

DATE: April 27, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33639

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

John T. Turco, Esq.

SYNOPSIS

Applicant is one of many boat people who left Vietnam after the collapse of South Vietnam in 1975. He is a 43-year-old man who, at the age of 16, fled Vietnam in 1977. He was allowed to immigrate to the U.S. as a refugee and he has since obtained a college education, registered for the selective service, and he is now a U.S. citizen. He is employed as a computer programmer for a large defense contractor. Applicant's father and eight siblings are resident citizens of Vietnam. Based on the record evidence as a whole, Applicant has successfully mitigated the security concern of foreign influence based on his family ties to Vietnam. Clearance is granted.

STATEMENT OF THE CASE

On June 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence. Applicant replied to the SOR on June 21, 2004, and requested a hearing. Department Counsel indicated he was ready to proceed on November 8, 2004, and the case was assigned to me November 10, 2004. A notice of hearing was issued scheduling the hearing for December 27, 2004. Applicant appeared with counsel and the hearing took place as scheduled. For unknown reasons, DOHA did not receive the transcript until arch 7, 2005. The transcript delay, coupled with a heavy caseload, have delayed issuing a decision in this case.

FINDINGS OF FACT

In his Answer, Applicant admitted the SOR allegations except for subparagraph 1.e. His admissions are incorporated into my findings, and after a thorough review of the record, I make the following findings of fact:

Applicant testified during the hearing, and I find his testimony credible. In making this finding, I note that English is not Applicant's native language and some allowances have been made for potential communication problems.

Applicant is one of many boat people who left Vietnam after the collapse of South Vietnam in 1975. He is 43 years old, married, and the father of two native-born U.S. citizen children. Like Applicant, his wife is a native of Vietnam and she is now a U.S. citizen. He is seeking to obtain a security clearance, for the first time, in conjunction with his employment as a computer programmer for a defense contractor.

In 1977, the then 16-year-old Applicant, at his parents' urging, fled Vietnam by boat. His father encouraged Applicant to depart because it appeared Applicant would be conscripted into the Vietnamese military. Applicant traveled by boat to Malaysia where he stayed for about seven months before arriving in the U.S. under the sponsorship of relatives already living in the U.S.

Applicant obtained a college education in the U.S., and he has been working as a computer programmer since about January 1995. He currently earns about \$52,000.00 annually. His wife earns a higher salary, and together they own a home and investments in the U.S. Neither Applicant nor his wife has any financial interests in Vietnam.

In February 2001, Applicant completed a security-clearance application (Exhibit 1). In it, he revealed, among other things, his birth in Vietnam, that he obtained U.S. citizenship, and that he had immediate family members who are Vietnamese citizens residing in Vietnam. He also indicated he had registered, as required by federal law, with the U.S. Selective Service System.

In April 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS), and the interview produced a sworn statement (Exhibit 2). Because it is brief, the statement is quoted in full:

I could not be influenced by other government because of my family or relatives. If in the situation that they threaten my family or my wife and children, right now, I don't know how to handle it. (I hope it won't happen to me). I [have] loyalty to the United States of America.

In his response to the SOR, Applicant, noting that English was his second language, further explained that he would report any threat incident to his security officer immediately.

Applicant's father is a resident citizen of Vietnam. He is a retired fisherman. He has no connection with the Vietnamese government or military or with any organization or company that would have an interest in U.S. classified information. Applicant has fairly regular contact with his father, perhaps calling once a month to check on his father's health and general welfare.

Applicant's eight siblings (brothers and sisters) are resident citizens of Vietnam. They all have rather work-a-day lives working as fishermen, shopkeepers, and the like. None of the siblings have connections with the Vietnamese government or military or with any organization or company that would have an interest in U.S. classified information. Applicant does not have regular contact with his siblings, but may speak to one if present when he telephones his father.

In addition to these siblings, Applicant has one brother who is a resident citizen of the U.S. Also present in the U.S. are Applicant's grandparents, three uncles, and numerous other family members.

As a sign of respect and to help, Applicant sends money to his father. The amount varies, but ranges from \$300.00 to \$500.00 annually. Applicant provides no financial assistance to his siblings.

Since fleeing Vietnam in 1977, Applicant has returned twice, both times as a U.S. citizen using a U.S. passport. The purpose of the first trip was to introduce his wife to his family. The purpose of the second trip was to attend his mother's funeral. Applicant had no problems or difficulties with Vietnamese officials during these two trips.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline B for foreign influence, a security concern 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 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. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record evidence as a whole, the government has established its case under Guideline B. Applicant has family ties to Vietnam, as evidenced by his father and eight siblings who are citizens of and residents in Vietnam. He has fairly regular contact with his father by monthly telephone calls and irregular contact with his siblings (no doubt the relationships with his siblings have grown distant since he left Vietnam in 1977). His two trips to Vietnam are also evidence of his family ties. Taken together, these circumstances raise a security concern under DC 1.⁽¹¹⁾

I have reviewed the MC under Guideline B and conclude that MC 1⁽¹²⁾ applies for Applicant.

The record evidence shows that Applicant's family members are not Vietnamese agents or agents of any other foreign power,⁽¹³⁾ and so the issue under MC 1 is if the family members are in a position to be exploited by the Vietnamese government. Although Vietnam is a communist-controlled country, the U.S. and Vietnam normalized diplomatic relations in 1995, and the normalization process continues to date. More specific to this case, his family members are not employed by or connected to the Vietnamese military or a governmental agency or some other organization that may have an interest in U.S. classified information. Given these circumstances, his family members are not in a position where they could be subject to exploitation.

In addition to MC 1, MC 5⁽¹⁴⁾ applies for Applicant, as neither he nor his wife has any financial interests in Vietnam. They earn their incomes by working hard for U.S. employers, and they own a home and investments in the U.S.

The analysis does not necessarily end with the formal mitigating conditions, as other matters under the whole-person concept may mitigate the security concern. First, Applicant's commitment to the U.S. is high. It is difficult to fully

appreciate the gravity of his decision, at the age of 16, to leave his immediate family and flee Vietnam for a possibility of becoming a U.S. citizen. Indeed, it was a potential life-and-death decision. Second, Applicant's ties or connections to the U.S. are strong. He has lived in the U.S. for essentially his entire adult life. Since his arrival here, Applicant can fairly be described as a model immigrant. He registered with the selective service, obtained a college education, and is employed as a computer programmer. Moreover, his professional career and financial interests are in the U.S. and that situation is unlikely to change. These are examples of ties that bind most members of a participatory democracy such as the U.S. To sum up, the record evidence demonstrates Applicant has all the indicators of a self-reliant, industrious, mature, responsible, and trustworthy individual. After weighing the record evidence as a whole, I conclude Applicant has successfully mitigated the foreign influence security concern raised by his family ties to Vietnam. Accordingly, Guideline B is decided for Applicant.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph a : For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: 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.

Michael H. Leonard

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. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

10. *Egan*, 484 U.S. at 528, 531.

11. E2.A2.1.2.1. "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."

12. E2.A2.1.3.1. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, 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."

13. *See* 50 U.S.C. § 1801(b), which defines the term of art "agent of a foreign power."

14. E2.A2.1.3.5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."