attended a state university during 1997-2001, and was awarded a B.S. degree in computer science.⁽¹⁰⁾ In May 2000, upon completing her degree requirements but before receiving her degree, and to fulfil a promise to her grandmother, Applicant returned to SRVN to visit her.⁽¹¹⁾ She remained in SRVN for five weeks and also visited with her now-retired paternal aunt (who is 69 years old) and her now-retired paternal uncle (who is 63 years old).⁽¹²⁾ The aunt has always been a housewife. The uncle is a France-trained medical doctor who became a school teacher, but when the Communists took over, he was no longer permitted to teach school, and he became a pedicab "cyclo-driver" until his eventual retirement.⁽¹³⁾ She is not close to them and rarely communicated with them in the past.⁽¹⁴⁾

Applicant usually sent her grandmother about \$600.00 each Lunar New Year, and continued that practice until her grandmother passed away in August 2003.⁽¹⁵⁾ She also used to call her grandmother during that holiday season. Upon her grandmother's passing in August 2003, Applicant returned to SRVN to attend the funeral.⁽¹⁶⁾ She also visited with a childhood friend who is an accountant for a foreign company.⁽¹⁷⁾ Applicant and the friend used to exchange e-mails as frequently as each month, but upon her friend's marriage, they no longer do so.⁽¹⁸⁾

Her father hates the Communists and blames them for causing the family to lose their home and for sending him to the re-indoctrination and re-education camp. His hatred for them is so intense that he has vowed to never return to SRVN, and that vow caused him to refuse to attend his mother's funeral.⁽¹⁹⁾

The current citizenship and residency status of Applicant's immediate family is as follows: her father is a naturalized

U.S. citizen residing in the U.S.;⁽²⁰⁾ her mother is a citizen of SRVN who has applied for U.S. citizenship permanently residing in the U.S. for the past six years;⁽²¹⁾ her husband, whom she married in June 2002,⁽²²⁾ is a naturalized U.S. citizen residing in the U.S.;⁽²³⁾ her stepmother is a naturalized U.S. citizen residing in the U.S.;⁽²⁴⁾ two of her three half-siblings are naturalized U.S. citizens residing in the U.S.;⁽²⁵⁾ the other half-sibling is a native-born U.S. citizen residing in the U.S.;⁽²⁶⁾ and her aunt and uncle are citizens of SRVN residing in SRVN.⁽²⁷⁾

Applicant renounced her Vietnamese citizenship when she became a naturalized citizen of the United States in September 1999, and pledged her loyalty to protect and defend the interests of the U.S. Applicant is not a dual citizen and considers herself to be a citizen of only the U.S.⁽²⁸⁾ The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

No member of Applicant's immediate family is an employee of any SRVN governmental agency or department or affiliated with any intelligence organization or with the Communist Party.⁽²⁹⁾ During her two visits to SRVN, Applicant was not approached by anyone seeking information about her activities in the U.S. She has vowed to report any such contacts if they occur.⁽³⁰⁾ Neither her relatives nor her friends in SRVN are aware of what she does in the U.S.

Applicant does not have any foreign investments or financial interests in SRVN,⁽³¹⁾ but does own a rather expensive residence in the U.S.⁽³²⁾ She does not send money or presents to anyone, including family or friends, residing in SRVN.⁽³³⁾

Applicant has been employed by the same government contractor since June 2001 where she serves as a software engineer.⁽³⁴⁾ Her supervisors and colleagues strongly support her application and characterize her performance and character in glowing terms.⁽³⁵⁾

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 that seemingly encourages technology transfers from the Vietnamese expatriate intellectuals abroad, 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," [\(36\)](#) 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:

With respect to Guideline B, the government has established its case. Applicant has been portrayed as a person who is a potential security risk because members of her immediate family or persons to whom she is bound by affection, influence, or obligation--in this instance, her paternal aunt and paternal uncle, are citizens and residents of SRVN and her mother is a citizen 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:⁽³⁷⁾

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.

The citizenship status of Applicant's aunt, uncle, and mother, 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 husband, father, stepmother, and three half-siblings are already either native-born or naturalized U.S. citizens, and only the continuing SRVN citizenship of her mother and the citizenship and residency of her aunt and uncle 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 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 Applicant's mother, aunt, and uncle, considering their citizenship and residency status, do not constitute an unacceptable security risk. Her mother has resided in the U.S. for a substantial period and, but for difficulty in learning English, would have applied for U.S. citizenship at an earlier date. Nevertheless, she has now done so.

Furthermore, Applicant's infrequent, and apparently casual, personal relationship with her 69-year-old aunt (a housewife to a pedicab "cyclo-driver") and 63-year-old uncle (a retired teacher and pedicab "cyclo driver"), as well as her more recent relationship with her childhood friend, has no security significance, and raises FI MC E2.A2.1.3.3. (*contact and correspondence with foreign citizens are casual and infrequent*). Her relationship with her aunt and uncle consisted substantially of infrequent holiday greetings and casual meetings when she visited her grandmother and later at her grandmother's funeral. She does not send gifts or money to them. While the e-mails between Applicant and her childhood friend were previously more frequent, their relationship has changed following the friend's marriage, and Applicant has seemingly withdrawn from such frequent contact.

Because Applicant's father served honorably alongside U.S. military forces during the Vietnam Conflict, he lost his home and was later forced to undergo postwar re-indoctrination and re-education for seven years. The family is not Communist--to the contrary, they apparently hate the Communists--and with the rapidly improving relations between the two countries, there is no indication they are targets of any intelligence gathering. Also, Applicant's husband, father, stepmother, and half-siblings, are all U.S. citizens residing in the U.S. Thus, 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.d. 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

Subparagraph 1.d.: 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 November 15, 2001), at 1.
2. Government Exhibit 2 (Statement, dated March 21, 2002), at 1.
3. *Id.*
4. Tr., at 22-23.
5. Government Exhibit 2, *supra* note 2, at 1.
6. Tr., at 35-36.
7. Government Exhibit 2, *supra* note 2, at 1.
8. Tr., at 23-24.
9. Tr., at 22.
10. Government Exhibit 1, *supra* note 1, at 2.
11. Tr., at 24, 32.
12. Response to SOR, dated December 2, 2003.
13. Tr., at 37-38.
14. Tr., at 26-27, 41.
15. Tr., at 25-26
16. Tr., at 24.
17. Government Exhibit 2, *supra* note 2, at 2; Tr., at 30.
18. Tr., at 27-29.
19. Tr., at 37.

20. Government Exhibit 1, *supra* note 1, at 4

21. Tr., at 22-23, 40-41; Applicant Exhibit B (Letter from Applicant's mother, dated March 3, 2004); Applicant Exhibit C (U.S. Department of Justice, Immigration and Naturalization Service, Permanent Resident Card, expires November 17, 2011; Applicant Exhibit J (U.S. Department of Justice, Immigration and Naturalization Service, Notice of Action (Application For Naturalization), dated March 3, 2004).

22. Applicant Exhibit F (Marriage Certificate, dated June 29, 2002).

23. Applicant Exhibit G (Certificate of Naturalization, dated May 24, 2000).

24. Government Exhibit 1, *supra* note 1, at 4.

25. *Id.*, at 4-5.

26. *Id.*, at 5.

27. *Id.*

28. *Id.*, at 1; Tr., at 44-45.

29. Tr., at 42.

30. Government Exhibit 2, *supra* note 2, at 2; Tr., at 43.

31. *Id.* Government Exhibit 2.

32. Applicant Exhibit H (Home Loan Statement, dated January 31, 2004).

33. Government Exhibit 2, *supra* note 2, at 2.

34. Government Exhibit 1, *supra* note 1, at 2.

35. Applicant Exhibit I (Letters from supervisors and co-workers, dated either February 18, 2004 or March 3, 2004).

36. 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).

37. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.