



## REQUESTING ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

### PRACTICE ADVISORY<sup>1</sup>

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## I. INTRODUCTION

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 *et seq.*, authorizes payment by the government of attorneys' fees and costs for successful federal court litigation against the government. A successful litigant who establishes eligibility under EAJA is entitled to a fee award for litigating both the case and the fee motion. Fees and costs under EAJA are assessed without regard to whether or how much money, if any, the client actually paid his or her attorney. As such, attorneys who take cases on a pro bono or "low bono" basis may seek reimbursement under EAJA.

This advisory discusses the deadline for filing an EAJA motion and the statutory requirements for eligibility. In addition, the advisory addresses procedural and substantive aspects of filing an EAJA motion, including assignment of fees to counsel and documenting and calculating fees.

Highlights of this advisory include:

### **Preparing for Filing an EAJA Motion Even Before Commencing Litigation**

- Attorneys should have a written agreement with their clients (and co-counsel, if any) regarding assignment of fees in the event of a court award or settlement at the outset of representation. EAJA fees and costs belong to the client, not the attorney, absent a representation agreement to the contrary.
- Attorneys should keep contemporaneous time records with descriptive billing entries for all time spent by attorneys, paralegals, and law clerks preparing for and litigating the case and an itemization and description of all costs incurred.
- Although EAJA does not require it, it may be advisable to state in an initial pleading or brief that attorneys' fees will be requested under EAJA.

### **Assessing Eligibility and Filing an EAJA Motion after Winning in Federal Court**

- Any EAJA motion must be filed within 30 days of entry of final judgment in the action, i.e., within 30 days after the expiration of time for filing an appeal, or, if an appeal is filed, within 30 days of entry of final judgment by the court of appeals or Supreme Court.
- The fee motion must establish that the petitioning party has met the appropriate net worth requirements.
- The fee motion also must establish that the petitioning party is a prevailing party. A prevailing party is one who demonstrates that she achieved a "material alteration of the legal relationship of the parties" and a "judicial imprimatur on the change." *Buckhannon Bd. Care & Home Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-605 (2001). Examples of court orders that confer prevailing party status are merits judgments, court-ordered consent decrees, and orders that serve as the equivalent of consent decrees.

- The motion should allege that the pre-litigation *and* litigation positions of the government were not substantially justified, although the court need only find that one position was not substantially justified to award fees. The motion must also allege that there are no special circumstances that would make an award unjust.
- The fee motion must include a statement of the total amount of fees and costs requested along with an itemized account of time expended and rates charged.
- If seeking fees for work performed in more than one court (i.e., district court and court of appeals), attorneys should check the relevant case law and local court rules to determine where to file the motion.

## **II. PROCEDURAL REQUIREMENTS**

### **A. Overview of the Components of an EAJA Motion**

A motion for fees and costs under EAJA should include the following:

- A written motion explaining why the client is statutorily eligible (Part V)
- A signed declaration executed by each named party attesting that he/she met the appropriate net worth requirements at the time the action was filed and attesting to assignment of fees and costs to counsel (Parts V.D and VII and sample declaration)
- Contemporaneous time records and description of costs (Part II.B.)
- Evidence of the formula used to calculate the requested fee award (Part VI)

In addition, the motion may include:

- An application form, if required by local rule
- Evidence of prevailing market rates for paralegal or law clerks in the relevant area (Part VI.C)
- Evidence of prevailing market rates for attorneys claiming enhanced rates based on specialized knowledge (Part VI.B)

Before filing an EAJA motion, attorneys should have a clear, written agreement with their client (and co-counsel) regarding who is entitled to the fees in the event of a court award or settlement. Ideally, this agreement is reached at the outset of the attorney-client relationship. Fees belong to the client absent a representation agreement to the contrary.

## B. Documenting Fees and Costs<sup>2</sup>

### 1. Compensable Work

In general, fee-shifting statutes like EAJA compensate for time that is “reasonably expended *on the litigation.*” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). In preparing the fee request, the petitioning party is expected to exercise “billing judgment,” *i.e.*, to “make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.” *Id.* at 434.

The initial work performed before the immigration agencies, the immigration court, or the Board of Immigration Appeals (BIA) is not compensable.<sup>3</sup> However, requesting compensation for time preparing litigation is permissible. The Supreme Court has expressly approved compensation for time spent drafting the initial pleadings and developing the theory of the case. *Webb v. Bd. of Educ.*, 471 U.S. 234, 243 (1985).<sup>4</sup>

A petitioning party who has established eligibility for a fee award is entitled to recover “fees on fees.” In other words, the party is entitled to compensation for time reasonably expended on litigating the fee motion. *Comm’r, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 163-165 (1990).

### 2. Keeping Contemporaneous and Detailed Time Records

The EAJA fee applicant bears the burden of documenting fees and costs. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). A fee award may be reduced for non-contemporaneous, insufficient or inadequate documentation. For this reason, it is best to keep contemporaneous time records indicating: (1) the date; (2) the identity of the timekeeper; (3) a description of the specific task performed; and (4) the amount of the time spent on the task.<sup>5</sup> Avoid grouping tasks together.

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<sup>2</sup> The Administrative Conference of the United States has information available online regarding amounts awarded under EAJA in a variety of cases. See Administrative Conference of the United States, *Background About EAJA* (last visited Aug. 10, 2020), <https://www.acus.gov/eaja/background>.

<sup>3</sup> See *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 134-35 (1991); *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989). Since *Ardestani*, courts only have allowed recovery of fees for administrative proceedings where there was a court-ordered remand and counsel’s representation was required to effectuate the court’s remand order. See *W. Watersheds Project v. U.S. Dep’t of the Interior*, 677 F.3d 922, 926-29 (9th Cir. 2012); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887-88 (8th Cir.1995).

<sup>4</sup> *But see LaPointe v. Windsor Locks Bd. of Educ.*, 162 F. Supp. 2d 10, 18 (D. Conn. 2001) (reducing fee award for pre-litigation time spent in telephone conferences with client and co-counsel, drafting file memos, drafting client correspondence because, that court concluded, “none of these activities were actually spent ‘on the litigation’”).

<sup>5</sup> The failure to contemporaneously document time may result in a reduction or disallowance of EAJA fees. See *Hensley*, 461 U.S. at 438 n.13 (upholding district court’s reduction of one attorney’s hours to account for his failure to keep contemporaneous time

Include some detail when describing the specific task performed. For example, instead of “research and drafting legal brief or motion,” one might write “research for opening brief” or “drafting habeas petition.”<sup>6</sup>

Maintain a list containing the date and description of all costs stemming from the litigation, including, for example, filing fees, long-distance telephone and facsimile charges, messenger/courier fees, computer research, and expert witness fees.

Itemize the fees and costs incurred. This will assist the court in determining whether the hours and costs claimed are reasonable for the work performed. Thus, an EAJA fee application should include a tally of the total number of hours expended on the litigation by each timekeeper, the total amount of costs, and the total amount of combined fees and costs requested.

### **3. Defending Against Allegations of Improper Time Records**

Once an EAJA fee application is filed, the government’s response often raises objections to billing entries that it deems to be vague, imprecise, or duplicative. The government will usually request that the court remedy the alleged impropriety by reducing any fee award in the exercise of discretion.

Case law addresses the degree of specificity required for billing records and whether the records, taken in context, are sufficient to identify the substance of the work done.<sup>7</sup> In addition, presenting documentary or testimonial evidence from qualified attorneys who have reviewed the billing records and can attest that the records comport with general standards of timekeeping may rebut the government’s allegations of vague or non-descriptive billing records.

Courts generally recognize the need for multiple attorneys to prepare briefs to ensure timely filing, share information, assign responsibilities, and plan strategy.<sup>8</sup>

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records); *see also* *Castaneda-Castillo v. Holder*, 723 F.3d 48, 79-79 (1st Cir. 2013) (“Records that include the different tasks each attorney performed, the total number of hours billed, the billing rate for those hours, the date on which each tasks was performed, and the amount of time spent on each task generally fulfill [the EAJA] requirement.”); *Scott v. City of New York*, 626 F.3d 130, 133 (2d Cir. 2010) (“[A]bsent unusual circumstances attorneys are required to submit contemporaneous records with their fee applications.”). *But see* *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (and cases cited therein) (finding that district court abused discretion denying fee request “summary compiled from time slips” and that contemporaneous time records are preferred, but not “absolutely necessary”).

<sup>6</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (“Plaintiff’s counsel . . . is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures.”).

<sup>7</sup> *See, e.g., Castaneda-Castillo v. Holder*, 723 F.3d 48, 79 (1st Cir. 2013).

<sup>8</sup> *See, e.g., Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008); *Berberena v. Coler*, 753 F.2d 629, 633-34 (7th Cir. 1985); *Catanzano v. Doar*, 378 F. Supp. 2d 309, 323 (W.D.N.Y. 2005); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986).

However, the government often contests a claimed EAJA fee based on duplication, overbilling, or may request that the court reduce the award in the exercise of discretion. Reductions for alleged duplication, however, are appropriate “only if the attorneys are *unreasonably* doing the *same* work.”<sup>9</sup> The burden is on the government to show specific instances of duplication or unreasonableness.<sup>10</sup>

### III. FILING DEADLINE

The EAJA statute requires that the successful litigant file the fee application within 30 days of “final judgment” in the action. 28 U.S.C. § 2412(d)(1)(B). If a local rule provides for a different fee application deadline, the statutory deadline in EAJA nonetheless controls. *See Al-Harbi v. Immigration & Naturalization Serv.*, 284 F.3d 1080, 1082 (9th Cir. 2002) (finding that “to the extent that Ninth Circuit Rule 39-1.6 is inconsistent with the EAJA, the Circuit Rule is inapplicable, and the EAJA controls” because EAJA “contains a statutory provision to the contrary” of the local rule deadline).<sup>11</sup>

A “final judgment” means “a judgment that is final and not appealable, and includes an order of settlement. . . .” 28 U.S.C. § 2412(d)(2)(G). Thus, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal or petition for certiorari. In immigration cases (where longer appeal deadlines apply because the government is always a party), the time for filing an appeal or petition for certiorari varies depending on whether the case was litigated in district or circuit court.

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<sup>9</sup> *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original). *See, also Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1105 & n.6 (10th Cir. 2010) (same; time records reflect “efficient cooperation, rather than redundancy”); *Rode v. Dellarciprete*, 892 F.2d 1177, 1187–88 (3d Cir. 1990) (same; remanded for district court to specify which hours it considered duplicative and why).

<sup>10</sup> *McGrath v. County of Nevada*, 67 F.3d 248, 255-256 (9th Cir. 1995) (holding defendant “did not meet its rebuttable burden of providing specific evidence that plaintiffs’ hours were duplicative or inefficient”) (quotation omitted); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (stating that once the moving party submits “evidence supporting the hours worked and rates claimed,” subsequently “the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee”) (quotation omitted).

<sup>11</sup> Following the Supreme Court’s decision in *Scarborough v. Principi*, 541 U.S. 401, 414 (2004), recognizing the deadline as non-jurisdictional, some courts have concluded that it is subject to equitable tolling. *See, e.g., Townsend v. Comm’r of Soc. Sec.*, 415 F.3d 578, 581-83 (6th Cir. 2005); *Froelich v. Astrue*, 561 F. Supp. 2d 1044, 1046 (D. Minn. 2008); *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep’t of Transp.*, 104 F. Supp. 2d 599, 602-05 (M.D.N.C. 2000); *Lane v. Colvin*, No. 15-CV-53-BLG-CSO, 2016 WL 5936866, 2016 U.S. Dist. LEXIS 141421, at \*2 (D. Mont. Oct. 12, 2016); *Batchelder v. Astrue*, No. 10-CV-0267 (MAD), 2012 WL 4513766, 2012 U.S. Dist. LEXIS 141391, at \*1 (N.D.N.Y. Oct. 1, 2012).

In addition, because the EAJA deadline is non-jurisdictional, movants may seek an extension of time to file a motion for fees, which may be helpful in some cases to provide time to settle without requiring the filing of a full EAJA motion.

In district court cases, a party has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 60-day period for filing an appeal. If an appeal is taken, the district court's judgment is not final and therefore the time to file an EAJA fee application does not begin until all appellate proceedings are concluded. *Al-Harbi*, 284 F.3d at 1084 (stating that "final judgment" is "the date on which a party's case has met its final demise, such that there is no longer any possibility that the district court's judgment is open to attack") (quotation omitted).

In circuit court cases, a party has 90 days after the judgment or order is entered by the circuit court to file a petition for certiorari to the Supreme Court. Sup. Ct. R. 13(1). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 90-day period for filing a petition for certiorari. *See Al-Harbi*, 284 F.3d at 1083 (collecting cases). Some courts have held that this post-judgment appeal period applies even if the court entered the judgment pursuant to the government's request. *See, e.g., Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007) (citing *Hoang Van v. Barnhart*, 483 F.3d 600, 612 (9th Cir. 2007)).<sup>12</sup> The Ninth Circuit expressly held "that the thirty-day EAJA fee application period does not begin to run until ninety days after an order remanding an immigration matter to the BIA, even if such an order is at the request of the government." *Li*, 505 F.3d at 917.

If the circuit court remands a case to the district court, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal following the district court's entry of judgment on remand.

If the court remands a case to the agency and the court does not retain jurisdiction over the matter, a motion for fees must be filed within 30 days after the court's entry of judgment ordering the remand. If the court remands a case to the agency and the court retains jurisdiction over the matter, the court's order may not be a final judgment. If there is no final judgment, the party cannot yet calculate the deadline for filing a fees motion. *See, e.g., Castaneda-Castillo v. Holder*, 723 F.3d 48, 63-66 (1st Cir. 2013) (finding that remand order was not final judgment where court of appeals expressly retained jurisdiction over a case remanded for further administrative proceedings); *see also infra* Section V.A.3 (discussing cases in which a party sought fees after a remand order).

The date the mandate is issued is not relevant to calculation of the filing deadline. *Zheng v. Ashcroft*, 383 F.3d 919, 921-22 (9th Cir. 2004).

If a petition for rehearing is filed in the court of appeals, the 90-day period to file a petition for

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<sup>12</sup> *See also Scafara Contracting, Inc. v. Sec'y of Labor*, 325 F.3d 422 (3d Cir. 2003); *Adams v. Securities & Exchange Comm.*, 287 F.3d 183 (D.C. Cir. 2002). *But see Briseno v. Ashcroft*, 291 F.3d 377, 379-80 (5th Cir. 2002) (finding that 30-day EAJA period started at time court granted voluntary dismissal because plaintiff "did not have the option to appeal"); *Bryan v. Office of Personnel Mgmt.*, 165 F.3d 1315, 1321 & n.7 (10th Cir. 1999) (same, though noting potential exceptions).

certiorari runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Sup. Ct. R. 13(3). Moreover, if the losing party files a petition for certiorari, the circuit court's judgment is not final and therefore the 30-day period for filing an EAJA fee application would not begin to run until the Supreme Court denies the petition for certiorari. In the event that the Supreme Court grants the petition for certiorari, the 30-day period would not begin to run until the Supreme Court enters judgment or, if the case is remanded, until the circuit court (or district court if the circuit court orders remand) enters judgment.

In general, the government responds to EAJA fee applications by filing an opposition within the time prescribed by Federal Rule of Appellate Procedure 27(a)(3) or by requesting additional time to file a response. If the government fails to file a timely opposition, the court may find that the government's silence is a concession that fees are appropriate. In *Gwaduri v. Immigration & Naturalization Serv.*, 362 F.3d 1144 (9th Cir. 2004), the government filed an opposition along with a motion to accept the untimely opposition nearly six weeks after the due date. The court denied the motion to accept the untimely opposition and granted fees, stating "[t]here is simply nothing in the significantly delinquent motion for filing out of time that justifies the government's lengthy silence in this matter." *Id.* at 1146. The court reasoned that it was "well-within [its] discretion" to determine that the government's lack of a timely opposition amounted to a concession that its litigation position was not substantially justified or, alternatively, a failure to offer a basis for a finding of substantial justification. *Id.*

#### **IV. WHERE TO FILE**

The EAJA statute does not specify where to file a fee motion. However, logic and common practice dictate that where only one court has considered the merits of the case, that same court should consider the merits of the EAJA fee request. Following a petition for review, an EAJA motion is properly filed in the court of appeals that adjudicated the petition. In district court actions where neither side appealed to the court of appeals, the application is properly filed in the district court where the action was adjudicated.

In district court actions where one side appeals on the merits, the issue of where to file is more complicated as the appellate court may issue the final judgment in the case when adjudicating the appeal or may remand the case for further proceedings. When an EAJA motion includes fees for appellate work, it is advisable to review the appropriate circuit court case law and consult the court's local rules.

Some courts of appeals have indicated a preference for district courts to adjudicate fee motions that include appellate fees.<sup>13</sup> Others have awarded fees for appellate work without remanding for

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<sup>13</sup> See, e.g., *McDonald v. Sec'y of Health and Human Servs.*, 884 F.2d 1468, 1481 (1st Cir. 1989) ("Plaintiffs may also apply to the district court for attorneys' fees reasonably incurred in connection with the present appeal."); *Garcia v. Schweiker*, 829 F.2d 396, 398 (3d Cir. 1987) (reiterating that it is more efficient for the district court to "set the fees for work in both courts when representation in each was required") (quoting *Stokes v. Bowen*, 811 F.2d 814, 817 (3d Cir. 1987)); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1527 (10th Cir. 1984)

the district court to award fees in the first instance.<sup>14</sup> Still others have expressly stated that either the district court or the court of appeals may adjudicate fee motions that include fees for work on appeal.<sup>15</sup> In the Second Circuit, practitioners should file applications for appellate fees directly with the court of appeals and file a separate fee motion for work before the district court.<sup>16</sup> In the Ninth Circuit, a panel has the discretion to adjudicate the fee motion itself, refer it to the Ninth Circuit's Appellate Commissioner to determine the fee amount owed, or remand it to the district court.<sup>17</sup>

Many local rules expressly provide that the court of appeals may remand fee motions filed in that court to the district court for adjudication upon a motion or in the exercise of the court's discretion.<sup>18</sup> For a discussion regarding where to file an EAJA fee application for work done before the Supreme Court, see *Dague v. City of Burlington*, 976 F.2d 801, 803-804 (2d Cir. 1991).

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(remanding antitrust action to district court to assess appropriate attorney fees for plaintiff's appeal), *aff'd*, 472 U.S. 585 (1985). *See also Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) (stating that the amount of attorneys' fee award, including for appellate services, under § 4 of the Clayton Act "should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered"); *Smith v. Detroit Bd. of Educ.*, 728 F.2d 359, 360 (6th Cir. 1984) (per curiam) (finding district court more appropriate forum to assess attorneys' fees under § 1988 for appellate work).

<sup>14</sup> *See, e.g., Jenkins v. Missouri*, 127 F.3d 709, 719 (8th Cir. 1997) (regarding fee request under 42 U.S.C. § 1988); *Yaron v. Township of Northampton*, 963 F.2d 33, 37-38 (3d Cir. 1992) (holding that fee request under § 1988 can be made in the appellate court).

<sup>15</sup> *Martin v. Heckler*, 754 F.2d 1262, 1265 n.6 (5th Cir. 1985) ("In some cases, applications for fees and expenses should be considered in the district court in the first instance. In others, we may consider them first."); *Ekanem v. Health & Hosp. Corp.*, 778 F.2d 1254, 1257 (7th Cir. 1985) ("[O]ur research reveals that a petition on entitlement to appellate attorneys fees may be filed in either the district court or the court of appeals."). *Accord* 11th Circuit R. 39-2(e) (permitting attorney's fees request for services related to appeal to be filed in district court in lieu of court of appeals where party prevailed on merits after remand).

<sup>16</sup> *Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) ("Applications [under EAJA] for appellate fees in this Circuit should be filed directly with the Court of Appeals."); *McCarthy v. Bowen*, 824 F.2d 182, 183 (2d Cir. 1987) (per curiam) (holding that EAJA appellate fee applications must be filed with appellate court so it can decide whether district court assistance is needed to resolve disputed issues).

<sup>17</sup> *Orn v. Astrue*, 511 F.3d 1217, 1220-21 (9th Cir. 2008) (citing Ninth Circuit Rules 39-1.8 & -1.9 and listing factors that a panel may consider).

<sup>18</sup> *See, e.g.,* 1st Cir. R. 39.1(a)(2)(D) ("The court of appeals, in its discretion, may remit any [fee] application to the district court for a determination."); 8th Cir. R. 47C(b) ("On the court's own motion or at the request of the prevailing party, a motion for attorneys fees may be remanded to the district court . . . for appropriate hearing and determination."); 9th Cir. R. 39-1.8 ("Any party who is or may be eligible for attorneys fees on appeal to this Court may . . . file a motion to transfer consideration of attorneys fees on appeal to the district court . . . from which the appeal was taken."); 11th Cir. R. 39-2(d) (same).

## V. STATUTORY REQUIREMENTS

The EAJA statute directs that a fee application must include:

- A showing that the petitioning party is a prevailing party. 8 U.S.C. § 2412(d)(1)(A).
- An allegation that the pre-litigation and litigation positions of the government were not substantially justified. 28 U.S.C. § 2412(d)(1)(A), (d)(2)(D).
- An allegation that there are no special circumstances that would make an award unjust. 28 U.S.C. § 2412(d)(3).
- A showing that the petitioning party has met the appropriate “net worth” requirements. 28 U.S.C. § 2412(d)(2)(B).
- A statement of the total amount of fees and costs sought along with an itemized account of time expended and rates charged. 28 U.S.C. § 2412(d)(1)(B).

Each statutory requirement is discussed in detail below.

There is one additional threshold issue that litigants should consider. The EAJA statute applies to “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.” 28 U.S.C. § 2412(d)(1)(A). Thus, in the immigration context, EAJA fees generally are available in petitions for review, mandamus actions, Administrative Procedure Act suits, and habeas corpus actions.<sup>19</sup> Notably, however, the government has argued that the term “civil action” does not unambiguously encompass habeas corpus actions under 28 U.S.C. § 2241 and, thus, has claimed that EAJA fees are not available in habeas cases.<sup>20</sup>

EAJA fees generally are not recoverable in actions under the Federal Tort Claims Act, though some courts have allowed recovery where the government acted in “bad faith.” *See, e.g., Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1180-85 (9th Cir. 2019) (en banc) (remanding

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<sup>19</sup> *See, e.g., Gomez-Beleno v. Holder*, 644 F.3d 139, 144-45 (2d Cir. 2011) (petition for review); *Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58-59 (2d Cir. 1995) (habeas action); *Aboushaban v. Mueller*, 475 F. Supp. 2d 943, 945-46 (N.D. Cal. 2007) (mandamus).

<sup>20</sup> While some courts have accepted this argument for prisoners in *criminal* custody, importantly, to date, no circuit court has accepted it for noncitizens in *immigration* custody. *Vacchio v. Ashcroft*, 404 F.3d 663, 668-72 (2d Cir. 2005) (rejecting government’s argument that habeas petition challenging an immigration detention does not qualify as a “civil action”); *In re Petition of Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (rejecting government’s “civil action” argument in habeas case challenging petitioner’s exclusion); *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (same); *see also O’Brien v. Moore*, 395 F.3d 499, 507-08 (4th Cir. 2005) (accepting government’s “civil action” argument but acknowledging cases distinguishing habeas petitions challenging immigration detentions from habeas petitions in the criminal context).

for district court to consider totality of government’s conduct and to decide whether its litigation position “as a whole” was in bad faith); *Rodriguez v. United States*, 542 F.3d 704, 711, 713 (9th Cir. 2008) (remanded to determine if fees attributable to bad faith); *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (no bad faith in litigation position, so exception inapplicable).<sup>21</sup> Moreover, EAJA fees are *not* recoverable against individual federal officers in successful damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). 28 U.S.C. § 2412(d)(2)(C); *Kreines v. United States*, 33 F.3d 1105, 1109 (9th Cir. 1994); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984), *aff’d*, *Cleavinger v. Saxner*, 474 U.S. 193 (1985). EAJA does not govern the availability of fees and costs incurred in civil rights actions filed against state or local entities under 42 U.S.C. § 1983 or actions under the Freedom of Information Act, 5 U.S.C. § 552. Those statutes each have separate provisions governing fee recovery.<sup>22</sup>

## A. Prevailing Party Status

To qualify for an EAJA award, the petitioning party has the burden of proving that he is a prevailing party. A “prevailing party” is one who “has been awarded some relief by a court.” *Buckhannon Bd. Care & Home Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001). The Supreme Court held that, for purposes of fee-shifting statutes such as EAJA, a prevailing party is one who demonstrates that he achieved a “material alteration of the legal relationship of the parties” and a “judicial *imprimatur* on the change.” *Id.* at 604-05 (quotation omitted). Examples of court entries that confer prevailing party status, the Court said, are “enforceable judgments on the merits and court-ordered consent decrees.” *Id.* at 604.

Notably, “[a] party need not succeed on every claim in order to prevail. Rather, a plaintiff prevails if she has succeeded on any significant issue in litigation which achieved some of the benefit she sought in bringing suit.” *Carbonell v. Immigration & Naturalization Serv.*, 429 F.3d 894, 900 n.5 (9th Cir. 2005) (quotation omitted); *see also J.D. v. Kanawha Cty. Bd. of Educ.*, 571 F.3d 381, 387 (4th Cir. 2009) (stating that “a party need not prevail on every issue or even the most ‘central’ issue in a proceeding to be considered a ‘prevailing party’”) (quotation omitted). *See also infra* Section V.B (discussing determining whether government’s position was substantially justified where plaintiff succeeds on some but not all claims).

### 1. Prevailing Party Status Cannot Be Based on the Catalyst Theory

Under the so-called catalyst theory, a litigant is entitled to prevailing party status if the lawsuit was a catalyst that prompted the government to voluntarily alter its conduct. For example, a party could be considered a prevailing party under the catalyst theory if the lawsuit prompted the government to voluntarily grant the requested relief or pass legislation that mooted the federal case.

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<sup>21</sup> For further discussion of the causal link necessary between bad faith conduct and the attorneys’ fees incurred, *see Lu v. United States*, 921 F.3d 850, 859–64 (9th Cir. 2019) (discussing the bad faith standard in light of *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017)).

<sup>22</sup> *See* 42 U.S.C. § 1988(b) and 5 U.S.C. § 552(a)(4)(E)(i).

In *Buckhannon*, the Supreme Court held that the catalyst theory is no longer a permissible basis for an attorneys' fees award under the fee-shifting statutes at issue in that case. The "catalyst theory," the Court reasoned, "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605.

## 2. Types of Court Entries That May Prove Prevailing Party Status

Examples of court entries that may serve as the basis for an award of EAJA fees include enforceable judgments on the merits and settlement agreements that are favorable to one side and enforceable through a consent decree. *Buckhannon*, 532 U.S. at 604. A consent decree is technically a judgment entered by consent of the parties whereby the government agrees to stop the alleged illegal activity without necessarily admitting guilt or wrongdoing. Notably, courts have held that "the formal label of 'consent decree' need not be attached" to confer prevailing party status.<sup>23</sup> Orders that serve as the equivalent of a consent decree also may confer prevailing party status.<sup>24</sup>

Post-*Buckhannon* case law has created additional examples of judicially enforceable court entries specific to immigration cases. In *Vacchio v. Ashcroft*, 404 F.3d 663, 673-74 (2d Cir. 2005), the court held that an interim order directing release pending adjudication of petitioner's habeas corpus appeal was sufficient to confer prevailing party status. *See also Ali v. Gonzales*, 486 F. Supp. 2d 1197, 1201-03 (W.D. Wash. 2007). In *Carbonell*, 429 F.3d 894, 900-01 (9th Cir. 2005), the Ninth Circuit held that a district court order attesting to a voluntary stipulation between petitioner and the former Immigration and Naturalization Service (INS) to stay deportation pending the BIA's adjudication of a motion to reopen conveyed prevailing party status because it awarded a substantial portion of the relief sought.

District courts have also recognized additional scenarios in which plaintiffs are prevailing

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<sup>23</sup> *Aronov v. Napolitano*, 562 F.3d 84, 90 & n.7 (1st Cir. 2009) (en banc) (citing cases); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("We doubt that the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly.").

<sup>24</sup> *See, e.g., Smyth*, 282 F.3d at 281 (assuming "that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such"); *Am. Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1321 (11th Cir. 2002) (holding that order "approving the settlement agreement and then expressly retaining jurisdiction to enforce its terms" had "precisely the same result as would have been achieved pursuant to a consent decree"); *Pres. Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) ("*Buckhannon* does not limit fee awards to enforceable judgments on the merits or to consent decrees."); *Me. Sch. Admin. Dist. No. 35 v. R.*, 321 F.3d 9, 17 (1st Cir. 2003) (finding that "a court faced with the need to decide whether a litigant is (or is not) a prevailing party must make a qualitative inquiry into the import of the result obtained"); *Samsung Elecs. Co. v. Rambus, Inc.*, 440 F. Supp. 2d 495, 511 (E.D. Va. 2006) (holding that a voluntary dismissal with prejudice under Fed. R. of Civ. P. 41(a)(2) "is the equivalent of a consent decree" and conferring prevailing party status).

parties. For example, courts may find that plaintiffs are prevailing parties on notice-and-comment claims, even if the regulation vacated through the litigation is eventually replaced by an identical replacement regulation. *See Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 202 F. Supp.3d 20, 24-25 (D.D.C. 2016). Another court found that plaintiffs were the prevailing party where they successfully opposed the government's efforts to dissolve or substantially modify a permanent injunction. *Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 947-48 (C.D. Cal. 2010).

Courts also may find that plaintiffs who obtain orders remanding a case to the agency are prevailing parties in some cases; such orders are further discussed in the next section, including remand orders requiring U.S. Citizenship and Immigration Services (USCIS) to adjudicate or grant naturalization applications. *See infra* Section V.A.3.c. District courts also have held that an order granting mandamus to adjudicate an adjustment of status application, and remanding for the agency to do so, is sufficient to convey prevailing party status. *See, e.g., Aboushaban v. Mueller*, 475 F. Supp. 2d 943, 946 (N.D. Cal. 2007). Significantly, in mandamus cases, generally, a court must issue an order requiring the agency to act in order for a litigant to be eligible for fees; otherwise, the court is likely to find that, under the catalyst theory, no EAJA fees are available.

A judicial pronouncement that the government has violated the Immigration and Naturalization Act or the Constitution without any grant of judicial relief will not serve as a basis for an award of attorneys' fees. *See Buckhannon*, 532 U.S. at 606-07. In addition, changes in the actual circumstances of the parties that are not related to the federal court case may not be used as the basis for an EAJA fee award. *Id.* For example, if the BIA grants a motion to reopen or reconsider after the filing of federal lawsuit challenging the final removal order, the petitioner in the federal lawsuit is not considered a prevailing party if the federal case has been mooted out by the BIA's order. Similarly, if the agency acts after a petitioner files a mandamus action but before the district court rules, the petitioner is not considered a prevailing party because the agency's action moots the district court case. In the absence of an enforceable court ordered judgment or remedy, a court is not likely to find prevailing party status as defined by the Court in *Buckhannon*.<sup>25</sup>

Additionally, courts have recognized that grants of preliminary injunctions may confer prevailing

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<sup>25</sup> *See, e.g., Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008) (finding plaintiff was not a prevailing party where USCIS corrected erroneous denial of adjustment application and adjusted plaintiff's status after case filed but before court acted); *Goldstein v. Moatz*, 445 F.3d 747, 751-52 (4th Cir. 2006) (holding that "tactical mooting" of a case does not render plaintiff the prevailing party, though declining to determine whether the same rule would apply where defendant voluntarily provided relief requested after a court affirmatively indicates that the plaintiff is about to prevail); *Morillo-Cedron v. Dist. Dir., U.S. Citizenship & Immigration Servs.*, 452 F.3d 1254, 1257-58 (11th Cir. 2006) (finding prevailing party status was not conferred where USCIS voluntarily granted permanent resident status before the district court entered a final judgment); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (finding plaintiff was not a prevailing party where he naturalized during litigation, and district court dismissed the case as moot)

party status, but that grants of Temporary Restraining Orders (TROs) generally do not.<sup>26</sup>

In light of *Buckhannon*, if the government grants the relief sought before the court decides the case on the merits, memorializing the victory in a court-approved order or settlement may preserve eligibility for prevailing party status.

### **3. Court Ordered Remand**

A leading Supreme Court case on whether court ordered remand confers prevailing party status is *Shalala v. Schaefer*, 509 U.S. 292 (1993). In *Shalala*, the Court held that a social security claimant who obtained a reversal and remand of a Secretary of Health and Human Services' administrative decision pursuant to sentence four of 42 U.S.C. § 405(g) was a prevailing party. *Id.* at 300-301. In cases remanded under this section, the court enters judgment in the claimant's favor immediately and the litigation is terminated. In cases remanded under another social security provision, the court postpones entering judgment until after post-remand agency proceedings have been completed and the results are filed with the court. The Court relied heavily on this distinction. *Id.*

Notably, in cases involving remand orders for further proceedings, courts generally only allow recovery for fees and costs incurred in the federal court litigation, not for work done before the agency in remanded proceedings. *See supra* n.3.

#### **a. Remand Where the Court Enters Judgment**

The Court's decision in *Shalala* can support finding prevailing party status when a court orders remand to the agency, enters a formal judgment immediately and does not retain jurisdiction over the federal court action.

In *Rueda-Menicucci v. Immigration & Naturalization Serv.*, 132 F.3d 493 (9th Cir. 1997), the Ninth Circuit granted the petition for review of the denial of petitioners' asylum applications and remanded their case to the BIA for further proceedings. The court's order terminated the proceedings, and the court did not retain jurisdiction over future appeals. Petitioners then sought fees under EAJA. The Ninth Circuit reasoned that, since it could "perceive no difference

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<sup>26</sup> *See, e.g., Mastro v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (noting that "[a] plaintiff receiving interim injunctive relief may be a prevailing party where she prevailed on the merits at the interim stage," but that a plaintiff receiving "a TRO in which the court does not address the merits of the case but simply preserves the status quo to avoid irreparable harm to the plaintiff" is not) (quotations omitted); *see also Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013) (recognizing plaintiff as prevailing party where preliminary injunction obtained but "the case is subsequently rendered moot by the defendant's own actions"); *Dearmore v. City of Garland*, 519 F.3d 517, 525-26 (5th Cir. 2008) (same). *But see Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding that preliminary injunction did not confer prevailing party status, in part because "the less stringent assessment of the merits of claims that are part of the preliminary injunction context" precluded the court from finding that it was the same as or "akin" to an enforceable judgment on the merits).

between a ‘sentence four’ remand under 42 U.S.C. § 405(g) (at issue in *Shalala*) and a remand to the BIA for further proceedings,” petitioners who obtain such remand are prevailing parties. *Id.* at 495. In *Li v. Keisler*, 505 F.3d 913, 917-18 (9th Cir. 2007), the court extended this ruling and held that an order issued by a circuit mediator granting an unopposed motion to remand after the petitioner filed an opening brief is sufficient to satisfy *Buckhannon* where the orders advanced the petitioners’ goals and constituted material alterations of the parties’ legal relationship.

The Seventh and Third Circuits have similarly ruled that a petitioner who wins remand for further proceedings is a prevailing party within the meaning of EAJA. The courts reasoned that petitioners’ situations were analogous to the Supreme Court’s decision in *Shalala* and also noted that their conclusions were consistent with *Rueda-Menicucci*. See *Muhur v. Ashcroft*, 382 F.3d 653, 654-55 (7th Cir. 2004); *Johnson v. Gonzales*, 416 F.3d 205, 208-10 (3d Cir. 2005).<sup>27</sup>

As a practical matter, because the question of whether a party has prevailed on a significant issue in litigation potentially could be equated with whether the party requested the relief obtained, it is advisable to ask the court to vacate *and/or remand* the agency or court decision when drafting a request for relief.

#### **b. Remand Where the Court Postpones Entering Judgment**

If the court orders remand to the agency, postpones entering judgment until the completion of post-remand agency proceedings, and also retains jurisdiction over the federal court action, the petitioning party may be eligible for prevailing party status if they are successful before the agency on remand.<sup>28</sup>

In this situation, it might be possible to recover fees for administrative work on remand. In *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 135-39 (1991), the Supreme Court held that courts cannot award EAJA fees for *initial* work done in administrative immigration proceedings. However, since *Ardestani*, courts generally only have allowed recovery of fees for administrative proceedings where there was a court-ordered remand and counsel’s representation was required to effectuate the court’s remand order.<sup>29</sup>

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<sup>27</sup> See also *Caplash v. Nielsen*, 294 F. Supp. 3d 123, 128-29 (W.D.N.Y. 2018) (finding remand to USCIS vacating I-130 denial and requiring further adjudication conferred prevailing party status); *Salem v. Immigration & Naturalization Serv.*, 122 F. Supp. 2d 980, 984 (C.D. Ill. 2000) (finding remand to the INS conferred prevailing party status under the rationale of *Rueda-Menicucci*). Cf. *SecurityPoint Holdings, Inc. v. Transp Sec. Admin.*, 836 F.3d 32, 39 (D.C. Cir. 2016) (agreeing with *Johnson*, *Muhur*, and *Rueda-Menicucci*).

<sup>28</sup> *Shalala*, 509 U.S. at 299-300 (discussing *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989)).

<sup>29</sup> *Castañeda-Castillo v. Holder*, 723 F.3d 48, 71 (1st Cir. 2013) (holding administrative proceedings conducted after remand of asylum application were so “intimately related” to judicial proceedings ordering remand that they had to be considered part of same “civil action”) (quotation omitted); *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) (“We hold that parties who secure a consent order remanding a proceeding to an administrative agency because of an alleged error on the merits, where the court also retains jurisdiction, are ‘prevailing parties’ under EAJA if they succeed on the merits in the

### c. Remand Orders in Naturalization Cases

As several courts have held, a court order approving a stipulation to remand a naturalization application to USCIS for adjudication pursuant to 8 U.S.C. § 1447(b) can confer prevailing party status if it satisfies the *Buckhannon* criteria for prevailing party status, i.e., a material alteration in the parties' legal relationship and judicial oversight. *See, e.g., Al-Maleki v. Holder*, 558 F.3d 1200, 1206 (10th Cir. 2009) (order instructing USCIS to administer oath of citizenship after the agency stipulated plaintiff was entitled to naturalization); *Hassine v. Johnson*, 53 F. Supp. 3d 1297, 1301-03 (E.D. Cal. 2014) (order requiring naturalization interview within 30 days and adjudication within 45 days and retaining jurisdiction if USCIS did not timely adjudicate the application or denied it); *Shalash v. Mukasey*, 576 F. Supp. 2d 902, 909-10 (N.D. Ill. 2008) (order remanding and setting a deadline for USCIS to adjudicate application); *Osman v. Mukasey*, 553 F. Supp. 2d 1252, 1255-56 (W.D. Wash. 2008) (order denying motion to dismiss, granting government's motion to remand, and instructing USCIS to adjudicate naturalization application within fixed time period); *Alghawi v. Mukasey*, 543 F. Supp. 2d 1252, 1255-56 (W.D. Wash. 2008) (order finding applicant eligible to naturalize and remanding application to USCIS to issue a decision within five days); *Zheng Liu v. Chertoff*, 538 F. Supp. 2d 1116, 1121-22 (D. Minn. 2008) (order granting in part and denying in part the government's motion to dismiss and remanding application to USCIS with instructions to adjudicate within six months); *Lord v. Chertoff*, 526 F. Supp. 2d 435, 438 (S.D.N.Y. 2007) (order approving consent agreement for USCIS to approve application and retaining jurisdiction for the purpose of enforcement); *Berishev v. Chertoff*, 486 F. Supp. 2d 202, 204-06 (D. Mass. 2007) (order remanding and setting a deadline for USCIS to adjudicate the application).<sup>30</sup>

To the extent some courts have held otherwise, those remand orders either have lacked a material alteration in the parties' legal relationship or judicial oversight. For example, in *Aronov v. Napolitano*, the parties settled a case immediately after it was filed, and the district court granted a joint motion to remand in a short docketing order. 562 F.3d 84, 87 (1st Cir. 2009) (en banc).

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remand proceeding.”) (quotation omitted); *Davidson v. Veneman*, 317 F.3d 503, 505-06 (5th Cir. 2003) (where district court ordered remanded to Farm Services Agency and stayed motion for EAJA fees pending completion of remand proceedings and plaintiff was successful in remand proceedings, plaintiff was entitled to prevailing party status). *Cf. Yong Tang v. Chertoff*, 689 F. Supp. 2d 206, 214 (D. Mass. 2010) (finding plaintiff is prevailing party where USCIS ordered to adjudicate adjustment and report back to court on compliance so that agency could “[n]o longer . . . dawdle, temporize, or delay”). *But see, e.g., Bernal-Garcia v. Immigration & Naturalization Serv.*, 852 F.2d 144, 147 (5th Cir. 1988) (finding petitioner was not prevailing party where court “only remanded th[e] case for reconsideration in light of additional evidence”).

<sup>30</sup> *See also Xiaosi Hu v. Munita*, No. 2:19-cv-01302-RAJ, 2020 U.S. Dist. LEXIS 80006, at \*1-2 (W.D. Wash. May 6, 2020) (post-summary judgment motion stipulation to remand case to USCIS for “prompt adjudication” of naturalization application); *Rashid v. U.S. Dep’t of Homeland Sec.*, No. 2:14-cv-2109-JAM-KJN, 2017 U.S. Dist. LEXIS 181377, at \*6-9 (E.D. Cal. Nov. 1, 2017) (order granting government's opposed motion to remand ordering adjudication within sixty days and requiring joint status report upon adjudication); *Alghamdi v. Ridge*, No. 3:05cv344-RS, 2006 U.S. Dist. LEXIS 68498, at \*13-20 (N.D. Fla. Sep. 25, 2006) (order instructing USCIS to adjudicate application within thirty days).

The First Circuit held that the docketing order did not confer prevailing party status because it did not order USCIS to do anything, nor did the court retain jurisdiction to enforce the stipulation. *Id.* at 92-93. Likewise, in *Iqbal v. Holder*, the Tenth Circuit held that an order remanding a naturalization application for adjudication did not confer prevailing party status where the order “simply instructed the USCIS to determine the merits of Mr. Iqbal’s naturalization application; it did not order the USCIS to naturalize him, and it did not order the USCIS to adjudicate the application by a date certain.” 693 F.3d 1189, 1195 (10th Cir. 2012). In an unpublished decision, the Fifth Circuit held that that a remand order imposing a deadline for adjudication lacked the “judicial imprimatur” necessary to confer prevailing party status where the court did not “enter any decision about the merits” of the naturalization application and there was no indication that the court retained jurisdiction. *Othman v. Chertoff*, 309 F. App’x 792, 794 (5th Cir. 2008). *See also Potris v. Sec’y, Dep’t of Homeland Sec.*, 161 F. Supp. 3d 534, 539-43 (E.D. Mich. 2015) (stipulated order remanding without prejudice to adjudicate naturalization application by a certain date did not qualify plaintiff for prevailing party status).

## **B. Substantial Justification**

An initial EAJA fee application must, at a minimum, *allege* that the position of the United States, which is both the agency’s underlying position and its litigation position, was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).<sup>31</sup> However, as the government routinely attempts to demonstrate that its position was substantially justified, it is advisable to fully brief this important issue in the initial fee application rather than waiting to brief it in the reply brief, when page space is more limited.

Once the petitioning party establishes prevailing party status, the government can avoid payment of fees only if it can show that its pre-litigation conduct *and* litigation position were “substantially justified.” To meet this burden of proof, the government must show that its position has a reasonable basis both in law and in fact.<sup>32</sup>

Significantly, the government must meet this threshold twice—it must independently establish that the agency misconduct that gave rise to the litigation was substantially justified and that its litigation positions also were substantially justified.<sup>33</sup>

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<sup>31</sup> In *Scarborough v. Principi*, 541 U.S. 401, 406 (2004), the Court held that a timely-filed EAJA fee application may be amended after the 30-day filing period has run to cure an initial failure to allege that the government’s position in the litigation lacked substantial justification.

<sup>32</sup> *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as “‘justified in substance or in the main’ – that is, justified to a degree that could satisfy a reasonable person”); *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir. 2010) (holding that “it is not necessary for the Government’s position to be ‘justified to a high degree’”) (quotation omitted); *Aronov v. Chertoff*, 562 F.3d 84, 94 (1st Cir. 2009) (en banc) (“The [pre-litigation position] test is whether a reasonable person could think the agency position is correct.”) (citing *Pierce*, 487 U.S. at 566 n.2).

<sup>33</sup> 28 U.S.C. § 2412(d)(2)(D); *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 158-60 (1990); *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (en banc) (“[T]he substantial justification test is comprised of two inquiries, one

Thus, if the court finds that the government’s underlying, pre-litigation conduct lacks substantial justification, the court need not consider whether its litigation positions were substantially justified.<sup>34</sup>

In some cases involving petitions for review of a BIA decision, the government has argued that the relevant “position of the United States” was the position of the Department of Homeland Security (DHS), not the position that the immigration judge or BIA set forth in their decisions, because the Executive Office for Immigration Review (which houses both the immigration courts and the BIA) and DHS are no longer in the same executive department following the 2002 enactment of the Homeland Security Act. The Ninth Circuit rejected this argument, finding that it “completely lacks justification.” *Thangaraja v. Gonzales*, 428 F.3d, 870, 873 (9th Cir. 2005). The court affirmed that the IJ’s decision, summarily affirmed by the BIA, constituted “the action . . . by the agency upon which the civil action is based” under the plain language of the EAJA statute, and thus, the relevant pre-litigation position. *Id.* at 874. The court also found that nothing in the government reorganization resulting from the Homeland Security Act affected this conclusion because EOIR and DHS both “are part of the executive branch of the United States government, despite their mutual independence” and “the manner in which responsibilities are divided within the executive branch is immaterial to determining” the underlying government action upon which the petition for review was based. *Id.*<sup>35</sup>

A court evaluates whether the government’s position is reasonable based on several factors, including the clarity of the governing law;<sup>36</sup> the foreseeable length and complexity of the

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directed toward the government agency’s conduct, and the other toward the government’s attorneys’ conduct during litigation.”); *Dantran, Inc. v. U.S. Dep’t of Labor*, 246 F.3d 36, 41 (1st Cir. 2001) (“To satisfy its burden, the government must justify not only its pre-litigation conduct but also its position throughout litigation.”).

<sup>34</sup> *Jean*, 496 U.S. at 160 (“The single finding that the Government’s position lacks substantial justification, like the determination that a claimant is a ‘prevailing party,’ thus operates as a one-time threshold for fee eligibility.”); *United States v. 515 Granby, LLC*, 736 F.3d 309, 316 (4th Cir. 2013) (“[W]hen the government’s unjustified prelitigation position forces a lawsuit, the petitioner may recover fees under the EAJA for the entire suit, even if the government’s litigation position was reasonable.”); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (“[O]nce a court determines that the government’s position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute.”).

<sup>35</sup> *See also Gomez-Beleno v. Holder*, 644 F.3d 139, 145 (2d Cir. 2011) (“[O]ur ‘substantial justification’ inquiry encompasses not only the litigation position of the Office of Immigration Litigation (‘OIL’), but also the underlying administrative decisions of the BIA and IJ.”).

<sup>36</sup> However, the government’s position is not *per se* justifiable simply because the case involves a new statute or an issue of first impression. *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (en banc) (“Fees may be denied when the litigation involves questions of first impression, but ‘whether an issue is one of first impression is but one factor to be considered.’”) (quotation omitted); *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001) (“[T]here is no *per se* rule that EAJA fees cannot be awarded where the government’s

litigation; the consistency of the government’s position; views expressed by other courts on the merits; legal merits of the government’s position;<sup>37</sup> and the stage at which the litigation was resolved.<sup>38</sup> See generally *Jean v. Nelson*, 863 F.2d 759, 767-69 (11th Cir. 1988), *aff’d*, *Comm’r, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154 (1990). The agency’s position may be substantially justified “even if a court ultimately determines the agency’s reading of the law was not correct.” *Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (en banc) (citing *Pierce*, 487 U.S. at 566 n.2).

The government’s position must be substantially justified as a whole.<sup>39</sup> Courts generally do not award a portion of fees by issue. *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1167–72 (9th Cir. 2019) (en banc); *Gatimi v. Holder*, 606 F.3d 344, 349 (7th Cir. 2010).

The government may attempt to claim that its position was substantially justified because it prevailed on some (though not all) claims. But a party is not precluded from recovering fees for

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litigation position contains an issue of first impression.”); *Bah v. Cangemi*, 548 F.3d 680, 684 (8th Cir. 2008) (“The government *may*... be justified in litigating a legal question that is unsettled in [a] circuit.”) (emphasis added). *But see Cody v. Caterisano*, 631 F.3d 136, 142 (4th Cir. 2011) (stating that “litigating cases of first impression is generally justifiable”); *Vacchio v. Gonzales*, 404 F.3d 663, 675 (2d Cir. 2005) (holding that an unsettled question of law combined with a government position that was “far from unreasonable” amounted to substantial justification).

<sup>37</sup> See, e.g., *Int’l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1359 (Fed. Cir. 2016) (affirming the determination that the government’s position “was not founded on a reasonable basis both in law and fact”) (quotation omitted); *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 977 (10th Cir. 2016) (suggesting that “an agency decision that loses track of its own controlling regulations and applies the wrong rules” is likely not substantially justified); *Tchemkou v. Mukasey*, 517 F.3d 506, 510 (7th Cir. 2008) (“Having failed to provide any support for th[eir] argument, the Government also has failed to show that its position was substantially justified.”); *Florioiu v. Gonzales*, 498 F.3d 746, 749 (7th Cir. 2007) (per curiam) (holding the government’s position was not substantially justified because, in part, the government provided no legal authority to support it); *Thangaraja v. Gonzales*, 428 F.3d 870, 875 (9th Cir. 2005) (holding Attorney General’s arguments on the merits of the plaintiff’s asylum and withholding of removal claims were substantially unjustified because they were “entirely unsupported by the record”).

<sup>38</sup> Surviving a dispositive motion does not necessarily mean the government’s position was substantially justified. *Compare Int’l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1360–61 (Fed. Cir. 2016) (declining to find a presumption that the government was substantially justified if it survived summary judgment) *with United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010) (finding a rebuttable presumption that government’s position was substantially justified when it survived dispositive motions).

<sup>39</sup> *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 161-62 (1990); see also *Glenn v. Comm’r of Soc. Sec.*, 763 F.3d 494, 498-99 (6th Cir. 2014) (holding that substantial justification is not “a matter of comparing the number of successful claims to unsuccessful claims in a single appeal” but instead whether the government’s position was reasonable as a whole).

reasonable hours expended on its successful claims, provided that the unsuccessful claims are related to the successful ones. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Where a party seeks attorney’s fees in partially successful litigation, courts employ a two-part test. At step one courts determine whether the unsuccessful claims are related to the successful claims. 461 U.S. at 434.<sup>40</sup> If unrelated, the plaintiff cannot recover fees for the time spent on unsuccessful claims. If the claims are related, the court moves to step two and measures the degree of overall success in relation to the hours expended. *Id.* at 435. Fees for all time expended is recoverable where the litigant has achieved “excellent results” in his challenge to an agency action. *Id.* See also *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (upholding district court’s finding that plaintiffs were entitled to full recovery of fees because they “accomplished their mission” as equivalent to *Hensley*’s “excellent results”).

However, a court may deny recovery of fees if it finds the government’s position was substantially justified regarding the one issue on which the plaintiff prevailed. *Hardisty v. Astrue*, 592 F.3d 1072, 1077-78 (9th Cir. 2010) (finding no basis for EAJA “fee-shifting,” the court refused to award fees on alternative grounds not reached by the district court where the government was substantially justified on the sole issue on which plaintiff prevailed).

In some circuits, courts have found the government’s position lacks substantial justification where it violates the Constitution, a statute, or governing regulations. See, e.g., *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that “the agency’s position lacked substantial justification because it was ‘wholly unsupported by the text’ of the applicable regulations”) (quotation omitted); *Cornella v. Schweiker*, 728 F.2d 978, 985 (8th Cir. 1984) (“It was not reasonable for the Secretary to ignore her own regulations.”).

In *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007), where the government sought and was granted a voluntary remand, the court held that an assessment of substantial justification (and special circumstances) requires the court to examine “the likely reason behind the voluntary remand in question.” The court held the petitioners are entitled to fees where the government requested a remand “to reevaluate the prior proceedings due to a misapplication of, or failure to apply, controlling law and where there is no new law or claims of new facts.” *Id.* The court distinguished such situations from cases where the government may be justified in seeking a remand “due to intervening case law, because of unclear controlling case law, or where the agency should have an opportunity to adjudicate a new claim for relief in the first instance.” *Id.*<sup>41</sup>

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<sup>40</sup> *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016) (finding claims “sufficiently related” where “[t]hey all pertained to a ‘common core of facts’”) (quoting *Hensley*, 461 U.S. at 435); *Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003) (awarding fees for unsuccessful summary judgment motion where “work done to prepare the motion on those theories [two ultimately successful claims, one unsuccessful] could have contributed to the final result achieved”).

<sup>41</sup> See also *Kholyavskiy v. Holder*, 561 F.3d 689, 693 (7th Cir. 2009) (holding the government’s position was substantially justified, in part, because the novelty of the question created uncertainty in the law); *Hardisty v. Astrue*, 435 F. App’x 537, 540 (7th Cir. 2011) (affirming government was substantially justified in defending the position of an administrative law judge who did not have access to evidence that claimant later produced to supplement the

Once the court determines that the government’s position lacks substantial justification, the prevailing party is presumptively eligible for fees for all phases of the federal case unless the prevailing party has “unreasonably protracted” a portion of the litigation, which would warrant exempting fees for that portion of the litigation from the award.<sup>42</sup>

### C. Special Circumstances

The government has the burden of proving the existence of special circumstances that would make a fee award unjust.<sup>43</sup> This “special circumstances” exception to awarding fees was intended as a “safety valve” to allow the government to advance “novel but credible” legal theories and to give courts discretion to deny awards for equitable considerations.<sup>44</sup> This provision of the EAJA is to be narrowly construed so as to not interfere with or defeat Congress’s purpose in passing the EAJA.<sup>45</sup>

Special circumstances include close or novel questions.<sup>46</sup> Equitable considerations can mean that the prevailing party acted in bad faith or has “unclean hands.”<sup>47</sup> The Ninth Circuit has held that the “the government’s request for a voluntary remand [to the BIA] is not a ‘special circumstance’ that would relieve the government from the applicants’ statutory entitlement to EAJA fees.” *Li v. Keisler*, 505 F.3d 913, 920 n.1 (9th Cir. 2007). Rather, the court collapsed its discussion of the special circumstances exception with its substantial justification analysis, holding that the court must examine “the likely reason behind the voluntary remand in question.” *Id.* at 919.

### D. Net Worth

In order to satisfy the net worth requirement under EAJA, an individual party’s net worth must not exceed \$2,000,000 at the time the lawsuit was filed. 28 U.S.C. § 2412(d)(2)(B). If the party is a business owner, corporation, or organization, the party must establish that it did not have more than 500 employees and its net worth did not exceed \$7,000,000 at the time the lawsuit was filed.

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record).

<sup>42</sup> 28 U.S.C. § 2412(d)(2)(D); *Comm’r, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 161 (1990).

<sup>43</sup> See, e.g., *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989).

<sup>44</sup> H.R. Rep. No. 96-1418, at 11 (1980), as reprinted in 1980 U.S.C.C.A.N. 4984.

<sup>45</sup> *Martin v. Heckler*, 773 F.2d 1145, 1149-50 (11th Cir. 1985) (en banc), overruled on other grounds, *Texas State Teachers Ass’n v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989).

<sup>46</sup> *Nat’l Truck Equip. Ass’n v. Nat’l Highway Traffic Safety Admin.*, 972 F.2d 669, 671 (6th Cir. 1992); *S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm’n*, 672 F.2d 426, 431 (5th Cir. 1982); *Midwest Research Inst. v. United States*, 554 F. Supp. 1379, 1392 (W.D. Mo. 1983), *aff’d*, 744 F.2d 635 (8th Cir. 1984).

<sup>47</sup> *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1180–85 (9th Cir. 2019) (en banc); *Sakhawati v. Lynch*, 839 F.3d 476, 478–79 (6th Cir. 2016); *U.S. Dep’t of Labor v. Rapid Robert’s Inc.*, 130 F.3d 345, 348-49 (8th Cir. 1997); *Taylor v. United States*, 815 F.2d 249, 253-254 (3d Cir. 1987); *Oguachuba v. Immigration & Naturalization Serv.*, 706 F.2d 93, 98 (2d Cir. 1983).

*Id.*<sup>48</sup> A non-profit that qualifies for tax-exempt status under § 501(c)(3) of the Internal Revenue Code must only show that it did not have more than 500 employees at the time the lawsuit was filed. *Id.*

Net worth is calculated for each individual named party to the lawsuit. Although the EAJA statute does not define the term “net worth,” courts agree that generally accepted accounting principles apply, with total liabilities subtracted from total assets. *See Broaddus v. U.S. Army Corps of Eng’rs*, 380 F.3d 162, 166-67 (4th Cir. 2004) (and cases cited therein). Net worth should, at a minimum, be documented by submitting a signed affidavit attesting that the petitioning party met the appropriate requirements at the time the lawsuit was filed.<sup>49</sup> As a best practice, if the affidavit is from the litigant, it also should attest to an assignment of any EAJA award payment to counsel and, if true, that the litigant does not owe a federal debt. *See Astrue v. Ratliff*, 560 U.S. 586, 597-98 (2010), discussed in detail *infra* at Section VII.

## **VI. CALCULATING FEES, RATES, AND ADJUSTMENT FOR INFLATION**

EAJA fees are “based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of \$125 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 the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A).

Congress increased the statutory hourly rate of compensation for attorneys from \$75 to \$125 for cases commenced on or after March 29, 1996.<sup>50</sup> This amount can be adjusted for inflation based on a cost of living adjustment (COLA) or enhanced based on the presence of a special factor.

### **A. EAJA Statutory Rate Adjusted for Inflation**

Most courts calculate the COLA for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U).<sup>51</sup> The CPI-U is published by the U.S. Bureau of Labor Statistics and is

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<sup>48</sup> Different types of businesses and business owners may qualify as a party under EAJA, including the owner of an unincorporated business (such as a sole proprietor or a limited liability company), a partnership, a corporation, or an association. 28 U.S.C. § 2412(d)(2)(B).

<sup>49</sup> *See, e.g., Broaddus*, 380 F.3d at 169 (providing signed affidavit by applicant’s CPA and noting that “[i]f the CPA’s affidavit allows the court to subtract liabilities from assets, thereby enabling the court to determine an applicant’s net worth, then no further documentation is required”); *United States v. Heavrin*, 330 F.3d 723, 732 (6th Cir. 2003) (“[T]he movant should at least proffer an affidavit showing that the statutory criteria has been met.”); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000) (finding “unverified and unsworn letter from [an] accountant” that did not allow for subtraction of liabilities from assets insufficient).

<sup>50</sup> Equal Access to Justice Act Amendments, Pub. L. No. 104-121, §§ 231-33, 110 Stat. 847, 862-63 (1996).

<sup>51</sup> *See, e.g., Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *Sorenson v. Mink*, 239 F.3d 1140, 1148 (9th Cir. 2001); *Harris v. Sullivan*, 968 F.2d 263, 264-

updated monthly. It is available online at <https://www.bls.gov/bls/news-release/cpi.htm>. Currently, courts measure the COLA based on change from March 1996, when Congress set the \$125 statutory hourly rate of attorney compensation. The March 1996 CPI-U was 155.7.

One formula that is often used for calculating the cost of living adjustment is:

$$\frac{\$125 \times \text{CPI-U for year work performed}}{155.7}$$

Courts generally make this calculation using the CPI-U for the year in which the work was performed.<sup>52</sup> This means that the hourly rate for each year attorney work was performed requires a separate calculation using this equation. Some courts, however, have permitted litigants to calculate one COLA, based on the year the fee requester became a prevailing party, even if the attorney work was performed during more than one year.<sup>53</sup> In this situation, the formula is:

$$\frac{\$125 \times \text{CPI-U for year requester became a prevailing party}}{155.7}$$

Some cases suggest that litigants may use regional or local CPI-Us, rather than the national, in computing the EAJA rate adjusted for inflation.<sup>54</sup> Others disagree. For example, the Ninth Circuit has used the national CPI-U in fee applications filed in that circuit.<sup>55</sup> That court also posts the applicable EAJA statutory maximum hourly rate adjusted for increases in the cost of living starting with 2010. The rate chart is located at:

[http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000039](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039).<sup>56</sup>

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265 (2d Cir. 1992); *Begley v. Sec'y of Health & Human Servs.*, 966 F.2d 196, 199 (6th Cir. 1992); *Dewalt v. Sullivan*, 963 F.2d 27, 28-30 (3d Cir. 1992); *Sullivan v. Sullivan*, 958 F.2d 574, 576-77 & n.6 (4th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990).

<sup>52</sup> See, e.g., *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005); *Masonry Masters, Inc. v. Nelson*, 105 F.3d 708, 710-13 (D.C. Cir. 1997); *Marcus v. Shalala*, 17 F.3d 1033, 1039 (7th Cir. 1994); *Perales v. Casillas*, 950 F.2d 1066, 1076-77 (5th Cir. 1992).

<sup>53</sup> See *Garcia v. Schweiker*, 829 F.2d 396, 402 (3d Cir. 1987).

<sup>54</sup> See *Porter v. Astrue*, 999 F. Supp. 2d 35, 39 (D.D.C. 2013) (requiring use of regional CPI); *Hamblen v. Colvin*, 14 F. Supp. 3d 801, 805-09 & n.7 (N.D. Tex. 2014) (requiring use of local CPI and discussing split authority as to whether to apply the national, regional, or local CPI); see also *Castañeda-Castillo v. Holder*, 723 F.3d 48, 76-77 (1st Cir. 2013) (calculating based on regional CPI-U where the government did not object); *Sprinkle v. Colvin*, 777 F.3d 421, 428 n.2 (7th Cir. 2015) (noting it is in discretion of district courts to use national or regional CPI); *Knudsen v. Barnhart*, 360 F. Supp. 2d 963, 974 (N.D. Iowa 2004) (using regional CPI); *Stanfield v. Apfel*, 985 F. Supp. 927, 931 (E.D. Mo. 1997) (same). Cf. *Yoes v. Barnhart*, 467 F.3d 426, 427 & n.1 (5th Cir. 2006) (recognizing cost of living differences within federal district and declining to adopt a uniform COLA for the district).

<sup>55</sup> *Thangaraja*, 428 F.3d at 877. See also *Jensen v. Berryhill*, 343 F. Supp. 3d 860 (E.D. Wis. 2018); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 366 & n.5 (E.D. Pa. 1997).

<sup>56</sup> In an unpublished decision, the Sixth Circuit found the Ninth Circuit's rate chart a "reasonable basis" for awarding attorneys' fees to an Oakland, California attorney for a

For individuals in areas with higher costs of living, use of the regional or local CPI-U results in a higher rate of compensation.

## **B. Enhanced Rates**

### **1. Establishing Special Factors Merit Enhanced Rates**

Attorney rates also may be increased if a special factor justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A)(ii). The EAJA statute provides one example of a special factor: “the limited availability of qualified attorneys for the proceedings involved.” *Id.* The Supreme Court has addressed the meaning of this statutory phrase as follows:

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.

*Pierce v. Underwood*, 487 U.S. 552, 572 (1988).

Convincing a court to grant enhanced rates is challenging. In one case, the court acknowledged that counsel’s representation amounted to “a herculean effort” lasting over two decades and requiring litigation before both administrative and federal courts, but nevertheless denied fees because counsel did not demonstrate that “distinctive knowledge” or “specialized skill” was essential to the case. *Castañeda-Castillo v. Holder*, 723 F.3d 48, 75-76 (1st Cir. 2013).

Some courts have recognized that a specialized knowledge of immigration law could warrant enhanced attorney rates in certain cases.<sup>57</sup> In the Ninth Circuit, an enhanced rate may be

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successful petition for review of a BIA decision. *Pablo Lorenzo v. Barr*, 806 F. App’x 431, 436-37 (6th Cir. 2020).

<sup>57</sup> See, e.g., *Nadarajah v. Holder*, 569 F.3d 906, 914 (9th Cir. 2009) (holding enhanced rates were appropriate because the “case involved more than established principles of [immigration] law with which the majority of attorneys are familiar”); *Muhur v. Ashcroft*, 382 F.3d 653, 656 (7th Cir. 2004) (noting “immigration lawyers are not ipso facto entitled to fees above the statutory ceiling” but finding immigration expertise, “such as knowledge of foreign cultures or of particular, esoteric nooks and crannies of immigration law,” warrants a special factor rate adjustment when sufficient evidence presented); *Rueda-Menicucci v. Immigration Naturalization Serv.*, 132 F.3d 493, 496 (9th Cir. 1997) (stating that “a specialty in immigration law could be a special factor warranting an enhancement of the statutory rate” it were necessary to the litigation but finding enhancement not warranted in this case); *Jean v. Nelson*, 863 F.2d 759, 774 (11th Cir. 1988), *aff’d on other grounds, Comm’r, Immigration & Naturalization Serv.*, 496 U.S. 154 (1990) (noting that attorneys’ “special expertise in immigration law,” described as a “narrow legal specialty,” and one attorney’s foreign language fluency, which the district court found “crucial” to witness preparation, might be special factors); *Douglas v. Baker*, 809 F. Supp. 131, 135 & n.7 (D.D.C. 1992) (awarding enhanced EAJA rate based, in part, on attorney’s

warranted if the attorney “possess[es] distinctive knowledge and skills developed through a practice specialty,” the skills are “needed in the litigation,” and the skills are not “available elsewhere at the statutory rate.” *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citing *Pirus v. Bowen*, 869 F.2d 536, 541-42 (9th Cir. 1989)).

Special factors do *not* include the limited availability of attorneys with a general legal competence (as contrasted with attorneys qualified by “some distinctive knowledge or specialized skill”), litigation that involves novel and difficult issues, the “undesirability of the case,” or “the results obtained.” *Pierce v. Underwood*, 487 U.S. 552, 572-73 (1988). These factors are considered “applicable to a broad spectrum of litigation; little more than routine reasons why market rates are what they are.” *Id.* at 573.

When reviewing whether to grant enhanced rate requests, courts require evidence of the attorney’s particular qualifications, how those qualifications were needed in the litigation, and information regarding the lack of availability of attorneys who could litigate the case.<sup>58</sup>

Declarations from other attorneys will help document a claim for enhanced rates based on expertise in immigration law. The declarations could explain why immigration law expertise was necessary to litigate the case and further attest that the party would be unable to find an attorney with the requisite immigration expertise at the \$125 EAJA statutory rate. *See, e.g., Nadarajah v. Holder*, 569 F.3d 906, 915 (9th Cir. 2009) (quoting attorney declaration to support finding that “no other counsel was available to take [the] case at the adjusted statutory maximum hourly rate”).

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extensive experience in immigration law).

*But see Johnson v. Gonzales*, 416 F.3d 205, 213 (3d Cir. 2005) (finding enhancement not warranted in case involving “straightforward application of the substantial evidence and asylum standards”); *Castañeda-Castillo v. Holder*, 723 F.3d 48, 76 (1st Cir. 2013) (finding no “‘special skill’ or ‘distinctive knowledge,’ apart from that obtained by immigration lawyers pursuant to their general experience, was necessary to prevail”); *Perales v. Casillas*, 950 F.2d 1066, 1078-79 (5th Cir. 1992) (finding that immigration lawyers, unlike patent lawyers and experts in foreign law, do not warrant enhanced rates for a special factor); *National Ass’n of Mfrs. v. U.S. Dep’t of Labor*, 962 F. Supp. 191, 199 (D.D.C. 1997), *aff’d*, 159 F.3d 597 (D.C. Cir. 1998) (“Unlike patent law, no technical education is necessary to excel in either [immigration or administrative law].”). *See also Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (declining to adopt a *per se* rule that immigration law is a specialty area like patent law).

<sup>58</sup> *See, e.g., Floroiu v. Gonzales*, 498 F.3d 746, 749 (7th Cir. 2007) (denying rate enhancement where attorney provided only his statement regarding years of immigration law experience and a conclusory statement regarding case complexity); *Nat’l Venture Capital Ass’n v. Nielson*, 318 F. Supp. 3d 145, 152 (D.D.C. 2018) (denying enhanced rate where counsel made no showing that immigration attorneys were only available at their market rates or that immigration experience was required to challenge a “recurring” administrative law question); *Caplash v. Nielsen*, 294 F. Supp. 3d 123, 138-39 (W.D.N.Y. 2018) (denying enhanced rate where counsel failed to present evidence that experience in immigration, administrative and constitutional law was required).

## 2. Establishing the Prevailing Market Rate for Attorneys

An attorney seeking an enhanced rate based on special factors must establish the prevailing market rate for services. 28 U.S.C. § 2412(d)(2)(A). This is true whether the attorney represents the client *pro bono* or for a fee, and whether the attorney works for a non-profit organization or a private firm. *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (assessing fees under 42 U.S.C. § 1988); *Nadarajah v. Holder*, 569 F.3d 906, 915-16 (9th Cir. 2009).

The prevailing market rate need not reflect the rate charged to the client.<sup>59</sup> Therefore, counsel need not submit a copy of any fee agreement with the client for the court to determine the appropriateness of the EAJA fee award. *Id.*, at 916 (9th Cir. 2009) (rejecting government’s claims that court could not evaluate fee request without copy of retainer between attorney and nonprofit organization and that nonprofits should not receive market rates as “not supported by legal authority and lack[ing] merit”).<sup>60</sup>

Instead, there are several methods that litigants seeking enhanced rates may use to provide evidence of prevailing market rates.

### a. Market Rate Surveys and Attorney Declarations

Attorneys can submit market rate surveys as evidence of prevailing rates based on specialization, location, and years of experience.<sup>61</sup> More commonly, attorneys submit sworn declarations from

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<sup>59</sup> See *United States v. \$186,416.00 in U.S. Currency*, 642 F.3d 753, 755 (9th Cir. 2011) (“Under [42 U.S.C.] § 1988 and EAJA, the actual fee agreement does not act as a cap on the amount of statutory attorney fees awarded. However, the agreement can be considered when determining a reasonable fee under the lodestar approach.”) (citations omitted); *Merkeldove v. Astrue*, 635 F.3d 784, 791-92 (5th Cir. 2011) (finding that plaintiffs “incur” fees as EAJA requires where they have contingent fee agreements or are represented pro bono); *Phillips v. Gen. Servs. Admin.*, 924 F.2d 1577, 1582-83 (Fed. Cir. 1991) (holding the prevailing party was entitled to attorney fees in excess of the \$2,500 she was obligated to pay regardless of the outcome of the case because her fee arrangement also included a contingency fee if the court awarded EAJA fees); *Cornella v. Schweiker*, 728 F.2d 978, 986 (8th Cir. 1984) (noting that, per legislative history of EAJA, attorney fees should be available in pro bono cases and “should be based on prevailing market rates without reference to the fee arrangements between the attorney and client”) (quotation and emphasis omitted). *Accord Corder v. Gates*, 947 F.2d 374, 378 n.3 (9th Cir. 1991) (“[I]t is clear that an award of a ‘reasonable’ attorney’s fee [under § 1988] may be made to a prevailing plaintiff notwithstanding the fact that the plaintiff’s attorney has agreed to accept a smaller fee, or even no fee at all.”).

<sup>60</sup> In unpublished orders by the Appellate Commissioner, the Ninth Circuit has rejected expressly any obligation to share retainer agreements to establish that EAJA fees are appropriate. *Arredondo v. Holder*, No. 08-73835, slip op. at 9 (9th Cir. Nov. 30, 2012) (order determining fee award); *Zenhua Li v. Holder*, No. 07-72560, slip op. at 3-4 (9th Cir. July 2, 2012) (order determining fee award).

<sup>61</sup> See *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (relying upon declaration from “attorneys’ fees expert” compiling hourly rates charged by attorneys in

other attorneys of similar expertise and years of experience attesting to their individual and/or firm's hourly rate to provide evidence of prevailing market rates.<sup>62</sup> For example, an attorney in Los Angeles with 8-10 years of immigration experience who is claiming an enhanced rate could document the prevailing market rate for his or her services by submitting one or more declarations from other immigration lawyers in Los Angeles with 8-10 years of similar immigration experience attesting that they routinely charge the requested hourly rate (or more).

**b. *The Laffey Matrix***

The *Laffey Matrix* is another mechanism that attorneys sometimes can use to establish prevailing market rates. Named after the 1983 court case which first employed it, this matrix provides hourly rates based on years of litigation experience in the D.C. area. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983).<sup>63</sup>

Modified and updated versions of the *Laffey Matrix* are available as tables with hourly rates, updated annually, based on attorneys' years of experience, as well as an hourly rate for paralegals and law clerks.

The Civil Division of the U.S. Attorney's Office for the District of Columbia (DC USAO) issues one version of the fee matrix, originally based on the *Laffey* rates, for its use in evaluating requests in civil cases in D.C. courts, where "a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees."<sup>64</sup>

There is also a "competing *Laffey Matrix*" developed that calculates the adjusted rate of inflation using the Legal Services Index (LSI)—known as the LSI *Laffey* matrix. *Eley v. District of*

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the relevant market involved in federal civil litigation in assessing fees under 42 U.S.C. § 1988); *Nadarajah v. Holder*, 569 F.3d 906, 917 (9th Cir. 2009) (relying upon declaration from attorney describing, inter alia, annual surveys she conducted of Los Angeles law firms "to obtain relevant comparisons for billing rates").

<sup>62</sup> See, e.g., *id.*; *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990).

<sup>63</sup> On appeal, the DC Circuit required a recalculation of fees based on different rates. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 18-20 (D.C. Cir. 1984). However, that DC Circuit decision was subsequently overruled in relevant part. See *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1521-25 (D.C. Cir. 1988) (en banc). The original *Laffey* rates were for attorneys with experience in complex federal litigation. 572 F. Supp. at 372, 374.

<sup>64</sup> U.S. Department of Justice, *USAO Attorney's Fee Matrix*, at 1 (last visited Jul. 17, 2020), <https://www.justice.gov/usao-dc/page/file/1189846/download>. Although originally based on the *Laffey* rates, in its current version, the DC USAO matrix is calculated based on "average hourly rates from 2011 survey data for the D.C. metropolitan area . . . adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index." *Id.* Previously, this matrix was based on the *Laffey* rates and adjusted over time based on the Bureau of Labor Statistics' Consumer Price Index for All Urban Consumers (CPI-U) for the Washington, D.C. area. *Id.* at 2.

According to DC USAO, the matrix is not "generally for use outside the District of Columbia or by other Department of Justice components, or in other kinds of cases." *Id.* at 1.

*Columbia*, 793 F.3d 97, 101-02 (D.C. Cir. 2015).<sup>65</sup> In 2015, the D.C. Circuit upheld as reasonable the use of the LSI *Laffey* Matrix. *Salazar ex rel. Salazar v. District of Columbia*, 809 F.3d 58, 64-65 (D.C. Cir. 2015).<sup>66</sup>

Both fee matrices have their detractors. *See, e.g., Eley v. District of Columbia*, 793 F.3d 97, 101-02 (D.C. Cir. 2015) (noting critics of the DC USAO matrix and criticizing the LSI *Laffey* matrix for tracking price increases nationwide, rather than locally); *DL v. District of Columbia*, 924 F.3d 585, 591-93 (D.C. 2019) (holding that the current version of the DC USAO matrix is no longer “presumptively applicable” and permitting use of the LSI *Laffey* matrix). The Federal Circuit considered the appropriateness of using a prior DC USAO matrix instead of the LSI *Laffey* Matrix and concluded that “it would be an abuse of discretion to blindly use either matrix without considering all the relevant facts and circumstances.” *Biery v. United States*, 818 F.3d 704, 714 (Fed. Cir. 2016).<sup>67</sup>

In light of the different matrices, counsel are advised to review circuit law before relying on a version of the *Laffey* Matrix as a base from which to determine prevailing market rates. Counsel also should consider supplementing a *Laffey* Matrix with other sources to demonstrate the prevailing market rate.<sup>68</sup>

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<sup>65</sup> The LSI *Laffey* Matrix is available at <http://www.laffeymatrix.com/see.html>.

<sup>66</sup> The appellate court upheld the district court’s conclusion that the LSI *Laffey* Matrix was “probably a *conservative* estimate” of the cost of legal services in the D.C. area. *Id.* (emphasis in original, quotation omitted).

<sup>67</sup> Outside of Washington, DC, cases take a variety of approaches. *See, e.g., Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245-46 (4th Cir. 2009) (rejecting use of DC USAO *Laffey* matrix where litigation not complex, attorney practiced in Virginia, and attorney affidavit was insufficient evidence of market rates); *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 708-10 (3d Cir. 2005) (approving on remand use of LSI *Laffey* Matrix); *Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 948-49 (N.D. Cal. 2010) (awarding fees in an antitrust lawsuit based on DC USAO matrix (CPI-U version), adjusted for cost of living in San Francisco area); *In Re HPL Technologies, Inc. Secs. Litig.*, 366 F. Supp. 2d 912, 921-22 (N.D. Cal. 2005) (same). *See also Int’l Petroleum Prods. & Additives Co. v. Black Gold S.A.R.L.*, No. 19-cv-03004-YGR, 2020 WL 789567, at \*4 (N.D. Cal. Feb. 18, 2020) (awarding fees based on actual rates as evidenced by “short declaration” from one attorney as to experience and actual rates charged for similar work and noting that such rates were reasonable, in part, because the *Laffey* Matrix rates were higher). Some courts have disputed the relevance of the *Laffey* Matrix outside of Washington, D.C. *See, e.g., Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010) (“[J]ust because the *Laffey* matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles away.”); *Am. Bird Conservancy v. U.S. Fish & Wildlife Serv.*, 110 F. Supp. 3d 655, 673 (E.D. Va. 2015) (“[T]he *Laffey* Matrix has little, if any, applicability in determining the prevailing market rates of attorneys’ rates in Northern Virginia.”).

<sup>68</sup> These additional sources may include surveys, affidavits as to fees similarly qualified attorneys received from their clients for comparable legal services, or documentation of fees won in court or by settlement by similarly qualified attorneys in similar cases. *See Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995).

### c. *Rates for Out-of-Area Counsel*

There are a limited number of cases that address the relevant market rates when an attorney performs legal services in a location outside of the court's area of jurisdiction. In general, courts will apply the prevailing market rate for legal services provided within the court's jurisdiction. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703-05 (3d Cir. 2005); *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). However, a court may deviate from this norm when a party demonstrates that it needed the "special expertise" of an attorney outside the judicial district or that "local counsel [were] unwilling" to take the case. *Interfaith Cmty. Org.*, 426 F.3d at 704-05 (quotation omitted).

### C. **Law Clerk, Paralegal and Expert Witness Rates**

Under EAJA, prevailing parties may also receive compensation for the work of paralegals, law clerks, and expert witnesses. 28 U.S.C. § 2412(d)(2)(A) (including "the reasonable expenses of expert witnesses," as well as "reasonable attorney fees"); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988) (upholding award for paralegal and law clerk work "normally done by an attorney").<sup>69</sup> Compensation is at the prevailing market rate. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (holding that statutory construction "compel[s] the conclusion that paralegal fees are recoverable as attorney's fees at the 'prevailing market rates'" (quoting 5 U.S.C. § 504(b)(1)(A)).<sup>70</sup> *See also Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (holding that fees are compensable for those, like law clerks, "whose labor contributes to the work product for which an attorney bills her client" under 42 U.S.C. § 1988). A court may reduce a fee request if it includes hours billed for clerical work done by paralegals and interns.<sup>71</sup>

The prevailing market rate need not reflect the rate charged to the client. However, the statute provides that expert witnesses cannot be compensated at a "rate in excess of the highest rate of compensation for expert witnesses paid by the United States." 28 U.S.C. § 2412(d)(2)(A)(i).

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<sup>69</sup> *See also Hyatt v. Barnhart*, 315 F.3d 239, 255-56 (4th Cir. 2002) (holding that, on remand, district court must exclude from fee award paralegal time for tasks not traditionally performed and billed by an attorney); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (finding that district court did not abuse discretion in awarding attorneys' fees in Title VII class action for non-clerical portion of paralegals' work).

<sup>70</sup> In *Richlin*, the Supreme Court considered whether EAJA allows recovery of fees for paralegal services at market rate or only at the actual cost to the attorney, citing both 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). 553 U.S. at 573. The Court focused on the meaning of "fees" under 5 U.S.C. § 504(b)(1)(A), which relates to administrative agency proceedings. *Id.* at 576-77. The Court described the fee-shifting provision in 28 U.S.C. § 2412(d)(1)(A) as "virtually identical" and "assume[d] without deciding" that its reasoning "would extend equally to §§ 504 and 2412." *Id.* at 577 n.3.

<sup>71</sup> *See Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009) (reducing the fee award by the hours the paralegal recorded for clerical work); *Jenkins*, 491 U.S. at 288 n.10 (finding that "purely clerical or secretarial tasks should not be billed at a paralegal rate regardless of who performs them").

Market rate surveys often contain information on prevailing rates for law students and paralegals. Counsel also can submit declarations from other attorneys attesting to the rates paid to law students and paralegals in the area to establish prevailing rates.

## VII. EAJA AWARD PAYMENTS

The Supreme Court, in *Astrue v. Ratliff*, held that an EAJA award is payable to the litigant, not his or her attorney. 560 U.S. 586 (2010). The Court reasoned that the government’s practice of paying fees to counsel (in cases where the prevailing party assigned the fee award to counsel) bolstered its conclusion; such assignments would be unnecessary if the EAJA statute required payment to counsel, not the litigant. *Id.* at 597-98. In addition, the Court concluded that any fee award is subject to offset to satisfy the litigant’s pre-existing debt to the government. *Id.*

Under *Ratliff*, an award is payable to the attorney where the client has no outstanding federal debt and expressly assigned the right to receive fees to their attorney.<sup>72</sup>

Attorneys should consult with clients to determine if they owe any debt to the federal government because that amount will be deducted from any EAJA award. Courts take different approaches as to who is responsible for determining the existence of a debt. *Compare Oliver v. Comm’r of Soc. Sec.*, 916 F. Supp. 2d 834, 838 (S.D. Ohio 2013) (finding it was not court’s duty to assess whether the plaintiff owed a debt) *with Cowart v. Comm’r of Soc. Sec.*, 795 F. Supp. 2d 667, 671-72 (E.D. Mich. 2011) (ordering the Commissioner of Social Security to determine whether litigant owed the government a pre-existing debt); *Gunther v. Comm’r of Soc. Sec.*, 943 F. Supp. 2d 797, 806 (N.D. Ohio 2013) (same).

In some cases, the government may cite to *Ratliff* to argue that the court must limit any fee award to the amount the litigant actually incurred, or paid to counsel, and to justify its request that counsel provide the court with a copy of the client’s retainer. *Ratliff*, however, does not limit the fee award to the amount already paid out by the client, and attorneys should oppose any such argument. *See Turner v. Comm’r of Soc. Sec.*, 680 F.3d 721, 723-24 (6th Cir. 2012) (citing cases). Courts have expressly recognized that a client can incur fees for purposes of EAJA pursuant to a contingent fee or pro bono representation agreement. *See id.* at 724 (“[I]t is ‘well-

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<sup>72</sup> *See, e.g., Mathews-Sheets v. Astrue*, 653 F.3d 560, 565 (7th Cir. 2011) (interpreting *Ratliff* to suggest, “that if there is an assignment, the only ground for . . . insisting on making the award to the plaintiff is that the plaintiff has debts that may be prior to what she owes her lawyer”), *overruled on other grounds by Sprinkle v. Colvin*, 777 F.3d 421 (7th Cir. 2015); *Jensen v. Berryhill*, 343 F. Supp. 3d 860, 867-68 (E.D. Wis. 2018) (providing for award payable to attorney where counsel verifies plaintiff owes no pre-existing debts and for award, less offset, payable to plaintiff and mailed to attorney where there is pre-existing debt); *Beattie v. Colvin*, 240 F. Supp. 3d 294, 299 n.1 (D.N.J. 2017) (“[W]here . . . there is an assignment agreement and the prevailing party owes no debt to the government, the Supreme Court has honored that agreement and awarded attorney’s fees directly to the prevailing party’s counsel.”); *Kirk v. Berryhill*, 244 F. Supp. 3d 1077, 1084-85 (E.D. Cal. 2017) (same); *Bolden ex rel. L.K.B v. Colvin*, 114 F. Supp. 3d 397, 399-400 (N.D. Miss. 2015) (“[A]n EAJA award, less any administrative offsets, may be paid directly to an attorney pursuant to an express fee assignment with the attorney’s client.”).

settled’ that the existence of an unsatisfied contingency or pro bono representation agreement does not preclude a fee award, even where the statute limits fees to those ‘incurred’ by the plaintiff in that action.”); *Nadarajah v. Holder*, 569 F.3d 906, 916 (9th Cir. 2009) (noting that the award of EAJA fees “should not be viewed as unjustified ‘windfall’ profit to the attorney” “regardless whether the claimant is represented by private counsel or a non-profit legal services organization”); *see also Murkeldove v. Astrue*, 635 F.3d 784, 790-94 (5th Cir. 2011) (holding claimants “incurred” attorney’s fees with contingent fee arrangement).<sup>73</sup> The EAJA statute states that the purpose of EAJA is to diminish the deterrent that litigants face in “seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.” Pub. L. No. 96–481, § 202, 94 Stat. 2321, 2325 (Oct. 21, 1980). Hence, it does not matter how much the client actually paid counsel; the point of EAJA is to ensure that the client has access to counsel to defend his or her rights. Practitioners are not required to hand over their retainer agreements to the government because the amount paid by the client simply is not relevant to the amount counsel may recover.

Because *Ratliff* establishes that, absent an agreement to the contrary, an EAJA payment is the property of the client, counsel should obtain an assignment from the client for any fee award or settlement. Many courts, however, have found that the individual attorney-client relationship, the fee agreement, and the purpose and nature of EAJA give rise to an express or implied obligation for the client to pay to his or her attorney any court-ordered EAJA fee award.<sup>74</sup>

Post-*Ratliff*, to ensure counsel receives payment of any EAJA award, attorneys are advised to:

- Set forth an assignment of fees to counsel in the retainer agreement. The following is suggested language:

In the event of prevailing in the litigation described above, [Client] authorizes [Counsel] to pursue a motion for attorneys’ fees and expenses on [Client’s] behalf. [Client] agrees to assign any fee award to [Counsel/Counsel’s Office]. [Client] agrees to state in a declaration that any attorneys’ fees payment should be issued to [Counsel/Counsel’s Office] and mailed to either to [Counsel’s] address or direct deposited into

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<sup>73</sup> In unpublished orders by the appellate commissioner, the Ninth Circuit has expressly rejected any obligation to share retainer agreements to establish that EAJA fees are appropriate. *See, e.g., Zenhua Li v. Holder*; No. 07-72560 (9th Cir.) (order dated Jul. 2, 2012, motion to reconsider denied Aug. 30, 20102); *Khoshfahm v. Holder*, No. 10-71066 (9th Cir.) (order dated Feb. 3, 2012).

<sup>74</sup> *See Turner*, 680 F.3d at 725 (holding that “litigants ‘incur’ fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives, regardless of whether the court subsequently voids the assignment provision under the [Anti-Assignment Act]”); *Ed. A. Wilson, Inc. v. GSA*, 126 F.3d 1406, 1409 (11th Cir. 1997) (affirming that an EAJA fee award is appropriate where there is an “express or implied agreement . . . that any fee award will be paid to the legal representative”); *Phillips v. GSA*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) (“Inherent in the [fee] agreement is an intention on the part of [the plaintiff] to be obligated to her counsel for fees properly obtainable under that statute.”).

[Counsel's] bank account.

If fees and expenses were to issue to [Client], [Client] authorizes [Counsel] to endorse [Client's] name to any check, insurance draft, or settlement draft only for the purpose of depositing said check or draft into [Counsel's] account.

- With any EAJA motion, submit an affidavit from the client that attests to: (1) the client's net worth (*see supra* Section V.D), (2) assignment of fees, and (3) the absence of a federal debt. This should avoid any alleged need for the government or court to review retainer agreements. A sample declaration follows this advisory.
- In the body of the EAJA motion, ask the Court to order the government to pay any EAJA award directly to counsel.
- Separately establish with the client what portion of the fees remain the property of the attorney, and what portion are to be returned to the client or applied to future work.

**SAMPLE NET WORTH AND FEE ASSIGNMENT DECLARATION**

DECLARATION OF [Name of Client]

I, [Name of Declarant], hereby declare and state:

1. My current residence is \_\_\_\_\_.
2. I am a private individual and my net worth does not, nor has it ever, exceeded the amount of \$2,000,000.
3. I make this declaration in support of my motion for attorney fees and costs incurred in my successful representation before the [Court] in [Case Name and Number].
4. I previously retained [Counsel] to represent me [if applicable, pro bono] in this case.
5. I authorize the recovery of fees and expenses to my [attorney, attorneys, attorney's office] in order to compensate [him/her/them] for work performed on my behalf [if applicable, for which their office was not compensated].
6. I further assign payment of any award of fees and costs to [Counsel's Office] and request payment to [Counsel's Office] either via a check mailed to [Counsel's] office address at [Counsel's Address] or directly deposited into [his/her] office's account.
7. To the best of my knowledge, I do not owe any debt to the United States federal government.

I declare under penalty of perjury under the laws of the State of \_\_\_\_\_ that the above is true and correct to the best of my knowledge and belief. Executed on [DATE] at [City, State].

\_\_\_\_\_  
[Name of Declarant]