



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF B-T-O-

DATE: DEC. 21, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-687, APPLICATION FOR STATUS AS A TEMPORARY RESIDENT UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

The Applicant, a native and citizen of Mexico, seeks status as a temporary resident. *See* Immigration and Nationality Act (the Act) § 245A, 8 U.S.C. § 1255a. The Director, California Service Center, denied the application. We rejected the Applicant's appeal as untimely. The matter is now before us on a motion to reopen and reconsider. The motion to reopen and reconsider will be denied.

The Director denied the Form I-687 on July 31, 1992, and mailed the denial notice to the Applicant at his address of record. On August 7, 1992, the denial notice was returned to the Immigration and Naturalization Service, now U.S. Citizenship and Immigration Services, as undeliverable. In November 1998, the Applicant filed a request to obtain copies of his immigration-related documents under the Freedom of Information Act (FOIA). The record indicates that the FOIA request was completed on January 21, 1999, and the documents were mailed to the Applicant. On December 3, 2003, the Applicant filed an appeal seeking review of the Director's July 31, 1992, denial decision. On December 22, 2004, we rejected the Applicant's appeal, as the appeal was filed more than 11 years after the denial decision was issued. An appeal received after the 30-day period (including any time required for service or receipt by mail) may not be accepted. 8 C.F.R. § 245a.2(p). On September 16, 2013, the Applicant submitted the instant motion seeking to reopen or reconsider the denied Form I-687.

Regulations provide that motions to reopen a proceeding or reconsider a decision under section 245A of the Act shall not be considered. 8 C.F.R. § 245a.2(q); 8 C.F.R. § 103.5(b). Accordingly, we do not have jurisdiction to consider the Applicant's motion and must deny it.

While we must deny the Applicant's motion, we will consider whether the matter warrants reopening *sua sponte*. We may reopen and reconsider *sua sponte* any adverse decision where it appears that manifest injustice would occur if the adverse decision were permitted to stand. *See Matter of O-*, 19 I&N Dec. 871 (Comm. 1989); 8 C.F.R. § 103.5(b).

The Applicant asserts that the July 31, 1992 denial of his Form I-687 should be reissued on the ground that it was never delivered and that the Applicant did not have an opportunity to timely

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appeal the decision. In support of this assertion, the Applicant cites *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002). This case involved a foreign national who was found eligible for reopening of removal proceedings because he did not receive a notice of hearing sent to him by regular mail. In the alternative, the Applicant requests that his denied Form I-687 be reopened for further processing. The Applicant asserts that his application was not properly supported with the required documents and that he did not appear for the scheduled interviews because of ineffective assistance of a *notario*.

There is no remedy available for an applicant who assumes the risk of an unlicensed attorney or unaccredited representative to undertake representations on his behalf. See 8 C.F.R § 292.1; see also *Hernandez v. Mukasey*, 524 F.3d 1014, 1019 (9th Cir. 2008) (“non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary precondition for ineffective assistance of counsel claims”). We only consider complaints based upon ineffective assistance against accredited representatives. See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The record reflects that the Applicant’s Form I-687 was denied because he did not include evidence of his residence in the United States during the requisite period; he did not submit Form I-693, Report of Medical Examination and Vaccination Record; and he did not appear for two interviews scheduled in connection with his application. The denial notice was mailed to the Applicant’s address of record by certified mail on July 31, 1992, but it was returned as undeliverable on August 7, 1992. The Applicant asserts that for this reason he did not have an opportunity to appeal the adverse decision in a timely manner.

The record shows that the Applicant appealed the denial of his Form I-687 in December 2003. With the appeal, the Applicant submitted additional evidence to overcome the reasons for the denial, including copies of letters confirming his employment in 1987 and 2003; a copy of the Applicant’s baptismal certificate issued on September 22, 1996, in [REDACTED] California; copies of his 2001 and 2002 federal income tax returns; a copy of a cancelled check dated August 10, 2000; and copies of undated photographs. In the brief submitted with the appeal, the Applicant stated that he would submit additional evidence of his presence in the United States since January 1981 within three to four weeks. The record does not show that the Applicant submitted this additional evidence.

In order to establish eligibility for temporary resident status under section 245A of the Act, an applicant must show that he or she entered the United States before January 1, 1982, and resided in the United States in a continuous unlawful status from before 1982 until the date of filing of Form I-687.

The documents submitted by the Applicant with his Form I-687 do not show, by a preponderance of the evidence, that he resided in the United States from before January 1, 1982, until he filed the application. Specifically, the employment letter issued by [REDACTED] and dated February 4, 1988, only confirms the Applicant’s employment in the United States after August 21, 1987. The documents the Applicant submitted on appeal do not include evidence of his

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presence in the United States between January 1982 and the date his Form I-687 was filed on May 1, 1988.

With the instant motion, the Applicant submits a declaration, allegedly from his former employer, as evidence that the Applicant resided in the United States between 1981 and 1987. In his declaration, executed on June 3, 2013, the declarant states that he met the Applicant in 1979 and that he employed the Applicant in his recycling business, [REDACTED] from January 1981 until August 1987. The declaration is not accompanied by additional evidence of the Applicant's claimed employment between 1981 and 1987. Further, the declaration does not include the declarant's contact information.

The Applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility, and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. 8 C.F.R. § 245a.2(d)(3)(i). To have probative value, letters from employers must include an applicant's address at the time of employment, exact period of employment, periods of layoffs, and duties with the company. They must be accompanied by a statement as to whether or not the information was taken from official company records, where records are located or, if the record is unavailable, an affidavit explaining why such records are unavailable. *Id.*

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In this case, there is no proof that the declarant has direct personal knowledge of the events and circumstances of the Applicant's residency or entry into the United States, nor is there any proof that the declarant himself was present in the United States between 1981 and 1987. Although the declarant states that he was a business owner and that the Applicant worked for him for six years, no evidence was submitted to show that the declarant did, in fact, own the business. In addition, the declaration does not contain the specific employment information required by 8 C.F.R. § 245a.2(d)(3)(i). Further, the Applicant has not submitted evidence to show his employment with the declarant, such as pay stubs, W-2 forms, tax return forms, or similar documents. Given these deficiencies, the declaration has minimal, if any, probative value. As such, it does not overcome the lack of primary evidence to support the Applicant's claim of residence in the United States between 1981 and 1987. The Applicant submits no other documents to establish eligibility for temporary resident status pursuant to section 245A of the Act.

Therefore, based upon the foregoing, we find that the Applicant has not established by a preponderance of the evidence that he entered the United States before January 1, 1982, and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M-, supra*. The Applicant is, therefore, ineligible for temporary resident status under section 245A of the Act.

The record reveals no error in the Director's denial of the Applicant's Form I-687 or our rejection of the Applicant's appeal on December 22, 2004. Further, the Applicant has not submitted additional evidence that establishes his eligibility for the benefit sought. We find, therefore, that reopening of this matter *sua sponte* is not warranted.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of B-T-O-*, ID# 14991 (AAO Dec. 21, 2015)