



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-08128
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gina L. Marine, Esquire, Department Counsel

For Applicant: *Pro Se*

June 27, 2008

**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a Security Clearance Application, Standard Form 86 (SF-86), signed on November 12, 2003. On October 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns arising under Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On October 12, 2007, Applicant acknowledged receipt of the SOR. On November 20, 2007, he submitted his notarized Answer to the SOR, admitted the five allegations raised in the SOR, and declined to have a hearing. A March 13, 2008, File of Relevant Material (FORM), including seven documents, was submitted by the Government. Applicant declined to respond to the FORM, but submitted one additional

document on May 13, 2008. It was admitted into the record without objection. Based upon a review of the case file, exhibits, and testimony, Applicant met his burden of mitigating security concerns arising under Guideline B. Security clearance is granted.

### **Procedural Matters**

The Government moved administrative notice be taken with regards to certain items contained in its FORM regarding Vietnam. Administrative notice is hereby taken: Vietnam, formally the Socialist Republic of Vietnam, is “an authoritarian state ruled by the Communist Party of Vietnam (CPV).”<sup>1</sup> It often works with China, its largest trading partner. U.S.-Vietnam relations “have gradually been normalizing” since the 1990s, although tensions remain regarding human rights issues.<sup>2</sup> Arbitrary detentions, particularly with regard to political activities, remain a problem. Three Americans were arrested in Vietnam in 2005 while visiting relatives and charged with plotting violence against the Vietnamese government.<sup>3</sup> Police sometimes mistreat those under arrest or in custody and arbitrary detentions remain a problem. Freedom of speech and of the press is restricted, particularly with regard to the Internet and cyber-dissidents.<sup>4</sup> It is not unusual for Vietnamese citizens to be monitored and visitors may be put under surveillance. Timely notice to the U.S. of the detention of a U.S. citizen in Vietnam is rare and access to such detainees can be difficult, particularly if they are former citizens of Vietnam.

### **Findings of Fact**

Applicant is a 53-year-old engineer currently employed by a defense contractor. He was born in Vietnam to an upper middle class family. Opposed to the encroaching Communist presence in the country, his family moved south when Vietnam was divided. There, his father rose to the rank of Vice-Chief of Police in a major city. His mother ran a business supporting the United States (U.S.) Forces by providing them with fresh produce. When Communist forces took Vietnam in 1975, Applicant’s father arranged for the family to flee the country on a U.S. helicopter. The family arrived in the U.S., which they now call their “beloved country.”<sup>5</sup> Applicant became a naturalized U.S. citizen in April 1982. In 1984, he completed his academic studies and received a Bachelor of Science degree in engineering. He purposefully selected his academic major to prepare himself for employment within the defense industry. He considers such work as his way

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<sup>1</sup> FORM at 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Item 3, SOR Answer, dated November 20, 2007, at 3. “. . . America is our beloved country. . . . I always dreamed to do something for our country. So when I graduated (college), I (had) already set my mind and career path to the defense industry.”

to help “defend and protect [the U.S].”<sup>6</sup> Applicant appreciates “the importa[nce] of our national security and how to protect it.”<sup>7</sup>

In 1989, Applicant married a former colleague. After their 2002 divorce, Applicant decided to visit Vietnam. He had visited it once before, in 2000, and wished to see more of the country. He advised his employer of his desire to travel to Vietnam and attended a briefing.<sup>8</sup> He solicited travel information from Internet sources in around October 2002. One of those individuals was a female with whom he became a pen pal.

During his two week trip to Vietnam in January 2003, Applicant met his pen pal. She was a physician working for a national entity. Her parents, now in their 70s, were former high school educators and both citizens and residents of Vietnam. Her siblings are similarly citizens and residents of Vietnam, each college educated and currently in a lucrative career. The woman also has a son from a prior marriage, born in 1994. When she sued her ex-husband for divorce in 2001, she relinquished custody in the boy and agreed to pay her ex-husband approximately \$20 U.S. dollars a month for “child alimony.”<sup>9</sup> Their relationship is not overtly close and contact is sporadic, consisting of an occasional phone call or holiday gift.<sup>10</sup> Applicant has never met the son.

After his trip, Applicant reported his activities to his employer. They continued to correspond. A return trip was planned and his employer was notified. It was taken in the summer of 2003. Upon his return, Applicant reported his trip and his engagement to the woman to his security officer. In 2004, Applicant’s fiancée immigrated to the U.S., married Applicant, and applied for U.S. citizenship. On December 28, 2007, she became a naturalized citizen. Applicant describes his relationship with his in-laws as “good” without elaboration<sup>11</sup> They do not discuss his work and are unaware of his security clearance. His in-laws are content in Vietnam, but hope to visit the U.S. Neither Applicant nor his wife has returned to Vietnam or seen her family since her 2004 emigration.

## Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Item 6, Workplace Correspondence Regarding Travel.

<sup>9</sup> Rather than use the term support, Applicant termed the funds his wife owed under her divorce decree “child alimony.” See SOR Answer, dated November 20, 2007.

<sup>10</sup> Item 3, SOR Answer, dated November 20, 2007, at 2.

<sup>11</sup> *Id.*

potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.<sup>12</sup> The burden of proof is something less than a preponderance of evidence.<sup>13</sup> The ultimate burden of persuasion to obtain a favorable clearance decision is on an applicant.<sup>14</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of

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<sup>12</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>13</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>14</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

denials.”<sup>15</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>16</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>17</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.

### Analysis

Based upon consideration of the evidence, I find that GUIDELINE B - FOREIGN INFLUENCE is most pertinent to the evaluation of the facts in this case. The concern under that adjudicative guideline is that foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. The adjudication can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

When Applicant’s wife immigrated to the U.S., she left behind her son, parents, and siblings, all of whom are residents and citizens of Vietnam. Personal contact is impossible due to distance, but other forms of contact have been made. This fact raises concerns under Foreign Influence Disqualifying Conditions (FI DC) AG ¶ 7a (*contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of exploitation, inducement, manipulation, pressure, or coercion*), AG ¶ 7b (*connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information*), and AG ¶ 7d (*sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion*).<sup>18</sup> With

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Executive Order 10865 § 7.

<sup>18</sup> The Government similarly urges application of AG ¶ 7i (*conduct, especially while traveling outside the U.S., which may make individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government or country*). The facts, however, fail to detail any particular conduct on the part of Applicant which, based on the Government’s submissions for administrative notice regarding the country at issue, may have made him vulnerable. There is no indication, for example, that he was involved in any political activities or anti-

disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns.

As a threshold matter, the issue regarding Applicant's wife's Vietnamese citizenship has been made constructively moot by her intervening oath of U.S. citizenship. Moreover, his un rebutted testimony regarding his trips to Vietnam depict pleasure holidays. It does not suggest any of the political activities or motives associated with those types of conduct depicted as provoking scrutiny or action in the materials administratively noted, nor is it argued that Applicant was in any way politically active in his trips. Consequently, central focus is thus aimed at the remaining allegations.

Although Applicant provided considerable written testimony with regard to his courtship, his travel, and his family, fewer facts are provided regarding his step-son and in-laws. With regard to his step-son, however, Applicant established that he has never met the child. Although the bond between mother and child is generally presumed to be deep and intimate, the facts here are atypical. His wife petitioned for divorce from her first husband and voluntarily relinquished custody of the child to her ex-husband, to whom she pays a negligible amount of money for the child's welfare. Her own contact with the child is irregular and nominal. When contact is made through the mail or by telephone it is fleeting, and apparently lacks intimacy. Consequently, Foreign Influence Mitigating Condition (FI MC) AG ¶ 8c (*contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation*) applies with regard to the minor step-child.

Few facts are presented regarding Applicant's in-laws. Although his parents-in-law are retired, it cannot be determined whether they are retired from a state or a private high school, nor can it be determined whether they are dependent on a state pension. Similarly, although it has been shown his wife's siblings are educated professionals, it is unclear as to whether they or their professions bare any nexus with the government of Vietnam or the CPV. No facts are given depicting the relationship between his wife and her family, although it is known neither Applicant nor his wife has physically seen her family since she moved to the U.S. Furthermore, the relationship between Applicant and his in-laws is flatly summarized as being "good," with no particular intimation of intimacy. With regard to the relationship between his wife and her parents, there is no description of whether her relationship with them is any deeper or more frequently maintained than the relationship she has with her son. Consequently, neither AG ¶ 8a (*the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.*) nor AG ¶ 8c (*contact or*

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CPV activity. They only note he visited Vietnam as a tourist and courted his current wife.

*communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation)* applies.<sup>19</sup>

The facts show, however, that Applicant properly apprised his employer with facts regarding his travel to Vietnam and his growing relationship with his new wife. Neither the SOR nor the record indicate he ever failed to comply with any controlling reporting requirements. Therefore, FI MC AG ¶ 8e (*the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country*).

Furthermore, the facts squarely demonstrate that Applicant and his immediate family are predisposed to the American way of life and have both a deeply rooted allegiance to the U.S. and an antipathy for its enemies that predates their immigration: The family was relatively affluent and fled to South Vietnam *en masse* when the country was divided. There, his father worked to maintain law and order while his mother worked to support U.S. operations in that region. The family fled Vietnam in 1975 through assistance received from the U.S. The family then immigrated to the U.S. and settled. In college, Applicant prepared himself for a career that would help him contribute to U.S. national security. He has worked extensively and successfully in that area for nearly 25 years. His written testimony reflects that he relishes his U.S. citizenship, his life in his “beloved country,” and his ability to help protect this country. Such unwavering devotion is notable. The facts give rise to FI MC AG ¶ 8b (*there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest*).<sup>20</sup>

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): “(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.” Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility

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<sup>19</sup> FI MC AG ¶ 8d and ¶ 8f are not applicable.

<sup>20</sup> This is particularly true given the FORM’s representation of the types of potential human rights threats Vietnam might pose, which does not include evidence that Vietnam actively seeks to inveigle industrial secrets from U.S. citizens through their kin remaining in Vietnam or is otherwise linked to terrorism. See AG ¶ 6.

for a public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole person” factors noted above. I particularly note that Applicant successfully raised FI MC AG ¶ 8b and ¶ 8e. Applicant is an immigrant who speaks of this country in reverent terms. He is a mature man who has proven himself to be goal-oriented and devoted to serving this country as best he can. An engineer/scientist who has devoted his professional life to the U.S. defense industry and possesses 25 years of experience working with protected information, there is no question with regard to his affinity for and loyalty to the U.S. Moreover, while inadequate facts were raised to gauge his wife’s long-distance relationship with her family or determine whether Applicant has any genuine allegiance to his in-laws, there are no facts indicating his affinity for these people is as strong as his demonstrated allegiance to his adopted country. Further, while the Government’s materials depict unresolved human rights issues in Vietnam, particularly with regard to active dissidents, there is no evidence that country endeavors to gather or extort secret information through American kin residing in Vietnam or otherwise targets Americans on simple pleasure holidays. These facts, taken together with the mitigating conditions raised, and after consideration of Applicant as a whole, lead me to conclude that the security concerns raised have been mitigated and that it is in the national interest to grant or continue Applicant’s security clearance. Security clearance is granted.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is granted.

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ARTHUR E. MARSHALL, JR.  
Administrative Judge