

DATE: November 15, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26744

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez Jr., Esq., Department Counsel

FOR APPLICANT

Brian A. Bannon, Esq.

Andrew W. Dyer Jr., Esq.

SYNOPSIS

Applicant fled Vietnam when the North Vietnamese conquered South Vietnam in 1975. He has been a U.S. citizen since 1981. He is married to a naturalized U.S. citizen, and his children were born in the U.S. One of his brothers and an uncle are naturalized U.S. citizens. Another brother just emigrated from Vietnam to the U.S. Applicant has held a security clearance continuously for the past 22 years. Applicant mitigated security concerns raised by his father and four siblings being citizen residents of Vietnam. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 27 April 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 4 May 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 9 August 2004. On 14 September 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 23 September 2004.

FINDINGS OF FACT

Applicant is a 45-year-old software engineer for a defense contractor. He has held a security clearance continuously since 1982.

Applicant was born and raised in Vietnam. In April 1975, when Applicant was a 17-year-old high school student, the Communist forces from North Vietnam began the final overthrow of the South Vietnamese government. Applicant's mother feared he would be drafted and told him to leave. Applicant and his older brother, a member of the South Vietnamese military who had worked closely with U.S. forces in Vietnam, fled Saigon on a boat. The boat ran out of

fuel, food, and water. Applicant and his brother transferred to a barge and were eventually rescued by the U.S. Navy and taken to the Philippine Islands. From there, Applicant was flown to Guam. A few months later a sponsor was found for Applicant, and he was flown to the U.S. That fall, he enrolled in high school. After graduation, he enrolled in college and, in 1981, graduated with a degree in electrical engineering. In 1981, Applicant became a naturalized U.S. citizen. Since 1982, he has worked for the same organization, although it has changed names several times. He is a highly skilled and trusted member of the engineering staff. He received his master's degree in in 1985.

In 1983, Applicant married a woman who had emigrated from Vietnam in 1975. She became a U.S. citizen in 1981 or 1982. They have two children born in the U.S., a 13-year-old daughter and a 7-year-old son. Neither of their children speak Vietnamese. All of Applicant's wife's immediate family reside in the U.S. and are U.S. citizens.

Applicant's mother is deceased. His father is 75 years old, is in very poor health, and is a citizen resident of Vietnam. He had been a police officer prior to the North Vietnamese take-over. At the end of the war in Vietnam, Applicant's father was sent to a re-education camp. He then began repairing bicycles for a living. He is now retired. Applicant and his older brother sent their father approximately \$3,000 so he could repair his home. Applicant sends a monetary gift of about \$900 twice a year to Vietnam to be divided among his relatives there. He speaks to his father briefly by telephone twice a year and one of his sisters five times a year.

Applicant's older brother is a citizen resident of the U.S. He married a native-born U.S. citizen and they have two children, neither of whom speak Vietnamese.

Applicant sponsored his youngest brother for entry to the U.S. Since the issuance of the SOR, the brother has arrived and is now a U.S. resident. One other brother and three sisters remain in Vietnam. None of them work for the government and none of them are agents of a foreign power. His sisters are housewives and do not work outside their homes. Applicant is close to one of his sisters, but does not communicate with his other sisters or brother living in Vietnam.

Applicant's uncle served four years in a re-education camp after the war. Upon his release in 1979, he escaped Vietnam and is now a U.S. citizen as are his wife and six children.

Applicant has made two trips back to Vietnam: once in 1995 to visit his family and once in 1998 to return to an uncle's family money the uncle had willed to Applicant. Applicant sought permission from the company security office before each trip and reported for debriefings after the trips. His wife has never returned to Vietnam and his children have not visited there. Applicant does not intend to return to Vietnam even if his father or sisters become ill or die.

Applicant owns a home and has financial investments in the U.S. He has no assets or financial interests in Vietnam or other foreign countries.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or.

10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).*

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)*; *see Directive ¶ E3.1.15*. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *ISCR Case No. 01-20700 at 3.*

CONCLUSIONS

In the SOR, DOHA alleged Applicant's father (¶ 1.a) and his five siblings are citizen residents of Vietnam (¶ 1.c); he and his brother bought a house in Vietnam for their father (¶ 1.b); he sends \$900 every January and June to his father in Vietnam (¶ 1.d); he traveled to Vietnam in July 1995 and August 1998 (¶ 1.e); and he was working to sponsor his brother, a resident of Vietnam, for entry into the U.S. (¶ 1.f). A security risk may exist when members of an applicant's immediate family or persons to whom the applicant 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. *Directive ¶ E2.A2.1.1.*

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has immediate family members--his father, three sisters, and a brother--who are citizen residents of Vietnam. *DC E2.A2.1.2.1*. There are two mitigating conditions that might apply to Applicant's case: a determination that the family members 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 applicant to choose between loyalty to the person and loyalty to the U.S. (*MC E2.A2.1.3.1*) and contact and correspondence with foreign citizens are casual and infrequent (*MC E2.A2.1.3.3*).

Evidence an applicant who has contacts with family members in a foreign country raises a rebuttable presumption those contacts are not casual in nature. *ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002)*. I am unable to conclude Applicant's relationship with his family members in Vietnam is casual in light of his contacts with his father and sister, sending them money twice a year, helping finance the reconstruction of his father's home, and sponsoring his brother into the U.S.

Applicant asserts that maintaining contact with and his family is done out of a sense of duty rather than any emotional ties. Under Guideline B, it is not important whether the ties with foreign citizens are caused by close emotional ties or born out of a sense of duty. Both may be disqualifying under *DC E2.A2.1.2.1*.

While the nature of the government in the country in which an applicant has associates is not dispositive of whether a security clearance should be granted, it may influence whether those foreign associates are "in a position to be exploited by a foreign power." "Vietnam is a one-party state, ruled and controlled by the Communist Party of Vietnam." *Ex. 7 at 1*. Despite some recent improvement in the areas of individual freedoms, people's control over their lives, and expanded freedom of religion, the Government's human rights record remains poor, and it continues to commit serious abuses. *Ex. 6 at 1; Id.* However, Vietnam is not one of the states known to commit military or economic espionage against the U.S.

On the other hand, Applicant has possessed a security clearance for 22 years. This fact does not prevent the Government from reconsidering an applicant's security suitability based on information available at the time previous decisions to grant a security clearance were made. *Cf. ISCR Case No. 02-17609 at 4 (App. Bd. May 19, 2004)*. Nevertheless, the security clearance process requires making predictive judgments based on all of the facts and circumstances of the case. The holding of a security clearance for 22 years without adverse incident is certainly a matter that should be seriously considered in making such a judgment.

After carefully considering all of the evidence, I conclude MC E2.A2.1.3.1 applies. I find Applicant's family members in Vietnam are not in a position of vulnerability such as to place Applicant in a position of having to choose between his loyalty to the U.S. and his loyalty to his family members. I find for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).