



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

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

In Re: 22776762

Date: JUN. 26, 2023

Appeal of National Benefits Center Decision

Form I-360, Petition for Special Immigrant Juvenile

The Petitioner, a native and citizen of Guatemala, 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 denied the Petitioner's Form I-360, Petition for Special Immigrant Juvenile (SIJ petition), concluding the Petitioner was ineligible for SIJ classification as she was over the age of 21 when she filed her SIJ petition. The matter is now before us on appeal. On appeal, the Petitioner asserts that she has demonstrated her eligibility for SIJ classification. We review the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

To establish eligibility for SIJ classification, a petitioner must establish, among other requirements, that they were under 21 years of age at the time of filing their SIJ petition. Section 101(a)(27)(J) of the Act; 8 C.F.R. § 204.11(b). The petitioner bears the burden of proof to demonstrate their eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

In [redacted] 2019, when the Petitioner was 20 years old, the Superior Court of Washington [redacted] Juvenile Court (Juvenile Court) issued an order entitled *Findings and Order Regarding Eligibility for Special Immigrant Juvenile Status* (SIJ order). Based on that SIJ order, the Petitioner filed her SIJ petition in September 2021, at which time she was 22 years old. The Director issued a notice of intent to deny (NOID) in November 2021, indicating the SIJ petition would be denied on the basis that the Petitioner was over 21 years of age at the time of filing and inviting the Petitioner to submit any additional evidence supporting her eligibility for SIJ classification. The Petitioner responded to the NOID in February 2022, submitting a letter from her former counsel acknowledging, and describing the circumstances that resulted in, the late filing. The Director subsequently denied the SIJ petition in March 2022, finding the Petitioner failed to establish she was under 21 years of age at the time of filing her SIJ petition.

On appeal, the Petitioner asserts her SIJ petition should be deemed received by USCIS prior to her 21st birthday based on the ineffective assistance of her prior counsel, who failed to timely file her

petition.¹ Specifically, she alleges her prior counsel did not diligently obtain the requisite state court orders and then failed to timely file her SIJ petition, despite having all the necessary materials and representing to the Petitioner that the SIJ petition was both filed and approved.² The Petitioner acknowledges she was over 21 years old when her SIJ petition was ultimately filed, but she requests that USCIS consider the SIJ petition *nunc pro tunc*. She asserts that such a practice is not explicitly prohibited by statute and is warranted because of her prior counsel's negligence and that accepting the SIJ petition backdated to her being under 21 years of age would not amount to "waiving" a requirement of eligibility, but rather an "acknowledgement of her undisputed *prior* statutory eligibility."

An SIJ petitioner must be unmarried and under the age of 21 at the time their petition is filed and may not be denied SIJ status based on age if they meet this requirement. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), section 235(d)(6), Pub. L. 110-457, 122 Stat. 5044, 5080 (2008) (providing that an SIJ petitioner may not be denied SIJ status based on age if they were a child on the date on which they applied for such status); section 101(b)(1) of the Act (defining "child" as an unmarried person under 21 years of age); 8 C.F.R. § 204.11(b)(1)-(2) (stating that an SIJ petitioner must be under 21 years of age and unmarried at the time of filing the petition). A petitioner must be eligible for the immigration benefit sought at the time of filing. 8 C.F.R. § 103.2(b)(1). We acknowledge the errors of the Petitioner's prior counsel that resulted in her SIJ petition being filed over a year after she turned 21. However, there is no provision in the Act or the implementing regulations which authorizes USCIS to disregard the age requirement and accept an SIJ petition as timely filed after a petitioner is 21 years of age and is no longer a child under the Act.

Although the Petitioner argues that USCIS should accept the petition backdated to before she reached 21 years of age, the age requirement for filing an SIJ petition is not a flexible requirement and is not subject to equitable tolling. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-49 (9th Cir. 2008) (holding that the filing deadline in section 245(i) of the Act is a statute of repose and not subject to equitable tolling).³ Similar to the filing deadline under section 245(i) of the Act, the requirement that an SIJ petitioner be under 21 years of age at the time of filing, when they are still a child as defined in the Act, is a fixed cutoff date that "effectively closes the class of individuals" entitled to eligibility. *Id.* at 1049; *see also Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003) (holding that even if the applicant were defrauded by a notary as she claimed, the doctrine of equitable tolling did not apply to the one-year deadline of the Diversity Immigration Visa Lottery Program).

¹ The Petitioner submits a copy of a Memorandum of Decision and Show Cause Order related to litigation in the U.S. District Court for the Eastern District of New York, *In re 21st Birthday Denials of Special Immigrant Juvenile Status Applications by USCIS*, No. 22-CV-1926 (GRB), 2022 WL 16540657 (E.D.N.Y. Oct. 28, 2022). The district court's order in that case is not binding in these proceedings, and we further note that the facts of that case are materially distinguishable from the present matter, as they involve SIJ petitions mailed before the petitioners' 21st birthdays, but received on their birthday or shortly thereafter due to severe winter storms and resulting mail delays and office closures.

² The Petitioner provided an affidavit describing the agreement she had with her prior counsel and the events that transpired. The record indicates that she alerted prior counsel of the ineffective assistance she alleged occurred and that a complaint has been filed with the appropriate state bar.

³ The court in *Balam-Chuc* compared the deadline under section 245(i) of the Act to other statutory deadlines and determined that it was a statute of repose, finding that its fixed cutoff date for filing a visa petition in order to qualify for adjustment of status was "a specific date that marks the close of a class, not a general period based on discovery of an injury or accrual of a claim." 547 F.3d at 1049.

The Petitioner further argues that even if equitable tolling is not available, consideration of her SIJ petition *nunc pro tunc*, as if it were filed while she was under the age of 21, would not amount to waiving a requirement of eligibility and is warranted because her prior counsel's negligence essentially deprived her of her right to counsel. Where *nunc pro tunc* relief is not barred by statute, courts have defined the circumstances in which it is appropriate to grant such relief, such as "where necessary to correct a clear mistake and prevent injustice. It does not imply the ability to alter the substance of that which actually transpired or to backdate events to serve some other purpose." *Carino v. Garland*, 997 F.3d 1053, 1058 (9th Cir. 2021) (quoting *U.S. v. Sumner*, 226 F.3d 1005, 1009-10 (9th Cir. 2000); see also *Edwards v. INS*, 393 F.3d 299, 310 (2d Cir. 2004) (quoting *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995)) (allowing for *nunc pro tunc* relief only when it is necessary "to put the victim of agency error in the . . . position [they] would have occupied but for the error."). In the immigration context, *nunc pro tunc* relief should ordinarily be available "where agency error would otherwise result in an [noncitizen] being deprived of the opportunity to seek a particular form of deportation relief." *Edwards*, 393 F.3d at 310-11.

Here, the Petitioner was not rendered ineligible for SIJ status due to an agency error, as she seeks to correct the error on the part of her prior counsel. We acknowledge that the Ninth Circuit Court of Appeals has held, where ineffective assistance of counsel resulted in failure to submit an application for relief by a deadline imposed by an Immigration Judge, that the appropriate remedy was to apply the law in effect at the time the ineffective assistance occurred. *Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000) (remanding for application of prior law where attorney negligently failed to timely submit an application for suspension of deportation when applicant would have been eligible for such relief). However, commencement of removal proceedings begins when a charging document is filed and filing deadlines for applications for relief are then determined on an individual basis by the Immigration Judge, a process distinct from that of an applicant or petitioner affirmatively submitting a benefit request with USCIS and jurisdiction vesting upon its receipt. Compare 8 C.F.R. § 103.2(a), with 8 C.F.R. §§ 1003.14(a) and 1003.31(c). Moreover, *nunc pro tunc* or other equitable relief cannot be granted "in contravention of the expressed intent of Congress." *Edwards*, 393 F.3d at 309; see also *Matter of Rivas*, 26 I&N Dec. 130, 132-33 (BIA 2013) (finding that the statute precludes a "stand alone" waiver under section 212(h) of the Act, and "a *nunc pro tunc* waiver should not be available to avoid the requirement that an adjustment application must be concurrently filed with the waiver request") (citing *Fedorenko v. United States*, 449 U.S. 490, 517-18 (1981)); *Gutierrez-Castillo v. Holder*, 568 F.3d 256, 262 (1st Cir. 2009) (finding *nunc pro tunc* relief through application of pre-existing law was not available where it would be contrary to the intent of Congress that applicants with pending deportation proceedings be subject to newly enacted statutory bar).

The requirement that a petitioner be a child at the time the SIJ petition is filed with USCIS is a fixed, substantive eligibility requirement. The Petitioner filed her SIJ petition in October 2021, when she was 22 years old, and treating the petition as filed while she was under the age of 21 would be contrary to the intent of Congress as illustrated through section 235(d)(6) of TVPRA 2008 and section 101(a)(27)(J) of the Act. We are not permitted to waive this eligibility requirement, even where ineffective assistance of counsel is established.⁴ See *Matter of Compean*, 24 I&N Dec. 710, 735 (BIA

⁴ We note that the Petitioner has complied with the requirements set forth in *Matter of Lozada*, which establishes a framework for asserting and assessing claims of ineffective assistance of counsel. See 19 I&N Dec. 637, 639 (BIA 1988). However, regardless of whether the Petitioner has met the *Lozada* requirements, an ineffective assistance of counsel claim under *Lozada* does not provide as a remedy the waiver of applicable eligibility requirements.

2009) (finding that, inherent in the requirements for a *Lozada* claim, a noncitizen should show that but for the ineffective assistance of counsel, they are otherwise eligible and would have been granted the relief sought).

The age requirement for SIJ status must be met at the time of filing and cannot be waived through equitable tolling or *nunc pro tunc* relief. As the Petitioner filed her SIJ petition after her 21st birthday, when she was no longer a child under the Act, she is not eligible for SIJ classification under section 101(a)(27)(J) of the Act. Accordingly, the Petitioner has not demonstrated the Director erred in finding her ineligible for SIJ classification.

ORDER: The appeal is dismissed.