



(b)(6)

DATE: **JUN 10 2013** Office: TEXAS SERVICE CENTER

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 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, revoked the employment-based immigrant visa petition on March 10, 2011 and reaffirmed that decision on motion. The AAO summarily dismissed a subsequent appeal and reaffirmed that decision on motion. The matter is now before the AAO a second time on a motion to reopen and a motion to reconsider. The motion to reconsider will be dismissed. The motion to reopen will be dismissed. The previous decisions of the AAO will be affirmed, and the petition will remain revoked.

The petitioner filed the initial motion to reopen with the director on March 25, 2011 (motion #1), which the director dismissed on May 13, 2011, based on the petitioner's failure to provide new facts with the motion as required by the regulation. The director stated: "If you desire to appeal *this* decision, you may do so." (Emphasis added.)

On appeal, prior counsel indicated that he would submit a brief and/or additional evidence to the AAO within 30 days of filing the appeal, but failed to do so. On the Form I-290B Notice of Appeal or Motion, part 3, prior counsel asserted generally that the petitioner is eligible for the classification sought, but did not contest the director's most recent decision that the March 25, 2011 filing did not meet the requirements of a motion. As the petitioner failed to file a substantive appeal and did not submit supplement the appeal with additional evidence and/or a brief, the AAO summarily dismissed the petitioner's appeal of motion #1 on March 22, 2012.

The petitioner subsequently filed a motion to reopen on April 25, 2012 (motion #2), claiming ineffective assistance of prior counsel, [REDACTED]. When a motion is based on a claim of ineffective assistance of counsel, it requires the alien claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), *reaffirmed* in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009). 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;
3. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, is to be submitted with the motion; and
4. If a violation of ethical or legal responsibilities is claimed, the motion should reflect 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.

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. *Matter of Lozada*, 19 I&N Dec. at 640. 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). "To prevail, the respondent must show that the conduct of former counsel was so egregious that it rendered [the] hearing unfair." *Matter of B-B-*, 22 I&N Dec. 309, 311 (BIA 1998).

The AAO dismissed motion #2 on December 7, 2012, for the following reasons: (1) the motion was not accompanied by a statement indicating whether the "whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding" in accordance with 8 C.F.R. § 103.5(a)(1)(iii)(C); (2) the petitioner failed to provide sufficient proof that he complied with the second *Lozada* requirement listed above; (3) the petitioner failed provide sufficient proof that he complied with the fourth *Lozada* requirement listed above; and (4) the petitioner did not demonstrate that his previous counsel's actions were prejudicial and that previous counsel's assistance was ineffective.

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 U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. See *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). A motion to reconsider is based on the existing record and petitioners may not introduce new facts or new evidence relative to their arguments.

Additionally, 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. *Id.* at 60.

In support of the present motion to reconsider, counsel cites to *Ray v. Gonzales*, 439 F.3d 582 (9th Cir. 2006). Counsel indicates that in *Ray*, the court found the respondent met the *Lozada* requirements through providing proof of his "engagement with his attorneys and filing formal

grievances with the California State Bar provided notice to the attorneys of his complaints against them.” Counsel then asserts that “the petitioner has met the *Lozada* requirements under the principles of *Ray v. Gonzales* in that he proved his engagement with his prior attorney and filed a formal complaint with the State Bar which would be considered by the Ninth Circuit sufficient notice to the former attorney.” In support of motion #2, the petitioner did not demonstrate that he filed a formal grievance with the California State Bar; he merely provided an April 23, 2012 declaration intended for the bar and a photocopy of an envelope addressed to the bar. The petitioner did not provide any evidence that, similar to the facts in *Ray*, the petitioner actually sent the notice the bar. In support of the present motion to reopen, the petitioner submits a June 21, 2012 letter from the State Bar of California responding to the petitioner’s complaint and advising that the Chief Trial Counsel has declined to prosecute a violation. The letter, however, does not indicate when the petitioner filed his complain. Even assuming the petitioner had corresponded with the state bar prior to filing motion #2, the respondent in the *Ray* decision was denied asylum and was in deportation proceedings, wherein he alleged he was aggrieved by the actions of multiple attorneys relating to multiple filings of appeals and motions. The Ninth Circuit went so far as to describe the *Ray* situation as “shockingly inadequate representation.”

At issue is whether prior counsel’s actions prejudiced the petitioner. Significantly, the petitioner’s appeal related to motion #1, not to the decision to revoke the petition. Thus, the petitioner must establish error within that motion prior to shifting focus to the actual revocation decision.

Within the brief accompanying motion #2, the petitioner alleges that prior counsel was ineffective not only by failing to submit a brief and/or additional evidence on appeal, but also in failing to support the motion before the director with new evidence. Specifically, counsel states: “[The petitioner] met with attorneys at [redacted] and was advised that [former counsel] filed a deficient Motion to Reopen with TSC [the Texas Service Center] in the first place by failing to provide new facts.” The petitioner, however, has not submitted the evidence he asserts former counsel should have submitted with motion #1 in support of either the appeal or either motion before the AAO. Without such evidence, the petitioner has failed to sufficiently demonstrate that former counsel’s actions were ineffectual or prejudiced his case. As the petitioner failed to provide any evidence prior counsel failed to submit with motion #1, he has also not established plausible grounds for relief as required under another case counsel cites, *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1046 (9th Cir. 2000). Similar to the facts in the *Lozada* case, the petitioner has not shown prejudice from prior counsel's failure to, or decision not to assert new facts supported by evidence in support of motion #1. Cf. *Matter of Lozada*, 19 I&N Dec. at 640. The petitioner has received at least two opportunities to present his case and to submit the evidence that former counsel allegedly should have submitted in support of motion #1. Consequently, he has not demonstrated that prejudice has resulted from prior counsel’s actions.

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 the new evidence relates to the grievance against prior counsel but not how prior counsel’s actions prejudiced the petitioner.

As the present motion fails to meet all the requirements within the *Lozada* decision, it must be dismissed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decisions of the AAO dated December 7, 2012, and March 22, 2012, are affirmed, and the petition remains revoked.