



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

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

In Re: 28468891

Date: OCT. 26, 2023

Appeal of National Benefits Center 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). SIJ classification protects foreign-born children in the United States who cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar basis under state law. The Director of the National Benefits Center 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. On appeal, the Petitioner submits a brief reasserting his eligibility. 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, 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 SIJ classification may only be granted upon the consent of the Secretary of the Department of Homeland Security (DHS), through U.S. Citizenship and Immigration Services (USCIS), when the petitioner meets all other eligibility criteria and establishes that the request for SIJ classification is bona fide, which requires the petitioner to establish that a primary reason the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under State law. Section 101(a)(27)(J)(i)–(iii) of the Act; 8 C.F.R. § 204.11(b)(5). 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).

The Petitioner, whose date of birth is in [redacted] 1996, entered the United States in April 2015. In [redacted] 2016, when he was 20 years old, the New York Family Court for [redacted] County appointed guardianship of the Petitioner to J-S-². In [redacted] 2017, when the Petitioner was still 20 years of age, the court issued a separate order titled "ORDER Special Immigrant Juvenile Status" (SIJ order),

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).

² We use initials to protect individuals' privacy.

containing its SIJ related findings.³ Based on these court orders, he filed the instant SIJ petition over four years later in November 2021. The Director denied this petition, because the Petitioner did not establish that he was under 21 years of age at the time he filed the SIJ petition.

The Petitioner does not contest the actual date USCIS received the SIJ petition in November 2021 when he was over 21 years of age at the time of filing. Instead, he raises a claim of ineffective assistance of counsel against his former counsel for the delay in filing, citing *Matter of Lozada*; and in support of that claim, submits an affidavit describing the agreement he had with his prior counsel and the alleged attorney misconduct, a 2021 letter acknowledging receipt of his attorney misconduct complaint filed with the Executive Office for Immigration Review, Office of the General Counsel, and another 2021 letter acknowledging that he also filed a bar complaint with a state attorney grievance committee. See 19 I&N Dec. 637 (BIA 1988) (setting forth the procedural requirements of an ineffective assistance of counsel claim); 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). However, apart from acknowledging receipt of the complaints, these letters do not indicate that the respective disciplinary authorities investigated the Petitioner's allegations or made any professional misconduct findings. In fact, the letter from the state bar committee even declined to investigate the matter or otherwise assist the Petitioner and informed him to pursue resolution through the Board of Immigration Appeals. The record also does not contain any evidence that he notified his former counsel of the alleged misconduct and gave her an opportunity to respond, and it does not contain any explanation as to the Petitioner's lack of compliance with *Lozada*'s procedural requirements. See, e.g., *Zheng v. U.S. Dep't of Just.*, 409 F.3d 43, 46 (2d Cir. 2005) (requiring "substantial compliance" with the reasonable requirements set forth in *Lozada*) (citations omitted). The Petitioner nonetheless avers that, given the ineffective assistance of his prior counsel and in the interests of justice and humanitarian considerations, we must essentially waive the statutory age requirement and adjudicate his current SIJ petition retroactively as of the date he filed his previous SIJ petition in February 2017, when he was still 20 years old.

We acknowledge the Petitioner's assertion that the delay in filing the instant SIJ petition was not his fault and solely due to the ineffective assistance of his former counsel. However, a successful ineffective assistance of counsel *Lozada* claim does not provide as a remedy the waiver of applicable eligibility requirements mandated by statute and implemented by regulation. *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 528 (9th Cir. 2000) (holding that the appropriate remedy for ineffective assistance of counsel in that case is the reopening of the matter and application of the law in effect at the time the ineffective assistance occurred). The relevant SIJ regulations provide that a petitioner must be eligible for the 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 petitions are filed. 8 C.F.R. § 103.2(b)(1) (providing that a petitioner for an immigration benefit must show their 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,

³ In 2018, the Director denied a separate, prior SIJ petition based on these same guardianship and SIJ orders, and we dismissed a subsequent appeal, in part due to lack of evidence that the juvenile court made the requisite SIJ findings before the Petitioner filed his previous SIJ petition. We also dismissed a subsequent combined motion to reopen and reconsider, concluding that he was ineligible for SIJ classification at the time he filed the prior SIJ petition because the SIJ order containing the remaining requisite SIJ related findings was not issued until *after* he filed that petition in February 2017.

5080 (2008) (providing age-out protections for SIJs who are unmarried and under the age of 21 at the time their petitions are filed); 8 C.F.R. § 103.2(a)(7)(i) (stating that a properly completed SIJ petition is considered filed on the date of actual receipt by USCIS). Here, USCIS received the instant SIJ petition four years after the Petitioner had already attained 21 years of age. Consequently, he has not established that he was eligible for SIJ classification when filed his SIJ petition with USCIS.

Accordingly, even if the Petitioner satisfied the *Lozada* requirements for an ineffective assistance of counsel claim, he does not provide persuasive appeal arguments or cite pertinent legal authority for the proposition that USCIS has authority under the Act or the implementing regulations to disregard and waive the eligibility requirement that an SIJ petitioner must be under 21 years of age and a “child” under the Act at the time they file their SIJ petition. *See 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).⁴

The Petitioner’s remaining appeal arguments pertain to the denial of his previous SIJ petition, which is not before us on this appeal. As the Petitioner was over 21 years of age on the date he filed his SIJ petition, he has not established his eligibility for SIJ classification.

ORDER: The appeal is dismissed.

⁴ We disagree with the Petitioner that we must separately reopen and re-adjudicate the denial of his previous SIJ petition on a service motion. 8 C.F.R. § 103.5(a)(5)(i); *Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999) (explaining that sua sponte authority is reserved for extraordinary circumstances); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (observing that sua sponte reopening in an exercise of discretion by the Board of Immigration Appeals is not intended for circumventing the regulations, where enforcing them might result in hardship).