U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B2

[redacted]

DATE: DEC 1 0 2012 Office: TEXAS SERVICE CENTER

[redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 11, 2011. The petitioner submitted a motion on August 16, 2011, and on July 23, 2012, the AAO dismissed the petitioner's motion to reopen as untimely and for failure to meet the requirements of a motion when filed. The matter is now before the AAO again as a motion to reopen and reconsider.

Regarding motions to reopen or reconsider, 8 C.F.R. § 103.5(a)(1)(ii) states in relevant part: "The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The latest decision was the AAO's July 23, 2012 decision dismissing the initial motion to reopen and reconsider. Therefore, a review of any claims or assertions that the petitioner's motion raises is limited in scope and is restricted to the AAO's prior decision.

To the extent that the petitioner requests the current motion to be considered as a motion to reopen, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. In this instance, the AAO has already considered and rendered a decision on a motion to reopen and reconsider that the petitioner submitted. The petitioner has failed to show in the current motion that the most recent AAO decision dismissing the first motion was erroneous.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The AAO dismissed the petitioner's previous motion in part because it was deemed to be untimely. In the July 23, 2011 decision the AAO fully considered the facts behind the delayed filing, including the three letters from the petitioner's former counsel, and ultimately determined that the delay in filing was neither reasonable or beyond the control of the petitioner, as required under 8 C.F.R. § 103.5(a)(1)(i). The petitioner provides no legal authority, and the AAO is unaware of any, that would allow the petitioner to cure a previously late filed motion by simply timely moving to reopen and reconsider the decision that rejected the untimely motion. Rather, the petitioner bears the burden of establishing that the dismissal as untimely was itself in error.

In the current motion, the petitioner states on the Form I-290B that his former counsel represented to him that his motion was timely filed but sent it to the wrong address, resulting in a five day delay. In the statement accompanying the motion, the petitioner mentions that both attorneys who previously represented him provided "bad help" and "hurt" him. The record reflects that the petitioner is no longer represented by counsel on the motion currently before the AAO and while he refers to the insufficiency of the prior representations, the petitioner has not asserted a claim of ineffective assistance of counsel pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (outlining four procedural requirements that must be met in order to make a claim of ineffective assistance of counsel). As the petitioner has failed to meet the antecedent procedural requirements that must be met to make a claim of ineffective assistance of counsel claim under *Lozada*, the AAO finds no error in the prior decision dismissing the motion as untimely. Because the previous motion was untimely and the petitioner cannot show that the

finding of untimely filing was made in error, the motion must be dismissed.

The petitioner submits evidence along with the motion to reopen, but the evidence does not relate to the AAO's prior decision dismissing the initial motion to reopen for the delay in filing. Instead, the evidence goes toward the merits of the underlying visa petition that was appealed to the AAO, which was ultimately dismissed on July 11, 2011. As noted above, because the latest decision in these proceedings was the AAO's July 23, 2012 decision dismissing the initial motion to reopen and reconsider, the scope of review is limited to whether the AAO's decision to deny the motion to reopen and reconsider was erroneous. Any evidence and arguments relating to the decision on the merits of the petitioner's eligibility as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A), as discussed in the AAO's July 11, 2011, decision is beyond the scope of the most recent AAO decision and is not properly before the AAO. *See* 8 C.F.R. § 103.5(a)(1)(ii).

To the extent that the petitioner intends the current motion to be a motion to reconsider, a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

Moreover, a motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60. The petitioner, in the statement accompanying the motion, solely raises legal arguments that again relate to the merits of the petitioner's eligibility as an alien of extraordinary ability, as discussed in the AAO's July 11, 2011 decision. Because any arguments relating back to the merits of the petitioner's eligibility for the visa petition is beyond the scope of the current motion to reconsider, the motion to reconsider must be denied. The petitioner had an opportunity to specify legal error in his previous motion and failed to raise them.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed, the AAO's July 23, 2012 decision is affirmed, the AAO's July 11, 2011 decision is affirmed, and the petition remains denied.