

No. 05-00000

(Agency No. A00 000 000)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSE FULANO DE TAL,

Petitioner,

v.

ALBERTO GONZALES, Attorney General of the United States,

Respondent.

PETITIONER’S MOTION FOR ATTORNEY’S FEES

Petitioner Jose Fulano de Tal, through counsel, seeks recovery of fees and costs pursuant to Circuit Rule 39-1.6 and the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), for time reasonably expended and expenses incurred challenging the Board of Immigration Appeals’ (“BIA”) summary affirmance of the Immigration Judge’s order denying his application for asylum, withholding of removal and relief under the Convention Against Torture. Petitioner is a prevailing party, the position of the government was not substantially justified, and the fees requested are reasonable.

1. This fee request is timely.

A party seeking attorney's fees and other expenses must file the application within "thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). Congress amended the EAJA in 1985 to define "final judgment" as a "judgment that is final and *not* appealable." Al-Harbi v. INS, 284 F.3d 1080, 1082 (9th Cir. 2002), *quoting* 28 U.S.C. § 2412(d)(2)(G). In the present case, this Court granted the petition for review and remanded the matter on May 23, 2007. The matter became final and not appealable 90 days later on August 21, 2007. This motion is filed within 30 days from that date, and is therefore timely. This information is provided in compliance with Circuit Rule 39-1.6(b)(3).

2. Petitioner meets the requirements for an award of EAJA fees.

To qualify for an EAJA award, petitioner must first establish that he is the prevailing party. 28 U.S.C. § 2412(d)(1)(B)(2005). At that point, the burden shifts to the government, which may avoid fees only if it can show that its pre-litigation conduct and its litigation position were both "substantially justified." 28 U.S.C. § 2412(d)(1)(B), (2)(D). As demonstrated below, petitioner is indisputably the prevailing party and the government cannot meet its "heavy burden" of demonstrating "substantial justification."

A. Petitioner is Prevailing Party.

A “prevailing party” is one who “has been awarded some relief by a court.” Bukhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 603 (2001). Petitioner is a prevailing party because he received the relief he sought, namely the granting of his petition for review and a remand of the matter to the BIA.

B. The government’s position was not substantially justified.

Unless the government can prove that its position was “substantially justified,” EAJA fees must be awarded. Congress placed a heavy burden of proof on the government to demonstrate that its position was substantially justified. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13-4 (1980); Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001), *citing* Meinhold v. U.S. Dep’t of Defense, 123 F.3d 1275, 1277 (9th Cir.), *amended by* 131 F.3d 842 (9th Cir. 1997).

“‘Substantial justification’ is equated with ‘reasonableness.’ ... The government’s position is ‘substantially justified’ if it ‘has a reasonable basis in law and fact.’”

Thangaraja v. Gonzalez, 428 F.3d 870, 874 (9th Cir. 2005) (*quoting* Ramon-Sepulveda v. INS, 863 F.2d 1458, 1459 (9th Cir. 1988) (*quoting* Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988))). In determining whether the

government met its burden, this Court must consider, first, the reasonableness of the underlying government action at issue, and second, the reasonableness of the position asserted by the government in defending the validity of the action in court. 28 U.S.C. § 2412(d)(2)(D)(2005); Al-Harbi v. INS, *supra*, 284 F.3d at 1094.

In the present case, the Court found that the Immigration Judge did not provide a specific and cogent basis for her adverse credibility determination regarding the omission in Petitioner's initial asylum application, and further found that the IJ's remaining adverse credibility findings were not supported by substantial evidence. Fulano de Tal v. Gonzales, 2007 WL 0000000 (9th Cir., May 23, 2007). As in Thangaraja v. Gonzales, *supra*, 428 F.3d at 874, the Court's holding that the agency's decision

was unsupported by substantial evidence is therefore a strong indication that the 'position of the United States' in this matter was not substantially justified. Indeed, it will be only a 'decidedly unusual case in which there is substantial justification under the EAJA even though the agency's decision was reversed as lacking in reasonable, substantial and probative evidence in the record.'

428 F.3d at 874 (citing Al-Harbi, *supra*, 284 F.3d at 1085). As in Thangaraja, the government's litigation position was to defend the IJ's credibility findings without reference to controlling case law. See 428 F.3d at 875. Because the government's litigation position was essentially identical to the position advanced by the IJ in her

decision, the government cannot meet its burden of demonstrating substantial justification.

C. There are no special factors that warrant denial of fees in this case.

While it is the government's burden to demonstrate the existence of any special factors, Petitioner is not aware of any factors that would suggest that attorney's fees be denied in this case.

D. Petitioner meets the net worth requirements.

Petitioner is an individual who at all times has had a net worth of much less than two million dollars. See Declaration of Petitioner, attached. He is therefore eligible pursuant to EAJA's net worth requirements.

3. The hours claimed by Petitioner, and the hourly rates, are reasonable.

Petitioner seeks an award of fees for the work of two attorneys, Christopher J. Todd and Carter C. White. Mr. Todd has represented Petitioner in this Court since June 2006. He prepared and filed Petitioner's Substitute Opening Brief in October 2006, and Petitioner's Reply Brief in January 2007. Mr. White prepared this motion for attorney's fees.

Petitioner has submitted time records documenting the time that the attorneys have spent working on his case. The hours requested are reasonable. A

portion of the fee request represents time spent in preparing this fee application. These are also reimbursable. Commissioner, INS v. Jean, 496 U.S. 154 (1990).

Petitioner's attorneys seek compensation at the standard hourly rate under the EAJA, adjusted for inflation. The inflation adjustment in this case requires an inquiry into the cost of living increase since March 1996 when EAJA was last amended and the statutory rate, prior to any adjustment, was changed from \$70/hr to \$125/hr. Rueda-Menicucci, 132 F.3d at 496; Lucas, 63 F.Supp.2d at 1060. The statutory cap is adjusted by the change in the Consumer Price Index for urban consumers ("CPI-U") using the appropriate regional category. United States v. Real Property Known as 22249 Dolorosa Street, 190 F.3d 977, 984 (9th Cir. 1999)(using the regional CPI-U to calculate cost of living adjustment). As set forth in Ramon-Sepulveda v. INS, 863 F.2d 1458, 1463 n.4 (9th Cir. 1988), the increase is determined by the following equation: $125 \text{ (current statutory rate)} \times \frac{\text{CPI-U}}{\text{March 1996 CPI-U}}$. The cost of living adjustment applies to each year in which the work was performed. Sorenson v. Mink, 239 F.3d 1140, 1148-49 (9th Cir. 2001). This Court has published on its website a schedule of appropriate hourly rates for attorney's fees under the EAJA for recent years.¹ Petitioner

¹[http://www.ca9.uscourts.gov/ca9/documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/d8b56f883da91ebd88257266005db186/\\$FILE/EAJ_Act_rates.pdf](http://www.ca9.uscourts.gov/ca9/documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/d8b56f883da91ebd88257266005db186/$FILE/EAJ_Act_rates.pdf)

submits this application at the 2006 rate of \$161.85, as the bulk of the work was done during that year and the rate for 2007 would be at least that amount.

The declarations of each of Petitioner's counsel are attached. The total award sought, is compensation for 24.6 hours for the work of Mr. Todd and 7.0 hours for the work of Mr. White, \$3,981.51 and 1132.95, respectively, or a total of \$ 5,114.46 at this point. Additional fees will be requested if respondent opposes the motion and petitioner's counsel needs to spend time on a reply.²

V. CONCLUSION

This case presents precisely the type of circumstance which EAJA intended to address and for which petitioner, as a prevailing party, is entitled to compensation. For the reasons set forth in this motion, the award should be in the amount requested, namely \$ 5,114.46.

Dated: September 19, 2007

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²Should the government oppose this motion, Petitioner reserved the right to amend this request to not only include any additional time, but to recalculate the 2007 hours at the slightly higher hourly rate.

List of Exhibits

1. Declaration of Petitioner
2. Declaration of Christopher J. Todd (with time sheet)
3. Declaration of Carter C. White (with time sheet)
4. Ninth Circuit Form AO 291

Certificate of Service

I certify that on this ____ day of September, 2007, I sent a true copy of
this motion to counsel for Respondent, as follows:

Carol Federighi, Esq.
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