

**ATTORNEY FEES AND RECOVERABLE EXPENSES UNDER THE
EQUAL ACCESS TO JUSTICE ACT (“EAJA”)**

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ATTORNEY FEES AND RECOVERABLE EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT (“EAJA”)

I. THE STATUTE

[28 U.S.C. § 2412\(d\)\(1\)\(A\)](#) provides:

[A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

See also [Meza-Vazquez v. Garland](#), 993 F.3d 726, 728 (9th Cir. 2021) (order) (“To be awarded attorneys’ fees under the EAJA, (1) the party seeking fees must be a prevailing party, (2) the government’s position must not have been substantially justified, and (3) there must not be special circumstances rendering an award unjust.” (citing [28 U.S.C. § 2412\(d\)\(1\)\(A\)](#))).

Eligible parties include “an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed.” *Id.* [§ 2412\(d\)\(2\)\(B\)\(i\)](#).

[Section 2412\(d\)\(1\)\(B\)](#) requires that an EAJA applicant,

within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the

agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

See also id. § 2412(d)(2)(D) (defining “position of the United States” to mean, “in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based”).

“Fees and other expenses” include:

the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party’s case, and reasonable attorney fees[.] (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) 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.)

Id. § 2412(d)(2)(A). *But see id.* § 2412(d)(2)(D) (stating that “fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings”).

An order awarding or denying EAJA fees is reviewed for abuse of discretion. *See Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1089 (9th Cir. 2022) (reviewing denial of fees); *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1166 (9th Cir. 2019) (en banc) (reviewing award of fees); *Gardner v. Berryhill*, 856 F.3d 652, 656 (9th Cir. 2017) (reviewing denial of fees); *Decker v. Berryhill*, 856 F.3d 659, 663 (9th Cir. 2017) (reviewing denial of fees). A district court’s interpretation of the EAJA is reviewed de novo. *See Ibrahim*, 912 F.3d at 1166. “[A] district court’s fee award will be overturned if it is based on an inaccurate view of the law or a clearly erroneous finding of fact.” *Id.* (internal quotation marks and citation omitted). “[B]ecause the EAJA is a limited waiver of the government’s sovereign immunity, it must be strictly construed in favor of maintaining immunity not specifically and clearly waived.” *In re Sisk*, 973 F.3d

945, 946 (9th Cir. 2020) (as amended) (internal quotation marks and citation omitted).

II. CASELAW

This section outlines selected Ninth Circuit immigration cases addressing EAJA. Because EAJA applies in other contexts as well, readers of this outline should also consult precedents beyond the immigration field.

A. Jurisdiction

In order for a court to award fees under EAJA, it must have jurisdiction over the underlying action. *See* 28 U.S.C. § 2412(d)(1)(A); *Zambrano v. INS*, 282 F.3d 1145, 1149-50 (9th Cir. 2002) (as amended) (no jurisdiction under EAJA where district court dismissed underlying action for lack of jurisdiction).

B. Filing Deadline

“Under the EAJA, the deadline to file for attorney’s fees is 30 days after a final judgment—that is, 30 days after the date when a petition for a writ of certiorari would be untimely.” *Lizardi v. Wilkinson*, 986 F.3d 1294 (9th Cir. 2021), *as amended* (Feb. 10, 2021). *See also* *Li v. Keisler*, 505 F.3d 913, 916-17 (9th Cir. 2007) (“The thirty-day deadline to file an application for attorney’s fees under EAJA does not begin to run until after the . . . period during which a party may seek a writ of certiorari from the United States Supreme Court.”); *Zheng v. Ashcroft*, 383 F.3d 919, 920 (9th Cir. 2004) (order) (“After a ‘final judgment,’ a petitioner has thirty days to file a motion for attorney’s fees under the EAJA. . . . We have interpreted ‘final judgment’ for EAJA purposes as the date on which a petition for certiorari would be untimely.” (citation omitted)). “[A] party need not wait until the judgment is final to move for attorney’s fees.” *Lizardi*, 986 F.3d 1294 (holding that motion for attorney’s fees under the EAJA was not premature). To be timely, an application must be received, not mailed, on or before the deadline. *See Arulampalam v. Gonzales*, 399 F.3d 1087, 1090 (9th Cir. 2005) (order).

EAJA’s thirty-day deadline is not affected by when this court’s mandate issues. “[T]he Supreme Court’s explicit rule starts the time to file a petition for a writ of certiorari on the date of judgment or order to be reviewed, not on the date mandate issues. Running from the date of judgment or order, there are ninety days

before that petition is untimely, rendering the order or judgment ‘final’ for EAJA purposes.” *Zheng v. Ashcroft*, 383 F.3d 919, 921 (9th Cir. 2004) (order). “Because filing a petition for rehearing or a petition for rehearing en banc tolls the time period for filing a petition for a writ of certiorari, *see* Sup. Ct. R. 13(3), it follows that the EAJA clock [is] similarly tolled.” *Id.* at 921 n.3.

C. Prevailing Party

“As the Supreme Court recently reiterated, ‘[b]efore deciding whether an award of attorney’s fees is appropriate . . . a court must determine whether the party seeking fees has prevailed in the litigation.’” *Wood v. Burwell*, 837 F.3d 969, 973 (9th Cir. 2016) (quoting *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016)). Prevailing party status requires a material alteration of the legal relationship between the parties that was judicially sanctioned. *See Wood*, 837 F.3d at 973; *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007) (order) (citing *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598, 604-05 (2001)). “[T]he petitioner’s success in obtaining the desired relief from the federal court is critical to establishing prevailing party status under *Buckhannon*, regardless of whether the federal court’s order addressed the merits of the underlying case.” *Li*, 505 F.3d at 917. The court has held that a Circuit Mediator’s remand order satisfies this standard. *Id.* at 918. “Procedural remedies can constitute a material alteration in the parties’ legal relationship.” *Wood*, 837 F.3d at 974. Note that the “material alteration and the judicial sanction are two separate requirements.” *Klamath Siskiyou Wildlands Center v. United States Bureau of Land Management*, 589 F.3d 1027, 1030 (9th Cir. 2009).

When a petitioner has obtained a remand for further consideration, he or she is a prevailing party. *Rueda-Menicucci v. INS*, 132 F.3d 493, 495 (9th Cir. 1997). *See also Wood*, 837 F.3d at 978 (“the retention of jurisdiction for practical and equitable reasons did not undermine the reality that the Wood plaintiffs were a prevailing party” where the remand was not interim relief, but rather represented success on the challenge); *Carbonell v. INS*, 429 F.3d 894, 899-902 (9th Cir. 2005) (holding that a district court’s order incorporating a voluntary stipulation to a stay of deportation materially altered the relationship between Carbonell and the government, and that the alteration was judicially sanctioned, making the applicant a prevailing party); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (holding that applicant who was granted naturalization at the administrative level

while the federal court action was held in abeyance was not a prevailing party because he “unmistakably did not gain a change in his legal relationship with the INS by judgment or consent decree”).

D. Position of the United States

“[T]he ‘position of the United States’ as defined by EAJA encompasses both the DHS’s litigation position and the underlying agency decision rendered by the BIA or an IJ. . . .” *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (order); *see also Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (en banc) (“When evaluating the government’s ‘position’ under the EAJA, [the court considers] both the government’s litigation position and the ‘action or failure to act by the agency upon which the civil action is based.’” (quoting 28 U.S.C. § 2412(d)(1)(B)); *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013) (social security case) (“As EAJA provides, position of the United States means, in addition to the position taken by the United States in the civil action, *the action or failure to act by the agency upon which the civil action is based.*” (internal quotation marks and citation omitted))).

E. Substantial Justification

“The government bears the burden of demonstrating substantial justification.” *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (order); *see also Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1089-91 (9th Cir. 2022) (government’s litigation position was substantially justified); *Meza-Vazquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021) (order) (explaining that the government bears the burden of showing that it was substantially justified in both its litigation position and the underlying agency action giving rise to the civil action, meaning that both the immigration judge’s decision and the BIA’s decision must have been substantially justified); *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1167 (9th Cir. 2019) (en banc); *Tobeler v. Colvin*, 749 F.3d 830, 832 (9th Cir. 2014).

“[T]he substantial justification test is comprised of two inquiries, one directed toward the government agency’s conduct, and the other toward the government’s attorneys’ conduct during litigation.” *Ibrahim*, 912 F.3d at 1168 (citation omitted). “‘Substantial justification’ in this context means ‘justification to a degree that could satisfy a reasonable person[.]’” *Al-Harbi v. INS*, 284 F.3d

1080, 1084 (9th Cir. 2002) (order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also* *Meza-Vazquez*, 993 F.3d at 729; *Decker v. Berryhill*, 856 F.3d 659, 664 (9th Cir. 2017); *Tobeler*, 749 F.3d at 832; *Meier v. Colvin*, 727 F.3d 867, 870-72 (9th Cir. 2013) (social security case). “The government’s position is not substantially justified simply because . . . precedents have not squarely foreclosed the position.” *Decker*, 856 F.3d at 664.

The court has “interpreted the term substantial justification as describing a position that has a reasonable basis both in law and fact.” *Renee v. Duncan*, 686 F.3d 1002, 1017 (9th Cir. 2012) (internal quotation marks, alterations, and citation omitted); *see also* *Meza-Vazquez*, 993 F.3d at 729; *Ibrahim*, 912 F.3d at 1168; *Decker*, 856 F.3d at 664. “The test is not whether the government was correct, but whether it was for the most part justified in taking the position that it did. . . . A position that was not contrary to clearly established law is thus substantially justified.” *Meza-Vazquez*, 993 F.3d at 729 (internal quotation marks and citation omitted). It is a “decidedly unusual case in which there is substantial justification under the EAJA even though the agency’s decision was reversed as lacking in reasonable, substantial and probative evidence in the record.” *Al-Harbi*, 284 F.3d at 1085 (internal quotation marks and citation omitted); *see also* *Decker*, 856 F.3d at 664; *Thangaraja*, 428 F.3d at 874; *Campbell v. Astrue*, 736 F.3d 867, 868-69 (9th Cir. 2013) (order).

“In assessing whether the government’s position was substantially justified, we also consider any ‘extraneous circumstances bearing upon the reasonableness of the government’s decision’ [which] can include ‘relevant legal or factual precedents.’” *Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1090 (9th Cir. 2022) (internal citations omitted). “A ‘string of losses’ or a ‘string of successes’ can be an objective indicator of reasonableness[,]” though the fact that a lower court initially agreed with the government’s position “is not ‘conclusive of whether or not the government was reasonable.’” *Id.* at 1090-91 (internal citations omitted) (the circumstances—that “no fewer than six federal judges” had been persuaded by the government’s position on issue of first impression—supported the district court’s conclusion that the government’s position was not unreasonable despite this court’s en banc ruling against that position).

When the court “decide[s] whether the government’s litigation position is substantially justified, the EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line items.” *Al-Harbi*, 284 F.3d at 1084-85 (internal

quotation marks and citation omitted). *See also Ibrahim*, 912 F.3d at 1169-71 (explaining that EAJA favors treating a case as an inclusive whole, rather than as atomized line-items, and concluding that the district court erred in its “piecemeal approach” to substantial justification, particularly where the agency’s original action of erroneously placing petitioner on a No Fly list was “not justified at all, much less substantially”).

“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.’” *Ibrahim*, 912 F.3d at 1168 (quoting *United States v. Marolf*, 277 F.3d 1156, 1162 n.2 (9th Cir. 2002)).

“That the government lost (on some issues) does not raise a presumption that its position was not substantially justified.” *Ibrahim*, 912 F.3d at 1168.

The government’s failure to address contrary circuit precedent weighs against substantial justification. *See Singh v. Gonzales*, 502 F.3d 1128, 1129 (9th Cir. 2007) (government position not substantially justified where it repeated an argument already rejected by this court without acknowledging the case that rejected it, particularly where the Department of Justice was involved in previous case); *Thangaraja*, 428 F.3d at 874-75. “Relitigation of a previously decided issue is a strong factor weighing against the government in determining substantial justification.” *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1460 (9th Cir. 1988) (order) (internal quotation marks and citation omitted), *receded from on other grounds by Sorenson v. Mink*, 239 F.3d 1140 (9th Cir. 2001). Whether a BIA opinion is consistent with caselaw in other circuits “is irrelevant to whether the government was substantially justified” when Ninth Circuit law is to the contrary. *Ratnam v. INS*, 177 F.3d 742, 743 n.1 (9th Cir. 1999).

“A lack of judicial precedent adverse to the government’s position does not preclude a fee award under the EAJA.” *Ramon-Sepulveda*, 863 F.2d at 1459. Subsequent caselaw “only support[s] a finding that the government’s position was ‘substantially justified’ if the government contested the petitions . . . on the ground on which those cases were decided.” *Abela v. Gustafson*, 888 F.2d 1258, 1265 (9th Cir. 1989). Partial concessions by the government do not necessarily constitute substantial justification, as the court “expect[s] nothing less than such candid and rigorous evaluations of the agency’s explanations of its decisions in all parties’ briefs.” *Thangaraja*, 428 F.3d at 875.

In a situation where the government seeks a voluntary remand, “EAJA’s standards are best served by considering the likely reason behind the voluntary remand in question.” *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). *See also Meza-Vazquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021) (“When the government seeks a voluntary remand, [the court] evaluate[s] substantial justification based on whether the request was motivated by ‘subsequent, novel considerations,’ which undercut a previously justified agency action.”).

If the government seeks a remand because the record indicates that the Agency’s prior action was not consistent with clearly established law at the time the case was before it, then the government’s position would not be substantially justified and the petitioner would be entitled to EAJA fees. In other words, the petitioner would be entitled to reasonable attorney’s fees where the government requests 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.

Li, 505 F.3d at 919. However, in cases where the government seeks 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 . . . , the government’s position may have been substantially justified at the time the Agency acted, even though subsequent, novel considerations have since undercut the underlying Agency decision.” *Id.* (citation omitted). *See also Meza-Vazquez*, 993 F.3d at 729 (“[S]o long as the IJ’s and BIA’s decisions were not contrary to controlling law at the time that they were made, the government’s position is substantially justified.”).

See also Meza-Vazquez, 993 F.3d at 729 (holding that EAJA fees were not appropriate where the government was substantially justified in its position); *Li*, 505 F.3d at 920 (holding that, “[i]n the absence of guidance from this court, the government’s position was substantially justified”). *Compare id.* at 921 (holding that petitioners in two companion cases were entitled to reasonable attorney’s fees pursuant to EAJA).

F. Scope of EAJA Fees

EAJA allows for the recovery of reasonable attorney's fees and other expenses including expert witness fees and the cost of any study, analysis, report, or test. 28 U.S.C. § 2412(d)(1)(A).

In *Hensley v. Eckerhart*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his claims for relief or achieves "limited success." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983)). First, the court asks, "did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Hensley*, 461 U.S. at 434. Second, the court asks whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.*

Applying *Hensley*, this court clarified that "when a district court awards complete relief on one claim, rendering it unnecessary to reach alternative claims, the alternative claims cannot be deemed unsuccessful for the purpose of calculating a fee award." *Ibrahim v. DHS*, 912 F.3d 1147, 1166 (9th Cir. 2019) (en banc) (explaining that all petitioner's legal theories ultimately challenged the same government action underlying the lawsuit: the government's placement of petitioner's name on the No Fly list without justification).

G. Enhanced Fees

Enhanced hourly rates in immigration cases are not available "pursuant to the statutory exception for limited availability of qualified attorneys where the litigation in question required no 'distinctive knowledge' or 'specialized skill.'" *Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (order) (citation omitted). Although "a speciality in immigration law could be a special factor warranting an enhancement of the statutory rate," *Rueda-Menicucci v. INS*, 132 F.3d 493, 496 (9th Cir. 1997), counsel must establish that his or her distinct qualifications were necessary to litigating the particular case, *see id.* *See also Thangaraja*, 428 F.3d at 876 (citing *Rueda-Menicucci*, 132 F.3d at 496). *See generally United States v. Real Prop. Known as 22249 Dolorosa St.*, 190 F.3d 977, 985 (9th Cir. 1999) (as amended) (requiring for enhanced fees a showing that "no suitable counsel would have taken on claimants' case at the statutory rate").

See also Nadarajah v. Holder, 569 F.3d 906, 912-15 (9th Cir. 2009) (attached to order denying motion for reconsideration is the Appellate Commissioner’s order awarding attorneys’ fees, which details the calculation of fees and explains why enhanced fees were warranted).

III. COURT PROCEDURES

Ninth Circuit Rule 39-1 addresses “Costs and Attorneys Fees on Appeal.” Rule 39-1.6(b) states:

A request for an award of attorney’s fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 or a document that contains substantially the same information, along with:

- (1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;
- (2) a showing that the hourly rates claimed are legally justified; and
- (3) an affidavit or declaration attesting to the accuracy of the information. All applications must include a statement that sets forth the application’s timeliness. The request must be filed separately from any cost bill.

Id. EAJA applicants should also submit EAJA Form AO 291.

Ninth Circuit Rule 39-1.7 states that oppositions to requests for attorneys fees, and subsequent replies, must be filed according to the “time periods set forth in [Federal Rule of Appellate Procedure] 27(a)(3)(A) and (4) for responses and replies to motions. . . .” Where the government does not file an opposition, panels have discretion to grant an application without reaching the merits (as long as entitlement to fees is shown or apparent) when the government fails timely to file a request for extension of time to oppose an application. *Gwaduri v. INS*, 362 F.3d 1144, 1145-46 (9th Cir. 2004) (order).

Form AO 291, Application for Fees and Other Expenses Under the Equal Access to Justice Act, is available on the Ninth Circuit website:

<http://www.ca9.uscourts.gov/datastore/uploads/forms/EAJA-Fees.pdf>

The court posts a Notice regarding the statutory maximum rates under EAJA. The most recent Notice is available at:

<https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/>