U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28744357

Date: NOV. 2, 2023

Motion on Administrative Appeals Office Decision

Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (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 denied the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (SIJ petition) because the Petitioner was not under the age of 21 years at the time of filing, as required. We dismissed the Petitioner's subsequent appeal and combined motion to reopen and reconsider. The matter is now before us on a second motion to reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

A motion to reconsider must establish 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 proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

On motion, the Petitioner contests the correctness of our prior decision. As we noted in previous decisions, the Petitioner does not dispute that he filed his SIJ petition after he turned 21 years of age. In our decision on his prior combined motion to reopen and reconsider, we acknowledged the Petitioner's claim of ineffective assistance of counsel but explained that even a successful claim of ineffective assistance cannot waive the applicable eligibility requirements established by statute and implemented by the regulations. *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 528 (9th Cir. 2000). On motion to reconsider, the Petitioner now states that under *Castillo-Perez v. I.N.S.*, the appropriate remedy for ineffective assistance of counsel would be to reopen the matter and apply the law in effect at the time the ineffective assistance occurred. He states that "the time the ineffective assistance occurred in this case was the day before the applicant's 21st birthday, when prior counsel had the last opportunity to submit the I-360 SIJ Petition . . . ." However, prior counsel's *actions* before the Petitioner turned 21 years old do not constitute the *law* in effect at the time of the claimed ineffective

assistance. 212 F.3d at 528 (stating that the "only effective remedy for ineffective assistance of counsel . . . is to remand the case with instructions to apply the law as it existed at the time . . . ."). The relevant law that was in effect at the time of the claimed ineffective assistance of counsel was section 101(a)(27)(J)(i) of the Act, as implemented by 8 C.F.R. § 204.11, which require that an SIJ petitioner be under the age of 21 years at the time of filing. As we have explained, we lack the authority to waive this statutory requirement, even if the Petitioner were to make a successful ineffective assistance of counsel claim. *See United States v. Nixon*, 418 U.S. 683, 695 (1974) (holding that government officials are bound by governing statutes and regulations in force).

The Petitioner also generally refers to equitable tolling and states that courts can "extend non-jurisdictional filing deadlines" when an "extraordinary circumstance stood in the way of timely filing," citing *Holland v. Florida*, 560 U.S. 631 (2010) in support. However, the age requirement for filing an SIJ petition is not a flexible requirement and is not subject to equitable tolling. *See, e.g.*, *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).[1] 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. I.N.S.,* 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).

The Petitioner further argues that we have authority to consider his SIJ petition nunc pro tunc, as if it were filed while he was under the age of 21, pursuant to 8 C.F.R. § 214.1(c)(4). The regulation the Petitioner cites relates to extensions of stay for nonimmigrants and is not relevant to SIJ classification under section 101(a)(27)(J) of the Act. *See* 8 C.F.R. § 214.1(a) (listing nonimmigrant classifications defined at section 101(a)(15) of the Act). He also cites *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996), which relates to a noncitizen who sought to establish their failure to appear for a deportation hearing was due to ineffective assistance of counsel, but does not explain its applicability to his SIJ petition.

Finally, the Petitioner requests that we reopen and reconsider this matter on our own motion, or sua sponte, because of exceptional circumstances due to his claim of ineffective assistance of counsel. However, as we have explained, the Petitioner did not meet the statutory requirement of filing his SIJ petition while under the age of 21 and we lack the authority to waive that requirement.

On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.

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[1] 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.