

DATE: June 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06308

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant owes the Internal Revenue Service about \$360,000.00, and has more than \$113,000.00 worth of other accounts that have been charged off as bad debts, submitted for collection, resulted in liens being filed against him, or were the result of a repossession. There is no prospect any of these accounts will ever be paid, and Applicant has not yet determined whether he will seek bankruptcy protection. He has failed to mitigate the security concerns caused by the financial considerations present in this case. Clearance is denied.

STATEMENT OF THE CASE

On August 23, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline F (financial considerations). The file contains two responses to the SOR, one filed stamped as received by DOHA on September 27, 2004, and the other file stamped as received on November 10, 2004. Applicant admitted all SOR allegations, denied they created a security concern, and requested a hearing.

The case was assigned to another administrative judge on March 9, 2005, and scheduled for a hearing on April 7, 2005, pursuant to a notice of hearing issued on March 10, 2005. The hearing was cancelled at the request of Applicant due to a personal family matter. The case was then reassigned to me on April 11, 2005, to be consolidated with other hearings I had scheduled in the region. A notice of hearing was issued on May 2, 2005, scheduling the hearing for May 18, 2005. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified at the hearing, called one witness to testify on his behalf, and submitted eleven documentary exhibits that were marked as Applicant's Exhibits (AE) 1-11, and admitted into the record without objection. The transcript was received by DOHA on June 21, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 55-year-old man who has been employed by a defense contractor as a technical writer since September 2002. He received a bachelor of science degree in organizational management in 1995, and thereafter held a variety of jobs ranging in duration from a few months to several years. He also unsuccessfully attempted to operate his own power-washing business in 1999, and experienced periods of unemployment from November 1999 to July 2000, and October 2001 to June 2002.

Applicant first married in August 1971. That marriage ended in divorce in December 1975. He married a second time in August 1976. That marriage ended in divorce in December 1980. He has been married to his current wife since August 1982. Applicant has two adult daughters.

Applicant submitted the testimony of his work site manager, and letters of recommendation from his immediate supervisor, and friends and fellow church members, who are also retired military officers. Together they establish his reputation as a dependable, honest, trustworthy, and loyal individual.

Applicant owes the Internal Revenue Service (IRS) an estimated \$360,000.00, including interest and penalties. His liability to the IRS stems from his investment in one of more than 100 partnerships established by a nationally recognized cattle breeder during the 1980s. Applicant, and several thousand other investors located throughout the United States, invested in the partnerships in good faith, only to eventually learn they were illegal tax schemes set up by the cattle breeder who was eventually convicted of numerous counts of fraud. Unfortunately, the way the schemes were conducted caused the innocent investors to become indebted to the IRS for many times their original investments.

Numerous attempts have been made by Applicant, other investors, attorneys acting of the behalf of groups of investors, and others to get the IRS to forego collection on the delinquent taxes without success. Applicant estimates his tax liability, excluding interest and penalties, to be about \$50,000.00. He indicates he would be willing to enter into some payment arrangement with the IRS for that amount, but it insists on full payment of \$360,000.00, which includes interest and penalties.

Applicant has at times, with the assistance of counsel, unsuccessfully attempted to negotiate with the IRS. However, he testified the IRS had not pursued collection of any amount for several years, and therefore he did nothing to deal with the delinquent taxes. However, sometime around the beginning of 2005, the IRS once again initiated collection efforts, and he has again retained the services of an attorney to represent him.

Applicant also has 13 accounts, totaling more than \$113,000.00, that have been delinquent since approximately the late 1990s. The delinquencies arose from his effort to start up a power-washing business. He initially was successful in attracting customers by placing road signs around the region. However, within a few months of beginning the business, the local government ordered him to remove the signs or face a fine for each sign. Unable to advertise his service, the business quickly folded, and he incurred the substantial debt that remains delinquent. Applicant has not made any payment on any of the 13 accounts.

Applicant and his wife have a combined yearly gross income of about \$60,000.00. They manage to pay their living expenses, but have little left over to apply to the delinquent accounts. It is clear that Applicant does not have the means to satisfy either the IRS or the delinquent accounts.

Applicant testified he has not sought bankruptcy protection because he has been waiting to see if he would be successful in negotiating with the IRS before attempting to discharge the other debt. He claims this was done on the advice of his attorneys. The attorney he now has representing him has indicated they might file bankruptcy and attempt to discharge the IRS debt as well as the 13 delinquent accounts. No reason was given for not attempting this avenue of relief previously.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant has incurred overwhelming debt that he has no ability to repay. All of the debt has been delinquent for many years with Applicant doing virtually nothing to resolve it, other than to attempt to negotiate with the IRS, and hoping it would give up and resolve the delinquent taxes in his and the other investors favor. Disqualifying Condition (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

Applicant's financial problems are the result of him being duped into investing in a scheme that turned out to be a tax fraud, and, naively, although in good faith, attempting to start a business without providing for a lawful means of attracting customers. Accordingly, Mitigating Condition (MC) 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)* applies.

Applicant's actions as they relate to the IRS debt are somewhat understandable, and to a large extent based upon the advice of counsel. However, his failure to do anything to resolve any of the 13 accounts that have been delinquent for years is inexcusable. He could have attempted to pay some of the smaller debts, seek credit counseling, negotiate with the creditors himself, or file for bankruptcy protection. His claim that he may seek bankruptcy protection in the future is severely wanting in view of his total inaction in the past.

Considering all relevant and material facts and circumstances present in this case, including the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant is unable to mitigate this security concern. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline F is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

DECISION

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.