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CV 02-02304 #0000005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YUSUF ALI ALI, et al ,

Petitioners,

v

JOHN D ASHCROFT, et al.,

Respondents

No. C02-2304P

ORDER ON PETITIONERS' MOTION FOR ATTORNEY'S FEES

This matter comes before the Court on Petitioners' Motion for Attorney's Fees and Costs under the Equal Access to Justice Act ("EAJA"), 28 U S C § 2412 (Dkt No 50) Petitioners are Somali nationals who moved this Court for an order enjoining the Immigration and Naturalization Service ("INS") from deporting them (and others similarly situated) to Somalia and a declaration that the INS did not have the statutory authority to do so This Court, by order of January 17, 2003, granted the requested relief on a class-wide basis, and on request of the parties, made the injunction permanent The Court also ordered three of the four named Petitioners released pursuant to the Supreme Court's directive in Zadvydas v Davis, 533 U S 678 (2001) The Government appealed that decision to the Ninth Circuit Court of Appeals, and the matter is currently pending

Petitioners now bring this motion seeking an award of attorney's fees and costs as the "prevailing party" under the EAJA. The Government to date has not opposed this motion on the merits, but asserts that the motion is not yet timely because of the pending appeal The Government therefore argues that an award of fees and costs would be premature. Having carefully considered the papers and pleading submitted by the parties, the Court holds that the motion is timely Further,

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because the Government carries the burden of establishing that its litigation position was substantially justified and has chosen not to address the merits of the fee petition, the Court finds the motion unopposed, and GRANTS the petition for an award of fees.

BACKGROUND

Petitioners move for an award of attorney's fees under the Equal Access to Justice Act, 28 U S C § 2412. In support of that motion, petitioners submit an affidavit from one of the attorneys working on the case, attesting to the hours worked by the various other attorneys and nonattorneys for the petitioners The affidavit provides the total number of hours worked by each person and a brief description of the issues researched work performed by each attorney The total number of hours claimed is 953 1 hours of attorney time and 107 15 hours of paralegal and assistant time At a rate of $125 per hour of attorney time, and between $47 and $125 per hour of paralegal/assistant time, the total amount requested is $146,873 11

Respondents presently defend on only one ground that the request for fees under the EAJA is premature Respondents argue that a successful litigant has a 30-day "window" in which to file a request for fees, and that that window does not begin until judgment has become final and is no longer appealable Therefore, Respondents move this Court to dismiss the EAJA motion for lack of jurisdiction, or in the alternative to hold the motion in abeyance pending appeal Respondents do not make any arguments concerning its position as being "substantially justified," nor do they presently dispute any of the fee claims. Respondents do, however, request that if its motion to dismiss the EAJA claim and motion to hold EAJA motion in abeyance are both denied, that they be afforded more time to respond to the substance of the motion, citing the need to spend time working on the present appeal and "other litigation matters." No competent affidavit was submitted attesting to what "other litigation matters" were so demanding of counsel's time

Moving to the petitioners' motion, the precise issue that the Court must first address is to define the time at which the period begins that a prevailing party may file a motion for fees and costs under the EAJA In other words, the Court must decide whether the EAJA establishes a fixed

window in which a prevailing party must file an application for fees, or a deadline by which the party must file Because the Court determines that a deadline is established and that the application for fees is therefore timely, the Court then considers the underlying claim with respect to the substantial justification issue and the affidavit submitted in support of the application, and GRANTS the motion

ANALYSIS

1 Timeliness

The EAJA provides for an award of attorney's fees in cases litigated against the Federal Government Specifically, the EAJA provides.

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust
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> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed The party shall also allege that the position of the United States was not substantially justified Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought

28 U.S C § 2412 (2002) (emphasis added) "Final judgment" is defined as "a judgment that is final and not appealable " Id at § 2412(d)(2)(G)

At first glace, the language "within thirty days" may appear to imply that an application for fees must be made during a fixed window of time beginning when an action can no longer be appealed – 30 days after judgment is entered by a district court if that judgment is not appealed, or 90 days after judgment is entered by a circuit court if the Government does not file for a writ of certiorari Yet courts that have examined the legislative history of the act and its 1985 amendments

have come to the contrary conclusion, that the EAJA establishes a deadline for filing fee requests, not a fixed window during which they must be filed This appears to be an unresolved issue in the Ninth Circuit

Prior to the amendments to the act, a circuit split existed as to whether the 30-day deadline for filing a fee application commenced upon a final but appealable order of the district court, McQuiston v Marsh, 707 F 2d 1802 (9th Cir 1983), or not until the expiration of the time for appeal or the completion of any appeal taken Mass Union Public Housing Tenants v Pierce, 755 F 2d 177 (D C. Cir 1985), McDonald v Schweiker, 726 F 2d 311 (7th Cir 1983) Congress resolved the difference of opinion by clearly defining "final judgment" as "a judgment that is final and not appealable " Pub.L No 9980, § 2, 99 Stat. 185 (Aug. 5, 1985) In enacting the amendments, Congress expressly stated its intent to "ratify the approach taken by the courts" in McDonald and Mass Union. Cervantez v Sullivan, 739 F Supp 517, 519 (E D. Cal. 1990) citing H R. Rep No 99-120, 99th Cong , 1st Sess , U.S Code Cong & Admin News 1985, at 132.

Thus, it is clear that the EAJA establishes a deadline after which an application for fees is time-barred, occurring 30 days after judgment is entered by a district court if the action is not appealed, or 90 days after judgment is entered by a circuit court if the Government does not file for a writ of certiorari Al Harbi v INS, 284 F 3d 1080, 1084, 1086 (9th Cir. 2002) Yet McDonald also noted that "the 30-day provision in the Act was meant to establish a deadline, not a starting point " 726 F.2d at 314 At least two courts have adopted this rationale after the amendments took effect Utu Utu Gwaitu Paiute Tribe v DOI, 773 F Supp 1383 (E D. Cal 1991), Cervantez v Sullivan, 739 F Supp 517 (E.D. Cal 1990)

A recent circuit court decision also sheds light on this issue In Adams v SEC, 287 F 3d 183, 186-89 (D.C. Cir. 2002), the court interpreted § 504 of the EAJA, the parallel attorney's fees provision applicable in administrative proceedings, to also establish a "deadline" for filing for fees of 30 days after an administrative order is no longer appealable In doing so, the court analogized § 504 to § 2412, and found McDonald to be persuasive authority. The court found that having a deadline

by which the prevailing party could file a single application for fees would reduce the costs to that party Yet the court acknowledged that

> Even if EAJA may still allow the filing of two applications by reading EAJA's 30-day period as not a window for filing, but rather merely as a deadline for filing, allowing the applicant to choose when to file does not disadvantage the government "[G]iving the claimant a choice whether to ask for fees after he wins in the district court or after the appeal maximizes his welfare, at some cost perhaps to the courts but none we can think of to the executive branch "

Adams, 287 F 3d at 188 (emphasis in original), citing McDonald, 726 F 2d at 314-15

The Court finds the above rationale persuasive. There is no disadvantage to allowing a prevailing party to apply for fees along the way, each time it prevails In general, it would appear that allowing for application of fees immediately after a district court issues its judgment would tend to promote judicial efficiency, since any fee award or denial thereof could be addressed immediately and contemporaneously with the merits, if even by way of separate appeal. The Court concludes that the EAJA does not create a fixed window during which all fee applications must be filed, but rather a deadline before which such applications must be filed The choice of whether to file for an award of fees as the case proceeds in the appellate process or to wait until all litigation has ceased should be left to the litigant

The Supreme Court's decision in Melkonyan v Sullivan, 501 U S 89 (1991), and related cases do not compel a different result Those cases clearly hold that a prevailing party may choose to wait until the end of the litigation to apply for fees and costs at all levels at which he or she prevailed Id. at 96 Yet nothing in those decisions precludes the prevailing party from filing separately at each level as the litigation proceeds A filing deadline was established, not a filing window

2. "Substantially justified"

"[A] court shall award to a prevailing party . fees and other expenses . incurred by that party in any civil action . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified " 28 U S C § 2412. Although a prevailing party must allege in its motion that the Government's

position was not substantially justified, the Government bears the burden of showing substantial justification Edwards v McMahon, 834 F 2d 796, 802 (9th Cir 1987)

The Court considers the issue of substantial justification to be unopposed for several reasons First, the Local Rules of the Western District of Washington set forth clear deadlines for pleadings submitted on motions on the Court's calendar Local Rule CR 7(d)(3), under which the present motion was properly noted, requires that "[a]ny opposition papers shall be filed and served not later than the Monday before the noting date " If more time is required to respond to a motion, the opposing party has the option of filing a "motion for relief from a deadline or limit imposed by an order, federal rule or local rule." Local Rule CR 7(d)(2)(A) Such a motion would be noted on the Court's calendar for consideration seven days after its filing date In the present case, the Government filed a timely response to the motion, but rather than address the merits of the motion or move the Court for a continuance, it chose to argue solely that the motion was untimely The Government then asked that it be given another opportunity to address the merits of the motion should the Court decide that the motion was timely No motion for leave of court was filed, no motion for relief from a deadline was noted on the Court's calendar The Court has no sympathy for such complete disregard for the Local Rules of this district To allow such a tactic to succeed would invite chaos, civil litigants could simply choose not to respond to arguments whenever they were too busy in their law practices to comply with the Local Rules, expecting to get another chance to argue if their primary argument did not succeed This approach would not be countenanced with any other represented litigant before this Court, and it will not be countenanced here

Second, the Local Rules provide that "[i]f the motion requires consideration of facts not appearing of record, the movant shall also serve and file copies of all affidavits, declarations, photographic or other evidence presented in support of the motion " Local Rule CR 7(b)(1) Respondents assert that their "opening brief in the Ninth Circuit [in the appeal of this case] is due on or before March 21, 2003, and the time of undersigned counsel must be directed toward writing the brief as well as handling other litigation matters " Opp at 6 Even if demands on counsel's time

were a legitimate excuse for not addressing the merits of a motion properly before the Court, Respondents put forth no affidavit or declaration of counsel attesting to what "other litigation matters" are so pressing.

Third, it is well-established that failure to argue an issue in one's brief constitutes waiver of that issue Jones v Wood, 207 F 3d 557, 562 n 2 (9th Cir 2000) (failure to argue an issue in an opening brief constitutes waiver), Bazauye v. INS, 79 F 3d 118, 120 (9th Cir 1996) (issues raised for the first time in reply brief are waived) Further, issues raised in a party's brief but not specifically argued are likewise deemed abandoned Acosta-Huerta v Estelle, 7 F 3d 139, 144 (9th Cir. 1992) (failure to argue reasons for new trial and severance of charges constituted waiver of those arguments). Here, the Government has failed to put forth any argument on the issue of substantial justification of its positions in the underlying case, those arguments are therefore deemed waived As the Government bears the burden of showing substantial justification, the Court considers the assertion of petitioners to be unopposed, and grants the motion on this issue

In any case, a brief review of this Court's order of January 17, 2003, demonstrates that, taken as a whole, the underlying position of the agency and the Government's litigation position were not substantially justified First, this Court found that every source of law presented by the parties contradicted the INS' legal position regarding its interpretation of the relevant statute, including the "structure of the statute, the relevant case law, the legislative history of the precursor statute, [and] international law," and that Petitioners' reading was "the only interpretation that would give effect to all sections of the statute " January 17, 2003 Order at 19 Second, prior to this action Respondents had twice litigated these same statutory issues unsuccessfully Jama v. INS, 2002 WL 507046 (D Minn March 31, 2002) (Tunheim, J); Farah v INS, 2002 WL 31866481 (D Minn Dec 20, 2002) (Frank, J.) Third, where an agency's position violates its own regulations, the position is not substantially justified Gutierrez v. Barnhart, 274 F 3d 1255, 1258 (9th Cir 2001) This Court has already found that Respondents' litigation position is inconsistent with its own regulations January 17, 2003 Order at 17-18 Finally, Respondents' decision not to release the identities and locations of

the members of petitioners' class was not substantially justified, making class certification necessary in order to "address[] the problem of interstate transportation of individuals subject to final orders of removal and the corresponding difficulty in obtaining counsel." Id at 24

3 Petitioner's "itemized statement"

An affidavit submitted in support of a motion for fees and costs under the EAJA must include an "itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed " 28 U S C § 2412(d)(1)(B) The Supreme Court has observed that. "[t]here is no precise rule or formula for making fee determinations under EAJA The District Court may attempt to identify specific hours that should be eliminated The court necessarily has discretion in making this equitable judgment " Hensley v. Eckerhart, 461 U.S 424, 434-37 (1983)

First, for the reasons stated above, the Court finds the itemized statement to be unopposed

Next, the Court finds the statement submitted by Petitioners does contain the "actual time expended" and the "rate at which the fees were computed." The Court notes that the rate charged by Petitioners' counsel was the statutory rate of $125, pursuant to 28 U.S C § 2412(d)(2)(A), which counsel states is far below normal billable rates charged to private clients The declaration submitted by counsel indicates each attorney's area of work, as well as a statement of actual time expended by each attorney to the tenth of an hour The requirements of the statute having been met, and there being no opposition, the Court hereby GRANTS the motion for attorney's fees in the amount of $119,137.50 The Court finds this amount to be reasonable in light of the complexity of the litigation and the quality and thoroughness of the work performed

Next, work done by paralegals and legal assistants can be compensable under the EAJA See Krecioch v United States, 316 F.3d 684, 687 (7th Cir 2003). "The Supreme Court, and lower courts, have approved the inclusion of fees for paralegals, law clerks, and law students, in fee awards

under EAJA or analogous fee-shifting statutes, on the theory that their work contributed to their supervising attorney's work product, was traditionally done and billed by attorneys, and could be done effectively by nonattorneys under supervision for a lower rate, thereby lowering overall litigation costs." Cook v. Brown, 68 F.3d 447, 453 (Fed. Cir. 1995), citing Missouri v. Jenkins, 491, U.S. 274, 288 n.10 (1989). However, paralegal and assistant work is normally only compensable when the work was that "traditionally done by an attorney." Hyatt v. Barnhart, 315 F.3d 239, 255 (4th Cir. 2002), Celeste v. Sullivan, 988 F.2d 1069, 1070 (11th Cir. 1992).

The declaration submitted attests to specific tasks performed by Ms. Kathy Riley, the lead paralegal who worked on this case, including the collection and organization of materials from other jurisdictions, as well as organization of cases, statutes and regulations and other materials. Gellert Decl. at 5. These tasks can be said to have been traditionally done and billed by attorneys. However, given that the justification for allowing such compensation is the lowering of overall litigation costs, the Court finds that the proposed rate is unreasonable, and lowers the rate to $65 per hour. Therefore the total amount of compensation for Ms. Riley's time is 145.6 hours x $65/hour = $9464. As to the other paralegals working on this case, not enough information is provided for the Court to determine whether the tasks performed were traditionally those done and billed by attorneys. These amounts are therefore DENIED.

Finally, costs are requested in the amount of $847.96. The Court finds these costs to be reasonable, and therefore GRANTS the request.

CONCLUSION

In light of the legislative history of the EAJA and the relevant case law, the Court holds that Petitioners' application for fees is timely. As the merits of the motion were not opposed by Respondents, the Court hereby GRANTS the motion. Fees and costs are awarded in the total amount of $129,449.46.

The Clerk is directed to send copies of this order to all counsel of record

Dated May 24, 2003

Marsha J Pechman
United States District Judge