

KEYWORD: Foreign Influence

DIGEST: Applicant failed to mitigate foreign influence security concerns raised by the presence of his mother in Vietnam. Clearance is denied.

CASENO: 03-25414.h1

DATE: 01/17/2006

DATE: January 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25414

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant failed to mitigate foreign influence security concerns raised by the presence of his mother in Vietnam. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 24 January 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision ⁽¹⁾-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 12 February 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 21 July 2005. A hearing was originally scheduled on 28 September 2005, but was postponed due to Hurricane Rita. On 2 November 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 17 November 2005.

FINDINGS OF FACT

Applicant is a 37-year-old stress engineer for a defense contractor. He was born in Vietnam in 1968, the same year his father, a soldier in the South Vietnamese Army, was killed. As a result of his father's service, Applicant was denied educational opportunities by the government after North Vietnam overran the South.

Applicant escaped Vietnam in 1990 and was sent to a refugee camp in Indonesia. In 1993, he immigrated to the U.S. He became a naturalized U.S. citizen in February 2002. He received his U.S. passport in March 2002. Applicant's sister is also a U.S. citizen residing in the U.S.

Applicant's mother is a citizen resident of Vietnam. She is 63 years old. She was a teacher before 1975, but quit after the North Vietnamese takeover of South Vietnam. She is not treated well by the government. Applicant is sponsoring her for entry into the U.S. Although Applicant originally feared returning to Vietnam, he has visited his mother at least once each year since 1999, after relations between the U.S. and Vietnamese governments improved. His last visit was in October 2005. He normally stays for two or three weeks at a time. He was permitted entry to Vietnam with his permanent residence "green card" and his re-entry card to the U.S. Since he received his U.S. passport, he uses it to travel to Vietnam. When he enters Vietnam, he reports his employment as "worker" or "student."

Applicant and his sister send small amounts of money to their mother in Vietnam because she has no other means of support. Tr. 22. Applicant talks to his mother on the telephone at least once a month.

Vietnam has a poor human rights record and it continues to commit serious abuses. The government continues to deny citizens the right to change their government. Ex. 3 at 1. The government is known to open and censor mail, confiscate packages and letters, monitor telephone conversations, and electronic mail. The government encourages former citizens to return and at times monitors them carefully. Ex. 3 at 14. Bilateral relations between the U.S. and Vietnam have expanded dramatically in recent years. Ex. 4 at 1.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant's mother is a citizen resident of Vietnam (¶ 1.a); he sends his mother \$50 a month (¶ 1.b); he is actively working to sponsor his mother for entry into the U.S. (¶ 1.c); and he traveled to Vietnam each year from 1999-2003 (¶ 1.d). Applicant admitted each of the allegations, except for ¶ 1.c. A security risk may exist when an applicant's immediate family, or other persons to whom he 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. Directive ¶ E2.A2.1.1.

The Government's evidence established potentially disqualifying conditions under Guideline B. Applicant has a family member, his mother, who is a citizen resident of Vietnam. DC E2.A2.1.2.1. Sponsoring a family member for entry into the U.S. is not a disqualifying condition. Nor is visiting Vietnam on a yearly basis. Nevertheless both show the depth of his commitment to his mother.

Applicants are responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts establishing disqualifying conditions. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." Directive ¶ E3.1.15.

An applicant may mitigate foreign influence security concerns in several ways. Potentially mitigating conditions in Applicant's case include the following: His immediate family members and foreign associates are neither "agents of a foreign power" nor in a position to be exploited by a foreign power in a way that could force the applicant to choose between loyalty to the family member or associate and loyalty to the U.S. (MC E2.A2.1.3.1); Applicant has promptly reported to proper authorities all of his contacts with a foreign country (MC E2.A2.1.3.4); and he has no foreign financial interests (MC E2.A2.1.3.5).

In weighing the evidence, an administrative judge must evaluate an applicant's security eligibility in terms of the totality of his conduct and circumstances under the whole person concept. A piecemeal analysis is inconsistent with the whole person analysis. ISCR Case No. 02-09907, 2004 DOHA LEXIS 642 (App. Bd. Mar. 17, 2004); *but see* ISCR Case No. 02-31154 (App. Bd. Sep. 22, 2005) (evaluating each fact individually and concluding the administrative judge erred because the individual fact alone was not determinative).

In assessing whether an associate is in a position to be exploited by a foreign power, it is helpful to consider several

factors. Even friendly nations can have profound disagreements with the U.S. over matters they view as important to their vital interests or national security. We know friendly nations have engaged in espionage against the U.S., especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. *See* ISCR Case No. 02-24254, 2004 DOHA LEXIS 703 at *17 (App. Bd. Jun. 29, 2004) (distinguishing ISCR Case No. 98-0419 (App. Bd. Apr. 30, 1999) and suggesting it was appropriate for the administrative judge to consider that the foreign country involved had a friendly relationship with the United States, is not an authoritarian regime, and is not on the U.S. list of countries sponsoring terrorism); *but see* ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (claiming "nothing in Guideline B indicates or suggests that it is limited to countries that are hostile to the U.S.").

Vietnam is not on the list of state sponsors of terrorism. Nevertheless, it is controlled by a repressive, authoritarian government with a poor human rights record. It exploits both its citizens and visitors.

After considering all of the evidence, under the totality of circumstances, I conclude MC E2.A2.1.2.1 does not apply. The record supports a conclusion that Applicant's mother is not an agent of a foreign power. *See* 50 U.S.C. §§ 438(6), 1801(b).⁽²⁾ Whether Applicant is in a vulnerable position concerning his foreign associates "hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that applicant should not be placed in a position where he is forced to make such a choice." ISCR Case no. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005). Applicant was unable to establish that his mother is not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to her and loyalty to the U.S. The more dutiful the son, the less chance he has of establishing that his mother living in a foreign country does not make him vulnerable to exploitation.

MC E2.A2.1.3.4 applies, as Applicant has promptly reported to proper authorities all contacts and travels to Vietnam.

After considering all of the evidence, I find against Applicant on ¶ 1.a. He failed to mitigate the concern raised by his association with his mother who is a citizen resident of Vietnam. I find for Applicant on ¶¶ 1.b, 1.c, and 1.d. Sending \$50 a month to his mother is not disqualifying. Neither are his travels to Vietnam or his efforts to sponsor his mother into the U.S. But they do reinforce the evidence Applicant has a close relationship with his mother, thus making him more vulnerable to exploitation.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. As required by Exec. Or. 10865 (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended and modified (Directive).

2. The phrase "agent of a foreign power" is a statutory term of art defined in 50 U.S.C. § 1801(b). It does not include a person who is simply employed by a foreign government, unless they are so employed in the U.S., or they are engaged in intelligence gathering or terrorism. The Appeal Board has not discussed the applicability of 50 U.S.C. § 1801(b) to DOHA cases. In fact, its interpretation of "agent of a foreign power" seems to be inconsistent with the statutory definition. *See* ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004) (holding an employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of MC 1). Although I am convinced 50 U.S.C. § 1801(b) defines "agent of a foreign power" for national security matters, including security clearance decisions, I am required to follow the Appeal Board's opinion. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004).

