

DATE: March 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04584

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns were raised by a 47-year-old Vietnam-born naturalized U.S. citizen Applicant whose brother and brother-in-law spent varying periods in re-indoctrination and re-education camps, with a sister (a housewife), with whom he has had virtually no contact, who remains a citizen and resident of Vietnam, and is not an agent of Socialist Republic of Vietnam (SRVN) or in a position to be exploited by that government. Applicant's wife, three children, and two other sisters are either naturalized or native-born U.S. citizens residing in the U.S. His 90-year-old mother is a Vietnam-born citizen, permanent U.S. resident unable to apply for U.S. citizenship because of her age and difficulties with English. The security concerns are mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On November 21, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed 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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated December 9, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, me on February 20, 2004. A notice of hearing was issued that same day, with a corrected notice issued on February 23, 2004, and the hearing was held before me via video-conference on March 11, 2004. During the hearing, one joint exhibit (a stipulation), two government exhibits, two Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on March 22, 2004.

RULINGS ON PROCEDURE

During the proceeding, under Rule 201(b)(2), Federal Rules of Evidence, Department Counsel requested that official notice be taken of certain adjudicative facts as set forth in a document furnished for consideration. There being no objection by Applicant, I took official notice of the U.S. Department of State, Bureau of Consular Affairs, *Consular Information Sheet: Vietnam*, dated January 28, 2004, consisting of nine pages.

FINDINGS OF FACT

Applicant has admitted two of the three factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. and 1.c.). Those admissions are incorporated herein as findings of fact. He denied the remaining allegation.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 47-year-old employee of a defense contractor seeking to retain a SECRET security clearance initially granted to him in 1984.

Applicant was born in 1956 in what was then the Republic of Vietnam (RVN).⁽¹⁾ He resided with his parents and four siblings, and attended elementary school, high school, and one year of college there. Applicant was also employed as a bank teller.⁽²⁾ Upon the collapse of RVN in April 1975, Applicant escaped with some friends who were in the RVN Navy aboard a U.S. Navy ship, and soon found himself in a refugee camp in the Republic of the Philippines.⁽³⁾ In August or September 1975, he arrived in the United States.⁽⁴⁾ Applicant's family was not aware of his intentions or escape from RVN, and did not know of his whereabouts until six months later when he wrote them a letter from the U.S.⁽⁵⁾ When he arrived in the U.S., Applicant was sent to a military facility for two months with other refugees and was administered various "school" tests.⁽⁶⁾ He subsequently attended a local college for two years and transferred to a state university for additional course work.⁽⁷⁾ He then transferred to a college in another state where, in June 1980, he was awarded a B.S. degree in mechanical engineering.⁽⁸⁾

While attending college in the U.S. Applicant met his future wife,⁽⁹⁾ and they were married in December 1978.⁽¹⁰⁾ She was also born in RVN, escaped from the collapsing RVN by small boat, was picked up at sea by the U.S. Navy, and immigrated with her entire family to the U.S. in 1975.⁽¹¹⁾ Applicant and his wife became naturalized U.S. citizens in September 1982.⁽¹²⁾ They have three U.S.-born children between the ages of 17 and 26.⁽¹³⁾

During the Vietnamese conflict, Applicant's father worked as a laborer or technician for the RVN Navy in a shipyard.⁽¹⁴⁾ He passed away in 1975 about six months after the collapse of RVN.⁽¹⁵⁾ Applicant's mother, born in 1914,⁽¹⁶⁾ was a primarily a housewife,⁽¹⁷⁾ but she also worked at a small family-owned shop with his sisters.⁽¹⁸⁾ Commencing in about 1981, Applicant generally sent his mother \$100.00 every three months, through his mother-in-law because he wanted to hide the source of the money from SRVN authorities.⁽¹⁹⁾ After nearly nine years of waiting under the Orderly Departure Program to join her son in the U.S., Applicant's mother was finally reunited with him in 1992.⁽²⁰⁾ She has attained permanent U.S. resident status, but because of difficulties with learning English, she has been unable to pass the required tests for naturalization.⁽²¹⁾ She remains a citizen of SRVN.

Applicant's brother, born in 1949,⁽²²⁾ served with the RVN Air Force (VNAF).⁽²³⁾ Upon the collapse of RVN in 1975, he was sent to a re-indoctrination and re-education camp, where he remained for several months before he was released.⁽²⁴⁾ He eventually accompanied his mother to the U.S. in 1992,⁽²⁵⁾ and was scheduled for his final U.S. naturalization interview for citizenship in November 2003 when he passed away.⁽²⁶⁾

Two of Applicant's sisters, born in 1936 and 1955 respectively, also accompanied their mother and brother to the U.S. in
⁽²⁷⁾ ⁽²⁸⁾

1992. They both became naturalized U.S. citizens in 2003. They continue to reside in the U.S. His third sister, born in 1939, (29) is a housewife whose husband was a teacher before the collapse of RVN. (30) Because of the size of her family, including seven children, (31) Applicant was initially reluctant to sponsor the family under any departure program and she has remained both a citizen and resident of SRVN. (32) There was apparently a rift between the two stemming from before his departure from RVN and it continued with his failure to sponsor her. (33) During the period 1975-2003 they rarely had contact with each other. One of those rare occurrences took place when he visited her family for one hour during a tour of SRVN in 1996. (34)

Because of curiosity regarding his native country, and for pleasure and sightseeing, Applicant toured SRVN on three occasions-in 1996, 1999, and 2000. (35) He stayed in hotels and was never approached by anyone seeking information about his activities in the U.S. (36) He is aware the authorities in SRVN used to open his letters to his family when they were still residing in SRVN from time to time. (37)

Applicant renounced his Vietnamese citizenship when he became a naturalized citizen of the United States and pledged his loyalty to protect and defend the interests of the U.S, including defending the U.S. against SRVN even though his sister remains there. (38) Applicant is not a dual citizen and considers himself to be a citizen of only the U.S. (39) The government has offered no evidence to rebut Applicant's contention, and I accept it as fact.

No member of Applicant's immediate family is an employee of any SRVN governmental agency or department or affiliated with any intelligence organization or with the Communist Party. (40)

Applicant does not have any foreign investments or financial interests in SRVN. (41) Since his mother immigrated to the U.S. in 1992 he no longer sends money or presents to anyone residing in SRVN. (42)

Applicant has been employed by the same government contractor since September 1983 where he now serves as a senior design engineer. (43) His supervisor supports his application and has characterized him as a valuable and vital member of a team whose work has been outstanding. (44)

The government of RVN collapsed in 1975, coinciding with the establishment of the Communist SRVN. Full diplomatic relations were established between the U.S. and SRVN in 1995, and, in 2001, a bilateral trade agreement between the two countries finally commenced. Under that agreement, *temporary*--later modified to *conditional*--normal trade relations (formerly known as most-favored nation status) were extended by the U.S. SRVN has also given the U.S. modest support in the war against terrorism. While SRVN has a Communist totalitarian government which seemingly encourages technology transfers from the Vietnamese expatriate intellectuals abroad, the Department Counsel has offered no evidence to indicate SRVN conducts intelligence operations or economic espionage against the United States.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in

making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

GUIDELINE B - FOREIGN INFLUENCE: 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 obligation are: (1) not citizens of the United States or (2) 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽⁴⁵⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that 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. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline B. Applicant has been portrayed as a person who is a potential security risk because members of his immediate family or persons to whom he is bound by affection, influence, or obligation--in this instance, one of his three sisters is a citizen and resident of SRVN and his mother is a citizen of SRVN--are either not citizens or residents of the United States or may be subject to duress. These situations raise the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B: [\(46\)](#)

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

The citizenship status of Applicant's one sister and mother, when considered in light of the nature of the government in SRVN--a Communist totalitarian country that is no longer involved in open military hostilities with the United States, and whose interests are not necessarily inimical to the United States, and currently is engaged in normal trade relations with the U.S.--facilitates an analysis involving the adjudicative guidelines and the various applicable conditions set forth therein. Applicant's wife, three children, and two of his three sisters are already either native-born or naturalized U.S. citizens, and only the continuing SRVN citizenship of his mother and the citizenship and residency of his third sister raise the issue of potential foreign influence. These facts activate Foreign Influence Disqualifying Condition (FI DC) 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*).

However, also applicable, in this instance, is Foreign Influence Mitigating Condition (FI MC) 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 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*). After an examination of the evidence, I determine that Applicant's mother and third sister, considering their citizenship and residency status, do not constitute an unacceptable security risk. His mother has resided in the U.S. since 1992 and, but for difficulty in learning English, would have applied for U.S. citizenship at an earlier date. Furthermore, considering her advanced age, she appears to be a risk to no-one.

Furthermore, Applicant's rare, and apparently strained and casual, personal relationship with his 64 year-old sister raises FI MC E2.A2.1.3.3. (*contact and correspondence with foreign citizens are casual and infrequent*). His relationship with his sister can be characterized as one brief visit and no other contact through telephone or e-mail in 29 years--clearly casual and infrequent.

Because Applicant's brother and a brother-in-law served honorably alongside U.S. military forces during the Vietnam Conflict, they were forced to undergo postwar re-indoctrination and re-education for varying periods. His brother was lucky and only had to endure the process for several months; his brother-in-law had to endure it for 13 years. The family is not Communist--to the contrary, they apparently hate the Communists--and with the rapidly improving relations between the two countries, there is no indication they are targets of any intelligence gathering. Also, Applicant's wife, three children, two of his three sisters, and his wife's family, are all U.S. citizens residing in the U.S. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline B. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application (SF 86), dated November 15, 2001), at 1.
2. Government Exhibit 2 (Statement of Subject, dated June 19, 1984), at 2.
3. *Id.*
4. Tr., at 28.
5. Tr., at 27.
6. Government Exhibit 2, *supra* note 2, at 2.
7. *Id.*
8. *Id.*
9. Tr., at 30.
10. Government Exhibit 1, *supra* note 1, at 2.
11. Government Exhibit 2, *supra* note 2, at 3.
12. Government Exhibit 1, *supra* note 1, at 1, 4.
13. Tr., at 41.
14. Government Exhibit 2, *supra* note 2, at 2.
15. Tr., at 32.
16. Government Exhibit 1, *supra* note 1, at 3.
17. Tr., at 31.
18. Tr., at 43.
19. Government Exhibit 2, *supra* note 2, at 3.

20. Response to SOR, dated December 9, 2003), at 1.

21. *Id.*

22. Government Exhibit 1, *supra* note 1, at 3.

23. There is conflicting evidence as to which military service Applicant's brother served in. In his sworn statement to the Defense Investigative Service, now known as the Defense Security Service (DSS) in June 1984 (Government Exhibit 2), Applicant indicated his brother served in the RVN army (ARVN), but during the hearing he testified his brother had served with the VNAF. While the difference is not significant, I have chosen to accept the most recent description of his brother's service.

24. Government Exhibit 2, *supra* note 2, at 2.

25. Tr., at 43.

26. Response to SOR, *supra* note 20, at 1.

27. *Id.*

28. *Id.*

29. Government Exhibit 1, *supra* note 1, at 3.

30. Tr., at 35.

31. Applicant Exhibit A (Birth Certificates for sister's family, various dates).

32. Response to SOR, *supra* note 20, at 1.

33. Tr., at 36.

34. *Id.* There is some inconsistency in Applicant's description of the contacts he had with his sister. In his Response to SOR he said he "rarely communicated" with her since he left RVN and also stated he only saw her one time during 1975-2003, and that occasion was for one hour in 1996. During the hearing he indicated there had been "no trip, no telephone, no letters, during the last 20 years."

35. Response to SOR, *supra* note 20, at 2.

36. *Id.*

37. Government Exhibit 2, *supra* note 2, at 4.

38. *Id.*

39. Government Exhibit 1, *supra* note 1, at 1.

40. Government Exhibit 2, *supra* note 2, at 3.

41. Tr., at 30-31.

42. Tr., at 37, 42.

43. Government Exhibit 1, *supra* note 1, at 2.

44. Atch. 2 to Applicant Exhibit A (e-mail message, dated December 3, 2003).

45. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

46. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.