

DATE: December 30, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22006

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Laura J. Anderson, Esq.

SYNOPSIS

Applicant is a 56-year-old naturalized citizen of the United States. He was born in South Vietnam, and was an officer in the South Vietnamese Navy until the country was overrun by the communists in 1975. Applicant escaped to the United States, graduated from college here, and has worked for a defense contractor for 23 years. One of Applicant's brothers and three of his sisters still live in Vietnam. Applicant has not spoken to these sisters since he left Vietnam in 1975, however he writes to them once or twice each year and sends small monetary gifts. Applicant speaks to his brother by telephone several times a year. Applicant has extensive ties to the United States, including his spouse, two brothers, and substantial financial interests. Applicant has mitigated the security concerns arising from the possible foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On May 24, 2000, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 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 (the "Directive"). On May 14, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, Guideline B, Foreign Influence.

Applicant answered the SOR in writing on May 27, 2004. He elected to have a hearing before an administrative judge.

The case was assigned to me on August 11, 2004. With the concurrence of the parties, I conducted the hearing on September 22, 2004. The government presented three documents. Applicant's counsel presented four documents and Applicant testified on his own behalf. DOHA received the transcript on October 12, 2004.

FINDINGS OF FACT

Applicant admitted the factual allegations in ¶¶ 1.a and 1.b of the SOR. Applicant's Answer to SOR, dated May 27, 2004. Those admissions are incorporated herein as findings of fact. Applicant denied the allegation in ¶ 1.c of the SOR. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 56 years old. Ex. 1 at 1. He was born in what was then called the Republic of Vietnam (or South Vietnam). He was an officer in the Navy of South Vietnam from 1969 until 1975, when communist forces overran the country. *Id.* at 5. In April 1975, he was assigned to a South Vietnamese ship in port in Saigon, when the North Vietnamese army captured the city. Tr. at 20. The ship was ordered to put to sea to avoid capture and left the day before Saigon fell. *Id.* The ship sailed to a U.S. Navy base in the Philippines, and then to a base in Guam. Tr. at 21.

When South Vietnam fell, Applicant became a refugee. He moved to a series of refugee camps in the United States for two months. Tr. at 22. An American citizen sponsored him into the United States, and he lived with his sponsor for about six months. *Id.* Applicant attended college in the United States between about 1978 and 1981, and was graduated with a bachelor of science degree in mechanical engineering. Ex. 1 at 1. Applicant became a naturalized citizen of the United States in June 1982. Tr. at 22-23.

Applicant began working for his present employer, a defense contractor, in 1981 as a mechanical engineer. Tr. at 16; Ex. 1; Ex. A. Applicant has an unblemished record of duty performance for the company. Tr. at 16; Ex. A. Applicant held a security clearance from 1984 to 1991. Tr. at 23; Ex. 1 at 8. The clearance was terminated when the project for which it was required concluded. Tr. at 23. His security clearance has never been denied, suspended, or revoked. Ex. 1 at 8.

Applicant's parents passed away more than 20 years ago. Tr. at 18; Ex. 1 at 3. Applicant has one brother and three sisters still living in Vietnam. Tr. at 18-19. Applicant's oldest sister is 59 years old. Tr. at 18-19. She was married, but her husband died 10 or 15 years ago attempting to escape Vietnam. Tr. at 27. She has a small business, but has been very sick lately. *Id.* Applicant's second sister in Vietnam is 52 years old (Tr. at 19), and is married to a taxi driver. *Id.* His third sister is 46 years old (Tr. at 19), and is married to a motor bicycle driver. *Id.* None of them have any connection to the government. *Id.*; Ex. B, C. Applicant's sisters do not have telephones; Applicant has not spoken to his sisters since he left Vietnam in April 1975. Tr. at 25-26. Applicant sends small monetary gifts (\$200.00 to \$300.00) to each of his sisters periodically, about every 12 or 18 months, since about 1990. Tr. at 24-25.

Applicant's brother in Vietnam is 50 years old. Tr. at 33; Ex. 2 at 3. He was a cadet in the South Vietnamese Army Academy between 1973 and 1975. Tr. at 34. After the fall of South Vietnam, the communists sent him for "reeducation" for three days, although he was not a prisoner of war. *Id.*; Ex. 2 at 3. He makes a good living designing and selling clothing. *Id.* Applicant's brother has no connection to the government of Vietnam. Tr. at 35. Applicant has not seen his brother since 1975, but calls him on the telephone about two or three times each year. *Id.* Applicant never discusses his work with his brother. Tr. at 35.

Applicant met his wife in 1981. Ex. 2 at 4. She was born in Vietnam and became a naturalized citizen of the United States in 1985. Ex. 1 at 5. Applicant and his wife lived together for about ten years before they were married in 1996. Ex. 2 at 4. She is an accountant for a defense contractor. *Id.* Neither Applicant nor his wife have any property or economic interests in Vietnam. Ex. 2 at 1. They have substantial assets in the United States. Tr. at 45. Applicant's wife has two brothers and one sister who are citizens and residents of the United States. Tr. at 44.

Applicant's father-in-law was an officer in the South Vietnamese Army, Airborne division, holding the rank of Lieutenant Colonel. Ex. 2 at 2. The Communists held him as a prisoner of war for ten years and he died before he could immigrate to the United States. *Id.* Applicant's mother-in-law immigrated to the United States and lived in California, where Applicant and his wife visited her once or twice a year. *Id.* She passed away recently in California. Ex. 4 at 2.

Applicant has two brothers who live in the United States. Applicant's oldest brother in the United States is 63 years old. Ex. 1 at 3. He was a Major in the infantry of the South Vietnamese Army, and was a prisoner of war for nine years. Tr. at 28. He immigrated to the United States in 1994, and is now a naturalized citizen. Ex. 2 at 2. He visits Vietnam occasionally, and has not reported any problems. Tr. at 42. Applicant's other brother in the United States is 59 years old. Ex. 1 at 3. He was a First Lieutenant in the South Vietnamese Army, and was held as a prisoner of war for six years before being allowed to immigrate to the United States. Ex. 2 at 2. He is also a citizen and resident of the United States.

Id.

At the time Applicant was interviewed by security investigators, he and his wife were planning a vacation trip to Vietnam. Tr. at 37; Ex. 2. at 1. However, Applicant's wife decided not

to go, so she could attend a family gathering in the United States. Applicant did not travel to Vietnam, and has no plans to do so. Tr. at 37-38.

POLICIES

In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only 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." A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline B, Foreign Influence: A security risk may exist when an individual's immediate family, including cohabitants, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the United States 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 to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Directive, ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. 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 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following

conclusions regarding the allegations in the SOR.

The Government's evidence and Applicant's admissions constitute substantial evidence of a potentially disqualifying condition under Guideline B of the Directive. Paragraph E2.A2.1.2.1 provides that it may be a disqualifying condition if "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." Paragraph E2.A2.1.3.1. defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. The evidence indicates that Applicant has a brother and three sisters who are citizens and residents of Vietnam. Applicant maintains regular, although somewhat sporadic, contact with his brother.

These circumstances "could create the potential for foreign influence that could result in the compromise of classified information." Directive, ¶ E2.A2.1.1. While the

mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying . . . [it] does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at **33-34 (App. Bd. Feb. 8, 2001).

These security concerns can be mitigated where it is determined that "the immediate 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 individual to choose between loyalty to the person involved and the United States." Directive, ¶ E2.A2.1.3.1. In this case, none of Applicant's brother or sisters in Vietnam have any connection to the government or a political party. Thus none of them are an "agent of a foreign power." See 50 U.S.C.A. § 1801(b).

In assessing whether relatives are vulnerable to exploitation, it is helpful to consider several factors, including the character of the government of the relevant foreign country. Vietnam is a communist country. Ex. 3 at 1, 13. For more than a decade after the war, Vietnam and the United States had no economic or political relations. *Id.* at 1. Since 1985, both countries have taken significant steps toward normalizing relations through trade agreements and other political and security initiatives. *Id.* at 4-7. Vietnam is still dominated by the Communist party and its government is intolerant of dissent. *Id.* at 13. Vietnam has a poor record of protecting human rights. *Id.* at 10. Under the circumstances, the possibility exists that the government would attempt to exploit or pressure its residents to act adversely to the interests of the United States.

It is important to consider the vulnerability to duress of Applicant's relatives in Vietnam. As noted above, Applicant's brother and sisters are not and have never been employed by the government or the military of the present government of Vietnam, nor do any of them rely upon a government pension. Each of them operate an independent family business. Applicant's sisters are not well-off financially, making them somewhat more vulnerable. His brother's financial position is such that he can travel abroad if desired. Under these circumstances, the opportunity for adverse influence is substantially reduced.

Another significant factor is Applicant's vulnerability to pressure or duress applied indirectly through his ties with his relatives. Applicant has little contact with his sisters in Vietnam—he has not spoken to any of them since he left the country in 1975. He maintains regular contact with his brother, however. At the same time, he has extensive ties to the United States. Applicant has now lived here most of his adult life, his spouse is a citizen and resident of the U.S., and many of his family members live here. All his financial interests are in the United States. He has worked for this defense contractor for over 23 years and has substantial professional and financial ties to the company. Applicant held a security clearance from 1984 to 1991 without adverse incident. Finally, when confronted with the possibility of improper foreign influence, Applicant wrote, "I can honestly say that my loyalty lies with the United States. I am very anti-Communist and I would defend this country if called upon to do so, as I have done in the past." Ex. 2 at 4. Considering the extent of his ties to the United States, I find Applicant is not vulnerable to pressure or duress. I conclude the mitigating condition set out in ¶ E2.A2.1.3.1 of the Directive applies.

Under ¶ E2.A2.1.3.3 of the Directive, it may also be mitigating where "[c]ontact and correspondence with foreign

citizens are casual and infrequent." Applicant has very little contact with his sisters in Vietnam. As mentioned above, he has not spoken to them since he left the country in 1975, and corresponds only once or twice each year. "Nothing in the plain language of Foreign Influence Mitigating Condition 3 precludes its application to an applicant's immediate family members. See, e.g., ISCR Case No. 98-0552 (May 4, 1999) at 7." ISCR Case No. 00-0484 (February 1, 2002), 2002 DOHA LEXIS 85. I find Applicant has only casual and infrequent contact with his sisters in Vietnam.

Paragraph 1.c of the SOR alleges Applicant planned to travel to Vietnam in December 2003. While that was true at the time, Applicant never made the trip. He is not planning to visit Vietnam in the future.

I considered carefully all the facts and circumstances in this case. I conclude Applicant has mitigated any potential security concerns arising from Applicant's family ties to Vietnam.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of 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 J. Breslin

Administrative Judge