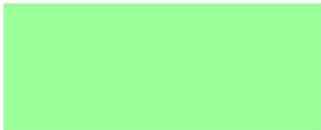




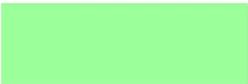
U.S. Citizenship
and Immigration
Services

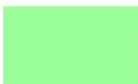
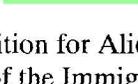
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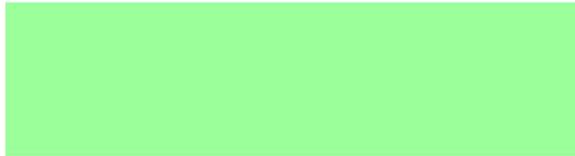
Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
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:



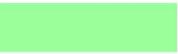
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office



DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on December 14, 2010. The Administrative Appeals Office (AAO) summarily dismissed the appeal of that decision on April 20, 2012. The AAO also dismissed the petitioner's first motion to reopen and motion to reconsider on December 17, 2012 and second motion to reopen and motion to reconsider on October 7, 2013. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

Procedural History

The petitioner filed the instant petition on July 12, 2010. On August 19, 2010, the director issued a request for additional evidence (RFE). The petitioner did not respond. On December 14, 2010, the director denied the petition on its merits. On December 30, 2010, the petitioner filed an appeal requesting 30 days in which to submit a brief and/or additional evidence. On April 20, 2012, the AAO summarily dismissed the appeal, noting that the petitioner had not supplemented the appeal. On May 23, 2012, an unaffected party filed a motion to reopen and reconsider. On December 17, 2012, the AAO dismissed the motion as having been filed by an unaffected party and for failing to meet the requirements of a motion. On January 17 2013, the petitioner filed a motion to reopen and reconsider. On October 7, 2013, the AAO dismissed the motion, determining that the petitioner failed to address all of the elements in the previous AAO decision and that the filing did not meet the regulatory requirements for a motion to reopen or a motion to reconsider.

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). On motion, the petitioner submits a statement and copies of a constituent contact form and email. The form and email, both from 2009, were previously submitted and reference a prior filing under the same classification. The petitioner's statement generally restates the history of the petition and repeats previous claims regarding his qualifications, some of which occurred after the date of filing of the petition on July 12, 2010. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Therefore, any evidence which references events which occurred after the date of filing of the petition on July 12, 2012 is not probative of the petitioner's eligibility. Regardless, the petitioner's statement is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (9th ed., 2009).

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, 108 (1988)). “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 at 107. Based on its discretion, “[T]he [USCIS] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.” *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.* A party seeking to reopen a proceeding bears a “heavy burden.” *Id.* at 110. With the current motion, the petitioner has not met that burden as he has not submitted new evidence pertaining to his eligibility at the time of filing.

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 asserts that at the time of the previous decision, an error was made. *Compare* 8 C.F.R. § 103.5(a)(2).

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. 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. 56, 60 (BIA 2006). The petitioner has not provided any pertinent precedent decision or other legal authority to support a finding that the AAO’s most recent determination was in error. Consequently, he has not met the regulatory requirements for a motion to reconsider.

Ineffective Assistance of Counsel

In the statement supporting the motion, the petitioner asserts that his case was impaired by the “ineffective counsel of two attorneys.” The AAO advised the petitioner in the December 17, 2012 decision that 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. *Id.* at 639. The petitioner's ineffective assistance of counsel claim, therefore, is not a basis for reopening.

In addition to complying with the *Lozada* requirements discussed above, the petitioner must also show prejudice as a result of his former counsel's ineffectiveness. *Id.* at 640. The Court of Appeals for the Ninth Circuit has held that prejudice exists when the performance of former counsel is so inadequate that there is a reasonable probability that but for the counsel's negligence, the outcome of the proceedings may have been different. *Matter of D-R-*, 25 I&N Dec. 445, 457 (BIA 2011) (citing *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004)).

Based on the evidence in the record, however, the petitioner has not shown prejudice as a result of his former counsel's performance. The petitioner has not established that there is a reasonable probability that, but for his former counsel's performance, the outcome of the proceedings may have been different. *See Matter of D-R-*, 25 I&N Dec. at 457. Specifically, the director concluded that while the petitioner has received qualifying awards and displayed his work pursuant to 8 C.F.R. § 204.5(h)(3)(i) and (vii), he did not meet any other criterion. Thus, even if the AAO were to find that the record supports those findings, the petitioner would need to submit qualifying evidence that meets a third criterion. 8 C.F.R. § 204.5(h)(3).

While [REDACTED] attempted to address additional criteria in his May 18, 2012 letter, his submission does not establish that qualifying evidence existed that prior counsel could have submitted in response to the director's RFE or on appeal. Specifically, Mr. [REDACTED] referenced the petitioner's overall "membership in the ice sculpting field" rather than "in associations in the field" as required under 8 C.F.R. § 204.5(h)(3)(ii). Similarly, Mr. [REDACTED] referenced published material about the petitioner without responding to the director's concern that the record lacks evidence that the material appeared in professional or major trade publications or other major media as required under 8 C.F.R. § 204.5(h)(3)(iii). Further, Mr. [REDACTED] referenced business contributions to one museum rather than contributions in the petitioner's field of ice sculpting as required under 8 C.F.R.

§ 204.5(h)(3)(v). Mr. [REDACTED] discussion of the petitioner's purported leading or critical role pursuant to 8 C.F.R. § 204.5(h)(3)(viii) involved roles that postdate the filing of the petition. Such roles are not probative evidence of the petitioner's eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Regarding the petitioner's salary, Mr. [REDACTED] similarly addressed what the petitioner will earn and taxes he has paid without demonstrating that the petitioner had already commanded a high salary in comparison with others in the field as required under 8 C.F.R. § 204.5(h)(3)(ix). Finally, Mr. [REDACTED] addressed critical accolades the petitioner, a visual artist, has received without explaining how such accolades demonstrate commercial success in the performing arts as documented by sales data or box office receipts. 8 C.F.R. § 204.5(h)(3)(x).

The petitioner, in the current filing, states that he "clearly meets the criteria for an EB-1 extraordinary ability visa...but that his case was not put forward effectively" by one former counsel and that another former counsel "failed to submit the documents in a timely manner." Merely repeating the language of the statute or regulations, however, does not satisfy the petitioner's burden of proof. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 Civ. 10729, 1997 WL 188942 at *1, 5 (S.D.N.Y. Apr. 18, 1997). Similarly, USCIS need not accept primarily conclusory assertions. See *1756, Inc. v. United States Att'y Gen.*, 745 F. Supp. 9 (D.C. Dist. 1990).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated October 7, 2013, is affirmed, and the petition remains denied.