

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant has two brothers and one sister who are citizens and residents of Vietnam. Since 1994, he has traveled to Vietnam nine times to visit his family members. In 1999, he was fired from a job with a government contractor for using his employer's international telephone code and business telephone to place approximately \$8,000 in personal telephone calls to his family in Vietnam. Applicant's poor judgment in failing to follow his employer's rules for the use of company telephones and his close familial ties to citizens and residents of Vietnam raise serious security concerns because they could be exploited by a hostile government and result in the compromise of classified information. Clearance is denied.

CASENO: 05-02197.h1

DATE: 01/30/2006

DATE: January 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02197

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has two brothers and one sister who are citizens and residents of Vietnam. Since 1994, he has traveled to Vietnam nine times to visit his family members. In 1999, he was fired from a job with a government contractor for using his employer's international telephone code and business telephone to place approximately \$8,000 in personal telephone calls to his family in Vietnam. Applicant's poor judgment in failing to follow his employer's rules for the use of company telephones and his close familial ties to citizens and residents of Vietnam raise serious security concerns because they could be exploited by a hostile government and result in the compromise of classified information. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 12, 2005, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing September 14, 2005, and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on October 31, 2005. The FORM contained documents identified as Items 1 through 8. By letter dated November 1, 2005, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received a copy of the FORM on November 15, 2005. The record indicates he did not submit any information within the time period of 30 days after receiving the FORM. On December 22, 2005, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains two allegations of disqualifying conduct under Guideline B, Foreign Influence, and one allegation of disqualifying conduct under Guideline E, Personal Conduct. (Item 1.) In his answer to the SOR, Applicant admitted all three allegations. (Item 2.) His admissions are incorporated as findings of fact.

Applicant, a 40-year-old systems engineer employed by a defense contractor, holds a bachelor of science degree from a U.S. university. He was born in Vietnam and emigrated to the U.S. in 1991 under a refugee program. (Item 5 at 1.) He became a naturalized U.S. citizen in 1996. He does not currently hold a security clearance. (Item 4.)

Applicant is married and the father of one child, who was born in the U.S. Applicant's wife was born in Vietnam and is also a naturalized U.S. citizen. (Item 4.)

Applicant has two brothers and a sister who are citizens and residents of Vietnam. The two brothers are self-employed businessmen, and the sister is an accountant. Applicant's mother and two of Applicant's siblings are citizens and residents of Australia. His father is deceased. (Item 6 at 2.)

Applicant communicates with his siblings in Vietnam by e-mail two or three times a week. He speaks with them by telephone every two to three months. (Item 5.) Applicant traveled to Vietnam to visit his family members in December 1994, June 1995, January 1997, January 1998, January 1999, January 2000, June 2002, April 2003, and June 2004. (Item 3.) Applicant is recognized as a U.S. citizen when he is in Vietnam. (Item 5.)

From 1997 to 1999, Applicant was employed as a senior software test engineer by a government contractor. In 1999, his father, a citizen and resident of Vietnam, became ill with cancer. ⁽³⁾ (Item 3; Item 4; Item 6.) Applicant was concerned about his father and felt the need to speak with him frequently. He asked a secretary in his office to give him the code for making foreign long distance calls. He told the secretary he would pay for the calls when the company received the bills for them. He then used the code and his employer's telephone to call and speak with his father during working hours. Applicant's employer learned of his long distance telephone calls to his father in Vietnam and informed him that his conduct violated company policy. His employer then terminated Applicant's employment. Applicant took out a loan and repaid the employer for the long distance telephone charges he had incurred when calling his father in Vietnam. (Item 3; Item 6.) ⁽⁴⁾

I take administrative notice of a document entitled "Vietnam: Country Reports on Human Rights Practices - 2004," released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (Item 7.) I also take administrative notice of testimony by the Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, delivered February 12, 2004, before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign

Relations Committee (Item 8.) These documents point out that Vietnam, a one-party state, ruled and controlled by the Communist Party of Vietnam, continues to have a poor human rights record. The government of Vietnam carries out such serious abuses of human rights as arbitrary arrest and detention of citizens and foreign visitors for the peaceful expression of political and religious views. It also requires all religious groups to be registered with the State, and it uses this process to control and monitor church organizations.

The government of Vietnam also monitors and controls citizens' access to and use of the Internet and requires all owners of domestic web sites to register their sites with the government and to submit web site content to the government for approval. Additionally, the government monitors the telephone conversations, electronic mail, and facsimile transmissions of individuals targeted for surveillance. In 2004, the government detained and interrogated several U.S. citizens who allegedly were affiliated with groups opposed to the Communist Party of Vietnam or who advocated democracy in Vietnam.

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Guideline B - Foreign Influence

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's two brothers and one sister were citizens and residents of Vietnam (¶ 1.a.); and that Applicant had traveled to Vietnam in December 1994, June 1995, January 1997, January 1998, January 1999, January 2000, July 2002, April 2003, and June 2004 (¶ 1.b.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that the government of Vietnam is a totalitarian State intent upon controlling the lives of its citizens, preventing dissent, and discouraging many of the democratic practices and policies espoused by the U.S. Vietnam's government carries out policies and actions that can directly threaten U.S. security interests. American citizens with immediate family members who are citizens or residents of Vietnam could be vulnerable to coercion, exploitation, or pressure.

Applicant's admissions raise security concerns under Guideline B, Disqualifying Conditions (DC) E2.A2.1.2.1. and E2.A2.1.2.6. Applicant's two brothers and one sister are citizens and residents of Vietnam. Applicant is bound to his siblings in Vietnam by close ties of obligation and affection. He has traveled to Vietnam nine times on personal business since 1994 to see his family. These facts could make Applicant vulnerable to coercion, exploitation, or pressure by a hostile foreign government.

An applicant may mitigate foreign influence security concerns by demonstrating that foreign associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the US. Mitigating Condition (MC) E2.A2.1.3.1. While the evidence does not establish that Applicant's brothers and sister in Vietnam are agents of a foreign power, they are citizens of a totalitarian state with interests antithetical to the United States, and they could be exploited by their government in a way that could force Applicant to choose between loyalty to them and the United States. (ISCR Case No. 02-13595, at 4-5 (App. Bd. May 10, 2005) Accordingly, MC E2.A2.1.3.1 applies only in part to Applicant's case.

An applicant may also mitigate foreign influence security concerns if he shows his contact and correspondence with foreign citizens are casual and infrequent. C E2.A2.1.3.3. Applicant is in frequent e-mail contact with his family in Vietnam. He also calls them on the telephone every two or three months, and he travels to Vietnam approximately once a year to visit them. Applicant's contacts with his family members who are citizens and residents of Vietnam are based on ties of familial affection or obligation, and they are not casual. Accordingly, mitigating condition E2.A2.1.3.3 does not apply to Applicant's relationships with his two brothers and his sister in Vietnam.

Nothing in Applicant's answers to the SOR suggested he was not a loyal American citizen and a credit to his adopted country. However, he failed to put forward evidence that could mitigate the security concerns discussed herein and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, allegations in subparagraphs 1.a. and 1.b. under Guideline B of the SOR are concluded against the Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant was fired from a job with a defense contractor in August 1999 because he placed approximately \$8,000 in personal telephone calls to Vietnam by using the employer's international telephone code and the company's business telephone (§ 2.a.).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant's admitted conduct raises a concern under Disqualifying Condition (DC) E2.A5.1.2.5. of Guideline E. While in the workplace, Applicant put his concern for his family in Vietnam and his need to communicate with his sick father ahead of his employer's rules and regulations for the use of international telephone codes and business telephones, thereby exposing his employer to economic risk. Applicant used poor judgment in not asking an authorized official if the

company's rules permitted the use of the employer's international telephone code to call, on company time, a family member in Vietnam. Applicant's conduct suggests a willingness to put his needs ahead of the interests of his employer, and it could also suggest he may put his needs and interests before those of the Government in protecting classified information. No Mitigating Conditions under Guideline E apply to the facts of this case. Accordingly, the Guideline E allegation in the SOR is concluded against the Applicant.

In ISCR Case No. 98-071 at 3 (Dec. 27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive, and I conclude that Applicant has not mitigated the security concerns raised by the allegations in the SOR and he has not demonstrated that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: 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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. On his security clearance application, Applicant acknowledged his use of his employer's long distance code and business telephone to call his sick grandfather in Vietnam in 1999. (Item 4 at 6.)
4. In the SOR, the Government alleged the long-distance calls Applicant made to his father from his employer's phone totaled approximately \$8,000. In his response to the SOR, Applicant admitted the disqualifying conduct but said he was unable to obtain the records necessary to verify the amount he reimbursed the employer for the calls. (Item 2 at 1-2.)