UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0046

In re: Mitchel Kalmanson,

Petitioner

Decision and Order

Appearances: Mitchel Kalmanson, *Pro Se,* Maitland, Florida, Petitioner
Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Respondent

Preliminary Statement

This action involves an Application/Motion for Equal Access to Justice Act (EAJA) Fees & Expenses filed by the Petitioner following an entry on September 24, 2012 of a Decision and Order favorable to him in a case brought against him by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture.

The Respondent has filed a Response arguing that the application is premature as there is an appeal pending and consequently no final disposition has been made.

Discussion

Contrary to the practice in many other countries, under the "American Rule," prevailing litigants generally must bear the burden of their own attorney fees.[1] While the

[1] The origin of the American Rule goes at least as far back as 1796. *See, Arcambel v. Wiseman,* 3 U.S. (3 Dall) 306 (1796). *See also,* John Luebsdorf, *Toward a History of the American Rule on Attorney Fee Recovery,* 47 LAW & CONTEMP. PROBS. 9 (1984) and Mary Frances Derfner, *The True "American Rule": Darfting Fee Legislation in the Public Interest,* 2 NEW ENG. L. R. 251 (1979).

American Rule is well settled among American Courts, [2] several statutory exceptions to the Rule permit litigants to recover their attorney fees under certain conditions.[3]

Where an application is filed seeking fees and costs to be paid pursuant to the Equal Access to Justice Act (EAJA) (*See,* 7 C.F.R. §15f.25), normally three separate issues must be decided: whether the Complainant is a prevailing party, whether the Secretary's position was substantially justified, and exactly what fees and costs submitted by the Complainant are allowable.

The framework for the analysis of a party's status as a "prevailing party" is set forth in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.,* 532 U.S. 598 (2001) ("*Buckhannon"*). In *Buckhannon*, the Supreme Court surveyed its precedent on the issue of prevailing parties and made several observations. Initially, the Court noted that the term "prevailing party" is a legal term of art and that in accordance with both its precedent and Black's Law Dictionary a prevailing party is "one who has been awarded some relief by the court." *Buckhannon* at 603. The Court found that a party must "receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 604 (*quoting Hewitt v. Helms,* 482 U.S. 755, 760 (1987)). Even an award of nominal damages will suffice. *Id. (citing Farrar v. Hobby,* 506 U.S. 103 (1992)). Similarly, the Court looked at whether there was a court ordered change in the legal relationship of the parties. *Id. (citing Texas State Teacher's Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989).

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[2] See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 260-62 (1975); *Pennsylvania v. Delaware Valley Citizens' Council for Claen Air,* 478 U.S. 546, 561-62 (1986).

[3] There are generally four exceptions: (a) Congressional authorization; (b) the Court's authority to enforce its own orders by assessing attorney fees against a party that willfully violates a court order; (c) the Court's authority to award attorney fees against a losing party that acted in "bad faith, vexaciously, wantonly, or for oppressive reasons;" and Courts may use their equitable powers to award attorney fees in commercial litigation to plaintiff who recover a "common fund" for themselves and others.

Similarly, by statute, no award can be given if the position of the United States was substantially justified….28 U.S.C. §2412(d)(1)(A). The burden of proof is upon the Secretary. *Lundin v. Mecham,* 980 F. 2d 1450, 1459 (D.C. Cir. 1992); *Scarborough v. Principi*, 124 S. Ct. 1856 (2004); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).[4]

The last determination involves consideration of exactly what fees and costs submitted by the Petitioner are allowable. In this regard, the burden of proving reasonableness rests with the applicant. See, Hensley v. Eckerhart. 461 U.S. 424, 437 (1983)[5]; *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691-2 (1983).

It will be observed that it is obvious that Counsel for the Respondent is correct that consideration of the three identified issues would be premature at this time as there has been no final determination in the case; however, further examination is still indicated. Congress first enacted EAJA as a rider to a small business assistance bill. (Small Business Act, Pub. L. No. 96-481, §201, 94 Stat. 2321, 2325 (1980).) As first enacted, the EAJA had a sunset provision that rendered it null and void at the end of a three year trial period. *See id.* at 2327. Shortly after the period ended, Congress passed a number of amendments to EAJA. *See,* H.R. 5479, 94th Cong. (1984) Included in the amendments was a provision limiting EAJA eligible parties to those with a net worth of no more than $2 million. After President Reagan found select provisions of the bill objectionable and vetoed the amendments, Congress revised the bill and the President signed the revised bill and EAJA became a permanent statute. Pub. L. No. 99-80, 99 Stat. 186 (1985).

[4] See also, H.R. Rep. No. 96-1005, at 10 "[T]he strong deterrents to contesting Government action that currently exis[t] require that the burden of proof rest with the Government."
[5] *Hensley* dealt with attorney's fees awarded under 42 U.S.C. §1988; however, the standards set out there are generally applicable to attorney's fee cases.

Examination of the instant application reveals that despite the lack of finality in this action, disposition of the application can nonetheless be made on jurisdictional grounds as the Petitioner has not demonstrated that he is an EAJA eligible party and has asked that the eligibility requirements of 7 C.F.R. §1.184 be waived. The eligibility requirements in 7 C.F.R. §1.184 are consistent with the language found in the eligibility requirements found in 28 U.S.C. §2412(d)(2)(B) of the EAJA statute and preclude EAJA awards to those who exceed the net worth thresholds.

Order

Accordingly, it appearing that the Petitioner is not an eligible individual for an award of EAJA fees and costs and there is no provision for waiving such eligibility requirements, the application will be **DENIED.**

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

November 28, 2012

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Peter M. Davenport
Chief Administrative Law Judge

Copies to: Mitchel Kalmanson
Colleen A. Carroll, Esquire