



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

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

MATTER OF R-D-G-

DATE: JAN. 13, 2016

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, Nebraska Service Center, denied the application and certified the decision to us. We affirmed the Director's decision to deny the application. The matter is now before us on a motion to reopen. The motion to reopen will be denied.

The Director denied the Form I-687, Application for Status as a Temporary Resident under Section 245a of the Immigration and Nationality Act, finding the Applicant statutorily ineligible for adjustment of status to temporary resident under section 245A of the Act. Specifically, the Director concluded that the Applicant's [REDACTED] 1982, departure pursuant to a deportation order automatically disrupted his continuous residence in the United States. Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).¹ On certification, we determined that the Applicant's deportation from the United States on [REDACTED] 1982, did not affect his eligibility for adjustment of status under section 245A of the Act. This determination was based on the Applicant's *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations. We concluded that for this for this reason, and in accordance with the terms of the settlement agreement in *Proyecto San Pablo v. Dept. of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007), USCIS was precluded from using the Applicant's 1982 deportation to deny the application on the basis of lack of continuous residence.

Nevertheless, we found that the Applicant did not establish eligibility for status as temporary resident, because he did not submit independent, objective evidence to resolve his materially inconsistent testimony regarding his residences, employment, and absences from the United States during the requisite period. Thus, we determined that the Applicant did not show by a preponderance of evidence that he continuously resided in the United States in an unlawful status

¹ This section provides that "an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of departure under an order of deportation."

since before January 1, 1982, until he filed the application for temporary status, Form I-687, on July 28, 1987.

The Applicant urges us to reopen the application on our own motion, stating that we did not consider the Congressional intent and spirit of the legalization program, which was to be implemented in a liberal and generous fashion without unnecessarily rigid demands for proof of eligibility. Further, the Applicant asserts that we did not acknowledge his explanation for certain discrepancies in the addresses listed on his application for his residence prior to 1983. Finally, the Applicant avers that in affirming the Director's decision, we ignored and made no reference to the immigration officer's recommendation to approve his Form I-687 following an in-person interview on August 20, 1987.

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three-day period is added to the 30-day period. 8 C.F.R. 103.8(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The Applicant's motion does not meet applicable requirements because it was not timely filed. We mailed our decision to the Applicant on July 9, 2014, and USCIS received the instant motion 344 days later, on June 18, 2015.² The Applicant presents no evidence concerning the delay in timely filing the motion. 8 C.F.R. § 103.5(a)(1)(i). Accordingly, we must deny the motion as untimely filed.

We will consider, however, whether we should reopen the matter on our own motion. Pursuant to 8 C.F.R. § 103.5(b), we may *sua sponte* reopen or reconsider a decision under section 245A of the Act when it appears that manifest injustice would occur if the prior decision were permitted to stand. *See Matter of O-*, 19 I&N Dec. 871 (Comm'r 1989).

An applicant for temporary resident status must establish, *in part*, that he or she entered the United States before January 1, 1982, and resided in the United States continuously in an unlawful status since such date through the date the application is filed. In addition, the applicant must establish, with certain exceptions, that he or she is admissible to the United States. *See* 8 C.F.R. § 245a.2(c).

We will first consider the Applicant's claim that denying his application for lack of sufficient objective evidence is contrary to Congressional intent behind the legalization program. The Applicant asserts that in its guidance on the subject, USCIS³ acknowledged that "not every legalization applicant would be able to produce full documentary proof of eligibility and that the

² The Applicant asserts that he initially submitted the motion on June 1, 2015, but that the motion was rejected on June 9, 2015, for lack of evidence to support his fee waiver request. Even if we were to accept June 1, 2015, as the initial filing date, the motion would still be untimely.

³ Formerly Immigration and Naturalization Service (INS).

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regulations provide a variety of ways in which applicants may satisfy the requirements.” In support of his argument, the Applicant references *Memorandum of David W. Wolfe* (Feb. 13, 1989), reprinted in 66 Interpreter Releases 12 (1989), and *Siddiqui v. Holder*, 670 F.3d 736, 743 (7th Cir. 2012).

We agree with the Applicant that “full documentary proof” is not required to establish eligibility for adjustment of status under section 245A of the Act. As reflected in the regulations, the evidentiary standard in these proceedings is a “preponderance of the evidence,” which allows for a wide range of proof, including affidavits. 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’r 1989). In evaluating the evidence, “[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 applicant 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 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 issue here is whether the Applicant established that it is “more likely than not” that he resided in the United States continuously since before January 1, 1982, until he filed Form I-687 on July 28, 1987. After considering the evidence of the record in the aggregate, we conclude that he did not.

An applicant for temporary resident status shall be regarded as having resided continuously in the United States if the applicant has no single absence from the United States exceeding 45 days, and the aggregate of all absences does not exceed 180 days between January 1, 1982, and the date the application for temporary resident status is filed. 8 C.F.R. § 245a.2(h)(1)(i).⁴

The reports generated from the Applicant’s fingerprint submissions show that he was apprehended several times when attempting to enter the United States illegally. The Applicant was apprehended on [REDACTED] 1979; [REDACTED] 1982; [REDACTED] 1986; and [REDACTED] 2000, in connection with these attempts. These apprehensions indicate that the Applicant departed the United States between 1982

⁴ The regulation provides for an exception of this requirement if an applicant can establish that he or she was not able to return to the United States within time period allowed due to emergent reasons. The Applicant has made no such claims.

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and 1987. In his June 3, 2013, statement, the Applicant claims that he was absent from the United States for between two and three months after he was deported on [REDACTED] 1982. In the subsequent statement, executed on March 20, 2014, the Applicant does not mention his 1982 absence, but he states that he was absent from the United States for approximately two months between August and October 1986.⁵ Accordingly, the Applicant's own statements indicate that he was absent from the United States for a period of over 45 days at least twice following his initial illegal entry into the United States: after he was deported on [REDACTED] 1982, and in 1986. Because both absences took place after January 1, 1982, and before the Applicant filed the Form I-687 on July 28, 1987, we find that the Applicant disrupted the continuity of his residence in the United States for the purposes of adjustment to temporary resident under section 245A of the Act.

Although the Applicant admitted two absences from the United States in excess of 45 days, we evaluated the employment verification letters he offered in support of his claim of continuous residence. Applying the regulations at 8 C.F.R. § 245a.2(d)(3)(i), which provide specific guidance on sufficiency of documentation pertaining to proof of residence through past employment, we found that the letters did not meet the evidentiary standard because they did not include the details of the Applicant's work duties, his address at the time of employment, periods of layoffs, or an explanation why this information was not available. Despite these deficiencies, we considered the information in the letters and found that it was inconsistent with the representations the Applicant made about his residence in the United States on the Form I-687. We have also considered his explanation that the inconsistencies in the record were caused by his lack of involvement in the application process and his legal counsel's failure to check the accuracy of the dates on the application. Although we found this explanation plausible, we noted that the information in the Applicant's March 20, 2014, affidavit regarding his departures from the United States was inconsistent with information he provided in the affidavit dated June 3, 2013. Moreover, the information in both affidavits contradicts the information on the Form I-687, on which the Applicant did not list any absences from the United States. In light of these conflicting statements, we concluded that the Applicant did not sufficiently resolve the inconsistencies in the record as they related to the continuity of his residence in the United States.

As we have noted previously, the evidence pertaining to the Applicant's employment in the United States contains significant gaps, indicating a possibility of the Applicant's extensive absences from the United States. In most cases such gaps can usually be explained by the passage of time or lack of a formal employment record of someone working in the United States without authorization. In this case, however, the evidence pertaining to the Applicant's employment in the United States, including the employment verification letters, paystubs, and W-2 forms, was submitted contemporaneously with the Form I-687. The employment verification letters attest to the Applicant's employment between October 1981 and February 1982, February 1982 through March 1983, February 1984 through December 1984, and April 1986 through May of 1986. The paystubs

⁵ In our July 9, 2014, decision, we mistakenly stated that this absence was for two weeks. The Applicant's March 20, 2014, statement, however, makes it clear that he was absent from the United States for a period of approximately two months, from August until October 1986.

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confirm these claimed periods of employment. However, this evidence shows that the Applicant resided in the United States only during these specific time frames, not that he resided in the United States continuously as defined in 8 C.F.R. § 245a.2(h)(1)(i). For example, the only evidence of the Applicant's residence in the United States in 1986 is the employment verification letter from [REDACTED] attesting to the Applicant's employment with the company between April and May 1986, paystubs confirming his employment with [REDACTED] between April and May 1986, and a Form W-2, Wage and Tax Statement, showing that the Applicant earned \$2072.97 working for [REDACTED] in 1986. This evidence of low income and limited time period of employment in the United States in 1986, when considered with the Applicant's statement confirming his absence from the United States between August and October 1986, indicates that the Applicant may have been absent from the United States for a long period of time in 1986. Similarly, the only evidence of the Applicant's residence in the United States in 1982 is the employment letter from his uncle, stating that the Applicant worked for him from October 23, 1981, until January 20, 1982. However, in his June 3, 2013, affidavit, the Applicant states that he left the United States "before Christmas 1981" to travel to Mexico. In addition, the Applicant states that he did not return to the United States until between two and three months after he was deported on [REDACTED] 1982, following his unsuccessful attempt to re-enter the United States without inspection on January 1, 1982. Accordingly, because the Applicant left the United States before December 25, 1981, and he did not re-enter the United States until sometime in March or April 1982, the information in the employment verification letter is inaccurate. Therefore, applying even the most liberal evidentiary standard to the Applicant's case and considering the evidence of the record in the aggregate, we cannot conclude, that the Applicant was "more likely than not" continuously present in the United States between January 1, 1982, and July 28, 1987.

The Applicant avers that we did not afford sufficient weight to the fact that his Form I-687 was recommended for approval following his interview on August 20, 1987. The record shows that the Applicant was interviewed in connection with his Form I-687 on August 20, 1987, by a legalization adjudicator. The record also shows that during the interview, as indicated by the adjudicator's red check-marks, the Applicant verbally confirmed the representations he made on the Form I-687 filed on July 28, 1987. These representations included the Applicant's claims that he entered the United States on May 8, 1980; he had no aliases; he never departed from the United States; he was not involved in assisting others to enter the United States in violation of the law; and he did not attempt to procure a visa by fraud or misrepresentation. The adjudicator's note, likely made after the interview, states: "He [the Applicant] entered the U.S. prior to 1/1/82. Has established proof of identity, residence and employment." There is no indication in the record that at the time he made this note, the adjudicator was aware that the Applicant's representations on the Form I-687 and his testimony at the interview were not truthful. Specifically, when the Applicant was interviewed on August 20, 1987, he had been absent from the United States at least twice, in 1982 and 1986. In addition, the record of the Applicant's apprehensions in 1982 and 1986 indicates that he was involved in smuggling other individuals into the United States. Furthermore, the record of the Applicant's fingerprints shows that he attempted to enter the United States on June 12, 1979, with documents of another individual. Finally, the record shows that the Applicant used the names of [REDACTED] and [REDACTED] when he was arrested during his attempted illegal

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entries into the United States in 1982 and 1986. In view of the above, we cannot afford much weight to the legalization adjudicator's recommendation for approval of the Applicant's application for temporary resident status, as this recommendation was made based on the Applicant's false representations, and without the benefit of review of the Applicant's two immigration files, which contained the information about his arrests for immigration violations in 1982 and 1986 under assumed names.

After a thorough review of the record, we find that it reveals no error in the adjudication of the application for temporary resident status that would warrant reopening of this matter *sua sponte*. The motion was untimely filed and must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is denied.

Cite as *Matter of R-D-G-*, ID# 14938 (AAO Jan. 13, 2016)