DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 06-19030
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Richard Allen Stevens, Esquire, Department Counsel
For Applicant: *Pro Se*

March 6, 2008

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Decision

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RIVERA, Juan J., Administrative Judge:

Statement of the Case

Applicant submitted Security Clearance Applications (SF 86) on April 8, and July 1, 2004. On May 2, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).[1]

Applicant answered the SOR on June 4, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on August 22, 2007. The Notice of Hearing was issued on August 24, 2007, convening a hearing on September 26, 2007. On September 5, 2007, Applicant requested a postponement to a date not

[1] 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.

earlier than October 24, 2007. I granted a delay and rescheduled the hearing for October 16, 2007 (Tr. 23). The hearing was convened as rescheduled.

The Government presented two witnesses and 49 exhibits, marked GE 1-49. GEs 1-41 are substantive exhibits. GEs 12, 14, 15, 16, and 18 were admitted over Applicant's objection. GE 42 (comprised of eight documents) was considered for administrative notice purposes. GEs 44-47 were admitted over Applicant's objections for the limited purpose of rebuttal. I gave GEs 44-47 little or no weight since they are agent summaries of interviews conducted by government investigators and neither the interviewees nor the interviewer testified at the hearing. I gave GE 49 no weight since it is an opinion/conclusive memorandum.

Applicant testified on his own behalf, and presented two witnesses and 12 exhibits, marked AE A-L. (Most of these exhibits are comprised of numerous tabs with several documents under each tab. The following documents were admitted over Department Counsel's objections: (1) AE A, two page document entitled "[Applicant's] Legal Defense Fund;" (2) AE B, at Tab 8, a letter dated Aug. 23, 1993 and its attached affidavit; (3) AE C, at Tab 12, a two page unsigned, handwritten letter, addressed "To whom it may concern;" (4) AE C, at Tab 13, a letter dated Nov. 12, 1990, and a letter signed by [J.L.B]; and, (5) AE C, at Tab 16, Applicant's letter dated May 25, 1991. The following documents were not admitted: (1) AE B, Tab 4, to the first two pages (unsigned, undated notes allegedly prepared by then Applicant's trial attorney); (2) AE B, at Tab 7, the polygraph results; (3) AE C, at Tab 14, a one page document entitled "In the High Court of Justice Chancery Division;" (4) AE D, Tab 17, the last one-page document signed by [J.G.].

I kept the record open until October 31, 2007, to allow Applicant time to submit additional matters. He timely submitted AE K and L. AE L was admitted over the Government's objection. (AE L is comprised of the second half of his five inch binder of documents which were provided to me at the hearing, but not identified for the record. It begins at the yellow tab identified as "Detailed Rebuttal – Import/Export Case"). The record closed on October 31, 2007. Applicant submitted Appellate Exhibit 4 on November 10, 2007, and it was not considered. DOHA received the transcript (Tr.) on October 31, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated June 4, 2007, Applicant admitted the factual allegation in SOR ¶¶ 1.a and 1.b, with explanations. He denied all the remaining SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 62-year-old aeronautical engineer. He received a Bachelor of Science degree in Aeronautical and Astronautical Engineering in 1968. He completed his Master's of Science degree in Mechanical Engineering in 1973, and his Master's in

Business Administration in 1975. He started his doctorate studies but stopped short of completing his thesis due to work considerations. He does not have a Ph.D. (Tr. 10-11).

After college, Applicant worked for several defense contractors and received access to classified information at the secret level from around 1968 to 1984, and from 1987 to 1990. Applicant married his wife in 1966, and they have three adult daughters, ages 36, 33, and 23.

In 1984, Applicant was enticed to leave an important position with a major aerospace defense contractor to accept an attractive employment offer from a large international corporation (IC) (a privately held, foreign corporation with a headquarters in the United States), which was also a major U.S. defense contractor (Tr. 164-165). IC was primarily engaged in the design, manufacture, sales and brokering of sales of medium to high technology, electronic military equipment and systems for domestic and international customers.

When Applicant was hired in 1984, IC's president/owner told him that IC was working covertly but legally in a highly classified program with a government agency to supply a foreign country (FC) with defense components (Tr. 165).[2] Applicant was directed to keep secret his knowledge of the export program and that he would have neither access to nor involvement on that part of IC's business. Applicant claimed that on several occasions he met with and was debriefed by government agents concerning the FC. Because of these meetings, Applicant believed IC had secret U.S. government authorization to import/export to FC defense components (Tr. 170-173).

From 1984 to 1986, Applicant was the Vice President of an IC subsidiary (ICT), and the President of ICT from 1986 to March 1987. He was demoted in March 1987, but continued to work for IC. In his capacities at ICT, Applicant supervised the international marketing of weapons as well as weapons programs for IC and headed a missile program. This program contemplated the sale to another foreign country (FC2) of an FC anti-armor missile upgraded with U.S. components and technology. The missile program was to be portrayed publicly as the sale by IC of a European developed missile system. There is no evidence as to whether Applicant or his company ever applied for the required licenses. IC was to receive a 35% commission on a contract expected to be valued at $300 to $500 million.

Applicant's Criminal Trial in U.S. District Court and Appeal

Applicant knew that the import or export of defense articles and services to and from FC required a U.S. government license or written authorization (GE 29).[3] In 1985,

[2] AE B, Tab 1 (letters dated December 1992 and January 1993, from IC's owner and director corroborate Applicant's testimony).

[3] In the 1960s, the United States prohibited the sale of items for use in combat or training by the military or police to FC. In the late 1970s, U.S. law prohibited the import or export of military articles without a license or written authorization. In the mid 1980s, an Executive Order barred the importation

Applicant asked two government agencies to sponsor the importation of FC' missiles into the United States, but both agencies refused (Tr. 268-272).[4] Applicant and IC did not request the permits and licenses required to import the missile dummies. Instead, Applicant attempted to avoid the U.S. law provisions by importing the missile dummies through another country.

Prior to shipping the missiles to the United States, Applicant consulted with government experts and several lawyers (Tr. 283), who advised him that if there was a "value-added" to the missiles in a country different than FC, the missiles then would be legally considered as originating from the country where the additional value was added (Tr. 268-269, 283).[5]

FC's missile dummies were shipped to another country (FC2), where they were substantially modified (value was added).[6] In 1986, Applicant imported FC's missile dummies and parts for the purpose of conducting platform fit and safety tests (Tr. 165) as if FC2 was the country of origin. Applicant established the validity of the "value-added" concept through statements made by a former Commissioner for the U.S. Customs Service and a former Bureau of Alcohol, Tobacco, and Firearms (ATF) Director (AE B, Tab 4).

Applicant testified he never intended to violate U.S. law and that he was innocent of the conspiracy charges. He had a good-faith belief that the missiles were properly classified as originating from FC2, and as such, the importation of the missiles was not in violation of U.S. law.

Concerning the exportation of missile components (munitions parts) to FC, Applicant claimed he was never involved with that aspect of IC's operation (Tr. 277), and that had a good-faith belief that IC had U.S. government authorization to do so. He based his good-faith belief on representations made to Applicant by his boss (the President of IC (G), and the leader of the alleged conspiracy, about IC's work with a government agency, and IC having U.S. government's approval for the exportation of parts to FC (Tr. 170-173). G also provided Applicant a letter stating that Applicant had no knowledge of, and was not involved in any of the offenses for which he (G) was convicted, that G never discussed any of the conspiracy issues with Applicant, and that

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into the United States of defense articles and services originating from FC. In October 1986, additional U.S. law prohibited the import of defense articles and manufacturing data from FC, and the export of defense articles and technology to FC.

[4] *See* AE B, Tab 2; and Detailed Rebuttal documents, TAB 19, last page.

[5] *See* AE B, Tab 4. The value added concept provides that: "when multiple countries have provided components for an article that is to be imported into the United States, if the last country of export has substantially transformed (an increase of 35% in labor and material costs to the pre-transformation value of an object) the article in question, then that country and the manufacturer in that country are properly designated as the country of import and manufacturer for Customs purposes."

[6] Tr. 289, AE B, Tab 4.

Applicant's position did not require him to be involved with the conspiracy (AE B, Tab 1). Applicant also presented a letter from IC's Vice-President (convicted conspirator) stating Applicant had no knowledge of and was not involved in the conspiracy to violate U.S. law (Tr. 305; AE B, Tab 6, summary of interview dated Nov. 16, 1999).

Applicant was acquitted of the conspiracy to provide missile flight technical information to FC corporations. Applicant had ordered the wind tunnel testing of FC's missile dummies. However, he had specifically instructed subordinates not to disclose technical data to FC personnel and not to allow FC personnel to participate in the testing (Tr. 300-305, AE B, Tab 6; GE 30). Another IC employee confessed to providing FC with the results of wind tunnel testing conducted in the United States (Tr. 297, AE B, Tab 5, [B's] statement, dated Nov. 18, 1992).

In October 1989 and April 1990, Applicant started cooperating with government prosecutors investigating IC's conspiracies (Tr. 496).[7] At the time of these interviews, Applicant believed he was a cooperating witness in the conspiracy to violate U.S. law and fraud investigations and did not expect to be indicted (GE 42)[8].

During the same period, however, Applicant was audited and became the subject of a tax fraud/evasion investigation concerning his income tax returns for tax years 1984-1987. Applicant did not ask for immunity to provide information or testimony concerning IC's conspiracy to avoid U.S. laws or fraud investigation. However, he asked for immunity concerning any possible tax fraud/evasion charges in exchange for his testimony in the IC conspiracy and fraud prosecution.

In 1991, Applicant was indicted and charged with three conspiracy counts. In December 1992, Applicant was convicted of the first count which alleged a conspiracy to violate U.S. law by aiding FC to evade U.S. law by exporting U.S. missile components to FC, and by aiding in the illegal importing of dummy missiles from FC to the United States for testing and evaluation. Count two was dismissed by the government before trial. Applicant was acquitted of count three - the illegal exportation to FC of technical data and information derived from U.S.-based flight testing of missiles originally produced in FC. In July 1998, Applicant was sentenced and later served approximately 24 months' incarceration.

In August 2002, Applicant's conviction was vacated and set aside because of ineffective assistance of counsel. His trial attorney failed to investigate, interview, and call witnesses favorable to Applicant's defense at trial. The government elected not to prosecute him again.

[7] IC had created numerous fictitious (shell) companies for the purpose of inflating the number of contracts and sales, and making IC look larger and more profitable than it was (Tr. 433-434). Applicant was not involved in these fraud allegations. His evidence suggests he refused to participate in the fraud.

[8] *See United States v. Jasin*, NO. CR. A. 91-602-08 (E.D.Pa.) at 35-40 (August 8, 2002).

Applicant started working for a defense contractor in April 2003. He was granted interim access to classified information at the secret level in April 2004. His access was withdrawn in May 2007 pending the adjudication of the security concerns outlined on the current SOR (Tr. 571).

Allegations of Tax Fraud

Applicant was charged in August 1995 with a count of tax evasion in violation of 26 U.S.C. § 7201 and one count of filing a false tax return in violation of 26 U.S.C. § 7206(1) (SOR ¶ 1(b)). Both counts were dismissed by the government in November 1995, because the statute of limitations had lapsed. Applicant alleged these charges were brought against him by federal prosecutors as leverage to force him to testify against IC personnel involved in the conspiracy to violate U.S. law and corporate fraud, and to force him to plead guilty of the conspiracy charges (Tr. 180, 277) .

SOR ¶ 2(a) also alleged Applicant intentionally filed fraudulent income tax returns for tax years 1984 to 1987. The Government's evidence established that from 1984 to 1987, Applicant received yearly income between approximately $150,000 and $300,000, filed his income tax returns, and paid no income tax for tax years 1984 to 1987.

The Government contended that during the alleged tax years, Applicant evaded paying taxes by filing false Schedules Cs (depreciation) and Es (business deductions) with his income tax returns; that Applicant falsely claimed to be involved in real estate ventures and construction business using several fictitious companies to deduct personal expenditures for the remodeling and/or renovation of his residence and to avoid the payment of taxes. Specifically, the Government tried to establish that Applicant falsely included in his Schedule C depreciation expenses for a vehicle (Jeep) owned and depreciated by his employer and given to Applicant for his use and that he depreciated three additional vehicles he owned by claiming they were used by him and his family to conduct business for his fictitious companies.

After reviewing several Internal Revenue Service (IRS) audit reports challenging Applicant's tax filings for 1984-1987, and excerpts of Applicant's tax returns for the same years, the Government's expert witness could not determine from these documents whether Applicant illegally avoided paying taxes or whether he filed fraudulent income tax returns (Tr. 100-113). However, the Government's witness opined that if Applicant's companies were fictitious and/or if Applicant depreciated vehicles that did not belong to him, then any income tax returns claiming business expenses incurred by the fictitious companies and/or the depreciation of vehicles or things used in the business of the company were fraudulent.

Applicant claimed that his state law allowed him to do business using fictitious company names.[9] He stated he speculated in real estate on his spare time with the help

[9] AE C, Tab 11.

of several of his family members, including his parents, wife, daughters, and his daughter's friends (Tr. 309, 458-459). He claimed the vehicles he depreciated were used by him and his family to search for possible investment properties (Tr. 471-476). Applicant introduced several statements of people who knew him and that lived close to his residence, to show he was involved in the construction business and real state investment. He presented some evidence to corroborate his assertions (Tr. 318; AE C, Tab 11, 13).

Applicant claimed that from 1985 to 1987, he considered his residence an investment property, and that he had his residence for sale on several occasions. He introduce pictures of his residence with posted "For Sale" signs, to show he attempted to sell it. He explained that as the director of an international company (ICT), he always expected to relocate either to London or Washington, D.C. (Tr. 315-316).[10]

Applicant purchased his residence in April 1985 (GE 8), and has lived in it since then. Applicant's residence is located on a corner lot. He used two different addresses to identify the same property. He used one address to identify his home of residence. He used the second address (the cross street address) to identify the address of several of his fictitious companies, his rental property, and the place where he stored construction materials for his businesses (Tr. 449, 467).

In his 1984-1987 income tax returns, Applicant depreciated his residence, as if it was a rental or investment property, using the cross street address to distinguish his rental property from his residence. Applicant explained he had divided his residence into two separate living structures, and that he rented one side of his residence to his brother (Tr. 468). In the same return, he claimed mortgage interests paid, presumably for the rented property. He could not explain how he arrived at the mortgage interest claimed in his income tax returns (Tr. 448).

Except for two real estate contracts Applicant signed made in July 1984 and March 1985 (GE 6 and 7, respectively) for the purchase of lots of land to build a house, and the purchase of his residence, Applicant presented little evidence to show that during the period in question he owned, rented, or entered into any contracts for the purchase of real estate property. During the same period, Applicant performed extensive renovations and repairs on his residence while living on it (Tr. 450-456). Except for his testimony, Applicant presented no evidence to show he divided his residence into two dwellings. He presented no business records, employee records, or documentation of expenses for his fictitious companies. His evidence is insufficient to show that any of his fictitious companies conducted any bona fine business activity to support his depreciations and deductions.

[10] Included in AE C, Tab 12, are statements corroborating Applicant's testimony that IC was looking into establishing an office in Washington, D.C. However, IC, the parent corporation of Applicant's company, was headquartered and located in the same county and state where Applicant purchased his home. Applicant lived five miles away from his place of work.

Regarding the Jeep he depreciated, Applicant claimed he originally purchased the Jeep, that his employer reimbursed him the value of the vehicle (they promised him a company car), and that later he bought the vehicle back from his employer. He claimed he paid his employer using a personal check. Applicant presented no documentary evidence to corroborate his claims (Tr. 460-461).

The attorney who represented Applicant in the August 1995 tax evasion/fraud charges testified at Applicant's hearing. He claimed informing federal prosecutors that the stature of limitations had lapsed before the government filed the tax charges, to no avail. After the income tax charges were dismissed, the government opened a civil investigation and audited Applicant's income tax returns for tax years 1984 through 1997. After the completion of the investigation, no further tax liability, interests, or penalties were assessed against Applicant, and no additional civil or criminal charges were filed against him for tax law violations (Tr. 409-423, AE K, letter dated Oct. 29, 2007).

Under the IRS Code, there is no statute of limitations for filing a false or fraudulent return with the intent to evade tax liability. Although the criminal charges against Applicant were dropped because of the expiration of the statute of limitations, the government could have assessed civil tax liability against Applicant if they could have established he filed false or fraudulent returns to avoid tax liability.[11] Applicant has always filed income tax returns.

Concerning SOR ¶ 2(b), Applicant denied he engaged in expense account fraud while working for IC, or for IC's successor corporation (FI).[12] Applicant claimed he was removed as President of ICT because he refused "to cook" ICT's books, and to give a foreign country equipment that it was not authorized under U.S. law (Tr. 368-369). Applicant explained that when FI took over IC's organization, FI refused to honor Applicant's employment contract and cancelled Applicant's employment benefits package. Applicant sued FI for breach of contract, and around February 1990 FI counterclaimed by accusing Applicant of expense account fraud to force him to withdraw his suit (Tr. 485).

In general, the expense account fraud allegations were that Applicant submitted fraudulent receipts to justify travel and/or business expenses he did not incur or were not authorized. Applicant established his job entailed working classified compartmentalized activities which sometimes involved foreign nationals. For security reasons, IC did not allow its employees to identify customers by name, country of origin, or the project in which they were involved in their business expense reports. Instead, employees were asked to keep separate diaries for review by supervisors, and to use fictitious names to conceal identities (Tr. 359-368; AE D, Tab 18). To recover for expenses incurred during his classified business trips, Applicant substituted personal

[11] Internal Revenue Code §§ 6501(c)(1), (2), and (3) (1986); Treasury Reg. § 301.651(c)-1.

[12] IC was acquired by FI, another foreign corporation doing business in the United States.

receipts for the actual receipts of expenses incurred during classified business meetings (Tr. 482, 511).

Applicant's evidence showed the alleged fraudulent trips and business expenses were valid business trips and the expenses were authorized by his supervisors (AE D, Tab 18, 19). The evidence of record is not sufficient to establish by substantial evidence that Applicant did engage in expense account fraud.

Falsification Allegations

SOR ¶¶ 2c (1), (2), and (3), and ¶ 2d alleged Applicant falsified his answers to questions 40 and 21 of his April/July 2004 SF 86. Question 40 asked whether in the last seven years he had been a party to any public civil court actions not listed elsewhere in his application. Applicant disclosed one civil action he brought against his trial attorney, but failed to disclose that his former employer (FI), filed a civil action against him in October 1988 which went on until at least September 2002. He also failed to disclose a 1996 civil action filed against him by an investment company which was closed in May 1997, and a civil action he filed against an investment company in October 1996, which was dismissed in December 1997.

Question 21 of Applicant's April/July 2004 security clearance application asked whether he had ever been charged with or convicted of any felony offenses. The question required Applicant to disclose information regardless of whether the record in his case had been sealed or otherwise stricken from the record. Applicant disclosed his 1991 charges and conviction for the conspiracy to violate U.S. laws, but failed to disclose he was charged with income tax evasion and fraud in August 1995.

While completing his 2004 SF 86, Applicant was uncertain about how to answer the questions because his conspiracy conviction was vacated and set aside, and the tax charges were dismissed. Applicant sought legal advice from the attorney (a former Assistant U.S. Attorney) currently representing him on a malpractice suit against his former trial lawyer. Applicant's attorney advised him that: (1) his conspiracy conviction did not exist, and that he did not have to disclose it; (2) he did not have to disclose the three civil actions in question because the initial actions for these suits were filed outside of the period asked in the questions; (3) he did not have to disclose his 1995 charges for tax evasion and fraud because they were dismissed, and as such they were a "nullity" and did not exist (AE E, Tab 21, Tr. 392-406). Applicant followed his attorney's advice and did not disclose the information (Tr. 515-516).

SOR ¶ 2e alleged that in September 2006, Applicant made a false statement to the DOHA adjudicator handling his case by sending the adjudicator an e-mail stating that "[he] have never been accused of wrongdoing during [his] life in the 45 years before or the 16 years after this dispute." The government contended Applicant's statement was false because it made reference only to his 1991 conspiracy charges, and failed to disclose his former employer's 1990 expense account fraud allegation.

Applicant's e-mail in its pertinent paragraph reads as follows: "I believe it useful for you to know that all these issues are related to an alleged import violation in the 1985 timeframe (20 years ago!). It was a dispute that went on for many years resulting in my family and I being subjected to horrendous pressure by prosecutors because I would not give them a plea bargain. I could not agree to plead guilty to something I did not do. In the end, after a very difficult and long struggle, my innocence was recognized by the court. I was exonerated. The conviction was overturned and the indictment was dismissed. Please be aware that I have never been accused of wrongdoing during my life in the 45 years before or the 16 years after this dispute." (GE 41).

Applicant considered the 1990 expense account fraud allegations, the 1991 conspiracy charges, and the August 1995 tax fraud/evasion charges, part and parcel of what he referred in his e-mail as "these issues" and "this dispute." He was referring to everything that happened during the period he worked for IC (Tr. 384-385). I find that the conspiracy charges, the tax evasion/fraud charges, and the expense account fraud allegations are temporally interrelated, are connected to Applicant's employment to IC, and involved substantially the same prosecutors.[13]

DOHA's adjudicator had several telephone conversations with Applicant prior to receiving the e-mail in question (Tr. 151-152). During those telephone conversations, Applicant discussed his tax indictment and some other litigation that the adjudicator could not recall during his testimony. The adjudicator testified it was possible that during one of those conversations Applicant mentioned to him the expense account fraud allegations. Having observed Applicant's demeanor and testimony for two days, I noticed he provides elaborate and lengthy responses to questions. It would be easy for the adjudicator to miss the nuances and details of his explanations. I do not believe the e-mail was submitted with the deliberate intent to mislead the adjudicator.

At his hearing, Applicant testified he always intended to do everything legally (Tr. 287). He had access to classified information from 1968 to 1984, from 1987 to 1990. From April 2003 to May 2007, he held interim access to classified information. There is no evidence he has been involved in any security violations. He averred that except for the incidents alleged in the SOR, he has had an impeccable record.

Applicant's references are impressive.[14] His witnesses included, two former Assistant U.S. Attorneys, and he presented statements by people who have held senior positions in the U.S. government such as a Secretary of State and White House Chief of Staff, a senior director of an important government agency, a rear admiral and associate administrator of an important government agency, and a general officer. Some of his

[13] *See United States v. Jasin*, No. CR.A. 91-602 at 35-40 (E.D. Pa.) Aug. 8, 2002. Considering this decision together with Applicant's evidence it seems as if the tax charges were filed as leverage to secure Applicant's testimony.

[14] AE B, Tab 5, letter dated August 23, 1993; AE C, Tab 14, affidavit dated Sep. 30, 2007; AE D, Tab 17, letter dated October 3, 2007; Tab 18, letter dated November 1, 1993; AE F, Tab 22 and 23; and AE H (character letters).

references have known Applicant for over 20 years. They described his on and off duty performance both before and after the incidents alleged in the SOR.

Applicant was described as a patriot, invariably honest, completely trustworthy, and of high integrity. His references and friends assess him as loyal, conscientious, and responsible. He has an excellent reputation as an extremely hard-working and accomplished business man, dedicated father and husband, and U.S. citizen. Applicant's references consider him a highly qualified senior manager with unique skills who has made invaluable contributions to his employers and his country. His witnesses and documentary evidence recommend him for a security clearance without reservations.

For many years, Applicant has also been involved in community and philanthropic work including, flying search-and-rescue missions as a volunteer pilot for the Civil Air Patrol, and providing disaster relief with the American Red Cross, the Christian Relief Effort, and Lend A-Hand organizations (Tr. 387, AE G).

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.[15]

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be considered 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 controlling 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."[16] In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on

[15] *See Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988).

[16] *Egan, supra,* at 528, 531.

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 J, Criminal Conduct

Under Guideline J, the security concern is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. AG ¶ 30.

Applicant's 1991 three count indictment on a conspiracy to violate U.S. laws, his 1992 conspiracy conviction for illegally importing prohibited items from a foreign country (FC), and his 1995 charges for filing false income tax returns and tax evasion raise security concerns under Criminal Conduct disqualifying condition AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

In 1992, Applicant was convicted of one conspiracy count, acquitted of another count, and the third count was dismissed prior to trial. In 2002, his 1992 conspiracy conviction was vacated and set aside because of ineffective assistance of counsel. Additionally, in October 1995, the August 1995 income tax fraud and evasion charges were dismissed.

Applicant averred he never intended to violate U.S. law.[17] He claimed he is innocent of the conspiracy charges for several reasons: (1) He had a good-faith belief that IC has working on the importation of the items with the approval of a U.S. agency (based on his boss' assertions); (2) his meetings with government agents concerning FC corroborated his boss' assertions; and, (3) the legal counsel and advice he received from government export experts and corporate counsel indicating IC was using legal methods to import the items without the required license (value-added concept). Applicant established he relied on incorrect legal advice he received from his government export experts and several corporate legal counsels, his value-added scheme involved a lawful method of circumventing U.S. law.[18]

Concerning the 1995 tax evasion and false income tax return charges, the evidence established that from 1984 to 1987, Applicant received yearly income between approximately $150,000 and $300,000, filed his income tax returns, and paid no income tax. The Government's evidence raised serious questions about Applicant's business and accounting practices, including the questionable depreciation of his residence, a vehicle apparently owned by Applicant's employer, and business deductions and depreciations for fictitious companies he was operating from his home. The rental of half of his residence, the storing of construction materials for his businesses at his home of residence, and the depreciation of three other vehicles he owned also raised income tax concerns.

Applicant presented little evidence to corroborate his claims that he had bona fide business activity to support his business depreciations, and deductions i.e., he presented no business records, employee records, documentation of expenses for his fictitious companies, or business transacted during the alleged period. Furthermore, he presented no evidence to corroborate his claim that he divided his residence into two different dwellings, or that he rented half of his residence. Some of the supporting information he never created, other evidence he could not be located because the tax allegations were 20 years old and he could not find it.

Applicant strongly denied filing false income tax returns to evade tax liability. His 1995 income tax related charges were dismissed because the statute of limitations had lapsed. Federal prosecutors then opened a civil investigation and audited Applicant's income tax returns from 1984 to around 1997. After the investigation was completed, no further tax liability, interests, or penalties were assessed against Applicant, and no additional civil or criminal charges were filed for tax violations. Department Counsel's tax expert witness testified at the hearing that he could not conclude from the documentary evidence presented that Applicant had filed fraudulent income tax returns with the intent to avoid tax liability. There is no statute of limitations for filing false or

[17] Applicant knew U.S. law prohibited the importation of defense items from FC without United States authorization, and there is no evidence that he ever asked for the required U.S. license to import the items.

[18] *See* page 4.

fraudulent income tax returns with the intent to evade tax liability. The government's 1984-1997 civil investigation/audit apparently found insufficient evidence of false or fraudulent tax returns or tax evasion.[19] Applicant has consistently filed his income tax returns, and there is no evidence of any further questionable tax behavior. Considering the record as a whole, I find Applicant did not commit the offenses.

Moreover, I find any remaining criminal conduct security concerns mitigated under AG 32(a): "so much time has elapsed since the criminal 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;" AG 32(c): "evidence that the person did not commit the offense;" and AG 32(d): "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

Applicant's questionable behavior occurred 20 years ago and there is no evidence of additional criminal activity. Applicant's behavior related to the conspiracy to violate U.S. laws happened under such unusual circumstances that I find it is unlikely to recur. His questionable income tax returns, business and accounting practices are also temporally remote. Available evidence suggests that since 1984-1987, Applicant has filed his income tax returns properly, and has not engaged in similar questionable behavior. Based on Applicant's demeanor and testimony, I believe he has learned his lesson from his past mistakes, and similar questionable behavior is unlikely.

Applicant's impressive references commented favorably on his employment record and unconditionally recommend he receive access to classified information. He has also shown constructive community involvement. On balance, Applicant has mitigated the criminal conduct security concern.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that 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. AG ¶ 15.

SOR ¶ 2a alleged Applicant intentionally filed fraudulent income tax returns to avoid tax liability for tax years 1984-1987. This allegation was considered and adjudicated together with the 1995 tax fraud and evasion charges discussed above under the criminal conduct guideline, and incorporated herein.

As previously discussed, the Government's evidence raised serious questions about Applicant's business and accounting practices, including the questionable

[19] I considered in my analysis that there could have been many reasons why the IRS elected not to proceed on a civil action against Applicant, and that in a security clearance adjudication the standard of proof is "substantial evidence."

depreciation of his residence, a vehicle apparently owned by Applicant's employer, and business deductions and depreciations for fictitious companies he was operating from his residence, the rental of half of his residence, the storing of construction materials for his businesses at his home of residence, and the depreciation of three other vehicles he owned.

Applicant presented little documentary evidence to corroborate his claims that he had bona fide business activity to support his business depreciations, and deductions. He explained some of the supporting information he never created (business records), other records were not produced because the tax allegations were 20 years old and he could not find the documents.

After federal prosecutors dismissed the 1995 income tax related charges (the statute of limitations had lapsed), they opened a civil investigation and audited Applicant's income tax returns from 1984 to around 1997. The civil investigation resulted in no further tax liability, interests, or penalties assessed against Applicant, and no additional civil or criminal charges were filed for tax violations. Department Counsel's tax expert witness (IRS agent) testified he could not conclude from the documentary evidence presented at the hearing that Applicant had filed fraudulent income tax returns with the intent to avoid tax liability.

There is no statute of limitations for filing false or fraudulent income tax returns with the intent to evade tax liability. Apparently, the government's 1984-1997 civil investigation/audit found insufficient evidence of false or fraudulent tax returns or tax evasion to bring a civil action against Applicant. Applicant has consistently filed his income tax returns since 1984-1987, and there is no evidence of any further questionable tax behavior.

Applicant's behavior raised concerns under AG ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information" and AG ¶ 16(d)(3): "a pattern of rules violations."

Considering the record as a whole, I find that AG ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;" and AG ¶ 17(f): "the information was unsubstantiated," apply.

Applicant's questionable income tax returns, business and accounting practices occurred 20 years ago and there is no evidence of additional questionable behavior. His behavior is so temporally remote that I find it no longer cast doubt on Applicant's reliability, trustworthiness, or judgment. Available evidence suggests that since 1984-

1987, Applicant has filed his income tax returns properly. Based on Applicant's demeanor and testimony, I believe he has learned his lesson from his past mistakes, and similar questionable behavior is unlikely.

Concerning SOR ¶ 2b, the record evidence shows that in 1990, Applicant's prior employer accused him of expense account fraud after Applicant filed suit for breach of employment contract. Applicant explained he was removed as ICT president for refusing to cook ICTs' books and give a foreign country items it was not permitted to receive under U.S. law. Applicant's evidence show that many of the specific incidents alleged as unauthorized expenses were approved or sanctioned by IC personnel as proper business expenses. Balancing the evidence available, his explanations are corroborated by the evidence of record. The evidence did not establish by substantial evidence that Applicant engaged in expense account fraud.

Concerning SOR ¶¶ 2c and 2d, Applicant falsified his SF 86 when he failed to disclose in his answer to SF 86 question 40 that he had been party to three civil suits, and in his answer to question 21 that he was charged with income tax evasion and fraud in 1995. AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;" applies.

Applicant conclusively established his omission was caused by the improper advice of his legal counsel who was specifically advising him on how to complete the SF 86. Applicant should not have followed his attorney's improper advice. Notwithstanding, he clearly relied upon his legal counsel's improper advice, -- a former Assistant U.S. Attorney with significant credentials that enhanced the credibility of his erroneous legal advice. Mitigating condition AG ¶ 17(b) applies.

SOR ¶ 2e alleged that in 2006, Applicant made a false statement to the DOHA adjudicator handling his case by sending the adjudicator an e-mail stating that "[he] have never been accused of wrongdoing during [his] life in the 45 years before or the 16 years after this dispute." The Government alleged the statement was false because Applicant had been accused in 1990 by his then employer of expense fraud account.

Applicant explained that when he used the term "this dispute" he meant to include all the related incidents that surfaced out of his period of employment for IC. I find that the conspiracy charges, the tax evasion/fraud charges, and the expense fraud account allegations are temporally interrelated, and connected to Applicant's employment to IC. I also find the conspiracy charges and the tax charges involved substantially the same prosecutors, and that the tax charges may have been filed as leverage to secure Applicant's testimony.

DOHA's adjudicator had several telephone conversations with Applicant prior to receiving the e-mail in question. During those telephone conversations, Applicant discussed his tax indictment and some other litigation that the adjudicator could not recall during his testimony. The adjudicator testified it was possible that during their conversations Applicant mentioned to him the expense account fraud allegations.

Having observed Applicant's demeanor and testimony for two days, I noticed he provides elaborate and lengthy explanations. He likely provided many details about his legal problems that are not included in the e-mail. I do not believe the e-mail was submitted with the deliberate intent to mislead the adjudicator.[20]

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 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. Applicant is a mature, well educated man, highly regarded for his business acumen and technical proficiency. He has worked for several defense contractors and received access to classified information at the secret level for approximately 22 years. Except for the current allegations, most of which occurred from 1984 to 1990, there is no evidence Applicant has compromised or caused others to compromise classified information.

Applicant's questionable behavior happened during a four year period approximately 20 years ago. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and the circumstances that led to his questionable behavior are unlikely to recur. He is now a more mature and savvy person as a result of the legal, economic, and personal difficulties he and his family has endured, including the security clearance process. There is no evidence Applicant has been involved in additional misconduct or questionable behavior. To the contrary, Applicant's references recommend him for a security clearance without reservations. They also lauded his reputation as an extremely hard-working and accomplished business man, dedicated father, husband, and patriot. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

[20] Arguably, Applicant's omission could be considered mitigated under AG I7(b) if it was caused by the improper advice of Applicant's legal counsel. See the previous discussion concerning SOR ¶¶ 2c and 2d.

Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the allegation of his criminal conduct and personal conduct security concerns.

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 J:	FOR APPLICANT
Subparagraphs 1.a & 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.e:	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 continue Applicant's security clearance. Eligibility for access to classified information is granted.

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JUAN J. RIVERA
Administrative Judge