



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



In the matter of:)
)
) ISCR Case No. 12-08777
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

09/02/2014

Decision

CURRY, Marc E., Administrative Judge:

The possibility that Applicant may have a property interest in Jamaica does not generate a foreign influence security risk. Also, there are no personal conduct security concerns because he did not deliberately omit any relevant information or falsify his 2012 security clearance application. However, the invalid basis for disputing two of Applicant's delinquent debts together with his failure to begin satisfying a third delinquent debt renders him an unacceptable security clearance candidate at this time.

Statement of the Case

On March 13, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, financial considerations, E, personal conduct, and B, foreign influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

On April 23, 2014, Applicant answered the SOR, denying all of the allegations except subparagraph 3.a, and requesting a hearing. The case was assigned to me on June 3, 2014. DOHA issued a notice of hearing on June 18, 2014, scheduling the hearing for July 2, 2014. The hearing was held as scheduled. At the hearing, I received five Government exhibits (GE 1-GE 5) and fifteen Applicant exhibits (AE A - AE B, and AE D-P). Department Counsel objected to the admissibility of AE C, and I reserved on making a ruling. I have sustained the objection. (Tr. 27) Also, I considered the testimony of Applicant.

At the close of the hearing, I left the record, open at Applicant's request, to allow him to submit additional exhibits. Within the time allotted, he submitted six more exhibits that I received as AE Q through AE V. DOHA received the transcript (Tr.) on July 9, 2014.

Findings of Fact

Applicant is a 41-year-old single man. In 1999, he graduated from college majoring in computer science. While in college, he received the university's presidential scholar award for outstanding academic achievement. (GE 2 at 55) After finishing college, Applicant successfully earned a master's degree in the field of information systems in 2003. (Tr. 31) According to his graduate advisor, he was a "motivated and intelligent student who consistently ranked first among equals" and never complained about work despite "often being overloaded with projects." (GE 2 at 82)

For the past ten years, Applicant has worked in the field of information technology, information security, and cyber-security. (Tr. 6, 32-33) In January 2006, Applicant started a limited liability company (LLC). (Tr. 6, 32-33) He served as its president and owned all of its shares. (Tr. 6) The number of people Applicant employed was variable. At its zenith, Applicant's business employed six people. (Tr. 36)

Applicant's business was initially successful. However, in 2008 after the recession, it began struggling. (Tr. 37) Consequently, Applicant began falling behind on the business' debts. In March 2012, Applicant's mother, a citizen and resident of Jamaica, died. (GE 2 at 32) Applicant paid approximately \$20,000 of airfare and funeral expenses. (Tr. 89) He did not have enough income to meet these expenses, and ultimately depleted his savings. (Tr. 88-89)

By the time Applicant's went out of business in January 2014, he had incurred approximately \$48,000 of delinquent business debt, as alleged in the SOR. (Tr. 53) SOR subparagraph 1.a is a debt owed to a bank that extended credit to Applicant's business to cover payroll expenses in 2011. Applicant guaranteed this loan in his capacity as company president.(GE 2 at 32) The original amount of the loan was \$25,000. (AE B) This loan became delinquent in November 2012. (AE V) As of December 8, 2013, the delinquent balance totalled \$21,324. (GE 2 at 50) On December 16, 2013, Applicant contacted the creditor to make payment arrangements. (GE 2 at 32) As of the SOR date, Applicant had made no payments. He now contends that he is not

individually liable for the debt because it was incurred by his business and it is no longer operational. (AE A)

SOR subparagraph 1.b is a collection agent for a creditor that provided Applicant with a business credit card in 2008. (AE D) It became delinquent in 2009. (GE 3 at 5) The alleged balance as of August 2010 was \$14,323. By March 2012, Applicant had disputed this bill with the credit reporting agencies, contending that he is not personally responsible for it because it was a business debt, and that his company's status as a LLC shielded him from any secondary liability related to the business. (AE M at 4; AE U; GE 4 at 8; Tr. 94-96)

The record evidence includes three letters from the original creditor written between April and June of 2009, regarding the delinquent debt. Each letter is addressed to Applicant, not his company. (GE 2 at 47-50)

In 2008, Applicant borrowed \$20,000 from an individual for business operating capital. Applicant personally guaranteed the loan. (Tr. 62) Per the agreement, Applicant was to repay the loan in \$550 monthly increments. (Tr. 87; AE R) As his business struggled in 2011, Applicant gradually began missing payments. (Tr. 71) In December 2012, the creditor obtained a judgment against Applicant for \$16,943. (GE 5 at 1) On July 3, 2014, Applicant contacted the court to obtain the creditor's address. Applicant will begin making payments this month in \$1,000 monthly increments. (AE Q at 2)

In 2011, Applicant contracted a serious illness while performing charity work in a developing country. (Tr. 39) Subparagraph 1.d is a delinquent medical bill stemming from this period totalling \$243. In May 2014, Applicant identified the creditor and paid the bill. (AE H)

Applicant recently began working on a new long-term project. (Tr. 76) He will earn approximately \$12,000 monthly. He will have approximately \$4,000 of monthly discretionary income. (Tr. 76) This is about the same amount of discretionary income that he has had since late 2013. (See GE 2 at 20)

Applicant was born and raised in Jamaica. (GE 1 at 6) He immigrated to the United States in 1995 and became a naturalized U.S. citizen in 2010. (GE 1 at 7) Applicant's father is a Jamaican citizen who lives in the United States. Applicant has no relationship with him, as his father did not raise him. (GE 2 at 23) Applicant has one sister and one brother. His sister immigrated to the United States from Jamaica and is a naturalized U.S. citizen. (GE 2 at 24) His brother remains in Jamaica.

Applicant suspects he may have inherited a property interest in his mother's home after she passed away. He does not know the value of the home. Applicant knows no additional information about the home because his brother, who lives in the home, and from whom he is estranged, has not responded to his inquiries. (Tr. 42)

Policies

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

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 for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, “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.” (AG ¶ 18) Over the past five years Applicant has incurred approximately \$48,000 of delinquent debt. AG ¶ 19(a), “inability or unwillingness to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply.

The following mitigating conditions under AG ¶ 20 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

With the exception of subparagraph 1.d, a \$243 medical bill that Applicant has satisfied, all of his bills stem from a business that began struggling during the 2008 recession. The business ultimately failed in 2012 when the expenses that Applicant incurred related to his mother's death rendered him unable to continue to pay his business creditors.

Applicant provided evidence of his efforts contesting the disputed delinquencies. Also, he clearly has carefully considered his argument disputing the debts, as he provided a copy of the state statute supporting his contention that individual members of LLCs are not liable for the debts of their companies. (AE U) I conclude that Applicant's argument is not frivolous, and that AG ¶ 20(b) and AG ¶ 20(e) apply.

Applicant's contention about the liability of LLC shareholders vis a vis company debt is accurate, but inapplicable to subparagraph 1.a because he guaranteed payment of the debt in the event the LLC defaulted. Absent proof of ambiguity, fraud, or duress, a person cannot evade liability on a loan that they guaranteed. *Ubom v. SunTrust Bank*, 198 [state] App. 278, 286, 17 A. 3d 168 (April 4, 2011).

Applicant produced no such proof. Instead, he argued that he was not liable because he guaranteed the loan, not in his individual capacity, but in his capacity as company president. This is a specious distinction because if a guarantor could avoid liability in this manner, it would nullify the purpose of guarantor agreements. (See generally, *Ubom*) I conclude that Applicant has not mitigated subparagraph 1.a.

The Government presented evidence indicating that subparagraph 1.b is a personal debt. (GE 3 at 5, *supra*.) Consequently, although an individual member of an LLC, such as Applicant, is generally shielded from debt that the LLC incurred, the burden of proof is on Applicant. In such cases, courts first look to the original loan document for guidance. (See *Ubom*) Applicant did not provide the original loan document, therefore, he has failed to meet the burden of proof to establish that he is not individually responsible for this loan. Applicant has not mitigated subparagraph 1.b.

The creditor in subparagraph 1.c obtained a judgment against Applicant himself, not the LLC. Consequently, any discussion of LLC liability is irrelevant to this debt.

Nearly two years have passed since the court entered the judgment, and Applicant has yet to make a payment. Although he recently contacted the court to obtain the plaintiff's address and will start making payments this month, there is not enough demonstrated track record of reform for me to resolve this subparagraph in his favor. I conclude Applicant has failed to mitigate subparagraph 1.c, and his failure to make any payments towards this judgment over the past 18 months since it was entered render the remaining mitigating conditions inapplicable.

Applicant earns in excess of \$125,000 per year and has approximately \$4,000 of monthly disposable income. Because his failure to pay subparagraphs 1.a and 1.b stemmed from a good-faith misunderstanding of LLC law, it is understandable that he has not made any payments towards these debts while the disputes are pending. Conversely, the judgment listed in subparagraph 1.c was clearly against Applicant in his individual capacity. I conclude AG ¶¶ 20(a), 20(c), and 20(d) are inapplicable.

Guideline E, Personal Conduct

The security concern under this guideline is as follows:

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.

Applicant completed an Electronic Questionnaires Investigations Processing (EPSQ) in February 2012. Section 26 requires applicants to disclose, among other things, any delinquencies incurred, turned over for collection, or cancelled for failure to pay within the past seven years. The SOR alleges that Applicant falsified material facts by not listing subparagraphs 1.a through 1.c in response to Section 26. This raises the issue of whether AG ¶ 16(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," applies.

Subparagraph 1.a was not delinquent when Applicant completed the EPSQ. Although Applicant began having problems paying the debt listed in subparagraph 1.c in 2011, there is no conclusive evidence that the debt was in default when Applicant completed the EPSQ. As for subparagraph 1.b, Applicant disputed this debt, therefore he had no responsibility to list it. I conclude that Applicant did not falsify his EPSQ, and there are no personal conduct security concerns.

Guideline B, Foreign Influence

Under this guideline, “foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in the U.S. interests, or is vulnerable to pressure or coercion by any foreign interest” (AG ¶ 6). Moreover, “adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism” (*Id.*).

There is no record evidence detailing Jamaica’s relationship with the United States. Moreover, Applicant is unsure of whether he has a property interest in Jamaica, and is estranged from his only immediate family member who lives on the property. I conclude there are no foreign influence security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They are as follows:

- (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.

Applicant could not have been expected to satisfy debts that he disputed in good-faith. Consequently, the negative security ramifications of Applicant’s failure to make payments towards the delinquent debts listed in subparagraphs 1.a and 1.b are somewhat mitigated. Conversely, he has made no payments to date on 1.c, a judgment for a delinquent debt that a creditor obtained against him nearly two years ago. The invalid basis of the dispute of subparagraphs 1.a and 1.b, and his failure to make payments towards the satisfaction of subparagraph 1.c render him an unacceptable candidate for a security clearance at this time.

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-1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant
Paragraph 3, Guideline B:	FOR Applicant
Subparagraphs 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge