DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-02793
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline H. Jefferys, Esq., Department Counsel
For Applicant: *Pro se*

03/16/2012

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Decision

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DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, Financial Considerations. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 16, 2010. On October 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F. In issuing the SOR, DOHA acted pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program,* dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On November 11, 2011, Applicant answered the SOR and requested a hearing. The case was assigned to me on January 10, 2011.

DOHA issued the Notice of Hearing on January 26, 2012. The hearing was held as scheduled on February 15, 2012. At the hearing, Department Counsel offered exhibits (GE) 1 through 5 that were admitted into evidence without objection. Applicant testified, called two witnesses to testify, and offered exhibits (AE) A through S that were admitted without objection. The transcript (Tr.) of the hearing was received on March 6, 2012.

Findings of Fact

Applicant is a 56-year-old computer technician who works for a defense contractor. He has worked at his current job for a series of different defense contractors since December 2004. He earned a bachelor's degree in electronics in 1999. He is divorced and has two daughters, ages 20 and 26. His daughters live with him, and he supports them. He served in the U.S. Army from February 1979 to December 2003 and retired in the grade of sergeant first class (E-7). He has held a security clearance over 30 years without incident. In the Army, he was awarded the Meritorious Service Medal, four Army Commendation Medals, and three Army Achievement Medals.[1]

The SOR lists seven delinquent debts totaling $91,077. In his Answer to the SOR, Applicant admitted each of the delinquent debts. His admissions are incorporated as findings of fact.[2]

Applicant attributed his financial problems to being the victim of a Ponzi scheme. In early 2007, a friend recommended that he invest in a specific company. He received a sales pitch from a representative of the company and consulted with two church pastors about the company. The pastors advised him that the company was legitimate and its investment methods were legal. The company supposedly generated money through a foreign currency money market.[3]

From January to April 2007, Applicant obtained cash advances on several credit cards totaling $116,025 and invested that money with the company. The SOR debts are those credit card accounts. From this investment, he was supposed to receive $6,000 in July 2007 and $8,500 per month thereafter as long as he kept that amount of money invested in the company. In May 2007, the U.S. Justice Department (DOJ) shut down the company and froze its assets. The DOJ notified Applicant that he was a possible victim of fraud. Three of the key management officials of the company were arrested, charged, and convicted of federal offenses arising from this fraud. In December 2010, two of the officials were sentenced to 27 years in prison and the third was sentenced to 30 years. The federal judge who presided over the criminal trial indicated that these criminals preyed upon individuals using their faith and targeted the military and

[1] Tr. 5-8, 39, 68-71, 97-99; GE 1, 2.

[2] Applicant's Answer to the SOR; GE 3-5.

[3] Tr. 17, 27-28, 31-34, 50-51; GE 2; AE A.

upstanding citizens. It was reported that 7,000 people invested about $82 million in this fraudulent scheme.[4]

Even after the investment company was shut down, Applicant continued making credit card payments towards the cash advances. In December 2008, he consulted with a credit repair company that advised him to stop making payments towards those credit card accounts, allow them to be placed for collection, not to reply to any judgments, and not to make any court appearances in judgment proceedings. He paid the credit repair company $1,500 and was told it would handle everything. After about two years, he became dissatisfied with the credit repair company and began working with another credit repair company. He indicated that he quickly realized the second company was no better than the first. In January 2011, he consulted with a credit counseling service and began working with the creditors to establish a debt consolidation program. In July, 2011, he paid over $7,600 towards the delinquent accounts. He was able to settle two accounts. However, one creditor was not interested in participating in a debt consolidation program and obtained a writ of execution to satisfy its debt. This writ authorized the local sheriff to seize Applicant's assets to satisfy the debt. The writ made debt consolidation a less desirable option and bankruptcy, which automatically stays collection actions, the preferred alternative.[5]

In July 2011, Applicant consulted with a bankruptcy attorney. He filed a Chapter 13 bankruptcy petition in September 2011. The petition indicated that his total assets were $200,250 and his total liabilities were $305,874. The alleged debts are listed in the petition. At the hearing, the bankruptcy attorney testified that the Meeting of the Creditors has occurred. No objections have yet been filed to the proposed Chapter 13 Plan and the attorney expects the court will approve the plan. Under the proposed plan, Applicant will pay $1,400 per month to the bankruptcy trustee for 57 months. So far, he has made five monthly payments from October 2011 to February 2012 to the trustee. At the time of the hearing, he has made all required payments under the proposed plan. As part of this bankruptcy, he also completed a financial management course.[6]

The assets seized from the investment company have been turned over to a receiver. Applicant and approximately 4,000 other individuals have filed claims with the receiver. The receiver has proposed a plan for distributing the assets, which a federal district court must approve. A hearing on objections to the distribution plan was set for September 2011. The notice for that hearing provided:

> The Receiver intends to make an initial distribution of $19 million to those claimants determined to be eligible for an initial distribution. A second much smaller distribution will occur in the future. This Plan adopts the

[4] Tr. 28-33, 50-51, 73-76, 90-93; GE 2; AE A, B, L.

[5] Tr. 16-17, 35-42, 51-55, 77-81, 83-87; GE 2; AE C-F.

[6] Tr. 29, 40-50, 54-57, 81, 88-90; GE 2; AE G, K, N-S.

> Rising Tide theory of distribution which will return more money to Claimants who never received any money or other benefits from the [company].

Applicant anticipates that he will receive about 50% of his investment, *i.e.*, $58,000, from the receiver. He does not know when the funds will be disbursed. His bankruptcy attorney testified that, based on his experience, the amount returned to investors from such crimes is generally only about 10% of the money invested. Upon receipt of those funds, Applicant indicated that he and his attorney will confer with the trustee on how best to apply them to the delinquent debts.[7]

Prior to being a victim of this fraud, Applicant stated he never had any delinquent debts. He indicated that he is meeting his current living expenses. He has about $7,900 in his checking account and $16,000 in cash at another location. In July 2011, he submitted a Personal Financial Statement (PFS) that reflected his net monthly income was $7,044, his total monthly expenses were $1,618, and his monthly debt payments were $2,241, which left him a net monthly remainder of $3,184. His PFS was submitted before his bankruptcy and did not include payments to the trustee. However, even considering the monthly bankruptcy payments, he is still able to save money each month.[8]

A former coworker testified on Applicant's behalf. She has known him since 2002. They served in the Army together. They also worked together as security guards. She trusts him and believes he is an honest individual. He received an "excellent" rating on his last job performance evaluation. Last month, he received the Tech of the Month award.[9]

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[7] Tr. 28-29, 43, 73, 75-76, 95; GE 2; AE B, M.

[8] Tr. 35-42, 57-58, 68-73, 81-82; GE 2; AE H-K.

[9] Tr. 58-68, 98-100; GE 2

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavourable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

> 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. Two are potentially applicable in this case:

(a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant accumulated a number of delinquent debts that he was unable or unwilling to satisfy for a number of years. This evidence is sufficient to raise the above disqualifying conditions.

Several Financial Considerations mitigating conditions under AG ¶ 20 are potentially applicable:

> (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;
>
> (b) 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;
>
> (c) 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; and
>
> (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant was the victim of a Ponzi scheme. In early 2007, he obtained $116,000 in cash advances on credit cards that he invested in the fraudulent scheme. Thousands of people who invested millions of dollars were victims of this fraud. All of Applicant's delinquent debts pertain to the Ponzi scheme. He has no other delinquent debts. His financial problems involve this isolated incident. More specifically, these problems arose under unusual circumstances that are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) applies.

Applicant voluntarily made the decision to invest in the Ponzi scheme. Although pastors and others recommended this investment, he should have exercised greater diligence in investigating the company before investing in it. In particular, with its marketed yearly return on investment of nearly 90%, this company's legitimacy should have been questioned. AG ¶ 20(b) does not apply. Nevertheless, he has learned a difficult lesson from this incident and will be more cautious in the future.

Even after he became aware that he was the victim of the fraudulent scheme, Applicant continued making payments on the credit card accounts for about 20 months. In December 2008, he consulted a credit repair company that advised him to stop making payments on those credit cards and to allow them to be placed in a collection status. About two years later, he became dissatisfied with that credit repair company and eventually consulted with a credit counseling service. Following the advice of the credit counseling service, he contacted the creditors and attempted to establish a debt consolidation program. In July 2011, he paid about $7,600 to the creditors. One creditor, however, was not interested in participating in such a program and obtained a Writ of Execution to seize his assets. After consulting with an attorney, he filed Chapter 13 bankruptcy to obtain the automatic stay of that collection action. Since then, he has made all of the required payments under his proposed bankruptcy plan. His attorney expects that the plan will be approved by the trustee. Under that plan, Applicant will pay $1,400 per month for 57 months. Given his current budget, he is able to make those payments. Overall, he has shown that he is committed to resolving his delinquent debts. There are clear indications that his financial problems are being resolved and are under control. AG ¶¶ 20(c) and 20(d) apply.

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.

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. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. I have considered Applicant's service in the Army and his subsequent employment with defense contractors. His financial problems are attributable to him being the victim of a fraudulent scheme. In December 2008, he received questionable advice from a credit repair company that told him to stop making payments on his credit card debts. This resulted in him becoming delinquent on the alleged debts. Later, he received credit counseling and attempted to resolve these debts. One creditor obtained a Writ of Execution that caused him to file Chapter 13 bankruptcy. Since then, he has made all of the required bankruptcy payments. A receiver is liquidating assets seized from the fraudulent investment company. Applicant anticipates that he will receive funds from the receiver. He plans to consult with his bankruptcy attorney about how best to apply any funds he receives from the receiver to the delinquent debts. Throughout these events, he has been persistent in attempting to resolve his delinquent debts.

Overall, the record evidence leaves me with no questions about Applicant's eligibility and suitability for a security clearance. Therefore, I conclude Applicant has mitigated the security concerns arising under the guideline for Financial Considerations.

Formal Findings

Formal findings 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:	FOR APPLICANT
Subparagraphs 1.a – 1.g:	For Applicant

Decision

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 eligibility for a security clearance for Applicant. Clearance is granted.

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James F. Duffy
Administrative Judge