

DATE: January 27, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24172

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1975 with the fall of Saigon, the 14 year old Applicant was evacuated from Vietnam by the Americans. He was transported to the U.S., where he was educated, naturalized in 1981, and granted a security clearance in 1984. His spouse is a citizen of Vietnam, but resides with the Applicant in the U.S. She is a housewife. The Applicant has two brothers, one who also resides with the Applicant in the U.S., and the other resides in Vietnam. His brother in Vietnam drives a pedicab. The Applicant has in-laws who reside in Vietnam. His father-in-law is a construction worker. His mother-in-law is a housewife. He also has a 28 year old sister-in-law and a 12 year old brother-in-law. None of the Applicant's foreign relatives have any with any foreign government, nor are they members of the communist party. Mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On June 9, 2005, 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 July 27, 2005.

The case was received by the undersigned on October 18, 2005. A notice of hearing was issued on October 26, 2005, and the case was heard on November 8, 2005. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript (TR) was received on November 22, 2005. 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 of all of the allegations, except for subparagraph 1.c., as his wife has been granted permanent resident status.]

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 45 years of age, and is employed by a defense contractor who 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

In 1975, with the fall of Saigon, the 14 year old Applicant was evacuated from Vietnam by the Americans (TR at page 13 line 22 to page 15 line 3, at page 16 line 17 to page 17 line 4, and at page 25 line 18 to page 26 line 21). He was transported to the U.S., where he was educated, naturalized in 1981, and granted a security clearance in 1984 (*Id.*, and Government Exhibit (GX) 1 at pages 1 and 6).

1.a.~1.e. The Applicant's spouse is a citizen of Vietnam, but resides with the Applicant in the U.S. (TR at page 15 line 18 to page 16 line 10, at page 19 line 14 to page 20 line 23, and at page 27 line 24 to page 28 line 4). She was granted permanent resident status in 1984, and is a housewife (*Id.*). The Applicant has two brothers, one who also resides with the Applicant in the U.S., and the other resides in Vietnam (TR at page 15 lines 5~17, at page 17 line 14 to page 18 line 1, at page 18 line 9 to page 19 line 13, and at page 26 line 22 to page 27 line 19). His brother in Vietnam drives a pedicab (TR at page 26 line 22 to page 27 line 19). The Applicant has in-laws who reside in Vietnam. His father-in-law is a construction worker, and his mother-in-law is a housewife (TR at page 21 line 2 to page 22 line 4, and at page 29 lines 1~4). He also has a 28 year old sister-in-law and a 12 year old brother-in-law (TR at page 22 lines 5~21, and at page 24 lines 4~12). None of the Applicant's foreign relatives have any connection with any foreign government, nor are they members of the communist party.

1.f. and 1.g. The Applicant's wife sends \$300 each month to her family in Vietnam (TR at page 22 line 22 to page 23 line 9). He has traveled to Vietnam in 1999, 2000, 2002 and 2003 (TR at page 16 lines 11~16, and at page 23 line 21 to page 24 line 3). Most of these trips were to see his, then, Vietnam based spouse. In his trips to Vietnam, the Applicant has never been approached by anyone inquiring as to his employment (TR at page 24 line 13 to page 25 line 7). He knows the reporting requirements should such an inquisitive approach ever occur (*Id.*).

Mitigation

Those who have know the Applicant for many years at his place of employment speak most highly of the Applicant (Applicant Exhibit A). They would all recommend him for a position of trust (*Id.*).

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. Furthermore, 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 disqualifying 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 came to the U.S. in 1975 as a teenager, having been evacuated by the Americans. However, one of the Applicant's brothers, and his in-laws, are citizens of and reside in Vietnam. The first disqualifying condition under Foreign Influence is therefore applicable as "[a]n immediate family member . . . is a citizen of . . . a foreign country." None of the Applicant's foreign family members are connected with any government, and there is no evidence that their presence in the U.S. or in Vietnam can be exploited by any government. In addition, I conclude that it would be unlikely that the Applicant would even consider any such attempt at exploitation (TR at page 28 lines 5~14). The first mitigating condition is therefore applicable as "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 persons involved and the United States." Mitigation is shown. Guideline B is found in the Applicant's favor.

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.

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