



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 06-26041
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Candace L. Le'i, Esquire, Department Counsel  
For Applicant: Kevin R. Hancock, Esquire

June 17, 2008

**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information must be granted.

Applicant submitted his Security Clearance Application (SF 86), on March 21, 2006. On January 4, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F, E and J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on January 22, 2008. He answered the SOR in writing through counsel on February 1, 2008, and requested a hearing

before an administrative judge. DOHA received the request on the same day. Department Counsel was prepared to proceed on February 20, 2008, and I received the case assignment on February 27, 2008. DOHA issued a notice of hearing on March 24, 2008, and I convened the hearing as scheduled on April 30, 2008. The government offered eight exhibits (GE) 1 through 8, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted three exhibits (AE) A through C, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 9, 2008. I granted the government's request to keep the record open to submit additional matters. I also requested additional evidence from Applicant. On May 2, 2008, the government submitted one additional exhibit which has been received and admitted as GE 9, without objection. On May 13, 2008, Applicant submitted two additional exhibits, which have been received and admitted as AE D and AE E, without objection. The record closed on May 15, 2008.

### **Procedural and Evidentiary Rulings**

#### **Motion to Amend SOR**

Department Counsel moved to amend the SOR by adding the following language to ¶ 1.b: "As of April 5, 2006, this debt had not been paid." and adding a new allegation as ¶ 1.f, alleging "You are indebted to {debtor} on an account that has been charged off in the amount of \$924 since about June 2000. As of April 5, 2006, this debt had not been paid." Applicant denied the allegation, but did not object to the motion, which I granted. The SOR is amended as requested. (Tr. at 11.)

#### **Findings of Fact**

In his Answer to the SOR, dated February 1, 2008, Applicant admitted the factual allegation in ¶ 2.a of the SOR, with explanation. He denied the factual allegations in ¶¶ 1.a through 1.f, and 3.a of the SOR.

Applicant is a 51-year-old corporate security manager for a Department of Defense contractor. He enlisted in the United States Army in 1981 and retired on permanent disability in 2000 as a sergeant first class (pay grade E-7). While in the Army, he held a top secret - Sensitive Compartmented Information (SCI) clearance, without any violations or allegations of violation of the rules and procedures for his clearance level.<sup>1</sup>

Applicant married his first wife in October 1990. Their daughter is 16 years old. They divorced in November 1999, and his daughter lives with her mother. He pays

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<sup>1</sup>GE 1 (Applicant's security clearance application, dated March 21, 2006) at 1, 7, 20-22; GE 2 (Interrogatories and answers) at 5; Tr. 34-35.

regular monthly child support. He married his present wife in November 2000. They have a four-year-old daughter.<sup>2</sup>

In 2003, Applicant and his wife argued after a long day when they were both tired and stressed. His wife threatened to call the police and he told her “fine”. She called 911 then hung up without speaking to the operator. Thirty minutes later the police arrived at their house. Under the state’s no tolerance law for domestic violence, the police advised that one of them would be arrested and taken to jail. Applicant volunteered. The police arrested him and he spent 24 hours in jail. At subsequent court proceedings two weeks later, the prosecutor asked the court to dismiss the charges, which the court did. Applicant requested his attorney to seek expungement of his criminal record. His criminal attorney filed a petition to seal his arrest and criminal record. The court granted the motion and ordered that his records be sealed on May 24, 2004. Thereafter, because of a concern about the impact of his arrest in the future, Applicant asked his criminal attorney what information, if any, he must reveal about his arrest if asked. His criminal attorney advised that since his record had been expunged (sealed), his arrest did not exist. The expungement meant that his arrest never happened.<sup>3</sup>

Applicant currently earns approximately \$75,000 a year. His wife works as a real estate broker and earns between \$90,000 and \$180,000 a year. At his security investigation interview in August 2006, he listed his gross monthly income at \$4,000 and his net monthly income at \$3,350 plus \$1,700 a month in military retirement. His monthly expenses, including mortgage, utilities, food, car payment, and child support, total approximately \$5,000. He and his wife keep their finances separate, so the full extent of household income and expenses is not known. In August 2006, a security clearance investigator interviewed Applicant. Until one hour before this interview, Applicant did not know he had unpaid debts.<sup>4</sup>

The record contains six credit reports with conflicting information. The government submitted three credit reports prepared by two of the credit reporting agencies, dated April 5, 2006 (Equifax), December 14, 2006 (Experian), and June 29, 2007 (Equifax).<sup>5</sup> In his response to the second set of interrogatories, Applicant provided two credit reports, one from Equifax, dated September 26, 2007 and one from Experian, dated September 27, 2007. Applicant submitted a credit report from all three credit reporting agencies, dated April 10, 2008. Applicant’s credit report submissions reflect a very good credit history and do not contain the debts listed in the SOR. The April 5,

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<sup>2</sup>GE 1, *supra* note 1, at 11-20.

<sup>3</sup>GE 3 (Second set of Interrogatories and Answers) at 3; GE 8 (State Criminal Records) at 1; AE C (May 24, 2004 Order) at 1; Tr. 53-61.

<sup>4</sup>GE 3, *supra* note 3, at 3-5; Tr. 36-39.

<sup>5</sup>GE 3, *supra* note 3, attachments; GE 4 (Experian credit report); GE 5 (Equifax credit report); GE 6 (Equifax Credit report); AE B (April 2008 credit report).

2006 Experian credit report shows all the debts listed in the SOR and the December 14, 2006 Equifax credit report lists many of the debts in the SOR, but not all. The June 29, 2007 Experian credit report lists only the debt identified in ¶ 1.c of the SOR. Except for the April 2008 credit report, all the credit reports contain a credit history for Applicant for at least 10 years. The June 2007 and September 2007 Experian credit report information conflicts with the information contained in the April 2006 Experian credit report. Likewise, the September 2006 Equifax credit report information conflicts with the December 2006 Equifax credit report information. The reason for the conflicting information is not clear or explained.<sup>6</sup>

Based on this evidence of record and Applicant's testimony, I make the following finding of facts. The debt contained in allegation ¶ 1.a belongs to Applicant. He states that he paid the debt, but has not provided proof of his debt. The letter from a creditor, dated May 6, 2008, does not provide information indicating the account number, the amount owed and paid, and the original creditor; thus, it is insufficient to show payment for this debt. The debt alleged in allegation ¶ 1.b is listed in the April 5, 2006 credit report only. Two other accounts with this creditor are paid and timely.<sup>7</sup>

After a careful review of the credit reports, I find that the allegations ¶ 1. c and ¶ 1.e are the same debt. Originally, the debt belonged to a bank. It totaled \$3,674 and became delinquent in June 2000. Based on the amount of the debt, in April 2001, the original bank sold the debt to another bank (P.F.), which assigned a new account number to the debt. Based on this account number, bank P.F. sold the account to bank 3, which sold the account to the current debt holder in November 2006. A letter from the current creditor (identified in allegation ¶ 1.e) contains the account number of the original creditor, but refers back to the third bank purchaser. The debt now totals \$6,982, without an explanation for the basis for the new balance. Applicant credibly testified that he verbally requested specific information about this account, including the original creditor and the nature of the charges.<sup>8</sup> The current creditor failed to provide this information in its letter of September 6, 2007; rather, it requested payment in full. This creditor has not filed an action in court to obtain a judgment and collect its debt. From this failure, I infer that the creditor knows that the claim is barred by the statute of limitations and lacks supporting documentation for its claim. At least one credit reporting agency shows this debt as paid. Likewise, the other creditors have not sought recovery of the alleged debts through legal process.<sup>9</sup>

The debt listed in allegation ¶ 1.d is not sufficiently identified for Applicant to determine the original creditor, the actual amount of the debt, and the basis for the debt.

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

<sup>7</sup>GE, 3, attachments; GE 4; GE 5; GE 6; AE E (Letter, dated May 6, 2008); Tr. 39-40.

<sup>8</sup>Applicant might have received a response if he had put his dispute in writing.

<sup>9</sup>GE 3 attachments; GE 4 at 2, 7; GE 5 at 1; GE 6 at 1; AE B at 4.

Finally, the debt identified in allegation ¶ 1.f is listed in the April 5, 2006 as sold to another creditor. This debt is not listed in any later credit reports. I infer that since the debt was sold to another creditor, it was mistakenly listed in Applicant's credit report. Applicant denies knowledge of all the debts except the first debt. He admits having a credit card with the bank listed in allegation ¶ 1.c, but states he paid the account and closed the account. Applicant acknowledged these debts could have been established in his first marriage, but he has no knowledge or recollection that the accounts were acquired in his first marriage. He credibly testified that he verbally requested information from the creditors about the nature of the debts owed to determine if the debts are his.<sup>10</sup>

When Applicant completed his security clearance application, he answered "no" to question f in Section 23: Your Police Record. He answered "no" based on the advice given to him by his criminal attorney in 2004.<sup>11</sup>

The record contains two possible social security numbers for Applicant. In the SF-86, he lists his social security number and his military service/ certificate number. The third digit of his military number is different than the third digit of his social security number. Otherwise both numbers are the same and are listed on his credit reports. I find that these numbers belong to Applicant.

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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

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<sup>10</sup>GE 3, Creditor letter, dated May 6, 2008 and attachments; GE 4, GE 5, GE 6; AE B; Tr. 84-86.

<sup>11</sup>GE 1, *supra* note 1, at 24; Tr. 56-62, 111-116.

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 F, Financial Considerations**

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

In the instant case, Applicant has denied owing the debts listed in the SOR. The government bears the burden of proving by substantial evidence that Applicant owes the debts listed. The record contains six credit reports, which provide conflicting information about his past debts and credit history. All of the reports, except the most recent, contain a lengthy credit history for Applicant. The 2007 and 2008 credit reports reflect an excellent credit history for the last 10 years or more. Given the existence of a 10-year credit history in the reports prepared by Experian and Equifax, the absence of

some of the debts listed in the SOR can not be explained as dropped from the report due to age. The inconsistency in the information provided by Experian and Equifax in the 2006 and 2007 credit reports is not explained. In light of his lack of knowledge about these debts and the lack of substantive information in these credit reports about the source and type of debts, the reports are not sufficient to establish that Applicant owes the debts alleged in SOR ¶¶ 1.b, 1.d and 1.f. Thus, the government has not met its burden of proof as to these allegations.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant acknowledged the debt in SOR allegation ¶ 1.a and the evidence indicates that the debt in SOR allegation 1.c belongs to Applicant. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” Applicant’s two debts occurred in 2000, shortly after his divorce from his first wife. Applicant has not incurred any delinquent debt since this time. With his present income level and payment history, there is little likelihood that he will have debt problems in the future. This mitigating condition has some applicability.

Under AG ¶ 20(b), it may be mitigating where “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.” As noted above, Applicant’s financial problems arose shortly after his divorce in 1999 and may be related to unknown accounts from his previous marriage. He has requested information to determine if these debts are his. He has acted reasonably in requesting information about debts unknown to him. I find this potentially mitigating condition has some applicability in this case.

Evidence that “the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not received counseling nor has he resolved these two delinquent debts. Applicant has sought information to determine if these debts are his, but the creditors have refused to provide him with information. The credit reports indicate Applicant’s finances are under control. I conclude that these potentially mitigating conditions apply partially.

Finally, AG ¶ 20(e) “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue” has partial applicability. Applicant credibly testified to telephone contacts to the creditors, as shown by the September 2007 letters from one creditor. That creditor has refused to provide him with detailed information about the old debt it wants him to pay. Except for the creditor listed in allegation ¶ 1.a of the SOR, the remaining creditors have not responded to his verbal requests for information on the debt.

He also receives some credit in the whole person analysis, *infra*, for the application of the state’s 6-year statute of limitations, which applies to the debts listed in SOR allegations 1.a and 1.c.<sup>12</sup> Under state law, the creditors are time barred from collecting these debts See State Code. Ann. §13-80-103.5.<sup>13</sup> Elimination of these delinquent debts through the statute of limitations has ended his potential vulnerability to improper financial inducements related to these debts as he no longer has any legal responsibility for these debts. The fact that these debts are very old and not collectible under state law may not negate his past conduct in not paying these outstanding debts, a factor I must consider.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct::

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.

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<sup>12</sup>The debts not established as Applicant’s are also barred by the state’s statute of limitation.

<sup>13</sup>A State Court of Appeals, in another jurisdiction, succinctly explained the societal and judicial value of application of the statute of limitations:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence and promote repose by giving security and stability to human affairs. The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be ha[ld] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system.

*Carolina Marine Handling, Inc. v. Lasch*, 609 S.E.2d 548, 552 (Ct. App. 2005) (internal quotation marks and citations omitted).

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(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;

The government established that Applicant omitted material facts from his SF-86 when he answered “no” to Question f in Section 23 about his past criminal record. This information is material to the evaluation of Applicant’s trustworthiness to hold a security clearance and to his honesty. For this guideline to apply, Applicant’s omission must be deliberate. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s intent or state of mind at the time the omission occurred.<sup>14</sup> For DC ¶ 16 (a) to apply, the government must establish that Applicant’s omission, concealment or falsification in his answer was deliberate.

At the time he completed his SF-86, Applicant knew he had been arrested for domestic violence following an argument with his wife in 2003. Given his long experience in security work, he knew this information was relevant to his background investigation. He deliberately falsified his answer to this question. The government has established its case.

AG ¶ 17 provides conditions that could mitigate security concerns:

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to 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.

Following his arrest in 2003 and the dismissal of the charges by the prosecutor, Applicant asked his criminal attorney to petition the court to expunge his record. In May 2004, the court sealed his arrest and criminal record. Because he knew his arrest may have a negative impact on future jobs, Applicant asked his criminal attorney if he had to provide any information about his arrest since his record had been expunged. His counsel told him he did not have to discuss the arrest because the expungement meant

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<sup>14</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

it never happened. Thus, Applicant understood that when his record had been expunged, he had no past criminal record. Applicant thought expungement and sealed meant the same thing. To his detriment, Applicant relied upon the incorrect advice of his criminal attorney and did not list his 2003 arrest. He has mitigated the Guideline E security concern.

## **Guideline J**

In light of my finding under Guideline E, the government has not established its case under this guideline.

## **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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Until his divorce in 1999, Applicant had excellent credit. Shortly thereafter in 2000 and unbeknownst to him, problems developed with his credit because several debts had not been paid. Outside of this year, the record shows that Applicant timely paid his debts and continues to do so.

Applicant sought information from the creditors about the debts listed in the April 2006 credit report so that he could understand what type of debts he owed, the source of the debts, and his actual liability for the debts. The creditors have refused to provide him with this information, most likely because the listed creditors do not have the information requested. The same creditors have failed to use the legal process to obtain a judgement, in part for the same reason. Applicant's failure to pay these old debts is not because of neglect but because of lack of knowledge about the existence of the debts. When he learned that he had these debts in 2006, he requested additional

information for the purpose of determining if the debts were his, a reasonable request on his part. He cannot be faulted for the refusal of the creditors to provide him with the information requested.

Applicant held a top secret-SCI clearance for many years without incident. There is little likelihood that he can be pressured or coerced because of these unpaid debts. Department Counsel's argument that these debts may have occurred during his first marriage is speculative, and thus, insufficient to establish that the debts are his. He received extensive training and has a good record of commendable duty performance during and after his military service. He is married and has one daughter living with him. As a result, he has focused his attention on providing a stable domestic environment for his family. Of course, the issue is not simply whether all his debts are paid – it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. While some debts remain unresolved, they are insufficient to raise security concerns. His finances are stable and his monthly bills are paid in a timely manner. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

### **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 F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 3.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 eligibility for a security clearance. Eligibility for access to classified information is granted.

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MARY E. HENRY  
Administrative Judge