

DATE: June 25, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19027

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The facts and circumstances show that Applicant's family ties to Vietnam do not pose an unacceptable security concern or risk of foreign influence under Guideline B. Clearance is granted.

STATEMENT OF THE CASE

On February 12, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence based on Applicant's family ties to Vietnam.

Applicant answered the SOR on February 28, 2003, and he requested a clearance decision based on the written record without a hearing. In his Answer, Applicant admitted to the factual events alleged in the SOR. Thereafter, Department Counsel prepared and submitted a File of Relevant Material (FORM), which was mailed to Applicant on April 25, 2003. Applicant's written response to the FORM was received by DOHA June 6, 2003, and Department Counsel made no objections to the response. DOHA assigned the case to me on June 11, 2003, to determine if Applicant's security clearance should be granted, continued, denied, or revoked.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

In general, I find that the record evidence as a whole is sufficient to establish, by substantial evidence, the occurrence of all the factual events alleged in SOR subparagraphs 1.a., 1.b., 1.c., and 1.d.

Applicant is a 32-year-old married man. He is employed by a major aerospace company as a software developer. He's

worked for this aerospace company since January 2002. The record is silent concerning Applicant's abilities and attributes as an employee.

In conjunction with his employment, Applicant completed a security-clearance application (SF 86)⁽²⁾ in January 2002 disclosing that he was born in Vietnam, has immediate family members in Vietnam, Australia, and the U.S., obtained U.S. citizenship in 1996, possesses a U.S. passport, registered with the U.S. Selective Service System, earned a college diploma in December 2001, and worked as a watch maker from November 1991 to December 2001. He also disclosed traveling to Vietnam in 1998.

Applicant was born into a Vietnamese family consisting of his parents, three brothers, and himself. His parents and one brother are citizens of and residents in Vietnam. One brother is a citizen of and a resident in Australia. The other brother lives in the U.S. and his immigration status is resident alien.

The record is unclear when and how Applicant arrived in the U.S. Based on Applicant's security-clearance application, Applicant has lived in the U.S. since at least January 1991.⁽³⁾ In his written response to the FORM, Applicant said he arrived in the U.S. from a refugee camp, which is common for a person fleeing Vietnam.

Applicant worked as a watch maker for the same company from November 1991 through December 2001. While employed there, Applicant enrolled at a state university in August 1998 studying until December 2001 when he was awarded a diploma. He started work with his current employer the following month.

Applicant married in November 1995. His spouse was also born in Vietnam. The record is silent how and when she arrived in the U.S., although she obtained her American citizen in August 2001. He and his spouse have one child, a daughter, born in the U.S. The record is also silent on whether his spouse is employed outside the home in addition to her obligations as mother and spouse.

In May 1998 Applicant traveled to Vietnam to visit his parents. He stayed approximately one month.

As a son, Applicant believes he has a duty or obligation to his parents. He gives his parents money twice per year for the Christmas and Vietnamese New Year holidays. The total value of the gifts is about \$1,000 annually.

His father and mother are old and in poor health. Both his parents are more than 80-years-old. His father had a stroke about four years ago. His mother is blind suffering with this condition for the last five years. Given their ages and poor health, I presume that neither parent is employed in any capacity. For the same reasons, it is fanciful to think his parents are involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security or defense information.

His brother in Vietnam is a farmer and thus not connected to Vietnamese law enforcement, the military, or a governmental agency. As a farmer, the brother is not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security or defense information.

Applicant understands the potential security concerns based on his family ties or connections to Vietnam. He is also willing to resist and report any potential foreign influence, coercion, or pressure. Both his understanding and willingness are demonstrated by the following statement:

In today's climate of improved diplomatic relations between the United States of America and [the] Socialist Republic of Vietnam, it is unlikely that such coercion would be applied to me. Even if it was directed against me, it would have no effect. I am a U.S. citizen. I would report to the FBI any such attempts at blackmail or coercion immediately.

Although my parents and one brother still live in Vietnam, my parents are ill and they will die any way so in case they could be placed in a position of vulnerability I make an oath that I will choose the United States. Moreover, I was brought to the United States from a refugee camp, and I graduated here, and especially I am living here, thus the United States is my highest priority. I am a U.S. citizen. I have daughter, and my own family are living in the United States, so these are my primary obligations. To protect the United States it means to protect my own family. For these reasons, I

swear that I always choose the United States of America over any country and anyone else.

Family in foreign countries is always a concern to anyone. However, I have chosen, and always will choose the actions which are in the best interest of my country the United States of America.⁽⁴⁾

Since July 1976, Vietnam has been officially known as the Socialist Republic of Vietnam. The government is a constitutional republic, and the controlling political party is the Vietnamese Communist Party. The communist government does not have a stellar human-rights record. After a 20-year hiatus of severed ties, the U.S. Government normalized diplomatic relations with Vietnam in 1995.⁽⁵⁾

Australia's government has a democratic federal-state system recognizing the British monarch as sovereign. The democratic government was created with a constitution patterned partly on the U.S. Constitution. Australia is an independent nation no longer subject to any British legal authority. The U.S. Government has a Status of Forces Agreement (SOFA) with Australia concerning the stationing of members of the U.S. Armed Forces in that country. Australia is one of 49 nations that have joined America in Operation Iraqi Freedom, which is ongoing.⁽⁶⁾

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following adjudicative guidelines are most pertinent here: Guideline B for foreign influence.⁽⁷⁾

BURDEN OF PROOF

The only 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.⁽⁸⁾ The government has the burden of proving controverted facts.⁽⁹⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹⁰⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹¹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹²⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹³⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁴⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

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.

In addition, 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. And in every security-clearance case an applicant's ties or connections to any foreign country deserve careful examination.⁽¹⁶⁾ Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on an applicant's family ties in a foreign country.⁽¹⁷⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern or risk under Guideline B.⁽¹⁸⁾ Indeed, to do otherwise amounts to nothing more than a *per se* disqualification of an applicant.

Here, based on the record as a whole, the government has established a *prima facie* case under Guideline B. In particular, Disqualifying Condition (DC) 1⁽¹⁹⁾ applies given Applicant has close relationships with immediate family members who are citizens of and residents in Vietnam, and he believes he has a duty or obligation to his parents.⁽²⁰⁾ The strength of those relationships is evidenced by, among other things, Applicant's travel to Vietnam and his gifting of money to his parents. His family ties raise security concerns due to the potential for foreign influence.⁽²¹⁾ The remaining seven disqualifying conditions of Guideline B do not apply given the record evidence.

In mitigation, Applicant's immediate family members in Vietnam 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 as a whole, I conclude Applicant's immediate family members (his parents who are old and in poor health and his farmer brother) are not agents of a foreign power, and under these circumstances, mitigating condition (MC) 1⁽²²⁾ applies in Applicant's favor.⁽²³⁾ 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 substantial as demonstrated by his affirmative choices. He chose to leave communist-controlled Vietnam. As a refugee, he chose to seek permission to immigrate to the U.S. And unlike a person who was fortuitously born here, he chose to live his life as an American citizen. Indeed, when he became an American citizen, he took an oath swearing allegiance to the United States.⁽²⁴⁾ Recently in January 2002, he chose to accept employment with a major aerospace company that is part of the U.S. military-industrial complex. Applicant's substantial commitment to the U.S. is a relevant and material fact that weighs in his favor.

Second, Applicant's ties or connections to the U.S. are substantial. Applicant is an educated, stable, and industrious individual. He met his obligation by registering with the selective service, he's been gainfully employed since at least November 1991, and he graduated from a state university. His wife is a naturalized American citizen and his daughter is a native-born American and these circumstances are unlikely to change. Moreover, Applicant has lived in the U.S. since at least January 1991, more than 10 years, which is nearly all of his adult life. These are examples of the ties that bind and these ties are firmly rooted in the U.S. Applicant's substantial ties or connections to the U.S. are relevant and material facts that weigh in his favor.

To sum up, based on the record as a whole, it is my predictive judgment that Applicant has the willingness to resist and report any potential foreign influence or pressure by either coercive or non-coercive means. Likewise, after weighing the record evidence as a whole, it is my commonsense determination that the facts and circumstances show that Applicant's family ties to Vietnam do not pose an unacceptable security concern or risk of foreign influence. Applicant has overcome the case against him and satisfied his ultimate burden of persuasion as to obtaining a favorable clearance decision. Guideline B is decided for Applicant, and formal findings concerning the SOR allegations are entered below.

FORMAL FINDINGS

SOR ¶ 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Exhibit 1.
3. Item 5 at page 3, Question 7-People Who Know You Well.
4. Response to FORM.
5. Although I was not asked to take administrative or official notice, these are facts known to this agency through its expertise in deciding security-clearance cases involving foreign influence or preference. *See* ISCR Case No. 99-0451 (March 21, 2000) at p. 4.
6. *Id.*
7. Guideline B is found at Attachment 2 to Enclosure 2 of the Directive, at pages 21-22.
8. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
9. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
10. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
11. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
12. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
13. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
14. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
15. *Egan*, 484 U.S. at 528, 531.
16. *See* ISCR Case No. 97-0699 (November 24, 1998) at 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.").
17. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
18. *Id.*
19. "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."

20. *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).

21. *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).

22. "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."

23. For commonsense reasons, I attach little, if any, security significance to Applicant's brother in Australia. Indeed, counsel did not mention this matter in their argument. FORM at pp. 3-4.

24. Title 8 U.S.C. § 1448 (oath of renunciation and allegiance).