

KEYWORD: Foreign Influence

DIGEST: Applicant is a 48-year-old naturalized American citizen. In 1975, a day before South Vietnam fell to communist control, Applicant escaped. He came to the U.S., graduated from college and became a U.S. citizen in 1984. Applicant has held a security clearance since 1987. Applicant sponsored two of his siblings to come to the U.S., but could not afford financially to sponsor the others that remained. Applicant's brothers fought for South Vietnam in the war, one was killed, one wounded and one later imprisoned by the communists. Applicant has three sisters and a brother that still live in Vietnam. None are government agents or affiliated with the government. Applicant has infrequent contact with them. Applicant has successfully mitigated the security concerns due to foreign influence. Clearance is granted.

CASENO: 03-24965.h1

DATE: 01/06/2005

DATE: January 6, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24965

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

## **FOR GOVERNMENT**

Kathryn Trowbridge, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant is a 48-year-old naturalized American citizen. In 1975, a day before South Vietnam fell to communist control, Applicant escaped. He came to the U.S., graduated from college and became a U.S. citizen in 1984. Applicant has held a security clearance since 1987. Applicant sponsored two of his siblings to come to the U.S., but could not afford financially to sponsor the others that remained. Applicant's brothers fought for South Vietnam in the war, one was killed, one wounded and one later imprisoned by the communists. Applicant has three sisters and a brother that still live in Vietnam. None are government agents or affiliated with the government. Applicant has infrequent contact with them. Applicant has successfully mitigated the security concerns due to foreign influence. Clearance is granted.

## **STATEMENT OF THE CASE**

On May 24, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B, foreign influence. Applicant submitted a response to the SOR, dated June 15, 2004, and requested a hearing. In his SOR response, Applicant denied some allegations contained in the SOR, and admitted others while providing explanations in an effort to extenuate and mitigate the security concerns raised by the allegations.

The case was assigned to me on November 29, 2004. A notice of hearing was issued on November 29, 2004, scheduling the hearing for December 16, 2004. The hearing was conducted as scheduled. The government submitted two exhibits that were marked as Government Exhibits (GE) 1-2. They were admitted without objection into the record. The government requested administrative notice be taken of U.S. Department of State, Bureau of Consular Affairs Information Sheet: Vietnam, dated September 20, 2004. Administrative notice was taken without objection. Applicant testified on his own behalf, two witnesses testified on his behalf, and he submitted two exhibits that were marked as Applicant's exhibits (AE) 1-2. The exhibits were admitted without objection. Applicant requested administrative notice be taken of U.S. State Department, Background Note: Vietnam, dated September 2004, The White House Press Release Fact Sheet, Vietnam Bilateral Trade Agreement, dated July 13, 2000, and U.S. State Department Release, U.S.-Vietnam Relations: "30 Years After the War, 10 Years After Normalization," dated April 4, 2004. Administrative notice was taken without objection. The transcript was received on January 4, 2005.

## FINDINGS OF FACT

Applicant is a 48-year-old senior electronics engineer for a defense contractor. Applicant was born in Vietnam, and when he was 19 years old, he escaped on April 29, 1975, a day before the country fell to communist control. Applicant came to the United States and became a naturalized citizen in 1984 and graduated from college in 1985. Applicant has worked for defense contractors since 1987 and has held a security clearance since then. Applicant has been married since 1989 and has three children. His wife is also a naturalized citizen from Vietnam.

In 1985, Applicant submitted applications to bring his family to the United States. In 1995, the applications were approved and Applicant sponsored two of his six siblings to come to the United States. By this time Applicant was married with children and could not afford financially to bring over any additional members of his family. Applicant brought over the two younger siblings, believing they would have an easier time assimilating to the American culture and they could speak some English. He was concerned about bringing over other members, who after remaining in the U.S. for three years, would be eligible for welfare. Applicant did not think that it was appropriate for him to sponsor family members that would not be able to support themselves.

Applicant has seven siblings. Two brothers and one sister are naturalized citizens of the United States. Applicant's other three sisters and a disabled brother live together in Vietnam. The sisters work as seamstresses and the brother sells lottery tickets. The sisters are all in their sixties, and the brother is in his forties. Applicant's brother is confined to a wheelchair. Applicant also has a niece who lives in Vietnam and works for a phone company. Three of Applicant's brothers served in the South Vietnamese military, his disabled brother did not. One brother was wounded, and immigrated on his own to the United States. Another, was held in a prison camp by the communists for three years, released and sponsored by Applicant to enter the U.S., and one was killed during the war. Applicant never served in the military in Vietnam. Applicant's sister, who is now a naturalized citizen, also attempted to escape Vietnam, was caught and held in prison for a short period of time. The siblings that remain in Vietnam were forced to farm uncultivated land for a number of years. Once the land was cultivated, they were moved to the city to do other labor. None of Applicant's siblings in Vietnam work directly for the government, although it is likely that the companies they work for are in some way government controlled. None of his relatives living there are involved with the military or the government. None of them receive any benefits from the Vietnamese government.

Applicant had limited contact with his relatives in Vietnam from 1975-1995 because the communication system was primitive and his family did not have a phone. In 1995, communication improved and Applicant now calls his family once or twice a year. Their conversations are casual and concern their personal welfare. Applicant waited until relations were normalized between the United States and Vietnam before returning to Vietnam for a visit. He visited his family in Vietnam in 1997 and 1999 during the Christmas holidays. Prior to traveling to Vietnam, Applicant consulted the security manager of his employer to ensure there were no security issues, conflicts or prohibitions. He was provided a security brief prior to traveling. Applicant did not have any incidents that would be a security concern while visiting. Applicant's sisters do not know anything about his work or whom he works for. Applicant would immediately notify his

security manager and/or the Federal Bureau of Investigation if anyone attempted to exploit or coerce him regarding any information he may have.

Applicant does not send money or gifts to his family in Vietnam. He did give his family monetary Christmas presents when he was in country visiting them. Applicant provides no support for his family in Vietnam. Applicant's father and mother remained in Vietnam and died in 1987 and 1991, respectively. He was notified by telegraph. He did not return for their funerals. Applicant has no friends or contact, other than his family in Vietnam. Applicant does not own any property in Vietnam. Applicant has assets totaling approximately \$250,000, including his own home, all in the United States. Applicant is a law abiding, loyal citizen of the United States.

Applicant's supervisor testified that he has known Applicant since 1992, and Applicant has worked directly for him for four years. Applicant is diligent, careful and abides by all the security regulations and has never been involved in any type of violation. He is trusted and there has never been a reason to question his integrity. Another supervisor testified that he has known Applicant since 1985, and Applicant is conscientious about his work and has never had any security violations.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, with its respective DC and MC, applies in this case.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (2) The government has the burden of proving controverted facts. (3) The burden of proof is something less than a preponderance of evidence, (4) although the government is required to present substantial evidence to meet its burden of proof. (5) Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. (6) Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (7) Additionally, an applicant has the

ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(11)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(12)</sup> 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.

## CONCLUSION

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligations 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 interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Based on the allegations in the SOR, DC 1: *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*, must be evaluated in determining whether it is clearly consistent with the national interest to grant a security clearance to Applicant under Guideline B. DC 1 applies in this case because Applicant's sisters and a brother live in Vietnam.

Vietnam is a poor agrarian country controlled by a Communist government. Its political power is centralized in the Communist-party-dominated constitutional republic. Vietnam has strict entry and exit requirements and those deviating from their intended purpose on visiting can be expelled. Naturalized citizens of the United States who were born in Vietnam, former citizens of Vietnam and their children are treated as Vietnamese nationals when dealing with criminal matters. They also may be subjected to laws that impose special obligations, such as military service and taxes. U.S. citizens of Vietnamese origin may be charged with offenses allegedly committed prior to their original departure from Vietnam. The U.S. State department is concerned about terrorist attacks on westerners in Vietnam. Human rights and due process in Vietnam are not afforded the same sanctity as in the U.S. Foreign visitors may be placed under surveillance and rooms may be monitored. Foreign visitors have been arbitrarily arrested, detained or expelled for acts that would not be a crime in the U.S. Visitors deemed to be suspicious by Vietnamese security may be detained, along with their Vietnamese contacts, relatives and friends. U.S. citizens have been detained for "discussions" not related to any alleged illegal activities. Involvement in politics, possession of political material, business activities that have not been licensed by appropriate authorities, or non sanctioned religious activities can result in detention. Person's violating Vietnamese laws are not afforded due process. Often foreign visitors are detained for longer periods of time and not

charged with an offense. A 1994 agreement between the United States and Vietnam provides for immediate notification of and reciprocal access within 96 hours to each other's detained citizens. Vietnam rarely follows the agreement in a timely manner. In 1995, the United States normalized relations with Vietnam. The United States has increased its economic cooperation and trade with Vietnam and removed a trade embargo. The countries regularly have dialogue on human rights and political exchanges. The cooperation between the U.S. and Vietnam has improved considerably since normalizing trade relations.

The following mitigating conditions must be evaluated in determining whether it is clearly consistent with the national interest to grant a security clearance to Applicant, under Guideline B, MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate(s) in question 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, and MC 3: Contact and correspondence with foreign citizens are casual and infrequent.*

There is no evidence to suggest that any of Applicant's family members are, or ever have been agents for the Vietnam Government. Applicant's sisters were forced to work on farms and later as seamstresses and his brother sells lottery tickets. They do not receive any subsistence from the government. Although it has been relatively recent that relations have been normalized with Vietnam, friendly trade exists between the countries. No evidence was presented to indicate Vietnam has attempted to exploit any of its residence for the purpose of compromising a security clearance holder within the United States.

Applicant's relationship with his siblings that remain in Vietnam is very casual and his contact with them is infrequent. For almost twenty years he did not have any contact with them. He has no other ties, personal, professional or financial within Vietnam. Applicant's family history is one of defiance with the Communist government. His brothers fought, were wounded and one died fighting against the Communist. One brother was in a prison camp and his sister attempted to escape from Vietnam. Applicant identifies with being an American and living the American dream.

Applicant has held a security clearance since 1987. He has had no security violations during that time. While the fact that he held a clearance for approximately 17 years is not dispositive, it does demonstrate how he acted in the past, regarding safeguarding classified information. Considering there are no changed circumstances, Applicant's consistent and responsible conduct in the past, should weigh heavily for predicting his future conduct.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence, including Applicant's credibility in this case, and considered him under the "whole person" concept. Accordingly, I find Applicant has successfully mitigated the foreign influence concerns and in demonstrating that both MC 1 and MC 3 apply.

I am satisfied that Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline B is decided for Applicant.

### **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline B FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

### **DECISION**

In light of all 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Section E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p.3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p.2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, Section E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Section E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id.* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. Executive Order. 10865. § 7.