DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-06997
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: Charles L. Simmons, Jr., Esquire
Martin B. King, Esquire

October 20, 2010

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,[1] Applicant's clearance is denied.

On 28 April 2009 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct.[2] Applicant timely answered, and requested a hearing. DOHA assigned the case to me 4 September 2009, and I convened a hearing 22 October 2009. DOHA received the transcript (Tr.) 29 October 2009.

[1]Consisting of the transcript (Tr.) and Government's exhibits (GE) 1-15. GE 15 is an index of the 14 substantive exhibits, admitted solely to identify those exhibits for the record (Tr. 20-21).

[2]DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegations. He is a 52-year-old chief engineer for a company solely owned by his wife, but founded by them in November 2002. Because the company is solely owned by his wife, the company qualifies for preferential treatment contracting with the federal government. The company specializes in complex electrical applications. From August 2000 to November 2002, Applicant was a principal in a different start-up company. Applicant also created a subchapter S corporation in 1998 (GE 7). Applicant has bachelor's and master's degrees in electrical engineering, and completed doctoral studies, but has yet to write the thesis to get his degree. He held a clearance in a variety of jobs from 1985 until his clearance was suspended in March 2008 because of the issues raised in the SOR (GE 3).

Applicant's wife is a naturalized U.S. citizen. They have been married over 22 years, and have three children together, plus a toddler they adopted in 2008. Before adopting, they fostered 15 children with ages ranging from nine to 13. His wife is fluent in Spanish. They are both very involved in their church, where he serves as a deacon.

In November 2006, Applicant's request for special access at another government agency was denied because of the issues raised in the SOR, as well as for conduct cited under the criminal conduct and financial considerations guidelines that are not alleged in the SOR (GE 12).[3] Applicant appealed the decision in March 2007 (GE 13), and his appeal was (GE 14). He did not exercise his further right to appeal.

Applicant's company had sponsored him for special access in October 2005 (GE 1, 6). Between December 2005 (GE 7) and August 2006 (GE 11), Applicant underwent five lifestyle polygraphs to resolve issues that arose during the interviews (Tr. 101). Applicant was fully cooperative, and he dredged up every conceivable piece of potentially adverse information, including some he thought silly. However, the issues could not be resolved to the agency's satisfaction. Each interview was summarized (GE 7–11), and the information condensed in the agency's decision statement (GE 12).

DOHA alleged, the Government's exhibits establish, and Applicant admits that: the other agency denied his request for special access (SOR 1.a.), he employed several foreign nationals who he suspected were illegal aliens (SOR 1.b.), he failed to report their income to the Internal Revenue Service (IRS) from about 1990 to 2006 (SOR 1.c.), he overcharged his company for mileage from about 1985 to 2006 (SOR 1.d.), he deliberately under-reported his work hours between 1996 and 2002 (SOR 1.e.), he bought items with company money from 2002 to 2006, returned some of them for cash refunds, then used the cash to pay for personal items (SOR 1.f.), he was occasionally undercharged for purchases but did not report to the store (SOR 1.g.), and he unlawfully discharged a gun on his property from 1993 to 2006, while being aware of the

[3]The other agency acted under regulations that use adjudicative guidelines that are virtually identical to the guidelines applicable here.

unlawfulness since 1999 (SOR 1.h.). The adverse conduct ranges from serious to not very. Applicant's explanations run the gamut from reasonable to not very.

The most serious of the conduct is Applicant's employment of illegal aliens and failure to report their income to the IRS from about 1990 to 2006. Applicant hired a series of nannies and housekeepers to watch his children, clean his home, and look after his elderly parents when they moved in with Applicant. He also hired a yard man around 2002 to do regular yard work at his home. He stated (Tr. 131, GE 5) that he had no actual knowledge that they were illegal aliens, and believed until about 2005 that they were independent contractors and not employees (Tr. 132-133). A more accurate characterization is that Applicant assiduously avoided that actual knowledge, but knew many facts about his employees that all-but-confirmed their illegal status.

Applicant stated in a May 2008 sworn statement (GE 5) that he never accepted fraudulent documents, but also never asked anyone who worked for him their immigration status, nationality, or citizenship. However, in December 2005, he stated that the workers presented him with social security cards that he nevertheless suspected were fraudulent. He paid these workers in cash (GE 7, 9), and did not file the appropriate paperwork with the IRS because he suspected doing so would make them disappear (GE 7). In a May 2006 interview conducted under oath (GE 10), he reiterated that he paid his workers cash, suspected that they were not U.S. citizens, and did not report his payments to the IRS because it "was inconvenient and too much trouble to fill out the appropriate paperwork."

Applicant's wife did all the actual hiring because all the workers were native Spanish speakers and spoke little or no English. The workers came to them by word of mouth, through recommendations to his wife. In one instance in July 2006, Applicant lent his yard man (whose last name is unknown to Applicant) $1,000 in cash to bring his wife to this country. The yard man had worked for him long enough that he felt he should help him. He later hired the yard man's wife (whose last name he also does not know) as a housekeeper (Tr. 149-151, GE 11). He paid them both in cash. He suspected that the yard man and his wife were both illegal aliens, and that the $1,000 was used to smuggle her into the U.S. However, he told his wife he did not to know any of the particulars. The yard man later repaid the loan, in cash. Applicant pays his workers in cash because the workers either do not have checking accounts or are in the U.S. illegally. Applicant eventually hired a tax attorney to try and sort out his obligations to the IRS, but without full names or social security numbers (SSNs), there is little chance of his being able to report any of the money he paid his workers to the IRS.

In his March 2007 appeal to the other agency (GE 13), Applicant identified six women who worked for him between 1990 and 2006. He paid them from $100 to $300 per week, for a total of nearly $45,000. The last names and SSNs of five of them are unknown to Applicant. He does not know the SSN of the one woman whose last name he knows. Applicant did not know the last name of his yard man, and suspects that any name he would have been given would have been false (GE 11).

Applicant lives in a housing development in a quasi-rural part of the state. His house backs up to a woods, and he is plagued by groundhogs. From 1993 to 2006, he shot groundhogs with his .22 caliber rifle, always taking care to shoot toward the woods. However, state law prohibits discharging a firearm within a given distance from other residences, and Applicant's neighbors were within that distance from his house. Initially, Applicant was unaware of the state law, but he continued to shoot groundhogs even after he became aware of it in 1999.

Over the years, Applicant has engaged in some questionable business practices. From 1985 to 2002, he rounded up his mileage on company expense reports, so his employers were overcharged. However, he probably only broke even because of the times he did not expense mileage he was eligible to claim. When he and his partners founded their start-up company in 2000, they all reported working 40 hour weeks for payment purposes, because they were salaried employees, but the company needed to keep records. Forty hours was seldom the standard work week. Most weeks it was well more than 40; some weeks as few as 35.

When Applicant and his wife founded their company in November 2002, they were the only employees. Applicant did a lot of the construction work himself, and the company record-keeping practices were not very well controlled. On occasion, Applicant would return excess supplies bought with company money, and use the cash or store credit for personal expenses rather than return the money to corporate accounts. But the net effect of this practice was to turn what would otherwise be income to him into a corporate expense, deductible against corporate income. From 1990 to 2006, Applicant would purchase items from stores and discover when he got home that he had not been charged for some items. He did not return the items to the store or return to the store to pay for the items. Most of the time the money involved was insignificant, but on one occasion at least, Applicant kept an $80 door.

Applicant and his wife engage in fairly sophisticated tax and business planning. The company they founded is solely owned by her to take advantage of preferential treatment given to companies owned by women (GE 4). Applicant owns the building that houses the company, and his wife pays fair-market rent, albeit on the high side. This perfectly-legal arrangement has benefits for both the Applicant and the company. The rent paid is a business expense of the company and income to the Applicant which can be offset by his business expenses of owning the property. In addition, Applicant and his wife take advantage of IRS gift tax rules to make tax-advantaged monetary gifts to their children.

Applicant's character witnesses, who include several business associates and his pastor for nearly 20 years, consider him honest and trustworthy, and eligible for a clearance. His business references, in particular, note his adherence to security protocols by removing himself from business meetings where the discussions moved into classified areas above his clearance level. He no longer engages in any of the conduct raised by the SOR.

Policies

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.[4]

Analysis

The Government established a case for disqualification under Guideline E and the whole-person concept, and Applicant did not mitigate the security concerns, except regarding the 35-hour work weeks alleged in SOR 1.e. Applicant was a full-time, salaried employee of a company he co-founded. The 40-hour work weeks reported by Applicant and his co-founders were an accounting device used to show that they were all full-time employees on the company's books. They earned no overtime. Any weeks that were actually less than 40 hours were more than covered by the many weeks that were actually more than 40 hours—weeks that would be routine in a start-up company. No fraud was intended by Applicant nor experienced by the company. I find SOR 1.e for Applicant.

However, Applicant's other employment adventures and his violation of state gun law raise serious security concerns. Distilled to its essence, Applicant's misconduct —whether relatively minor (overstating mileage expense or not returning or paying for items he had not been charged for) or more serious (hiring illegal aliens and not reporting their income to the IRS, and deliberately violating state gun

[4] *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

law)—demonstrates a consistent pattern of poor judgment and untrustworthiness over many years, including years he held a clearance.[5] Although the other agency's special access decision is not binding on my adjudication of his underlying clearance both because that decision involved additional adverse information not alleged in the SOR and because of the additional sensitivity of information in special access programs, the reasoning is particularly apt.[6] Applicant is an entrepreneur. Entrepreneurs take risks. They have little time for rules and regulations that they perceive as inconvenient or silly. They will cut corners to get the job done, whether for themselves or their clients. This is precisely what Applicant did.

Applicant knew, or should have known, that he was hiring illegal aliens for a variety of jobs at his home. The circumstantial evidence alone confirms that he believed them to be illegal aliens: referrals by word of mouth, employees who speak little or no English, whose last names are unknown, who present no employment documents (or suspected fraudulent ones), who are paid only in cash, for whom he did not file IRS paperwork because it was burdensome and would make his employees disappear, and for whom Applicant chose to not acquire any of this missing information—going so far as to tell his wife (the native Spanish speaker) not to tell him anything that would confirm his suspicions. This is plausible deniability to an unbelievable extreme. It contrasts vividly with the meticulous way he established his businesses.

Similarly, Applicant knew, or should have known, that his employees were not independent contractors and that he had to report their income to the IRS. Much of the same circumstantial evidence above demonstrates his knowledge. The workers came to him through individual referrals, with no apparent company affiliation. Applicant used their services on a frequent and recurring basis. He paid them in cash, in fairly small amounts (this alone should have suggested to Applicant that the employees were not reporting their pay as income to the IRS, and caused him to ask himself why that might be so). He knew the paperwork was onerous, and that filing with the IRS would likely make his employees disappear. Applicant's claim that he did not know he had to report their income to the IRS is belied by his conduct well before 2005, and by the sophistication and general knowledge he acquired in starting his own companies in 1998, 2002, and 2002. Finally, Applicant's claim that he did not know his obligation to

[5]¶ 16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. . . ;

[6]"When viewed individually, the actions referenced in the denial statement may appear relatively minor, however, when viewed in total, a more disturbing pattern of behavior appears. What is particularly concerning about [Applicant's] conduct over the years has been what appears to be his belief that laws, rules, and regulations do not apply to him when they are not convenient." (GE 14)

report his employees income until 2005 is belied by the entry of a single word into the American lexicon in January 1993: nannygate—the political and legal fallout attendant to hiring domestic employees, whether U.S. citizens or legal or illegal aliens, without filing the required documents with the IRS. The events that spawned this word got national, if not international, coverage, but more important, occurred in the same geographic region where Applicant has lived since then.

Applicant's conduct regarding his household workers alone supports denying his clearance, but his other misconduct only adds to that result. In decreasing order of severity, his violating state gun law was dangerous (despite his reported precautions) and showed his willingness to violate laws when expedient. Similarly, his pocketing company refunds and using the money for personal expenses was dishonest and converted company finances into personal income for him. Finally, not paying for or returning items he was not charged for may not be illegal, but neither is it particularly honest or ethical. How a person acts when others are unaware of their conduct gives insight into their character. These latter two allegations might deserve to be mitigated as minor misconduct, but as they are part of the thread of questionable judgment and trustworthiness demonstrated by the more serious misconduct, I do not find them mitigated. Applicant's favorable evidence, and the fact that he has not committed any misconduct since 2006, do not ameliorate the security concerns raised by his misconduct over more than 15 years. The mere passage of time is insufficient to mitigate this conduct. I resolve Guideline E against Applicant.

Although this case is alleged under Guideline E, it is equally about a whole-person analysis. Despite the recommendation of his employer, the fact that Applicant has not had any other incidents since 2006, and has demonstrated his adherence to security protocols, his long history of poor judgment and untrustworthiness augurs against a whole-person analysis in his favor.

Formal Findings

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraphs a-d, f-h:	Against Applicant
Subparagraph e:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge