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 17 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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, California Service Center, initially granted the employment-based immigrant visa petition on October 9, 2001. On September 10, 2010, the Director, Nebraska Service Center (the director), issued a notice of intent to revoke (NOIR) the approval of Form I-140, the Immigrant Petition for Alien Worker. In a Notice of Revocation (NOR), dated October 19, 2010, the director ultimately revoked the approval of the petition. On appeal, the Administrative Appeals Office (AAO) affirmed the director's adverse decision on the petition on May 1, 2012. The matter is now before the AAO on a motion to reopen.[1] The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

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 May 1, 2012 decision dismissing the appeal. 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. In addition, to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, the petitioner failed to submit a statement regarding whether the validity of the AAO's decision has been, or is, the subject of any judicial proceeding. The regulation mandates that this shortcoming alone requires U.S. Citizenship and Immigration Services (USCIS) to dismiss the motions. *See* 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, the AAO will consider the motion to reopen and the purported new evidence. However, 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.

As an initial matter, the record reflects that the petitioner is represented by a new counsel on the motion currently before the AAO. In the brief supporting the motion, petitioner's current counsel asserts that the petitioner suffered prejudice and would have been able to establish her eligibility as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), but for the ineffective assistance of her former counsel. An alien making an ineffective assistance of counsel claim must comply with the requirements set forth by the Board of Immigration Appeals (BIA) in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The

[1] On May 31, 2012, counsel submitted a brief titled "Petitioner's Motion to Reopen Revocation of Her Immigration Petition for Alien Worker (Form I-140)" (hereforth "brief in support of the motion") and also submitted a second brief titled "Respondent's Motion to Accept Supplemental Brief" (hereforth "supplemental brief"). The AAO will consider all arguments and evidence submitted along with both briefs collectively as part of one motion that is currently before the AAO.

Lozada decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;

2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and

3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

Matter of Lozada, 19 I&N at 639. While counsel for the petitioner acknowledges that a claim of ineffective assistance of counsel must comply with the procedural requirements of *Lozada* and correctly outlines those requirements in the brief supporting the motion, counsel makes no effort to comply with them. Instead, counsel states that once petitioner is: "given the opportunity to investigate, if appropriate, will seek to supplement this motion to reopen with a detailed affidavit, as well as inform former counsel of such allegations, in order to comply with the criteria for ineffective assistance of counsel set out by the BIA in *Matter of Lozada.*" The procedural requirements need to be met at the time the motion to reopen is submitted. The intent to meet the requirements at a subsequent time is insufficient. The BIA reasoned that the high procedural standard is necessary to have a basis for assessing the substantial number of claims of ineffective assistance of counsel and where essential information is lacking, it is impossible to evaluate the substance of such a claim. *See Matter of Lozada*, 19 I&N at 639. The petitioner's ineffective assistance of counsel claim, because it fails to meet all three procedural requirements, cannot be a basis for reopening. Moreover, while counsel focuses on prior counsel's failure to provide translations that comply with 8 C.F.R. § 103.2(b)(3), the absence of qualifying translations was not the AAO's sole basis for concluding that the evidence did not establish the petitioner's eligibility under the various criteria.

A motion to reopen, furthermore, 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). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[2] Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. The petitioner has been afforded at least three opportunities to submit this evidence: at the time of the original petition filing on June 4, 2001, in response to the director's September 10, 2010 NOIR, and at the time she filed the appeal on November 3, 2010. A review of the evidence that counsel submits on motion reveals no

[2] The word "new" is defined as "1: having recently come into existence : RECENT, MODERN. 2a (1) : having been seen, used, or known for a short time : NOVEL <rice was a new crop for the area> ." http://www.merriam-webster.com/dictionary/new, accessed on November 13, 2012.

fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

Along with the motion, counsel has submitted two documents issued from the Armenian Hockey Federation: (1) a document stating that the petitioner played and competed at the highest level since 1980 and noting that in 1985 she won the highest team voucher; (2) a document stating that the petitioner, following her 1985 graduation from the Yerevan State Institute of Physical Culture, was appointed as an Assistant Coach and from 1997 to 1999, prepared high class players at the Track and Field School as a trainer. Given that 1999 is the most recent year to which the evidence refers, counsel's failure to explain why this evidence was previously unavailable undermines any claim that the two documents are "new" evidence.

Moreover, while counsel maintains that there is sufficient evidence for the petitioner to meet three of the ten regulatory requirements outlined in 8 C.F.R. § 204.5(h)(3), such evidence was not submitted along with the motion to reopen. A motion to reopen must meet the requirements of a motion to reopen when filed. While the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows a petitioner to supplement an appeal, no similar provision allows a petitioner to supplement a motion. The AAO will not reopen a matter for the purpose of awaiting more evidence. Thus, counsel's request that the AAO reopen the matter to afford another opportunity to submit qualifying translations is not a proper basis for a motion to reopen.

For all the reasons discussed above, the motion to reopen will be dismissed.

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 May 1, 2012 decision is affirmed, and the petition remains denied.