



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-05053
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Fahryn Hoffman, Esquire, Department Counsel  
For Applicant: *Pro se*

07/23/2014

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

**Statement of the Case**

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on August 29, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on March 13, 2014, detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. The action was taken under Executive Order 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on March 18, 2014, and he answered it on April 5, 2014. Department Counsel requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on May 9, 2014, and I received the case assignment on May 15, 2014. DOHA issued a Notice of Hearing on June 2, 2014, and I convened the hearing as scheduled on June 10, 2014. The Government requested that a letter of rights and obligations, dated May 9, 2014 and mailed to Applicant, be received as hearing exhibit (HE) 1. Applicant did not object, and HE 1 was received in the record. In its case in chief, the Government offered exhibits (GE) marked as 1 through 6, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) A through R, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 27, 2014.

I held the record open until June 20, 2014, for Applicant to submit additional matters. Applicant timely requested additional time to obtain the requested documentation. On June 20, 2014, I issued an order granting Applicant until July 8, 2014 to submit the requested documentation. On July 8, 2014, Applicant advised that he had not received the information requested and asked for more time. He was given until July 16, 2014 to submit the requested documentation. On July 16, 2014, Applicant advised that he had not received the requested information and said it was time to move forward. Applicant did provide two documents which are marked, received, and admitted into evidence as AE S and AE T. The Government did not object to these documents. The email communication among Department Counsel, Applicant, and the undersigned from June 20, 2014 through July 16, 2014 has been marked as AE U. The record closed on July 16, 2014.

### **Procedural Ruling**

#### **Notice**

Applicant received the notice of the date, time and place of the hearing less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right. (Tr. 9.)

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1 and 2.a of the SOR. He neither admitted or denied the allegation in SOR ¶ 2.b, which is deemed denied.<sup>1</sup> He also provided additional

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<sup>1</sup>When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and

information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 59 years old, works as an engineering project manager for a DOD contractor. He began his current employment in February 1999, after retiring from the U.S. Army. Applicant served in the Army from October 1977 until his honorable discharge in January 1998. He retired at the rank of major, pay grade O-4. While in the Army, Applicant completed a bachelor's degree in business administration in May 1988. He worked in the private sector at another company for one year after his retirement.<sup>2</sup>

Applicant and his wife married in November 1979. They have two sons, ages 32 and 26. His oldest son now serves in the Army. Applicant moved from State X to State Y in August 2010. He continues to live in State Y.<sup>3</sup>

The August 23, 2011 and the November 5, 2013 credit reports reflect that Applicant pays his monthly bills and that all his credit accounts are or were current, except one charged-off debt, which has been paid. The August 23, 2011 credit report indicates that the Internal Revenue Service (IRS) filed a tax lien against Applicant in May 2011. The November 5, 2013 credit report indicates that the IRS released its tax lien.<sup>4</sup>

In 2000, Applicant prepared his federal and state income tax returns for the tax year 1999. Between his earnings and military retirement income, he owed approximately \$10,000 in federal income taxes. He acknowledged that he did not contact the IRS to discuss a possible payment plan as he did not think the IRS allowed payment plans. He did not seek help from any source to resolve this problem. He simply did not file his income tax returns for that year. He also did not file his federal or state income tax returns for the tax years 2000 through 2011 because he was concerned that he would be in trouble with his employer or the IRS. During this time period, he increased the amount of money being withheld from his paycheck for his yearly taxes. He believed that the increase in money withheld to pay his yearly taxes covered the

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events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

<sup>2</sup>GE 1; GE 2; Tr. 29-31.

<sup>3</sup>GE 1; GE 2; Tr. 35.

<sup>4</sup>GE 5; GE 6. The record also contains a credit report dated September 19, 2006. This credit report shows one bad debt, which is the debt shown as paid on the August 2011 credit report. Two other debts indicated that he had been past due on his payments, but that his payments were current. At this time, his wife had problems with past-due bills. All his other accounts were in good standing. GE 4.

income taxes he owed. He explained that he made his decision because of ignorance and stupidity.<sup>5</sup>

The IRS filed a tax lien against Applicant in May 2011 for \$126,512 in past-due income taxes plus interest and penalties. The IRS notified his employer of its intent to garnish his pay for the income taxes owed. The IRS instituted a garnishment of his wages in May 2011, initially at the rate of \$2,650 a paycheck. By July 2012, Applicant was garnished about \$2,983 a paycheck. This amount declined to approximately \$2,704 a paycheck beginning August 20, 2012. Between May 2011 and December 2012, Applicant paid the IRS approximately \$107,000 on his past-due income taxes, as well as interest and penalties. He paid his federal tax debt in full.<sup>6</sup>

When he received the notice of garnishment in 2011, Applicant retained the services of a tax professional. With the assistance of the tax professional, Applicant prepared his federal income tax returns for the tax years 1999, 2000, and 2003 through 2011. His income tax returns were filed with the IRS on September 9, 2011. Applicant provided a copy of the income tax returns for these years, which reflect that Applicant owed approximately \$61,250 in back income taxes plus penalties and interest. Applicant also provided a copy of a summary of his last 13 payments to the IRS (July 9, 2012 to December 13, 2012). This document indicates that in this time period, he paid the IRS \$39,195 and that his past-due income tax balance for each of the years 2005 through 2011 was zero. The IRS released its lien after Applicant paid his past-due income taxes. Applicant timely filed his 2012 and 2013 federal income taxes. At the recommendation of the IRS, Applicant now has his income taxes withheld from his pay as a single person with no exemptions. He also has federal income taxes withheld from his retirement pay.<sup>7</sup>

Since moving to State Y, Applicant has filed his state income tax returns and paid any income taxes owed. Applicant did not file income tax returns in State X for the same years he did not file his income tax returns with the IRS. After moving to State Y, he continued to have money withheld from his pay to pay income taxes in State X. On an unknown date, he filed income tax returns with State X as a non-resident for the years 2011, 2012 and 2013. He received a small tax refund for each year. He no longer has income tax money withheld from his pay for State Y.<sup>8</sup>

Applicant has not filed his federal income tax returns for the tax years 2001 and 2002. His tax professional advised him that the IRS informed the tax professional that Applicant did not have to file his income tax returns for these years. Applicant does not know why the IRS is not requesting his income tax returns for these years. After the hearing, Applicant spoke with his tax professional and the IRS. He requested a letter

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<sup>5</sup>GE 3; Tr. 31-33, 37.

<sup>6</sup>GE 3; GE 6; Tr. 33, 34, 41-42.

<sup>7</sup>GE 3; GE 6; AE A-AE M; AE O; AE Q; AE S; Tr. 31-34, 42-44, 47.

<sup>8</sup>Attachments to Response to SOR; AE N; AE P; AE R; Tr. 35-37, 49, 51.

from the IRS to verify that he did not need to file these income tax returns. Prior to June 20, 2014, the IRS told him he would received a letter in 7 to 10 days. He has not received the letter.<sup>9</sup>

Applicant has not filed his past-due income tax returns for State X because his tax professional told him that State X would not accept income tax returns beyond the last three years. State X has not filed a lien against him. His tax professional also told him that he would not have received a refund from State X if he owed back income taxes. After the hearing, Applicant contacted State X, which advised him that he did not have a tax liability. At the instruction of State X, Applicant wrote a letter requesting a Statement of Account. He has not yet received a response to his letter.<sup>10</sup>

When he completed his e-QIP on August 14, 2006, Applicant answered “no” to the following questions under Section 28: Your Financial Delinquencies:

- a. In the last 7 years, have you been over 180 days delinquent on any debt(s)?
- b. Are you currently over 90 days delinquent on any debt(s)?

The Government alleges that he intentionally falsified his answer to these questions because he did not acknowledge his failure to file his federal and state income tax returns, and he did not admit that he owed federal and state income taxes. Applicant denies he intentionally falsified his answers. He explained that at the time he completed his e-QIP, he considered as debts only his recurring monthly expenses, such as rent or utilities, and consumer debt, such as credit cards or loans. He did not consider his income taxes as a debt to acknowledge in answering this question.<sup>11</sup>

On the same e-QIP, Applicant also answered “no” to questions in section 27 which asked if he had filed bankruptcy, had his wages garnished, had judgments against him, or had a lien for failing to file his taxes. These answers were truthful in 2006 and not at issue in this case.<sup>12</sup>

Applicant completed a new e-QIP on August 26, 2011. In section 26, he answered “no” to the following questions: “m. Have you been over 180 days delinquent on any debts(s)?” and “n. Are you currently over 90 days delinquent on any debt(s)?” The SOR does not allege that he falsified these answers.<sup>13</sup>

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<sup>9</sup>AE U, p. 1 and 4; Tr. 31, 48.

<sup>10</sup>AE T; AE U, p. 1 and 4; Tr. 35-36, 49.

<sup>11</sup>Response to SOR; GE 2; Tr. 38-39, 52.

<sup>12</sup>SOR; GE 2.

<sup>13</sup>SOR; GE 1.

On the same e-QIP, Applicant acknowledged that he failed to file his federal and state income tax returns and that his wages had been garnished. Applicant explained that his wages were being garnished by the IRS for income taxes owed.<sup>14</sup>

### **Policies**

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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 the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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.

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<sup>14</sup>GE 1. Page 26 of GE 1 is missing from the record.

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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

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

Applicant developed significant financial problems when he failed to file his federal and state income tax returns from 2000 until 2011. Initially he did not file these income tax returns because he lacked funds to pay the taxes owed. His actions show a history of not meeting his financial obligations. These three disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and 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; and

(c) 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.

Three years ago, Applicant took control of his income tax debt after the IRS garnished his pay. He hired a tax professional, who prepared his 1999, 2000, and 2003 through 2011 federal income tax returns and filed the returns on Applicant's behalf. After filing his past-due income tax returns, Applicant and the IRS agreed to his continuing to pay his substantial income tax debt through his wage garnishment. Applicant fully paid his past-due income taxes by December 2012, and the IRS released its lien.

Applicant understands that he exercised poor judgment when he did not file his income taxes in 1999 and decided not to file his federal and state income taxes for many more years. Based on this conduct, he knows the negative financial problems which he can create for himself by not filing his taxes timely, and the negative impact such conduct could have on his eligibility to maintain a security clearance and possibly his job. He finally took responsibility for this conduct. In all other aspects of his life, he has acted responsibly and shown good judgment. Applicant has corrected his federal tax problem. AG ¶¶ 20(a) and 20(c) apply as it is unlikely that he will fail to file future income tax returns, and he has paid his tax debt to the IRS.

#### **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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another



country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

The Government alleges two incidents of falsification by Applicant when he completed his 2006 SF-86 and answered “no” to the questions about delinquent debts. For AG ¶ 16(a) to apply, Applicant’s omissions must be deliberate. The Government established that Applicant omitted material facts from his 2006 security clearance application when he failed to provide information about his unpaid federal and state income taxes. This information is material to the evaluation of Applicant’s trustworthiness and honesty. He denied intentionally falsifying his answers to the 2006 e-QIP, and he denied an intent to hide information about his unpaid income taxes. At the hearing, he again denied intentionally withholding information from the Government about his unpaid income taxes in 2006.

When the allegation of falsification 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>15</sup>

Applicant credibly explained that he thought the question was asking for information about unpaid credit card debts or expenses related to his usual monthly living expenses, such as rent, phones, or utilities. He indicated that he did not think about his income taxes as a debt in this sense, rather he focused on bills, particularly since his wife had fallen behind in some credit card debt. His thoughts are bolstered by the 2006 credit report, which does show some late payments and one charged-off debt. Based on his credible testimony and the record evidence, I find that Applicant did not intentionally falsify his 2006 e-QIP. Even if I did conclude he falsified his answers intentionally, I would find that he mitigated any security concerns under AG ¶ 17(a) as the Government first learned about his tax problem when he provided this information on his 2011 e-QIP. SOR allegation 2.a is found in favor of the Applicant.

The SOR alleges that Applicant’s failure to file his income tax returns for so many years raises a concern about his personal conduct and judgment which could create a vulnerability to exploitation, manipulation, or duress. Applicant’s decision to ignore his income tax issues shows poor judgment and a lack of responsibility which could make him vulnerable to exploitation, manipulation or duress. A security concern has been established under AG ¶ 16(e).

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<sup>15</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)).

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant acknowledged his failure to file his taxes in his 2011 e-QIP after the IRS garnished his pay. In September 2011, he filed federal income tax returns for 11 of the 13 previous years. In just over 18 months, he paid his substantial income tax debt as well as interest and penalties assessed by the IRS. He has timely filed his federal income tax returns for the tax years 2012 and 2013. He has followed the IRS recommendation to have his income taxes deducted from his pay as a single person with no exemptions and is having federal income taxes withheld from his military retirement benefit to assure that he will be able to pay his income taxes in the future. He has taken the necessary steps to change his behavior and to prevent a reoccurrence of this problem. By taking affirmative action to correct his past income tax issues, Applicant eliminated his vulnerability to exploitation, manipulation, or duress. He has mitigated the security concerns raised under AG ¶¶ 17(d) and 17(e). Guideline E is found in Applicant's favor.

### **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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both

favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. When he prepared his 1999 federal income tax returns, Applicant learned that he owed substantial additional income taxes to the IRS. Instead of seeking immediate help with this problem, he ignored it. He not only did not file his income tax return or pay his income taxes in 2000, but he chose not to file his income tax returns for many years. While he did not file his income taxes, he did increase the amount of taxes being withheld from his pay, believing that he had resolved his problem. Applicant acknowledged that he exercised poor judgment and acted stupidly in handling his income tax situation.

When the IRS started garnishing his pay, Applicant took action. He hired a tax professional and filed all his past due federal income tax returns and three years of state income tax returns. He contacted the IRS thereafter and reached an agreement to continue garnishing his pay at more than \$5,000 a month. Within 19 months, Applicant paid more than \$100,000 to eliminate his federal income tax debt. He followed the recommendation of the IRS to have taxes withheld from his pay as a single person with no deductions, and he now has taxes withheld from his military retirement. These actions assure him that he will have sufficient money to pay his future income taxes.

Applicant failure to file income tax returns raised serious questions about his judgement and trustworthiness. He ignored his problem for many years, but he has now resolved the problem and taken steps to make sure he will not find himself in this situation in the future. He has changed his behavior and has demonstrated that he will file his taxes in future years. He cannot be coerced, pressured, or exploited because of this conduct. He pays his monthly expenses and did so while his pay was being heavily garnished without a negative impact on his finances.

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 personal conduct and finances under Guidelines E and F.

### **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
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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