



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)
)

ISCR Case No. 10-05104

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

08/21/2012

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his security violations. He mitigates security concerns regarding foreign influence. Eligibility for access to classified information is denied.

Statement of Case

On February 22, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and DOHA recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. This 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 Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on March 2, 2011, and requested a decision on the administrative record. (Tr. 14) At the request of Department Counsel, the case was converted to a hearing. The case was assigned to another judge on April 16, 2012, and reassigned to me on May 31, 2012. The case was scheduled for hearing on June 27, 2012, and was convened on that date. At hearing, the Government's case consisted of four exhibits (GEs 1-4). Applicant relied on one witness (himself) and no exhibits (AEs). The transcript (Tr.) was received on July 5, 2012.

Procedural Issues

Following the hearing, I informed the parties of my intention to take administrative notice of a State Department document covering the country of Vietnam. There being no objections, and for good cause shown, I have taken administrative notice of *Background Note: Vietnam*, U.S. Department of State (January 2012).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Section 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in Vietnam. Administrative notice was extended to the documents themselves, consistent with the provisions of Rule 201 of the Federal Rules of Evidence.

Summary of Pleadings

Under Guideline K, Applicant allegedly (a) left a building unsecured and unattended in March 2009 and received a verbal warning and briefing on proper handling and storage of classified material; (b) had two combinations written on a piece of paper in his wallet in March 2009 and received a written warning; and (c) improperly transported classified hardware from a remote company building to a building on the company's campus, and given a courier briefing.

Under Guideline B, Applicant allegedly has family members who are citizens and residents of Vietnam. Both his mother and brother are allegedly citizens and residents of Vietnam.

In his response to the SOR, Applicant admitted each of the allegations. He provided no explanations.

Findings of Fact

Applicant is a 57-year-old electronics technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by

Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant was born and raised in Vietnam. (GE 2; Tr. 22) While living in Vietnam, he was placed in a concentration camp. (GE 2) He fled Vietnam in May 1981, first to Thailand, and ultimately to the United States in 1982. (GE 2) His wife and son (just 18 months old when they fled Vietnam) are Vietnamese "boat people." (GE 2; Tr. 23-24) He has been married for 32 years. (GE 1; Tr. 25) His father-in-law was a high-ranking officer in the Vietnamese government.

In May 2009, Applicant and his son became naturalized U.S. citizens. (GE 1; Tr. 26) Applicant retains no loyalties to Vietnam and will always defend U.S. interests in times of conflict. (Tr. 26) Applicant's father passed away in 1996. (GE 2; Tr. 28) Applicant attended a local community college in the United States between January 1984 and January 1987 and earned an associate's of arts degree. (GE 1) He earned an electronics certificate in August 1985. (GE 1)

Applicant's mother still resides in Vietnam. (GEs 1, 2, and 4; Tr. 27) He communicates with her once or twice a year and sends her \$500 to \$1,000 a year for her support. (GE 4; Tr. 27-28) His mother has never held any position or affiliation with the Vietnamese government or military and receives no financial benefits from the government. (Tr. 28-29)

Applicant has an older brother and three younger brothers who are citizens and residents of Vietnam. (GE 2; Tr. 30-32) He communicates with them once or twice a year. (Tr. 32) His oldest brother owns a small house and has never served in the South Vietnamese army or held a position or affiliation with the Vietnamese government. (Tr. 29-30)

Applicant owns property in the United States and has no intent of ever returning to Vietnam. (Tr. 35) Since immigrating to the United States, he has twice traveled to Vietnam to visit his family: once in 1998 and once in 2001. (GEs 2 and 4; Tr. 30-31) Applicant maintains only a U.S. passport and has never possessed a Vietnamese passport. (GE 2) Applicant has no property or inheritance rights in Vietnam and retains no privileges, benefits, or obligations in Vietnam. (GE 2)

Country information on Vietnam

Vietnam is a single-party constitutional republic controlled by the Communist Party. (*Background Note: Vietnam, supra*, at 3) Vietnam is an authoritarian state ruled by the Communist Party. China established economic ties with Vietnam in 1991 and remains Vietnam's largest trading partner. (*Id.*) With a population of over 90 million residents, Vietnam's identity has been shaped by longstanding running conflicts with internal and foreign forces. (*Background Note: Vietnam, id.*, at 3-4) With the fall of

Saigon in 1975, the Democratic Republic of Vietnam (the north) absorbed the former Republic of Vietnam (the south) to form the Socialist Republic of Vietnam in 1976. (*Background Note: Vietnam, id.*, at 6) Following reunification, the Vietnamese government confiscated privately owned land and forced civilians to adopt collectivized agricultural practices. (*Id.*, at 6-7)

Although the United States has enjoyed “virtually normalized relations” with Vietnam since the mid-1990s, tensions remain. Albeit, tensions were improved by the U.S.-Vietnam bilateral trade agreement (BTA) of 2001. ((*Background Note: Vietnam, id.*, at 9) As the result of the BTA, there has been an expansion of trade between the two countries, rising from \$2.97 billion in 2002 to \$16.6 billion in 2010. (*Id.*) The United States is Vietnam’s second largest trading partner after China. And in 2006, Vietnam was granted permanent normal trade relations (PNTR) status by the United States. (*Id.*) U.S.-Vietnam relations have been increasingly cooperative and broad-based since normalization. A series of bilateral summits have helped to improve ties. (*Id.*, at 12-13)

Still, human rights conditions in Vietnam are poor and continue to be a source of contention in U.S.-Vietnam relations. Despite laws protecting freedoms of speech and the press, the Vietnamese government has continued to restrict those freedoms, including control over the internet and limitations on citizen privacy rights. (*Background Note: Vietnam, id.*, at 13)

When traveling to Vietnam, foreign passport holders are required to both register to be permitted to stay in private home and must register with police when they stay overnight in locations outside of their homes. (*Background Note: Vietnam, id.*, at 15-16) The Vietnam government has encouraged visitation and investment by emigrants, but sometimes monitors them carefully. (*Id.*) Vietnamese security personnel may place foreign visitors under surveillance, and may monitor hotel rooms, phone conversations, fax transmissions, and email 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. Notwithstanding 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 of detained U.S. citizens, especially when the Vietnamese government considers the person to be a Vietnamese citizen. (*Id.*)

Security violations

Applicant committed several security violations between 2009 and 2010 while employed by his current employer. Charged with responsibility for leaving a building insecure in March 2009, he received a verbal warning and was briefed on proper handling of classified systems. (Tr. 38) Several days later, Applicant was detected with two safe combinations he had written on a piece of paper he placed in his wallet. (GE 2;

Tr. 38-40) For this security violation, he received a written warning and was briefed again on proper handling and storage of classified information. (GE 3; Tr. 40)

In January 2010, Applicant improperly transferred classified hardware from a remote campus building to another campus building without authorization from his command. One week prior to this incident (in December 2009), he was given a courier briefing on the proper methods for transporting classified material. (GE 3) Incident reports reveal that Applicant carried the classified material in a single-wrapped opaque envelope that his company provided for transporting classified materials between offices and labs on the main campus. (GE 3) This single-wrapped envelope did not meet double-wrapping and labeling requirements for transporting classified information. (GE 3) Records reveal that Applicant's mishandling of classified materials did not result in any compromise, or suspected compromise, of any classified information. (GE 3)

Based on a thorough review of the incident reports and Applicant's received statements, inferences warrant that none of the covered violations resulted from any knowing and wilful disregard of established procedures for protecting installations housing classified materials, or for transporting classified materials. (Tr. 38-40) However, each of his actions reflect carelessness and inattention to established procedures for protecting classified facilities and transported classified materials.

Endorsements

Applicant did not provide any endorsements from his employer or community. Nor did he provide any performance evaluations or other testaments to his overall judgment, reliability, and trustworthiness.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, revoked, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs. AG ¶ 2(a) is intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors:

(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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Handling Protected Information

The Concern: Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, or willingness and ability to safeguard such information, and is a serious security concern.

Foreign Influence

The Concern: 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 the this Guideline can and should considered 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. See AG ¶ 6.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is an electronics technician for a defense contractor who committed several security violations over a short period of time spanning March 2009 and January 2010. His reported violations reflect a pattern of careless and negligent safeguarding of classified facilities and materials under his control. Applicant was born and raised in Vietnam to parents of Vietnamese descent and became a naturalized citizen of the United States in 2009. Both his mother and older brother are citizens and residents of Vietnam, a country known for its improving U.S. bilateral relations and growing respect for the rule of law in their trade and commercial relations. Because of Vietnam's poor human rights record, it poses some heightened risks and additional security concerns about the status of Applicant's family members residing there.

Security violation concerns

Applicant presents with a long history of service to his current employer: almost 14 years. Beginning in March 2009, Applicant committed a series of security breaches in safeguarding buildings housing classified materials and transporting classified materials without required double wrapping. His actions reflect pattern instances of negligent building safeguarding and transporting of classified materials on his part, but no intentional disregard of security regulations and employer security requirements.

The importance of safeguarding classified facilities and materials cannot be overemphasized. Protecting the nation's security interests against the risks of foreign coercion and intimidation remains a core governmental responsibility that finds roots in the early federalist papers (*e.g.*, *Federalist No. 8 (Hamilton)*, "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates") and enjoys the sustaining force of the courts. *Cf. United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936). Put in geopolitical terms, national security policy implies a state of continuing readiness to take the necessary steps to maintain our national independence. *Cf. H. Lasswell, National Security and Individual Freedom* 51 (1950, reprinted 1971).

As a fiduciary of the Government with assigned administrative and courier responsibilities, Applicant was duty-bound to exercise not only personal accountability over the facility under his control, but prudent courier responsibility over his transporting of classified materials. Holding a personal security clearance draws upon the highest fiducial burdens imposed on persons with access to facilities covered by the National Industrial Security Policy Manual (NISPOM) and implementing DoD security regulations. These imposed security requirements enable the Government to rightfully claim strict adherence to governing trust responsibilities that justifiably inhere in the trust relationship extant between Applicant and DoD. *See Snapp v. United States*, 444 U.S. 507, 511n.6 (1980). Applicant can and should be held accountable for security violations that occur in his facility and which are caused by or result from his failure to properly safeguard building security and courier requirements. *See DISCR OSD No. 89-0781* (February 23, 1993).

Applicant's admitted security violations invite application of two disqualifying conditions of the AGs for handling protected information. DC ¶ 34(g), "any failure to comply with rules for the protection of classified or other sensitive information;" and DC ¶ 34(h), "negligence or lax security habits that persist despite counseling by management." Applicant's failure to properly secure his employer's buildings under his control and properly wrap the classified materials he transported from his facility collectively reflect a pattern of lax security measures and disregard of established rules for protecting buildings designed to store classified materials and wrapping/labeling requirements for transporting classified materials. Applicant committed these breaches of security despite his prior briefings and warnings on proper methods for safeguarding classified storage facilities and transporting classified materials.

Applicant claims little extenuation in his defense. That his security breaches were not intentional does not excuse him from an inferred pattern of negligent behavior and rules violations. Briefed and warned before and after the covered incidents (still of recent occurrence), he cannot credibly claim the absence of proper security briefing. On this record, Applicant cannot qualify for either MC ¶ 35(a), “so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;” MC ¶ 35(b), “the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;” or MC ¶ 35(c), “the security violations were due to improper or inadequate training.”

To Applicant’s credit, he has shown understanding and appreciation of his safeguarding mistakes and pledges to exercise improved protection and handling procedures in the future. But given his pattern of lax building protection and handling of classified materials he has demonstrated in the past, his assurances are not enough to surmount the serious concerns raised about Applicant’s safeguarding classified storage facilities and transporting classified and protected materials in the foreseeable future. Seasoning of Applicant’s compliance restoration efforts remains a legitimate Government expectation. And in his mitigation efforts, Applicant can claim no more than two-plus years of compliance with his company’s safeguarding and handling rules, practices, and procedures. In the final analysis, conclusions warrant that Applicant requires additional time to demonstrate his enduring commitment to safeguarding his classified buildings and transported classified materials.

From a whole-person perspective, Applicant has not provided any additional materials (such as endorsements and personnel evaluations) to better appraise his overall reliability and trustworthiness in safeguarding buildings and classified materials. Because of the special care requirements typically imposed on security violation assessments, positive endorsements and evaluations are always important in evaluating an applicant’s overall reliability and trustworthiness.

Taking into account all of the facts and circumstances surrounding Applicants’ covered security violations, Applicant does not mitigate security concerns over his record of mishandling building security and courier responsibilities entrusted to him in 2009 and 2010. Unfavorable conclusions warrant with respect to the allegations contained in subparagraphs 1.a through 1.c of the handling protected information guideline.

Foreign Influence concerns

Foreign influence concerns are raised, too, over the presence of members of Applicant’s family (*i.e.*, his mother and older brother) who are or have been citizens of Vietnam, a country historically beset with human rights issues and geopolitical tensions with the United States. Because Applicant’s mother and older brother are still citizens and residents of Vietnam, they present some potential security risks covered by disqualifying

condition (DC) ¶ 7(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,” of the AGs for foreign influence.

The citizenship and residence status of Applicant’s mother and older brother in Vietnam pose some potential concerns for Applicant because of the risks of undue foreign influence that could compromise sensitive or classified information under Applicant’s possession and/or control. Risks are considerably lessened, however, by the absence of any affiliations or contacts of family members with Vietnamese officials currently known to be associated with intelligence or military organizations interested in collecting proprietary or sensitive information in the United States.

Further, from what is known from the presented evidence, none of Applicant’s family members have any (a) political affiliations with the Vietnamese government or military, (b) history to date of being subjected to any coercion or influence, or (c) appear to be vulnerable to the same. Vietnam, although a country with reported human rights issues and human rights violations, enjoys an improving bilateral relationship with the United States, with a strong respect for the rule of law in the areas of foreign trade and commerce. While Vietnam has a documented record of illegal arrests and detentions, kidnaping, and human trafficking, it generally enjoys stable diplomatic and trade relationships with the United States.

The AGs governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical need be weighed on a case-by-case basis, guidelines are available for referencing in the country information about Vietnam.

Vietnam remains a valuable trading partner and a country with institutions that are increasingly compatible with our traditions and respect for the rule of law. The AGs do take into account the country’s demonstrated relations with the United States as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter. Vietnam, while reported to have terrorism, human rights, and human trafficking issues in certain parts of the country, is still a country with no known recent history of government-sponsored hostage taking or disposition for exerting undue influence against family members to obtain either classified information, or unclassified economic and proprietary data.

As for security concerns associated with the Vietnamese citizenship status of Applicant’s mother and older brother, any potential heightened risk of a hostage situation or undue foreign influence brought in the hopes of eliciting either classified information or economic or proprietary data out of Applicant through his family members residing in

Vietnam is quite remote. Applicant, accordingly, may take advantage of one important mitigating condition: MC ¶ 8(a), “the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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.”

MC ¶ 8(b), “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,” has application, too, to Applicant’s situation. Since immigrating to the United States in 1981, Applicant has demonstrated loyalty and professional commitments to this country. Whatever potential conflicts he may have through his prior dual Vietnamese citizenship and contacts with his family members in Vietnam have been more than counterbalanced by his demonstrated U.S. citizenship responsibilities. Any conflict risks are further reduced by the lack of any Applicant financial interests in Vietnam and corresponding material financial interests in the United States.

In appraising risks associated with Applicant’s Vietnamese family relationships, considerable weight is accorded Vietnam’s improving bilateral relations with the United States, the lack of any cognizable potential conflicts between Applicant and members of his family, the U.S. residency status of his family members, and the absence of any detectable Applicant financial interests in Vietnam (and corresponding material interests in the United States). When considered together, any risk of undue foreign influence on Applicant and his family members is insubstantial, and clearly not of the magnitude that could make them subject to a heightened security risk of coercion, pressure or compromise under the foreign influence guideline.

Whole-person assessment is helpful to Applicant in surmounting security concerns over his family members who are citizens and residents of Vietnam. Vietnam in balance presents no heightened country risks, and Applicant’s family members residing in the country do not place Applicant at any known risks of pressure or coercion.

Considering all of the facts and circumstances surrounding the continuing Vietnam citizenship and residence status of Applicants’s mother and elder brother, Applicant mitigates security concerns over the status of his family members residing in Vietnam. Favorable conclusions warrant with respect to the allegations covered by the foreign influence guideline.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE K (HANDLING PROTECTED INFORMATION):AGAINST APPLICANT

Subparas. 1.a through 1.c: Against Applicant

GUIDELINE B (FOREIGN INFLUENCE): FOR APPLICANT

Subparas. 2.a and 2.b: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge