

KEYWORD: Foreign Influence

DIGEST: Applicant traveled twice to Vietnam to visit his ailing mother, who was a citizen of Canada living in Vietnam, and he provided her financial support. His mother recently died. Applicant's oldest brother is a citizen and resident of Vietnam, but he and Applicant are estranged and have virtually no contact. The security concern based on foreign influence is mitigated. Clearance is granted.

CASENO: 03-25616.h1

DATE: 12/08/2005

DATE: December 8, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-25616

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Daniel C. Schwartz, Esq.

Elizabeth L. Martin, Esq.

**SYNOPSIS**

Applicant traveled twice to Vietnam to visit his ailing mother, who was a citizen of Canada living in Vietnam, and he provided her financial support. His mother recently died. Applicant's oldest brother is a citizen and resident of Vietnam, but he and Applicant are estranged and have virtually no contact. The security concern based on foreign influence is mitigated. Clearance is granted.

**STATEMENT OF THE CASE**

On February 24, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guideline B (Foreign Influence), based on Applicant's family ties in Vietnam.

Applicant answered the SOR in writing on April 6, 2005, admitted the allegations in part, offered explanations, and requested a hearing. The case was assigned to me on June 27, 2005, and heard on September 13, 2005. DOHA received the transcript (Tr.) on September 27, 2005. Applicant's counsel submitted suggested corrections to the transcript on October 3, 2005, and Department Counsel did not object. I corrected the transcript in accordance with Applicant's suggestions by order dated December 2, 2005.

## FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant was born in Saigon, South Vietnam, in October 1962, the youngest of ten siblings. His father was an officer in the South Vietnamese Army. After the fall of Saigon in 1975, two of his brothers were sent to Communist "reeducation" camps, two brothers were required to perform manual labor in "new economic zones," and his sister was moved to the countryside to teach school. At age 15, Applicant was forced to sign a document agreeing to carry ammunition and supplies in a combat zone.

In October 1978, Applicant attempted to flee Vietnam by boat but was unsuccessful because the boat sprang a leak and was forced to return to Vietnam. In November 1978, Applicant and his 14-year-old cousin successfully fled to Malaysia on a fishing boat. The boat was not allowed to dock in Malaysia, but Applicant and other passengers forced their way ashore. They were captured and sent to a refugee camp on an island off the coast of Malaysia. After several months, Applicant was able to contact his brother in the U.S., who sponsored him to come to the U.S. His brother had emigrated to the U.S. in 1974 on a student visa and became a U.S. citizen in 1980.

Applicant came to the U.S. in June 1979 and became a permanent resident two years later. He graduated from college in 1984 and became a U.S. citizen in February 1985. He obtained a master's degree in September 2000. <sup>(1)</sup>

Applicant was married in August 1993 to a native of Cambodia who became an American citizen in 1995. His wife's parents and siblings all reside in the U.S., except for one brother who lives in Australia. <sup>(2)</sup>

Applicant worked in private industry for two years and then began working for a defense contractor in 1987. He obtained a security clearance in December 1992, and he has worked for defense contractors until the present. He currently works as a senior software systems engineer. He has received numerous awards for his work and is regarded by friends, colleagues, and supervisors as a person of sound judgment, reliability, and integrity. <sup>(3)</sup>

Applicant's father died in 1980, and his mother moved to Canada and became a Canadian citizen. After she became physically and mentally debilitated with severe Alzheimer's disease, she returned to Vietnam, where full-time nursing care was less expensive, and Applicant's brother cared for her. <sup>(4)</sup> Applicant traveled to Vietnam in 1996 to check on his

mother's health. He visited her again in 2000 because her health had dramatically deteriorated, and he bade her farewell at that time because she was so ill. From 1986 until April 2004, Applicant sent his mother about \$100 per month. He stopped sending money in April 2004, because he disagreed with his brother's insistence on prolonging his mother's suffering by keeping her on extraordinary life-support measures. His mother died on May 14, 2005. He did not travel to Vietnam to attend her funeral. [\(5\)](#)

Applicant's brother served as a dentist in the South Vietnamese Navy and rose to the rank of captain. [\(6\)](#) After the fall of Saigon he was sent to a "reeducation camp." He later returned to his dentistry practice as a civilian until he retired about a year ago. His brother has no connection to the Vietnamese government.

Applicant and his brother were never close because of their difference in age and the family separation. Applicant is 18 years younger than his brother, and they never had any childhood time together. They became estranged and terminated direct communication as a result of their disagreement about the care of their mother. When their mother died, Applicant called his brother in Vietnam and offered condolences, but they conversed about nothing else.

None of Applicant's other siblings live in Vietnam. Three brothers and one sister are citizens and residents of Canada. One brother is a Canadian citizen residing in the U.S. Two brothers and his oldest sister are citizens and residents of the U.S.

Vietnam is a constitutional republic dominated by the Communist Party. After 20 years without diplomatic relations, the U.S. and Vietnam resumed diplomatic relations in July 1995, and in upgraded their liaison offices to embassy status. The two countries signed a bilateral trade agreement in July 2000, [\(7\)](#) and Vietnam now is a growing economic partner of the U.S. [\(8\)](#) The two countries also have a growing cooperative relationship in counterterrorism and law enforcement. [\(9\)](#) The U.S. recently lifted prohibitions on transactions involving property in which Vietnamese nationals have interests. [\(10\)](#)

The Vietnamese government's human rights record is poor. Vietnamese security personnel are known to place foreign visitors under surveillance, monitor their communications, and search their possessions in hotel rooms. They occasionally have seized the passports and blocked departures of foreigners involved in commercial disputes. Despite a 1994 agreement, U.S. consular officers are rarely given timely notification when a U.S. citizen is arrested or detained. [\(11\)](#) On the other hand, the Vietnamese government recently agreed to implement new legislation guaranteeing religious freedom. [\(12\)](#)

## 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 has 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), as amended and modified. 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.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶

E3.1.15. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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." Directive ¶ E2.A2.1.2.1.

The security concern based on Applicant's ties to his mother, including his financial support, was resolved by her recent death. Applicant's two visits to Vietnam were related to his concern for his mother, and they have no independent security significance. However, DC 1 is established because Applicant's brother is a citizen and resident of Vietnam.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "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 person(s) involved and the United States." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and

unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, 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.

Applicant's brother is not an agent of a foreign power or in any way connected to the Vietnamese government. To the contrary, he is something of an outcast because of his previous involvement with the South Vietnamese military. As a retired dentist, he is not involved in political or commercial activities that lend themselves to economic, political, or military espionage. Applicant's estrangement from his brother makes him much less vulnerable to direct or indirect exploitation through his brother. Applicant has made his life in the U.S. and virtually severed his ties with Vietnam. Throughout his life he has demonstrated courage and determination that make him unlikely to succumb to pressure or coercion. On the basis of all the evidence, I conclude MC 1 is established.

None of the individual family circumstances discussed above are determinative. Furthermore, an applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the Government. [\(13\)](#) Nevertheless, Applicant's evidence showing his family's lack of governmental or political connections, financial dependence on the government, or business connections susceptible to industrial espionage is relevant to the security concern based on his family ties to Vietnam. I conclude MC 1 is established.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant had no direct contact with his brother for many years. His condolence call after their mother's death was certainly not "casual," but it was a courtesy more than a demonstration of affection or obligation. While the literal language of MC 3 is not established, its underlying premise is established.

After weighing the disqualifying and mitigating conditions and evaluating Applicant's familial ties to Vietnam in the context of the whole person, I conclude the security concern based on foreign influence is mitigated.

## **FORMAL FINDINGS**

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

Paragraph 1. Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Answer to SOR at pp. 2-4; Government's Exhibit (GX) 1 at p. 1.

2. Tr. 88-89.
3. Applicant's Exhibits (AX) A through K.
4. Tr. 95-96.
5. AX L at p. 2.
6. GX 5 at p. 2.
7. Hearing Exhibit (HX) II at pp. 1, 8.
8. HX VI at p. 1.
9. *Id.* at p. 3; *see also* HX VIII..
10. HX IV.
11. HX I at pp. 6-7; HX III at pp. 1, 4, 6.
12. HX V.
13. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).