



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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Applicant for Security Clearance)

ISCR Case No. 12-09257

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Jay Ian Igiel, Esq.

08/14/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted. Applicant presented sufficient information to mitigate security concerns for financial considerations.

Statement of the Case

On September 21, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) issued Applicant interrogatories to clarify information in her background. Applicant responded to the interrogatories on November 9, 2013. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOD could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated April 10, 2014, detailing security concerns for financial considerations under Guideline F based on delinquent state and federal taxes. 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 (AG) effective in the DOD on September 1, 2006.

Applicant answered the SOR on May 6, 2014. She admitted six of the 14 delinquent tax debts noting that three of the six were duplicates. She denied eight of the delinquent tax debts since the debts had been paid. Department Counsel was prepared to proceed on May 28, 2014, and the case was assigned to me on June 3, 2014. DOD issued a Notice of Hearing on June 13, 2014, scheduling a hearing for July 17, 2014. I convened the hearing as scheduled. The Government offered five exhibits that I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 5. Applicant and one witness testified. Applicant offered 20 exhibits that I marked and admitted into the record without objection as App. Ex. A through T. I received the transcript of the hearing (Tr.) on July 25, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 55-year-old college graduate. She married her husband in 1989, and they have two college-age children. She has been employed by a defense contractor as a program assistant since 2010. This is her first application for eligibility for access to classified information. (Tr. 29-33; Gov. Ex. 1, e-QIP, dated September 21, 2011)

Applicant's husband has been a self-employed broker of employee health benefits for businesses for over 35 years. Applicant has no role or involvement in his company and business. From 1989, when she married, until 2009, when Applicant entered the workforce, she was a stay-at-home mother raising the couple's two children. The only source of the family's income during this time was her husband's compensation from his business. Her husband managed all of the family finances, paid all of the bills, had the family's taxes prepared by an accountant, and managed their taxes. Applicant had no role in the family finances except to sign yearly tax returns. From 1989 until 2010, Applicant and her husband filed joint tax returns. Since the sole source of the family's income was from her husband's business, he made all of the decisions concerning the finances, particularly in regard to payment of taxes. Tax transcripts from 1989 until 2009 show no income attributed to Applicant. The SOR lists over \$345,000 in federal tax liens for federal income taxes owed from 1994 until 2011, and \$34,000 in state tax liens for income taxes owed for tax years 1994 and 1998. (Tr. 50-53, 79-82)

Applicant's husband testified that all of the family financial decisions were made by him. His business income varied greatly over the years and even varied from quarter to quarter. He started to have a downturn in his business starting in the early 1990s. In 2005, he lost a client who was 35% of his business that he was unable to replace in 2005. His income levels are now off over 70% from the levels he had at times in the 1990s. In some years, his business had very good income and in other years limited income. He did not have taxes taken from his business income and did not pay

quarterly taxes. Applicant and her husband filed tax returns each year prepared by their accountant. They always paid taxes, but the payments may be late. There were tax liens in the 1990s, but Applicant's husband was able to pay those liens later. He started having difficulty making tax payments in 2005. Some of the yearly tax transcripts from the IRS show income in excess of \$200,000 but only a few hundred dollars in withholding. He paid federal and state income taxes when he had funds available to pay the taxes. Some years, his income was sufficient to pay additional taxes to the IRS or the state to make up for years in which no or limited taxes were paid. At one time, Applicant's husband had their house refinanced, and he used part of the equity to pay taxes. (Tr. 82-83, 90-92)

Applicant's husband recently suffered a disabling back condition that prevents him from working on a full-time basis. His income suffered because he was unable to work full-time. However, it should be noted that he has disability insurance from a policy that is now paying him over \$8,000 a month. He is not required to report this income to the IRS and he has not informed them that he has these disability payments. However, the personal financial statement submitted by Applicant shows that between Applicant and her husband, they have a combined monthly income of approximately \$15,336. This includes the disability payments received by her husband. They have monthly expenses of approximately \$12,000, leaving approximately \$3,330 in discretionary income. (Tr. 87-92, Gov. Ex. 2, Personal Financial Statement, dated November 5, 2013)

Applicant noted that the tax lien of \$15,197 filed in March 2011 at SOR 1.a is for the federal income tax owed for tax year 2008 that is listed at SOR 1.f for \$19,412. Applicant also noted that the federal tax lien of \$72,822 entered in June 2009 is for the \$34,603 in federal taxes owed for tax year 2007 at SOR 1.g, and \$29,496 in federal taxes owed for tax year 2006 at SOR 1.h. (Tr. 82-83; App. Ex. S, Tax Lien filed March 16, 2011)

Applicant's husband paid the state tax lien (SOR 1.c) for \$18,756, in 1996, and the lien was released. (Tr. 26-27; App. Ex. H, Release, dated July 2, 1996). Applicant's husband paid the state tax lien (SOR 1.d) for \$15,499.57 in November 2001, and the lien was released. (Tr. 28-29; App. Ex. G, Memorandum of Release, dated November 21, 2001)

Applicant's husband paid the federal tax lien (SOR 1.i) for \$25,599 in January 2003, and the lien was released. (Tr. 25-26; App. Ex. F, Memorandum of Release, dated January 30, 2003) Applicant's husband paid the federal tax lien (SOR 1.j) for \$55,650 in January 2003, and the lien was released. (Tr. 24-25; App. Ex. E, Memorandum of Release, dated January 30, 2003) Applicant's husband paid the federal tax lien (SOR 1.k) for \$5859.02 in January 2003, and the lien was released. (Tr.22-24; App. Ex. D, Memorandum of Release, dated January 30, 2003) Applicant's husband paid the federal tax lien (SOR 1.l) for \$6,601.24 in January 2003, and the lien was released (Tr. 21-22; App. Ex. C, Memorandum of Release, dated January 30, 2003) Applicant's husband paid the federal tax lien (SOR 1.m) for \$10,882 in January 2003, and the lien was released. (Tr. 20-21; App. Ex. B, Memorandum of Release, dated January 30, 2003). Applicant's husband paid the federal tax lien (SOR 1.n) of \$32,273 in March 1998, and the lien was released. (Tr. 18-20; App. Ex. A,

Memorandum of Release, dated March 17, 1998) The documentary evidence submitted by Applicant establishes that Applicant's husband paid the tax debts list at SOR 1.a to 1.h. The unpaid tax liens total approximately \$150,000. (Tr. 112-130)

Applicant has not intervened in the tax issues since the sole source of the income was from her husband's business. The business and the business finances are complicated and she has no role or involvement. Applicant's husband has worked extensively with the IRS on the tax issues. The IRS did an extensive examination of his taxes and determined that because of Applicant's husband disability and his loss of business income, the taxes are uncollectible. While the IRS is not taking action to collect the back taxes, Applicant and her husband are not relieved of the liability for the taxes. (Tr. 91-93; App. Ex. I, IRS Letter, dated February 12, 2013)

Applicant started to file her own individual tax return when she entered the work force again in approximately 2009. She had funds withheld from her pay for taxes. Her tax returns were prepared by the same accountant that had prepared the tax returns when she and her husband filed jointly. Her first year back to work in 2009, she made slightly in excess of \$1,000, so she and her husband filed a joint tax return. Starting in 2010, Applicant filed her federal tax return as an individual taxpayer. She wanted to separate her income from her husband's income. Applicant's federal and state taxes for 2010-2012 were paid in full by Applicant. Applicant's and her husband's tax return for tax year 2013 has been prepared by their accountant and they have requested a delay to file the return. The return will be filed in October 2014. Applicant's income in 2013 was more than her husband's income, making it more advantageous tax wise for them to again file jointly for tax year 2013. They are due a refund which will be used by the IRS to pay back taxes. (Tr. 39-61, 92-95; App. Ex. O, tax return 2010; App. Ex. P, tax return 2011; App. Ex. Q, Tax return 2010; App. Ex. R, Tax return 2013) Since she has been working, Applicant's credit score has increased to 674. (App. Ex. T, FICO Summary, dated July 7, 2014)

Applicant intends to file either a joint tax return or an individual tax return in the future depending on which is more advantageous for her and her husband. Applicant's husband will continue to negotiate a payment plan with the IRS. After the 2013 tax returns are filed, Applicant's husband will file a request for spousal excusal of taxes as well as enter a settlement in compromise. (Tr. 67-79)

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 must 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 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, 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 in seeking 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 that the applicant may deliberately or inadvertently fail to 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.

Analysis

Financial Considerations

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) An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. However, the security concern is broader than the possibility that an individual might knowingly compromise classified information to raise money. It encompasses concerns about an individual’s responsibility, trustworthiness, and good judgment. Security clearance adjudications are based on an evaluation of an individual’s reliability and trustworthiness. It is not a debt-collection procedure. An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligations to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person’s relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is at risk of acting inconsistently

with holding a security clearance. An applicant is not required to be debt free, but is required to manage her finances in such a way as to meet her financial obligations. Federal and state tax liens were filed against Applicant and her husband because they did not have sufficient funds to meet their tax liabilities. The tax liens are delinquent debts, as established by Applicant's statements and court records. These delinquent debts raise Financial Considerations Disqualifying Conditions AG ¶ 19(a) (inability or unwillingness to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations). The evidence indicates a history of both an inability and unwillingness to satisfy debt.

I considered the Mitigating Conditions AG ¶ 20(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 AG ¶ 20(b) (the conditions that resulted in the financial problems 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). These mitigating conditions apply.

Applicant did not have any taxable income from 1990 until 2010. All of the family income was attributed to Applicant's husband's business income. Since all the family income was attributed to his business income, Applicant's husband controlled the family finances. He wrote the checks, paid the bills, and had the tax returns prepared by an accountant. He made all of the financial decisions. Applicant's role in the process was to sign the tax returns as requested by her husband. Even though tax returns were filed, Applicant's husband did not pay taxes for many years. Since his business was a self-employment business, he did not have taxes withheld or pay quarterly estimated taxes. When taxes had to be paid, Applicant's husband did not have the funds available to pay the taxes. The tax issues and the tax liens are directly attributed to the actions of Applicant's husband and not to her. He managed the taxes and made the financial decisions. She is listed as a holder of the tax liens since she filed joint tax returns with her husband. She incurred a tax debt under the unusual circumstances of her husband's inappropriate financial actions and not by her personal actions. The conditions leading to the delinquent tax debts were beyond her control since her husband controlled the family finances.

It is reasonable for Applicant not to have participated in the financial decisions. The sole source of the income was her husband's business. The business and the business finances were complicated and technical. She had no role in the business and was not part of the business decision-making. Her husband employed an accountant to prepare the tax returns. Her husband made the decisions when to pay the taxes. Applicant knew there were tax issues, but she knew that her husband was working extensively with the IRS to resolve the issues. She did not have the knowledge to take control or intercede in the financial decisions.

When Applicant entered the work force in 2009 and had her own income, she filed as married filing separately the next year. She isolated her income from her husband's income. She had tax funds withheld from her pay. All income taxes attributed

to her income are paid. She acted reasonably to separate her tax liability from her husband's liability. As her husband stated at the hearing, if he reasonably managed the taxes as he should have, Applicant's security worthiness would not be questioned.

It is noted that Applicant may have benefitted from her husband not paying taxes for many years by having additional funds available for the family. However, this benefit is not attributed to her actions but is attributed to her husband's actions. Applicant's tax debts were incurred under circumstances beyond her control and are not likely to recur. She acted reasonably and responsibly towards her finances by filing separately.

I considered mitigating condition AG ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts). For AG ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty and obligation. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. A promise to pay delinquent debts in the future is not a substitute for a track record of paying debts in a timely manner and acting in a financially responsible manner. Applicant must establish that she has a reasonable plan to resolve financial problems and has taken significant action to implement that plan. This mitigating condition applies to the delinquent tax debt.

Even though Applicant's husband did not timely pay all of their taxes resulting in tax liens, he has paid some of the taxes. Of the 14 tax liens or debts listed in the SOR, Applicant presented sufficient information to establish that 11 tax liens or debts have been paid. The federal and state tax debt has been reduced from over \$400,000 to approximately \$150,000 in federal tax debt. The 2013 tax return has not been filed but an extension to file has been granted. The tax return is prepared and will be filed in October 2014. It shows that the family is due a refund which will be applied to the outstanding tax debt. After the tax return is filed, Applicant's husband will request from the IRS a spousal excusal for Applicant from liability for the back taxes still owed. He will seek an offer in compromise from the IRS for the remaining tax debt. Applicant's husband should inform the IRS of the disability payments he receives. While he is not required to inform them, the IRS cannot determine a good payment plan without knowing of this income.

The payment of current taxes by Applicant, the payment of past taxes by Applicant and her husband, and a plan to pay the remaining taxes, establishes a "meaningful track record" of debt payment and shows an honest adherence to financial duty and obligation by Applicant. Applicant has shown that she manages her personal financial obligations reasonably and responsibly, and her responsible financial conduct is likely to continue. There is ample evidence of responsible behavior, good judgment, and reliability. Based on all of the financial information available to include the information provided by Applicant, I conclude that Applicant has mitigated security concerns based on financial considerations.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An 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 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 presented sufficient information to establish that she acted reasonably and responsibly towards her finances. Her financial track record establishes confidence in the responsible management of her financial obligations. This indicates she will be concerned and act responsibly in regard to classified information. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated security concerns arising under the financial considerations guideline. Eligibility for access to classified information is granted.

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
Subparagraphs 1.a-1.n:	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.

THOMAS M. CREAN
Administrative Judge