

KEYWORD: Foreign Influence

DIGEST: Applicant is one of many boat people who left Vietnam after the collapse of South Vietnam in 1975. He is a 42-year-old man who, at the age of 17, fled Vietnam in 1979. He was allowed to immigrate to the U.S. as a refugee and he has since earned an associate's degree in electronics, registered for the selective service, and has been a U.S. citizen since 1986. He is employed as a field services engineer for a defense contractor. Applicant's two sisters, mother-in-law and two sisters-in-law 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.

CASENO: 03-25784.h1

DATE: 01/31/2006

DATE: January 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25784

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Edward S. Owens, Personal Representative

SYNOPSIS

Applicant is one of many boat people who left Vietnam after the collapse of South Vietnam in 1975. He is a 42-year-old man who, at the age of 17, fled Vietnam in 1979. He was allowed to immigrate to the U.S. as a refugee and he has since earned an associate's degree in electronics, registered for the selective service, and has been a U.S. citizen since 1986. He is employed as a field services engineer for a defense contractor. Applicant's two sisters, mother-in-law and two sisters-in-law 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 July 27, 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 August 20, 2004, and requested a hearing. Department Counsel indicated she was ready to proceed on January 25, 2005.

The DOHA hearing office received the case on March 9, 2005 and it was assigned to another administrative judge on the same day. On March 10, 2005, DOHA issued a notice of hearing scheduling the case to be heard on April 6, 2005. Due to caseload considerations, the case was reassigned to me on April 1, 2005. The case was conducted as originally scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the hearing, the Government presented five exhibits, which were marked as Government Exhibits (GE) 1 through 5, without objection. Applicant presented nine exhibits, which were marked as Applicant Exhibits (AE) A through I, without objection. DOHA received the transcript (Tr.) of the proceeding on April 19, 2005. A heavy caseload has delayed issuing a decision in this case.

FINDINGS OF FACT

In his Answer, Applicant admitted the SOR allegations. His admissions are incorporated into my findings. At the conclusion of the case, Department Counsel moved to amend the SOR to conform with the evidence. 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 42 years old, married, and the father of two native-born U.S. citizen children. Like Applicant, his wife is a native of Vietnam and at the time of hearing, her U.S. citizenship interview was scheduled for May 2005. Applicant is seeking to obtain a security clearance, for the first time, in conjunction with his employment as a field service engineer for a defense contractor. He has been employed by that defense contractor since October 2001.

In 1985, the then 23-year-old wife of Applicant, at her parent's urging, fled Vietnam by boat. Her parents owned a hotel in South Vietnam, which was confiscated along with all of their property by the government following the unification of Vietnam and collapse of South Vietnam in 1975. Applicant's wife, her parents, and sibling were forced to move to a farm where they were required to live and work. Her parents urged her to leave in order to seek opportunities not available to her in Vietnam. After a stopover in Malaysia, Applicant's wife successfully immigrated to the U.S. after being sponsored by her sister and brother-in-law, who were already living in the U.S. Presently, Applicant's wife has two U.S. citizen resident brothers living in the U.S. Her father passed away in June 2004 leaving her 85-year-old mother and two sisters remaining in Vietnam. Applicant's wife owns no property nor does she have any financial interests in Vietnam. None of her remaining immediate family members in Vietnam were associated with the Vietnamese government.

Applicant's wife does not expect to inherit any property from her mother when she passes away. As a sign of respect and

to help, she sends an occasional gift of \$500.00 to her aged mother. Applicant's wife limits the contact with her family in Vietnam to a monthly telephone call to her mother. Applicant's wife testified that her life as she knows it is in the U.S. Her husband and two sons are in the U.S. and it is with them and her adopted country that her loyalties lie.

Applicant's arrival in the U.S. mirrored his wife in many respects. In 1979, the then 17-year-old Applicant, at his parents' urging, fled Vietnam by boat. His father, who had served with the South Vietnamese Army, encouraged Applicant to leave because he believed his son had "no future" in Vietnam. Applicant traveled by boat, along with his uncle's family to Hong Kong and from there successfully immigrated to the U.S. The families of Applicant and his wife were exposed to considerable risk of reprisals from the Vietnamese government at the time they left. All parties determined the risk to leave Vietnam by boat and the uncertainty that would bring as well of the risk of reprisal for the remaining families was worth the price to achieve a better life in the U.S.

The majority of Applicant's immediate family have since immigrated to the U.S. His mother and father are now U.S. citizen residents, and of his six siblings, two brothers and one sister are U.S. citizen residents, one brother and one sister are U.S. resident aliens waiting for their citizenship interview or waiting to take their oath of citizenship, and two sisters in Vietnam who have approved petitions to immigrate to the U.S. and are waiting for their visas.

Shortly after arriving in the U.S., Applicant registered for the selective service. He obtained an associate's degree in electronics from a community college in ay 1997. He became a U.S. citizen in July 1986. His employer and co-workers attest to his integrity and loyalty to the U.S. He had a demonstrated track record of being a top performer, who is making a significant contribution to the defense industry. His employer opines his contribution will be much greater if granted a security clearance.

Applicant owns no property nor does he have any financial interests in Vietnam. None of his remaining immediate family members in Vietnam were associated with the Vietnamese government. Applicant does not expect to inherit any property in Vietnam. Applicant and his wife own their own home and three rental properties. Applicant has his bank accounts in the U.S., votes, and enjoys all rights and privileges of being a U.S. citizen.

Applicant testified convincingly of his loyalty to the U.S. He spoke of the "second life" he has had since coming to the U.S. and would never do anything to jeopardize his adopted country. He is extremely grateful for the opportunities he and his family have had since immigrating to the U.S.

Since fleeing Vietnam in 1979, Applicant has returned three time as a U.S. citizen using a U.S. passport. The purpose of these trips was to visit his and his wife's family. 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 two sisters, mother-in-law and two sisters-in-law who are citizens residents in Vietnam. Applicant has no direct contact with his sisters in Vietnam. He maintains contact with them through his parents. Applicant's wife maintains contact with her aged mother by telephone about once a month. His three 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, three rental properties, 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 17, 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, earned an associate's degree, and is employed as a field services engineer.

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

Subparagraph f: For the Applicant

Subparagraph g: 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 J. Tuidier
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."