DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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----------	)	ISCR Case No. 08-04409
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro Se*

April 28, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

While serving as the executor of an estate, he illegally invested assets of the estate into his own software company. He is on probation until 2028 after pleading nolo contendere to felony embezzlement. Clearance is denied.

Statement of the Case

Applicant submitted a Security Clearance Application (SF 86) on January 22, 2004. On November 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concern under Guideline J that provided the basis for its action to deny him a security clearance and refer the matter to an administrative judge. 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 as of September 1, 2006.

Applicant answered the SOR in writing on November 17, 2008, and requested a hearing before a DOHA administrative judge. The case was assigned to me on January 6, 2009. On January 29, 2009, I scheduled a hearing for February 19, 2009.

I convened the hearing as scheduled. Before the introduction of any evidence, on the government's motion, and with no objection from Applicant, SOR ¶ 1.a was amended to allege that Applicant was charged with four counts of felony embezzlement on March 3, 2006. The government submitted five exhibits (Ex. 1-5) which were admitted into evidence. Applicant objected to Exhibit 5, a court docket report, as it did not reflect the dismissal of the criminal case. His objection was overruled and the document accepted to reflect the case status as of the date of the report. Three Applicant exhibits (Ex. A-C) were admitted without any objections, including as Exhibit C the disposition of the case proceedings reported in Exhibit 5. Applicant also testified, as reflected in a transcript (Tr.) received on March 3, 2009.

Findings of Fact

In the amended SOR, DOHA alleged under Guideline J (criminal conduct) that Applicant was charged on March 3, 2006, with four felony counts of embezzlement over $100, and that on or about February 13, 2008, he pleaded nolo contendere to one count and was sentenced to pay restitution and to 20 years probation. Applicant admitted the charge and sentence and explained that heirs of an estate for which he was an executor felt he was not justified in investing estate funds into his own software company. After consideration of the pleadings, exhibits, and hearing testimony, I make the following findings of fact.

Applicant is a 59-year-old computer programmer who has been employed by a defense contractor since January 2004 (Ex. 1). He seeks a secret-level security clearance for his duties (Tr. 5).

Applicant married in October 1971. He completed one year of college at a prestigious university in the U.S. in June 1974, and in February 1979, he started his own computer software consulting company, developing custom software for banks and brokerage firms (Tr. 53). He and his spouse held the company jointly and were the sole stockholders (Tr. 47). Applicant employed contract programmers that came and went, and he employed his brother-in-law at one point, but he had no regular full-time employees that worked for him (Tr. 47). The business provided sufficient income for Applicant to support his spouse, their five children born during the 1987 to 1998 time frame (Ex. 1), and apparently also her mother (Tr. 61).

In January 1999, a cousin of his by marriage died (Tr. 54). Applicant had a close relationship with this cousin ("he and I were like brothers," Tr. 32). Under the terms of the will, Applicant was named the executor of his estate, which exceeded $1 million in

value and included a trust as well as an apartment property in France that would have to be sold and the proceeds distributed to his cousin's heirs (Ex. 1, 2, Tr. 30, 45). That April, Applicant traveled to France to clean out the apartment (Ex. 1, Tr. 54). He initially disbursed "a considerable amount" of bank stock assets to the heirs (Tr. 29), but held the estate's money market assets to pay taxes and maintenance fees and other necessary expenses associated with the foreign property (Tr. 53-54). Applicant was not himself a beneficiary of the estate but his children and spouse were heirs (Tr. 34).

Applicant read the will as giving him the power to invest estate assets as he saw fit (Tr. 33). His computer consulting business was doing well at that time, and Applicant began in 1999 to invest estate funds in his own company with the intent of increasing the value of the estate for its heirs (Ex. 2, Tr. 28-29), and because he was not certain of the costs associated with the maintenance and sale of the foreign property (Tr. 57). From about late 1999 through 2002, Applicant took almost $400,000[1] out of the estate (primarily money market account funds) and invested it in his business (Ex. 2, Tr. 31, 45).[2] Profits from his consulting business were not repaid to the estate. Rather, they went toward the next contract, and toward soliciting more work for his company (Tr. 64). Applicant's software business suffered a significant downturn in the 2001/02 time frame, and funds were diverted from the estate in an effort to keep his software consulting business afloat. He wrote checks from the estate directly for the health insurance provided as a company benefit (Tr. 33, 46), paid wages with some of the funds (Ex. 2), and some business travel expenses (Tr. 62). Applicant did not inform the beneficiaries, including his spouse, that he had diverted assets of the estate to his business (Tr. 32, 49), and he did not seek any legal advice about the propriety of his conduct (Tr. 33-34). He did not see a need to inform the heirs and there was no directive that required it (Tr. 34).

Applicant closed down his software business in January 2003 (Tr. 35). Realizing that he had made poor investment decisions and that he would be unable to repay the estate, Applicant became seriously depressed. Facing an audit of the estate by its attorney at the request of the probate court because the estate had been in probate for a longer period than normal (Tr. 46, 57), he attempted suicide twice in 2002, and again in January 2003 (Ex. 2, Tr. 46). He voluntarily admitted himself to a mental health treatment facility for the month of February 2003, where he received inpatient treatment for severe depression (Ex. 2). Applicant has been under the care of his treating psychiatrist since his hospitalization (Ex. 2, Ex. C).

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[1]Applicant estimated that he invested between $200,000 and $400,000 in his computer consulting business (Ex. 2). The court ordered him to pay restitution of $398,000 (Tr. 38), a figure that was arrived at by reviewing the estate's books (Tr. 48). While some of the funds may well be for legitimate expenses in traveling to France for example, the amount misappropriated is closer to $400,000 than $200,000.

[2]As to when he began to write checks from the estate's money market fund to his company, Applicant testified he had definitely done so by 2000. He did not believe he had written any before 2000, but also testified that he was charged with four counts of embezzlement, one for each year that he had diverted the estate's assets to his business (Tr. 54).

Applicant's misappropriation of estate assets was discovered during an audit of the estate in 2003. A civil suit was filed to have him removed as executor. The case was dropped when Applicant resigned voluntarily, and a new executor was appointed (Ex. 2).

In late April 2003, Applicant went to work as a programmer/analyst for a company. In June 2003, Applicant and his spouse divorced, and he was ordered to pay child support for his five children. He quit his job in late July 2003, because it was not suited to his training. In September 2003, he became employed as a desktop support specialist for a local school system, but he resigned at the request of the school department in early November 2003. He held a second job as a sales consultant with an electronics retailer for about a month before he lost his job at the school, and remained at that job until January 2004. He also worked part-time in 2003 as an adjunct professor at a community college, and as a crew trainer at a restaurant (Ex. 1).

After commencing employment with the defense contractor in January 2004, Applicant continued to work a second job. He gave his entire check from his defense contractor employment to his ex-wife (about $900 a week) for her and the children because he felt bad about what he had done. He supported himself on the income from his second job (Tr. 60).

In early September 2005, his ex-wife and her two sisters, all heirs to their cousin's estate, filed a complaint with the police about his handling of the estate. On the advice of the state police, Applicant turned himself in and he was released on personal recognizance. On March 3, 2006, he was formally charged with four counts of felony embezzlement over $100 (Exs. 2, 3), and in April 2006, his case was transferred to superior court (Ex. 3). Applicant pleaded not guilty at his arraignment in June 2006. Pursuant to a plea bargain, he retracted his not guilty plea and pleaded nolo contendere in February 2008 to one count of felony embezzlement over $100. He was convicted and sentenced to 20 years in prison, suspended, and placed on 20 years probation. He was also ordered to pay restitution of $398,000, $75,000 in a lump sum followed by $300 per week for the next 20 years (Exs. 2, 4, Tr. 38). Applicant obtained advances of $50,000 from his mother and $25,000 from a close friend to cover the $75,000 lump sum payment. His friend also paid his legal expenses for him. Applicant has continued to make his $300 weekly restitution payments from his employment income (Tr. 55-56).

In November 2007, Applicant reduced the amount of money sent to his ex-wife to cover only what he is required to pay in court-ordered child support (Tr. 60), which has caused some custody issues with his spouse. He is seeking joint custody of his children (Tr. 30). The amount of his restitution is under court review because his spouse had already benefitted from the estate (Exs. 2, 4, Tr. 48). Applicant plans to show the court in a deposition that his restitution should be reduced by one-third and that he has already paid his ex-wife well over $100,000 (Tr. 48, 60).

On December 9, 2008, Applicant was charged with misdemeanor simple assault/domestic after he shook his fianceé during an argument (Ex. 5, Tr. 39). Since he

was on probation for the felony embezzlement, he was held in jail for one week. He admitted to violating his probation (Tr. 40), and a no contact order was issued before he was released (Ex. 4). On January 6, 2009, the no contact order was rescinded and the simple assault charge was dismissed. His probation for the felony offense was not revoked (Ex. A, Tr. 39-41). Applicant informed his manager at work about his felony embezzlement and domestic assault offenses (Tr. 42).

Applicant does not have the same financial pressures that contributed to his diversion of estate funds to his personal business. His previously had a jumbo mortgage with monthly payments close to $3,000 (Tr. 51). He currently has a $46,000 mortgage for a mobile home (Tr. 56). He is paying child support for three minor children, and as of May 2009, will be paying for two of his children (Tr. 28).

Applicant works directly with a government project engineer on a daily basis. During 2008, he met and occasionally exceeded his employer's expectations (Ex. B). Applicant has been compliant with his treatment for his depression. His treating psychiatrist sees no reason why Applicant should be denied full visitation or shared custody of his children (Ex. C). For the past year, Applicant has been teaching computer classes twice weekly for senior citizens (Tr. 30).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 J—Criminal Conduct

AG ¶ 30 sets out the security concern about criminal conduct:

> 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.

In February 2008, Applicant pleaded nolo contendere and was convicted of one count of felony embezzlement for diverting about $398,000 in assets of a deceased relative's estate to his personal business. A review of the estate's books showed that his criminal conduct spanned four years, from 1999 through 2002. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," apply. Since he is on probation for the offense until 2028, AG ¶ 31(d), "individual is currently on parole or probation," is also implicated. Furthermore, he admitted that a simple assault of his fianceé in December 2008 was in violation of his probation. So, even though the assault charge was dismissed, and his probation was not revoked, his violation of a condition of a probation—that he remains on good

behavior—implicates AG ¶ 31(e), "violation of parole or probation, or failure to complete a court-mandated rehabilitation program."

Applicant's criminal conduct is too egregious and recent to apply mitigating condition AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Any violation of fiduciary obligations, such as an executor has to the heirs of an estate, raises considerable judgment, reliability, and trustworthiness concerns.

Applicant's case for mitigation under AG ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," is not persuasive. His financial situation has improved since he diverted the estate funds to his business. His company ceased operations in January 2003, he no longer has a high mortgage payment, and pays child support for only three children at this point. As of May 2009, only two of his children will be eligible for support payments. Yet, to apply AG ¶ 32(b), I would have to ignore the knowing and voluntary nature of his criminal conduct and that it began even before his business downturn.

AG ¶ 32(d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," applies in only very limited part. Applicant has a good work record with his present employer, as reflected in his annual performance appraisal for 2008 (Ex. B). He also teaches computer classes to senior citizens. But it would be premature to conclude that he is successfully rehabilitated. His current probationary status is not an automatic bar to a security clearance, but he has served only one year of a 20-year term. Furthermore, his first year of probation was not without incident, as evidenced by the simple assault of his fianceé. Applicant maintains that he is a different person now than he was five years ago (Tr. 51), but despite the criminal charges and his conviction on one count of felony embezzlement, he continues to believe that he had broad investment powers ("I maintain it even until today, my reading of the will said I could basically do and invest and use my judgment to invest the money." Tr. 33). When asked to comment about his failure to appreciate his ethical obligation as executor, Applicant responded, "I also appreciated the obligation I had to five children, a wife, a mother-in-law, a mortgage that was too high for us" (Tr. 51). Even if Applicant did not mean to suggest that his misappropriation of estate funds was justified because of the needs of his family, it raises doubts about whether he fully accepts responsibility for his criminal conduct.

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.

Applicant's judgment is called into serious question because of his embezzlement of about $398,000 in estate funds when he served as executor of a family member's estate. He was sentenced for his felonious conduct to 20 years in prison, suspended, and 20 years of probation with restitution. While he has been making his restitution payments, initially with the help of his mother and a close friend, he has yet to demonstrate the judgment, reliability, and trustworthiness that must be demanded of those persons granted access to classified information.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of 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.

ELIZABETH M. MATCHINSKI
Administrative Judge