

KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant was seriously financially overextended because of the failure of a restaurant business he and his spouse owned and operated before her death. While he still owes about \$11,000 in federal income taxes and is indebted to several other creditors in the aggregate about \$18,215, Applicant had owed about \$72,851 in delinquent debt. His payments and efforts to apprise his creditors of his financial status reflect sufficient good faith on his part to resolve his debts to mitigate the Financial Considerations concerns. Personal Conduct concerns are not raised by Applicant's failure to report a June 2001 tax lien and February 2001 judgment on his February 2002 SF 86 when he was unaware of the lien and the judgment had been satisfied. Although Applicant did not file his federal income tax return for 2001 until February 2003, his failure to do so was not criminal where he had applied for extensions to file and was working with an accountant on its preparation. Clearance is granted.

CASENO: 03-04601.h1

DATE: 09/16/2004

DATE: September 16, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04601

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Warren Miller, Esq.

**SYNOPSIS**

Applicant was seriously financially overextended because of the failure of a restaurant business he and his spouse owned and operated before her death. While he still owes about \$11,000 in federal income taxes and is indebted to several other creditors in the aggregate about \$18,215, Applicant had owed about \$72,851 in delinquent debt. His payments and efforts to apprise his creditors of his financial status reflect sufficient good faith on his part to resolve his debts to mitigate the Financial Considerations concerns. Personal Conduct concerns are not raised by Applicant's failure to report a June 2001 tax lien and February 2001 judgment on his February 2002 SF 86 when he was unaware of the lien and the judgment had been satisfied. Although Applicant did not file his federal income tax return for 2001 until February 2003, his failure to do so was not criminal where he had applied for extensions to file and was working with an accountant on its preparation. Clearance is granted.

**STATEMENT OF CASE**

On September 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(1\)](#) DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on Financial Considerations (Guideline F), Personal Conduct (Guideline E), and Criminal Conduct (Guideline J).

On October 27, 2003, Applicant filed his response to the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on December 17, 2003, and pursuant to notice of February 17, 2004, a hearing was scheduled for March 10, 2004. At the hearing held as scheduled, the Government submitted 18 exhibits. Applicant's case consisted of 12 exhibits and his testimony. A transcript of the hearing was received on March 19, 2004.

## FINDINGS OF FACT

The SOR alleges Financial Considerations concerns because of outstanding delinquencies, including unpaid federal, state, and municipal taxes; Personal Conduct concerns due to Applicant's alleged intentional omission of tax liens and unpaid judgments from his February 2002 SF 86; and Criminal Conduct due to his failure to file his individual federal income tax return for tax year 2001. In his Answer, Applicant admitted those debts yet unpaid, contended he had satisfied or was repaying many of the debts, and contested legal responsibility for others, *i.e.*, those alleged in subparagraphs 1.n., 1.o., 1.t. Asserting he had no knowledge of any tax liens and that no judgment had been filed because of unpaid municipal taxes, Applicant denied any intentional falsification of his security clearance application. Applicant offered a copy of his 2001 federal income tax return to contest the alleged willful failure to file. Applicant's admissions to various debts are accepted and incorporated as findings of fact. After a complete review of the evidence of record, I render the following additional findings:

Applicant is a 54-year-old electronic mechanic who has worked for a defense contractor (company A) since January 2002. He had been employed by the company as a test engineer and most recently as a weapons program management advisor from February 1979 to April 1997 when he was laid off due to lack of work in his specialty. Applicant held a secret security clearance throughout this earlier employ, and he seeks reinstatement of that clearance.

Applicant secured employment as a program director. He finished up his studies for an M.S. degree in finance and an MBA in international management awarded him in June 1998. He financed his graduate education at least in part through a student loan taken out in July 1997 that had a balance of \$19,624 as of arch 2003.

Applicant decided to open his own business in June 1999. Then current in their financial obligations, Applicant and his spouse in July 1999 purchased a building in the local area in which they opened a restaurant with her as the primary chef and him as the manager. Applicant and his spouse granted a business lender a security interest in the business assets and properties (including equipment, furniture and fixtures) in return for a venture capital loan of \$220,000. Within a year of the restaurant's opening, his spouse had to quit working as she experienced a recurrence of cancer that had been in remission, <sup>(2)</sup> necessitating the hire of a replacement chef. Applicant also hired a manager as he was unable to attend to the business while taking care of his spouse.

With business debt and personal debt incurred for the business mounting in part due to mismanagement by the newly hired manager, Applicant borrowed from whatever source he could, <sup>(3)</sup> relied on credit cards to their maximum limits, put off payments to vendors, and even withdrew about \$220,000 from his retirement plan with company A, which resulted in a federal tax penalty. Applicant also refinanced the mortgage on his personal residence in January 2001 to put more money (about \$37,000) into the restaurant, and personal property taxes were no longer paid out of an escrow account maintained by the lender. In July 2001, Applicant entered into an agreement with a nonprofit credit counseling

service to repay four delinquent consumer credit accounts on which he owed a total of \$33,644. Over the next year, \$1,559.50 in payments were made to the creditors. As the restaurant business deteriorated further, Applicant stopped making payments to the consumer credit counseling service and he fell behind in his property tax obligation on his residence. The city filed a tax lien against him in June 2001 for nonpayment of real estate taxes on the restaurant. Credit card accounts also became seriously delinquent and were charged off.

In January 2002, he returned to work at company A, initially as a mechanic. With a steady income (annual wage \$37,950.16 for 2002), he concentrated on paying the tax obligations and tried to make the mortgage payments for the restaurant. With reported losses totaling \$24,750 from the business in 2002, he was forced to close the business. The lender who had fronted them the startup fees repurchased the loan, paying off the local taxes, and in return took the building and the equipment/fixtures. Applicant estimates he lost \$400,000 of his own personal financial assets in the business.

Needing a secret clearance for his duties at company A, Applicant executed a security clearance application on February 5, 2002, disclosing a lien filed against him in about January 1999 to recover on a radiology services debt of \$1,562.39 (listed at \$1,200). He did not list the tax lien assessed by the municipality against him for unpaid real estate taxes on the business property in June 2001 because he had not received notice of the lien. A judgment awarded a business creditor in February 2001 for \$550 had been paid in full, so it was not an unpaid judgment required to be listed on the SF 86. Applicant responded negatively to financial delinquencies over 180 days in the last 7 years (question 38), but he indicated he was currently over 90 days delinquent on five credit card accounts with an aggregate indebtedness of \$18,845.

A check of Applicant's credit in March 2003 listed as outstanding a \$117 debt in collection since November 2002, the \$550 civil judgment awarded in February 2001, three additional judgments of \$2,765, \$3,535, and \$627 awarded between May 2002 and November 2002, two tax liens filed by local municipalities (\$2,110 in June 2001 and \$1,420 in May 2002), and eight other accounts written off as bad debts totaling about \$37,282. He was also 90 days past due in his student loan. Specifics concerning the financial delinquencies alleged in the SOR follow:

Debt (as listed in SOR)	Delinquency history	Repayment status as of March 2004
1.a. Federal tax debt \$8,730 for 1999	IRS record of December 2002 reflects debt of \$8,730.75 for 1999	Payments of \$150 made in October and November 2002, \$854 paid in May 2003. Through application of tax overpayments <sup>(4)</sup> and \$150 payments by Applicant, tax obligation reduced to \$972.18 as of February 2004. As of March 2004, Applicant was paying back the IRS at \$150 per month per an agreement with the IRS.
1.b. Federal personal income tax debt \$9,626 for 2000	IRS record of December 2002 reflects debt of \$9,626.67 for 2000	As of February 2004, debt balance \$10,907.93
1.c. State sales tax debt \$2,925	Restaurant collected sales taxes he failed to turn over to the state; no payment	As of April 2003 had submitted payment plan; State reported no outstanding income tax liability as of December

for June 2000 to December 2002	since July 2002; owed \$2,925.50 as of December 2002	2003; Applicant indicates it has been paid.
1.d. Municipal tax debt (real property) \$8,179 for 1999 and 2000 for restaurant	As of November 2002, owed unpaid real estate taxes on the restaurant for tax years 1999 and 2000 of \$8,179.28.	As of April 2003, had not contacted city. A tax bill of \$5,578.70 for tax year 2002 was paid in full in July 2003. Applicant submits a venture capital lender paid the taxes when it took over the building; References to specific property book entries in Statement of Subject indicate debt paid in full and lien released June 2002
1.e. Municipal tax debt (real estate and sewer) \$1,420 for personal residence	Sewer use lien filed July 2002 for \$236.13; with interest balance \$541 as of November 2002. Real estate lien of \$1,883.03 filed May 2002 for unpaid taxes due July 2000 and January 2001. (S) As of November 2002 owed \$2,119.86 in real estate taxes, \$541.62 in sewer charges.	Contacted town in April 2003 and was told to make partial payments. As of March 2004, he owed \$910.25 in real estate taxes for 2003 and \$452.74 in sewer charges after payment of \$400 toward sewer arrearage; Delinquent real estate tax debt for 2000/01 paid.
1.f. Judgment \$550 awarded February 2001 for individual who provided services to restaurant	Refused to pay when billed as services not provided; Creditor sued in small claims for \$670.89, awarded \$550.89 judgment	Paid in full in 2001
1.g. Judgment \$2,765 awarded business vendor ay 2002	Creditor filed against Applicant for \$2,735.60; Disputed some of the charges on invoices but creditor granted judgment of \$2,765.60 in May 2002; Judgment lien filed against Applicant's residence February 2003	Sent \$140 in September 2002, subsequent payments of \$500. As of March 2004 balance about \$500.
1.h. Judgment \$627 awarded business vendor July 2002	May 2002 creditor that provided ice machine rental filed against restaurant for \$1,835.37; Judgment award \$627.54 in July 2002	As of April 2003 claimed no debt owed as wife made payments in 2002 of about \$500. Paid off judgment as of March 2004 but creditor claims additional fee owed.
1.i. Judgment \$7,238 awarded credit card company 2002	Revolving charge opened September 1996; \$6,994 balance charged off to profit and loss. Judgment lien filed August 2002 to recover \$7,238.83	Prior to April 2003 DSS interview contacted attorney representing creditor; promised to pay \$50 per month; no payments made as of March 2004 with creditor not contesting delayed satisfaction.
1.j. Judgment \$3,535 awarded gas company in November 2002	Delinquent in gas payments for restaurant; Creditor filed against restaurant in October 2002 for \$3,500; judgment award of \$3,535 in November 2002; lien against his home	Began payment of \$35 weekly, cut back to \$50 monthly. As of April 2003 had made four or five payments of \$50 each. No subsequent payments with creditor agreeing to delayed satisfaction.
1k. Judgment \$7,477 awarded retailer December 2002 for revolving charges	Account opened June 1981; \$7,234 past due balance charged off in August 2002; December 2002 judgment of \$7,477.44 awarded creditor; Judgment lien filed.	Contacted his attorney after judgment awarded, arranged to pay \$35 per week; one payment of \$50 made by April 2003. In early 2004, creditor attached Applicant's account taking \$1,200. Creditor has agreed to delayed satisfaction of remainder.
1.l. Judgment \$5,836 awarded credit union	Revolving VISA charge opened February 1998; \$5,096 past due balance transferred to recovery; Judgment plus	One payment of \$125 before June 2003; Order issued June 2003 to garnish wages at \$35 per week from January 2003 until \$5,836.90 paid; Judgment lien released February 2004

December 2002	fees of \$5,926.90 awarded December 2002	on satisfaction.
1.m. Judgment \$429 awarded credit union April 2003	Business checking account opened as co-maker, \$312 balance written off to profit and loss April 2000, creditor pursued small claims action to recover \$359.78 debt; Judgment plus fees of \$394.78 awarded April 2003	Proposed payments of \$50 per month; sent in two payments by April 2003 (applied to larger credit card debt alleged in 1.1.); Order issued June 2003 to garnish wages at \$35 per week from May 2003 until \$429.78 paid; Judgment lien released August 2003
1.n. Collection debt of business \$4,249 for point of sale credit card machines leased	High credit of \$6,778 on two accounts opened in 1999; Balances of \$2,111 and \$2,132 sent for collection	Balance disputed. Contends he made some payments on original debt of over \$2,000; creditor wanted \$4,000 (entire balance of contract) when company went out of business.
1.o. Collection debt \$117 for unpaid communications charges	Placed for collection November 2002	As of April 2003 sending them \$25 per month; paid in full as of March 2004.
1.p. Credit card charge off \$6,044	Revolving charge opened April 1998; \$6,044 balance charged off May 2001 when account \$845 past due	On September 15, 2003, creditor offered to settle \$5,794.87 balance if payment of \$2,029 made by September 18, 2003; Applicant submits debt has been paid.
1.q. Bad debt \$587 for computer bought for business	Account opened January 2000, high credit \$841. Card cancelled by credit grantor May 2001 with unpaid balance \$587 (\$269 past due)	As of April 2003 had not contacted creditor. As of arch 2004, Applicant had been making \$100 monthly payments and was offered a settlement of 80 percent of the remaining debt.
1.r. Credit card charge off \$5,985	Account opened August 1999, \$5,985 high credit charged off January 2002 (\$590 past due)	Payment of \$100 made June 2003; August 2003 creditor offered to settle for \$2,000 if \$1,900 lump sum paid on or before August 22, 2003; Applicant submits debt has been paid.
1.s. Credit card charge off \$781	Revolving charge account with automotive business opened April 1991 fell \$99 past due, \$781 balance written off February 2002	Spoke with creditor late March 2003, offered to settle for lump sum payment he could not afford. Subsequent payments brought balance to \$420 as of March 2004.
1.t. Mortgage debt \$87,085 on Applicant's residence, reported past due since March 2002	May 2002 lender filed suit claiming he had failed to make payments; Applicant contested on basis a payment must have been lost in transfer of mortgage on refinancing; Payments for March through May 2002 had been late	Payment history record reflects payments current through March 2002; lender refused to accept installment payments thereafter. Attorney confirms he held mortgage payments for Applicant pending resolution. In May 2003, attorney forwarded \$13,025.89 in mortgage payments (including \$271.04 for legal costs) from April 2002 to June 10, 2003; Complaint against Applicant withdrawn June 2003 <a href="#">(6)</a>

On November 25, 2002, Applicant was interviewed by a Defense Security Service (DSS) special agent about his financial delinquencies. Applicant attributed his excessive indebtedness to the failure of his restaurant business. He indicated he was focusing on the most critical debts such as the tax obligations. While he had made some payments of \$700 per month to a credit counseling service in an effort to repay his consumer credit obligations through debt consolidation, he stopped as the business deteriorated. Applicant had recently requested the credit counseling firm to again intercede on his behalf with his creditors. He acknowledged a monthly net remainder of zero after payment of

current expenses and whatever he could on his delinquent debts, but denied any new delinquencies. Concerning specific payments to creditors, Applicant maintained he satisfied the debt alleged in 1.f. in March or April 2001, had started sending \$140 monthly payments on the debt alleged in 1.g., and paid the radiology judgment in March 2001. He admitted owing about \$541 in unpaid sewer use charges and \$1,883.03 in back property taxes alleged in 1.e., the debt alleged in 1.i., and several delinquent credit obligations, but contested those debts alleged in 1.n. and 1.t. With respect to the mortgage, he claimed not to have missed any payments.

In February 2003, Applicant was granted a forbearance of his student loan to where his payments were reduced from \$204.63 to \$50 per month for the period October 21, 2002, to September 21, 2003. On April 2, 2003, Applicant was reinterviewed by the DSS. Applicant indicated his total federal tax liability was about \$13,000, but he expected an overpayment of \$3,000 for 2001 to be applied to his 1999 balance. While he had set up a partial payment plan with the state to repay the back sales taxes for the restaurant, he had not yet heard from the state on his offer. Applicant had just the day before talked to one town as to the taxes owed (1.e) and had not yet contacted the other municipality owed personal property and water and sewer taxes. Having severed his ties with the debt consolidation service, Applicant indicated he was making payments directly to some creditors (those alleged in 1.i., 1.p., 1.o., 1.m., and 1.j. Due to his spouse's illness, he had medical expenses of \$1,450 per month which negatively impacted his ability to repay his creditors.

In February 2003, Applicant completed his federal income tax return for tax year 2001, having been granted an extension to file. He reported business losses for 2001 of \$90,439. As of December 2003, Applicant had filed all his personal income tax returns to the state and all taxes reported due had been paid.

As of March 2004, Applicant still owed about \$29,000 to his creditors in addition to \$15,000 in student loans. He was making payments on his student loan and to the IRS and was current in the mortgage payments on his residence. Applicant intends to repay the balances of the delinquent debts alleged in subparagraphs 1.q. and 1.s. first and then concentrate on repaying the IRS and the judgment alleged in 1.j. He expects a refund of federal taxes for 2003 that will be intercepted by the IRS in repayment of his overdue obligations. Applicant anticipates he will have all but his student loan paid off within the next year and a half.

Applicant's earned income is about \$55,000 annually from his work for the defense contractor, although he also works overtime on a regular basis (between 50 and 60 hours weekly for the past two years), paid at time and a half after five hours. Applicant drives a 1998 model year economy car that he financed through a loan taken out in 2003 of about \$6,000 that he was repaying at \$280 per month. He had purchased a new car in 2002 but was in an accident. He expects to receive a settlement sometime in the foreseeable future for injuries sustained in the accident that he will then apply to his remaining indebtedness. Applicant has about \$1,000 in his checking account and was contributing between 11 and 12 percent of his pay to a retirement account. He has one credit card with a limit of \$300 that is secured.

## 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 (DC) and mitigating conditions (MC) 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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(7\)](#)

## **Guideline F**

### **Financial Considerations**



E2.A6.1.1. The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable acts.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations;

E2.A6.1.2.3. Inability or unwillingness to satisfy debts.

E2.A6.1.3. Conditions that could mitigate security concerns include:

E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);

E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

## **Guideline E**

### **Personal Conduct**

E2.A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

None applicable.

## **Guideline J**

### **Criminal Conduct**

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

None applicable.

## **CONCLUSIONS**

Having considered the evidence in light of the appropriate legal precepts and adjudicative guidelines, and having assessed the credibility of Applicant, I conclude the following with respect to Guidelines F, E and J:

With respect to Guideline F, a person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an Applicant with a history of serious or recurring financial difficulties may be more susceptible to mishandling or compromising classified information.

Applicant has a history of extensive financial delinquency related to the failure of a restaurant business he owned and operated from 1999 to about July 2002. The Government alleged Applicant owed had delinquent debt totaling \$77,100 not including the mortgage debt in subparagraph 1.t. The evidence corroborates Applicant's claim that the financial company handling the mortgage debt on his personal residence was involved in questionable business practices and that he tried in good faith to make his mortgage payments. As for the other alleged debts, Applicant has consistently disputed owing \$4,249 (SOR 1.n.) to the leasing company, contending that he and his spouse had paid their obligation, which was about \$2,000. Applicant's March 2003 credit report lists an outstanding balance of \$2,132 placed for collection. (Ex. 4) While Applicant presented no documentation showing payment, he had been candid about his

responsibilities with regard to his other debts so his denial of liability is worthy of belief. About \$72,851 in delinquent debt (\$18,356 in federal income taxes, \$2,925 in sales/use state taxes, \$9,599 in city taxes, \$28,457 in judgment debt, and \$13,514 in charged off balances) was proven by the evidence. Disqualifying condition E2.A6.1.2.1. *A history of not meeting financial obligations* and E2.A6.1.2.3. *Inability or unwillingness to satisfy debts* applies in this case. While there is no record of financial delinquency before he opened his restaurant, he was unable to pay even his municipal real estate and sewer use taxes on his personal residence.

Applicant maintains he has satisfied all but about \$25,000 of the delinquent debt. IRS records confirm satisfaction of most of his income tax debt for tax year 1999. However, he still owes about \$11,000 in federal income taxes. Applicant indicates he paid off the \$2,925 in state sales and use taxes owed for the restaurant. The state reports all personal income tax returns have been filed with the state with no taxes owed. As of December 2003, there was no outstanding income tax liability for Applicant. (See Ex. C) It is not clear whether this audit by the state included review of sales/use tax records. Of the municipal taxes owed for the restaurant, Applicant provided documentation showing he has a zero balance owed for 2002 (Ex. D). The Government's concern was with the unpaid municipal taxes for 1999 and 2000. (See Ex. 14). That debt was apparently paid by the venture capital lender who took over the building. As confirmed by Exhibit F, Applicant owes \$910.25 in real estate taxes for his personal residence that were due January 2004 and he was still in arrears on his sewer charges after he had paid \$400. While he was not completely up to date on his payments, he was getting caught up with his obligations. Four of the judgment debts (SOR 1.f., 1.h., 1.l., 1.m.) have been satisfied and another (1.g.) has been reduced by payment to \$500. Accepting Applicant's claims of payment, he still owes about \$17,215 in outstanding judgments and another \$1,000 in unpaid charge off balances, bringing his total unpaid delinquent debt excluding the student loan to about \$29,000.

Given that the debts resulted from a business failure, mitigating condition E2.A6.1.3.3. *The conditions that resulted in the behavior were largely beyond the person's control*, applies in his favor. The degree to which Applicant invested personal assets in the business raises some concern, especially since he has an .S. in finance and an M.B.A., but the failure of the business itself was due to factors he could not have foreseen (his spouse's illness that necessitated unanticipated hiring and the mismanagement by the person he employment to manage the business in his absence). Yet Applicant still has a sizable debt to repay. While Applicant need not be debt free before he can be granted access, there must be adequate assurances that he has his financial situation under control and that he is not at risk of illegal or improper acts to generate funds to repay his obligations. Even before he closed the business, Applicant attempted to work with a credit counseling service to repay his debts. When his indebtedness proved ultimately too large to repay through a debt consolidation agreement, Applicant contacted his creditors and notified them of his financial situation. Documents of record reflect payments by Applicant thereafter, albeit sporadic on several accounts, with the largest payments through interception of tax refunds, garnishment action, or seizing of account assets. His failure to maintain regular payments with several creditors (such as the \$35 weekly promised the judgment creditors set forth in 1.j. and 1.k. and the \$50 monthly to the judgment creditor in 1.i.) were not due to disregard, but rather to substantial out of pocket medical expenses related to his spouse's serious illness (\$1,450 per month as of April 2003). As of March 2004, he was repaying the IRS at \$150 per month and other creditors had agreed to wait for their monies until he paid his back taxes. After considering all of the circumstances, there is sufficient evidence of demonstrated resolve to repay his obligations to credit him under mitigating condition E2.A6.1.3.6. *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. SOR subparagraphs 1.a. through 1.t. are resolved in Applicant's favor.

The Government's case under Guideline E is based on alleged falsification of his security clearance application for failure to list the tax lien filed against him in June 2001 and the February 2001 judgment.<sup>(8)</sup> Applicant has denied any deliberate falsification, contending he had no knowledge of the tax lien, and had paid the judgment debt. While security

significant Personal Conduct concerns are raised where an applicant has not been completely candid with the Government about matter relevant and material to his or her personnel security application and investigation (*see* DC E2.A5.1.2.2.), I am persuaded Applicant did not deliberately conceal the tax lien or judgment from the Government. Since he had paid the judgment by February 2002, it was no longer required to be listed on his SF 86. Those judgment debts that are still outstanding were awarded after he completed his SF 86. He credibly testified to having no prior notice of the tax lien. SOR subparagraphs 2.a. and 2.b. are therefore found for Applicant.

Applicant has also successfully rebutted the Government's contention that he knowingly and willfully failed to file his federal income tax return for tax year 2001. While the intentional failure to file by the due date can raise security significant Guideline J, Criminal Conduct, concerns (*see* DC E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), Applicant presented documentation (Exhibit L) showing that he had retained the services of a professional accountant to prepare his tax return for that year because of his complicated tax situation involving very substantial business losses. This return was not finished until February 2003, but Applicant and his spouse had requested an automatic extension to file. The extension requested in August 2002 was an additional extension signed by the tax preparer because they were missing information from an outside source. Applicant testified he retained the certified public accountant well in advance of the filing of his return. The Government having failed to prove that Applicant knowingly and willfully failed to file his federal tax return for tax year 2001, SOR subparagraph 3.a. is resolved in Applicant's favor.

## FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline F: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: For the Applicant

Subparagraph 1.k.: For the Applicant

Subparagraph 1.l.: For the Applicant

Subparagraph 1.m.: For the Applicant

Subparagraph 1.n.: For the Applicant

Subparagraph 1.o.: For the Applicant

Subparagraph 1.p.: For the Applicant

Subparagraph 1.q.: For the Applicant

Subparagraph 1.r.: For the Applicant

Subparagraph 1.s.: For the Applicant

Subparagraph 1.t.: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Paragraph 3. Guideline J: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

**DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

**Elizabeth M. Matchinski**

**Administrative Judge**

- 1.
2. Applicant's spouse passed away in 2003. (Tr. 41)
3. Applicant testified he lost in the business about \$250,000 of his own money, \$100,000 of borrowed funds, and an additional \$37,000 in funds from the refinancing of his personal residence. (Tr. 45)
4. On April 2, 2003, Applicant told the DSS agent that he had filed his personal income tax return for tax year 2001 in February 2003 and expected a \$3,000 overpayment to be applied to his delinquent federal tax obligation for 1999. (Ex. 3) His federal income tax return for 2001 completed February 5, 2003, reflects an overpayment of \$2,577. (Ex. L) When Applicant completed his tax return for 2002, he calculated a tax overpayment of \$3,564. (Ex. B) IRS records submitted by Applicant (Ex. A) reflect an adjustment to his account, a deduction of \$6,141, which is the total of the two income tax refunds. It appears his income tax refunds for tax years 2001 and 2002 were indeed applied to his delinquent federal tax obligation for 1999.
5. Applicant's credit report of March 2003 lists one lien in the amount of \$1,420 filed in May 2002. (Ex. 4). When interviewed in November 2002, Applicant cited specific property record information indicating two liens filed, a \$236.13 lien filed July 2002 and a \$1,883.03 lien filed in May 2002. (Ex. 2)
6. The company that serviced the mortgage is the subject of a class action lawsuit and proposed settlement due to alleged misconduct, specifically the company assessed late fees and other charges even though borrowers' monthly payments were not late; charged fees that were not authorized; obtained property insurance at the borrower's expense when the borrower already had insurance in place; engaged in improper collection practices; and took actions to foreclose on borrowers' properties when not warranted by law or contract. (Ex. K)
7. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. § 986.
8. The tax lien Applicant did not list is presumed to be the lien noted in SOR subparagraph 1.d. rather than 1.c., which alleges the unpaid sales/use taxes. There is no evidence the state ever filed a lien against Applicant for unpaid sales taxes. Similarly, the SOR inaccurately alleges subparagraph 1.e. rather than 1.f. in contending that Applicant failed to disclose an unpaid judgment. Subparagraph 1.e. refers to a municipal tax lien. The Government did not move to amend the SOR and did not argue in closing that Applicant deliberately falsified his SF 86.