

DATE: May 10, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-08097

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Candace L. Le'i, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant has one sibling who is present in and a citizen of Vietnam. This brother is not an agent of the Vietnamese government, or in a position to be exploited by that government. In addition, the Applicant has had no contact with that sibling in five years. His mother lives in the United States and, in my opinion, is not in a position to influence the Applicant. The Applicant is knowledgeable about his security responsibilities, and shows that he can fulfill them. Sufficient mitigation is shown. Clearance is granted.

**STATEMENT OF THE CASE**

On July 13, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on August 3, 2005, and requested a hearing. The case was received by the undersigned on September 22, 2005, and a Notice of Hearing was issued on September 28, 2005.

A hearing was held on November 9, 2005, at which the Government presented three documentary exhibits. Testimony was taken from the Applicant, who also submitted five exhibits. The transcript was received on November 23, 2005.

**FINDINGS OF FACT**

The Applicant is 52, single and has a high school education. He is employed by a defense contractor as a Technical Support Specialist Senior, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant may have foreign connections which potentially make him vulnerable to coercion, exploitation or pressure.

The Applicant was born in the Republic of Vietnam (South Vietnam) in 1953. In April 1975, as a member of the South Vietnamese Navy, the Applicant escaped South Vietnam upon the fall of that government. He emigrated to the United States in September 1975. The Applicant became a naturalized American citizen in September 1981. He has at least \$87,000 in assets in the United States. (Transcript at 24.)

Since becoming an American citizen, the Applicant has traveled two times to South Vietnam. These trips were in 1992 and 1999. The first trip was to see his mother, brother and sister after being away about 17 years. The second trip, in 1999, was as part of a Vietnamese/American tour group. (Transcript at 31-32.) The Applicant is very aware of the security responsibilities involved in foreign travel and informed his employer as required. (Applicant's Exhibit E.)

The Applicant's mother and sister came to the United States to live in 1995. They were sponsored by the Applicant. His sister is now an American citizen. (Government Exhibit 1 at question 9.) The Applicant's mother does not know English well and does not intend becoming a citizen. (Transcript at 25.)

The Applicant has one brother who remains in Vietnam. This brother served in the Vietnamese Army at some time in the past. He does not want to leave Vietnam because he lives in the Applicant's mother's house and runs a restaurant there. The Applicant is angered by his brother's refusal to leave Vietnam and has not spoken to him since late 1999, early 2000. (Transcript at 32-33.)

Except for the time his brother was in the Vietnamese Army, none of his family members have worked for or been involved in the Vietnamese government or the Communist Party. None of his relatives have been approached by any foreign intelligence service.

The Applicant was asked what he would do if he was approached by a foreign intelligence service. He stated in no uncertain terms that he was a proud American, that he had been briefed by his employer to report such situations to them, and that he would not respond to any such attempt. (Transcript at 33-34, 39.)

### POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be subject to foreign influence, which may lead to poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has foreign connections which could cause a security concern (Guideline B).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant's father is deceased and his mother and sister live in the United States. The evidence shows that the Applicant's relationship with his brother in Vietnam is not close. He has not traveled to Vietnam since 1999 and has not spoken to his brother since then. It is obvious that his relationship with that sibling has been deeply damaged. It is difficult to call any family relationship "casual and infrequent," but this one comes close. Finally, none of his extended family in Vietnam is an agent of the government or, in my opinion, in a position to be exploited by the Vietnamese government. The possibility that the Applicant can be coerced by his family is virtually nil.

Disqualifying Condition 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*) is the only one which applies on its face. Under the particular facts of this case, the following Mitigating Condition applies to his entire family: 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). With regards to his brother in Vietnam, Mitigating Condition E2.A2.1.3.3. applies: (Contact and correspondence with foreign citizens are casual and infrequent).*

The evidence shows that the Applicant is a patriotic American citizen and has been one for almost 25 years. The Applicant eloquently testified about his pride in being an American citizen and a member of the defense industry. He is knowledgeable about security and understands his responsibility. Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and is eligible for a security clearance. I have specifically considered that information set forth in Government Exhibits 2 and 3 in making this decision.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: 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 the Applicant.

Wilford H. Ross

Administrative Judge