



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

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

MATTER OF A-P-S-

DATE: FEB. 5, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner seeks classification as a special immigrant juvenile. *See* Immigration and Nationality Act (the Act) §§ 101(a)(27)(J) and 203(b)(4), 8 U.S.C. §§ 1101(a)(27)(J), 1153(b)(4). The Director, New York Field Office, denied the petition. We dismissed the Petitioner's subsequent appeal and denied his first motion to reopen. The matter is now before us on a second motion to reopen and a motion to reconsider. The motions will be denied.

I. APPLICABLE LAW

A motion to reopen must state the 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: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Director denied the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, based on a finding that the Petitioner was not under 21 years of age at the time he filed the Form I-360. We dismissed the Petitioner's timely appeal in a decision dated January 29, 2015. The Petitioner subsequently filed a motion to reopen.

In our August 3, 2015, denial of the Petitioner's motion to reopen, we concluded that the Petitioner filed the Form I-360 on the day he turned 21 years old, and that he therefore could not establish that he was a child on the date the Special Immigrant Juvenile (SIJ) petition was filed, as required by section 235(d)(6) of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008). The Petitioner argued that he was not yet 21 years old when U.S. Citizenship and Immigration Services (USCIS) received his Form I-360 at 9:56 a.m. on [REDACTED] his 21st birthday, because his time of birth was 11:35 p.m. on [REDACTED]. However, we concluded that a day is not a divisible unit for purposes of determining the age of an SIJ petitioner, and that the Petitioner was not a child, as defined at section 101(b)(1) of the Act, when he

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filed the Form I-360. We stated that, to the extent our January 29, 2015, decision on appeal suggested that the time of the Petitioner's birth on [REDACTED] was relevant, that portion of our decision was withdrawn, but that our final conclusion in our decision on appeal was correct.

Furthermore, in our August 3, 2015, denial of the Petitioner's motion to reopen, we indicated that the juvenile court order was deficient because it granted guardianship of the Petitioner to [REDACTED] only on a temporary basis and did not indicate that reunification with the Petitioner's parents was not viable. *See* TVPRA § 235(d)(5)(providing that a court-appointed custodian who is acting as a temporary guardian is not considered a legal custodian for purposes of SIJ eligibility). Our previous decisions are incorporated herein by reference.

III. ANALYSIS

A. The Petitioner Was Not Under 21 Years of Age When He Filed the Form I-360

In his brief on motion, the Petitioner asserts that we erred in concluding that he was not under 21 years of age when he filed the Form I-360. He contends that a day is a divisible unit and that he has demonstrated that he filed the Form I-360 in the morning of May 15, 2013, prior to turning 21 later that night. The Petitioner therefore asserts that he was under 21 "as a matter of biological fact" at the time he filed the Form I-360. He contends that our decision was contrary to the decision of the U.S. Court of Appeals for the Second Circuit in *Duarte-Ceri v. Holder*, 630 F.3d 83, 91 (2d Cir. 2010), in which the court found that a day is divisible for purposes of preserving the right of derivation of U.S. citizenship from a naturalized parent. As we noted in our decision of August 3, 2015, *Duarte-Ceri* did not involve an immigrant visa petition, and the holding is not directly relevant to this matter. Similarly, although the Petitioner now cites *Matter of L-M- & C-Y-C-*, 4 I&N Dec. 617, 621 (BIA 1952), that case focused on the retention of U.S. citizenship acquired through a U.S. citizen parent, and is not pertinent to the Petitioner's Form I-360.

Although the Petitioner also asserts on motion that "[c]ourts have allowed the use of fractions of a day in computing time in many similar matters," he does not provide pertinent precedent decisions to support his claim that a day is divisible for the purpose of satisfying the definition of "child" at section 101(b)(1) of the Act. The Petitioner cites *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437 (1931), for the assertion that: "The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time." *Id.* at 440. In *Burnet v. Willingham Loan & Trust Co.*, the U.S. Supreme Court declined to divide a day into parts. In determining the deadline for a tax assessment, the Court stated, "the day is the unit, because people generally measure periods of more than one day by days" *Id.* at 439. The Court further noted that "the day on which [an] event happened may be regarded as an entirety, or a point of time" *Id.* at 440 (quoting *Cornell v. Moulton*, 1846 WL 4260 (N.Y. Sup. Ct. 1846)).

The Petitioner also argues that we must resolve any ambiguities in his favor. However, in this case, the clear language of the statute at section 101(b)(1) of the Act indicates that a child is a person "under twenty-one years of age," and the Petitioner does not cite any portion of the Act or the

(b)(6)

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regulations to support his assertion that a day is a divisible unit. The Petitioner does not cite pertinent precedent decisions or other binding authority to establish that our decision was incorrect based on the evidence in the record of proceedings at the time of our decision. 8 C.F.R. § 103.5(a)(3).

B. Validity of Juvenile Court Order

The Petitioner further asserts that we improperly concluded in our August 3, 2015, decision that the juvenile court order was deficient because it was temporary, and therefore did not make a permanent finding that reunification of the Petitioner with his parents was viable. On motion, the Petitioner submits an Order Appointing Guardian of the Person (*nunc pro tunc* order), issued on [REDACTED] and dated *nunc pro tunc* to May 7, 2013. The *nunc pro tunc* order is nearly identical to the Temporary Order Appointing Guardian of the Person (temporary order) that the Petitioner previously submitted, but does not contain the statements that the appointment of guardianship of the Petitioner is temporary. However, like the temporary order, the *nunc pro tunc* order granted guardianship of the Petitioner only until he turned 21 years old. The *nunc pro tunc* order did not indicate that reunification with the Petitioner's parents was not viable due to abuse, neglect or abandonment or a similar basis under New York law, as required by section 101(a)(27)(J)(i) of the Act. The *nunc pro tunc* order also does not contain the court's determination that it would not be in the Petitioner's best interest to be returned to his or his parents' country of nationality, as required by section 101(a)(27)(J)(ii) of the Act.

Furthermore, the *nunc pro tunc* order is deficient because it does not specify the basis for the court's jurisdiction over the Petitioner. The age of majority in New York is 18. *See* N.Y. Dom. Rel. Law § 2 (McKinney). Both the temporary order and the *nunc pro tunc* order specified that the Petitioner was over the age of 18 at the time the orders were issued. The term "juvenile court," as used in subsection 101(a)(27)(J)(i) of the Act, is defined as a court "having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a). Further, a dependency or custody order issued by a court with jurisdiction over both adults and juveniles will only suffice if the record shows that the court exercised jurisdiction over the petitioner as a juvenile. *See* 8 C.F.R. § 204.11(c)(3) (requiring the court order to be in compliance with state law governing juvenile court dependency). Here, the record lacks any evidence that the *nunc pro tunc* order was issued pursuant to the court's jurisdiction over the Petitioner as a juvenile under state law. Therefore, the Petitioner does not meet the requirement at section 101(a)(27)(J)(i) of the Act.

IV. CONCLUSION

In these proceedings, the Petitioner bears the burden of proof to establish eligibility. *See* Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

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ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-P-S-*, ID# 15868 (AAO Feb. 5, 2016)