



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-03786

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

01/30/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant emigrated from Indonesia to the United States in 1992, and his connections to Indonesia are limited. He gave his Indonesian passport to his security officer in 2016. Foreign influence and foreign preference trustworthiness concerns are mitigated. Applicant stopped making payments on delinquent debts of \$41,189 and \$147,232 around 2010, and he did not provide evidence of ongoing contacts with the creditor or sufficient evidence of the status of these two debts. Financial considerations trustworthiness concerns are not mitigated, and eligibility to occupy a public trust position is denied.

Statement of the Case

On September 22, 2014, Applicant signed an Electronic Questionnaire for National Security Position (SF 86). (Government Exhibit (GE) 1) On December 9, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guidelines B (foreign influence), C (foreign preference), and F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked. (HE 2)

On December 28, 2015, Applicant responded to the SOR allegations. (HE 3) On June 27, 2016, Department Counsel indicated she was ready to proceed. On August 15, 2016, the case was assigned to me. On September 12, 2016, the Defense Office of Hearings and Appeals issued a hearing notice setting the hearing for October 6, 2016. (HE 1) The hearing was held as scheduled. At the hearing, the Government provided four exhibits; Applicant offered eight exhibits; and all exhibits were admitted into evidence without objection. (Tr. 19-23; GE 1-4; Applicant Exhibits (AE) A-H) On October 12, 2016, I received a transcript of the hearing (Tr.). On November 30, 2016, Applicant submitted one document, which was admitted into evidence without objection. (AE I) On December 6, 2016, the record closed. (Tr. 44, 77, 85-86)

Procedural Rulings

Department Counsel provided a summary reflecting the facts raising a trustworthiness concern about Applicant's connections to Indonesia as well as two exhibits for administrative notice to support the summary. (GE 4; I-II) Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Applicant did not object to me taking administrative notice of the proffered documents, and Department Counsel's request was granted. Department Counsel's summary is quoted without footnotes in the section labeled "Indonesia" *infra*.

Findings of Fact¹

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 2.a, 3.a, and 3b. He also provided explanations and mitigating information. (HE 2) His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

¹The facts in this decision do not specifically describe employment, names of witnesses, names of other groups, or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

Applicant is a 43-year-old employee of a contractor, and he has been employed by the same contractor in information technology as a system engineer for 15 years. (Tr. 5-6, 15) Applicant was born in Indonesia. (Tr. 6) In 1992, when he was 19 years old, he emigrated from Indonesia to the United States, and in 2014, he was naturalized as a U.S. citizen. (Tr. 7) He has not served in the U.S. military or Indonesian military. (Tr. 6) He has never married, and he does not have any children. (Tr. 6-7)

From 1998 to 2001, Applicant worked for a non-DOD federal agency, and from 2001 to 2005, he worked for Tricare Management Activity. (Tr. 15) From 2005 to 2014, he worked for a local government and police department. (Tr. 15) From 2014 to present, he worked for the Defense Health Affairs. (Tr. 15) He has not had any professional or ethical lapses or disclosures of sensitive information. (Tr. 15) He describes himself as loyal, ethical, professional, and trustworthy. (Tr. 15-16)

Foreign Influence and Foreign Preference

Applicant's mother and two brothers are citizens and residents of Indonesia. (SOR ¶ 1.a response) His mother is a 69-year-old retired real estate agent. (Tr. 17, 24) His brothers have no association or employment with the Indonesian Government. (Tr. 17) He does not contact his brothers, and he communicates with his mother about once a month. (Tr. 24) His most recent visit to Indonesia was in 2009. (Tr. 25) He does not own any property in Indonesia, and he does not provide any financial assistance to anyone in Indonesia. (Tr. 25) He intends to remain in the United States and to retire in the United States. (Tr. 28)

In 1998, Applicant requested, and in 1999, he was granted political asylum in the United States because of the Indonesian Government's mistreatment of individuals of Chinese-Indonesian descent. (Tr. 16; SOR ¶ 1.b response) Applicant feared persecution if he returned to Indonesia. (Tr. 16-17) He was not a dissident or a leader in an Indonesian anti-government movement. (Tr. 17) The current Indonesia Government is committed to the rule of law, and when Applicant returned to Indonesia in 2009, he was not persecuted, harassed, or threatened. (Tr. 17)

Applicant retained his Indonesian passport after becoming a U.S. citizen. (SOR ¶ 2.a response) On September 21, 2016, Applicant provided his Indonesian passport to his security manager, and his security manager defaced and invalidated his Indonesian passport. (AE F) His security manager retained Applicant's defaced Indonesian passport. (AE F)

Financial Considerations

Applicant conceded that the foreclosure of his rental property was "due to [his] financial mismanagement." (Tr. 18) It was also caused by the an unexpected significant decline in real estate values from around 2008 to 2010. (Tr. 18)

Applicant's October 10, 2014 credit report reflects: he opened a home equity line of credit in November 2005; the last act on account was in July 2010; the past due

amount was \$41,189; the account was charged off; and there was a “dispute following resolution.” (GE 3 at 8) Applicant’s October 10, 2014 credit report also indicates: he opened a home equity line of credit in August 2007; the last act on account was in September 2010; the past due amount was \$147,232; the account is in collections; and “consumer disputes after resolution.” (GE 3 at 8)

SOR ¶¶ 3.a and 3.b allege delinquent debts of \$41,189 and \$147,232 owed to the same mortgage company. Applicant said he purchased a rental property in 2007, for almost \$400,000. (Tr. 30-31)² He believed he could make some repairs, and then resell his rental property and make a profit. (Tr. 31) He rented the property for about three years; however, he had a negative cash flow of about \$1,000 per month. (Tr. 31-32) He unsuccessfully attempted to short sale the property. (Tr. 32) In 2010, the property went into foreclosure. (Tr. 32) Applicant believes “the deficit that was not written off, I guess it’s whatever the amount was stated in there. I think it’s \$144,000.” (Tr. 29) He said the bank decided not to file a lawsuit against Applicant because he had no assets. (Tr. 30) He has not heard from the creditor for four or five years. (Tr. 33, 38) He said he could not afford any payment plans. (Tr. 33) He did not dispute that the deficit after the foreclosure was \$144,000. (Tr. 39) He said an attorney told him “to ignore any deficiency request from the bank because he said after awhile if - - if they found out that I have no asset[s], the debt will be [written] off.” (Tr. 40)

Applicant received financial counseling, and he consulted a bankruptcy attorney. (Tr. 18) He uses a budget and controls his credit card use. (Tr. 18) He reduced his credit card debt from \$44,000 to zero. (Tr. 18) He is current with all of his bills. (Tr. 18) His credit score is now 743, which is an “excellent” score. (Tr. 18; AE H) His current annual salary is \$101,000. (Tr. 33) After paying his expenses and setting aside funds for his 401(k) account, he has a remainder of \$200 to \$300 for emergencies. (Tr. 34) In 2010, his 401(k) account totaled about \$20,000 to \$30,000. (Tr. 30) Applicant currently has \$120,000 in his 401(k) account. (Tr. 26)

Applicant asked for time to find out the status of his debt and “to make suitable arrangement[s].” (Tr. 40-41) I highlighted at the hearing the necessity of resolving his \$41,189 and his \$147,232 debts, which were owed to the same creditor. (Tr. 42-43; GE 3 at 8) I requested, and he agreed, to contact the creditor and find out the status of these two debts. (Tr. 43-44, 46) I gave him 60 days to provide additional information about these two debts. (Tr. 44)

After his hearing, Applicant stated:

On May 16, 2014, Maryland Governor Martin O’Malley signed a law (Maryland Rule 14-216) limiting the time banks can seek a deficiency judgment following a foreclosure to 3 years. This law applied retroactively

²Applicant’s October 10, 2014 credit report indicates he had a \$387,450 mortgage account that was 180 days past due, and it was redeemed through foreclosure. (GE 3 at 8) Applicant did not discuss whether a tenant occupied the rental property until the foreclosure or whether he made partial payments to the mortgage lender until the foreclosure.

to foreclosures at the height of the national housing crisis going back to 2008.

A deficiency judgement is sought when a foreclosure sale doesn't cover the balance and interest on a mortgage. In Maryland, the lender may file a motion for a deficiency judgment within three years after ratification of the auditor's report (Maryland Rule 14-216) which in my case is in 2011.

None of my creditors has filed deficiency of judgement in the case of my foreclosure. At this point, they are beyond the Statu[t]e of Limitation for debt collection. Both items on Government Exhibit 3 are no longer valid. (AE I)

Maryland Rule 14-216 reads:

(a) **Distribution of Surplus.** At any time after a sale of property and before final ratification of the auditor's account, any person claiming an interest in the property or in the proceeds of the sale of the property may file an application for the payment of that person's claim from the surplus proceeds of the sale. The court shall order distribution of the surplus equitably among the claimants.

(b) **Deficiency Judgment.** At any time within three years after the final ratification of the auditor's report, a secured party or any appropriate party in interest may file a motion for a deficiency judgment if the proceeds of the sale, after deducting all costs and expenses allowed by the court, are insufficient to satisfy the debt and accrued interest. If the person against whom the judgment is sought is a party to the action, the motion shall be served in accordance with Rule 1-321. Otherwise, the motion shall be served in accordance with Rule 2-121 and shall be accompanied by a notice advising the person that any response to the motion must be filed within 30 days after being served or within any applicable longer time prescribed by Rule 2-321(b) for answering a complaint. A copy of Rule 2-321(b) shall be attached to the notice.

Applicant did not describe how he knew that the creditor had not sought or obtained a deficiency judgment. He did not indicate he contacted the creditor. He did not provide any correspondence from the creditor or any foreclosure records. He did not provide any Internal Revenue Service (IRS) Form 1099-Cs, which are used by creditors to disclose to the IRS that a debt is forgiven. He did not indicate he searched the property records for evidence of any deficiency.

Character Evidence

Applicant's work colleague has known Applicant for more than 10 years, and he described Applicant as ethical, professional, reliable, diligent, and trustworthy. (AE D) This statement supports approval of his eligibility for a public trust position. (AE D)

Indonesia

Indonesia is a multiparty democracy. Civilian authorities generally maintain effective control over security forces. . . . [W]idespread corruption remained a problem, and some elements within the government, judiciary, and security forces obstructed corruption investigations and persecuted their accusers. Elements within the government applied treason, blasphemy, defamation, and decency laws to limit freedom of expression and assembly. . . . [B]oth military and police committed unjustified killings [and] used excessive force resulting in death during arrests, investigations, crowd control situations, and other operations. . . . On January 14, 2016, terrorists attacked civilians in Central Jakarta using guns and explosives. ISIL claimed responsibility for the attack. Currently, travel by U.S. government personnel to Central Sulawesi and Papua is restricted to mission-essential travel that is approved in advance by the Embassy security office.

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 [public trust position].” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7, C3.1.2.2, and C3.1.2.1.2.3. “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” Regulation ¶ C6.1.1.1. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

When evaluating an applicant’s suitability for a public trust position, an administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines 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 overarching 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 unfavorable.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. 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 therein and an applicant’s suitability for a public trust position. 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 access to sensitive information[.]” 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).

The protection of national security and sensitive records is paramount. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.”

Analysis

Foreign Influence

AG ¶ 6 explains the trustworthiness concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 has two conditions that could raise a trustworthiness concern and may be disqualifying in this case:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's mother and two brothers are citizens and residents of Indonesia. His mother is a 69-year-old retired real estate agent. His brothers have no association with the Indonesian Government. He does not contact his brothers, and he communicates with his mother about once a month. His most recent visit to Indonesia was in 2009. He does not own any property in Indonesia, and he does not provide any financial assistance to anyone in Indonesia.

The mere possession of close family ties with a family member living in Indonesia, is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood whether an applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, the government ignores the rule of law including widely accepted civil liberties, a family member is associated with or dependent upon the government, the government is engaged in counterinsurgency, terrorists cause a substantial amount of death or property damage, or the country is known to conduct intelligence collection operations against the United States. The relationship of Indonesia with the United States, places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Indonesia do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a family member living in Indonesia.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives or terrorists from Indonesia seek or have sought classified or economic information from or through Applicant or his family, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services. Department Counsel produced substantial evidence of Applicant's contact with his mother and has raised the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence trustworthiness concerns including:

- (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;
- (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
- (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;
- (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;
- (e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and
- (f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 8(b) applies. Applicant has frequent contact with his mother, who is a citizen and resident of Indonesia. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant immigrated to the United States in 1992, when he was 19 years old. In 2014, he was naturalized as a U.S. citizen.

AG ¶ 8(f) has limited application because there is no evidence that Applicant has any interest in property or bank accounts in Indonesia. However, this mitigating condition can only fully mitigate the disqualifying condition under AG ¶ 7(e), which provides, "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation." All of Applicant's assets are in the United States.

In sum, Applicant's connections to his mother living in Indonesia are less significant than his connections to the United States. His residence in the United States since 1992, his employment is in support of the U.S. Government, and his U.S. citizenship are important factors weighing towards mitigation of trustworthiness concerns. His connections to the United States taken together are sufficient to fully mitigate the foreign influence trustworthiness concerns under Guideline B.

Foreign Preference

AG ¶ 9 describes the foreign preference trustworthiness concern stating, "when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States."

AG ¶ 10(a) describes one condition that could raise a trustworthiness concern and may be disqualifying in Applicant's case: "(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen This includes but is

not limited to: (1) possession of a current foreign passport.” Applicant, who is a citizen of the United States, possessed a current Indonesian passport. AG ¶ 10(a)(1) applies to his possession of a current Indonesian passport after becoming a U.S. citizen.

AG ¶ 11(e) provides one condition that could mitigate trustworthiness concerns as follows: “(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” AG ¶ 11(e) applies to his possession of an Indonesian passport. On September 21, 2016, Applicant provided his Indonesian passport to his security manager, and his security manager defaced and invalidated his Indonesian passport. Foreign preference trustworthiness concerns are mitigated.

Financial Considerations

AG ¶ 18 articulates the trustworthiness 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Appeal Board explained the scope and rationale for the financial considerations trustworthiness concern as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s [eligibility for a public trust position].

ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted).

AG ¶ 19 provides two disqualifying conditions that raise a trustworthiness 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 SOR response, SCA, credit report, and hearing record establish the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;³ 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.

No mitigating conditions fully apply; however, Applicant presented some positive financial information. Circumstances beyond his control adversely affected his finances. The value of real estate had an unexpected and exceptional decline in the 2008 to 2010 timeframe, and the value of his rental property became less than the amount he owed on the property.

The negative financial considerations concerns are more substantial. SOR ¶¶ 3.a and 3.b allege and the record establishes delinquent debts of \$41,189 and \$147,232 Applicant owed to the same mortgage company. Applicant purchased a rental property in 2007, for almost \$400,000. He rented the property for about three years; however, he had a negative cash flow of about \$1,000 per month. He unsuccessfully attempted to

³The 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)).

short sale the property, and in 2010, the property went into foreclosure. He has not heard from the creditor for four or five years.

From 2010 to 2016, Applicant increased his 401(k) account from about \$20,000 to \$30,000 to \$100,000. His current annual income is \$101,000. He did not make any attempts to settle the debts for four or five years. The creditor may not have sought a deficiency judgment against Applicant or the debt could be collection-barred by the state statute of limitations, which is four years for most contract-based debts. See Code of Maryland § 2-725.

In a series of decisions, the Appeal Board has rejected statutes of limitations for debts generated through contracts, which is the law in all 50 states, as significantly mitigating financial considerations concerns under AG ¶ 20(d). See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008) ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007) (stating, “reliance upon legal defenses such as the statute of limitations does not necessarily demonstrate prudence, honesty, and reliability; therefore, such reliance is of diminished probative value in resolving trustworthiness concerns arising out of financial problems. See, e.g., ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).”).

Recently, the DOHA Appeal Board reinforced its position on statutes of limitations not mitigating financial considerations concerns stating:

In this case, the Judge noted that Applicant explained that he did not owe any of the alleged debts because they had either been deleted from his credit report or soon would be deleted, and he also relied on a state statute of limitations to absolve himself of debts. The Appeal Board has long recognized that debts remain relevant for [trustworthiness or] security clearance purposes even if they are no longer enforceable due to the running of the statute of limitations or cannot be legally listed on a credit report due to the passage of time. See e.g., ISCR Case No. 03-04779 at 4 (App. Bd. Jul. 20, 2005) and ISCR Case No. 03-20327 at 6 (App. Bd. Oct. 26, 2006).⁴ We also have held that reliance on a state’s statute of limitations does not constitute a good-faith effort to resolve financial difficulties and is of limited mitigative value. ADP Case No. 06-18900 at 5 (App. Bd. Jun. 6, 2008) (citing ISCR Case No. 03-04779 at 4 (App. Bd. Jul. 20, 2005) and ISCR Case No. 01-09691 at 2-3 (App. Bd. Mar. 27, 2003)).

ISCR Case No. 15-01208 at 3 (App. Bd. Aug. 26, 2016).

Applicant presented a credit report with a 743 score; however, it did not mention the two delinquent debts in SOR ¶¶ 3.a and 3.b. The Appeal Board’s position is “that

⁴ Compare ISCR Case No. 12-04806 (App. Bd. Jul. 3, 2014). In that case, Applicant corroborated efforts to settle debts that were in “charged-off” status. Also, that Applicant had received financial counseling. Ultimately, the Board affirmed the Judge’s favorable decision.

some debts have dropped off his credit report is not meaningful evidence of debt resolution.” ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)).

There is insufficient evidence about why Applicant was unable to make greater documented progress resolving the debts in SOR ¶¶ 3.a and 3.b. He did not make a sufficient effort to settle or investigate the status of these two SOR debts. There is not enough assurance that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to establish that financial considerations trustworthiness concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a public trust position 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.

The ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines B, C, and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 43-year-old employee of a contractor, and he has been employed by the same contractor in information technology as a system engineer for 15 years. Applicant was born in Indonesia. In 1992, when he was 19 years old, he emigrated from Indonesia to the United States, and in 2014, he was naturalized as a U.S. citizen. He successfully worked for the following entities: for a non-DOD federal agency from 1998 to 2001; for Tricare Management Activity from 2001 to 2005; for a local government and police department from 2005 to 2014; and for the Defense Health Affairs from 2014 to present. He has not had any professional or ethical lapses or disclosures of sensitive information. He describes himself as loyal, ethical, professional, and trustworthy.

Applicant’s work colleague has known Applicant for more than 10 years, and he described Applicant as ethical, professional, reliable, diligent, and trustworthy. His colleague’s statement supports approval of Applicant’s eligibility for a public trust position.

The negative financial information is more significant. The primary problem here is that Applicant has owed delinquent debts of \$41,189 and \$147,232 to the same mortgage company since 2010. He admitted he did not remain in contact with the creditor for four or five years. He was given additional time after his hearing to contact the creditor to provide a definitive status of the debts and possibly to settle them. He did not provide any evidence that he contacted the creditor. He did not provide enough evidence of efforts to clarify the status, resolve, settle, or mitigate the two debts.

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations trustworthiness concerns lead me to conclude that grant of access to sensitive information to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a public trust position in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his worthiness for a public trust position.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Foreign influence and foreign preference trustworthiness concerns are mitigated; however, financial considerations trustworthiness concerns are not mitigated.

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 B:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Mark Harvey
Administrative Judge