



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 25573079

Date: FEB. 28, 2023

Motion on Administrative Appeals Office Decision

Form I-360, Petition for Special Immigrant Juvenile

The Petitioner seeks classification as a special immigrant juvenile (SIJ) under sections 101(a)(27)(J) and 204(a)(1)(G) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(27)(J) and 1154(a)(1)(G). The Director of the National Benefits Center (Director) denied the Petitioner's Form I-360, Petition for Special Immigrant Juvenile (SIJ petition), because he did not establish that he was under 21 years of age when he filed his SIJ petition, and we dismissed the appeal. He now submits combined motions to reopen and reconsider. Upon review, we will dismiss the motions.

I. LAW

A motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must show that our prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that meets these requirements and establishes eligibility for the benefit sought.

To establish eligibility for SIJ classification, petitioners must show, inter alia, that they are unmarried, under 21 years old, and have been subject to a state juvenile court order determining that they cannot reunify with one or both parents due to parental abuse, neglect, abandonment, or a similar basis under state law. Section 101(a)(27)(J)(i) of the Act; 8 C.F.R. § 204.11(b), (c)(1).¹ Petitioners bear the burden of proof to demonstrate their eligibility for SIJ classification by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The Petitioner, whose claimed date of birth is [] 1997, entered the United States on or about December 25, 2015. As stated in our prior decision, incorporated here by reference, in [] 2018, the New York Family Court for [] County issued an order titled "Order-Special Immigrant Juvenile Status" (SIJ order) and provided determinations relevant to the Petitioner's SIJ eligibility.

¹ The Department of Homeland Security (DHS) issued a final rule, effective April 7, 2022, amending its regulations governing the requirements and procedures for those who seek SIJ classification. See Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066 (Mar. 8, 2022) (revising 8 C.F.R. §§ 204, 205, 245).

On the same date, the court issued a separate order appointing M-S- guardianship of the Petitioner.² Based on the Family Court orders, the Petitioner filed his SIJ petition, which U.S. Citizenship and Immigration Services (USCIS) received on [REDACTED] 2018, five days after he turned 21 years old. The Director denied the petition, concluding that the Petitioner was ineligible for SIJ classification because he did not establish that he was under 21 years of age at the time he filed his SIJ petition. We dismissed the Petitioner's appeal on the same basis, and the instant combined motions followed.

On motion, the Petitioner does not dispute that he sent his SIJ petition through his former counsel via United States Postal Service priority mail on [REDACTED] 2018, two days after his twenty-first birthday, nor does he contest the actual date USCIS received the petition. However, he raises a claim of ineffective assistance of counsel against his former counsel. Specifically, he asserts that although he retained his previous attorney who successfully obtained the Family Court orders months before the Petitioner's twenty-first birthday, the attorney nonetheless failed to timely file the SIJ petition while he was still under 21 years of age. The Petitioner also provides relevant supporting evidence for his claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988) (setting forth the requirements for ineffective assistance of counsel claims); *see also Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020) (explaining that in addition to *Lozada's* requirements, applicants must show that they were prejudiced by the attorney's errors). Further, the Petitioner contends that given the attorney's misconduct, we must essentially waive the statutory age requirement, and he also maintains that he is otherwise eligible for SIJ classification.

However, a successful ineffective assistance of counsel claim under *Lozada* does not provide as a remedy the waiver of applicable eligibility requirements established by statute and implemented by regulation. *See, e.g., Castillo-Perez v. I.N.S.*, 212 F.3d 518, 528 (9th Cir. 2000) (holding that the appropriate remedy for ineffective assistance of counsel is the reopening of the matter and application of the law in effect at the time the ineffective assistance occurred). The relevant regulations clearly provide that a petitioner must be eligible for the immigration benefit sought *at the time of filing*, and individuals, like the Petitioner, seeking SIJ classification must be under the age of 21 and unmarried at the time their SIJ petitions are filed. 8 C.F.R. § 103.2(b)(1) (providing that a petitioner for an immigration benefit must show his or her eligibility for the benefit sought at the time of filing the benefit); 8 C.F.R. § 204.11(b)(1)-(2) (providing that an SIJ petitioner must be under 21 years of age and unmarried at the time of filing the petition); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, section 235(d)(6), Pub. L. 110-457, 122 Stat. 5044, 5080 (2008) (providing age-out protections for SIJs who are unmarried and under the age of 21 at the time their petitions are filed). A properly completed SIJ petition is considered filed on the date of actual receipt by USCIS. 8 C.F.R. § 103.2(a)(7)(i). Here, although we acknowledge the Petitioner's ineffective assistance of counsel claim, USCIS received the petition after he had already attained 21 years of age. Consequently, he cannot show that he was under 21 years old when the petition was filed with USCIS.

The Petitioner has not otherwise shown that USCIS has authority under the Act or the implementing regulations to disregard and waive the eligibility requirement by accepting an SIJ petition as timely filed after a petitioner attains 21 years of age and they are no longer a "child" under the Act. *See, e.g., United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound by governing statutes and regulations in force); *see also United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) (stating that immigration regulations carry the force and effect of law).

² We use initials for privacy.

Further, we lack authority to apply the doctrine of equitable estoppel. *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991); *Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003) (explaining that equitable relief claims “lie outside the scope and jurisdiction of the immigration judges and the BIA”); *Mauting v. INS*, 16 Fed. Appx. 788, 790 (9th Cir. 2001) (holding that administrative agencies lack jurisdiction to apply equitable estoppel against the immigration service).

As the Petitioner has not overcome our prior determination, he has not established that he is eligible for SIJ classification and that reopening is warranted.³ Further, the Petitioner has not demonstrated that our dismissal of his appeal was based on an incorrect application of law or policy and that our previous decision was incorrect based on the evidence before us at the time. 8 C.F.R. § 103.5(a)(3).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

³ The record shows that the Petitioner previously used another date of birth, [REDACTED] 1994, which would have rendered him ineligible for SIJ classification, regardless of the alleged attorney misconduct, because he would have been over 21 years of age when the court issued the SIJ order in [REDACTED] 2018. The record reflects that the Director notified him of this inconsistency, and he admitted to having used the 1994 date of birth due to fear at the time of his entry in December 2015.