

KEYWORD: Foreign Influence

DIGEST: Applicant, a naturalized citizen of the United States since 1988, has lived, studied and worked in the U.S. continuously since 1981. His father is a naturalized U.S. citizen, and his mother and two sisters are permanent resident U.S. aliens. He has mitigated the security concern that existed based upon his brothers who are citizens and residents of Viet Nam and his travel to that country. Clearance is granted.

CASE NO: 04-04058.h1

DATE: 02/13/2006

DATE: February 13, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04058

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Candace Le'I, Esq., Department Counsel

FOR APPLICANT

Pro Se.

SYNOPSIS

Applicant, a naturalized citizen of the United States since 1988, has lived, studied and worked in the U.S. continuously since 1981. His father is a naturalized U.S. citizen, and his mother and two sisters are permanent resident U.S. aliens. He has mitigated the security concern that existed based upon his brothers who are citizens and residents of Viet Nam and his travel to that country. Clearance is granted.

STATEMENT OF THE CASE

On April 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B (foreign influence). Applicant submitted a response to the SOR that was received by DOHA on June 16, 2005, requested a hearing, and admitted both SOR allegations.

The case was assigned to me on August 15, 2005. A notice of hearing was issued on September 14, 2005, scheduling the hearing for October 31, 2005. The hearing was conducted as scheduled. The government submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3. GE 1 was admitted into the record and administrative notice was taken of the information contained in GE 2 and GE 3 without objection. Applicant testified and submitted 12 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-12, and admitted into the record without objection. The transcript was received on November 9, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 41-year-old man who has been employed as a senior electrical engineer by a defense contractor since June 1999. He was born in Viet Nam, and resided in that country until he escaped by boat to a refugee camp in a nearby Southeast Asian country with three of his aunts in about 1981. He was then sponsored into the United States by an uncle who had been a captain in the Army of the Republic of Viet Nam until that country fell to the communist north in 1975. The uncle had managed to escape from Viet Nam at the time of the fall with the assistance of the U.S. intelligence community.

Applicant continued his education after arriving in the U.S., and was awarded a bachelor of science degree in electrical engineering from a state university in July 1989. Applicant worked as an electronics engineer aboard a U.S. Air Force base from July 1992 until May 1999. He has possessed a secret security clearance since approximately 1989, and no previous action has ever been taken to revoke or downgrade that clearance. The certificates, awards, letter of appreciation, and the performance summary submitted by Applicant attest to him being a valuable and appreciated employee.

Applicant became a naturalized U.S. citizen in April 1988. He is engaged to a U.S. citizen who is Viet Nameese by birth. They jointly own two homes with a combined value of approximately \$500,000.00 in which they have accumulated about \$190,000.00 in equity. He owns a separate house in another state that was destroyed by Hurricane Katrina. His insurance company has refused to pay for repairs to the house, but he is hopeful that a nearby casino that was destroyed by the hurricane will purchase the property. Applicant earns \$80,000.00 per year and has amassed \$200,000.00, more or less, in 401K and IRA accounts. He also had at the time of the hearing somewhere between \$4,000.00 and \$5,000.00 in a checking account, and about \$50.00 in a savings account. Neither Applicant nor his fiancee own any property or have any other assets outside the United States.

Applicant's father was employed as a dispatcher and chauffeur by the United States Army and the Military Assistance Advisory Group in Viet Nam from 1952 until 1969. In 1969, the father resigned from his U.S. employment and took over operation of some sort of manufacturing plant that had been operated by Applicant's grandfather. Applicant's father managed to conceal his earlier involvement with the United States after the Republic of Viet Nam fell to the communists in 1975 and was not sent to a reeducation camp.

Applicant's mother and father were able to immigrate to the U.S. in 1996 based upon the father's previous employment by the U.S. in Viet Nam. His father became a naturalized U.S. citizen in 2004, but Applicant's mother was unable to pass a required written test because of language problems. Once Applicant's father was naturalized, he sponsored his two daughters, Applicant's sisters, into the U.S. The sisters were granted permanent resident alien status in March 2005. Applicant's parents and sisters resided in the house he owned in a different state until it was destroyed by Hurricane Katrina. They now reside with Applicant and his fiancee.

Applicant has four brothers who are still citizens and residents of Viet Nam. One of his brothers is 44 years old, and works for a business engaged in manufacturing agricultural products that is operated by a company owned by a European entity. He is married and his wife does not work outside the home. Applicant has another brother who is 40 years old and works as a teacher. This brother is married and his wife operates a pastry business

out of the family home. Applicant has two brothers, ages 48 and 36, who are severely mentally disabled and unable to function on their own. Both presently reside with Applicant's 40-year-old brother, although the younger of the two was institutionalized for many years. Applicant's only contact with any of his brothers consists of telephone calls to the 40-year-old two or three times a year and approximately monthly E-Mail exchanges with that brother.

Applicant's father is planning on assisting his two non-disabled sons in immigrating to the U.S. His efforts thus far have been delayed due to administrative complications caused by the fact that they are married. Applicant does not believe his two disabled brothers will be permitted to emigrate. There has apparently been some consideration given by the family as to what will happen with the disabled brothers if the others are able to immigrate to the U.S., with possibilities including hiring someone to care for them or Applicant's mother returning to Viet Nam to care for them.

Applicant has traveled to Viet Nam on a number of occasions to visit, assist his parents with their emigration efforts, and vacation with his fiancée. The last trip occurred in 2004. Applicant notified his employer in advance of his trips to Viet Nam, received security briefings, and acted as instructed so as to not call undue attention to himself. Every trip has been uneventful from a security concern and Applicant has never been questioned or approached by Viet Namese officials while in that country. He testified he would notify the appropriate authorities if he ever were approached.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline B, pertaining to foreign influence with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole 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⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁴⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they

must, on the side of denials." (10) Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. (11)

CONCLUSIONS

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 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.

Disqualifying Condition (DC) 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* applies in this case because Applicant's four brothers are citizens and residents of Viet Nam.

Once the government meets its burden of proving controverted facts (12) the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances. (13) Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition. (14)

The following Mitigating Conditions (MC) must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B: MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, 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;* MC 3: *Contact and correspondence with foreign citizens are casual and infrequent;* MC 4: *The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required;* and MC 5: *Foreign financial interests are minimal and not sufficient to affect the individual's security responsibility.*

Except for the 40-year-old school teacher, Applicant has virtually no contact with any of his brothers in Viet Nam. He only speaks with his 40-year-old brother by telephone two or three times a year and communicates with him via e-mail approximately once a month. The only other contact with any of his brothers is during his trips to Viet Nam.

There is no evidence to suggest that Applicant's family members are, or ever have been, agents of the Viet Nameese government, so the issue under MC 1 is whether they are in a position to be exploited by Viet Nam. Applicant bears the burden of demonstrating his family ties with relatives living in Viet Nam do not pose a security risk. To that end he has introduced evidence of his minimal contacts with his relatives in Viet Nam, his strong

ties to the U.S., and the substantial assets he has accumulated in this country. Further, he has reported his travel to Viet Nam in advance to his employers, obtained their permission to visit Viet Nam, and adhered to the security suggestions that were provided to him by the employers. Considering all those factors, I am satisfied that MC 1, MC 3, MC 4 and MC 5 all apply.

Additionally, considering the nature of Applicant's relationship with his brothers in Viet Nam, their employment, or lack thereof, in that country, the lack of interference with his activities on the occasions he has visited there, and his substantial familial and financial contacts within the U.S. it is unlikely he will in the future be placed in a position of having to choose between the interests of his foreign relatives and the interests of the U.S., or, if such a conflict ever arose, that he would resolve it against the interests of the U.S.

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 trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. I am satisfied Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline B is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline B: For Applicant

Subparagraph a: For Applicant

Subparagraph b: 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 or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 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. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. Directive, Additional Procedural Guidance, Item E3.1.14
13. Directive, Additional Procedural Guidance, Item E3.1.15
14. ISCR Case No. 99-0597 (December 13, 2000)