DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 18-00753
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Danel A. Dufresne, Esq.

10/31/2018

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Decision

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He did not provide sufficient evidence to rebut, explain, extenuate, or mitigate the security concern stemming from a conflict of interest based on his ongoing association with illegal aliens to whom he is related by marriage. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on September 30, 2016.[1] This document is commonly known as a security clearance application. Thereafter, on April 17, 2018, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF), Fort Meade, Maryland, sent Applicant a

[1] Exhibit 1.

statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline E for personal conduct.

Applicant answered the SOR in written submissions made in May and June 2018. He admitted the factual allegations, but also asserted that he had not shown questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations. He also requested a hearing before an administrative judge.

The case was assigned to me on August 14, 2018. The hearing took place as scheduled on September 20, 2018. Applicant appeared with counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-4. Applicant offered documentary exhibits, which were admitted as Exhibits A-E. Other than Applicant, no witnesses were called by either party.

At the hearing, the SOR was amended to correct both a minor drafting error and to make substantial changes to the factual allegations.[2] Although Applicant initially objected, he subsequently withdrew the objection.[3] As a result of the amendments, the initial three factual allegations in the SOR were reduced to two allegations as follows:

SOR ¶ 1.a. You have knowingly continued to associate with your mother-in-law and brother-in-law even after learning that they are illegal aliens residing in the United States.

SOR ¶ 1.b. You have knowingly continued to associate with your mother-in-law and brother-in-law despite the fact that you are or were employed as an enforcement and removal assistant with the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement.

Findings of Fact

Applicant is a 31-year-old employee who is seeking to obtain or retain a security clearance in the defense industry for his job as an armed security guard for a federal contractor. He has had this job since about August or September 2014. It is a part-time job on the weekend. During the week, he has a full-time job as a federal employee as an enforcement and removal assistant (ERA) with the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations. He has had this job since January 2015. In conjunction with his federal employment, it appears that DHS or ICE made a favorable public trust determination for Applicant in about September 2014.[4] His current paygrade is GS 8,

[2] Tr. 13-24.

[3] Tr. 23-24.

[4] Exhibit 1 at 47.

step 1. The ERA job is largely administrative in nature, and it involves case management, file distribution, bond management, and other duties in support of deportation officers in their daily duties.[5] Indeed, in Applicant's September 2016 security clearance application, he stated that he was in the process of being investigated for the position of deportation officer.[6] He has a good employment record based on multiple letters of recommendation and a recent performance evaluation.[7] Those who know Applicant consider him to be a reliable, honest, trustworthy, and hard-working employee.

Applicant's employment history includes about eight years of honorable military service in the U.S. Marine Corps during 2005-2013.[8] Trained as a mortarman, he deployed three times to the Middle East (twice in Iraq and once in Afghanistan).[9] As a result of his military service, the Department of Veterans Affairs determined he has a 70% service-connected disability stemming from bad knees, bad ankles, bad shoulders, and mixed anxiety.[10] He stated that he was diagnosed with PTSD, but it is not part of his disability rating. After his honorable discharge in July 2013, Applicant had a full-time job as a hotel security guard until December 2013. He later had a full-time job as an unarmed security guard from September 2013 to September 2014.

During his military service, Applicant was married and divorced twice. He married his third wife, a citizen of Mexico, in February 2016. They have two young daughters, ages two and ten months. They have owned a home since January 2016.

Applicant met his spouse about two months before he started his current federal contractor job in September 2014.[11] He was then unaware of her status as a foreign national residing in the United States under the Deferred Action for Childhood Arrivals (DACA) program.[12] It is unclear whether Applicant's spouse was eligible to apply for DACA or was DACA approved, the latter of which would mean that she would not be subject to removal (deportation) for a period of time from the United States. Regardless, his spouse is now a lawful conditional permanent resident alien in the United States. His spouse's immigration status was not alleged in the SOR, and I have not considered it other than for the obvious connection or linkage between Applicant and his in-laws.

[5] Exhibit B.

[6] Exhibit 1 at 46-47.

[7] Exhibits A, B, and D.

[8] Exhibit E.

[9] Tr. 71-76.

[10] Tr. 47-48.

[11] May 2018 answer to SOR.

[12] May 2018 answer to SOR.

Their relationship became more serious at about the time Applicant began working for ICE in January 2015. Applicant believed then that she was a U.S. citizen because she appeared to be a citizen; she spoke English better than most; she was attending college; and she was employed.[13] He learned about her status as a foreign national in July 2015, when she told him she could not travel outside the United States, and he was initially confused about the situation.[14] After doing some research on the matter, he disclosed his contact with his then foreign national girlfriend to ICE in August 2015.[15] He provided her name, country of citizenship, and date of birth, and he described the nature, frequency, and degree of contact. He provided no information about his then girlfriend's family members, as he was unaware of their situation.[16]

In his September 2016 security clearance application, Applicant fully disclosed the circumstances concerning his now spouse and in-laws.[17] He stated that the marriage occurred in February 2016, and that he was now aware that his mother-in-law, father-in-law, and an older brother-in-law were foreign nationals and that his wife's three other siblings were U.S. citizens. He stated that those family members had lived in the United States for more than 15 years and were deeply committed to U.S. values, laws, and traditions. He stated that he had discussed his new family members in detail, including their citizenship, and was currently in the process of helping to identify and cure any immigration deficiencies. He also stated that he had submitted the necessary immigration paperwork to obtain resident alien status for his spouse.

Later in the same document, Applicant reported that his father-in-law was a citizen of Mexico who was authorized to work in the United States and had both an alien registration number and a Social Security number.[18] For his mother-in-law, he reported she was a citizen of Mexico without any U.S. immigration status.[19] For both, he reported he had regular in-person contact consisting of weekly dinners and while picking up his daughter from his mother-in-law who provided child care. He reported that his brother-in-law was a citizen of Mexico without any U.S. immigration status, but he was employed by a well-known U.S. insurance company.[20] He reported having contact with his brother-in-law via weekly family dinners.

[13] May 2018 answer to SOR.

[14] May 2018 answer to SOR.

[15] Exhibit 4.

[16] Tr. 46.

[17] Exhibit 1 at 23-26.

[18] Exhibit 1 at 31-33.

[19] Exhibit 1 at 33-34.

[20] Exhibit 1 at 34-35.

Applicant provided additional information about his foreign family members during the April 2017 background investigation conducted by the Office of Personnel Management.[21] He stated that since completing the security clearance application, his spouse had obtained conditional resident alien status in March 2017, which required a trip to Mexico to process immigration paperwork. Concerning his mother-in-law, he stated that she was a citizen of Mexico and an undocumented resident of the United States. He further stated that he had contact with his mother-in-law one to two times monthly. Concerning his brother-in-law, Applicant stated that he is a citizen of Mexico and legal resident in the United States. He further stated that he has contact with his brother-in-law three to four times monthly. There is no information about his father-in-law from the April 2017 interview.

In October 2017, Applicant's federal employer initiated action to remove Applicant from his position as an ERA based on the improper association with an illegal alien.[22] Applicant provided both a written and oral response to the proposed termination action. After considering his response, the relevant ICE official determined in March 2018 that Applicant's offense was "very serious" and "directly related" to his job as an ERA. The ICE official considered Applicant's lack of previous disciplinary actions, his performance record over the past two years, his ability to get along with co-workers, the fact that he took his relationship with his spouse seriously and sought to obtain legal immigration status for her, which resulted in a successful petition for conditional permanent resident status. Having considered all those matters, the ICE official mitigated the proposed removal to a seven-day suspension without pay, effective May 2, 2018. There is no mention of Applicant's foreign national in-laws in the ICE official's memorandum of decision.[23]

At the September 2018 hearing in this case, Applicant addressed both the immigration status of his foreign national in-laws and his contact with them, noting that they all live in the same home. Concerning the mother-in-law, he stated that the previously mentioned child-care arrangement lasted for about 18 months, until the arrival of their second child, and his spouse is now a stay-at-home mother.[24] The mother-in-law's immigration status is unchanged. He has contact with his mother-in-law a couple of times per week and communicates with her weekly.[25] He has contact with his brother-in-law about once a week.[26] He also stated that his brother-in-law "has DACA."[27] It is unclear whether the brother-in-law is eligible to apply for DACA or was in fact DACA approved, the latter of which would mean he would not be subject to removal

[21] Exhibit 2.

[22] Exhibit C.

[23] Tr. 61.

[24] Tr. 53-54.

[25] Tr. 70.
[26] Tr. 71.

[27] Tr. 84.

for a period of time from the United States. Applicant stated that his father-in-law does not have lawful immigration status in the United States.[28] He further stated that his father-in-law is "going through immigration court," because he is pending a removal (deportation) action.[29] It is unclear whether Applicant's federal employer (ICE) is aware of the immigration status of Applicant's mother-in-law, father-in-law, and brother-in-law.[30]

Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.[31]

It is well-established law that no one has a right to a security clearance.[32] As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[33] Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[34] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[35]

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[36] An

[28] Tr. 79. Neither the original SOR nor amended SOR alleged the father-in-law. Accordingly, I have not considered the father-in-law's immigration status in disqualification, but have considered it as a circumstance that is relevant in assessing Applicant's evidence in mitigation.

[29] Tr. 84-85. It is unclear what the proposed grounds are for the removal action.

[30] Tr. 62-69.

[31] The 2017 AG are available at http://ogc.osd.mil/doha.

[32] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[33] 484 U.S. at 531.

[34] 484 U.S. at 531.

[35] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[36] Directive, ¶ 3.2.

unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[37]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[38] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[39] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[40] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[41]

Discussion

Under Guideline E, personal conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about a person's reliability, trustworthiness, and ability to protect classified or sensitive information.[42]

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

> AG ¶ 16(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 conduct, unwillingness to company with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy behavior to include breach of client confidentiality, release of propriety information, unauthorized release of sensitive corporate or government protected information; (2) any disruptive, violent, or other inappropriate behavior; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of government or other employer's time or resources; and

[37] Directive, ¶ 3.2.

[38] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[39] Directive, Enclosure 3, ¶ E3.1.14.

[40] Directive, Enclosure 3, ¶ E3.1.15.

[41] Directive, Enclosure 3, ¶ E3.1.15.

[42] AG ¶ 15.

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's ongoing association with illegal aliens to whom he is related by marriage raises a concern under AG ¶ 16(d), because it is an obvious conflict of interest with his responsibilities as an ERA employed by ICE. Taking the logic a step further, the spillover effect from the conflict of interest undermines his eligibility for access to classified information within the defense industry.[43] Applicant did not present sufficient evidence to mitigate the conflict of interest. What is missing here is reliable evidence from a relevant official at ICE affirmatively stating that they are fully aware of Applicant's in-laws' situation, and that their immigration status does not create a conflict of interest or other problem for Applicant's employment with ICE.

In mitigation, Applicant receives credit under AG ¶ 17(e). The risk of Applicant being vulnerable to exploitation, manipulation, or duress has been lessened by his disclosures concerning his foreign national in-laws. Nevertheless, his disclosures are insufficient to fully mitigate the ongoing conflict of interest here, which distinguishes Applicant's case from the cases cited by Applicant's Counsel in his trial brief.[44] Indeed, Applicant's employment as an ERA with ICE puts him in a position to potentially have access to information (documentary or electronic or both) concerning his foreign national in-laws who are involved in the immigration system. This includes his father-in-law who, accordingly to Applicant, is currently pending a removal (deportation) action in immigration court. Such circumstances create the potential for an insider threat, which is a major concern of the federal government's risk-management program.

In addition, I have considered the totality of the evidence, to include Applicant's eight years of honorable service in the U.S. Marine Corps, which includes three combat tours in the Middle East. Such selfless service speaks highly of Applicant, and I have given that evidence substantial weight. I also note that this is a difficult case, because the equities are certainly on Applicant's side. Nevertheless, his ongoing association with illegal aliens and the resulting conflict of interest cannot be reconciled with the clearly consistent standard that applies in these cases.

Following *Egan* and the clearly consistent standard, I have doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. I conclude that he has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

[43] It is well settled law that a security clearance may be denied or revoked based on an applicant's off-duty or away-from-work conduct. *E.g.*, ISCR Case No. 96-0371 (Jun. 3, 1997). Likewise, it follows that a security clearance may be denied or revoked based on an applicant's employment outside of the defense industry.

[44] Appellate Exhibit II.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant access to classified information. Eligibility denied.

Michael H. Leonard
Administrative Judge