

DATE: August 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26597

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 49 year-old naturalized United States citizen, born in the Vietnam. He came to the United States in 1975, and became a naturalized United States citizen in 1982. He has family members, who are citizens of Vietnam and reside in Vietnam. He maintains contact with some of them and gives them money regularly. Applicant also committed criminal conduct by striking and injuring his son and daughter. As a result he was ordered to attend treatment by a mental health professional, which he did. In a Security Clearance Application (SCA) supplied to the Government, Applicant provided false and incomplete information by not admitting that he was arrested or that he had received treatment by a mental health professional. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated November 4, 2003, to the Applicant which 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied.

Applicant filed a notarized response dated December 9, 2003, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On February 4, 2004, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice, dated March 4, 2004, a Hearing was held on March 31, 2004.

At the hearing, Department Counsel offered six documentary exhibits (Government Exhibits 1 through 6) and no witnesses were called. Applicant offered sixteen documentary exhibits (Applicant Exhibits A through P) and offered his own testimony. The transcript (TR) was received on April 19, 2004.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B (Foreign Influence), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive. The SOR contains three allegations, 1.a., through 1.c., under Guideline B, one allegation under Guideline J, and two allegations, 3.a. and 3.b., under Guideline E. Applicant admitted all of the SOR allegations, under Guidelines B and J. His responses under Guideline E are not clear admissions or denials. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 49 years old. He is employed as a Flight Test Engineer by a United States defense contractor. The company wants him to have a security clearance.

Applicant was born in South Vietnam. He came to the United States in 1975, and became a naturalized United States citizen in 1982. He received a bachelors degrees from a United States university. Applicant is married. He and his wife have three children, ages 20, 21, and 25. His wife and children are United States citizens.

Paragraph 1 Guideline B (Foreign Influence)

Applicant has a sister, who is a citizen of and resides in Vietnam. His sister does not belong to, or participate in, any government agency of Vietnam. She is planning to emigrate to the United States. He sends her approximately \$400 or \$500 a year. Applicant also has two brothers, who live in the United States. One is a citizen of the United States, and the other is still a citizen of Vietnam.

Applicant also has an aunt, uncle, niece and nephew in Vietnam, to whom he sends approximately \$100 or \$200 each, three or four times a year (Tr at 36 -39).

Applicant traveled to Vietnam on in 1998 to visit his sister and to show his children the differences between Vietnam and the United States. Neither Applicant nor his wife has any inheritance or financial interest in Vietnam (Tr at 42).

Paragraph 2 Guideline J (Criminal Conduct)

On November 13, 1999, Applicant was arrested and charged with two counts of Assault in the fourth degree. The arrest was based on Applicant committing battery on both of his children. During the hearing, Applicant attempted to minimize the seriousness of the violence that he committed against his children (Tr at 45-55). However, the police report, based on an investigation of this episode, has statements from both of Applicant's children, regarding serious physical abuse that he committed, including the punching and kicking of his son and the slapping of his daughter. Applicant's wife also gave a statement in which she stated that there had been family abuse to all family members, committed by Applicant (Exhibit 3). Ultimately, Applicant plead guilty, was fined \$300, and was ordered to attend an appropriate domestic violence parenting counseling program. He attended eight sessions with a counselor, who identified himself as a "mental health specialist"(Exhibit 4).

Paragraph 3 Guideline E (Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government. Applicant completed a signed, sworn Security Clearance Application (SCA) on October 2, 2001. Question 23.f. of the SCA asked if, in the last seven years Applicant had been arrested for, charged with, or convicted of any offenses. Applicant failed to disclose the arrest and conviction that occurred in November 1999, and that is listed in paragraph 2.

The Government also alleges that Applicant furnished untruthful information to the Government on Question 21. of the SCA, which asked if, in the last seven years, Applicant had consulted with a mental health professional. Applicant answered "No", and failed to list his treatment by the health care specialist, which was ordered by the Court as a result of his arrest. He testified that he did not read the question carefully, but he had no legitimate explanation for his failure

to identify his treatment (Tr at 66).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. 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. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is 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

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines B, J, and E:

Guideline B (Foreign Influence)

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. Based on the evidence of record, the Government has established a reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant has a number of family members who are citizens of and reside in Vietnam, not only his sister but his uncle, aunt and niece, to whom he regularly contributes money. The Vietnam citizenship and residency of Applicant's family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent

with the national interest to grant or continue a security clearance for him. He failed to do so.

The evidence of existence of Applicant's family, who are citizens of and reside in South Vietnam comes within Disqualifying Condition (DC) E2.A2.1.2.1, "immediate family members, or persons to whom the individual has close ties of affection or obligation, who are citizens of, or resident in, a foreign country."

Based on the nature of the overall record and the totality of the evidence, I have determined that his family in Vietnam does constitute an unacceptable security risk, and no Mitigating Condition (MC) applies.

Guideline J (Criminal Conduct)

Regarding Guideline J, the Government has established Applicant's criminal conduct. Applicant's physical altercation with his children and his wife in 1999 was extremely serious and severe. Applicant's criminal conduct falls within Criminal Conduct DC E2.A10.1.2.1. and DC E2.A10.1.2.2., because the violence perpetrated on Applicant's family by him involved serious criminal conduct, for which he pled guilty. Based on the egregious conduct involved, I cannot conclude that any MC applies.

Guideline E (Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant intentionally provided false material information to the Government in response to two questions on the SCA that he executed in October 2001.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, there has been no reasonable explanation for Applicant's failure to list his arrest and treatment. I conclude that Applicant's falsifications of his SCA were knowingly and willingly committed.

In reviewing the DCs under Guideline E, I conclude that DC E2.A5.1.2.3. applies because Applicant deliberately provided false and misleading information in his SCA. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his criminal conduct, and the misinformation that he provided to the Government, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3 Guideline E against Applicant

On balance, it is concluded that Applicant has not overcome the Government's information opposing his request for a security clearance.

FORMAL FINDINGS

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge