



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 11-06786
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

10/22/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (Financial Considerations). Clearance is granted.

Statement of the Case

On May 18, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On April 25, 2012, the Defense Office of Hearings and Appeals (DOHA) issued 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.

Applicant answered the SOR on June 5, 2012. Department Counsel was prepared to proceed on June 27, 2012. The case was assigned to me on July 9, 2012.

DOHA issued a notice of hearing on July 2, 2012, scheduling the hearing for July 25, 2012. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through D, which were received into evidence without objection.

I held the record open until August 3, 2012, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE E, which was received into evidence without objection. DOHA received the hearing transcript (Tr.) on August 2, 2012.

Findings of Fact

Applicant denied the two SOR allegations, with explanations. His answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 34-year-old senior systems engineer, who has worked for his current employer, a defense contractor, since October 2004. However, he has successfully held a secret security clearance since October 2000 while working for previous defense contractors. He seeks to retain his security clearance, which is a requirement of his continued employment. (Tr. 17, 23, 25-26, GE 1.)

Applicant is from Cambodia where he and his family led an uneventful life until the Khmer Rouge assumed power in 1975. Applicant, his parents, and 11 siblings were placed in a resettlement camp and separated. Three of his siblings died of starvation in the camp. Applicant and his remaining family members eventually escaped from the Khmer Rouge settlement camp and made their way to a refugee camp in Thailand. Applicant immigrated to the United States in March 1989 and became a U.S. citizen in December 1998. Applicant's remaining family members resettled in France, Canada, and the United States. (Tr. 18-22.)

Applicant completed his high school education in the United States in June 1996. (Tr. 22-23.) He was awarded a Bachelor of Science degree in electrical engineering in May 2000, and has partially completed his course work for a master's degree. (Tr. 17-18, 23.) Applicant married his wife, who is also from Cambodia, in November 2004. They have a two-year-old daughter. Applicant's wife is currently a homemaker. (Tr. 22-23.)

Financial Considerations

Applicant's SOR identified two unpaid debts – a home equity loan for \$61,008 and a home foreclosure balance of \$183,301. (SOR ¶ 1.a. and b.) Applicant's financial difficulties arose shortly after he got married and bought a house in a neighborhood that became very unsafe. Applicant's living situation became so intolerable due to the high crime rate that he and his family were forced to move. They relocated to their current home in a much safer neighborhood. Applicant unsuccessfully tried to rent the home that he left. He remained current on his house payments until his wife was laid off in 2009. Unable to pay for two homes on a reduced income, his second home went into foreclosure. (Tr. 23-25, 35-36.)

Applicant was issued a Form 1099A by his lender in 2010 for the foreclosed home that reflected a balance owed of \$183,301 and a fair market value of \$119,858. Following foreclosure, the home was sold in April 2011 for \$124,900. Applicant was subsequently notified by his lender that they forgave the remaining balance pursuant to The Mortgage Debt Relief Act of 2007. Applicant provided further documentation that he settled with the creditor for his home equity loan in May 2012. He provided documentation from both creditors that his loans are satisfied with zero balances. (GE 2, AE A – AE D, Tr. 27-35.) Throughout this entire process, Applicant remained in contact with his creditors, kept them apprised of his situation, and attempted to work with them. (Tr. 30-31, 37.)

Applicant's gross monthly salary is \$8,876. His monthly budget reflects that he is current on all of his bills and lives within his means. (Tr. 38-39, GE 2.)

Character Evidence

Applicant submitted a work-related reference letter from his supervisor. His supervisor provided an overall very positive endorsement for Applicant. He stated that Applicant is "an excellent engineer, dedicated to his job and his family." He concluded, "I can state with certainty, that [Applicant] is very loyal to the United States, and would never do anything to jeopardize US security." (AE E.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 commonsense 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.

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 in seeking 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

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.” Applicant’s history of delinquent debt is established by the evidence presented. He accumulated approximately \$244,309 in mortgage and home equity loan debt. These debts were in various states of delinquency for several years. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five 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;

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

(e) 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.

Applicant’s conduct warrants full application of AG ¶ 20(a) because his financial problems are isolated and limited to a single bad real estate investment. He remained and remains current on all his other debts. The SOR debts are not a “continuing course of conduct” under the Appeal Board’s jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). He receives credit under AG ¶ 20(a) because the debt occurred under circumstances that are unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant merits full credit under AG ¶ 20(b) because of two factors: (1) the neighborhood where he purchased his house became so unsafe that he was forced to move to a better neighborhood for the safety reasons; and (2) his wife was laid off and

became unemployed at the time Applicant had two mortgages. These two factors were circumstances beyond his control, and he acted responsibly under the circumstances. Even though he did not have the funds for full repayment, he remained in contact with his creditors and took reasonable steps to resolve his debts.¹

AG ¶ 20(c) is only partially applicable because Applicant did not seek financial counseling; however, his financial problems are resolved and are under control. He has produced evidence that reflects he is living within his means and has regained financial responsibility. There are clear indications that his financial problems are resolved. Furthermore, there is sufficient information to establish full mitigation under AG ¶ 20(d).² Applicant has resolved his two SOR debts – his creditors have provided him with documentation that reflects zero balances on both accounts. Given his financial situation, Applicant has done all that can reasonably be expected of him. AG ¶ 20(e) is not relevant insofar as Applicant has not contested the validity of any debt alleged.

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

¹“Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether she maintained contact with her creditors and attempted to negotiate partial payments to keep his debts current.

²The Appeal Board has previously explained what constitutes a “good-faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good-faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good-faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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 discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's record of service as a defense-contract employee, and the obstacles he overcame throughout his life that began as a Cambodian refugee, are notable and weigh heavily in his favor. He is a law-abiding citizen and a productive member of society. He is current on his day-to-day expenses, lives within his means, and his SOR debts have been addressed and are resolved.

As noted by his supervisor, Applicant is making a significant contribution to the national defense. His company fully supports him and recommends him for a security clearance. Due to circumstances beyond his control, his debts became delinquent. Despite Applicant's recent financial setback, it is clear that he had made a full financial recovery. These factors show responsibility, rehabilitation, and mitigation.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's employment record, his 12-year record of successfully holding a security clearance, the obstacles he overcame during his lifetime, his years of financial responsibility before falling into debt, the substantial steps he has taken to resolve his financial situation, his potential for future service as a defense contractor, his reference letter, and his testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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: FOR APPLICANT

Subparagraphs 1.a. and 1.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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

Robert J. Tuidor
Administrative Judge