

DATE: January 31, 2007

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12828

## **ECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant did not timely file his federal or state income tax returns for tax years 1996 through 2000. Personal conduct concerns are mitigated as he filed all his delinquent returns as of April 2006, and he timely complied with his tax filing obligations for tax years 2001 through 2005. He owes about \$3,000 in federal taxes for 2000, but financial considerations are mitigated where resolution of the tax debt is pending an Internal Revenue Service decision on his claim to a \$6,124 refund for tax year 1996 and he is not financially overextended. Clearance is granted.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on November 16, 2005, detailing the basis for its decision—security concerns raised under Guideline F (financial considerations) and Guideline E (personal conduct) of the Adjudicative Guidelines. Applicant submitted an undated answer, received by DOHA on December 22, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on April 5, 2006. With the consent of the parties, I convened a hearing on June 28, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Ten government exhibits (1-10) and 27 Applicant exhibits (A-AA) were admitted, and testimony was taken from Applicant, as reflected in a transcript (Tr.) received on July 17, 2006.

### **FINDINGS OF FACT**

DOHA alleged under Guideline F, financial considerations, that Applicant owed delinquent federal taxes of \$20,562.82 for tax year 1997 (SOR ¶ 1.a) and \$73,601.06 for tax year 1998 (SOR ¶ 1.b); that he filed his federal return for 1996 in 2003, more than three years after its due date (SOR ¶ 1.c); and had not filed his federal returns for tax years 1997 through 2000 (SOR ¶¶ 1.d through 1.g). This failure to file timely returns for tax years 1996 through 2000 was cross-alleged as willful felonious conduct under Guideline E, personal conduct (SOR ¶¶ 2.a through 2.e).

Applicant denied the alleged indebtedness when he answered the SOR. He admitted he had filed late returns, for 1997 and 1998 as well as 1996, and that he had not yet filed for tax years 1999 and 2000. Applicant indicated he was attempting to get his tax filing information to his tax preparer by January 31, 2006, for tax years 1999 and 2000. After consideration of the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 63-year-old divorced computer scientist who has been employed by a defense contractor since 1994. His services have been contracted out to the military and to defense firms, both in the U.S. and abroad. Applicant has been at his present duty station since sometime before August 2003. He has held a top secret-level security clearance since January 1996. Applicant does not access classified documentation in his work but does system administration on the operating system of a classified computer.

Applicant worked for his employer at a U.S. naval installation in Sicily from October 1996 to December 1999. He did not file U.S. federal or state income tax returns while residing abroad as his income was less than the maximum foreign earned income exclusion authorized under federal law (\$70,000 for 1996 and 1997, \$72,000 for 1998).<sup>(1)</sup> Applicant was unaware then that he could have had his returns prepared by a professional accounting firm (firm #1) retained by his employer to prepare the returns of its employees working outside of the U.S. After Applicant returned to the U.S., he procrastinated in filing his returns.

Based on wage earnings reported by Applicant's employer, the Internal Revenue Service (IRS) filed substitute 1040A returns for tax years 1997 and 1998. On May 6, 2002, the IRS notified Applicant of its intent to levy on his assets to collect unpaid tax liabilities, inclusive of penalties and interest, of \$20,562,82 for 1997 (Ex. 5) and \$73,601.06 for 1998 (Ex. 8).

Prompted to resolve his delinquent tax matters, Applicant secured the assistance of firm #1 to file those returns covering those years he has stationed outside of the U.S. In February 2003, Applicant filed his federal (Ex. D) and nonresident state income tax returns (New Jersey for 1996 and 1997 and Pennsylvania for 1996) for tax years 1996 and 1997.<sup>(2)</sup> For 1996, Applicant overpaid his federal taxes by \$6,124, and his New Jersey taxes by \$226, while he owed \$2 to Pennsylvania. In August 2003, the IRS disallowed Applicant's claim to the \$6,124 refund because he failed to file his return within three years of the due date. (Ex. 4) For 1997, Applicant claimed a refund of \$1,672 in state taxes but nothing in federal taxes after reporting an adjusted gross income of negative \$1,444. In ay 2003, the IRS abated prior tax assessments and penalties for 1997, and notified Applicant that he was entitled to a \$300 refund, which was intercepted to pay taxes for tax year 1998. (Ex. 7; Ex. A; Ex. F)

On July 20, 2003, firm #1 prepared Applicant's federal return for 1998, calculating that Applicant owed the IRS \$2,003 (underpayment of \$1,016 and the remainder penalties and interest). (Ex. 9) The return was received by the IRS in early September 2003. The IRS abated prior taxes, penalties and interest assessed, and paid Applicant a refund of \$381 in November 2003. (Ex. A; Ex. AA)

With the assistance of his personal accountant (firm #2), Applicant timely filed his returns for tax years 2001 and 2002. On an adjusted gross income of \$68,184, Applicant calculated he owed \$1,082 in federal taxes for 2001. (Ex. Q) On July 8, 2002, the IRS notified Applicant that due to mistakes on his return, he was instead entitled to a refund of \$300, that was taken to repay other federal taxes. (Ex. 10) Applicant was granted extensions to file his federal and state returns for tax year 2002, and the returns were filed in September 2003. His expected refund of \$284 from the state was intercepted by the IRS. (Ex. R) He overpaid his federal taxes by \$2,864 on an adjusted gross income of \$53,360. (Ex. S) The IRS paid him his refund on October 24, 2003. (Ex. AA)

Applicant was interviewed on July 23, 2002, July 16, 2003, and August 1, 2003, about his tax issues by a Defense Security Service (DSS) special agent. He indicated at their last meeting that he had not yet forwarded any data regarding unresolved tax years 1999 and 2000 to tax firm #1 due to his procrastination. (Ex. 2)

Applicant timely filed his federal and state returns for tax years 2003, 2004, and 2005 with the assistance of firm #2. On a federal adjusted gross income of \$53,129, Applicant overpaid his federal taxes by \$2,734 (Ex. U) and his state taxes by \$301 (Ex. T) for tax year 2003. On a federal adjusted gross income of \$60,135 for 2004, he owed \$109 in state taxes (Ex. V) but he was entitled to a refund of \$872 in federal taxes (Ex. W). For tax year 2005, Applicant filed a nonresident

return for Maryland in addition to filing in his state of residence. He owed \$79 to Maryland (Ex. X), and \$95 to Connecticut (Ex. Y), and was entitled to a refund of \$207 in federal tax overpayment on a federal adjusted gross income of \$64,337 (Ex. Z). Applicant sent in his \$95 payment to Connecticut with his return. (Ex. AA)

In April 2006, Applicant filed his delinquent state returns for tax years 1999 and 2000 with the assistance of tax firm #2. He owed no taxes for 1999, and overpaid his New Jersey taxes by \$2,282 (Ex. J) and his federal taxes by \$33 (Ex. L). For tax year 2000, he underpaid his New Jersey taxes by \$14 (Ex. N), Connecticut by \$660 (Ex. O), and his federal taxes by \$3,119 (Ex. P). On the advice of his tax preparer, Applicant did not make any payment when he submitted his federal return because he wanted to discuss with the IRS their rejection of his claim to a \$6,124 refund for tax year 1996. (Tr. 89-90) Applicant paid the state taxes owed when he sent in his returns on or about April 16, 2006. (Ex. AA) Applicant admits he filed the returns for 1999 and 2000 very late due to procrastination and the lack of anyone such as the DSS agent suggesting that he get them in. (Tr. 109, 123)

As of late June 2006, Applicant had filed his delinquent returns. He owed no back state taxes. He owes approximately \$3,000 in federal taxes if the IRS continues to disallow his claim to the \$6,124 in taxes overpaid for 1996.<sup>(3)</sup> As for his intent to file future tax returns timely, Applicant testified, "I will try and do them on time." (Tr. 124)

### 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). 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 (App. Bd. Dec. 19, 2002).

The Adjudicative Guidelines set forth potentially 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

### CONCLUSIONS

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

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. ¶ E2.A6.1.1. The government alleged that Applicant owed \$94,163.88 in unpaid federal taxes, penalties, and interest, based on IRS assessments for 1997 and 1998. However, after Applicant filed his returns for those tax years in 2003, the IRS rebated the assessments. As of June 2006, Applicant owed \$3,119 in federal taxes for 2000, assuming refunds for 1999 and 2005 were not intercepted, no penalties were added for his late filings, and the IRS continued to disallow his claim to the \$6,124 he would have received for 1996 had he filed his return within three years of its due date.

Disqualifying condition ( DC) ¶ E2.A6.1.2.1. *A history of not meeting financial obligations*, has limited applicability in this case. There is no evidence of Applicant living beyond his means or being unable to pay his bills. While he did not timely file his returns for 1996 through 2000, he always had taxes withheld from his pay, and with the exception of tax year 2000, owed little, if anything, after the returns were filed. He knew he had an obligation to file, but his failure to file timely returns does not amount to income tax evasion under DC ¶ E2.A6.1.2.2. *Deceptive or illegal financial practices, such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*. When the tax returns were due for 1996, 1997, and 1998, Applicant was living abroad. His earnings for part of 1996, and for 1997 to 1999, were subject to the

foreign earned income exclusion. Applicant procrastinated in filing his returns, especially those for 1999 and 2000, once he returned to the U.S., but he has filed them. His motivation was not to evade the payment of taxes.

The government's case for DC ¶ E2.A6.1.2.3. *Inability or unwillingness to satisfy debts*, has some merit, given Applicant's failure to pay the \$3,119 in delinquent federal taxes for tax year 2000. Applicant was advised by the IRS in August 2003 that he was not entitled to the \$6,124 overpayment for tax year 1996 because he had not filed his return within the time allotted by law. There is no evidence Applicant appealed the IRS' denial of his claim at that time. Under the circumstances, he could have gone a long way toward demonstrating reform had he paid the taxes owed when he filed his return in April 2006, pending IRS resolution of a renewed claim to the funds. Yet Applicant also testified, unrebutted by the government, that his accountant (firm #2) advised him to withhold payment until he heard from the IRS, and he showed good faith in paying his state tax debt of \$660 when he filed his 2000 state return (¶ E2.A6.1.3.6. *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). I find Applicant is likely to pay his federal tax debt if the IRS again disallows his claim. Concerns related to Applicant's failure to pay his taxes on time are not primarily financial.

### **Guideline E--Personal Conduct**

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.A5.1.1 Applicant showed very poor judgment in not filing his federal and state income tax returns on time for several years. Applicant was aware of his obligation to file returns even when he was residing in Sicily. As he admitted at his hearing, he failed to make the filing a priority. ("I was overseas and that wasn't real high on my list of things that I needed to do." Tr. 98). The inordinate delay in addressing his tax issues after he returned to the U.S. was explained as a matter between him and the IRS (Tr. 108), to procrastination, and the fact he did not owe the IRS a substantial amount of money (Tr. 109). Applicant's repeated disregard of this legitimate cost of United States citizenship, which includes not only paying taxes but filing the required tax forms timely, raises questions as to whether will comply with rules and regulations concerning the proper handling and safeguarding of classified information. Under the adjudicative guidelines pertaining to personal conduct (Guideline E), DC ¶ E2.A5.1.2.5. *A pattern of dishonesty or rule violations, including violating of any written or recorded agreement made between the individual and the agency*, is implicated. (4) None of the corresponding mitigating conditions are on point.

### **Whole Person Analysis**

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." ¶ E2.2.1. Applicant's failure to file timely federal and state income tax returns (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*) began when his permanent residence was in Sicily and he knew his income was less than the maximum foreign income exclusion allowed under federal law (¶ E2.2.1.2. *The circumstances surrounding the conduct*). Yet despite residing continuously at his present address since late January 2000, he made no effort to comply with his obligation until after his first DSS interview in July 2002. When contacted by the agent in July 2003, Applicant had not yet filed his returns for 1998, 1999, or 2000. His 1998 return had been prepared by August 1, 2003, and it was filed in September 2003, but there is no evidence that he took any action to file his 1999 and 2000 returns until after the SOR was issued. Procrastination in complying with one's legal obligations is incompatible with the good judgment that must be demanded of those with top secret access.

Applicant has filed his delinquent returns, but it is his timely compliance with his filing obligations for tax years 2001 through 2005 that reflects a favorable change in behavior (¶ E2.2.1.6. *The presence or absence of rehabilitation and other pertinent behavioral changes*) and leads me to conclude that he can be counted on to comply with his tax obligations in the future (¶ E2.2.1.9. *The likelihood of continuation or recurrence*). Despite displaying a somewhat cavalier attitude toward his tax obligation in the past, Applicant understands that he cannot ignore his taxes in the future and expect to retain his security clearance.

### **FORMAL FINDINGS**

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

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

Subparagraph 1.g: 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

Subparagraph 2.e: For Applicant

**DECISION**

In light of all of the circumstances 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. *See* IRS forms 2555 for 1996 (Ex. D), 1997 (Ex. F), and 1998 (Ex. H). The foreign earned income exclusion rose to \$74,000 in 1999. (Ex. L)
2. Applicant's returns show he owns two residential rental properties in Maryland. He provided Maryland returns for tax years 1998 (Ex. G), 1999 (Ex. I) 2000 (Ex. M), and 2005 (Ex. X). He worked in Maryland from October 1994 to April 1992. (Ex. 2)
3. If the IRS intercepted Applicant's refunds of \$207 for 2005 and \$33 for 1999, he would owe a balance of about \$2,897, provided his claim to the \$6,124 is again disallowed and not accounting for interest or penalties.
4. Although the government alleged that Applicant committed felonious conduct under 26 U.S.C. § 7203 by willfully not filing federal returns for tax years 1996 through 2000, the government incongruously did not cite concerns under Guideline J, criminal conduct.