

KEYWORD: Foreign Influence

DIGEST: Applicant was born in the Republic of Vietnam, now the Socialist Republic of Vietnam, in 1965. He became a United States citizen in 1993. While also born in the Republic of Vietnam, his wife, one of his sisters, one of his brothers, his mother-in-law, father-in-law are all United States citizens, living in the United States. His United States born children reside with him. Security concerns have been raised because Applicant's elderly mother, sister and brother are citizens of the Socialist Republic of Vietnam and continue to reside there. Applicant has failed to mitigate security concerns arising from possible foreign influence. Clearance is denied.

CASENO: 04-03573.h1

DATE: 09/20/2005

DATE: September 20, 2005

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-03573

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

## **SYNOPSIS**

Applicant was born in the Republic of Vietnam, now the Socialist Republic of Vietnam, in 1965. He became a United States citizen in 1993. While also born in the Republic of Vietnam, his wife, one of his sisters, one of his brothers, his mother-in-law, father-in-law are all United States citizens, living in the United States. His United States born children reside with him. Security concerns have been raised because Applicant's elderly mother, sister and brother are citizens of the Socialist Republic of Vietnam and continue to reside there. Applicant has failed to mitigate security concerns arising from possible foreign influence. Clearance is denied.

## **STATEMENT OF THE CASE**

On March 18, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline B (Foreign Influence) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On April 12, 2005, Applicant answered the SOR in writing and elected to have the case decided on the written record. On July 5, 2005, Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy. <sup>(1)</sup> Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on July 12, 2005. He did not submit additional information. This case was assigned to me on August 24, 2005.

## **FINDINGS OF FACT**

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

Applicant admitted the SOR allegations. Those admissions are incorporated herein.

Applicant is a 40-year old senior data programmer for a defense contractor. He has worked for this contractor for five years.<sup>(2)</sup> He completed a security clearance application in November 2000.<sup>(3)</sup>

Applicant was born in the Republic of Vietnam (RVN), which is now the Socialist Republic of Vietnam (SRVN).<sup>(4)</sup> He came to the United States in 1982, along with his sister, brother-in-law, and their two children.<sup>(5)</sup> He became a naturalized citizen of the U.S. on March 13, 1993.<sup>(6)</sup> Applicant has a U.S. passport.<sup>(7)</sup> His wife, who was born in the RVN, has been a naturalized U.S. citizen since 1995.<sup>(8)</sup> They were married in 1993 and have two children, now ages six and seven, who were born in the U.S. and are U.S. citizens.<sup>(9)</sup> Applicant never served in the military forces of RVN or SRVN.<sup>(10)</sup> He does not have any foreign property, business connections, or financial interests.<sup>(11)</sup> He and his wife own a home in the U.S.<sup>(12)</sup> Applicant has a good financial record and has not been arrested for or charged with any criminal offenses.<sup>(13)</sup> He received a Master's of Science in Computer Science from a major U.S. university in June 1994, and his undergraduate degree from another U.S. university in 1984. Since graduating college he has held several jobs in his field.<sup>(14)</sup>

Applicant's father and mother were born in the RVN.<sup>(15)</sup> His father is deceased.<sup>(16)</sup> Applicant is one five children all of whom were born in the RVN.<sup>(17)</sup> One of his brothers and one of his sisters live in the U.S. and are naturalized citizens of the U.S.<sup>(18)</sup> His mother in-law and father-in-law were born in the RVN. They are naturalized citizens of the U.S. and reside in the U.S.<sup>(19)</sup>

Applicant's 69-year old mother lives in SRVN with one of his sisters. His 48 year old brother also lives in Vietnam, but Applicant does not know where.<sup>(20)</sup> No information was provided about their employment or retirement status. No information was provided whether they receive monies from their government or if they have any ties to the government.

Applicant last traveled to Vietnam in 1995 to see his mother who was sick. At that time he also saw his sister and brother.<sup>(21)</sup> He said he calls his mother once a year and sends his family \$500 occasionally.<sup>(22)</sup> He has no other connections to RVN. He stated, "I hated living under Communist rule and I hated the bribery tactics as is the way of life there."<sup>(23)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. 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 in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(24)</sup> The government has the burden of proving controverted facts.<sup>(25)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(26)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.<sup>(27)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(28)</sup>

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

**Guideline B (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 United States *or 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.

As noted by the Court in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), "it should be obvious that no one has a right to a security clearance"<sup>(29)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(30)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(31)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(32)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of the appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline B (Foreign Influence) Disqualifying Condition (FI DC) E2.A2.1.2.1. (*An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in a foreign country*). An immediate family member includes a spouse, father, mother, son, daughter, brother and sister.<sup>(33)</sup> Applicant has a mother, sister and brother who are citizens of SRVN and live there. While the possession of family ties with a person in foreign country is not, as a matter of law, disqualifying under Guideline B,<sup>(34)</sup> such ties do raise a *prima facie* security concern. This concern is sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.<sup>(35)</sup>

I have considered all the potentially mitigating conditions under Guideline B in this case. I specifically considered Foreign Influence Mitigating Condition (FI C) E2.A2.A.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*), and conclude it does not apply in this case. No information was provided to show whether Applicant's family has any ties to the government. No information was provided about their background, employment history, or present status, which would reassure this government that they are not in a position that would subject them to exploitation by their government and subsequently, compromise the Applicant's loyalty to the United States

I have also specifically considered FI MC E2.A2.1.3.2. (*Contact and correspondence with foreign citizens are casual and infrequent*), and conclude it does not apply. Applicant has infrequent contact and visits with his family. However, he occasionally sends money to them for their personal use, indicating his intention to be helpful and remain connected. I find this contact to be more than casual.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration relevant circumstances, and applying sound judgment, mature thinking and careful analysis.

I have considered the evidence in this case in evaluating Applicant's risk and vulnerability in protecting our national interest, including his work history, education and citizenship of family members residing in the United States. However, Applicant's mother, sister and brother are Vietnamese citizens. With the limited information provided, the contact Applicant has with his relatives could create a position of vulnerability for him. These facts raise doubts about Applicant's ability to protect classified information unfettered by concerns about family members who may be subject to the interests of a foreign government and thus, his suitability for access to classified information. Absent substantial information to resolve those doubts, which Applicant failed to provide, and considering the whole person, I find applicant has not mitigated the security concerns. Therefore, I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline B is decided against Applicant.

### **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 (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

### **DECISION**

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

Shari Dam

Administrative Judge

1. The Government submitted eight items in support of its case.
2. Item 4 (Security Clearance Application, dated November 11, 2000) at 2.
3. *Id.* at 10.
4. *Id.* at 1.
5. Item 5 (Statement of Subject, dated August 15, 2002) at 2.
6. Item 4, *supra* note 2, at 1.
7. *Id.* at 1 and 7.
8. *Id.* at 3 and 6.
9. *Id.* at 4.
10. *Id.* at 7.
11. *Id.*
12. Item 5, *supra* note 5, at 4.

13. *Id.* at 9-10.
14. Item 4, *supra* note 2, at 4.
15. *Id.* at 4.
16. *Id.*
17. *Id.* at 4-5.
18. *Id.* at 6.
19. *Id.* at 5.
20. *Id.*
21. *Id.* at 7.
22. Item 5, *supra* note 5, at 3.
23. *Id.*
24. ISCR Case No. 96-0277 at 2 (App. Bd., Jul. 11, 1997).
25. ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
26. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
27. ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
28. ISCR Case No. 93-1390 at 7-8 (App. Bd., Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
29. *Egan*, 484 U.S. at 528.
30. *Id.*
31. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
32. Executive Order No. 10865 § 7.
33. Directive, ¶ E2.A2.1.3.1.
34. ISCR Case No. 99-0424, 2001 DOHA LEXIS at 33-34 (App. Bd. Feb. 8, 2001)
35. *Id.*