



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



In the matter of:)
)
) ISCR Case No. 08-06292
)
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: Kathleen E. Voelker, Esquire

March 26, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the foreign influence security concerns arising from his relationship and contact with his Vietnamese mother. He also mitigated the foreign preference security concerns arising from his French citizenship and possession of a valid French passport. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on February 12, 2007 (Electronic Questionnaires for Investigations Processing (e-QIP)) (GE 1). On October 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to him a Statement of Reasons (SOR).¹ The SOR alleges security concerns under Guideline C (Foreign

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended, modified, and revised (Directive), and the revised adjudicative guidelines (AG) promulgated by the

Preference) and Guideline B (Foreign Influence). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be denied or revoked.

Applicant answered the SOR (Answer) on October 20, 2008, and requested a hearing before an administrative judge. The case was assigned to me on November 26, 2008. DOHA issued the first notice of hearing on December 3, 2008, scheduling a hearing on December 23, 2008. On December 10, 2008, Applicant's counsel entered her appearance and requested a postponement, which I granted. The second notice of hearing was issued on December 12, 2008, and scheduling a hearing on January 22, 2009. The hearing was convened as scheduled. The government offered exhibits (GE) 1 through 4, which were admitted without objection (Tr. 14, 16).² Applicant testified on his own behalf, and presented three witnesses and 17 exhibits, marked (AE) 1 through 17, which were admitted without objection (Tr. 27). DOHA received the transcript of the hearing (Tr.) on January 28, 2009.

Findings of Fact

Applicant denied all the SOR allegations. After a thorough review of all evidence of record, I make the following findings of fact.

Applicant is a 42-year-old computer program analyst working for a defense contractor. He was born, raised, and educated in Vietnam by Vietnamese parents (Tr. 129). After high school, he was trained as an elementary school teacher by the Vietnamese government (Tr. 98, 129). He was exempted from his Vietnamese military service obligation because of his teaching duties. He worked as a school teacher until 1983, when he emigrated at age 23 to France with his father.

After the fall of Saigon in 1975, his father was imprisoned for three to five years (Applicant was unsure about the period) because he worked for the Republic of Vietnam's government. After his imprisonment, his father had difficulty finding good employment and was forced to work odd jobs. He divorced Applicant's mother, and emigrated to France, because his mother was already living in France with one of her brothers (Tr. 130).

Upon his arrival in France, Applicant and his father were considered "boat refugees" (Tr. 131). His father attended college in France and became a pharmacist. After becoming a French citizen, Applicant's father emigrated to the United States and became a U.S. citizen in 2002 (Tr. 100). He is currently living in the United States with his new wife.

President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

² GE 4 was considered for administrative notice purposes.

Applicant's 64-year-old mother worked as an administrative secretary for the Republic of Vietnam before the fall of Saigon, and later for the Vietnamese government when the communists took power (Tr. 179). She is still a resident and citizen of Vietnam and apparently receives a retirement pension from the Vietnamese government (Tr. 177-179). According to Applicant, his mother owns no property in Vietnam and lives in a house owned by his uncle (Tr. 99). He has telephonic contact with his mother approximately twice a month (Tr. 93).

While in France, Applicant attended college and worked odd jobs in fast food restaurants (Tr. 100). In 1999, he received his French citizenship and a French passport (Tr. 101). That same year, Applicant travelled to the United States to attend a friend's wedding. He met his future wife while in the United States, and in July 2000, he immigrated to the United States (Tr. 106). He received his green card in December 2001 (Tr. 106). Applicant became a naturalized U.S. citizen in January 2006, and received his U.S. passport in May 2006 (Tr. 107).

Applicant renewed his French passport in 2005. It will expire in 2015. He became aware of the security concerns raised by his possession of a valid French passport when he received the SOR. He surrendered it to his Facility Security Officer (FSO) with the understanding that the FSO will notify appropriate DOD personnel if Applicant ever requests his French passport (Tr. 108, 116, AE 1). At his hearing, Applicant credibly expressed his willingness to surrender his French citizenship (Tr. 128). He has not completed the process because he does not want to inform the French embassy he is surrendering his citizenship as a result of security concerns due to his employment (Tr. 109). He promised to report to his FSO any possible foreign travel (Tr. 126). Applicant credibly testified he considers the United States his home, and that his loyalty is only to the United States. His wife, child, and all his financial and proprietary interests are in the United States.

From 2004 to 2007, Applicant attended college in the United States. He received a bachelor's degree in network administration and security in 2007. He also completed a master's degree in telecommunications in 2008 (Tr. 114). While attending college, he worked part-time for the university he attended (Tr. 128-130). His then supervisor testified at Applicant's hearing. His supervisor is a retired Army lieutenant colonel who has held access to classified information for many years. He had close daily contact with Applicant for over four years. He considers Applicant extremely honest, trustworthy, and reliable. Applicant's job performance was outstanding and he was regarded as an asset to the organization (Tr. 28-32).

Applicant voted in U.S. elections in 2006 and in 2007. One month after voting in the 2006 U.S. elections, he registered to vote in French elections (Tr. 149-150). He voted in French elections twice in 2007 because of his curiosity with the electoral process and because the French presidential candidate was pro-U.S. government (Tr. 117). He has no financial or property interests in France or Vietnam (Tr. 120). His only relative living in France is his 72-year-old uncle who is a retired physician with no

contact with the French government (Tr. 121). Since immigrating to the United States, Applicant travelled to France twice. In 2002, he took his wife to France to introduce her to his uncle; and in 2006, he travelled to France to help his uncle move (Tr. 121). He has telephonic contact with his uncle approximately once a month (Tr. 93).

Applicant has been back to Vietnam only once since immigrating to France in 1983. In 2001, he took his wife to Vietnam to introduce her to his mother and extended family members living there (Tr. 122, 134). Applicant testified he is not interested in travelling to Vietnam, but would travel there if his mother is sick. He would also provide financial support to his mother if needed. He expressed no interest in going back to live in Vietnam or retiring there (Tr. 123-125).

Applicant has worked for his current employer, a government contractor, since 2007. His job encompasses sensitive functions in the administration of databases for government agencies (Tr. 49). His immediate supervisor is a retired Navy warrant officer. He has had direct supervision and close contact with Applicant over the last two years. He considers Applicant trustworthy and an excellent worker. Applicant is diligent, conscientious and reliable. Applicant complies with all rules and regulations and has not had any problems at work. Because of his work performance, Applicant has received top evaluations and numerous awards. His supervisor recommended Applicant receive a security clearance (Tr. 45-63).

Applicant's wife is 38 years old. She was born and lived in Vietnam until age 11 (1981) when she and her Vietnamese parents immigrated to the United States via Thailand and the Philippines. They arrive in the United States in 1984 (Tr. 89). She and her parents became naturalized U.S. citizens in 1990 (Tr. 70). She attended college in the United States and received her bachelor's degree in finance in 1992. She has been working as a financial analyst for a state government during the last 13 years (Tr. 72).

Applicant and his wife met in 1999 through her brother-in-law. They were married in July 2000 and decided to make their lives in the United States. They have a four-year-old daughter and another child is on the way (Tr. 74). Applicant and his wife have filed U.S. income tax returns since they were married. They have joint U.S. bank accounts, and bought a home in 2002, that has an assessed value of approximately \$400,000 (Tr. 79).

I take administrative notice of the following facts. France is one of the United States' oldest allies and is one of the world's premier democracies. France and the United States share common values and have parallel policies on most political, economic, and security issues.³ Relations between the United States and France are active and friendly. Differences are discussed frankly and have not generally been

³ Adjudication of security concerns under Guideline B requires the consideration of the foreign country involved and its relationship with the United States (AG ¶ 6). The source of the facts in this paragraph is the U.S. Department of State, Bureau of European and Eurasian Affairs August 2008, "Background Note: France," available at <http://www.state.gov>.

allowed to impair the pattern of close cooperation that characterizes relations between the two countries. France has significantly increased participation in NATO's military wing in recent years. Although France opposed the U.S. invasion of Iraq, France has 2,200 soldiers serving in Afghanistan, and assisted in assembling \$21 billion in pledges for economic assistance to Afghanistan. France is a close ally of the United States in the war on terrorism.

I also take administrative notice of the following facts. Vietnam is an authoritarian state ruled by the Communist Party of Vietnam. 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. Police sometimes mistreat those under arrest or in custody. Arbitrary detentions, particularly with regard to political activities, remain a problem. Three American citizens were arrested in Vietnam in 2005 while visiting relatives and charged with plotting violence against the Vietnamese government.

Freedom of speech and of the press is restricted, particularly with regard to Internet access and cyber-dissidents. 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. There has been progress with Vietnam on regional security issues, and the Vietnamese government has been helpful in the antiterrorism arena.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁴

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 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 controlling adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available,

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of 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.”⁵ 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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).

Analysis

Guideline C, Foreign Preference

Under Guideline C, the government’s concern is that “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.” AG ¶ 9.

Applicant became a naturalized French citizen in 1999 and was issued a French passport. He registered to vote and voted in French elections twice after becoming a naturalized U.S. citizen in 2006. He has a valid French passport that will not expire until

⁵ *Egan, supra*, at 528, 531.

2015. Applicant has enjoyed all the privileges and rights of French citizens. Applicant's possession of a valid French passport, as well as his voting in French elections, constitutes an exercise of his French citizenship and preference for France.

Applicant's behavior raises security concerns under foreign preference disqualifying condition AG ¶ 10(a): "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes . . . (1): possession of a current foreign passport, and (7) voting in a foreign election."

In 1999, months after becoming a naturalized French citizen, Applicant travelled to the United States, met his future wife, and became engaged. Applicant immigrated to the United States in 2000, and married his wife. They decided to make their home in the United States. He and became a naturalized U.S. citizen in 2006. Since 2000, he has been back to France twice: the first time to introduce his wife to his uncle, and the second time to help his uncle move residences. He received his bachelor's and master's degrees in the United States, and has worked for U.S. government contractors. All of Applicant's financial and economic ties are in the United States. He has no other financial, economic, or proprietary interests in any foreign country. Applicant's questionable actions (voting in French elections and possessing a valid French passport), were in part, motivated by his curiosity of the electoral process and without knowledge that such actions would raise security concerns.

These facts warrant the application of foreign preference mitigating conditions AG ¶¶ 11(b): "the individual has expressed a willingness to renounce dual citizenship," and 11(e): "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Applicant's actions and past behavior do not show a preference for France over the United States. Applicant and his father emigrated to France under duress seeking a better life and better living conditions. He became a French citizen in 1999, and shortly thereafter moved to the United States and started the process to become a U.S. citizen. He surrendered his French passport to his FSO and that mitigated the passport specific issues. He also agreed to notify U.S. authorities of any possible foreign travel. Applicant credibly expressed his willingness to renounce his French citizenship and there is not evidence to show he continues to exercise his French citizenship. Applicant and his wife have made the United States their home. Their daughter is an American citizen. All their financial and proprietary interests are in the United States. Considering the record as a whole, Applicant has mitigated the foreign preference security concerns.

Guideline B, Foreign Influence

Under Guideline B, the government's concern is that:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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. Adjudication under this Guideline 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 United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 6.

AG ¶ 7 sets out two conditions that could raise a security concern and may be disqualifying in this case, including:

(a) 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 foreign exploitation, inducement, manipulation, pressure, or coercion; and

(b) 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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.⁶ Applicant has frequent contacts and a close relationship of affection and/or obligation with his mother, who is a citizen and resident of Vietnam. The closeness of the relationship is shown by Applicant's feelings of affection and obligation, his frequent telephone contacts, and his trip to Vietnam to introduce his wife to his mother. This contact creates a risk of foreign pressure or attempted exploitation, because there is always the possibility that Vietnam's government may exploit the opportunity to obtain information about the United States.

The government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.

One Foreign Influence Mitigating Condition under AG ¶ 8 is applicable to these disqualifying conditions:

⁶ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(a) 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.

I do not believe Applicant's close relationship with his mother creates a heightened risk of foreign pressure or attempted exploitation because the nature of the improving relations between the United States and Vietnam. Although the Vietnamese government does have a questionable history with respect to human rights, there is no evidence it does so with the purpose of obtaining classified or sensitive information about the United States.

Since 1983, when he emigrated from Vietnam, Applicant has travelled back to Vietnam once to visit his mother and other extended family members there. His mother is 64 years old and retired from her administrative secretary position. She lives in a home owned by Applicant's uncle in France, and appears to be financially independent. Although Applicant has feelings of affection and obligation for his mother, I do not believe those feelings would overcome Applicant's feelings and obligations for his wife, child, and all of his financial and economic interests in the United States. Applicant has mitigated the foreign influence security concerns.

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) the 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 for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant is 43 years old and has lived in the United States approximately nine years. He has been a naturalized U.S. citizen for three years. He credibly asserted his willingness to surrender his French citizenship and his desire to be only a U.S. citizen.

In a short period, he and his wife have established themselves in the United States. He has worked hard for government contractors earning their trust. There is no evidence he has ever taken any action which could cause potential harm to the United States, or that he lacks honesty and integrity. His mother in Vietnam and his uncle in France are not likely to be vulnerable to coercion or exploitation by a foreign power or terrorist organizations.

On balance, after weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence and foreign preference.

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 C:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge