

DATE: September 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19780

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has six siblings, three live in the U.S. and three live in Vietnam. His brother is a U.S. citizen. His two U.S. sisters are manicurists, and have applied for U.S. citizenship. As to his three Vietnamese siblings, one brother is a farmer, another brother is a teacher, and his sister is a housewife. His mother is a housewife in Vietnam. The Applicant also has two sisters-in-laws and four bothers-in-law who reside outside of the U.S. One sister-in-law resides in China and is a retired English teacher. His other sister-in-law resides in Vietnam and is a housewife. Of his four bothers-in-law, one lives in France and works in manufacturing, two reside in Canada where, one is a machinist and the other is a teacher, and the last brother-in-law resides in Australia and works for its Immigration and Naturalization Service (INS). Mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On April 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on May 7, 2003.

The case was received by the undersigned on May 30, 2003. A notice of hearing was issued on June 17, 2003, and the case was heard on July 11, 2003. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript was received on July 21, 2003. The issue raised here is whether the Applicant's perceived foreign influence militates against the granting of a security clearance. [The Applicant admits the underlying factual basis for all of the allegations, except for i.a. as it pertains to his American brother.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 52 years of age, has some college education, and is employed by a defense contractor that seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline B - Foreign Influence

The Applicant was born in the former South Vietnam; but with the fall of Saigon and being a member of the South Vietnamese Air Force, he fled the country in a helicopter which he flew onto a waiting U.S. Navy aircraft carrier (Transcript (TR) at page 12 lines 12~17, and at page 13 line 4 to page 17 line 8). He came to the United States as a refugee in 1975, attended a U.S. college in 1977, married another refugee from Vietnam in 1983, and became a U.S. citizen in 1985 (TR at page 17 line 9 to page 20 at line 19, and Government Exhibit (GX) 1 at page 1).

1.a.~1.h. The Applicant has six siblings, three of them live in the U.S. and the other three live in Vietnam (TR at page 12 line 22 to page 13 line 3, at page 23 line 3 to page 26 line 3, and at page 29 line 19 to page 30 line 9, *see also* GX 1 at pages 3~4). His brother is a U.S. citizen (TR at page 29 lines 19~22). His two sisters, who also reside in the U.S., are manicurists, and both have applied for U.S. citizenship (TR at page 29 line 22 to page 30 line 9). As to his three Vietnamese siblings, one brother is a farmer, another brother is a teacher, and his sister is a housewife (TR at page 12 line 22 to page 13 line 3, at page 23 line 3 to page 26 line 3, and at page 29 line 19 to page 30 line 9). The Applicant's 75 year old mother is also a citizen of and resides in Vietnam (TR at page 22 line 7 to page 23 line 2). She is a farmer and a housewife (*id*). The Applicant also has two sisters-in-law and four brothers-in-law who reside outside of the U.S. (TR at page 27 line 25 to page 28 line 6). Except for one sister-in-law, they were all refugees from Vietnam (*id*). One sister-in-law resides in Vietnam and is a housewife (TR at page 31 lines 11~13). His other sister-in-law resides in China and is a retired English teacher (TR at page 31 lines 3~10). Of his four brother-in-laws, one lives in France and works in manufacturing, two reside in Canada, of whom one is a machinist and the other is a teacher. The last brother-in-law resides in Australia and works for their INS (TR at page 28 lines 14~23, at page 31 lines 14~25, and at page 32 lines 1~8). The Applicant has little contact with this last brother-in-law (TR at page 32 lines 1~8).

Mitigation

The Applicant offers the sworn declarations of his Facility Security Officer, his Production Manager, and his Senior Project Engineer (Applicant's Exhibits (AppXs) A~C). They are all most laudable in their comments as to the Applicant, and would recommend him for a position of trust.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Foreign Influence

Condition that could raise a security concern:

1. An immediate family member . . . is a citizen of . . . a foreign country;

Condition that could mitigate security concerns:

1. A determination that the immediate family member(s), . . . 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;

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guideline B (foreign influence), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who is subject to a foreign influence, may be prone to provide information or make decisions that are harmful to the interests of the United States. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

The Applicant's 75 year old mother is a citizen of and resides in Vietnam. She is a farmer and a housewife. Of his six siblings, only three remain in Vietnam. One is a farmer, the other a teacher, and the third is a housewife. They have absolutely no connection with any government, and there is no evidence that their presence in Vietnam can be exploited by any government. His three other siblings joined him in the U.S. as refugees, and one is a citizen of, and the others are in the process of becoming citizens of, the U.S. He also has six siblings-in-law who reside outside of the U.S. One is a housewife living in Vietnam, while the other five are refugees living in China, France, Canada, and Australia. Only his Australian brother-in-law has, arguably, any connection with a foreign government, as he works for its INS. However, the Applicant has little contact with this brother-in-law. As to the Applicant's other siblings-in-law, they have no connection with any government, nor is there any evidence that their presence in Vietnam, France and Canada can be exploited by any government. In addition, I conclude that it would be unlikely that the Applicant would even countenance any such attempt at exploitation of any of his relatives. The first mitigating condition is therefore applicable.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his alleged foreign influence. The Applicant has thus met the mitigating conditions of Guideline B, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline B.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.
- h. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge