

DATE: June 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15722

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Henry F. Sherrod, III, Esquire

SYNOPSIS

Applicant--a 48-year-old married man who escaped Vietnam in 1981 at age 27, emigrated to the U.S. as a refugee later that year, and became a U.S. citizen in 1986--was not subject to foreign influence, notwithstanding his ties to Vietnam via travel, sending money, and family members, where Applicant's commitment and ties to the U.S. are so substantial that he can be expected to resist and report any potential foreign influence or pressure. Security clearance granted in 1988 on essentially the same facts re-affirmed. Clearance granted.

STATEMENT OF THE CASE

On 11 February 2003, 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⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 19 February 2003, Applicant answered the SOR and requested a hearing. The case was assigned to me on 31 March 2003, and received and set by me the same day. On 2 April 2003, I issued a Notice of Hearing for a hearing on 1 May 2003.

At the hearing, the Government presented two exhibits--admitted without objection--and no witnesses; Applicant presented two exhibits--admitted without objection--and the testimony of two witnesses, including himself. DOHA received the transcript on 12 May 2003.

RULINGS ON PROCEDURE

At the hearing, Department Counsel requested that I take official notice of the U.S. Department of State, Consular Information Sheet for Vietnam, and the 1999 Country Reports on Human Rights Practices for Vietnam. I granted the motion (Tr. 12-13).

FINDINGS OF FACT

Applicant admitted the allegations the SOR. Accordingly, I incorporate these admissions as findings of fact.

Applicant--a 48-year-old employee of a defense contractor--seeks to retain the access to classified information he has held since 1988. His clearance was administratively transferred between employers in 1994, but is now up for periodic reinvestigation. He has never had a security violation.

Applicant was born in 1954 in South Vietnam. He grew up there and completed his undergraduate education there in 1972. Although he had been accepted to college in Vietnam, he joined the South Vietnam Air Force in October. After graduating from boot camp he was sent to the U.S. to learn to fly fighter jets under a joint agreement with the U.S. Air Force. He was in the U.S. from May 1973 to September 1974. After training, he returned to Vietnam but did not see combat duty. He left the military in April 1975 when the government of South Vietnam fell to the communist north. He was given a week or two of "reeducation" by the new government, consisting of propaganda films and lectures.

Applicant lived with his parents and worked at odd jobs for about six years, keeping a low profile, and awaiting an opportunity to escape, before his parents made arrangements for him to leave Vietnam on an illegal boat in April 1981. Applicant was picked up by a U.S.-flagged oil tanker and taken to Singapore, where he lived in a refugee camp briefly before emigrating to the United States in July 1981. He got a job as a house keeper, obtained a grant to go to college, and obtained his undergraduate degree in engineering through night school in December 1987. He became a naturalized citizen in December 1986 (G.E. 1, 2).

After graduating from college, Applicant obtained a job with an aircraft manufacturer/ defense contractor in January 1998, and applied for, and obtained, his security clearance in October 1988. Applicant's position did not require access to classified information, but he needed the clearance for access to the secure facility. During that application process, he described his potential foreign influence issues (G.E 2). Although he had family back in Vietnam, he had not been back to see them since leaving the country in 1981 and did not intend to go back because he did not think it would be safe to do so. However, he had sent them \$600 in the seven years he had been gone.

Applicant's employer suffered major layoffs in 1992, and he was laid off. While unemployed, he made his first return trip to Vietnam in 1993 to visit his family. He used his U.S. passport to travel there. He does not have a Vietnamese passport. Although he was married, he did not take his wife because she could not get the time off from work.

Applicant obtained work with his current employer in 1994, and his clearance was re-instated--apparently without reinvestigation. His current employer is a weapons-development company, but as with his first employer, Applicant does not have access to classified information but requires his clearance for access to secure facilities. The facility where he started work was subject to base realignment and closure in 1997 and Applicant moved to his current company location.

In early 1995--after the U.S. and Vietnam resumed diplomatic relations--he traveled to Vietnam to visit his family this time taking his wife and son. He did so again in 2001 to take his new wife to meet his family. Both times he used his U.S. passport to travel to Vietnam. Applicant has not experienced any problems or confrontations with Vietnamese officials when making these trips.

Applicant owns a \$120,000.00 house with a mortgage, and he pays local property taxes and federal income taxes. In addition, Applicant has bank accounts, CDs, and two IRAs (\$30,000.00 and \$50,000.00-60,000.00) in the U.S. He has no financial interests in Vietnam. He's also a registered voter. His new wife is currently expecting twins--their second and third children.

Applicant's parents and siblings are citizens of and residents in Vietnam. Consistent with Vietnamese culture, Applicant's immediate family is a close-knit family. Applicant believes he has a duty or obligation to assist his parents who are old, retired, and ill. Over the years he has sent money to his parents in various amounts totaling no more than \$400-600 annually. The money mostly goes to cover the cost of their medications.

None of his immediate family members are connected to Vietnamese law enforcement, military, or a national governmental agency. Likewise, his family members are not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security information. And none of Applicant's

immediate family members have been approached or questioned about Applicant's employment or living situation. His parents know only that he works in the U.S., not what he does.

Applicant's father served as a warehouseman in the South Vietnamese government. After the South fell, he was retained for six months or so, long enough to train his replacement, and then fired. He was a farmer until he retired.

Applicant understands the potential security concern based on his ties or connections to Vietnam and he guarantees he would protect classified information. Despite any pressure via his immediate family members in Vietnam, Applicant pledges that he would not reveal classified information and would report any attempts to U.S. authorities or his supervisor (Tr. 43). He has given his employer advance notice of his intended trips to Vietnam (Tr. 19, 43)

Since July 1976, Vietnam has been officially known as the Socialist Republic of Vietnam. The government is a Communist Party-dominated constitutional republic. The controlling political party is the Vietnamese Communist Party. After a 20-year hiatus of severed ties, the U.S. Government normalized diplomatic relations with Vietnam in 1995. (2)

Applicant's work performance has been very good. His three past and current supervisors--including the retired Army Colonel who hired him in 1994--consider him an outstanding employee who is indisputably loyal to the U.S. (Tr. 16-20; A.E. A, B). All agree he should retain his clearance.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FOREIGN INFLUENCE (CRITERION B)

E2.A2.1.1. The Concern: 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 not citizens of the United States or may be subject to duress. These situations 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

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 in, a foreign country;

E2.A2.1.2.3. Relatives, cohabitants, or associates who are connected with any foreign government;

E2.A2.1.3. Conditions that could mitigate security concerns include:

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;

E2.A2.1.3.4. The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required;

Burden of Proof

Initially, the Government must prove controverted facts alleged in the SOR. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Under Guideline B for foreign influence, a security concern 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 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. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure. 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 brought under control or used as a hostage by a foreign intelligence or security service.

In addition to the above concerns, the foreign country at issue is Vietnam, a communist-controlled country. Of course, in every security clearance case an applicant's ties or connections to any foreign country deserve careful examination.⁽³⁾ Common sense suggests that such connections do not deserve the same level of scrutiny, however, as a foreign country whose interests are hostile or inimical to the U.S., or a foreign country with an authoritarian or totalitarian government. Accordingly, I have reviewed Applicant's ties or connections to Vietnam with additional scrutiny.

The government has established its case under Guideline B, but the Applicant has mitigated the security concerns. Disqualifying Condition (DC) 1⁽⁴⁾ applies given that Applicant has close relationships with immediate family members who are citizens of, or residents in, Vietnam, and he believes he has a duty or obligation to his parents.⁽⁵⁾ In addition, DC 6⁽⁶⁾ applies based on Applicant's travel to Vietnam and his sending of money to his parents. The travel and money have the potential to make Applicant vulnerable to foreign influence. Those actions, coupled with Applicant's family members in Vietnam (including the father who attended the re-education camp), raise security concerns due to the potential for foreign influence.⁽⁷⁾ The remaining disqualifying conditions of Guideline B do not apply given the record evidence.

Applicant's service in the South Vietnam Air Force (1.f)--most of which he spent being trained in the U.S.--occurred at a time when South Vietnam was nominally democratic and an ally of the U.S. in trying to remain so. This service implicates no disqualifying factor under foreign influence. The government has presented no evidence to show how Applicant could be subject to foreign influence because of his past military service under a now-defunct regime. Similarly, Applicant's father was employed by the South Vietnamese government as a warehouseman (1.b), a position he retained after the communist takeover only long enough to train his replacement and be fired. He spent the remainder of his working career as a farmer and is now retired. As father's connection with the foreign government ended long before Applicant came to the U.S., none of Applicant's relatives, cohabitants, or associates are connected with any foreign government. Further, the father's employment as a warehousemen is not the kind of employment that would intrinsically raise any security issue.

In addition, Applicant's immediate family members are not employed by or connected with the Vietnamese military, law enforcement, or a governmental agency. They are not involved in political, scientific, commercial, or other activities

where they might benefit from obtaining U.S. national security information. Given the record evidence, I conclude Applicant's immediate family members are not agents of a foreign power, and under these circumstances, mitigating condition (MC) 1-(8) applies in Applicant's favor. The remaining mitigating conditions of Guideline B do not apply given the record evidence.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concerns. First, Applicant's commitment to the U.S. is extraordinarily high. It's difficult to fully appreciate the gravity of his decision, at age 27, to leave his family and escape a communist-controlled country for a possibility of becoming an American citizen. Indeed, it was a potential life-and-death decision. Second, Applicant's ties or connections to the U.S. are substantial. Since his arrival here in 1981, Applicant can fairly be described as a model immigrant. He registered to vote, graduated from college, worked, carried a U.S. passport, bought a house, and paid taxes. Moreover, his wife, child and child-to-be, professional career, and financial interests are in the U.S., and that situation is unlikely to change. These are examples of ties that bind most members of a participatory democracy such as the U.S. Accordingly, based on the record as a whole, I conclude Applicant is a self-reliant, responsible, and trustworthy individual. And it is my predictive judgment, also based on the record as a whole, that Applicant has the necessary strength of character so that he can be expected to resist and report any potential foreign influence or pressure by either coercive or non-coercive means.

The Applicant was previously granted a clearance on essentially the same facts as here, but that does not preclude the government from re-examining Applicant's eligibility for continued access to classified information or from revoking the clearance if the re-investigation reveals either new concerns or increased concerns. Still, revocation of a clearance where there has been little significant change in an applicant's circumstances should not be undertaken lightly.

Here, the government invokes only one disqualifying condition in its closing argument--family members residing overseas, which suggests that the government is satisfied that Applicant's travel to Vietnam and financial support to his parents does not constitute "conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government," and further concedes that there are no adjudicative facts in this case different from the adjudicative facts in 1988 (Tr. 49-50).⁽⁹⁾ Nevertheless, even if Applicant's \$400.00-500.00 annual financial support to his parents (1.d) and his travel to Vietnam in 1995 and 2001 (1.e) have no independent security significance under the Directive, the conduct serves to illustrate his family ties as alleged in the SOR (1.a. and d). However, Applicant's parents are 84 years old. Neither they nor Applicant's siblings are employed by the government or are agents of the government. None are employed in positions that make them susceptible to pressure by the government. After weighing the record evidence, the foreign influence security concerns raised by Applicant's ties or connections to Vietnam are mitigated. Applicant has overcome the case against him and satisfied his ultimate burden of persuasion as to obtaining a favorable clearance decision. I resolve Guideline B for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).
2. In addition to being asked to take administrative notice, these matters are known to the agency through its expertise in deciding security-clearance cases involving foreign influence or preference. *See* ISCR Case No. 99-0452 (March 21, 2000), p. 4.
3. *See* ISCR Case No. 97-0699 (November 24, 1998), p. 3. Nothing in Guidelines B or C "requires that the foreign country in question have interests that are inimical to the interests of the United States."
4. "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."
5. *See* ISCR Case No. 98-0507 (May 17, 1999) at pp. 10-11 (discussing various facets of security significance of family ties in a foreign country).
6. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government."
7. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to non-coercive means of influence).
8. "A determination that the immediate family member(s), (spouse, father, 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."
9. Indeed, the government relies on Applicant's 1988 statement (G.E. 1) to establish its case beyond Applicant's admission. The only two new facts of any significance are Applicant's three trips back to Vietnam, two of which occurred after normalization of relations with Vietnam, and his more regular financial support to his aged parents.