



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-06869
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: John N. Griffith, Esq.

December 16, 2010

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant allowed two loans on a rental property he owns to become delinquent. He sought and followed the advice of a real estate attorney and a bankruptcy attorney in resolving his delinquent debt. Clearance is granted.

On May 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges a security concern under Guideline F (financial considerations). Applicant submitted a response to the SOR that was received by DOHA on June 28, 2010. He denied both SOR allegations and requested a hearing.

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on August 6, 2010. A notice of hearing was issued on September 13, 2010, scheduling the hearing for September 28, 2010.<sup>2</sup> The hearing was conducted as scheduled. The Government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7 and admitted into the record without objection. Applicant testified, called four witnesses to testify on his behalf, and submitted 11 documentary exhibits that were marked as Applicant's Exhibit (AE) A-K, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Five documents were timely received, marked as AE L-P, and admitted into the record without objection. Department Counsel's e-mail indicating she did not object to AE L-P was marked as Appellate Exhibit (App. Ex.) I, and is included in the file. The transcript was received on October 7, 2010.

### **Findings of Fact**

After a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 35-year-old man who has worked as a software engineer for a defense contractor since April 2007. He was employed by a different defense contractor in the same capacity from October 1998 until March 2007. He graduated from college in December 1997, and was awarded a bachelor degree in electrical engineering. Applicant's gross income was \$95,209 in 2009, and \$98,382 in 2008. As of October 29, 2010, Applicant's gross income for 2010 was \$72,542.97. (AE L, pg. 40)

Applicant has been married since September 2001. He has three children, ages six, four, and one. Applicant's wife works part-time. Her gross income was \$14,626 in 2009, and \$22,714 in 2008. As of October 29, 2010, her gross income for 2010 was \$14,743.40. (AE L, pg. 40)

The SOR alleges two delinquent debts secured by mortgages owing in the combined total amount of \$62,122. Both of these debts arise from investment property that proved to be unprofitable and which Applicant has been trying to dispose of in the most cost-effective manner for the past four years. He filed for Chapter 13 bankruptcy protection on October 29, 2010, and will be rid of these debts in the near future. He received credit counseling in September 2010, as a prerequisite to filing for bankruptcy protection.

Applicant's financial problems originated from a business adventure he and his former college roommate entered into in 2002. After investigating investment opportunities and educationally preparing themselves to enter into the real estate investment market, they formed a corporation for that purpose. However, because the corporation was newly formed and lacked a credit history, they had to purchase properties in their individual

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<sup>2</sup> Applicant's attorney was notified of the hearing date by Department Counsel on or about August 16, 2010, and he agreed to waive any technical defect in the event the formal notice was not actually received by his office more than 15 days prior to the hearing. (Tr. 12)

names. As of the date of the hearing, they each owned three properties that were secured by mortgages in their individual or joint names.

The corporation was intended to concentrate on low-cost single family dwellings. It realized a profit of a few thousand dollars from the purchase and sale of two dwellings, but suffered a major setback when it ventured into the purchase of a four-unit apartment building. Almost \$10,000 damage was discovered to have been caused by one tenant when he vacated one of the units. Other tenants lasted only short periods of time leaving units unrented. The cost of mortgage payments, utilities, taxes, etc., greatly exceeded the income from the property necessitating a business decision to get rid of the property in the most cost-effective way possible.

Applicant unsuccessfully attempted a conventional sale of the apartment building beginning in 2006. However, the market value of the property had decreased from when he had purchased it. Applicant next attempted a short-sale of the building. When that also failed, he consulted an attorney on how to rid himself of the property. The attorney advised him to stop making payments on the mortgages owing on the building because it was unclear from the title record what company actually held the mortgages. One of the companies who purportedly owned the debt filed suit against Applicant in an attempt to collect the debt, but dismissed the suit because it could not affirmatively establish it was the owner of the debt. Through the various attempts to sell or otherwise settle the debts, the primary mortgage holder commenced foreclosure proceedings which were pending as of the date of the hearing.

Applicant's business venture took another downturn in April 2010, when a tenant in a two-unit apartment building he owns was charged with possessing controlled substances in the apartment. As a result, the city where the building is located condemned the building for one year which necessitated the second tenant vacating the premises and prohibits Applicant from renting either unit to anyone until May 2011.

Applicant and his partner have decided they need to dissolve the corporation and terminate their business relationship. Each is to retain the properties held in their individual names and Applicant is to assume responsibility for the property that is jointly held. They have further agreed to liquidate those properties and will settle between themselves any delinquencies they incur.

Applicant's credit reports indicate he is current on all debts other than those associated with the rental property. His Chapter 13 bankruptcy pleadings disclose that all rental units are to be surrendered. His remaining debts included in the bankruptcy are proposed to be settled by monthly payments of \$963 for 60 months.

Applicant is a deacon in his church and his responsibilities include overseeing the care of church property, overseeing the allocation of resources for those in need and distress in the congregation and community, and developing the church budget. He has personally participated in mission work in foreign countries. The senior pastor of his church and others who know him from his involvement in the church vouch for his integrity, trustworthiness, and honesty.

An individual who has known Applicant as a friend and as a person he supervised in his current employment considers Applicant to be responsible, trustworthy, and honest. A member of Applicant's bible study group provided similar opinions concerning Applicant's character.

## Policies

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

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>3</sup> The Government has the burden of proving controverted facts.<sup>4</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>5</sup> although the Government is required to present substantial evidence to meet its burden of proof.<sup>6</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>7</sup> Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>8</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>9</sup>

No one has a right to a security clearance<sup>10</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of

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<sup>3</sup> ISCR Case No. 96-0277 (July 11, 1997) at 2.

<sup>4</sup> ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

<sup>5</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>6</sup> ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

<sup>7</sup> ISCR Case No. 98-0761 (December 27, 1999) at 2.

<sup>8</sup> ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>10</sup> *Egan*, 484 U.S. at 528, 531.

denials.”<sup>11</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>12</sup>

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## Analysis

### Guideline F, Financial Considerations

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. . . . (Adjudicative Guideline [AG] 18)

Applicant incurred financial delinquencies in connection with two loans secured by mortgages on a rental property he owned. He failed in efforts to sell the property and followed the advice of an attorney who recommended that he stop making payments on the mortgage. The result was that foreclosure proceedings were commenced by one of Applicant’s creditors. Disqualifying Condition (DC) 19(a): *inability or unwillingness to satisfy debts* applies.

Applicant’s credit reports indicate that he has lived a financially responsible lifestyle and remained current on his debts, with the sole exception of the rental property in issue. He and his college roommate undertook a business venture in 2002. Applicant and his roommate educated themselves about the investment real estate business before they went into business together and initially made a small profit from the business. However, the destruction of one of the units in the four-unit rental property, the continuing turnover of tenants, the one-year loss of income from a second property, and the declining real estate market, caused them to start losing money in about 2006.

Applicant reasonably attempted to sell the four-unit property through a conventional sale and then through a short-sale. When those efforts failed, he consulted an attorney and followed his advice to stop making payments because of questions about the validity of the creditors’ claims to hold the mortgages. He has now begun to liquidate the business venture with his friend and he has initiated Chapter 13 bankruptcy proceedings, including participation in counseling, to fully resolve the financial problems that arose from the failed investment real estate business.

The following Mitigating Conditions (MC) apply: MC 20(a): *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*; MC 20(b): *the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., . . . a business downturn, . . .), and the individual acted responsibly under the circumstances*; MC 20(c): *the person has received or is receiving*

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<sup>11</sup> *Id.* at 531.

<sup>12</sup> *Egan*, Executive Order 10865, and the Directive.

*counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and MC 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.*

Department Counsel cited ISCR Case No. 09-00395 (June 8, 2010) in her argument that it is not consistent with the national interest to grant Applicant a security clearance. That case is distinguishable in a number of respects, including that Applicant herein did not purchase property that he should have been able to foresee would become unprofitable or beyond his ability to afford. On the contrary, Applicant prepared himself for the business venture he undertook, reasonably purchased low-cost properties that, at the time of purchase, could be expected to turn a profit, and acted responsibly in attempting to extricate himself from the financial problems he encountered from the failing business.

Considering all relevant and material facts and circumstances present in this case, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, the whole-person concept, including Applicant's church and community activities, his steady employment history, the recommendations of his supervisor, friends, and pastor, and the applicable disqualifying and mitigating conditions, I find Applicant mitigated the financial considerations security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline F is decided for Applicant.

### **Formal Findings**

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a & b: For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro  
Administrative Judge

