NO. 90-5590

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ZULEMA DE LA GARZA PERALES, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

v.

RICHARD CASILLAS, ET AL.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

REPLY AND RESPONSIVE BRIEF FOR THE APPELLANTS/CROSS-APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Appellants/Cross-Appellees believe that oral argument would assist this Court in resolving the legal issues presented in this appeal and cross-appeal.

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Plaintiffs in this case were awarded fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412, after they obtained a four-part permanent injunction against the Immigration and Naturalization Service (INS). The injunction required INS (a) to adjudicate all requests for voluntary departure by class members within 60 days, and (b) to make denials of such requests in writing; and prohibited INS from (c) considering certain factors in adjudicating requests for employment authorization and voluntary departure and (d) from initiating deportation proceedings against class members in retaliation for their requests for relief. We appealed the latter two aspects of the injunction (which we considered to be the more significant and onerous parts), however, and our position was completely vindicated by this Court.

In our opening brief we showed that in light of this Court's ruling on the merits appeal, there is simply no basis -- as a matter of law -- for a fee award under either 28 U.S.C. 2412(d) or (b). In response, plaintiffs argue not only that they are entitled to a fee award, but, also that the district court erred in not awarding them more than it did. In Part I of this brief, we reply to plaintiffs' arguments concerning their entitlement to a fee award. In Part II, we respond to the arguments made by plaintiffs concerning the amount of the award. Of course, if this Court agrees with us that plaintiffs are not entitled to <u>any</u> attorney's fees, costs and expenses under the Equal Access to Justice Act, then it need not reach Part II since the issues addressed in that portion of the brief would then be moot.

I. IN LIGHT OF THIS COURT'S RULING ON THE MERITS, THERE IS NO BASIS FOR AN AWARD OF ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. 2412.

A. Defendants' Objections To The Magistrate's Order Are Properly Before This Court.

Plaintiffs assert that defendants have waived their objections to the magistrate's March 14, 1990 fee order because defendants did not file their objections to that order until April 2, 1990. (Br. at 11). This argument is meritless.

On June 26, 1989, the district court referred plaintiffs' motion for attorney's fees, expenses and costs "to a United States Magistrate for disposition as he or she finds proper. 28

U.S.C. § 636(b)(1)."[1] R1: 236 (90-5590).[2] The magistrate issued his order on March 14, 1990 and on the same day returned the matter back to the district court "for all purposes." R1: 53 (90-5590). Defendants were served with the magistrate's order on March 16, 1990 and, on Friday, March 30, 1990, served their objections to that order on plaintiffs by certified mail, return receipt requested. R1: 52 (90-5590). The objections were file-stamped by the district court on Monday, April 2, 1990.[3]

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[1] A district court may refer a non-dispositive pretrial matter to a magistrate for hearing and determination under 28 U.S.C. § 636(b)(1)(A). Parties disagreeing with the magistrate's order have ten days from the date of entry of the order within which to file their objections. The district court may set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a).

When a district court makes a reference to a magistrate under 28 U.S.C. 636(b)(1)(B), parties have ten days after being served with a copy of the magistrate's proposed findings and recommendations within which to file and serve their objections. The district court shall then conduct de novo review of those portions of the report or proposed findings or recommendations to which objection is made. Fed. R. Civ. P. 72(b).

As noted above, the district court's order of reference to the parties did not indicate whether it was being made pursuant to section 636(b)(1)(A) or (b)(1)(B). Moreover, the fact that the district court spent four pages of its opinion discussing the appropriate standard of review (which is dependent upon the type of delegation) demonstrates that it was not sure of the nature of the delegation.

[2] As we explained in our opening brief, the record on appeal in this case consists of three volumes, supplemented by the ten volumes which were prepared for the merits appeal (89-5515). "R4: 851," for example, refers to page 851 in the fourth volume of the record in 89-5515. If reference is being made to one of the three record volumes prepared for this appeal, the cite will be "R__: __ (90-5590)." "App. __ " refers to pages in the separately bound Record Excerpts which were filed along with our opening brief.

[3] In their "Motion for Extension of Time to File Objections," plaintiffs stated that "On March 30, 1990,

(continued...)

Although the district court found that our objections were untimely, it nevertheless proceeded to consider the merits of the magistrate's decision, and it held that "[t]he Court, having carefully reviewed the Magistrate's Order, the objections, the facts of the case and the case law, agrees with the Magistrate's determinations in all things." App. 127. Obviously, the district court did not consider the untimeliness issue to have been a critical, jurisdictional one. The district court was correct.

As this Court recognized en banc in Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982), failure to timely file written objections does not result in the waiver of the right to appeal unless the magistrate's order contains notice advising the parties of such consequences. See also Rodriguez v. Bowen, 857

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[3](...continued)
defendants filed with the Court their objections to the Magistrate's Order. Plaintiffs did not receive the objections until Saturday, March 31, 1990, and thus, could not respond with their objections within the ten days permitted by the statute. 28 U.S.C. 636(b)(1)." R1: 33 (90-5590). At no point in that filing or in their "Memorandum in Opposition to Defendants' Objections and in Support of Plaintiffs' Objections, filed April 13, 1990, did plaintiffs assert that defendants' objections were untimely.

F.2d 275, 276-77 (5th Cir. 1988).[4] Plainly, the magistrate's order in this case contains no such notice.[5]

We note, however, that if plaintiffs' contention that our objections were untimely were valid, then plaintiffs' objections necessarily were also untimely. Plaintiffs did not file their request for an extension of time to file objections until April 2, 1990 -- after the ten-day period had run, according to the district court. Because they filed their request after time had run, plaintiffs had to show excusable neglect in order to obtain the extension. See Fed. R. Civ. P. 6(e). Plaintiffs made no such showing. Indeed, in their objections to the magistrate's order, plaintiffs state that "In light of Defendants' objections, Plaintiffs now submit objections to the following findings * * *." R1: 29 (90-5590). That statement suggests that plaintiffs' failure to file their objections earlier was due to a deliberate tactical decision on their part, rather than "excusable neglect." See also Plaintiffs' Br. at 12, n.9 ("Upon receipt of Defendants'

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[4] The cases cited by plaintiffs (Br. at 12) do not compel a contrary result. In Thomas v. Arn, 474 U.S. 140, 142 (1985), the issue before the Court was "whether a court of appeals may exercise its supervisory power to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment." The Supreme Court held that it could. United States v. Lewis, 621 F.2d 1382, 1386 (5th Cir. 1980) cert. denied, 450 U.S. 935 (1981), is a pre-Nettles decision (see text; see also Hardin v. Wainright, 678 F.2d 589 (5th Cir. 1982)) and Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 473 (2d Cir. 1985), is not a Fifth Circuit case.

[5] The statute, the Federal Rules of Civil Procedure and the Local Rules for the Western District of Texas are similarly silent on this point.

objections and to protect their own objections, Plaintiffs requested and received an extension of time.")

B. Defendant's Substantial Justification Argument Is Properly Before This Court.

Plaintiffs also argue (Br. at 12) that we waived our substantial justification argument because we did not raise it below. Plaintiffs are correct that we wanted to proceed with the fee litigation in the district court while the merits appeal was pending before this Court, and, further, that we stated in our district court filings that we were willing to pay plaintiffs for the two portions of the injunction that we did not appeal and to place funds for the remaining fees in an escrow fund. What we said to the district court was based on our understanding of the governing law and the posture of the case at the time. As we explained in our opening brief, however, both the governing law and the relevant facts of this case have changed since the district court issued its order. First, this Court's order in the merits portion of the case has undercut the factual and legal bases for the fee award. Second, the Supreme Court's decision in Commissioner, INS v. Jean, 110 S. Ct. 2316 (1990), instructs that the question whether the government's position was substantially justified is to be determined by looking at the case as a whole. Accordingly, this Court should not conclude that we have waived our substantial justification argument.[6]

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[6] It should also be noted that the district court, before even referring the fee matter to the magistrate, made the determination that the government's position was not

(continued...)

C. There Is No Reason to Remand This Case To The District Court For Reconsideration Of The Question Of Plaintiffs' Entitlement To A Fee Award.

Plaintiffs argue (Br. at 13) that, assuming arguendo, a "fee adjustment" should be made, it should be decided by the district court. In their view, "[t]he issues of substantial justification, the hourly rate and bad faith require a factual determination which the district court must make in the first instance." Id.

None of the cases cited by plaintiffs, however, compels the conclusion that this case must be remanded. As plaintiffs themselves admit (Br. at 13, n.10), all of their cases are factually distinguishable. Moreover, the reasoning of United States v. 329.73 Acres, Grenada and Yalobusha Counties., 704 F.2d 800 (5th Cir. 1983), cited by plaintiffs, actually supports our argument that a remand is not necessary in this case. The primary issue in 329.73 Acres was whether the EAJA, 28 U.S.C. 2412(d), applies to eminent domain cases. This Court, sitting en banc, held that it does. The question then arose as to whether the case should be remanded for the district court to decide whether the government's appeal (which was the only phase of the case for which the landowner had requested a fee award) was

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[6](...continued)
substantially justified in its merits order. App. 92. The magistrate did not make the determination in the first instance. See also footnote 10, infra.

substantially justified.[7] This Court held that the case should be remanded for a number of reasons, including: "[a] multi-membered en banc court is normally not the most appropriate tribunal to make a quasi-factual judgment of first instance that may depend on individual study by each judge of a particular record." Id. at 811. Significantly, however, the Court was unwilling to establish a rule requiring remands in every case: "[w]ithout further experience deciding § 2412(d) issues as they arise, we do not wish at this time to settle upon any preferred methodology for all circumstances, nor do we wish to attempt to determine criteria that suggest which of several possible methodologies is most appropriate under varying circumstances." Id. at 812.

In this case, the magistrate's thirty page fee order, which the district court affirmed, provides ample proof that the findings and conclusions concerning the appropriate hourly rate and bad faith contemplated by the 329.73 Acres Court, have already been made. And this Court's decision on the merits appeal plainly eviscerates the unexplained conclusion made below that the government's position was not substantially justified. A remand is, therefore, neither necessary nor appropriate in this particular case. For the reasons discussed more fully below, this Court should rule that plaintiffs are not entitled to an

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[7] The 329.73 Acres case was unusual because the Equal Access to Justice Act became effective while it was pending on appeal.

award under the Equal Access to Justice Act, 28 U.S.C. 2412(b) or (d), as a matter of law.[8]

D. In Light Of This Court's Ruling On The Merits Portion Of This Litigation, There Is No Basis For A Fee Award Under 28 U.S.C. 2412(d).

1. Prevailing Party Status.

Plaintiffs devote four pages of their brief to proving that they are prevailing parties for EAJA purposes and that their victory was significant. But, as plaintiffs acknowledge in the first sentence of this section of their brief (Br. at 14), we never argued that they were not prevailing parties. Our position in this appeal is that the government is not liable for fees under 28 U.S.C. 2412(d) because its position, as a whole, was substantially justified.[9]

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[8] Plaintiffs also argue (Br. at 13), citing Devine v. Sutermeister, 733 F.2d 892, 896 (Fed. Cir. 1984), that "[e]ven if this Court adopts Defendants' arguments that fees should be reduced, this evaluation should also be made by the District Court." The Sutermeister decision simply does not stand for the proposition advanced by plaintiffs. Indeed, in that case, which involved a fee application following a successful defense against a petition for review, the appellate court made the determination concerning substantial justification.

[9] Plaintiffs have, however, overstated the significance of the issues on which they did prevail. As explained in our opening brief, plaintiffs' goal was (and is) to immigrate to the United States. R9: Hrg. Tr. 121. Their position throughout this litigation -- including their most recent brief -- has been that they cannot work unless they have employment authorization (which they cannot get unless they have voluntary departure); if they cannot work, they cannot support themselves and their families; if they cannot support themselves and their families, they may not be able to avoid excludability on the basis of "public charge" grounds; and if they go to a consulate abroad for their visa appointment and are denied a visa on "public charge" grounds, they cannot seek review of that decision and they cannot legally reenter this country. See, e.g., R3: 469-471; R9: Hrg.

(continued...)

2. Substantial Justification.[10]

a. Plaintiffs assert, citing S & H Riggers and Erectors, Inc. v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982), that the "burden of proof is on the government to establish a 'strong showing' regarding substantial justification." Br. at 18.

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[9](...continued)
Tr. 125.

After this Court agreed with us on the merits appeal, only the two provisions of the injunction that we did not appeal, were left. Those provisions required INS to adjudicate plaintiffs' requests for voluntary departure within sixty days and to make denials of such requests in writing. Plaintiffs assert that "[b]ased on Defendants' practices of denying voluntary departure and thus precluding eligibility for employment authorization, and issuing Orders to Show Cause against class members," the remaining parts of the injunction "cannot be characterized as 'lesser relief.'" Br. at 17 (citation to defendants' brief omitted). First, plaintiffs' success in this case did not guaranty them that they would receive voluntary departure or employment authorization. Nor were they able to dictate the factors INS could consider in determining requests for such relief or limit INS' ability to illegal aliens in deportation proceedings. Second, the record does not support plaintiffs' assertion that INS had a "practice" of issuing Orders to Show Cause. Hence, plaintiffs cannot claim victory for putting an end to a nonexistent practice. See also pp. 27-29, infra.

[10] As previously noted, the district court made its finding about substantial justification in its merits decision, before referring the fee matter to a magistrate. The district court stated that:

> Plaintiffs' counsel have requested an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. Counsel are ordinarily entitled to an award when they prevail and the Government's position is not 'substantially justified.' It should be abundantly clear that it is the finding of this Court that Defendants' position in this lawsuit was not substantially justified.

App. 92. All that the magistrate said about the substantial justification issue in its thirty page opinion was "[t]hat plaintiffs prevailed and that the government's position was not substantially justified, is clear from the district court's findings." App. at 96.

Plaintiffs are incorrect. The question of the meaning of the term "substantially justified" was addressed by the Supreme Court in Pierce v. Underwood, 108 S. Ct. 2541 (1988). In discussing the appropriate standard, the Court noted that the respondents in that case had contended that "the phrase imports something more than 'a simple reasonableness standard,' Brief for Respondent 24 - though they are somewhat vague as to precisely what more, other than 'a high standard,' and a 'strong showing,' id. at 28." Underwood, 108 S. Ct. at 2549. (emphasis in original). The Court, as we stated in our opening brief, ultimately decided that "substantially justified" means "justified in substance or in the main." Underwood, 108 S. Ct. at 2550.

b. Plaintiffs mischaracterize our argument when they assert (Br. at 27) that "Defendants argue that 'substantial justification' must be determined based solely on the issues which Defendants successfully appealed." Our position -- which is compelled by the Supreme Court's decisions in Underwood and Commissioner, INS v. Jean, 110 S. Ct. 2316 (1990) -- is that the question of substantial justification must be made by looking at the case as a whole. If the government's position is "justified in the main" then it is not liable for fees at all. In this case, the reasonableness of the government's position on the two issues we appealed (and prevailed upon) necessitates the conclusion that our overall position was substantially justified because the issues we appealed were the much more significant

aspects of the case, which, as plaintiffs stress, presented several intertwined claims.

Plaintiffs assert (Br. at 28) that our reliance on Jean is misplaced because that case involved only the question whether a district court, having found that the government's position in the merits phase of the litigation was not substantially justified, must then make a separate inquiry concerning the reasonableness of the government's position in the fees portion of the litigation before awarding fees for the fee litigation. Plaintiffs are correct that only the "fees for fees" question was specifically before the Court.[11] Nevertheless, the analysis the Supreme Court used to reach the conclusion that only one substantial justification determination need be made is fully applicable here. In Jean, the Court relied heavily on the fact

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[11] Plaintiffs are mistaken when they claim (Br. at 28) that the Supreme Court "did not address the issue of how fees are to be awarded when the plaintiffs prevail on portions of their lawsuit * * *." In footnote 10 of its decision in Jean, the Supreme Court recognized that the government does not have to pay fees on those portions of the fee litigation which it won:

> Because Hensley, 461 U.S., at 437, 103 S. Ct., at 1941, requires the district court to consider the relationship between the amount of the fee awarded and the results obtained, fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation. For example, if the Government's challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate.

Commissioner, INS v. Jean, 110 S. Ct. 2316, 2321 n.10 (1990). This Hensley principle, of course, applies equally to non-fee litigation.

that the 1985 amendments to the Equal Access to Justice Act pertaining to the substantial justification determination refer to "position" of the United States rather than "positions," see 28 U.S.C. 2412(d)(2)(D),[12] in support of its ultimate conclusion that "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items." Id. at 2320. Under the approach used by plaintiffs -- and the myriad pre-Jean cases they cite[13] -- district courts must make an assessment of the reasonableness

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[12] 28 U.S.C. 2412(d)(2)(D) provides in pertinent part that:

> 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]

[13] Only one of the cases relied upon by plaintiffs in support of this argument -- Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990) -- is a post-Jean decision. In Myers, the Eleventh Circuit held that in order for the government's position to be substantially justified, all of its arguments must be substantially justified. We think that the Myers decision has misread Jean.

Plaintiffs also question our reliance on Battles Farms Co. v. Pierce, 806 F.2d 1098 (D.C. Cir. 1986), vacated on another ground, 487 U.S. 1229 (1988). The reason we rely on that case is that it is fully consistent with the rationale of Jean. As a fall back position, plaintiffs claim that even if this Court follows Battles Farms, they are still entitled to fees because the defenses raised by INS stand on "different footing." (See Battles Farms, 806 F.2d at 1104-1105). Plaintiffs are mistaken. First, as plaintiffs themselves have repeatedly argued, the claims they have presented were intertwined. Under Battles Farms, they would not be entitled to fees at all because they combined a lesser claim on which they were entitled to relief with a major claim on which they were not entitled to relief. In any event, we also believe that INS' defenses were intertwined as well.

of the government's positions with respect to each claim on which plaintiffs prevailed.[14] Although that is the argument that we made at one time, we believe that it is now foreclosed by Jean.[15]

c. While plaintiffs are correct that a determination as to whether the government's "position" is substantially justified requires an examination of both the underlying agency action and the government's posture in litigation, they err in defining "underlying agency action" in this case to include only INS's failure to adjudicate their requests for voluntary departure and employment authorization. While plaintiffs may have brought this litigation originally to challenge only INS' failure to adjudicate, they amended their complaint to challenge the factors INS used to decide requests and to challenge INS' decision to place one of the plaintiffs in deportation proceedings. (And it

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[14] Indeed, plaintiffs in this case ask this court to examine the reasonableness of each of the jurisdictional arguments advanced by the government. See Br. at 26-27.

[15] In footnote 18 of their brief, plaintiffs assert that:

> Moreover, a review of Commissioner, INS v. Jean, supra in the lower courts establishes that plaintiffs received fees under EAJA, even though they did not prevail on every issue in the lawsuit. Jean v. Nelson, 863 F.2d 759, 771-772 (11th Cir. 1988). Thus, if the dicta in Commissioner, INS v. Jean, supra, is binding, it stands for the proposition that EAJA fees are to be awarded when a party prevails on certain, but not all of the issues in a case.

Plaintiffs' argument is a non-sequitur. The original substantial justification determination in that case was not made using the standard adopted by the Supreme Court, and we did not ask the Supreme Court to review the original determination. Whether plaintiffs would have been entitled, under the new standard, to any fees is far from certain.

cannot be seriously disputed, in light of plaintiffs' theory concerning their need for employment authorization, that the "factors" issue was not one of the more important issues in the case.) Thus, the underlying agency action at issue in this case is comprised not only of INS' failure to adjudicate but also of its decisions as to the appropriate factors to be used in deciding requests for voluntary departure and employment authorization as well as its decisions regarding whether to place certain class members, who are illegally present in this country, in deportation proceedings.

In our view, the underlying agency actions, taken as a whole, were substantially justified. This Court's decision makes it clear that INS is allowed to decide the factors it will use in evaluating requests for voluntary departure and employment authorization, and that such decisions are not subject to judicial review.

With regard to placement of some[16] class members in deportation proceedings: the district court found that defendants had departed from their normal practice of allowing class members to stay in this country and concluded that bad faith could be inferred from such conduct. As we explained at pp. 27-31 of our opening brief, this Court's analysis of plaintiffs' retaliation claim precludes a bad faith award of fees

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[16] Plaintiffs claim (Br. at 9) that INS instituted deportation proceedings against "many" class members. They presented documentary evidence concerning only four class members. As we explained in our opening brief (at p. 30, n. 26), none of the class members was deported.

based on the fact that INS placed some class members in deportation proceedings. This Court did not, however, separately inquire into the reasonableness of this conduct. Plaintiffs' argument that this conduct was unreasonable is based on the assumption (and presumably, on the district court's finding) that INS was departing from its normal practice when it placed certain class members in deportation proceedings.

As we explained in our briefs in the merits appeal, however, there was no policy of affirmatively exempting class members from deportation; rather, there was a policy of not actively seeking them for deportation.[17] The class members against whom deportation proceedings were instituted were not actively sought

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[17] The district court misstated the testimony of defendant Casillas and defendants' witness Halydier in reaching its conclusion about the INS' policy. Neither said that it was the policy in San Antonio to institute deportation proceedings against approved visa petition beneficiaries solely on the basis of a sham marriage or serious criminal conduct. Casillas, who testified by deposition, gave an affirmative answer only to the question (the sole one on the subject that he was asked) whether it was San Antonio policy to initiate deportation proceedings "upon the filing" or "upon the approval" of a visa petition; he mentioned sham marriages merely as one example of the "something more" that would be necessary for a deportation proceeding to be instituted. R3: 643-644. Similarly, Halydier's deposition testimony was that, in his "experience," alien spouses were not "routinely" called in for the issuance of orders to show cause (R3: 634); to "his knowledge," deportation proceedings were not instituted "as a routine matter" upon adjudication of a visa petition (R3: 638); and to his "recollection" he had not, as a part of his "duties," issued call-in letters or orders to show cause to alien spouses where no criminal conduct or marriage fraud was involved. R3: 639-640. In his testimony during the hearing on the preliminary injunction, moreover, he said that whether an alien spouse is placed in deportation proceedings depended upon "all kinds of factors," including the length of both his marriage and his presence in this country, prior marriages, number of children and "how far" he had gone in his "procedure to immigrate." R2: Hrg. Tr. 9-10.

by INS officials, but rather, as the district court found (App. 73), came to the attention of those officials when they voluntarily appeared seeking relief. There was nothing unreasonable about INS placing these individuals, who are illegally in this country, in deportation proceedings.

Finally, there is the fact that INS failed to adjudicate plaintiffs' claims for discretionary relief during the period from August 1984 until May 1987.[18] We have already conceded that this failure was an abuse of discretion.[19] That concession does

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[18] Plaintiffs claim (Br. at 20) that they attempted to resolve the failure to adjudicate issue prior to bringing suit, but that INS rejected their efforts. In support of this claim, they rely on extra-record materials which they have attached to their brief. It is highly inappropriate for plaintiffs to trying to supplement the record at this late stage.

[19] At p. 21 of their brief, plaintiffs quote part of the portion in our brief in the merits appeal where we stated that the failure to adjudicate was an abuse of discretion. They do not, however, give the complete quote. What we said was:

> If the injunction had been limited to its first two paragraphs (the provisions grouped together as (1) above), there would have been no appeal. Failure to consider an application for discretionary relief is, we acknowledge, an abuse of discretion. Cf. Cuevas-Ortega v. Immigration & Nat. Service, 588 F.2d 1274, 1278 (9th Cir. 1979); see also 5 U.S.C. 706(1) (reviewing court empowered to "compel agency action unlawfully withheld or unreasonably delayed"). In light of our concession in our proposed findings of fact and conclusions of law that INS totally failed to adjudicate requests for pre-hearing voluntary departure between August, 1984 and May, 1987 (R. 222), we cannot say that it was "clearly erroneous" for the court to find that a 60-day time limitation on adjudication of voluntary departure requests (the same time period in which, by current regulation, employment authorization requests must be adjudicated) is an appropriate remedy to cure this past abuse of discretion.* While we fail to perceive any authority for the requirement that denials of voluntary

(continued...)

not, however, compel the conclusion that INS' inaction was not substantially justified. As we noted at footnote 14 of our opening brief in this appeal, this Court has recognized that, "a finding of unreasonable governmental action is not 'conclusive on the substantial justification issue, else in this class of case the substantial justification issue would always simply merge with the decision on the merits.'" State of La, ex rel Guste v. Lee, 853 F.2d 1219, 1222 (5th Cir. 1988) (footnote omitted), quoting Griffon v. HHS, 832 F.2d 51, 52 (5th Cir. 1987).

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[19](...continued)
departure be made in writing rather than orally, it is our understanding that a simple statement of reasons is all that is required and that no elaborate exegesis will be necessary. Cf. Hernandez-Cordero v. U.S.I.N.S., 819 F.2d 558, 563 (5th Cir. 1987) (en banc), quoting Osuchukwu v. I.N.S., 744 F.2d 1136, 1142-1143 (5th Cir. 1984) (the Board of Immigration Appeals "has no duty to write an exegesis on every contention. What is required is merely that it consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted"). Limited in that way, the requirement is not unduly burdensome, and hence we do not contest it.

In the accompanying footnote [*] we stated that:

> We merely acknowledge that this provision of the injunction is not "clearly erroneous"; we do not concede that, in light of INS's present practice of adjudicating both voluntary departure requests and employment authorization requests within the 60 days that the latter are required by regulation to be adjudicated, it is actually justified. While the court appeared to suggest that the present practice was initiated as a result of this lawsuit and might be changed if injunctive relief were not granted (see R. 142-143), we submit that the more obvious reason for the change of practice was the enactment of the Immigration Reform and Control Act and the consequent promulgation of the regulation limiting the time to adjudicate employment authorization requests.

Moreover, as we have explained both in our opening brief and elsewhere in this brief, resolution of the substantial justification question requires examination of the case as a whole -- not individualized scrutiny of each and every component part. Thus, even if the failure to adjudicate -- viewed in isolation -- were thought to be unreasonable, that would not mean that the government's position in this case was not substantially justified on the whole.

d. Plaintiffs also assert that the government's litigation position was not substantially justified. Among other things, they criticize the government for continuing to maintain that "voluntary departure and employment authorization were separate procedures." Br. at 22. This criticism is unwarranted. As plaintiffs themselves acknowledge in footnote 1 of their brief, employment authorization and voluntary departure are two different types of relief: "[t]he regulations provide that in order to obtain employment authorization, the alien must be granted voluntary departure status." See also Plaintiffs' Br. at 16 and App. 135 (wherein this Court recognizes that "the regulatory framework requires that class members obtain voluntary departure before they are eligible to receive employment authorization.")

Plaintiffs assert (Br. at 24) that "[d]efendants infer that the lawsuit would have ended sooner if Plaintiffs had only urged the issues which Defendants did not appeal. This argument is baseless and is irrelevant to the issue of 'substantial

justification.'" Our argument is neither baseless nor irrelevant. First, if plaintiffs had argued only the failure to adjudicate issue, there would have been no appeal. Moreover it cannot be seriously disputed that the nature of the proceedings in the district court would have been significantly different -- no time and energy would have been spent on the "factors" or "retaliatory deportation" issues. Second, under the reasoning of Battles Farms v. Pierce, 806 F.2d 1098 (D.C. Cir. 1986), vacated on another ground, 487 U.S. 1229 (1988), plaintiffs bear the risk when they combine a lesser claim that they are entitled to relief on with a major claim that they are not entitled to relief on.[20]

They also argue (Br. at 24-25) that "[a]lthough Defendants conceded that they had failed to adjudicate requests for almost three years, they denied any duty to remedy this violation"; thus, there remained "the contested issues of law and fact involved whether Defendants had a duty to adjudicate requests for voluntary departure and employment authorization simultaneously and whether Defendants could permissibly deny employment authorization, because a class member did not have voluntary

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[20] In this case, we have correspondence from plaintiffs' counsel dated June 1, 1987, indicating that plaintiffs would not agree to a settlement that ensured the timely adjudication of their claims; they wanted, among other things, to control the standards used by INS to resolve such claims. The fact is that now, nearly four years later, plaintiffs have nothing more than they would have had if they had settled this litigation way back then. Ordinarily, we would not refer to such non-record material concerning settlement discussion, but plaintiffs have injected consideration of this matter into this appeal by making unfair assertions about our settlement posture. See Pl. Br. at 47.

departure." The fact is, as noted above, that under the regulations employment authorization and voluntary departure are separate and voluntary departure is a prerequisite to obtaining employment authorization.

Finally, plaintiffs claim (Br. at 26-27) that our jurisdictional arguments were unreasonable. They assert that the fact we 1) lost on these issues and 2) did not appeal them, are indicia of the arguments' unreasonableness. First, these were minor matters in the overall litigation. More importantly, the fact that we did not appeal, should not be considered relevant to the determination of whether our arguments were reasonable. The decision whether a case should be appealed, and, if so, what issues should be presented, involves consideration of a variety of factors.

In sum, under the Supreme Court's decision in Jean, the determination as to whether the government's position is substantially justified is to be made by looking at the case as a whole. This approach is particularly appropriate where, as here, plaintiffs' demands were presented as non-severable. Under this "holistic" approach, the government's position in this case must be viewed as substantially justified.

E. Similarly, This Court's Merits Ruling Removes The Basis For The District Court's Finding Of Bad Faith; Accordingly, Attorney's Fees Cannot Be Awarded As A Matter Of Law Under 28 U.S.C. 2412(b).

As we explained in our opening brief, the district court awarded plaintiffs attorney's fees at the rate of $125 per hour

under 28 U.S.C. 2412(b), finding that the government had acted in bad faith. Plaintiffs contend that the district court's ruling as to bad faith was not affected by this Court's decision on the merits appeal, and, further, that "[e]ven assuming that the decision at the Fifth Circuit is relevant to the question of bad faith, this issue must be decided by the District Court." Br. at 36.

In its fee order, the magistrate found that defendants had acted in bad faith because:

> First, [defendants] continued their course of conduct, in failing to timely adjudicate plaintiffs' requests and in denying voluntary departure for impermissible reasons, for almost one year after this lawsuit was filed, rejecting the opinion of their own Deputy District Director that the process was flawed. Second, after agreeing to change this policy, they again began denying requests and delaying adjudication without justification. In rejecting defendants' assertion that the case is moot because plaintiff's requests are now being adjudicated, the District Court noted that, while defendants' counsel was willing to assure that defendants' past conduct would not reoccur, the testimony of INS officers reflected their belief that they had the right to continue to adjudicate requests based on impermissible factors or no factors at all. Finally, and most significantly, the INS retaliated against several class members for filing requests for voluntary departure and employment authorization. Defendants respond that two of the aliens were granted voluntary departure, and deportation proceedings against the other were dismissed. However, defendants still offer no explanation for initiating the deportation proceedings in the first place. This blatant abuse of the immigration process and flagrant disregard of this judicial proceeding constitutes bad faith and warrants an award of attorneys' fees at the market rate under Section 2412(b).

App. 101-102. At bottom, the magistrate's bad faith holding is premised on three things: 1) the factors INS used to adjudicate requests for relief; 2) INS' allegedly retaliatory use of

deportation proceedings against some class members; and 3) INS' failure to timely adjudicate requests for relief. We address these in turn.

1. In the portion of its merits decision addressing the "impermissible factors" issue, this Court held that "[b]ecause of an absence of statutory or regulatory standards here, a reviewing court is left without a basis for finding that discretion has been abused, and therefore any injunction ordering certain agency action is improper." App. 136. In other words, said the Court, the district court erred in trying to dictate the factors that INS could use to adjudicate requests for voluntary departure and employment authorization. Since INS has the discretion to decide what factors it will use to decide such requests, its choice of factors simply cannot be the basis for a finding of "bad faith." To hold otherwise would be to render INS' "discretion" meaningless. There is no reason for a remand on this point.

2. This Court's merits decision also sets forth the relevant test for determining whether a party has engaged in retaliatory conduct -- the same test used by the district court in his merits decision and mentioned by the magistrate in his fee order -- as well as all of the facts relied upon by the district court to justify that portion of the permanent injunction which prohibited the INS from placing class members in deportation proceedings. This Court rejected the district court's reasoning and, in so doing, made at <u>least</u> two holdings: 1) that "[i]mproperly motivated institution of deportation proceedings

cannot be inferred simply because plaintiffs had come to INS's attention only as a result of their appearance to request voluntary departure or employment authorization," App. 138, and 2) that

> [t]he district court's fundamental error is the attempt to issue a class-wide restraint on the basis of a quintessentially individual problem. Whether a deportation is retaliatory depends upon the peculiar facts of the individual case; they cannot be generalized to interdict all future prosecutions against an entire class of unknown individuals, at least on this record.

App. 139.

Plaintiffs' argument here is nothing more than an attempt to reargue the merits of this case and to show that INS really did retaliate against them by placing them in deportation proceedings. We will not belabor the point: in our view, this Court's merits ruling eviscerates this basis for a bad faith fee award.

3. With regard to INS' failure to adjudicate:[21] as noted previously, we have already conceded both in our opening brief in this appeal (Br. at 24, n.19) and in our opening brief in the merits appeal (Br. at 10-11), that our failure to adjudicate plaintiffs' requests for relief was an abuse of discretion.

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[21] Plaintiffs assert that "Defendants contested Plaintiffs' claims vigorously throughout trial, but then did not appeal. In an attempt to avoid liability for fees, Defendants now concede that they violated Plaintiffs' rights." Br. at 37. What we said was that the failure to adjudicate was an abuse of discretion. We made this statement in our opening brief in the merits appeal, not as plaintiffs suggest, to avoid liability for fees, but to explain why we were not appealing certain portions of the injunction.

That, however, does not necessarily entitle plaintiffs to a fee award under section 2412(b). We have already shown that a finding that INS abused its discretion does not necessarily lead to the conclusion that INS' position lacked substantial justification. The inquiry to be made for EAJA purposes is not the same as the merits determination. If a finding of abuse of discretion does not necessarily mean that the government's position lacked substantial justification, then it surely cannot mean that the government acted in bad faith for purposes of 2412(b), since "bad faith" is a higher standard than substantial justification. See Foster v. Tourtelotte, 704 F.2d 1109, 1111 (9th Cir. 1983).[22]

Moreover, even if failure to adjudicate can be viewed as constituting "bad faith," the fact is that INS did begin adjudicating requests again in May 1987. App. 132. Thus, that omission can not justify awarding market rates for the entire litigation.[23]

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[22] Plaintiffs cite Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), as a case where the government's failure to act was found to constitute bad faith. Plaintiffs fail to note, however, that rehearing en banc was granted in that case and the en banc court subsequently ordered the fee award vacated, finding that Lear Siegler was not a prevailing party. Lear Siegler, Inc. v. Lehman, 893 F.2d 205 (9th Cir. 1989).

[23] Furthermore, INS' failure to adjudicate prior to the litigation cannot give rise to a "bad faith" fee award. See Sanchez v. Rowe, 870 F.2d 291, 295 (5th Cir. 1989).

II. EVEN IF PLAINTIFFS ARE ENTITLED TO AN AWARD OF FEES, THE AMOUNT OF THE AWARD MUST BE REDUCED.

If this Court agrees with us that, under the holistic approach, the government's position in this case was substantially justified as a matter of law and that there is no basis, as a matter of law, for a finding of bad faith, then it need read no further. Plaintiffs would be not entitled to an award of attorney's fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412(b) or (d), and the district court's decision to the contrary should simply be reversed. If, however, the Court deems it appropriate to have the district court reconsider the issues of plaintiffs' entitlement to and/or the amount of the award, then it should vacate and remand to the district court for further proceedings. If this Court does intend to vacate and remand, it should address the cost of living and "limited availability of counsel" issues in order to give guidance to the district court. We address those issues below.

We begin this section of our brief, however, with a discussion of the consequence of a finding by either this Court, or the district court, that the government's position was not substantially justified. Plainly, even if the government's position in this case is found not to have been substantially justified, such a holding would not mean that plaintiffs are automatically entitled to compensation for all of the hours awarded by the district court. That is true even if plaintiffs' claims are intertwined.

As the Supreme Court held in Hensley v. Eckerhart, 461 U.S. 424 (1983),

> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Id. at 435-36 (footnote omitted; emphasis added).

Plainly, under Hensley, the appropriate fee will turn on the individual facts of a given case. For that reason, there is no need to discuss each of the cases cited at pp. 33-35 of plaintiffs' brief. Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987), a case cited by plaintiffs, is, however, worthy of comment.[24] In Greater Los Angeles Council on Deafness, the appellate court held that while plaintiffs in that case had won "massive relief" at trial, after the appeal, they were left with none of the affirmative remedies they had won. In the court of

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[24] Plaintiffs cite Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), in support of their assertion that "[h]owever, when the time spent on all claims is intertwined, courts have awarded fees for all of the work spent on the case." Br. at 33. In point of fact, however, plaintiffs in the Jean case were not compensated for all of the work done on the case. Specifically, they did not obtain fees for their Supreme Court merits work or for work done on their equal protection claim.

appeals' view, plaintiffs's success "was significant, but very limited," and it held that "it was patently excessive for the district court to reinstate after the appeal the same full fee award it made after trial. As a matter of law, the award must be reduced to match the limited extent of plaintiffs' success." Id. at 222. Although the appellate court recognized that "[p]laintiffs' claims were difficult to separate because they involved a 'common core of facts based on related legal theories,'" it held that the district court erred in "failing to simply reduce the award to account for the limited success." Id.[25]

Plaintiffs' argument to the contrary notwithstanding, their success in this case was rather limited. Plaintiffs' "success" in this litigation did not guaranty them employment authorization, but, rather, only consideration of their requests (and the new regulations required consideration of employment authorization requests within 60 days anyway). Plaintiffs also state that they "sought to stop deportations of class members in contravention of INS' stated policy of allowing them to remain in the U.S. pending visa processing," and claim that they achieved that goal because "the injunction requiring written denials and prohibiting the use of an Order to Show Cause as a written denial effectively stopped the deportations." Br. at 35. Plaintiffs'

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[25] We also note that City of Brunswick, Georgia v. United States, 661 F. Supp. 1431 (S.D. Ga. 1987), which plaintiffs cite several times in this portion of their brief, was reversed on appeal. See City of Brunswick, Georgia v. United States, 849 F.2d 501 (11th Cir. 1988), cert. denied, 489 U.S. 1053 (1989).

claim is meritless. The INS remains free to deport class members, who are illegally in this country. Finally, plaintiffs assert that they achieved their goal of obtaining employment authorization for class members because the INS now grants fully 80% of such requests. Id. The fact is that prior to 1984, INS routinely granted requests for voluntary departure and employment authorization. App. 132. Plaintiffs tried very hard in this litigation to limit the factors INS could use to consider such requests and, ultimately, they did not succeed. INS is free to change the factors that it uses to consider requests for employment authorization and voluntary departure. In sum, should this Court or the district court determine that the government's position in this case was not substantially justified, plaintiffs' award should, nevertheless, be significantly reduced to compensate for their limited success.

A. The District Court Properly Declined To Enhance The Fee Award Under 28 U.S.C. 2412(d) For Plaintiffs' Attorneys' Expertise In Immigration Law.

Although the district court found that plaintiffs' attorneys possessed expertise in immigration and that such expertise was needed for this litigation, it declined to award more than $75 per hour, finding that there was not limited availability of counsel. At point VII (Br. at 43) of their brief, plaintiffs assert that the district court abused its discretion when it declined to enhance the fee award for their expertise in immigration. At point IX (Br. at 47), plaintiffs argue that the district court erred in concluding that there was not limited

availability of counsel. Recent precedents of both the Supreme Court and this Court make it clear that these two issues must be considered together. In Pierce v. Underwood, 108 S. Ct. 2541, 2553 (1988), the Supreme Court held that:

> If 'the limited availability of qualified attorneys for the proceedings involved' meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap -- since the 'prevailing market rates for the kind and quality of the services furnished' are obviously determined by the relative supply of that kind and quality of services. * * * [T]he exception for 'limited availability of qualified attorneys for the proceedings involved' must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

(emphasis in original; footnote omitted).[26]

In Bode v. U.S., 919 F.2d 1044, 1049 (5th Cir. 1990), this Court considered the "limited availability" issue in a tax case involving a fee award made pursuant to 26 U.S.C. 7430(c)(1)(B)(iii).[27] In that case, the taxpayers had argued that because they could not get qualified counsel at $75/hour,

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[26] Plaintiffs thus oversimplify the holding of Underwood, when they state (Br. at 43) that the Supreme Court held that "specialization in a unique field of law or foreign language ability justify a higher fee award."

[27] Like section 2412(d) of the EAJA, 26 U.S.C. 7430(c)(1)(B)(iii) limits fee awards to $75 per hour unless "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceedings, justifies a higher rate."

they were entitled to an attorney's fee award above that rate. They also urged, as a separate and distinct claim, that their counsel possessed special skills and expertise. Relying upon Underwood, this Court stated that "[b]ecause the test for limited availability is couched in terms of a special expertise needful for the litigation in question, the Taxpayers' arguments under this issue are inexorably intertwined with their separately asserted argument that their counsel possessed special skills and expertise in the basic subject matter of their refund suit." Bode, 919 F.2d at 1049.

In this case, the parties and the district court relied heavily on Baker v. Bowen, 839 F.2d 1075 (5th Cir. 1988), a pre-Underwood case, in analyzing these issues. In Baker, this Court had instructed that in determining the "limited availability" issue, district courts must "be careful to distinguish the limited availability of attorneys from the special expertise of certain attorneys or the mere unattractiveness of the field." Baker, 839 F.2d at 1084. In our view, this approach is inconsistent with the Bode Court's understanding of Underwood -- and with Underwood itself. Significantly, while the Bode court was obviously aware of the Baker decision (see Bode, 919 F.2d at 1051, n.5), the Bode Court did not mention, much less rely upon, the Baker decision's approach to analyzing the "limited availability" issue.[28]

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[28] Assuming, however, that the Baker test is still viable, it was properly applied in this case. There is ample evidence to (continued...)

Under Underwood, three questions must be answered before an enhancement based on the limited availability of counsel may be awarded. These questions are: 1) whether specialization in immigration law can be a practice specialty; 2) if so, whether such specialization was "needful for the litigation in question"; and 3) if so, whether attorneys in this case have such specialization for EAJA purposes.[29]

The magistrate found that plaintiffs' attorneys have expertise in immigration law and that such expertise was needed for this litigation. See App. 108. The magistrate also, however, concluded that "Teran and Hines were qualified for these proceedings in a specialized sense. Immigration law is a specialty area requiring an extensive and current knowledge of applicable statutes and regulations. Jean v. Nelson, 863 F.2d 759, 774 (11th Cir. 1988), cert. granted, 110 S. Ct. 862 (1990)." App. 111. It is the district court's conclusion on the threshold question whether immigration law can properly be treated as a practice specialty for purposes of EAJA, with which we disagree.

Plaintiffs assert that the Eleventh Circuit has held, both in Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), and Pollgreen

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[28](...continued)
support the magistrate's findings and its ultimate conclusion that plaintiffs were not entitled to an enhancement for limited availability.

[29] Plaintiffs' attorneys also seek an enhancement on the basis of their fluency in Spanish. The district court found, however, that plaintiffs had not shown that there was a lack of attorneys with such fluency willing to handle this litigation for $75 per hour. App. 108-116.

v. Morris, 911 F.2d 527 (11th Cir. 1990), that immigration law is a qualifying practice specialty under Underwood. Br. at 44. On the contrary, the Eleventh Circuit simply left the question open.[30] In Jean, the appellate court stated that:

> First, some of the participating attorneys have a special expertise in immigration law. This is narrow legal specialty which might entitle them to an adjustment if market rates for their services exceed $75. * * * On remand, the [district] court shall consider whether either of these factors are 'special' for EAJA purpose [sic] and entitle the relevant attorneys to increased hourly rates.

Jean, 863 F.2d at 774 (emphasis added). The appellate court's use of the words "might" and "whether" indicates that it was leaving the matter open for the district court to decide. Similarly, the appellate court's statement in Pollgreen v. Morris, 911 F.2d at 538 (footnote omitted) that, "the district

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[30] Plaintiffs also assert (Br. at 44) that "[i]t is not necessary that Plaintiffs prove both a limited availability of representation for immigrants in this area together with proof of expertise and knowledge of a foreign language. In several recent cases, an enhanced fee has been awarded solely on the basis of the attorneys' expertise. In Jean v. Nelson, supra., the Eleventh Circuit held expertise in immigration law and foreign language ability may be considered special factors to warrant a higher fee." These statements are somewhat confusing. The question whether an attorney has special expertise in an identifiable practice specialty or knowledge of a foreign language is part of the larger "limited availability" inquiry. As Bode makes clear, the two concepts are not unrelated. Moreover, even if an attorney has the type of practice specialty contemplated by Underwood, he or she must still show that such expertise was needed for the litigation in question. Even in Jean, where the court suggested that immigration expertise might qualify for a special factor adjustment, the panel majority recognized (in response to the dissent in that case) that it could not be thought that "every immigration attorney or every immigration lawsuit warrants an upward adjustment of hourly rates and we would suggest that such is also the case in some patent or foreign law cases." Jean, 863 F.2d at 774-75, n.12.

court * * * is free to consider * * * the potential expertise of [applicant's attorney] in immigration matters, in reevaluating the appropriate hourly rate," cannot reasonably be interpreted as a holding on the issue.[31]

Moreover, in her dissent in Jean v. Nelson, Judge Kravitch disagreed with the majority's suggestion that specialization in immigration law might be a special factor, observing that "[t]he depths of fourth-amendment law or first-amendment law, for example, are no less murky than the recesses of immigration law." Id. at 781. She also noted that, "competence in immigration law" requires no peculiar basis of knowledge; an attorney with a reasonable amount of "'general lawyerly knowledge and ability' can learn immigration law. Allowing a premium for knowledge of immigration law therefore runs counter to the Supreme Court's counsel to 'preserve the intended effectiveness of the $75 cap. Id.'" Id. at 781 (citation omitted). We agree with Judge Kravitch's position.

While the Ninth Circuit has held that a legal practice specialty in a particular area of the law constitutes a "special factor" for EAJA purposes, see Pirus v. Bowen, 869 F.2d 536 (9th Cir. 1989) (social security); National Wildlife Fed'n v. FERC, 870 F.2d 542 (9th Cir. 1989) (environmental law); Ramon-Sepulveda

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[31] In Nadler v. INS, 737 F. Supp. 658 (D.D.C. 1989), a district court did hold that specialization in immigration law could be a special factor. The fee in Nadler, however, was settled on appeal and the district court judgment was vacated. See Order of Sept. 5, 1990, D.C. Circuit No. 90-5039.

v. INS, 863 F.2d 1458 (9th Cir. 1988) (immigration law) (dictum),[32] these decisions only serve to illustrate the difficulty of imposing any meaningful limits on special factor enhancements that are based on a practitioner's specialization in a particular substantive area of the law.[33] Each of the areas of law identified by the Ninth Circuit undoubtedly presents complex issues that may best be handled by lawyers who specialize in the topic and who bring their substantive expertise to bear on the questions presented by a given case. That, however, is true for virtually any area of law, particularly those involving the intricate federal statutory schemes that typically give rise to cases covered by the EAJA.[34] If such practice specialties routinely are recognized as "special factors," then fee awards

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[32] Plaintiffs also cite Abela v. Gustafson, 888 F.2d 1258, 1261 (9th Cir. 1989), as an immigration case in which counsel were awarded $125 per hour due to "the expertise [of counsel] and complexity of the area of law involved." Apparently, the government did not challenge the amount of the award in the district court, and the appellate court refused to entertain the argument on appeal. The case cannot be read to support the proposition that the Ninth Circuit recognizes immigration law as a qualifying practice specialty under Underwood.

[33] Plaintiffs also cite De Allende v. Schultz, 709 F. Supp. 18 (D. Mass. 1989), as a case where an attorney was awarded $175 per hour for "constitutional law, scholar [sic] and litigation." Br. at 45. That decision was reversed on another ground by the First Circuit in De Allende v. Baker, 891 F.2d 7 (1st Cir. 1989), making it unnecessary for the appellate court to reach the special factor issue.

[34] The district court's finding that "Immigration law is a specialty area requiring an extensive and current knowledge of applicable statutes and regulations," App. 111, is equally true of many areas of law.

that are actually subject to the statutory cap imposed by Congress will indeed be rare.[35]

It was precisely to preclude the possibility that the trend toward specialization would result in a broadening of the circumstances under which the $75 cap would be exceeded that the Supreme Court in Underwood narrowly defined the exception for "limited availability of qualified attorneys" as referring to "an identifiable practice specialty such as patent law, or knowledge of foreign law or language." 108 S. Ct. at 2554. Each of these practice specialties requires skills or expertise above and beyond an attorney's knowledge of a particular area of the law.[36] See Waterman S.S. Corp. v. Maritime Subsidy Bd., 901 F.2d 1119, 1124 (D.C. Cir. 1990) ("We note that the two instances cited by Pierce v. Underwood * * * as 'identifiable practice special-

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[35] Indeed, in the legal profession today, specialization is commonplace. See Bates v. State Bar of Arizona, 433 U.S. 350, 403 n.13 (1977)("[w]ith the increasing complexity of legal practice, perhaps the strongest trend in the profession today is toward specialization."); Chief Justice William H. Rehnquist, Dedicatory Address: The Legal Profession Today, 62 Ind. L.J. 151, 153 (1987) (noting increasing specialization within the legal profession); Rollins, The Coming of Legal Specialization, 19 U. of Rich. L. Rev. 479 (1985) (same).

[36] A patent lawyer, for example, must typically have training in a scientific or technical area. See Sperry v. Florida, 373 U.S. 379, 384 (1963); 37 C.F.R. 10.7(a)(ii) (stating that practice before Patent and Trademark Office is limited to persons with the scientific and technical qualifications necessary to render patent applicants a valuable service). Similarly, experts in foreign law or a foreign language bring to their practice additional knowledge and skills that are qualitatively different from the expertise in a substantive area of the law. Clearly, the Supreme Court intended to distinguish these non-legal, technical or linguistic abilities from other types of substantive specialization now ubiquitous within the profession.

t[ies]' justifying awards in excess of the cap, 'patent law, or knowledge of foreign law or language,' are both specialties requiring technical or other education outside the field of American law.") (emphasis in original).

Finally, the fact that plaintiffs' counsel are board-certified in immigration and nationality law does not compel the conclusion that immigration law is the sort of specialty contemplated by Underwood. We have been advised by Texas Board of Legal Specialization that the State of Texas recognizes thirteen areas of specialization: labor; criminal; family; estate planning and probate; personal injury trial; civil trial; immigration and nationality; tax; real estate; bankruptcy; oil, gas and mineral; civil appellate and administrative law.[37] That Texas does so simply confirms our argument that there is a growing trend toward specialization in the legal profession.

B. The District Court Erred In Awarding A Cost Of Living Adjustment Based On Current Rates.

As previously noted, section 2412(d)(2)(A) permits a court to award more than $75 hour if it finds that an increase in the cost of living justifies a higher rate. In this case, the parties offered different indices by which to measure the increase in the cost of living.[38] The district court, finding it

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[37] See Article XII of the Texas Plan for Recognition and Regulation of Specialization in the Law.

[38] Plaintiffs advocated use of the Consumer Price Index (CPI). In its decision in Bode, this Court stated that a district court could not be faulted for using the CPI as an inflation index. Bode, 919 F.2d at 1044 n.8.

"unnecessary to determine which side presented the best economic evidence" because "[t]he proximity of the parties' figures, suggests that there is no longer a dispute as to an appropriate increase," App. 105, awarded plaintiffs $95 per hour for all hours expended. It rejected our argument that Library of Congress v. Shaw, 478 U.S. 310 (1986), precludes the award of current rates which is tantamount to an award of pre-judgment interest and, alternatively, held that the delay that had occurred (and could be expected to occur if the government were to lose on appeal) was unusual and constituted a special factor justifying the award of $95 for all hours.

In our opening brief in this appeal, we argued that, if this Court were to vacate and remand the fee award, it should instruct the district court not to reimpose the portion of the award granting $95/hour for all hours. Our point was (and is) not that a cost of living adjustment should not be made, but rather that it should be determined for each year in which compensable services were rendered ("historic rates").

In response, plaintiffs assert (Br. at 45) that the district court properly rejected our argument that Library of Congress v. Shaw precludes the award of current rates. They further argue that "EAJA cost of living adjustments are routinely awarded based on the current CPI index, e.g. Jean v. Nelson, supra at 773-774, without regard to the year legal services were performed." Id. at 46. Both of these arguments are meritless.

In Library of Congress v. Shaw, 478 U.S. at 314, the Supreme Court reaffirmed the long-standing principle that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." See also United States v. Louisiana, 446 U.S. 253, 264-65 (1980). The Supreme Court also observed that the "no-interest rule provides an added gloss of strictness" upon the equally well settled rules that waivers of sovereign immunity are to be strictly construed in favor of the sovereign and that such waivers are not be enlarged beyond what the language requires. Library of Congress, 478 U.S. at 318.

The Equal Access to Justice Act does provide, in 28 U.S.C. 2412(f), for the award of post-judgement interest, but only in certain circumstances.[39] Under Library of Congress, an award of pre-judgment interest is, therefore, impermissible. And that prohibition extends to any component of a fee award, regardless of how it is denominated, that serves the same purpose as pre-judgment interest. In Library of Congress, 478 U.S. at 321, itself the Supreme Court rejected the respondent's argument that

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[39] Specifically, 28 U.S.C. 2412(f) provides that:

> If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

the no-interest rule does not prohibit the award of compensation for delay, saying "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution."

Congress has, of course, provided for cost of living adjustments under section 2412(d) of the Equal Access to Justice Act. The way to maintain the integrity of section 2412(f) and the no-interest rule, while making the cost of living adjustments permitted by Congress, is to make the cost of living adjustment on a yearly basis, rather than a one-time calculation using current rates.

Requiring district courts to make cost of living adjustments for each year in which services were rendered properly comports with the principle that the EAJA, as waiver of sovereign immunity, must be narrowly construed. Moreover, it is also fully consistent with the twin purposes of the Act which this Court identified in Baker v. Bowen, 839 F.2d 1075, 1083 (5th Cir. 1988), where it stated that "[s]ection 2412(d) serves a dual purpose: to ensure adequate representation for those who need it and to minimize the costs to taxpayers." (Emphasis in original).

The cases cited by plaintiffs do not support their argument that EAJA cost of living adjustments are routinely awarded based on the current CPI index without regard to the year legal services were performed. In Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), for example, the court made only two holdings concerning cost of living adjustments: 1) that district courts should describe mathematically all cost of living adjustments

under the Act; and 2) that EAJA's 1985 reenactment does not bar cost of living adjustments for services rendered prior to 1985. The court did not specifically address the historic v. current rates issue. Its instruction, id. at 773, that "[o]n remand, the district court shall quantify and explain all cost of living adjustments in favor of each of the plaintiffs' attorneys," does, however, suggest that the appellate court contemplated that more than one adjustment would be made for each attorney; in other words, that historic rates would be used.

Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) (a voting rights case), and Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (an antitrust action), are inapposite because they did not concern fee awards against the federal government.

While Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), did involve the United States, it is distinguishable because it was a Title VII case against the Department of Labor, in which the main issue was "the standards to be applied in awarding attorney's fees in Title VII suits against the government." 641 F.2d at 884.

State of Louisiana Ex Rel Guste v. Lee, 853 F.2d 1219 (5th Cir. 1988), was a case involving a fee award under section 2412(d). All that this Court said about cost of living increases was: "[t]he plaintiffs also persuasively argue that the district court made a miscalculation in denying two attorneys cost of living adjustments. Again, in Baker v. Bowen, this Court held

that 'consistent with the great weight of authority ... the cost-of-living adjustment of $75 an hour should be measured from the date of enactment of the EAJA in 1981 not the reenactment in 1985. The district court erred when it made the opposite determination." 853 F.2d at 1226 (footnote omitted). Nothing in either Guste (or Baker v. Bowen for that matter) indicates that this Court squarely confronted the current v. historic rates issue.

While it is true that the Third Circuit awarded $87.35 for all 13.5 hours claimed in Allen v. Bowen, 821 F.2d 963, 968 (3d Cir. 1987), there was no analysis of the historic/current rates issue in that decision. In any event, given the small number of hours claimed in that case, it can hardly be read to stand for the proposition that in litigation involving many hours expended over many years, "current rates" may be awarded. The real issue in that case was whether the change in the cost of living should be measured from 1981, when EAJA was first enacted, or 1985, when the Act was reenacted (with some amendments).

As previously noted, the district court also based its decision to award current rates on what it characterized as the unusual delay involved in this case, relying on Wilkett v. Interstate Commerce Commission, 844 F.2d 867, 876 (D.C. Cir. 1988).[40] First, to the extent that Wilkett stands for the

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[40] In Pollgreen v. Morris, 911 F.2d 527 (11th Cir. 1990), the Eleventh Circuit addressed the delay issue saying, "[t]he government's delay in litigating a case is a permissible special factor only when the motivation for the delay was improper or the (continued...)

proposition that "unusual delay" can constitute a special factor justifying one cost of living adjustment for all hours expended, it amounts to an end run of the no-interest rule in Library of Congress, and is therefore bad law.[41] Furthermore, since court dockets are commonly crowded, delay is simply not so unusual. To award current rates for delay thus violates the teaching in Pierce v. Underwood, that "special factors" cannot be of "broad and general" application. Underwood, 108 S. Ct. at 2554. In any event, Wilkett is not controlling precedent.

Moreover, even if "delay" can be a special factor in some cases, it cannot justify the award of current rates in this case. In Wilkett, the plaintiff filed his fee application in 1983, but, due to a clerical error, the panel which had heard the appeal, was not notified of the fee application until four years later.[42]

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[40](...continued)
length of the delay itself was inappropriate." Id. at 537. It cautioned, however, that a "delay that occurred because the government litigated a position that lacked substantial justification is not a permissible special factor because any litigation eligible for EAJA fees, by definition, involves the government's pursuit of an unjustified position." Id. at 538 (footnote omitted). In any event, there is no basis for a Pollgreen-type delay enhancement (by awarding a cost of living increase at current rates or otherwise) in this case.

[41] The same can be said of the prior D.C. Circuit cases upon which Wilkett was based: Hirschey v. FERC, 777 F.2d 1 (D.C. Cir. 1985) and Action on Smoking & Health v. CAB, 724 F.2d 211 (D.C. Cir. 1984).

[42] The district court ignored the fact that Wilkett involved solely the delay in the fee portion of the case. His opinion discusses length of all of the litigation in this case.

The Wilkett court recognized that only truly unusual delay can justify an enhancement:

> We emphasize, however, that no adjustment of the $75 cap other than that necessary to compensate for an increase in the cost of living is available in routine cases. Some delay in payment is inevitable given the strain under which almost all courts labor. The normal delay attendant on litigation of a fee request can hardly be called a 'special factor.' Nor will we permit an increase in the cap in every instance where there has been a delay in payment that is unusually long.

844 F.2d at 876 (emphasis in original).

In this case, the district court appears to have based its finding of "unusual delay" on its prediction that we would lose on the merits appeal and then take the case to the Supreme Court (see App. 106). Of course, as this Court well knows, we were fully successful on our appeal in this case. We cannot be penalized for exercising our right to appeal.[43]

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[43] Moreover, as we stated in our opening brief, part of the delay in this case was due to the claims being asserted by plaintiffs. Had they limited their claims to a challenge to INS' failure to adjudicate, this litigation would probably have ended a lot sooner.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order awarding plaintiffs fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412, or, in the alternative, vacate the order and remand the case to the district court for reconsideration of the fee award in light of the Court's decision in Perales v. Casillas, 903 F.2d 1043 (5th Cir. 1990).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1991, I served the foregoing Reply and Responsive Brief for the Appellants/Cross-Appellees by causing copies to be sent by overnight delivery to:

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