

DATE: January 29, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-12528

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

Erin C. Hogan, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Stephen C. Glassman, Esq.

**SYNOPSIS**

Applicant, an officer in a family business corporation, shared responsibility with her husband for satisfying tax liens, real property taxes, and other debts when their restaurant businesses failed and they jointly declared Chapter 11 bankruptcy in 1992. As a part of their bankruptcy reorganization plan, approved by the court in 1994, Applicant and her husband agreed to satisfy the debts within specific time frames. In her answer to the Statement of Reasons, Applicant denied she knew about the liens and delinquencies when she filed her security clearance application in 2000. Prior to her hearing in 2003, Applicant took action to satisfy her portion of the debts. Applicant's lack of candor about her financial obligations raises security concerns. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 28, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on April 14, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on July 21, 2003. A Notice of Hearing was issued setting the hearing for September 2, 2003. For good cause shown, an Amended Notice of Hearing was issued setting the hearing for September 4, 2003. On September 4, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the close of the hearing, I granted Applicant an additional 10 days to submit documents demonstrating that her debts had been satisfied, and I granted Department Counsel ten days after receiving Applicant's submissions to comment and transmit the entire package to me. Applicant and Department Counsel agreed that Applicant would submit additional documents to Department Counsel, who would review and comment on the documents before sending them on to me.

At the hearing, Applicant's counsel expressed some concern over the procedure. The Deputy Department Counsel stated that after receiving Applicant's post-hearing submissions, Department Counsel reserved the right to comment on the documents filed by Applicant, but would submit no new documents for admission to the record. (Transcript at 224-225.) Counsel for Applicant said he found such an arrangement satisfactory. (Transcript at 225.)

DOHA received the transcript (Tr.) of the proceeding on September 15, 2003. By letter dated September 15, 2003, Applicant filed four additional exhibits, identified as J, K, L, and M. By letter dated September 29, 2003, Department Counsel did not object to the admission of Applicant's four additional exhibits and provided commentary on them. In rebuttal, Department Counsel offered for admission an additional document identified as Government's Exhibit 9. Department Counsel served Applicant with a copy of his response and rebuttal submission. Applicant did not file an objection.

Upon reviewing the transcript of the hearing and the agreements between the parties regarding post-hearing submissions, I have admitted into evidence Applicant's Exhibits J, K, L, and M. I have admitted into evidence Department Counsel's commentary on Applicant's submissions, but have not admitted Department Counsel's proposed Exhibit 9, since it goes beyond the parties' agreement at the close of the hearing on September 4, 2003. I have not considered proposed Exhibit 9 in arriving at this decision.

### FINDINGS OF FACT

The SOR in this case contains 16 allegations of disqualifying conduct. Thirteen allegations relate to conduct charged under Guideline F, Financial Considerations, and three allegations relate to conduct charged under Guideline E, Personal Conduct. In her answer to the SOR, Applicant admitted filing Chapter 11 bankruptcy (subparagraph 1.j.), and the existence of the debts identified at subparagraphs 1.a., 1.b., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 1.k., and 1.l. She denied knowing of the existence of the debts in August 2000, when she filed her SF-86. Applicant did not answer allegation 1.c. of the SOR. In response to SOR allegation 1.m., Applicant denied she had the financial ability to pay off the debts identified in the SOR. She denied providing materially false responses to Questions 36, 37, 38, and 39 on her SF-86, as alleged in subparagraphs 2.a., 2.b., and 2.c. of the SOR. Applicant's admissions are incorporated herein as findings of fact.

Applicant, who is 45 years old, is employed by a defense contractor as a computer programmer at an annual salary of \$71,000. At the hearing, her employer praised her for outstanding work, subject matter expertise, professionalism, maturity, and skill in mentoring and training others in the organization. (Tr. 88.)

Applicant became a naturalized American citizen in 1992. She immigrated to the United States from country X in 1978, at the age of 20, with the intent to study further and to work (Tr. 32). She did not have a job when she came to the U.S., although she had experience in restaurant work in her home country (Tr. 32).

Prior to her arrival in the United States, Applicant had earned an undergraduate degree in economics and psychology in her home country. (Tr. 113-114.) Upon arriving in the U.S., Applicant went to live in the household of the man who is now her husband. He, like Applicant, had emigrated from country X and was related to a friend of her family back in her home country. He was at that time, and remains, a citizen of country X. In 1978, the man was married and he and his wife had three children. (3) After living in his home for one month, Applicant began working in the man's restaurant business. It is not clear whether she received a regular salary. She did not pay the man rent or room and board. Instead, she worked in his restaurant business for 12 hours or more each day, seven days a week, year round, in exchange for living in his home. Applicant's security clearance application (SF-86) states that she managed one of the man's several restaurants from 1978 to 1992. Applicant testified at her hearing that she worked as a waitress from 1978 to 1983. (Tr. 136.)

Applicant's SF-86 states that she and her employer were married in 1983. (4) They have two children. In 1983, Applicant became the manager of one of the restaurants. In January 1992, the former wife of Applicant's husband resigned as secretary-treasurer of the family restaurant businesses and Applicant purchased her shares in the business. Applicant signed and dated buy-sell agreements whereby she acquired interests in several restaurants and became secretary-treasurer of the family business corporation. (Ex. A-3, A-4, A-5.) At that time, the family business corporation owned

eight restaurants and four fast food outlets. <sup>(5)</sup>

The businesses began to fail. On September 17, 1992, Applicant's husband and Applicant filed a voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. By document signed and dated October 1, 1992, they identified and certified, under penalty of perjury, a five-page list of creditors to whom they owed money. (Ex. 5, at 2.) Applicant's husband and Applicant identified over \$836,266 in back taxes and other penalties owed to federal, state, and local governmental units. A plan of reorganization was proposed to creditors and confirmed by the bankruptcy court on July 6, 1994. As a part of the plan of reorganization, Applicant's husband and Applicant agreed to payment plans to settle their tax obligations. The court granted a Motion of Final Decree and closed the case on December 5, 1995.

Applicant's husband is in frail health and is no longer able to work. She is the sole support of her family and has managed the family's finances since 1997. (Tr. 43.) She denies any knowledge of the business dealings or financial obligations of the family business corporation. She acknowledges that she signed documents as a co-debtor with her husband but had no knowledge or understanding of the actions she was participating in and attesting to. She said she signed documents because she was told to do so by her husband and that, in the culture of country X, it was a wife's duty to obey her husband in all things and not to ask questions. (Tr. 37, 38, 39, 114.)

Applicant acknowledged that she has not received a federal income tax refund since 1995 because her refunds have been applied to back taxes. (Tr. 117). She acknowledged that when she filled out her SF-86 in August 2000 she was aware that her federal tax refunds were being applied to back taxes. (Tr. 118.)

At her hearing, Applicant provided documentation to show that she had paid the debts identified in SOR allegations 1.k. and 1.l. She also presented documents showing that the federal Internal Revenue Service (IRS) had granted her request for a certificate of subordination with respect to a Notice of Federal Tax Lien (NFTL) recorded against Applicant's husband in 1995. The IRS agreed to subordinate to a new first deed of trust in Applicant's home in the approximate amount of \$285,000, which would refinance the current first deed of trust in the home, pay settlement costs, pay off a state tax lien senior to the IRS NFTLs, and pay off two NFTLs filed against Applicant in the approximate amount of \$78,000. (Ex. F) Applicant also presented at her hearing an offer in compromise accepted by the Department of Taxation of her state of residence which would settle for \$6,000 her state income tax delinquencies of 1984, 1988, and 1992 and certain of her withholding and sales tax obligations for 1992. (Ex. E.) By letter dated September 15, 2003, Applicant presented evidence that she and her husband had refinanced their home and paid off the state tax lien and the two NFTLs attributable to Applicant's social security number. (Ex. L and Ex. M)

Applicant completed and signed her SF-86 on August 7, 2000. Question 36 on the SF-86 reads as follows: "Your Financial Record - Tax Lien. In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" Applicant answered "no" to Question 36.

Question 37 on the SF-86 reads as follows: "Your Financial Record - Unpaid Judgments. In the last 7 years, have you had any judgments against you that have not been paid?" Applicant answered "no" to Question 37.

Question 38 on the SF-86 reads as follows: "Your Financial Delinquencies - 180 Days. In the last 7 years, have you been over 180 days delinquent on any debt(s)?" Applicant answered "no" to Question 38.

Question 39 on the SF-86 reads as follows: "Your Financial Delinquencies - 90 Days. Are you currently over 90 days delinquent on any debt(s)?" Applicant answered "no" to Question 39.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use,

handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline F-Financial Considerations**

In the SOR, DOHA alleged that Applicant's existing debts include state tax delinquencies for 1984, 1988, and 1992 (1.i.); three pending tax liens dating to 1990 (1.e.), (1.f.), and (1.g.); a pending tax lien dating to 1991 (1.h.); a pending tax lien dating to 1995 (1.d.); a judgment dating from 1994 for past due property taxes (1.c.); and two pending federal tax liens dating from 1995 (1.a. and 1.b.). The SOR alleges Applicant and her husband filed Chapter 11 bankruptcy in 1992 (1.j.). The SOR identifies two delinquent accounts and alleges that Applicant has failed to pay them (1.k. and 1.l.). The SOR alleges that Applicant is financially able to pay on her many debts but has failed to do so. (1.m.)

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting her financial obligations, and this financial history suggests an inability or an unwillingness to satisfy her debts, conditions which raise security concerns under ¶¶ E2.A6.1.2.1 and E2.A6.1.2.3 of Guideline F.

Applicant argues that she was unable rather than unwilling to satisfy the debts, and she advances two reasons for this. First, Applicant and her husband attribute the financial downfall of their restaurant businesses to an economic downturn which occurred in the early 1990s. Second, Applicant argues that the conditions that caused her to fail in meeting her financial obligations were beyond her control since her husband made all operational and financial decisions about family and business obligations.

Applicant's arguments suggest four possible mitigating conditions under Guideline F. Security concerns related to Guideline F conduct can be mitigated if the behavior was not recent

(¶ E2.A6.1.3.1.), if the conduct derived from an isolated incident (¶ E2.A6.1.3.2.), if the conditions that resulted in the behavior were largely beyond the person's control (¶ E2.A6.1.3.3.), or if the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve the debts.

(¶ E2.A6.1.3.6.)

The record shows that Applicant's inability or unwillingness to satisfy her debts was not an isolated incident, and it

occurred in past and in recent time. The state tax liens filed against Applicant and her husband date back almost 20 years, to 1984. These and other liens, debts, and delinquencies were duly noted in the Chapter 11 bankruptcy petition filed by Applicant and her husband in 1992, almost 12 years ago. While the conditions giving rise to Applicant's financial difficulties occurred in the past, Applicant's reluctance to acknowledge her indebtedness and to follow through on payment plans she joined her husband in proposing to the bankruptcy court, and which the bankruptcy court then approved in 1994, causes security concerns. Applicant's behavior is recent and demonstrates a history of not meeting financial obligations; thus, mitigating conditions E2.A6.1.3.1 and E2.A6.1.3.2 do not apply.

Applicant argues that the conditions that caused her to fail in meeting her financial obligations were beyond her control. Applicant and her husband attribute their financial problems to an economic downturn in the 1990s, a situation over which they had no control. Mitigating condition E2.A6.1.3.3 can apply to such circumstances. Applicant also argues that the family's financial liabilities were beyond her control because her husband exercised exclusive control over all operational and financial decisions about family and business obligations. Even though Applicant was designated a corporate vice president and secretary treasurer in the business, her husband never discussed business matters with her. And, apparently, even though she was an educated woman and possessed a college degree in economics, she never asked. She signed legal documents her husband or his lawyers presented to her without question. To do otherwise, she explained, would be contrary to country X's cultural assumptions about a wife's role.

Applicant offered no evidence of physical coercion or intimidation to explain her reluctance or inability to accept her responsibilities as a debtor and business partner, leading to the conclusion that her inability or unwillingness to satisfy her debts was not a matter beyond her control. Thus, while mitigating condition E2.A6.1.3.3 applies to the economic downturn that caused financial difficulties for Applicant and her husband, it does not apply to her argument that she should be excused from financial accountability because she chose not to acquaint herself with her duties as an officer in the family business.

Applicant herself provided evidence of her ability to assume responsibility for managing her family's finances when her husband became ill. At her hearing, she stated that she has been the family breadwinner and financial manager since 1997. In 2002, she initiated an effort to repay creditors or otherwise resolve debts identified in the SOR, and, as the record shows, she has been successful in resolving many of her debts.

Mitigating factor E2.A.6.1.3.6. applies in part to Applicant's conduct in repaying overdue creditors and otherwise resolving her debts. Her "take-charge" actions in resolving her long-standing debts are commendable. The record shows that, as a result of Applicant's efforts, which were approved by the Internal Revenue Service, the Federal tax liens identified in SOR allegations 1.a., 1.b., 1.e., and 1.f., were released against her. Additionally, SOR allegation 1.d. was identified as a duplicate of SOR allegation 1.b. and SOR allegation 1.h. was discharged as to Applicant, but not as to her husband, in the allocation of liability approved by the Internal Revenue Service. The State tax liabilities identified in SOR allegations 1.g. and 1.i. were settled as a result of the State's acceptance of Applicant's offer of compromise and payment of funds acquired through the refinancing of her home mortgage. Department Counsel conceded Applicant's successful mitigation of SOR allegations 1.k. and 1.l. Applicant admitted SOR allegation 1.j., that she and her husband had filed Chapter 11 bankruptcy. She denied SOR allegation 1.m., but demonstrated her financial ability to use her resources to satisfy her debts and tax liens. In her answer to the SOR, Applicant did not respond to allegation 1.c., although at her hearing she denied liability for the real property taxes alleged. Applicant's submissions in support of her denial were insufficient to rebut the Government's allegation of her responsibility for the real property taxes.

In documentation submitted after her hearing, Applicant demonstrated that she was successful in paying off or otherwise resolving most of the debts and financial liabilities identified in the SOR. Many of these debts had been delinquent for years, and while Applicant is to be commended for finally satisfying them, it must be noted that creditors' claims were satisfied when it was in Applicant's interest to do so in order to mitigate an inference of financial unreliability. After considering the record as a whole, and after applying the whole person standard, I conclude that Applicant's recent efforts at dealing with her financial responsibilities are not sufficient to mitigate the negative security significance of her long-standing history of financial difficulties. Accordingly, Guideline F is concluded against the Applicant.

## **Guideline E-Personal Conduct**

Under Guideline E, Personal Conduct, the SOR alleges in subparagraphs 2.a., 2.b., and 2.c. that Applicant falsified material facts on her security clearance application by answering "no" to Questions 36, 37, 38, and 39 on her SF-86, thereby deliberately failing to disclose tax liens alleged in subparagraphs 1.a., 1.b., 1.d., 1.e., 1.f., 1.g., 1.h. and 1.i. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

When an applicant deliberately omits, conceals, or falsifies material facts on a personal security questionnaire, this raises a security concern and may be disqualifying. ¶ E2.A5.1.2.2. The security concern resulting from lack of candor or truthfulness in answering the questions on an SF-86 can be mitigated if the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily. ¶ E2.A5.1.3.2. The security concern can also be mitigated if the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. ¶ E2.A5.1.3.3.

Applicant provided negative answers to Questions 36, 37, 38, and 39 when she completed and signed her SF-86 in August 2000. In her answer to the SOR Applicant denied falsifying her responses to the questions and failing to disclose her tax debts. The record shows that Applicant and her husband received two notices of federal tax liens against their property in October 1995. (Ex. 7 and 8.) In her response to Question 36 on the SF-86, Applicant answered "no" when asked if, in the last seven years, there had been a lien placed against her property for failing to pay taxes and other debts. In her response to Question 37 on the SF-86, Applicant answered "no" when asked if, in the last seven years, there had been any unpaid judgments against her. By order of the Bankruptcy Court, entered March 7, 1994, Applicant and her husband agreed to a payment plan for the adjustment, payment and settlement of their real property tax obligations. The payment plan, if followed, provided for payments through 2000. In her response to Question 38 on the SF-86, Applicant answered "no" when asked if, in the past seven years, she had been over 180 days delinquent on any debt. In response to Question 39 on the SF-86, Applicant denied being over 90 days delinquent on any debt.

In her testimony, Applicant stated that she had become the family breadwinner and had taken over the management of her family's finances in 1997. She also acknowledged in her testimony that she had not received a federal tax refund since 1995 because her refunds were applied to back taxes. She also acknowledged in testimony that when she completed her SF-86 in August 2000, she was aware that her federal tax refunds were being applied to back taxes.

Applicant's denials of falsification lack credibility. While she argues that she knew nothing of the liabilities of the family business corporation of which she was an officer, she also asserts that she has been in charge of her family's finances since 1997 and has been aware for several years that tax liabilities were being satisfied with her tax refunds. Applicant, a college graduate, argues that she was an ignorant and obedient wife who signed papers having legal meanings and consequences in her adopted country and never dared question what they meant. She also argues she has sound judgment and should be trusted to use and protect classified information. Applicant puts forth irreconcilable arguments.

With respect to Applicant's Guideline E conduct, the Government has established its case. Her failure to answer Questions 36, 37, 38, and 39 on her SF-86 completely, truthfully, and correctly raises a security concern under ¶ E2.A5.1.2.2 of Guideline E. Neither mitigating condition E2.A5.1.3.2 nor mitigating condition E2.A5.1.3.3. applies to the facts of her case. Accordingly, allegations in subparagraphs 2.a., 2.b., and 2.c. are concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

### **DECISION**

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 or continue a security clearance for Applicant. Clearance is denied.

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**Joan Caton Anthony**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The man and his wife were divorced sometime between 1978 and 1983.
4. As a part of their Chapter 11 bankruptcy filing, Applicant and her husband provided personal background information in an amended disclosure statement, filed April 15, 1994. In a document signed by Applicant and her husband, it is stated that the couple was married November 4, 1981, and that, during the time of her marriage, Applicant "has been a full time housewife and mother." Ex. 5, FIRST AMENDED DISCLOSURE STATEMENT, ARTICLE ONE, PERSONAL BACKGROUND INFORMATION, Case No. 92-14479-AT, at 4.
5. In a Statement of Financial Affairs, filed with the United States Bankruptcy Court, Applicant's husband was listed as President of the corporation, and Applicant was listed as one of five Vice-Presidents and also as Secretary-Treasurer. Between them, Applicant and her husband held 100% of the stock in the corporation. Ex. 5, Statement of Financial Affairs, Case No. 92-14479-AT, at 10.

