U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33494125

Date: SEP. 17, 2024

Motion on Administrative Appeals Office Decision

Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (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 petition, concluding that the Petitioner did not establish that he was under 21 years of age at the time of filing his petition for SIJ classification. We dismissed a subsequent appeal. The matter is now before us on 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, arguing we must reconsider the decision to deny the SIJ petition based on the Petitioner's age at the time of filing and asserts that the petition should be accepted as timely. The Petitioner further asserts that U.S. Citizenship and Immigration Services (USCIS) should have accepted his SIJ petition *nunc pro tunc* as received prior to his 21st birthday. 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.

The age requirement for SIJ classification is not waivable, nor can it be met retroactively through *nunc pro tunc* relief. The requirement that a petitioner be a child at the time the SIJ petition is filed with USCIS is a fixed, substantive eligibility requirement. Section 101(a)(27)(J) of the Act proscribes a firm age requirement, setting clear boundaries on eligibility and inherently prohibiting inclusion of those who do not meet the requirement. The statute also specifically identifies the time at which the age requirement must be determined. *See* Section 235(d)(6) of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (2008) (stating 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). *See also* 8 C.F.R. §§ 103.2(b)(1) (providing that a petitioner for an immigration benefit "must establish that he or she is eligible for the requested benefit at the time of filing") and 204.11(b)(1) (stating that an SIJ petitioner must be "under 21 years of age at the time of filing"). The Petitioner filed the instant SIJ petition when he was 21 years old, and treating the petition as filed while he 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.[1] *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). Thus, we find that the Petitioner has not identified an incorrect application of law or policy that rendered our prior decision incorrect at the time it was issued.

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.

[1] We note that the Petitioner was not rendered ineligible for SIJ status due to an agency error; rather, the error which caused his initial filing to be rejected was on the part of the preparer of his SIJ petition.