



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



In the matter of:)	
)	
)	ISCR Case No. 23-01015
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: Matthew Thomas, Esq.

11/04/2024

Decision

HYAMS, Ross D., Administrative Judge:

Applicant did not provide sufficient information to mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 11, 2022. On June 23, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations). Applicant answered the SOR on July 7, 2023, and requested a hearing before an administrative judge. The case was assigned to me on June 10, 2024.

The hearing convened on September 26, 2024. Department Counsel submitted Government Exhibits (GE) 1 and 2, which were admitted in evidence without objection. Applicant submitted Applicant Exhibits (AE) A-M, which were admitted in evidence without objection. I held the record open for two weeks after the hearing to provide Applicant with the opportunity to submit additional documentation, and he submitted AE N-U, which were admitted without objection.

Findings of Fact

Applicant admitted the single SOR allegation. His admission is incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following additional findings of fact.

Applicant is 43 years old. He was married in 2003. He has one adult child. He earned a bachelor's degree in 2003. He has worked for a government contractor as a software engineer since 2021. He previously held a security clearance for about ten years. (Tr. 18-20; GE 1)

SOR ¶ 1.a alleges that Applicant owes the IRS \$77,570 in delinquent taxes for tax years 2009-2013, and 2017.

Applicant reported his financial problems started in 2008. His wife took a fellowship in another city, a location that had a high cost of living. The fellowship lasted four years, and she was only able to earn a yearly stipend of about \$20,000, which did not cover her rent or living expenses. He was earning about \$80,000 annually and had to assist her and maintain their regular expenses at home. (Tr. 20-69)

As a result of this financial burden, Applicant was unable to pay what was owed for their 2009 federal income taxes. Their home state does not have income taxes. He had the same issue in 2010. He decided a better paying job would solve the problem. In 2011, he started a new job as a 1099 employee, and while it looked like he was going to earn more, he did not understand the tax implications. Once he realized that federal income taxes were not being withheld from his pay and the resulting tax consequence, he started looking for a new job. He did not file federal income tax returns for the years he could not afford to pay the taxes owed. (Tr. 20-69)

In 2013, Applicant obtained a regular salaried job, and hired a tax professional to assist in filing missing returns and to adjust paycheck withholdings. He worked with this professional until 2020. In 2013, he also sought consumer credit counseling because he had acquired a large amount of consumer debt and was behind on the family's mortgage. In 2013, they incurred unexpected home repair and homeowner association costs. (Tr. 20-69)

Applicant and his wife had been unable to have children. She started a new job in 2014, which covered some in vitro fertilization (IVF) costs. They incurred about \$15,000 in IVF costs that year. His wife turned 35 in 2015, which is considered an advanced maternal age to have a child, and the IVF rate of success is greatly reduced. They spent at least \$10,000 annually on IVF costs from 2015 to 2018. They also had additional unexpected home expenses during these years, including air conditioner replacement. (Tr. 20-69)

Applicant reported that their IVF costs and home repair costs prevented them from being able to pay their existing federal income tax debt and their taxes for 2017 as well.

He eventually adjusted their W-4 forms to minimize their exemptions. This caused them to overpay taxes in their biweekly paychecks, and the IRS applied the refund amounts to their back taxes when they filed returns. (Tr. 20-69)

In 2019, Applicant's wife started a new job, and their IVF costs were about \$16,000. In 2020, their health insurance changed and his wife turned 40 years old. They had to replace their roof for about \$15,000 and had \$30,000 in IVF costs. In 2021, they had \$22,000 of IVF costs. That year his wife was diagnosed with a condition that would make it hard to get pregnant. After the diagnosis they gave up on IVF. (Tr. 20-69)

In 2022, their health insurance offered new IVF and fertility health coverage. They were told they had no more than a 15% chance of success, and the rate of success would drop every month. They had about \$3,000 of IVF costs. After more attempts, they decided a surrogate was their only option. They spent \$60,000 to start the match process with a surrogate agency. They also had additional home expenses of about \$10,000. (Tr. 20-69; AE G)

In 2023, they matched with a surrogate. Their costs were \$125,000 and her medical expenses, which exceeded \$10,000. It was determined that she would not be a successful surrogate, so the process started over again. A second surrogate had \$20,000 of medical costs. This surrogate was able to become pregnant, and she is due soon. However, in mid-2023 his wife was diagnosed with a serious medical condition which requires significant medical intervention. (Tr. 20-69; AE H, I)

Applicant estimated that they spent about \$300,000 on the IVF and surrogacy process. He resolved their consumer debts and mortgage delinquency over the years, but not their tax debt. They have not owed new tax debts to the IRS since 2018. They failed to timely file their federal income tax returns from 2009 to 2014, but all their filings since have been timely. They currently owe past-due taxes for 2009, 2010, and 2012 which total about \$62,000. (Tr. 20-93; AE A, C, U)

Applicant and his wife jointly earn about \$330,000 annually. They have about \$5,000 left over after their monthly expenses. Applicant reported that he saved about \$20,000 to apply to their tax debt but will not send it until his wife's health issues are resolved. He claimed that he has already paid the IRS about \$20,000 towards their back taxes. This amount was mainly from recaptured refunds. He submitted evidence showing that he has made four tax payments, totaling \$5,210, since March 2020. (Tr. 70-93; GE 2; AE B, O, Q, R, S, T)

Applicant claimed that he tried to set up installment agreements with the IRS in 2014 and 2023, but the monthly amounts they required were too high to agree to. In March 2024, he and his wife also submitted abatement requests to reduce their tax burden, which have not yet been decided. They continue to pay their back taxes owed through recaptured refunds. In 2023, about \$20,000 was taken from a refund they were owed and applied to their tax debt. (Tr. 70-93; GE 2; AE B, O, Q, R, S, T)

Applicant estimated that they spent about \$185,000 for surrogacy costs in the last 12 months. He took out a home equity loan to pay some of these expenses. He acknowledged that his finances are still uncertain considering his wife's medical costs and the expenses of a new baby. After his wife recovers, he plans to use the \$20,000 he saved for his overdue taxes and make monthly \$5,000 tax debt payments until it is resolved. In addition to the financial documentation, he submitted his 2022 work performance review, evidence of recognition and awards at work, and a character letter. (Tr. 70-106)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider 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 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 national security eligibility will be resolved in favor of the national security."

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 safeguard classified information.

Such decisions entail a certain degree of legally permissible extrapolation of 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 F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018).

The guideline notes conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The financial considerations security concerns are established by the tax records and Applicant’s admissions. AG ¶¶ 19(a), 19(c) and 19(f) apply.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

(a) 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;

(b) 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

AG ¶ 20(a) does not apply. Applicant failed to provide sufficient documentation showing that his tax issues are being resolved through a formal payment process, or that his tax problems occurred under such circumstances that they are unlikely to recur. His unresolved tax debts are long-term, ongoing, and unresolved. This continues to cast doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 20(b) does not apply. There is insufficient evidence to show that Applicant's financial problems occurred under circumstances beyond his control, and that he acted responsibly under the circumstances. The IVF and surrogacy costs are not unexpected medical emergency expenses or beyond their control. Their home repair costs may have been inconvenient but were typically the kind of expenses that homeowners incur with an aging home. Moreover, Applicant failed for several years to exercise due diligence and to file his tax returns, even if he was not able to pay what he owed.

AG ¶ 20(g) does not apply. Applicant submitted limited evidence that in 2014 and 2023 he had payment plan discussions with the IRS. He also made four payments in the last four and a half years, totaling \$5,210. Most of the progress in reducing their tax debt over the last 15 years has been attributable to IRS recapture of their income tax refunds. Relying on refund recapture does not constitute an arrangement to resolve or a good faith effort to resolve a tax debt.

Since 2008, Applicant and his wife have made some poor financial decisions and incurred costs associated with home ownership. They have also spent about \$300,000 on IVF and the surrogacy process. However, given their substantial income these costs have not prevented them from timely filing their federal income tax returns, making arrangements to pay taxes due or voluntarily making payments on their large federal tax debt. A person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).*

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(d):

(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 considered his character letter, and work performance documentation. I have incorporated my comments under Guideline F in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility for a security clearance. He did not provide sufficient evidence to mitigate the financial considerations security concerns. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for eligibility for access to classified information in the future.

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:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Ross D. Hyams
Administrative Judge