DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-04021
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

February 6, 2008

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86) on February 23, 2006. On August 22, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision deny her application, citing security concerns under Guideline F (Financial Considerations). This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 2, 2007, and answered it on September 10, 2007. On September 24, 2007, she requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 10, 2007. The case was assigned to an administrative judge on October 15, 2007, and reassigned to me on October 24, 2007. DOHA issued a notice of hearing on November 1, 2007, and I convened the hearing as scheduled on November 15, 2007. Government

Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified on her own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through T, which were admitted without objection. I granted Applicant's request to keep the record open until December 7, 2007 to enable her to submit additional matters. At her request, I extended the time until January 18, 2007. Applicant's two requests for additional time and my responses are attached to the record as Hearing Exhibit (HX) II. Applicant timely submitted AX U, and it was admitted without objection. Department Counsel's response to AX U is attached to the record as Hearing Exhibit III. DOHA received the transcript of the hearing (Tr.) on December 13, 2007. The record closed on January 18, 2008. Eligibility for access to classified information is denied.

Procedural Issue—Notice of Hearing

The hearing was convened within 15 days of the written notice of hearing. I advised Applicant of her right under Directive ¶ E3.1.8 to written notice 15 days before the hearing. She affirmatively waived her right to 15 days notice. (HX I; Tr. at 20-21.)

Findings of Fact

In her answer to the SOR, Applicant admitted all the factual allegations and offered explanations. Her admissions in her answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 41-year-old configuration/data manager for a federal contractor (Tr. 95). She has worked for her current employer since February 2006. Her current supervisor described her as extremely reliable, a self-starter, direct, street-smart, and demonstrating strong situational leadership skills (AX B).

Applicant has an associate's degree in computer information science. While working for her current employer, she has completed several professional development courses (AX E, F, and G), and she has received a cash award and several certificates for her exceptional performance of duty (AX D). She held a security clearance from 1990 to 1997, which was administratively terminated when she changed jobs. She does not currently hold a clearance (Tr. 10).

Applicant is married and has three children, a 20-year-old son, a 16-year-old daughter, and a 14-year-old daughter (Tr. 47). All three children live at home (Tr. 48). Applicant handles the finances for the family (Tr. 48, 82).

In 1995, Applicant and her husband contracted to build a new house. They sold their townhouse and leased an apartment for six months, the anticipated time for construction of the new house. Their house was unexpectedly completed in about three months, requiring Applicant and her husband to begin making mortgage payments on the new house while continuing to pay rent on the leased apartment for the remainder of

the lease term (Tr. 72-73). At about the same time, Applicant's husband's pay was cut by thirty percent when his employer's company was sold (AX A at 1; Tr. 74).

In July 1996, Applicant was seriously injured in an automobile accident, had no medical insurance, and was unable to work (AX A at 1; Tr. 74). In April 1997, she and her husband filed a petition for Chapter 7 bankruptcy, receiving a discharge in August 1997 (GX 2).

Applicant's husband lost his job shortly after they received their bankruptcy discharge (Tr. 77), leaving Applicant solely responsible for supporting the family. Based on their attorney's advice, they filed a petition for Chapter 13 bankruptcy in November 1998. After the petition was filed, Applicant found a new job that increased her income by about ten percent, and her husband found work as a sub-contractor for a counter-top company. Eight months later she was offered another job that increased her income by an additional thirteen percent. She also took a second job for about four months (AX A at 2). Based on the increases in their income, she and her husband asked their attorney to dismiss the Chapter 13 bankruptcy. The case was dismissed in November 1999 (GX 3).

Applicant's husband became the principal sub-contractor for the counter-top company in 2003. He formed his own company, bought equipment, and hired employees. He earned a reputation for being honest, reliable, and devoted to his family (AX C). Unfamiliar with the tax laws, he reported the income of his company as personal income on their joint return (Tr. 50). He also caused accounting problems for the family by mingling business income and expenses with personal income and expenses (Tr. 84). The family account is now separated from the business account (Tr. 85, 96-97).

Applicant was laid off in December 2004. Her husband laid off some of his staff in January or February 2005 due to a business downturn, and he overspent on purchases of equipment and materials (Tr. 53-54). They fell behind on the federal income taxes, and a tax lien for $30,219 was filed in March 2005 (GX 4). A second tax lien for $8,261 was filed in December 2005 (GX 5). After the liens were filed, they incurred additional unpaid tax debt of about $40,000, increasing their total tax debt to about $86,000 for tax years 2003 through 2006 (Tr. 65).

In late 2004, Applicant and her husband hired a tax debt consulting agency to negotiate a settlement of the federal tax debt, and they submitted an offer in compromise to the Internal Revenue Service (IRS) in December 2005. Applicant found a new job around February 2006 and reported the change in their financial status to the IRS. Because of her increased income, the IRS rejected their offer in compromise (Tr. 91-92). They submitted a proposed installment agreement in October 2006 but received no response (AX M at 2).

Applicant and her husband hired a tax lawyer around June 2007. The lawyer suggested a possibility of using the equity in their home to pay off part of the tax lien. The proposed plan was to refinance the home, pay off the first and second mortgages,

negotiate with the IRS to subordinate the tax liens to the new first mortgage, pay off part of the tax liens with the cash proceeds of the refinancing, and pay off the liens under a monthly payment plan (GX 6 at 2). This plan was expected to yield about $56,000 in home equity that could be applied to the tax debt, leaving about $30,000 to be resolved through a negotiated payment plan (Tr. 65-66).

Between August and November 2007, in anticipation of the refinancing and IRS payment plan, they paid off two credit card balances of about $7,000 and $3,400, a car loan of about $12,000, and a small medical bill (AX T at 1-6). In October 2007, they also sold a truck from the counter-top business for $3,000 (AX T at 7).

As of the date of the hearing, the loan had been approved and they were awaiting a decision on the subordination agreement from the IRS (AX I, J, K; Tr. 64). Applicant and her husband were anticipating a closing date on the refinancing within two weeks (Tr. 66). However, the closing on the refinancing did not occur as anticipated. Applicant and her husband were required to resubmit their loan application after the hearing. They subsequently qualified for a loan, but had not received a decision on the IRS subordination agreement as of the date the record closed. They were, however, paying $500 per month on the tax lien (AX U).

Applicant and her husband have hired a professional tax preparer to handle their 2007 taxes, and they have set aside about $10,000 to pay their federal income taxes (AX R; Tr. 67-69). Around August 2007, Applicant increased the income tax withholding from her income (AX S; Tr. 98).

Applicant's current gross annual pay is about $80,000, and her husband earns between $80,000 and $90,000 annually (Tr. 98). Her husband's income fluctuates depending on the demand for his services (Tr. 97). Their monthly expenses are about $6,000 (Tr. 97). They have a net monthly remainder of about $1,100 (Tr. 106).

Applicant and her husband currently pay $1,000 per month on the first mortgage on their home and $400 on the second mortgage. If the refinancing is completed, they expect to pay about $1,600 per month on a single mortgage (Tr. 98).

Even after selling the truck and paying off one car loan, they still have three car payments per month. Applicant has a 2005 Cadillac Escalade that she bought used, on which her monthly payment is $1,000. Her husband has a work truck on which the monthly payments are $440. The monthly payment on their son's car is $550. The loan on their son's car is "upside down," because the balance is greater than the value of the car. The car loan that was recently paid off also was "upside down." Applicant explained that, because of their previous bankruptcy filings and resulting lower credit rating, they could not finance a car purchase without paying a high interest rate (Tr. 98-99).

From January to October 2007, Applicant's brother-in-law and his children were in financial difficulty and lived with Applicant and her husband. The additional residents in the house increased their utility and food expenses (Tr. 101).

Applicant has six active credit card accounts, which are all current. She pays more than the minimum monthly payment, between $800 and $1,000 per month, but carries a total balance between $10,000 and $20,000. These accounts also have higher rates of interest because of Applicant's credit history (Tr. 102-03).

Applicant and her husband have a family savings account with a balance of slightly less than $10,000, but no other assets other than the family household furnishings and her husband's business equipment. Neither she nor her husband has any retirement savings (Tr. 106-07).

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 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), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 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. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

The SOR alleges Applicant petitioned for and received a Chapter 7 bankruptcy discharge in 1997 (SOR ¶ 1.a), and she petitioned for Chapter 13 bankruptcy in November 1998 and it was dismissed in November 1999 (SOR ¶ 1.b). It also alleges two unsatisfied federal tax liens filed against Applicant (SOR ¶¶ 1.c and 1.d). The security concern relating to Guideline F is set out in AG ¶ 18:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." Applicant's inability to pay her delinquent taxes raises AG ¶ 19(a).

AG ¶ 19(b) is a two-pronged condition that is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." The first prong of AG ¶ 19(b) is raised because Applicant's purchase of a late model luxury car during a time when she could not pay her taxes was "irresponsible," and it

contributed to her inability to pay her delinquent taxes. However the second prong is not established because she has demonstrated willingness to pay the debt.

AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." Applicant's financial history since 1997 raises this disqualifying condition.

AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis." The combination of Applicant's irresponsible purchase of a luxury car, pattern of "upside down" car loans, high credit card debt, and delinquent tax debt raises AG ¶ 19(e). Until recently, they had five vehicles in the family, of which four were being financed and at least two were "upside down" loans. They carry a monthly credit card debt between $10,000 and $20,000.

AG ¶ 19(g) is raised by "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." This disqualifying condition is not raised because there is no evidence of failure to file income tax returns or fraudulent filing. The record reflects only a failure to pay the taxes due.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 20(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

The first prong ("so long ago") is not established because Applicant's delinquent taxes are still unresolved. The second prong ("so infrequent") is not established because she has a history of financial problems, predating her Chapter 7 bankruptcy discharge and extending through delinquent taxes for several years. The third prong ("unlikely to recur") also is not established. The tax debt arose because Applicant and her husband did not understand or prepare for the consequences of their treatment of the income generated by her husband's business. They have since obtained the assistance of an accountant to manage the financial aspects of the business and a lawyer to negotiate a resolution of the tax debt. While they have reduced the likelihood

of further tax delinquencies, their unwise purchases, multiple high-interest loans, significant credit card debt, and the absence of a financial cushion militate against a conclusion that further delinquent debts are unlikely to recur. Finally, the fourth prong ("does not case doubt on the individual's current reliability, trustworthiness, or good judgment") is not established. Applicant's decision to incur additional debt to buy a late-model luxury car while she was seriously behind on paying her federal income taxes and carrying significant high-interest debt from other purchases reflects a lack of financial discipline that causes me to doubt her good judgment. I conclude AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." AG ¶ 20(b). Both prongs, i.e. conditions beyond the persons's control and responsible conduct, must be established.

The events preceding Applicant's 1997 bankruptcy, i.e., the unexpected early completion of their home, her husband's pay cut, her injuries in an automobile accident and inability to work, and her uninsured medical expenses, all were beyond her control. She and her husband tried to discharge their obligations, sought legal advice, and determined that a Chapter 7 bankruptcy was the best course of action. The event preceding Applicant's Chapter 13 bankruptcy petition, i.e., her husband's loss of employment, also was beyond her control. The later decision to dismiss the bankruptcy after her husband found a new job and she received several pay raises was reasonable. I conclude AG ¶ 20(b) is established for the two bankruptcies alleged in SOR ¶¶ 1.a and 1.b.

The business mistakes made by Applicant's husband were arguably a circumstance beyond her control, because she did not involve herself in her husband's business. However, she managed the household accounts and knew her husband was mingling the accounts. She filed a joint return with her husband reflecting his business income as personal income, and she knew the amount of taxes they owed. Furthermore, she did not respond reasonably to the consequences of her husband's business mistakes. She purchased a luxury car and obligated herself to make monthly payments of $1,000 on the car at a time when they could not afford to pay their taxes. I conclude AG ¶ 20(b) is not established for the tax liens alleged in SOR ¶¶ 1.c. and 1.d.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). Applicant and her husband hired a tax debt consulting agency and a tax lawyer to resolve their delinquent income tax debt. Their lawyer devised a plan, but it has not been executed and the IRS has not agreed to the plan's key components, the subordination of its liens to the first mortgage on the home, and an installment payment

plan. Thus, the problem is not yet being resolved or under control. I conclude AG ¶ 20(c) is not established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant began working or her current employer in February 2006 and submitted her SF 86 during the same month. Her efforts to resolve the tax debts began two years before she applied for a security clearance. Clearly, her efforts were not prompted by the pressure of qualifying for a security clearance.

Applicant and her husband have worked very hard to negotiate a settlement of the delinquent tax debt, but at the same time they continued to incur new debts. They have done little to scale back their lifestyle and generate additional funds to pay their taxes. I conclude AG ¶ 20(d) is not established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

The correspondence from Applicant's tax attorney (AX J and K) indicates that a security clearance is essential for her to retain her current position and an essential part of her solution to her tax problem. However, the Appeal Board has made it clear that "the consequences to an applicant's career and the financial well-being of [herself] or [her] family are not a relevant consideration in an adjudication of an applicant's security eligibility." ISCR Case No. 02-09220 at 5 (App. Bd. Sep. 28, 2004).

In addition to her tax debt, Applicant is carrying a significant balance on six credit cards and paying three car loans. Her largest car debt is for her Cadillac Escalade. Her husband's income fluctuates with the economy. She and her husband are supporting three children, two of high school age. They appear to have been living near their financial limits for several years. They have a small savings account and no retirement savings, leaving them with a minimal financial cushion for unexpected expenses and making further delinquent debts likely. Although they were optimistic at the hearing that a solution to their tax problem was imminent, they were unable to reach a solution by the time the record closed more than two months later.

Applicant presented herself at the hearing as an exceptionally talented, articulate, energetic person. I found her testimony candid and credible. Her supervisor describes her in glowing terms both as an employee and as a person. Unfortunately, she is a deep financial hole, due to a combination of some circumstances beyond her control and her own financial indiscipline.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by her Chapter 7 bankruptcy discharge in 1997 and her Chapter 13 bankruptcy petition that was dismissed in November 1999, but she has not mitigated the security concerns raised by the unsatisfied federal tax liens. Her situation may improve over time, but on this record and as of this date I must conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information. *See* ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000) (administrative judge lacks authority to grant a conditional or probationary security clearance); *but see* Directive ¶¶ E3.1.37 through E3.1.39 (reconsideration authorized after one year).

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline F (Financial):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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LeRoy F. Foreman
Administrative Judge