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:

SELF-REPRESENTED

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, Nebraska Service Center, denied the employment-based immigrant visa petition. On April 20, 2012, the Administrative Appeals Office (AAO) summarily dismissed the appeal and affirmed the director's adverse decision on the petition. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

As an initial matter, [redacted] owner of the Fairbanks Ice Museum that seeks to hire the petitioner, signed the Form I-290B, Notice of Appeal or Motion, which reflects that the filing is a motion to reopen or reconsider. Along with the motion, [redacted] submits: (1) a Form G-28, Notice of Appearance as Attorney or Accredited Representative, attesting that he is entering an appearance as a representative at the request of the petitioner and (2) a statement in support of the motion. The AAO observes that [redacted] failed to complete Part 2 of the Form G-28: "Information about Attorney of Accredited Representative." The regulations outlining the requirements for representation of others, provides that a person entitled to representation may be represented by: (1) attorneys in the United States; (2) law students and law graduates not yet admitted to the bar; (3) reputable individuals; (4) accredited representatives as described in 8 C.F.R. § 292.2; or (5) accredited officials. 8 C.F.R. § 292.1(a). Because [redacted] is not an attorney, a law student, an accredited representative, or an accredited official, the AAO infers that he is seeking to represent the petitioner as a reputable individual. The regulation at 8 C.F.R. § 292.1(a) states:

> (3) *Reputable individuals.* Any reputable individual of good moral character, provided that –
>
> > (i) He is appearing on an individual case basis, at the request of the person entitled to representation;
> >
> > (ii) He is appearing without direct or indirect remuneration and files a written declaration to that effect;
> >
> > (iii) He has a pre-existing relationship or connection with the person entitled to representation (e.g., as a relative, neighbor, clergyman, business associate or personal friend), provided that such requirement may be waived, as a matter of administrative discretion, in cases where adequate representation would not otherwise be available; and
> >
> > (iv) His appearance is permitted by the DHS official before whom he or she seeks to appear, provided that such permission will not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so.

[redacted] has failed to file a written declaration stating that he is appearing on behalf of the petitioner without direct or indirect remuneration. Consequently, he cannot appear before the AAO as a representative on behalf of the petitioner.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

> (B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding . . . . An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

Since [redacted], as noted above, cannot appear before the AAO as a representative, he has no legal standing in these proceedings to submit a Form I-290B bearing his signature instead of the petitioner's and file a motion to reopen and reconsider on behalf of the petitioner. Therefore, the motion has not been properly filed and can be dismissed on that basis.

In the alternative, even assuming *arguendo*, that the motion should not be rejected and the AAO accepts all the documents submitted along with the motion and Form G-28, dismissal of the motion is proper on multiple grounds. 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 April 20, 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).

To the extent that the petitioner intends the current motion to be 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 the statement supporting the motion, petitioner suggests that his ability to establish his 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), was impaired by the ineffective assistance of his former counsel. However, 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 *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. The petitioner has not met any of the procedural requirements of *Lozada*. Thus, he has failed to properly make an ineffective assistance of counsel claim. The BIA has 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, therefore, cannot be a basis for reopening.

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.[1] The record reflects that USCIS has afforded the petitioner prior opportunities to present evidence in support of his visa petition. The petitioner failed to respond to the Director's Request for Evidence (RFE) and his former counsel did not submit a brief or accompanying evidence on appeal on behalf of the petitioner, as she indicated she would do on the Notice of Appeal. Nonetheless, the previous AAO decision fully considered the former counsel's arguments relating to her failure to respond to the RFE and no explanation or any supplemental documentation were proffered for the failure to file the appeal brief. Thus, the petitioner's missed opportunities cannot be a basis for reopening. Furthermore, the "new evidence" that the petitioner now submits, including his resume, some newspaper clippings and photos, could have been discovered and presented in previous proceedings. As for Ice Alaska's 10 Year Development Plan, the statement in support of the motion acknowledges that the petitioner "has yet to become actively involved in Ice Alaska's 10-Year Development Plan" and, thus, such evidence lacks probative value relative to the petitioner's eligibility as of the priority date in this matter, July 12, 2010. The petitioner must establish his eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

---

[1] 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.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, the evidence cannot be considered a proper basis for a motion to reopen.

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 raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Matter of O-S-G-*, 24 I&N Dec. at 60.

In the present motion to reconsider, the petitioner fails to specifically allege any error of fact or law in the prior AAO decision. Instead, in the statement in support of the motion, the petitioner merely attempts to explain why he failed to capitalize on his opportunities to submit evidence and tries to re-assert his eligibility as an alien of extraordinary ability under the implementing regulations. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. 8 C.F.R. § 103.5(a)(3); *see Matter of Medrano,* 20 I&N at 219; *Matter of O-S-G-*, 24 I&N Dec. at 58-60. Accordingly, the motion to reconsider will be dismissed.

For all the reasons discussed above, the motion 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 April 20, 2012 decision is affirmed, and the petition remains denied.