



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



In the matter of:	)	
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	)	ISCR Case No. 11-04542
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

December 7, 2012

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**Decision**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for Sensitive Positions (SF 86), on September 13, 2007. (Government Exhibit 1.) On February 14, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B (Foreign Influence) and L (Outside Activities). 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on March 3, 2012, and requested a decision without a hearing. Pursuant to paragraph E3.1.7, Enclosure 3 of the Directive, Department Counsel requested that this case receive a hearing before an administrative judge. Department Counsel was prepared to proceed on April 25, 2012. I received the case assignment on May 11, 2012. DOHA issued notices of hearing on June 4 and July 30, 2012, and I convened the hearing as scheduled on August 28, 2012. The

Government offered Government Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf. DOHA received the transcript (Tr.) of the hearing on September 6, 2012. Applicant requested that the record remain open for the admission of additional documents until September 14, 2012. Applicant elected not to submit any further documentation. The record closed on September 14, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## **Procedural Ruling**

### **Request for Administrative Notice**

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Socialist Republic of Vietnam. (Tr. 14-18.) The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

## **Findings of Fact**

Applicant is 52, married, and has a Ph.D. in physics. He is employed by a defense contractor and seeks a security clearance in connection with his employment in the defense industry. Applicant admitted all of the allegations in the SOR. Those admissions are findings of fact. He also provided additional information to support his request for eligibility for a security clearance.

### **Paragraph 1 (Guideline B - Foreign Influence)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to manipulation or inducement to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or make him vulnerable to pressure or coercion.

Applicant was born in South Vietnam. He and his family escaped from Vietnam after the fall of Saigon, eventually settling in the United States. (Tr. 31-32; Government Exhibit 4.) Applicant attended college in the United States, and became a naturalized citizen in 1982. His wife is also a naturalized citizen, while his three children were all born in the United States.

Applicant worked for Company One from 1988 to May 2001. After several months of unemployment, he began working for his current employer, Company Two, in February 2002. (Government Exhibit 1 at 2-3.)

In 1995, through his wife, Applicant met a Vietnamese diplomat connected to their embassy. Eventually, this diplomat (Mr. A) asked Applicant to help the embassy

with a computer problem. This problem was in an area in which Applicant was knowledgeable. However, it was not an area connected to his employment with Company One. According to Applicant, he went and asked the Special Security Officer (SSO) at Company One for authority to meet the diplomat. Also, according to Applicant, the SSO gave him permission to continue the contact with the Vietnamese diplomat, but he was required to report any attempts to obtain any information. (Tr. 37-44.)

Having received what he felt to be sufficient authorization, Applicant began working with the Vietnamese embassy on this computer issue. He testified that his motivation was to allow the Vietnamese embassy to produce a professional product. (Tr. 61-63.) Applicant emphasized that he was not employed by the Vietnamese government and, indeed, received no compensation from them for his work. (Tr. 44-45.) Over the next 14 years, until 2009, Applicant worked extensively with the Vietnamese embassy here in the United States, as well as their embassies in two foreign countries. He also assisted the Vietnamese government in selecting the location for their consulate at a city in the United States. (Tr. 68-69.) He had frequent contact with Mr. A and other Vietnamese officials, as well as working many nights and weekends on this computer issue. (Tr. 49-51.) None of these contacts, travel, or other activities were ever reported to the SSO at Company One or Company Two. (Tr. 43-48.) Applicant stated that he did not feel his employers had a need to know of his work for Vietnam. (Tr. 74-75.) However, Applicant fully disclosed the activity to the Federal government during background investigations in 2002 and 2007. (Government Exhibits 1, 3, and 4.)

Applicant also had extensive personal relations with Mr. A. During two visits to Vietnam made by Applicant in, 2002 and 2004, he spent a substantial amount of time with Mr. A. While Applicant did inform his employer of his trips, he did not inform them of his relationship with Mr. A, who Applicant considers a friend. He testified that he was not required to report such contacts. (Tr. 54-58, 72.) Applicant testified that his supervisors and co-workers at both companies had knowledge of his activities with the Vietnamese government. (Tr. 59-60.) He was given an opportunity to supply documentation to support this contention. Applicant did not submit any such evidence after the hearing.

Applicant was contacted by a Special Agent with the FBI in 2009. Applicant stated in page 1 of his Answer:

Special Agent . . . hinted that, given my situation, I may be able to provide some unspecified help to the U.S. Government. When I asked, Special Agent . . . indicated that if I agreed to help, I should maintain the contacts and works. Otherwise, I should terminate them. I declined to help and I immediately terminated the contacts and works. My reluctance and, ultimately, my decision not to help were not a question of loyalty to the U.S. Rather, I understood that in order to help I would have to perform activities that would run against my character and personal beliefs. For this reason alone, I decline [sic] to help.

Applicant went on to say in his Answer, also on page 1, "Had I known that this contact was not permissible or even frowned [sic] upon by the US Government, I would not have started it or terminated it a long time ago." (See Tr. 28-30, 58-59, 63-68.) After his discussion with the FBI agent, Applicant discontinued the work and states he has had no further contact with the Vietnamese government or Mr. A. (Tr. 70-72.)

Applicant also stated that he has personal relationships with several other citizens of Vietnam. (SOR ¶¶1.d and 1.e.) Applicant's contacts with these persons are casual and infrequent. They do not have security significance. (Tr. 51-53.)

Finally, in 2002, Applicant stated the following:

I am loyal to the US, I would defend the US, against any country at war with the US except with VN [Vietnam]. I would apply for a conscientious objector status if US and VN were at war again however, I would never fight against the US, ever, under any circumstances, even if the US were at war with VN. I could never directly bear arms against the country of my origin but I would contribute to the US, effort through the job I hold. (Government Exhibit 4 at 5.)

## **Paragraph 2 (Guideline L - Outside Activities)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has been involved in outside employment or activities, as set forth under Paragraph 1, above, which could pose a conflict of interest with his security responsibilities, and create an increased risk of unauthorized disclosure of classified information.

## **Administrative Notice**

Applicant has contacts with Vietnam. Accordingly, it is appropriate to discuss the situation in that country at this time.<sup>1</sup> Vietnam is an authoritarian state ruled by the Communist Party of Vietnam. Since the establishment of diplomatic relations in 1995 overlapping security and economic interests have led the U.S. and Vietnam to begin to form a strategic partnership of sorts. However, the country's suppression of political dissent has continued to be a main issue of contention in relations with the United States. (See Administrative Notice Document I.)

## **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider

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<sup>1</sup>All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice and its attachments.

the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

### Paragraph 1 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows at 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.

The following Disqualifying Conditions apply to this case under AG ¶ 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; 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.

Applicant has not provided evidence showing that the following Mitigating Conditions under AG ¶ 8 apply to the security concerns raised under SOR ¶¶ 1.a through 1.c, given his particular background:

- (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.;

(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; 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 had extensive personal and professional contacts with the Vietnamese government, and a senior member of its foreign service, from 1995 to 2009. When required Applicant told the Federal government about his contacts and activities. He says both of his employers knew of his conduct, but he did not submit any evidence to support this statement. As noted above, the allegations in SOR ¶¶ 1.d and 1.e are mitigated under AG ¶ 8(c).

I have considered AG ¶ 8(d) "the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority." I have also considered the fact that it has been three years, according to Applicant, since he has had any relations with the Vietnamese government or Mr. A. Applicant stated that he had received permission for the contact with the Vietnamese government from Company One's SSO in 1995. There is no written evidence to corroborate this statement, and Applicant no longer remembers this person's name. He never checked in with that SSO again to inform him concerning the growing extent of Applicant's relationship with Vietnam. He also did not inform the SSO at his new employer of his Vietnamese contacts and his conduct, which included foreign travel and helping them choose a location for a consulate. This failure to do any follow-up with anyone in authority is strikingly naive, shows extremely poor judgment on the part of Applicant, or both. It is also possible that he thought his new employer would not want him to continue working for the Vietnamese government. It is obvious that the work meant a great deal to him for quite a long time. In either event, based on the state of the record, I find that this Mitigating Condition does not have application to this case.

Applicant states that he is a loyal and patriotic American citizen. There is no cause to doubt it. However, Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability.

Speaking now generically, at the end of the day, we are left with an applicant who established a close and continuing professional relationship with the foreign

government of his native land, which lasted for 14 years. This relationship required extensive personal contact with a senior diplomat of this foreign country. At the behest of this foreign country, he traveled to two other countries and worked in its embassies in those countries. He also helped this foreign country select the location for a consulate in this country. He developed a close relationship with the foreign diplomat, which Applicant describes as a friendship and entailed contact during visits of Applicant to his former home country. During this 14 year relationship, after receiving what he felt to be official approval, Applicant never notified the cognizant security officer of either of his two employers of the true extent of the relationship. Add into the equation the poor human rights record of Vietnam, and it can be seen that Applicant simply has not met his burden of submitting sufficient evidence to show it is clearly consistent with the national interest to grant him a security clearance. Paragraph 1 is found against Applicant.

## **Paragraph 2 (Guideline L - Outside Activities)**

The concern under this guideline is set forth under paragraph 36, "Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information."

In this case the Government has met its initial burden of proving by substantial evidence that Applicant has been involved in outside employment or activities, as set forth under SOR Paragraph 1, above, which could pose a conflict of interest with his security responsibilities.

The following Disqualifying Condition applies to this case under AG ¶ 37:

- (a) any employment or service, whether compensated or volunteer, with:
  - (1) the government of a foreign country;
  - (2) any foreign national, organization, or other entity; and
  - (3) a representative of a foreign interest.

As stated above, Applicant stopped all involvement with the Vietnamese government in 2009, three years ago, after being advised to do so by an FBI agent. Accordingly, AG ¶ 38(b), "the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities," applies and supports a finding for the Applicant on this paragraph.

## **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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guideline B and L analysis is applicable to the whole-person analysis as well. The evidence shows that the Applicant is a patriotic American citizen. However, he has been unable to sufficiently mitigate the fact that for 14 years, from 1995 to 2009, he had an extensive personal and professional relationship with the Vietnamese government. Using the whole-person standard, Applicant has not mitigated the security significance of his foreign connections and is not eligible for a security clearance.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in ¶¶ 1.a through 1.c of Paragraph 1 of the Government's Statement of Reasons. As stated above, Paragraph 2 is found for Applicant.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline C:	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.

WILFORD H. ROSS  
Administrative Judge