



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



In the matter of:)
)
) ISCR Case No. 09-07172
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

September 28, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline F, Financial Considerations. Her eligibility for a security clearance is denied.

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on June 25, 2009. On March 31, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On April 28, 2010, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. The case was assigned to me on June 4, 2010. On June 30, 2010, a Notice of Hearing was issued, scheduling Applicant's hearing for July 14, 2010. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. Applicant testified and introduced ten exhibits, which were marked as Ex. A through Ex. J. Applicant's Ex. A, B, C, D, E, F (pages 1 and 3), G, H, I (page 12), and J were admitted to the record without objection. Applicant's Ex. F (page 2) and Ex. I (pages 1, 2, 3, 4-7, 10, and 11) were admitted without objection but were given limited weight. Applicant's Ex. I (pages 8 and 9) were not admitted because they were written in a foreign language which was not translated into English. DOHA received the transcript (Tr.) of the hearing on July 22, 2010.

Procedural Matters

The Government offered a June 29, 2010 e-mail in which Department Counsel reported a telephone conversation with Applicant on June 29, 2010, in which he informed her of her right to at least 15 days written notice before her hearing, as provided by subparagraph E3.1.8. of Enclosure 3 of the Directive. Applicant agreed to a hearing date of July 14, 2010, even though her written notice of hearing was sent to her only 14 days before the date of her hearing. At her hearing, Applicant confirmed her intent to waive her right to 15 days written notice. I discussed with her the consequences of the waiver if she were to appeal her decision. She affirmed her intention to waive the 15-day rule. (Tr. 12-14.) I marked Department Counsel's e-mail as Hearing Exhibit (HE) 1 and included it in the record of the case.

Findings of Fact

The SOR contains five allegations of disqualifying conduct under AG F, Financial Considerations. (SOR ¶¶ 1.a. through 1.e.) In her Answer to the SOR, Applicant admitted two allegations (SOR ¶¶ 1.a. and 1.b.), and she denied the allegations at ¶¶ 1.c., 1.d., and 1.e. The Government conceded that Applicant had provided documentation in her Answer to the SOR establishing that the debts alleged at SOR ¶¶ 1.c, 1.d. and 1.e. had been resolved. Accordingly, SOR allegations 1.c., 1.d., and 1.e. are concluded for Applicant. Applicant's admissions are included as findings of fact. (Ex. B; Ex. C; Ex. D; Tr. 17.)

Applicant is 46 years old. She was born in a South American country. She came to the United States with her family in 1977, when she was 13 years old. She became a U.S. citizen in 1985. She has not returned to her country of birth. She has not previously held a security clearance. (Ex. 1; Tr. 76, 79.)

Applicant was married for the first time in 1984. She and her first husband divorced in 1994. Applicant has two sons, now 24 years old and 21 years old, from her first marriage. Applicant's first husband and her 24-year-old son hold security clearances. Applicant married for the second time in 2004. She and her second husband divorced in 2009. Applicant has a four-year-old son from her second marriage. (Ex. 1; Tr. 89-90, 96-97, 100.)

Applicant attended college for two years. From 1994 until 2003, she was an assistant and manager in an orthodontic dental practice. In 2003, she earned a realtor's license. In 2008, she acquired a license as a private investigator. Since 2007, she has worked part-time for the government contractor which is sponsoring her for a security clearance. She also does part-time work for organizations and individuals as a private investigator. (Ex. 1; Ex. 4 at 13-16; Ex. E; Tr. 33-32, 73, 79, 81, 83-85.)

Applicant met the man who became her second husband in February 2004, when they were both working as real estate agents.¹ They married in May 2004. In June 2005, Applicant's husband transferred ownership of a property he owned to Applicant. His extended family members lived in the house. He told Applicant that he was transferring the property to her because he wanted to purchase more properties, but he did not want his Social Security number on the property. Even though Applicant was the owner of record of the property, her husband assured her that he and his family members would make monthly mortgage payments directly to the lender. (Ex. 3 at 5, 13, 17-18; Ex. J; Tr. 112-113.)

Applicant did not know that her husband was an illegal resident of the United States. She later learned that he married her in order to acquire permanent resident status (Green Card). (Ex. J; Tr. 67-68.)

In September 2005, Applicant learned that she was pregnant. Her husband did not want the child and pressured her to have an abortion. She refused to have an abortion. She continued to sponsor her husband for a Green Card, which he received in November 2005. Soon thereafter, he told Applicant that he no longer wanted to live with her, and he left. In December 2005, she informed her husband that she wanted a separation. (Ex. J.)

Applicant and her husband reconciled several times, but his actions toward her remained hostile. He was involved in relationships with several other women. Their child was born in April 2006. Applicant's husband took little positive interest in the child. He was physically and mentally abusive to Applicant. In 2008, Applicant filed for divorce. In July 2008, Applicant's husband was arrested and detained for three months as an illegal alien. In 2009, the stress of her difficult marital relationship caused Applicant to have an

¹ Applicant explained that she has a realtor's license, but, because of the decline in the real estate market, she only accepts referrals. She does not actively participate in business with a real estate firm. (Tr. 84-85.)

aneurysm which required emergency medical treatment. (Ex. 4 at 52-53; Ex. J; Tr. 112-114.)

The debt alleged at SOR ¶ 1.a. arose after Applicant's husband and his family stopped paying the mortgage on the house he had deeded to her. The mortgage lender turned to Applicant, as the owner of record, for payment. Applicant brought an action to evict her husband's family from the house. In September 2008, the family members vacated the house. In July 2009, Applicant sold the property at a short sale. On July 23, 2009, the lender issued Applicant a Form 1099-C showing a debt cancellation of approximately \$89,467.² In April 2010, the lender notified Applicant that she owed an additional balance of approximately \$67,283 after the short sale. Applicant settled the debt for \$12,000. Applicant's documentation established that the lender consider the debt satisfied in full. (Ex. 3 at 10, 12, 16- 17, 19-21; Ex. A; Ex. H; Tr. 114-121.)

Applicant's 24-year-old son wired the \$12,000 settlement to the lender to settle the account. At her hearing, Applicant identified the source for the funds as "money . . . collected by working little by little and also from my son and my first ex-husband helping me out." Later at her hearing, Applicant testified that the funds she paid to resolve the debt came from her earnings placed in a family account. She stated that her oldest son, who remitted the money from an account belonging to him, helps her to manage her money. (Ex. H; Tr. 69, 90-93.)

The debt alleged at SOR ¶ 1.b. arose from the foreclosure of a property Applicant purchased on her own as an investment in July 2007. Applicant paid \$230,000 for the property, which was her first attempt to purchase real estate for investment purposes. She put no money down and purchased the property by taking out two mortgages. Her monthly payments on the mortgages totaled \$1,900. Applicant found tenants and rented the house for approximately \$1,400 a month. In July 2008, Applicant's tenants moved out. She tried renting the property again and also tried to sell it by short sale. Applicant's attempts to rent the property or to sell it by short sale were unsuccessful. She stopped making mortgage payments on the property in 2008. In January 2010, the lender foreclosed on the property, which had a value of \$140,000. (Ex. G; Tr. 123-132, 136.)

After the foreclosure, the lender issued Applicant a Form 1099-A: Acquisition or Abandonment of Secured Property. The Form 1099-A showed a balance of principal outstanding of \$183,927. The fair market value of the property was \$140,250. (Ex. G at 7.)

The Form 1099-A informs a borrower that information on the form is furnished to the Internal Revenue Service (IRS) and provides the following notice: "If you are required to file a return, a negligence penalty or other sanction may be imposed on you

² Form 1099-C advises that, unless some exception applies, the recipient of the Form 1099-C must report all cancelled amounts on the "Other Income" line of IRS Form 1040. (Ex. H at 5.)

if taxable income results from this transaction and the IRS determines that it has not been reported. (Ex. G at 7.)

The Form 1099-A also contains instructions for the borrower, which read, in pertinent part, as follows:

Certain lenders who acquire an interest in property that was security for a loan or who have reason to know that such property has been abandoned must provide you with this statement. You may have reportable income or loss because of such acquisition or abandonment. Gain or loss from an acquisition generally is measured by the difference between your adjusted basis in the property and the amount of your debt cancelled in exchange for the property, or, if greater, the sale proceeds. If you abandoned the property, you may have income from the discharge of indebtedness in the amount of the unpaid balance of your cancelled debt. You may also have a loss from abandonment up to the adjusted basis of the property at the time of abandonment. Losses on acquisitions or abandonments of property held for personal use are not deductible.

(Ex. G at 7.)

At her hearing, Applicant acknowledged that she did not know how much she owed in income tax on the debt represented by the first mortgage on the property. She also acknowledged a second mortgage debt of \$49,839 on the property. This debt is alleged at SOR ¶ 1.b. At her hearing, Applicant stated that she had not contacted the creditor to seek a settlement, and the debt remains unresolved. She estimated that the creditor would settle for about \$12,000, and she stated she was trying to save that amount before contacting the creditor to discuss settlement. (Tr. 134-137.)

Applicant has not paid her 2008 federal and state income taxes. She sought an extension in paying the 2008 taxes, but the extension expired in October 2009, and as of the date of her hearing, she had not requested a further extension or paid the 2008 taxes. She had not filed her 2009 income tax returns, but had filed for an extension, which was in effect at the time of her hearing. Applicant explained that she was trying to save the money required to pay her 2008 and 2009 federal and state income taxes. She estimated that she owed about \$3,000 in 2008 federal income taxes. (Tr. 165-170.)

Applicant was the owner of a home where she and her youngest son lived. She was responsible for paying two mortgages on the house. In 2009, Applicant's first ex-husband retired from the U.S. military. She invited her first ex-husband to share living space in her home with their two sons and her son from her second marriage. The first ex-husband and Applicant's sons did not know about Applicant's financial difficulties. When they learned of her financial situation, they arranged to help by sharing living expenses and assisting her with saving her money in order to pay her debts. Applicant would like to sell the house and use the proceeds to pay her debts. However, her first ex-husband does not want her to sell the house. (Tr. 93-95, 139-140.)

Applicant shares her household with her first ex-husband, their two adult sons, and her four-year-old son from her second marriage. Her first ex-husband pays the first mortgage on the residence and other household expenses. She did not have any information about the yearly earnings of her first ex-husband or her 24-year-old son. She provided the following information about her income and expenses. She earns \$1,000 a month, before taxes, from her work as a private investigator. She nets between \$500 and \$600 each month from her work as a government contractor. She receives \$65 a month in child support. (Tr. 144-145.)

She identified her monthly expenses as follows: \$230 on a home equity second mortgage³ on her residence; \$50 on a credit card debt of \$1,700; \$100 a month on a credit card debt of \$2,000; \$150 on a credit card debt of \$700; and \$800 a month for groceries. Applicant has a net monthly remainder of approximately \$335. (Tr. 146-154.)

Applicant purchased an automobile for \$17,000 in 2006 and financed the \$10,000 down payment with proceeds from the second mortgage home equity loan on her residence. She has since paid the car debt in full. (Tr. 154-158.)

Applicant estimated that she had \$800 in her checking account at the time of her hearing. She estimated that her son's account, to which she contributed her earnings, held approximately \$8,000. (Tr. 161-162.)

In 2008, Applicant had some credit counseling over the telephone before attempting to sell one of her houses in a short sale. Also in about 2008, she received some credit counseling when she was considering filing for bankruptcy. She did not provide documentation to support her claims of credit counseling. (Tr. 140-141.)

Applicant's first ex-husband provided a letter of character reference. He stated that Applicant was a loving and caring mother who dedicated herself to bringing up their two sons. He recounted how she carried out all obligations she assumed when they were divorced and maintained with him a "relationship of trust, friendship, and common purpose for the well-being of our two children." (Ex. F at 2.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's eligibility for access to classified information "only upon a finding that it is

³ Applicant stated that the second mortgage debt is \$60,000.

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.

When evaluating an applicant’s suitability for a security clearance, an 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, the administrative judge applies these guidelines 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 F, Financial Considerations

The security concern relating to the guideline 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns.

As the result of her real estate investments and obligations, Applicant accumulated substantial delinquent debt. She was unwilling or unable to satisfy her creditors. This evidence is sufficient to raise these potentially disqualifying conditions.

The guideline includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's financial delinquencies. If the financially delinquent 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," then AG ¶ 20(a) might apply. If "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," then AG ¶ 20(b) might apply. If "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," then AG ¶ 20(c) might apply. If "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," then AG ¶ 20(d) might apply. Finally, if "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue," then AG ¶ 20(e) might apply.

The record shows that Applicant's financial delinquencies resulted in part from the downturn of the real estate market, which began in 2007, in part from her difficult marriage to a fellow realtor who was an illegal resident of the United States, and in part

by her own choice. Despite assistance from her first ex-husband and her oldest son, her financial delinquencies continue. Applicant's current financial delinquencies involve substantial sums of money, occurred under circumstances that are likely to recur, and cast doubt on her current reliability, trustworthiness, and good judgment.

The record does not establish that Applicant's unfortunate second marriage and the downturn of the real estate markets in 2007 fully explain her failure over a period of years to meet her financial obligations. To her credit, Applicant provided documentation to show that she had settled or otherwise satisfied four of the debts alleged on the SOR. However, one debt, totaling over \$49,839 and alleged on the SOR, remains unresolved. Although the debt arose from Applicant's individual business venture in 2007, she has not sought out the creditor to discuss forbearance, resolution or satisfaction, suggesting that she has not acted responsibly under the circumstances. Despite the support and financial assistance of her first ex-husband, it is not clear that she has a plan in place to avoid financial overextension in the future. Applicant's intention to satisfy her creditors is laudable, but she has failed to demonstrate a track record of financial responsibility. She has not yet demonstrated priorities that emphasize paying her existing debts and avoiding additional financial delinquencies in the future. I conclude that AG ¶ 20(a) does not apply to the facts of Applicant's case. I further conclude that AG ¶¶ 20(b), 20(c), and 20(d) have some applicability to the facts in this case, but do not fully apply. AG ¶ 20(e) is not raised by the facts of Applicant's case.

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. Applicant's first ex-husband praised her reliability and steadfastness as a parent. Applicant's work record suggests

she has sought additional training and certification to respond to changing times. She has been employed, on a part-time basis, with her current employer since 2007.

At her hearing, Applicant acknowledged that she had not filed her 2008 federal and state income tax returns. The SOR did not allege under AG ¶ 19(g) of Guideline F that Applicant had failed to file federal, state, or local income tax returns as required. Applicant was not on notice that this could be a Guideline F security concern.

In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed the following five circumstances in which conduct not alleged in an SOR may be considered:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

I have considered Applicant's acknowledgment that she had not filed her 2008 federal and state income tax returns for the purpose of (e) and not for any other purpose.

Applicant's financial problems began when she was a mature adult. She is responsible for approximately \$49,839 in delinquent debt arising from the foreclosure of a property she owned. She is a trained real estate professional who is aware, or should be aware, of the tax consequences of short sales and foreclosures. She has not contacted the creditor to discuss a payment plan for the debt. Despite receiving notice from lenders of the tax consequences of a short sale and a foreclosure, she has not sought further information on her tax responsibilities.

Although Applicant had a distressing second marriage, she has been in a stable family situation with her first ex-husband and her three children since 2009. Her first ex-husband and her oldest son have provided financial support to Applicant, putting her in a position to resolve some of her current and longstanding financial responsibilities. While she provided documentation to show that four of the five debts alleged on the SOR have been settled or otherwise satisfied, she has failed to demonstrate that she has developed a long-term plan to satisfy her creditors and understands how to avoid excessive debt in the future.

Overall, the record evidence leaves me with questions and doubts at the present time about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of her case, the Financial Considerations adjudicative guideline, and the whole-person analysis, that Applicant failed to mitigate the security concerns arising from her financial delinquencies. If she wishes, and if her employer supports reapplication, Applicant can reapply for a security clearance one

year after the date that this decision becomes final. At that time, she can produce new evidence that addresses the Government's current security concerns.

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 F:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraphs 1.c. - 1.e.:	For 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.

Joan Caton Anthony
Administrative Judge