



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 07-08770
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

May 30, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Clearance is denied because of unmitigated foreign influence and personal conduct concerns. Applicant has close ties to family members in Guatemala, and his handling of his tax matters raises doubts for his judgment, reliability, and trustworthiness.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on December 28, 2005. On November 19, 2007 (reissued December 14, 2007), the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline B, Guideline F, Guideline J, and Guideline E. The 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 submitted an initial response dated December 19, 2007. Before it was received, DOHA reissued the SOR on December 14, 2007. Applicant filed an Answer dated January 11, 2008, which was incomplete because he failed to indicate whether or not he wanted a hearing. On January 31, 2008, Applicant annotated a copy of his January 11 response and indicated he did not wish to have a hearing. On February 15, 2008, the government notified Applicant of its request for a hearing before an administrative judge under ¶ E3.1.7 of the Directive. On March 19, 2008, Department Counsel indicated the government was prepared to proceed. At the same time, she requested administrative notice be taken of certain facts pertaining to the Republic of Guatemala (Guatemala). The case was assigned to me on March 20, 2008. On April 18, 2008, I scheduled a hearing for May 8, 2008.

The parties appeared as scheduled. Five government exhibits (Ex. 1-5) were admitted, including Applicant's December 19, 2007, response to the SOR (Ex. 1). Applicant was assisted in the presentation of his case by his spouse, and they both testified on his behalf. Twelve Applicant exhibits (Ex. A-L) were also accepted into the record. A transcript of the hearing was received by DOHA on May 19, 2008.

At Applicant's request, the record was held open for him to document satisfaction of his federal tax debt and/or release of the federal tax lien alleged in SOR ¶ 2.a. On May 13, 2008, Applicant timely submitted four documents from the Internal Revenue Service (IRS). The government had no objections, and the documents were admitted as exhibits M, N, O, and P.

Procedural and Evidentiary Rulings

Request for Administrative Notice

On March 19, 2008, Department Counsel requested administrative notice be taken of certain facts relating to Guatemala and its foreign relations, including with the U.S. The request was based on publications from the U.S. State Department. The government's formal request and the attached documents were not admitted into evidence but were included in the record.

On March 31, 2008, I notified the parties of my intention to take administrative notice of specific facts, subject to revision based on the evidence admitted at the hearing and any valid objections. The parties were given until April 15, 2008, to file any objections, and Applicant to also present alternative facts for notice. No responses were received by the due date. At the hearing, Applicant had no objections to the proposed facts. I agreed to take administrative notice of particular facts pertaining to Guatemala, as set forth below.

Findings of Fact

DOHA alleged under Guideline B, foreign influence, that Applicant's spouse (SOR ¶ 1.a) and parents-in-law (SOR ¶¶ 1.d, 1.e) are Guatemalan citizens living legally in the U.S.; that his father (SOR ¶ 1.b), his sister (SOR ¶ 1.c), and five uncles (SOR ¶ 1.f) are resident citizens of Guatemala; that one uncle is a judge in Guatemala (SOR ¶ 1.g); that he owns real property in Guatemala valued at approximately \$25,000 USD (SOR ¶ 1.h); and that he traveled to Guatemala at least eight times between October 2002 and May 2007 (SOR ¶ 1.i). DOHA alleged under Guideline F, financial considerations, that despite \$2,635 per month in discretionary income (SOR ¶ 2.b), Applicant has not satisfied a \$9,768.14 tax lien filed January 2001 for failure to pay income taxes due in May and July 1999 (SOR ¶ 2.a). Under Guideline J, criminal conduct, Applicant was alleged to have willfully failed to file federal (SOR ¶ 3.b) and state (SOR ¶ 3.c) income tax returns for tax years 2004 and 2005, and to have not paid the tax lien filed against him in January 2001 (SOR ¶ 3.a). Under Guideline E, personal conduct, DOHA alleged Applicant falsified material facts on his e-QIP by not disclosing the outstanding federal tax lien (SOR ¶ 4.a) and that he exercised poor judgment in not filing his 2004 and 2005 tax returns and not paying his tax debt (SOR ¶ 4.b).

Applicant does not deny the Guatemalan citizenship and/or residency of his family members, nor the employment of one uncle as a judge in Guatemala. He also admits the trips taken to Guatemala to visit family members, primarily his sister, and his ownership of real estate in Guatemala. Applicant also acknowledges that he did not timely file his federal or state income tax returns for tax years 2004 and 2005, but denies any outstanding tax debt or knowing of a tax lien for taxes due in 1999 when he filed his e-QIP. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 41-year-old janitor who has worked for his current employer since December 2005 (Ex. 2, Tr. 50). He held an interim security clearance until April 2008 when it was withdrawn pending final adjudication of his clearance. As a result, he cannot work later than 1900 hours (Tr. 4).

Applicant was born in Guatemala in March 1967. He and his sister, who is two years younger (Ex. 2), were raised by their maternal grandparents after his mother moved to the U.S. without them when he was five years old (Tr. 47, 110-11). He finished college in Guatemala in about 1987 and then taught in an elementary school (Tr. 48).

Applicant came to the U.S. in March 1989 (Tr. 46). He studied English as a second language at a college from about September 1989 to June 1990 (Ex. 2). It is not clear what Applicant did for work in the U.S., if anything, until September 1995, when he began cleaning for an oriental rug company. In April 1998, he began employment with a landscape company (Ex. 2). In April 1999, he married his spouse, a Guatemalan citizen residing in the U.S. She had been in the U.S. legally since March 1990 (Ex. 2, Tr. 49,

112-13). They have one child, a son, who was born in the U.S. in September 1999 (Ex. 2).

In about March 1999, Applicant and his spouse bought their current residence, located down the street from her parents (Ex. 2). It is a duplex and they rent out the other half at \$2,500 monthly (Tr. 80). Applicant started his own landscaping business out of his home in March 2000 (Ex. 2). His spouse helped with the business (Tr. 112).

Applicant filed his federal income tax return for tax year 1997 in June 1999 (Ex. N). While he filed his 1998 federal tax return on time, he paid only \$500 on a tax underpayment of \$5,902. He made payments of \$650 in 1999 and \$200 in 2000, which were applied to his 1998 tax debt (Ex. O). On January 23, 2001, the IRS filed a federal tax lien in the amount of \$9,768.14 against him for failure to pay balances of \$5,351.81 for tax year 1997 (assessed July 26, 1999), and \$4,416.33 for tax year 1998 (assessed May 31, 1999) (Ex. M). By Applicant making regular payments and the IRS intercepting his tax refunds for tax years 2000 and 2001, his federal tax debt was satisfied in 2002 (Ex. N, Ex. O).

In February 2002, Applicant became a naturalized U.S. citizen. He took an oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or perform noncombatant service or civilian service on behalf of the U.S. if required. He was issued his U.S. passport on July 26, 2002. Also in 2002, Applicant won \$1 million in the state lottery, paid to him at \$50,000 annually (Ex. D, Ex. E, Tr. 68). In about 2005, Applicant and his spouse decided to build a home on a quarter acre plot of undeveloped land in Guatemala that his grandfather had given him in 1995 (Tr. 43, 67-68). It would give them a place to stay during visits and possibly in retirement (Tr. 67-68).

Due to increased competition, his landscape company experienced a net loss of about \$22,699 during tax year 2004 (Ex. A, Ex. D). They decided to close the business, and ceased operating in October 2005 (Tr. 50-51). In December 2005, Applicant began working for his present employer (Ex. 2, Tr. 50). On December 28, 2005, Applicant completed an e-QIP. He disclosed the Guatemalan citizenship and U.S. legal residency of his spouse and parents-in-law, and the Guatemalan citizenship and residency of his sister. He also indicated that his mother had acquired her U.S. citizenship in November 1997 but that he did not know her address because he had no contact with her in a few years. His father was listed as deceased with the following comment: "I never knew my father I was raised by my mother she never seen [sic] him again we have no information about him. I am not sure if he is dead or alive." (Ex. 2) Applicant denies providing that information about his father, as his father lives in Guatemala and he visited with him during most of his visits to Guatemala (Tr. 52-53). Applicant reported on his e-QIP his ownership since September 1995 of less than an acre of land in Guatemala on which he was building a home, and travel to Guatemala from October to November 2002, February to March 2003, October to November 2003, in November 2004, December 2004 to January 2005, May to June 2005, and August to September 2005. Applicant

responded “No” to question 27c. “In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?” (Ex. 2).

A check of Applicant’s credit on January 23, 2006, revealed that the IRS had filed the federal tax lien of \$9,768 in 2001. Disposition of the tax lien was indicated as “UNK.” (Ex. 5). During an interview of September 16, 2006, Applicant apparently indicated to a government investigator that he had paid all his taxes except for 2004 and 2005. In interrogatories, DOHA asked Applicant about whether he had satisfied his federal tax lien and filed his federal and state returns for tax years 2004 and 2005. DOHA also asked about his foreign financial assets and any foreign travel since August 2005. On August 15, 2007, Applicant indicated in response that he had made his last payment on the federal tax lien debt in June 2007 (IRS records show satisfaction in 2002),¹ but he had not yet filed his federal or state income tax returns for tax years 2004 or 2005. He indicated he was still working on collecting the required documentation for his accountant. As for foreign assets, Applicant indicated he had only the property in Guatemala valued at about \$25,000 USD. He also reported a recent trip to Guatemala in May 2007 to visit family (Ex. 3).

By early 2007, after spending about \$20,000, Applicant and his spouse had temporarily stopped construction of their home in Guatemala as they could not afford to continue. The residence has been framed with walls, but it lacks doors and windows (Tr. 69). Applicant now estimates the value of the partially developed property at \$40,000-\$45,000 USD (Tr. 70).

In December 2006, the state issued a tax lien against Applicant in the amount of \$5,400.61 (Ex. 4, Ex. K, Tr. 78). The tax lien was released in May 2007 (Ex. K). On December 18, 2007, Applicant’s accountant completed the federal and state joint income tax returns for tax years 2004 (Ex. A, Ex. D, Ex. G, Ex. H), 2005 (Ex. B, Ex. E, Ex. F), and 2006 (Ex. C, Ex. P). The returns were filed with the IRS on December 21, 2007 (Ex. H, Ex. I, Ex. J, Ex. P). Applicant claimed his sister as a dependent on the returns for tax years 2004, 2005, and 2006, even though he testified she moved back to Guatemala about eight years ago (Tr. 55) and he does not support her (Tr. 58, 132). They also claimed a small business loss of \$679 (Ex. C) on their 2006 federal return (Ex. C) because of ongoing receipts and payments for the business (Tr. 133). Based on the figures provided, Applicant was entitled to federal income tax refunds for all three years (Ex. H, Ex. I, Ex. J). Applicant’s accountant was still working on their tax returns for 2007 as of May 7, 2008. The deadline for a timely submission had been extended (Ex. L).

Applicant’s spouse handles payment of their living expenses (Tr. 81). As of March 2008, Applicant owed no past due balances on any consumer credit accounts (Ex. 4).

¹Applicant was likely referring to repayment of state tax delinquency. His March 2008 credit report (Ex. 4) indicates that a state tax lien was filed against him in December 2006 for \$5,4000 but that it was released in May 2007.

Applicant's sister returned to Guatemala in 2000 after living in the U.S. (Tr. 55). She visited Applicant in the U.S. one time thereafter, in September 2001 (Tr. 57). Applicant stayed with his sister during each of his trips to Guatemala (Tr. 71-72). Her spouse owns a farm and she does not work outside of the home. When Applicant is not in Guatemala, he calls her once a month to once every two months (Tr. 42-43, 55-57).

Applicant visited with his father during most of his trips to Guatemala (Tr. 52-53, 74). He does not contact him otherwise (Tr. 52). Applicant has a half-brother in Guatemala who is a construction worker and lives in the area where Applicant grew up. Applicant sees him when he is in Guatemala (Tr. 54). Applicant has extended family in Guatemala whom he also visits when he is there. He is closest to a maternal uncle who is a judge ("a pretty prestigious position") in Guatemala and visited with him on most of his trips (Tr. 61-62). He does not contact him by phone often (Tr. 42). Applicant is unaware of the nature of his uncle's judicial duties (Tr. 60). He has two other uncles in Guatemala who work as a welder and as a farmer, respectively. Applicant has not seen either of these uncles in a long time and does not contact them by telephone (Tr. 62). Of his three aunts in Guatemala, two are retired teachers and one is a housewife. Applicant does not have ongoing contact with them (Tr. 62-64).

Applicant intends future travel to Guatemala to visit his family members, but he does not have a trip scheduled at present (Tr. 75). Applicant's spouse intends to file for U.S. citizenship to ensure a better future for their son. She has waited to file until all their tax issues had been resolved (Tr. 113-14). Applicant's spouse's parents and siblings are Guatemala citizens living in the U.S., although she was told by her parents that they have applied for U.S. citizenship. She has an aunt in Guatemala whom she may see when she is in Guatemala (Tr. 115-16). Applicant's spouse travels to Guatemala about once or twice a year, including by herself to give Applicant's sister money for materials for the home they are building (Tr. 117, 136).

* * *

Guatemala is a constitutional democratic republic with a legacy of violence and vigilante justice. While Guatemala generally respects the human rights of its citizens, the country continues to experience serious human rights problems, including unlawful killings and other improper conduct by security forces; widespread societal violence; corruption and substantial inadequacies in the police and judicial sectors; criminal activity by the police; arbitrary arrest and detention; and failure to protect judicial sector officials, witnesses, and civil society organizations from intimidation. Democratic institutions in Guatemala have only a limited capacity to cope with common and violent crime. On January 11, 2008, Guatemala and the United Nations inaugurated the work of a joint International Commission Against Impunity in Guatemala.

Relations between the U.S. and Guatemala traditionally have been close, although at times strained by human rights and civil/military issues. As a member of "the Friends of Guatemala," the U.S. played an important role in the UN-moderated peace accords which ended 36 years of internal armed conflict in Guatemala. The U.S.

supports broad-based economic growth in Guatemala and Central American integration. Guatemala is a signatory to the U.S.-Central America Free Trade Agreement and the U.S. is the country's largest trading partner. Guatemala and the U.S. cooperate in combating money laundering, corruption, narcotics trafficking, alien smuggling, and other transnational crimes, although severe resource constraints of both technology and manpower, corruption, and an ineffective judicial system hindered Guatemala's efforts against transnational crime in 2006. Guatemala also participates in several regional groups, especially those related to trade and the environment.

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Applicant’s spouse and her parents are citizens of his native Guatemala. There is little risk of undue foreign influence through his spouse or her relatives, given their longtime U.S. residency and the fact that his spouse does not share close bonds with any Guatemalan resident citizens separate from those gained through her marriage to Applicant. AG ¶ 7(a) (“contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion”) applies because of Applicant’s ties in Guatemala. Shared experiences with his sister under their grandparents’ care forged a strong bond with her, as evidenced by his several visits to Guatemala to see her since she moved back to Guatemala. He and his spouse stay with her when they are in Guatemala, and Applicant calls her once a month to once every two months. Although he does not contact other relatives by telephone, he visits with his father and also an uncle who is a judge when he is in Guatemala. Contact with his other uncles and his aunts in Guatemala is so casual and infrequent to raise little risk, however (see AG ¶ 8(c) (“contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation”). Applicant testified that he has had no contact for some time with these relatives.

Applicant also owns a small parcel of land in Guatemala that was given to him by the grandfather who raised him on which he and his spouse have started building a

home. The government failed to establish how or why this partially developed property presents an unacceptable risk under Guideline B. There is no indication that the property is being used as any form of leverage against him. Furthermore, assuming Applicant's valuation is accurate, it is worth only between \$40,000 and \$45,000 USD. In comparison to his U.S. assets (home ownership, rental income, employment earnings, and state lottery winnings) it is insubstantial (see AG ¶ 8(f) ("the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual").

The government also urges security concern because of Applicant's repeated travel to Guatemala. Applicant took eight separate trips between October 2002 and May 2007, primarily to see his sister and twice to attend funerals of family members. His travel is relevant as it confirms his ties of affection and/or obligation to these foreign nationals, but there is no evidence that Applicant engaged in any conduct while in Guatemala that would warrant application of AG ¶ 7(i) ("conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country").

The affection Applicant has for his sister in Guatemala heightens his vulnerability to undue foreign influence as does his uncle's position as a judge in Guatemala. AG ¶ 8(a) ("the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.") applies only to those relatives in Guatemala with whom he does not share particularly close relations. Applicant testified that of his uncles and aunts in Guatemala, he is closest to this uncle who is connected to the Guatemalan government through its judiciary. The risk of undue foreign influence cannot be safely ruled out where Applicant described his uncle's position as "pretty prestigious," and little more is known. Applicant claims to not know the nature of his uncle's duties other than he works in the courts. Guatemala is not known to target U.S. sensitive information, and the U.S. and Guatemala have had historically good relations. However, even friendly countries do not always share the same interests, and the Guatemala government fails to protect the human rights of its citizens in several aspects.

Applicant's vulnerability to undue foreign influence through his family members in Guatemala may yet be overcome by deep and longstanding relationships and loyalties in the U.S. (see AG ¶ 8(b) ("there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest"). In some ways, Applicant is living the American dream even though he is not working in the teaching field. He joined his mother in the U.S. in March 1989, and began working after an academic year of English language study. In 1999, he married his spouse, who remains a citizen of Guatemala but

immigrated to the U.S. when she was 17 in 1990. In 2000, he started his own landscaping business. While it was not as profitable as he had hoped, he won \$1 million in a lottery. He and his spouse own their home in the U.S. In 2002, he became a naturalized U.S. citizen. Yet, I am unable to conclude based on this record that his ties to the U.S. are deep and longstanding. He has strong bonds of affection with his sister. All his recent vacations have been spent in Guatemala to visit his family. He and his spouse have spent about \$20,000 so far to build a home that they hope to stay in during their trips to Guatemala and possibly retire to.

Guideline F, Financial Considerations

The security concern for financial considerations 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The government's case under Guideline F is based solely on Applicant's alleged failure to repay a federal income tax lien of \$9,768.14 (SOR ¶ 2.a) despite having about \$2,635 monthly in discretionary funds (SOR ¶ 2.b). IRS records show that the lien was filed in January 2001 for failure to pay balances owed for tax years 1997 and 1998. He did not pay the federal taxes owed for 1997 when he filed his return, and paid only \$500 on a tax debt of \$5,902 when he filed his return for 1998. He was assessed a late filing penalty for tax year 1997 because he did not file his return until June 2, 1999. AG ¶¶ 19(a) ("inability or unwillingness to satisfy debts") and 19(c) ("a history of not meeting financial obligations") apply.

While the credit bureaus have yet to report the lien as satisfied (Ex. 4, Ex. 5), IRS records corroborate Applicant's claim that the debt has been paid through a combination of payments and interception of tax refunds (see Ex. N, Ex. O). Applicant paid \$1,350 toward his tax debt for 1998 before the lien was filed. He has not adequately explained his failure to pay only \$200 during calendar year 2000, but IRS records also confirm that after the tax lien, his spouse made regular payments on the tax debt starting in February 2001. Debt satisfaction in response to a tax lien does not fully qualify as a good-faith effort under AG ¶ 20(d) ("the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts"), but there are clear indications that his tax problems are being resolved. AG ¶ 20(c) applies because of satisfaction of his delinquent tax debts and no evidence of any past due balances on other accounts. A state tax lien filed against Applicant in the amount of \$5,400 in December 2006 (Ex. 4) was released in May 2007, and Applicant's spouse has been

managing their day-to-day expenses responsibly. Applicant's March 2008 credit report (Ex. 4) lists no delinquent consumer credit accounts.

Guideline J, Criminal Conduct

Under Guideline J, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." (AG ¶ 30). The government submits criminal conduct concerns are raised by Applicant's failure to pay income taxes assessed in 1999, which the record shows was for tax years 1997 and 1998 (SOR ¶ 3.a) and by his willful failure to file federal and state income tax returns for tax years 2004 and 2005 by August 2007. Concerning the federal tax lien for failure to pay, the government did not allege a specific statutory violation. Under 26 U.S.C. § 7203 (see SOR ¶ 3.b), the failure to file a required return and/or pay a required tax is punishable as a misdemeanor, provided a willful noncompliance:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or apply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year or both, together with the costs of prosecution.

The lien was issued under IRS regulation (26 C.F.R. § 301.6321-1), which provides a legal remedy to collect where a liable person neglects or refuses to pay taxes after demand.² Failure to comply with a demand for taxes need not be willful for a lien to issue. In this case, the evidence falls short of proving a willful failure to pay the taxes for 1997 and 1998. Applicant made some payments on his tax debt for 1998 before the lien was issued, which shows some effort to comply with his tax obligation.

As for his failure to timely file his returns for tax years 2004 and 2005 (and while not alleged also 2006), the evidence shows he filed the returns in December 2007, shortly after he received the completed returns back from their accountant. Unquestionably, the returns were late. Both Applicant and his spouse testified that their accountant kept asking for additional documentation that it took some time to provide

²The lien (Ex. M) was filed in accord with IRS regulation 301.6323(f)(1). Under the Internal Revenue Service Code set forth in 26 C.F.R. Part 301, Section 301.6321 provides in part:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, tangible or intangible, belonging to such person.

("She would tell me I need a statement, like bank statements from whatever, I would start looking for those statements and bring it back to her." Tr. 129). In response to the seemingly unreasonable delay in furnishing the documentation, Applicant's spouse explained that documents were destroyed in a flood in their home so she had to request and pay for records (Tr. 129). It must also be noted that the returns for 2005 and 2006 were complicated by the closure of his landscaping business. Applicant showed poor judgment in failing to ensure they were filed reasonably promptly (See Guideline E, *infra*), but I am not persuaded he acted in willful disregard of his federal or state filing obligations.³

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

When Applicant applied for his security clearance in December 2005, he did not list the federal tax lien that had been filed against him in January 2001, even though that lien should have been disclosed in response to question 27c. When he responded to the SOR in December 2007 (Ex. 1), Applicant answered, "I admit," but then claimed he did not remember the lien ("I'm really sorry but I did not remembered [sic] at time."). After the SOR was reissued, Applicant denied knowing of the lien when he filed his e-QIP ("I did not know that but we don't owe anything." Answer). When questioned about his inconsistent explanations, Applicant testified, "I was thinking you asked me if I owe them that money to the IRS." He went on to indicate that he did not know about the lien (Tr. 86-87). He and his spouse both testified that they learned about the lien "like two years ago" (Tr. 88, 111). Despite Applicant's inconsistent explanations, the government conceded in closing that it failed to establish deliberate falsification of the e-QIP since it was not clear when Applicant learned of the federal tax lien (Tr. 146). After a review of the evidence of record, I conclude the evidence falls short of proving the deliberate falsification required under AG ¶16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities").

The IRS records show a levy notice was issued on January 18, 2001, and the tax lien on January 26, 2001. After making only one tax payment of \$200 in May 2000,

³The government did not allege any specific state law allegedly violated by Applicant in not filing his state returns on time.

Applicant's spouse began making monthly payments to the IRS in late February 2001. It is possible that these payments were in response to a levy notice, although that raises the issue of how and why Applicant learned of the lien only two years ago, when the tax debt had already been satisfied. DOHA interrogatories indicate that Applicant was interviewed in September 2006 by a government investigator and that he indicated he was unaware of any tax liens against him.

Yet at the same time, security significant personal conduct concerns are raised under AG ¶ 16(d) ("credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information") by Applicant's negligence in handling his tax debt for 1997 and 1998 and in failing to ensure that his tax returns for 2004 and 2005 were filed reasonably promptly. Applicant knew or should have known when he signed and submitted his income tax returns for tax years 1997 and 1998 that he had substantially underpaid his federal income taxes for those years. He paid an additional \$650 in 1999 on his tax debt for 1998, but nothing on the tax debt in 1999. He paid only \$200 toward his back taxes in 2000. His 2004 income tax return was not filed until December 2007. It is difficult to believe that his spouse followed up with their accountant at least once a month (Tr. 130) for that entire period. Although the taxes have been paid and all the delinquent returns have been filed, doubts persist about his reform given he claimed his sister as a dependent on the joint income tax returns for 2004, 2005, and 2006. Under IRS regulations, Applicant or his spouse was not entitled to claim his sister as a dependent for those years unless she received over half of her support from him or her. Applicant's sister moved back to Guatemala in about 2000 and they do not support her financially. When asked why they continued to claim his sister as a dependent, Applicant's spouse responded, "We told her not to be a dependent anymore" (Tr. 131) Neither Applicant nor his spouse offered a credible explanation for why they signed and submitted the returns to the IRS claiming his sister as a dependent. The IRS records of their returns for 2004 (Ex. H), 2005 (Ex. I), and 2006 (Ex. J) show four exemptions claimed each year with his sister as a dependent. Even if Applicant or his spouse had notified their accountant of the error, it does not relieve them of their obligation to claim only those deductions to which they are legally entitled. Applicant's handling of his income tax returns raises significant doubt about whether he takes his obligations of U.S. citizenship as seriously as he should.

Whole Person Concept

Under the whole person concept, the 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. The 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) the 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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The salient issue in the security clearance determination is not in terms of loyalty, but rather what is clearly consistent with the national interest. See Executive Order 10865, Section 7. An applicant may have the best of intentions and yet be in an untenable position of potentially having to choose between a dear family member and the interests of the U.S. Applicant's ties to primarily his sister in Guatemala, but also to his father and an uncle, present an unacceptable risk of undue foreign influence. Doubts also persist about his ability to abide by security regulations given the poor judgment exhibited in his handling of his tax issues.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant ⁴
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant

⁴To the extent that the travel confirms his close relationships with some family members, it has been covered under SOR ¶¶ 1.b, 1.c, and 1.g.

Subparagraph 3.c:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	For Applicant
Subparagraph 4.b:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

ELIZABETH M. MATCHINSKI
Administrative Judge