

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:

NOV 28 2012

Office: TEXAS SERVICE CENTER

FILE:

[REDACTED]

IN RE:

Petitioner:
Beneficiary:

[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 December 1, 2010. The petitioner submitted a motion on January 4, 2011, and on May 14, 2012, the AAO dismissed the petitioner's motion to reopen and reconsider and affirmed the AAO's December 1, 2010 decision. The matter is now before the AAO again as a motion to reopen and reconsider. The motion will be dismissed.

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 14, 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.

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. In the brief supporting the motion, counsel, on behalf of the petitioner, broadly asserts that the evidence previously submitted "was overlooked as being irrelevant and therefore lead to an erroneous decision." Counsel's assertion that the regulation at 8 C.F.R. § 103.5(a)(1)(i) allows U.S. Citizenship and Immigration Services (USCIS) to excuse late filed motion in its discretion is not persuasive. First, that regulation applies only to motion to reopen and the previous filing was both a motion to reopen and a motion to reconsider. Second, the AAO considered that regulation and determined that the petitioner had not established that the late filing was reasonable and beyond his control as required under that regulation. Counsel does not address that finding in the current motion. Counsel also cites an unpublished decision relating to coaches. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

To the extent that the petitioner requests the current motion to be considered as a motion to reopen, 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). In the previous motion before the AAO, the petitioner's former counsel maintained that the petitioner submitted supplemental documentation, which the AAO failed to consider before rendering the December 1, 2010, dismissal of the petitioner's appeal from the director's decision. In the May 14, 2012 decision dismissing the prior motion to reopen, the AAO properly disqualified the accompanying evidence because the motion was untimely. 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. The petitioner does not address why the prior January 4, 2011 motion was untimely filed other than to assert that the petitioner's former counsel was responsible for the late filing.

Furthermore, while the record reflects that the petitioner is represented by a new attorney on the motion currently before the AAO, the petitioner has not specifically asserted a claim of ineffective assistance of counsel pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). 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 failed to submit an affidavit with the details of representation with his former counsel along with the current motion. Similarly, the petitioner has submitted no evidence indicating that his former counsel has been notified on the allegations of ineffective assistance of counsel and provided him with an opportunity to respond to the allegations. Finally, the petitioner has failed to state whether or not he has filed a complaint with the proper disciplinary authority. Thus, the petitioner in this instance has failed to meet all three of the procedural requirements outlined in the *Lozada* decision. 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 lacks essential information and therefore cannot be the basis for reopening.

Consequently, because the previous motion was untimely filed and the petitioner cannot show that the finding of untimely filing was made in error, the motion must be dismissed.

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 last AAO decision dismissing the first motion was erroneous.

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 14, 2012 decision is affirmed, the AAO's December 1, 2010 decision is affirmed, and the petition remains denied.