



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



In the matter of:)
)
) ISCR Case No. 09-03448
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Joseph Testan, Esq.

February 25, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has failed to mitigate the Personal Conduct security concerns raised by his intentional omissions on several occasions regarding his 1994 interaction with Vietnamese government officials. Eligibility for access to classified information is denied.

Statement of the Case

On August 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on August 31, 2010, and requested a hearing before an administrative judge. The case was assigned to me on October 21, 2010.

DOHA issued a notice of hearing on November 8, 2010, and the hearing was convened as scheduled on December 14, 2010. The Government offered Exhibits (GEs) 1 through 7. GE 1 through GE 5 and GE 7 were admitted without objection, and GE 6 was admitted over the objection of counsel. The Government also offered country information for administrative notice and a demonstrative exhibit, marked I and II. The Applicant offered Exhibit (AEs) A through G, which were admitted without objection. Applicant also provided a copy of a DOHA Appeal Board decision, marked III. Applicant called five witnesses, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on January 4, 2011.

Motion to Amend SOR

Department Counsel submitted an amendment to the SOR dated October 13, 2010. The amendment added SOR ¶ 2.a. Applicant admitted the allegation. He signed and returned the Amendment to Department Counsel on October 29, 2010. At hearing, Applicant, through his counsel, indicated he had no objection to the amendment and the amendment was granted.

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor. He was born in Vietnam. He found life under the communist regime difficult and tried to escape from Vietnam on a boat twice. His first attempt failed and he was imprisoned for three-to-four months. His second attempt to escape communist Vietnam by boat was successful and he landed in Malaysia in December of 1980. He was in Malaysia for approximately six months and then moved to the U.S., after being granted refugee status here. He entered the U.S. in June 1981. He has lived in the U.S. continuously since June 1981. (GE 1; GE 7; Tr. 71-74, 162.)

Applicant earned both a bachelor's degree and a master's degree in electrical engineering from U.S. schools. He became a U.S. citizen in 1986. He is married to a U.S. citizen and has three children ages seven, five, and three, all of whom are natural born U.S. citizens. He has two brothers and three sisters, who are U.S. citizens and residents, as well as two sisters who are citizens and residents of Vietnam. (GE 1; GE 7; Tr. 75-76, 124.)

Applicant works as an electrical engineer for a government contractor. He is required to work with technical schematics, diagrams, and figures. His position requires him to be detail oriented. (GE 1; GE 7; Tr. 125-126.)

In 1994, Applicant took his first of two trips back to Vietnam.¹ At that time, he was working for a company that manufactured commercial aircraft. A delegation from Vietnam visited his company in the summer of 1994 to examine their product. Applicant was asked by his company's marketing department to assist with the visit as a translator. Later that year, Applicant heard about a trade show in Vietnam through his

¹ The second trip occurred in 2004.

local Vietnamese Chamber of Commerce. He consulted his company's marketing department and asked to be sent to Vietnam for the trade show. The company agreed and financed Applicant's trip to Vietnam, with the exception of the eight-day vacation Applicant added to visit his two sisters that live in Vietnam. The trip was sponsored, in part, by the U.S. Department of State. He provided a copy of a business card from a representative of the State Department as evidence of the State Department's involvement in the trip. During the trip, Applicant met with Vietnamese airline employees and employees of the Vietnamese Department of Transportation. At hearing, Applicant asserted that he did not know if any of the people he met with were in fact government employees. (AE D; AE F; Tr. 76-86, 127-128.)

In July 1997, Applicant was asked by another government agency to undergo a polygraph examination in connection with further contact with the Socialist Republic of Vietnam officials. The exam was scheduled for September 25, 1997. However, due to interruptions, the examination was never completed. (GE 6; Tr. 122-123, 141.)

In 2002, Applicant was going through a periodic review for a security clearance and was required to complete a new security clearance application, GE 7. Question 14 on GE 7 asks "Have you had contact with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business? (Does not include routine visa applications and border crossing contacts.)" Applicant answered "No" to this question. When explaining his answer to this question at hearing, he did not claim he was unaware if any of the people he met with were in fact government employees. Instead, he indicated that he tried to answer this question "Yes," but that the computer program would not allow him to enter the event since it had taken place more than seven years prior to completing the form. Further, he indicated that prior to submitting his 2002 security clearance application, he met with a DSS agent who advised him to answer this question "No" because it was beyond the seven-year investigative period. Applicant's security clearance application is dated March 22, 2002. Applicant failed to include any remarks about his 1994 trip or his meeting with Vietnamese government officials on the form, to include in the remarks section under Question 43. (GE 7; Tr. 88-91, 108-109, 115, 129-131, 139.)

Applicant worked with the same DSS agent to create a Statement of Subject dated April 10, 2002. In his statement, he briefly noted:

On October 1, 1994, I took a commercial plane from Los Angeles, CA International Airport to Vietnam with a one-day stop over in Hong-Kong. The trip was about two weeks long with stops in Hanoi, Saigon, and Cantho. I spent three days in Hanoi sightseeing. From there, I took a shuttle car to Cantho to visit my two sisters. I resided with them for 5 days. On October 14, I returned to Saigon and stayed there for two days before I boarded a commercial plane back to Los Angeles, CA. (GE 5.)

Applicant failed to provide any details regarding the trade show in Vietnam or his meetings with government officials from Vietnam in this statement. At hearing, he

indicated that the content of this statement came largely from the DSS agent. He met with her approximately four times and each time, she made suggestions and helped Applicant draft it, including the assertion that he spent time in Hanoi "sightseeing." He entered into evidence early drafts of the statement he eventually signed with the DSS agent's suggestions written on them. It does not appear that the drafts included any indication Applicant attended a trade show or met with Vietnamese officials during the 1994 trip. Applicant insisted at hearing that the DSS agent instructed him to draft the statement without mentioning his meeting with Vietnamese government agents on the 1994 trip. (GE 5; AE E; AE F; Tr. 91-111, 120, 130-139, 161.)

In December 2008, Applicant was again required to complete another security clearance application as part of another periodic review. Applicant submitted GE 1, an electronic Questionnaire for Investigations Processing on December 16, 2008. In Section 17.c. of this form, he was asked "Have you ever had any contact with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business? (Do not include routine visa applications and border crossing contacts)." Applicant again answered this question "No." Applicant testified that he answered this question "No," because he relied upon his 2002 Application as a guide to answer most of the questions in the 2008 application and that the instructions to the application only require him to go back seven years. Applicant testified on direct examination that he did not realize that the instructions to only go back seven years were referring solely to questions regarding residence, employment, and education. However, on cross examination, Applicant admitted he could not recall if he read the instructions to the application prior to completing his 2008 application. (GE 1; AE G; Tr. 111-113, 142-147.)

During the course of the adjudication of his security clearance, Applicant was then sent a series of interrogatories regarding his 1994 travel to Vietnam. The first interrogatory, signed by the Applicant on November 9, 2009, inquired "On April 10, 2002 you provided a signed sworn statement to a Special Agent of the Defense Security Service, wherein you indicated that you traveled to the Socialist Republic of Vietnam (Vietnam) in October 1994. What was the purpose of your trip?" Subsequent questions on this interrogatory inquired into any government officials Applicant met with in Vietnam. Applicant indicated that "the purpose of the trip was to visit my two sisters" and he wrote "none" in response to the question about meeting with Vietnamese government officials and representatives. In a second set of interrogatories, signed by Applicant on March 24, 2010, Applicant was asked to provide the names and titles of any persons he saw in Vietnam during his October 1994 trip. In response, he only listed his brother-in-law, who had since moved to the U.S. Finally, on an April 28, 2010 interrogatory, Applicant was told that "this office knows you provided another Federal Government Agency information regarding persons you interacted with in Vietnam that are NOT your family members during this trip," and in the same paragraph the interrogatory referred to the October 1994 trip. Applicant attached foreign national contact information, which he indicated he provided to another government agency. The foreign national information only referred to extended family members in Vietnam and did not list any Vietnamese government contact. (GE 2; GE 3; GE 4; Tr. 114-120, 147-149-155.)

At hearing, Applicant contended that he had taken a trip in 2004, back to Vietnam solely to visit his sisters and was thinking of this trip, not his 1994 trip when he answered each of the interrogatories. He testified that in 2004, he did not meet any Vietnamese government employees. Applicant further testified that he was not trying to conceal any information about his 1994 trip. The events of the 1994 trip were widely known within his company. In fact, his former manager and a co-worker testified that Applicant's 1994 trip was well known amongst Applicant's co-workers. He explained that it did not occur to him that the interrogatories were asking about the 1994 trip until he received the SOR, because it was "outside of the 7 year window and had previously been adjudicated." On September 1, 2010, after receiving the SOR, Applicant went back to the interrogatories propounded to him in GE 4 and submitted new answers. He responded this time with information about the 1994 trip, including the details above. (Answer; GE 2; GE 3; GE 4; AE F; Tr. 47-67, 114-120, 147-149-155.)

Applicant has the support of his supervisors and colleagues. His witnesses and character letters attest to his honesty, reliability, and trustworthiness. His Program Security Manager indicated that Applicant has not committed any reportable violations. Applicant's direct supervisor indicated that he is one of the top performers in his group. His performance evaluations reflect that Applicant either meets or exceeds expectations. He has earned performance bonuses, achievement awards, certificates for exceptional service, perfect attendance awards, and other letters of commendation from his employer and from the programs that he has supported. (AE A; AE B; AE C; Tr. 32-67.)

Concerning facts for administrative notice, Vietnam is an authoritarian state ruled by the Communist Party. China reestablished economic ties with Vietnam in 1991 and China remains Vietnam's largest trading partner.

The U.S. has had "virtually normalized" relations with Vietnam since the mid-1990s. However, tensions exist between the two nations with respect to Vietnam's human rights record. The Vietnamese Government's human rights record has been worsening due to crackdowns on anti-government activity and arbitrary detentions remain a problem. Further, while Vietnamese law provides for freedom of speech and the press, the Vietnamese government continued to restrict those freedoms including control over the Internet and by limiting citizen's privacy rights. A 2008 State Department report noted that systems of surveillance of citizens exist and the Vietnamese authorities have opened and censored targeted person's mail, confiscated packages and letters, and monitored telephone conversations.

When traveling to Vietnam, foreign passport holders are required to both register to be permitted to stay in private homes and must register with local police when they stay overnight in locations outside of their own homes. The Vietnamese government has encouraged visitation and investment by emigrants, but sometimes monitors them carefully. Vietnamese security personnel may place foreign visitors under surveillance, and may monitor hotel rooms, phone conversations, fax transmissions, and e-mail communications. Further, there have been instances where local security officers have questioned some U.S. citizens of Vietnamese origin for discussions not related to any

suspected violation of the law. Despite a 1994 agreement between the United States and Vietnam that provides for immediate notification of and reciprocal access within 96 hours to each other's detained citizens, U.S. consular officers are rarely notified in a timely manner when a U.S. citizen is arrested or detained, especially when the Vietnamese government considers the person to be a Vietnamese citizen.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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, 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 EO 10865 provides that adverse 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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government official.

Applicant denies that he intentionally falsified his March 2002 security clearance application, his April 2002 statement, his 2008 security clearance application and the three sets of interrogatories he completed. However, those denials are not conclusive evidence. I have considered his denials in light of the record evidence as a whole and I find Applicant’s was not credible.

Applicant lays the blame for his omissions on the DSS agent who advised him in 2002. Applicant’s attorney requested that an adverse inference be drawn since Department Counsel did not present the DSS agent to testify about Applicant’s 2002 security clearance application and/or his 2002 statement. With respect to the absence of a DSS agent’s testimony, the Appeal Board has noted: “The mere fact that Applicant’s testimony was not rebutted does not mean that it was conclusive or had to be accepted as true.”²

Overall, Applicant’s falsifications regarding his 1994 trip on his interrogatories lead me to believe that his explanations for his incomplete statements in 2002 and 2008

² ISCR Case No. 98-0265 (March 17, 1999).

regarding the 1994 trip did not contain the whole truth, either. It is clear from the Applicant's answers to the interrogatories that he was intentionally withholding information regarding his 1994 trip to Vietnam from the Department of Defense. Each of the three sets of interrogatories asked specific questions about the 1994 trip. The Applicant's answer to the November 9, 2009, inquiry is perhaps the most telling. It asked: "On April 10, **2002** [emphasis added] you provided a signed sworn statement to a Special Agent of the Defense Security Service, wherein you indicated that you traveled to the Socialist Republic of Vietnam (Vietnam) in October **1994** [emphasis added]. What was the purpose of your trip?" Applicant's explanation that he thought the question was asking about the 2004 trip makes no sense, given his statement to the DSS agent was made two years prior to the trip. His explanations for his answers to the interrogatories are simply not credible. I find he deliberately omitted or concealed his 1994 meetings with Vietnamese government representatives from his March 2002 security clearance application, his April 2002 statement, his 2008 security clearance application and the three sets of interrogatories he completed. These falsifications are sufficient to raise concerns under AG ¶¶ 16(a) and 16(b).

AG ¶ 17 provides conditions that could mitigate security concerns. I have considered each of the mitigating conditions under AG ¶ 17. Several are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to or by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant failed to make a prompt, good faith effort to correct his omission regarding the 1994 trip. From 2002 through 2010, he continued to omit information regarding his 1994 contacts in Vietnam when questioned by the Government. It was only after the receipt of the SOR that he came forward with details about meeting Vietnamese government officials during his 1994 trip. Further, Applicant attempted to downplay his meetings, suggesting even at the hearing that he was unsure if the

individuals he met with were in fact Vietnamese government representatives, while at the same time asserting that he tried to answer Question 17.c. on his 2002 security clearance application “Yes” to indicate that he had met with government officials. These statements are contradictory to themselves, and indicate that Applicant, even in his 2010 disclosure subsequent to the SOR, may not be fully forthright about what took place in 1994 in Vietnam. Mitigating Condition ¶ 17(a) does not apply.

While Applicant contends that his omissions on his 2002 security clearance application and his 2002 statement were due to the improper advice of the DSS agent he consulted with, this explanation does not mitigate his omissions in the instant case, as set out above. Even if his claim regarding the DSS agent’s advice was found to be credible, Applicant was explicitly questioned on the 1994 trip in the interrogatories and he still provided incorrect and untruthful answers. Mitigating Condition ¶ 17(b) does not apply.

While Applicant’s 1994 meetings with Vietnamese government representatives took place over 16 years ago, his falsifications are as recent as 2010. Further, the falsifications are not minor and they continue to cast doubt on Applicant’s reliability, trustworthiness, and judgment. Mitigating Condition ¶ 17(c) does not apply.

Applicant has neither acknowledged his intentional falsification nor obtained counseling to correct his behavior. There has been no showing that further falsification is unlikely to recur. Mitigating Condition ¶ 17(d) does not apply.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

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. 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 ¶ 7 describes conditions that could raise a security concern and may be disqualifying. It includes:

(f) failure to report, when required, association with a foreign national.

Vietnam is a communist nation and is known to conduct surveillance on foreign visitors. Vietnam also has a poor human rights record. Accordingly, family and

professional connections in Vietnam are cause for concern. In the instant case, Appellant failed to report his governmental contacts during his 1994 trip to Vietnam on his 2002 security clearance application, his 2002 statement, his 2008 security clearance application, and in his 2009 and 2010 answers to interrogatories. His failure to report his foreign governmental contact raises security concerns under Guideline B ¶ 7(f).

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 and find that the following mitigate the concern under AG ¶ 7(f):

(a) the nature of the relationships with foreign persons, the country in which these people 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.; and

(c) 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.

Applicant's last contact with Vietnamese government officials occurred approximately 16 years ago. The nature of his meetings with the Vietnamese representatives was to promote his company's product. His employer was aware of and sponsored his actions. He has not kept in contact with any Vietnamese government official since his meetings in 1994. Thus, it is unlikely that as a result of his 1994 contact with Vietnamese government officials, he would be placed in the position of having to choose between the interests of the Vietnamese Government and the interests of the U.S. Additionally, his contacts with the Vietnamese government are so casual and infrequent that there is little likelihood of foreign influence or exploitation.

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and B in my whole-person analysis. Applicant is well regarded by his supervisors, colleagues, and associates. He has received numerous awards from his employer and is well rated on his annual performance evaluations. However, his good conduct in the workplace does not excuse his falsification from 2002 through 2010 to the Department of Defense.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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 E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Subparagraph 1.f.:	Against 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 not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge