

DATE: May 4, 2004

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-19604

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is one of many boat people who escaped Vietnam after the collapse of South Vietnam in 1975. He is a 41-year-old man who, at the age of 17, fled Vietnam in 1980. He was allowed to immigrate to the U.S. as a refugee in 1982. Since arriving in the U.S., he has earned a bachelor's degree in computer engineering and a master's degree in computer science, registered for the selective service, obtained U.S. citizenship, worked as a software engineer in the private sector, and accumulated substantial financial assets. Applicant's father, mother, brothers, and sisters are resident citizens of Vietnam. The totality of 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 June 9, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence based on Applicant's father, mother, brothers, and sisters who are resident citizens of Vietnam. Applicant answered the SOR on July 5, 2003, and he requested a hearing.

Department Counsel indicated they were ready to proceed on September 16, 2003, and the case was initially assigned to an administrative judge the next day. The case was reassigned to another administrative judge on September 22, 2003. On November 13, 2003, the case was reassigned to me due to case load considerations. A notice of hearing was issued scheduling the hearing for December 16, 2003. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript January 9, 2004.

### **RULINGS ON PROCEDURE**

At the close of the evidence, Department Counsel moved to amend the SOR to conform to the record evidence as

follows:

- Subparagraph 1.c was amended to show Applicant has four sisters (not two) who are resident citizens of Vietnam.
- Subparagraph 1.d was amended to show Applicant has three brothers (not four) who are resident citizens of Vietnam.

Without an objection, the SOR was amended accordingly.

### FINDINGS OF FACT

In his Answer, Applicant admitted to all the SOR allegations. His admissions are incorporated into my findings, and after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant testified during the hearing, and I find his testimony credible. In making this finding, I note that English is not Applicant's native language and allowances have been made for potential communication problems.

Applicant is one of many boat people who escaped Vietnam after the collapse of South Vietnam in 1975. He is 41 years old and has not yet married, although he desires to have a wife and children. He is seeking, for the second time, to obtain access to classified information for his employment as a software engineer for a defense contractor.

In 1980, the then 17-year-old Applicant, at his parents' urging, fled Vietnam. His parents bought Applicant a place on a small boat. Applicant spent approximately 16 days at sea before reaching Hong Kong. Applicant described the voyage's conditions as crowded and austere. Applicant was placed in a camp where he applied for refugee status. He was accepted for resettlement in the U.S., and he arrived here in 1982 under the sponsorship of a refugee organization.

Upon his arrival in the U.S., Applicant spoke Vietnamese and French, but did not speak English. He was enrolled in high school where he concentrated on learning English and studying for the college entrance exam. Applicant was successful and went on to college where he studied computer engineering. Following his father's advice to take his education seriously, Applicant studied very diligently while working to support himself. He was awarded a bachelor of science degree in computer engineering in 1993 and a master of science degree in computer science, specializing in communication and networking, in 1998.

According to his resume (Exhibit B), Applicant has been working in the computer/high-tech sector since May 1992. As a software engineer with his current employer, Applicant has worked on various projects including a combat service support control system to provide near real time battlefield information. His current supervisor describes Applicant as "an able and productive worker" and "a conscientious and able employee" who the supervisor strongly recommends as a software engineer (Exhibit A).

In August 1997, while employed for a different defense contractor, Applicant completed a security-clearance application (Exhibit 1) disclosing he was born in Vietnam, obtained U.S. citizenship in January 1995, and had immediate family members (mother, father, four brothers and four sisters) who are Vietnamese citizens residing in Vietnam. He disclosed traveling to Vietnam in February-March 1995. He also indicated he had registered, as required by federal law, with the U.S. Selective Service System. Subsequently, Applicant was granted a secret-level security clearance in October 1997.

Applicant worked for this defense contractor from July 1997 to May 1998 when he accepted employment with another firm where he was not required to maintain a security clearance. He worked for this company from June 1998 to May 1999. He was unemployed from May 1999 to October 1999 when he accepted a position as a software engineer with his current employer.

In October 2000, Applicant completed another security-clearance application (Exhibit 2) wherein he disclosed, among other things, his birth in Vietnam, his immediate family members in Vietnam, and his travel to Vietnam for pleasure in 1995 and 1999. He also disclosed that one of his four brothers had immigrated to the U.S. Applicant's third and most recent trip to Vietnam was in 2001 for a sister's wedding. Applicant used his U.S. passport for all his trips to Vietnam, and he did not encounter any problems or difficulties with Vietnamese authorities during his trips.

Applicant's parents, three brothers, and four sisters are citizens of and residents in Vietnam. Given he left at the relatively young age of 17, coupled with difficulty in communicating with his family, Applicant describes his relationship with his immediate family members as distant. Several times during his testimony, Applicant referred to himself as "a lost child," meaning his parents considered him lost from the family given the distant nature of the relationship.

None of Applicant's immediate family members are connected to Vietnamese law enforcement, military, or a national governmental agency. Applicant describes his family members as very low-tech people. The family members who are employed are engaged in the low-level buying and selling of consumer goods in local markets similar to a flea market in the U.S.

Applicant's father served in the South Vietnamese military before the South fell to the North in 1975. Along with many other similarly situated men, he was sent to a reeducation camp for one month or so. After Applicant fled Vietnam in 1980, his father was again sent to a reeducation camp for about three months. Applicant found out about this event when he visited his family in Vietnam in 1995. No other family member has been sent to a reeducation camp.

Applicant is not a homeowner, but he has paid state and federal income taxes for many years. In addition to his salary, which he estimates at \$79,000 for 2003, Applicant has accumulated approximately \$100,000 to \$150,000 in financial assets located in the U.S. He has no financial interests in Vietnam.

Applicant considers the U.S. his homeland, he believes he owes the U.S. a great deal as it gave him his freedom, and he is willing to protect this country. In addition, Applicant does not feel particularly close to his immediate family members in Vietnam given he arrived here at age 17 and the distant nature of the relationship.

As requested by Department Counsel, I took official or administrative notice of the following facts: (1) since July 1976, Vietnam has been officially known as the Socialist Republic of Vietnam, and the government is controlled by the Vietnamese Communist Party; and (2) the communist-controlled government in Vietnam has an unfavorable human rights record (Exhibit 3). In addition, I note the U.S. and Vietnam normalized diplomatic relations in 1995 and the normalization process between the two governments is ongoing.<sup>(2)</sup>

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) 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 security guideline is most pertinent here: Guideline B for foreign influence.<sup>(3)</sup>

### **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.<sup>(4)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(5)</sup> The government has the burden of proving controverted facts.<sup>(6)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(7)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(8)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(9)</sup> 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 him.<sup>(10)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

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."<sup>(12)</sup> Under *Egan*, Executive Order 10865, and the Directive, any 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. 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. 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.<sup>(13)</sup> 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 under Guideline B.<sup>(14)</sup>

Here, based on the record evidence as a whole, the government has established its case under Guideline B. The concern here is Applicant's immediate family members in Vietnam. DC 1<sup>(15)</sup> applies because Applicant's mother, father, four sisters, and three brothers are resident citizens of Vietnam. He has irregular contact or communication with his family members as the relationship has grown distant since he left Vietnam in 1980 at the age of 17. In addition, DC 6<sup>(16)</sup> applies based on Applicant's travel to Vietnam in 1995, 1999, and 2001. The travel had the potential to make Applicant vulnerable to foreign influence. Along with Applicant's family members in Vietnam (including the father who twice attended a reeducation camp), these circumstances raise a security concern due to the potential for foreign influence.<sup>(17)</sup> The remaining disqualifying conditions do not apply given the record evidence.

I have reviewed the MC under Guideline B and conclude that MC 1<sup>(18)</sup> applies for Applicant.

The record evidence shows that Applicant's family members are not Vietnamese agents, and so the issue under MC 1 is if the family members are in a position to be exploited by the Vietnamese government. Although Vietnam is a communist-controlled country, the U.S. and Vietnam normalized diplomatic relations in 1995, and the normalization process continues to date. More specific to this case, Applicant has been a resident of the U.S. since 1982, a U.S. citizen since 1995, and was granted a security clearance in 1997. During this time his family members have lived in Vietnam with the exception of a brother who immigrated to the U.S. Other than his father who spent about three months in a reeducation camp in 1980, no family member has encountered any difficulties or problems with the Vietnamese government due to Applicant's presence in the U.S.

Still, Vietnam's communist-controlled government and its poor human rights record places a burden on Applicant to show his family ties to Vietnam do not pose a security risk or concern. On this point, Applicant has introduced evidence of his limited contact or communication and distant relationship with his family members. Likewise, his family members are not employed by or connected to the Vietnamese military, law enforcement, or a governmental agency. Moreover, although his father's time at the reeducation camp is a concern, it is greatly reduced by the passage of time (more than 20 years) without recurrence. Considering all these matters, I conclude Applicant has met his burden of showing that MC 1 applies, notwithstanding Vietnam's communist-controlled government.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concern. First, Applicant's commitment to the U.S. is high. It is difficult to fully appreciate the gravity of his decision, at the age of 17, to leave his family and flee a communist-controlled country for a possibility of becoming a U.S. citizen. Indeed, it was a potential life-and-death decision. Second, Applicant's ties or connections to the U.S. are substantial. He has lived in the U.S. since 1982, essentially his entire adult life. Since his arrival here, Applicant can fairly be described as a model immigrant. He registered with the selective service, earned college degrees in the high-tech field and worked in that field since 1992, possessed and used a U.S. passport, and paid state and federal income taxes. Moreover, his 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.

To sum up, the record evidence demonstrates Applicant has all the indicators of a self-reliant, industrious, mature, responsible, and trustworthy individual. Based on the record evidence as a whole, it is my predictive judgment that he has the necessary strength of character to resist and report any potential foreign influence or pressure by either coercive or non-coercive means. My judgment is influenced by his significant ties and firm commitment to the U.S. After weighing the record evidence as a whole, it is my commonsense determination that the facts and circumstances show Applicant's family ties to Vietnam do not pose an unacceptable security risk or concern of foreign influence.

In reaching my decision, I have considered the whole-person concept and the appropriate factors and guidelines in the Directive. And I have weighed the record evidence as a whole, and conclude the favorable evidence outweighs the unfavorable evidence. Under the totality of the facts and circumstances, I conclude Applicant has met his burden. Accordingly, Guideline B is decided for Applicant.

### FORMAL FINDINGS

SOR ¶ 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

### 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.

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. Although I was not asked to take official or administrative notice, this matter is 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) at p. 4.
  3. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
  4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
  5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
  7. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

12. *Egan*, 484 U.S. at 528, 531.

13. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

14. *Id.*

15. "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."

16. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government."

17. *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).

18. "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."