



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-10697
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel  
For Applicant: Richard Stoll, Esquire

12/20/2013

**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 a Public Trust Position Application (SF 85P) on March 1, 2012 and an Electronic Questionnaires for Investigations Processing (e-QIP) on May 21, 2012. The Department of Defense (DOD) issued Applicant a Statement of Reasons on November 7, 2012, an Amended Statement of Reasons on May 13, 2013, and a Second Amended Statement of Reasons (SOR) on June 14, 2013, 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 December 16, 2012, and he answered it on December 17, 2012. He also received and answered the amended SORs in June 2013. 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 July 11, 2013. The case was originally assigned to another judge, but was transferred to me for workload reasons on August 6, 2013. DOHA issued a Notice of Hearing on September 16, 2013 for a hearing on October 8, 2013. Due to the Government shutdown, the hearing was cancelled. DOHA issued a second Notice of Hearing on October 30, 2013, and the hearing was conducted on November 19, 2013, as scheduled. The Government offered exhibits (GE) marked as GE 1 through GE 9, which were received and admitted into evidence without objection. Applicant testified. He submitted one exhibit (AE) marked as AE A, which was admitted into evidence without objection. I held the record open until November 26, 2013, for Applicant to submit additional matters and a copy of AE A. Applicant timely submitted a copy of AE A and an additional document marked as AE B, which was received and admitted without objection. The record closed on November 26, 2013. DOHA received the hearing transcript (Tr.) on November 27, 2013.

## **Procedural and Evidentiary Rulings**

### **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 15 days before the hearing. Through counsel, Applicant affirmatively waived this right under the Directive. (Tr. 10.)

### **Findings of Fact**

In his Answers to the SOR and two amended SORs, Applicant admitted the factual allegations in ¶¶ 1.d and 1.e of the first amended SOR. He denied all the factual allegations in the SOR and the remaining allegations in the amended SORs.<sup>1</sup> He also provided additional 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.

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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 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).

Applicant, who is 56 years old, previously worked as a category 1 linguist. He works part time for a DOD contractor as a role player, and he now seeks a position as a category 2 linguist with a DOD contractor. The category 2 linguist position requires a security clearance. Applicant previously worked in a gas and food mart for 22 years. From 2002 until approximately 2011, he was a part owner of the gas and food mart business.<sup>2</sup>

Applicant was born in Afghanistan. He graduated from high school and has a bachelor's degree in chemical engineering from an Afghan university. Applicant moved from Afghanistan to Pakistan to avoid military service under the Soviet regime or the Mujahedeen. After living in Pakistan for six years, Applicant immigrated to the United States on a U.S. family visa because his wife was a U.S. citizen. Applicant became a U.S. citizen in September 1999.<sup>3</sup> Applicant and his wife married in Pakistan in 1987. They have two children, a 21-year-old son and a 17-year-old daughter, who are citizens and residents of the United States.<sup>4</sup>

Applicant's 21-year-old son suffers from a substantial disability incurred at birth. Applicant and his wife settled a lawsuit filed against the county and medical providers for his son's birth injury in February 1997. Under the terms of the settlement agreement, a special needs trust was created for his son's care, and Applicant is the designated trustee. The county provided the funds used to purchase three properties, which comprise the trust assets. Two properties are rental properties, and the third property is the family residence where his son lives. This arrangement is permitted by the trust agreement. The trust agreement also allows the trustee to make investments for the benefit of the trust. The trust agreement provides that Applicant or his wife may be paid a reasonable monthly compensation for the care services they provide to their son.<sup>5</sup>

In the summer of 2002, the owner of the gas and food mart (Mr. R) learned that Applicant's son had a trust fund. Mr. R approached Applicant about becoming a 50% owner in the gas and food mart. Applicant agreed and obtained a \$410,000 mortgage on the family residence to purchase the 50% ownership in the gas and food mart business. In August 2002, Applicant and Mr. R signed a business purchase agreement, which indicated that a partnership agreement would be prepared and signed by the parties. Neither agreement is in the record.<sup>6</sup>

Initially, Applicant continued to work his cashier job at the gas and food mart, sharing the work with Mr. R. However, Mr. R managed the finances and did not allow

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<sup>2</sup>GE 1- GE 3; Tr. 26-29.

<sup>3</sup>The hearing transcript incorrectly states 1990 as the year Applicant became a U.S. citizen. Tr. 26.

<sup>4</sup>GE 1 - GE 3; GE 8; Tr. 26.

<sup>5</sup>AE A; Tr. 63, 84-86..

<sup>6</sup>GE 8; Tr. 29-31.

Applicant to review the business records of the partnership. Within two years, problems developed with the business operations. Mr. R stopped working at the business. Applicant eventually learned that Mr. R had been arrested on drug charges and was in jail. Mr. R's arrest resulted in the loss of the gas and food mart's liquor and lottery licenses. Over the next years, the business continued to decline financially. Mr. R stopped paying the rent on their business property, and he stopped paying the gas suppliers. Eventually the major gas company, under whose name the business operated, withdrew its support. In 2010, Applicant and Mr. R established an independent gas and food mart, but this business did not perform well. Mr. R continued to manage the finances and continued to refuse Applicant access to the financial records. The business finally closed on April 15, 2012.<sup>7</sup>

In February 2007, Applicant filed a lawsuit against Mr. R and the landlord for the property on which the gas and food mart operated. Applicant sought to end his partnership with Mr. R. The landlord filed a cross-complaint against Applicant and Mr. R. The court dismissed Applicant's lawsuit, which included all parties involved the lawsuit. However, the cross-complaint proceeded. Eventually, the parties agreed to settle this case, and the court entered a judgment for \$87,000 against Applicant and Mr. R. As Applicant understood the agreement, Mr. R would pay the judgment from business income.<sup>8</sup>

One gas supplier filed two lawsuits against Applicant and Mr. R, the partners in the business. The supplier obtained two judgments on April 16, 2012 against Applicant and Mr. R in the amount of \$102,000 and \$64,000, respectively. The judgments have not been paid and are listed in SOR allegations 1.b and 1.c. A second gas supplier filed a lawsuit against the second business and Applicant. This supplier obtained a judgment against Applicant and the second business in the amount of \$39,358 on September 12, 2012. Finally, the owner of the business cash register, which is currently in the possession for Mr. R, filed a law suit against Applicant for the cost of the register on March 23, 2013. This lawsuit is pending.<sup>9</sup>

Applicant learned in April 2012, through a notice from the bankruptcy court, that Mr. R had filed for Chapter 7 bankruptcy. Mr. R listed Applicant as one of his creditors. The status of Mr. R's bankruptcy filing is unknown. Mr. R's bankruptcy and nonpayment of the business bills caused the creditors to seek payment of the business debts from Applicant.<sup>10</sup>

By its language, the special needs trust prohibits creditors from seeking to obtain payment of debts from the trust assets. Because of the judgments and other business

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<sup>7</sup>GE 8; Tr. 32-35, 38, 43.

<sup>8</sup>GE 4; Tr. 38-41.

<sup>9</sup>GE 5 - GE 7.

<sup>10</sup>GE 8; Tr. 44-45, 49-50.

debts, Applicant filed a Chapter 7 bankruptcy petition on June 18, 2013. All the debts identified in the SOR and amended SOR are listed in Schedule F, Creditors Holding Unsecured Nonpriority Claims, of Applicant's bankruptcy petition. Schedule E, Creditors holding unsecured priority claims, lists two unpaid business taxes: \$2,408 for employee taxes and \$98,443 for delinquent sales taxes. Applicant's \$800 federal income tax refund was applied to the \$2,408 debt and his \$5,229 state income refund was applied to the delinquent sales taxes. The state agency managing the delinquent sales tax issue released the \$93,198 lien it filed against Applicant on July 11, 2013. In his bankruptcy petition, Applicant retained and reaffirmed one \$3,000 debt, which he claimed in Schedule D, Creditors Holding Secured Claims, as an exempt debt. The court discharged Applicant's debts on September 23, 2013. The discharge of Applicant debts also resolved the lawsuit filed against him on March 23, 2013.<sup>11</sup>

In his bankruptcy petition, Applicant's listed his monthly income at \$1,200, the money his wife receives from the trust for providing care to their son. He listed his monthly expenses at \$1,200. In 2012, Applicant earned approximately \$13,200 of income from his linguist position. Applicant took the credit counseling course required by the bankruptcy court. The income to pay his living expenses in 2013 came primarily from his son's special needs trust earnings.<sup>12</sup>

When he completed his e-QIP on May 21, 2012, he failed to acknowledge or list the three judgments listed in SOR allegations 1.a through 1.c in his answer to Section 26. When he answered the questions in Section 28, he failed to list any court actions to which he was a party. In his response to these allegations and several times at the hearing, Applicant denied falsifying his answers to these questions. He explained that he did not consider the debts of the partnership his personal debts. He also acknowledged at the hearing that he was a partner with Mr. R and that as a partner, he was jointly and severally liable for the debts of the partnership. Even with this acknowledgment, Applicant considered these debts the debts of the partnership, which were to be paid by the business. Applicant denied intentionally falsifying his answers to these questions on his e-QIP.<sup>13</sup>

When Applicant completed his SF 85P in March 2012, he also did not list any judgments or liens against him or the business. Of the four judgments listed in the SOR and amended SOR, only the judgment in SOR allegation 1.a occurred before the completion of his SF 85P. He denies intentionally falsifying this answer as his credit reports did not list the judgment or law suits.<sup>14</sup>

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<sup>11</sup>GE 9; AE A; AE B; Tr. 75, 92-93.

<sup>12</sup>GE 9.

<sup>13</sup>Responses to SOR and amendments; Tr. 42, 49-50, 54-56, 74, 79-80, 88-89.

<sup>14</sup>*Id.*; GE 1; GE 4 - GE 7; Tr. 68-69.

Concerning SOR allegation 2.a, all issues related to the unpaid rent for the gas and food mart business have been resolved in his bankruptcy case. This debt arose because Mr. R managed the business income and bill payment, not Applicant.

### **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.

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; and
- (c) a history of not meeting financial obligations.

Applicant developed significant financial problems after he entered into a business partnership in 2002 because his partner mismanaged the business income and failed to pay the business bills. Most of the debts have not been paid. These two 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:

- (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; 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.

Applicant’s substantial debts arose from decisions made by his business partner without Applicant’s agreement or consent. His business partner denied him access to the financial records of the business, which prevented Applicant from learning how his

partner had mismanaged the business finances. Applicant has no personal income independent of this business to pay the debts. He chose the only reasonable option to resolve his financial problems when he filed for Chapter 7 bankruptcy. As required by the bankruptcy court, he completed a credit counseling course. The bankruptcy court discharged all his debts on September 23, 2013. Applicant has mitigated the security concerns about his finances under AG ¶¶ 20(b) and 20(c).

### **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

(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.

The Government alleges two incidents of falsification by Applicant when he completed his 2012 e-QIP, and one incident of falsification when he completed his 2012 SF 85P. For AG ¶ 16(a) to apply, Applicant's omissions must be deliberate. The Government established that Applicant omitted material facts from his 2012 e-QIP and SF 85P applications when he answered "no" to questions about the existence of judgments, liens, and unpaid debts. This information is material to the evaluation of Applicant's trustworthiness and honesty. Applicant denied in his response and at the hearing that he intentionally falsified his answers on his e-QIP and SF 85P.

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>

When he completed his e-QIP and SF 85P, Applicant failed to list the judgments obtained against him as a partner in the gas and food mart business. He has and still does view these debts as the debts of his business partnership, not his personal debts. Although he recognizes that he had joint and several liability for the business debts, he believes the debts are to be paid by the business, not him. While his belief is incorrect, his belief indicates that he had no intent to hide these debts from the government because these were business debts, not his personal debts, and that he did not intend to falsify his answers on his 2012 e-QIP and SF 85P applications. SOR allegations 1.b, 1.c, and 1.d are found in favor of Applicant.

Concerning the nonpayment of rent for the property where the gas and food mart operated, the Government has established a security concern under AG ¶16(c) because Applicant and his business partner did not pay the rent as required.

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 is 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.

Applicant acknowledged that the rent was not paid and explained that his business partner did not use the income from business operations to pay the business expenses incurred in the operation of the business. Applicant completed a credit counseling course and has resolved this debt through his bankruptcy proceeding. There is little likelihood Applicant will become involved in another business. SOR allegation 2.a is mitigated under AG ¶ 17(d).

### **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):

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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)).

(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. Prior to his decision to become a business partner with Mr. R, Applicant did not have financial problems. The financial issues in this case arose from the dishonest acts of Mr. R. When Mr. R learned about the trust fund for Applicant's son, he offered Applicant a partnership. Applicant was unaware of the nefarious intentions of Mr. R. Initially, the business succeeded, but Mr. R's personal problems soon led him to misuse the income generated by the business. As a result, business expenses were not paid, and creditors filed lawsuits to obtain payment of the debts. As the partner of Mr. R, Applicant was held liable for the debts. Although Mr. R said the business would pay the debts, he filed bankruptcy and listed Applicant as one of his creditors. Mr. R's decision to file bankruptcy left Applicant to pay the business debts. Applicant had no choice but to file bankruptcy because he did not have any personal assets or income. His debts have been discharged under Chapter 7 of the bankruptcy code. There is little likelihood that Applicant will enter into another business partnership. His normal living expenses are paid.

Applicant failed to understand that the debts incurred while he was the business partner of Mr. R were also his personal debts which he must pay. His mistaken belief that these debts were to be paid only by the business and not by him reflect that he did not intend to falsify his answers on his 2012 e-QIP and his 2012 SF 85P. After a careful weighing of the evidence and testimony, I find that Applicant has mitigated the security concerns raise by the Government.

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 finances and personal conduct under Guidelines F and E.

### **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
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	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