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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

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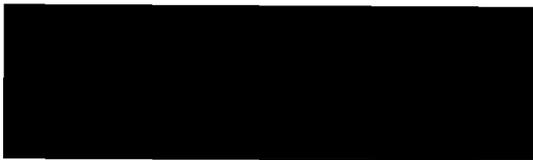
Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on February 23, 2004. The petitioner filed a motion to reopen with the director on March 19, 2004, which the director dismissed on April 16, 2004. The petitioner subsequently filed an appeal on May 19, 2004, which the Administrative Appeals Office (AAO) summarily dismissed on January 3, 2005. On November 26, 2007, the petitioner filed a motion to reopen and a motion to reconsider, which the AAO dismissed as untimely on March 12, 2009. On November 5, 2009, the petitioner filed a motion to reconsider, which the AAO dismissed as untimely on October 14, 2010. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. The previous AAO decision will be affirmed, and the petition will remain denied.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).<sup>1</sup>

In order 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, subject of any judicial proceeding. The regulation mandates that this shortcoming alone, requires USCIS to dismiss the motions. *See* 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, in the AAO’s decision dismissing the petitioner’s original appeal, the motion currently before the AAO fails to address the AAO’s most recent decision. The AAO found in its initial decision dated January 3, 2005 that the petitioner did not submit a brief with the appeal and consequently, failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v). The AAO found in its March 12, 2009 that the motion was nearly three years late, relied on case law that was easily distinguished and unsupported by evidence that the January 3, 2005 decision was incorrect because the petitioner had, in fact, submitted a brief. The elements discussed within the October 14, 2010 AAO decision relate to the petitioner’s motion being untimely by nearly eight months. The present motion must address the elements contained in the AAO’s most recently dismissed motion, dated October 14, 2010, namely that the November 5, 2009 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 November 5, 2009 motion was untimely filed.

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<sup>1</sup> The alien last entered the United States on September 21, 2001, as an E-2 nonimmigrant.

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 (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, 402-403 (BIA 1991).

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.

The present motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is a new precedent or a change in law that affects the AAO’s most recent decision. Instead, the whole of the current motion relates to the history of the petitioner’s case, making no arguments of errors in law or in fact in the most recent AAO decision. 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.

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). 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.<sup>2</sup> The only new evidence the petitioner submits with the present motion is a DHL tracking receipt reflecting a shipping date of February 25, 2004, which he asserts as evidence that the Texas Service Center received the appellate brief. First and foremost, the petitioner fails to explain why this evidence could not have been discovered or presented in the previous proceeding. The petitioner has been afforded at least two opportunities to submit this evidence with the two previously filed motions with the AAO on November 26, 2007, and November 5, 2009. A review of the evidence that the petitioner submits with the present motion reveals no 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.

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.*

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<sup>2</sup> The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . .” Webster’s II New Riverside University Dictionary 792 (1984)(emphasis in original).

*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. With the current motion, the petitioner has not met that burden.

Notwithstanding the above, the AAO will also address the petitioner’s claims that he “is a victim of incorrect and/or fraudulent counsel.” In effect, the petitioner claims ineffective assistance of counsel relating to Cindy Gornto. When a motion to reopen 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). 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.

On motion, the only evidence the petitioner provides is the March 12, 2009 AAO decision, a Texas Service Center cover sheet dated February 28, 2004, a DHL tracking results printout, the October 4, 2010 AAO decision, and a February 25, 2005 letter from [REDACTED] counsel who previously represented the petitioner, refunding attorney fees in connection with the appeal of the Form I-526.

The petitioner has failed to establish he meets *Matter of Lozada’s* first requirement noted above. The record lacks evidence that the petitioner and former counsel engaged in a detailed agreement in reference to what action former counsel should take and how she failed to uphold her portion of the agreement. The petitioner has failed to comply with *Matter of Lozada’s* second requirement. The petitioner provides no evidence that his former counsel has been put on notice of his claims. He did not even address this requirement within the present motion. The petitioner has failed to comply with *Matter of Lozada’s* third requirement. The petitioner provides no indication if he has filed a complaint with the proper authorities, or in the alternative, provided his reason for not doing so.

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. The motion to reopen will be dismissed

**ORDER:** The motion to reconsider and the motion to reopen are dismissed, the decision of the AAO dated October 14, 2010, is affirmed, and the petition remains denied.