

UNITED STATES COURT OF INTERNATIONAL TRADE

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LIZARRAGA CUSTOMS BROKER,	:
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Plaintiff,	:
	:
	: Before: Richard K. Eaton, Judge
	:
v.	: Court No. 08-00400
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BUREAU OF CUSTOMS AND BORDER	:
PROTECTION, U.S. DEPARTMENT OF:	:
HOMELAND SECURITY; and ROSA	:
HERNANDEZ, PORT DIRECTOR,	:
OTAY MESA, CALIFORNIA,	:
	:
Defendants.	:

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OPINION AND ORDER

[Plaintiff’s application for fees and other expenses pursuant to Equal Access to Justice Act is granted.]

Dated: October 17, 2011

*Sandler, Travis & Rosenberg, P.A. (Arthur K. Purcell and Kenneth N. Wolf), for plaintiff.*

*Tony West, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Justin R. Miller); Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (Nancy Gudel), for defendants.*

Eaton, Judge: This case is before the court on plaintiff Guillermo Lizarraga’s (“plaintiff” or “Lizarraga”) application for fees and other expenses pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d) (2006). The application follows the defendants’ Confession of Judgment dated

April 30, 2010 (the "Confession of Judgment") and the subsequent entry of judgment in plaintiff's favor. See *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, 34 CIT \_\_\_, Slip Op. 10-113 (Oct. 4, 2010). Defendants, the Bureau of Customs and Border Protection ("Customs"), the U.S. Department of Homeland Security, and Rosa Hernandez, Port Director for the Otay Mesa Port of Entry, San Diego, California (collectively, "defendants"), oppose the application.

For the reasons set forth below, the court grants plaintiff's application for fees.

#### BACKGROUND

##### I. Entry Filer Code

An entry filer code is a unique, three character code that Customs assigns to a licensed customs broker. 19 C.F.R. § 142.3a(b)(1) (2011). Filing "entries" means the filing of documentation required to ensure the release of imported merchandise from Customs' custody, or the act of filing that documentation. *Id.* § 141.0a(a).

Entries can be filed either manually or electronically through the Automated Broker Interface ("ABI") system. *Id.* §§ 143.34, 143.32(a). Ninety-six percent of all entries are filed electronically, and that figure is likely higher for licensed brokers. See *Automated Broker Interface (ABI)*, CBP.gov,

[http://www.cbp.gov/xp/cgov/trade/automated/automated\\_systems/abi/](http://www.cbp.gov/xp/cgov/trade/automated/automated_systems/abi/) (last visited Sept. 20, 2011). Each electronically-filed entry is identified by an entry number created by the broker. 19 C.F.R. § 142.3a(a), (b). The first three digits of the entry number are the broker's entry filer code. *Id.* § 142.3a(b)(1). Accordingly, the entry filer code identifies the broker filing a particular entry. The ABI system is part of Customs' Automated Commercial System that allows entry filers to both submit data electronically and receive messages from Customs. *Id.* § 143.1. In order to file electronically, the broker must have an active entry filer code and be approved for participation in the ABI system. *Id.* §§ 143.2, 143.34. The purpose of ABI is "to improve administrative efficiency, enhance enforcement of customs and related laws, lower costs[,] and expedite the release of cargo." *Id.* § 143.1.

## II. Suspension of Plaintiff's Entry Filer Code

Mr. Lizarraga is a licensed customs broker, and in 2008 had an assigned entry filer code. Under 19 C.F.R. § 142.3a(d), "[t]he Assistant Commissioner, Office of International Trade, or his designee may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker." On October 21, 2008, the Director of Field Operations at the Otay Mesa Port of Entry in San Diego, California wrote to the Assistant

Commissioner of the Office of International Trade and asked that Mr. Lizarraga's entry filer code be deactivated for misuse. Mem. from Dir. Field Operations to Asst. Comm'r, Office of Int'l Trade, Oct. 21, 2008 (C.R. Doc. 152). Although it did not compile a contemporaneous record,<sup>1</sup> Customs has represented that

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<sup>1</sup> On January 23, 2009, Customs filed, what it identified as, the administrative record. The record was comprised of three looseleaf binders containing 156 documents amounting to roughly 1,000 pages. Admin. R. (C.R. Doc. 1-156). Of these, the Assistant Commissioner of the Office of International Trade had before him one document consisting of four pages when he made the determination to suspend Mr. Lizarraga's entry filer code. See Baldwin Decl., Mar. 3, 2010. The court thoroughly reviewed the documents and on February 24, 2010, conducted a hearing at which counsel for defendants reviewed the documents in the record in open court. Tr. Or. Arg., Feb. 24, 2010, 6:10-28:2. The first two volumes of the record contained 122 documents, and about 800 pages whose purpose appeared to be to demonstrate to the court that Mr. Lizarraga was a sloppy bookkeeper and a thorn in the side of Customs generally, e.g.:

THE COURT: Volume 1 seems to have a lot of audits of Mr. Lizarraga which seem to me to be completely off the point. The audits find that he isn't conducting business the way [Customs] might have hoped. They make the findings. They ask him to correct things. He corrects them or doesn't correct them. There are letters back and forth. None of these things seem to have, at least in Volume 1 -- I've had a lot of trouble figuring out how the [entry filer] code was involved.

Tr. Or. Arg., Feb. 23, 2010, 7:8-7:15. The first document to which counsel for the defendants pointed as having to do with the suspension of the entry filer code was Document 146, which was found at about eighty percent of the way through Volume 3. This document consists of notes, compiled with the assistance of counsel, that purport to memorialize previous discussions. Tr. Or. Arg., Feb. 23, 2010, 9:16-10:19. Thus, while there was, arguably, some kind of "internal administrative review," no record was made of it while it was being conducted. For instance, with respect to evidence that Mr. Lizarraga had

it then conducted an "internal administrative review" of the Director's request. On November 3, 2008, the Assistant Commissioner "made the final determination to indefinitely and immediately suspend Mr. Lizarraga's entry filer code" for misuse (a final determination later memorialized in a letter to Mr. Lizarraga dated November 10, 2008). See Letter from Port Dir. to Lizarraga, Nov. 10, 2008 (C.R. Doc. 156) ("Port Dir. Letter"). The Assistant Commissioner stated that "[t]he suspension is

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provided his entry filer code for use by Mexican nationals, document 152 was prepared by counsel after the fact:

[COUNSEL FOR DEFENDANTS]: That information was based upon interviews that I had conducted with individuals involved in a transaction and then that information was then transmitted to Customs, the trade aspect of it. So there wouldn't be any -- 152 is a summary of the conversations between [U.S. Immigration and Customs Enforcement] and Customs.

THE COURT: Let me see if I've got this straight. You provided me with these three volumes. They're supposed to represent the record but that there is nothing . . . in the record to back up this statement [regarding providing the entry filer code to Mexican nationals]?

[COUNSEL FOR DEFENDANTS]: 152 would be the documentary evidence.

THE COURT: 152 is just -- so there's nothing to back up the material that [the Assistant Commissioner] made his determination on other than 152?

[COUNSEL FOR DEFENDANTS]: Other than the conversations between individuals.

THE COURT: But they're not the record.

[COUNSEL FOR DEFENDANTS]: No, Your Honor, they're not.

Tr. Or. Arg., Feb. 23, 2010, 10:15-11:6. It is worth noting that the Assistant Commissioner did not, in fact, even have document 152 before him when he made his determination. See Baldwin Decl., Mar. 3, 2010.

necessary to prevent Mr. Lizarraga from using his individual filer code to facilitate smuggling narcotics into the Customs territory of the United States and allowing the use of his license, permit, and filer code . . . by Mexican nationals." Mem. from Asst. Comm'r, Office of Int'l Trade to Dir. Field Operations (C.R. Doc 155) ("Asst. Comm'r Mem."). Customs did not provide Mr. Lizarraga with notice of its internal administrative review or an opportunity for a hearing, nor did it solicit a written submission from him prior to its final determination.

Instead, by letter dated November 10, 2008,<sup>2</sup> Customs notified plaintiff that, effective November 14, 2008, it would "immediately and indefinitely" suspend his entry filer code. Port Dir. Letter (C.R. Doc. 156). The notice cited 19 C.F.R. § 142.3a(d) as authority for defendants' action, and stated that the action was "necessary to prevent the misuse of [Lizarraga's] filer code in the conducting of customs business." Port Dir. Letter (C.R. Doc. 156). The notice also stated that the suspension was to prevent Mr. Lizarraga from using his individual filer code to "facilitate smuggling narcotics," and to ensure that plaintiff's "license, permit, name[,], and filer code are not used by persons who are not employed by [Lizarraga] and authorized to act for [Lizarraga]." Port Dir. Letter (C.R. Doc.

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<sup>2</sup> Plaintiff received this notice on November 11, 2008. Lizarraga Aff. ¶ 2.

156).

The notice further stated:

By requiring you to use the alternative filing procedures found in 19 CFR § 142.3a(e), [Customs] will be able to effectively review the accuracy of the documentation you are submitting for the entry of merchandise. *This will enable you to continue conducting customs business; however, you will be required to file entry/entry summary documentation using customs assigned numbers with estimated duties attached before the merchandise may be released.*

Port Dir. Letter (C.R. Doc. 156).

Thus, Customs stated that, even though he could no longer use his entry filer code, Mr. Lizarraga would nonetheless be able to continue to conduct his business as a customs broker.

### III. Proceedings in CIT

On November 13, 2008, Mr. Lizarraga sought to halt the suspension of his entry filer code by filing a motion for a temporary restraining order ("TRO") and a preliminary injunction. At the November 14, 2008 hearing, defendants opposed the entry of the TRO, in part, because they claimed the case involved America's national security. As counsel for defendants stated:

The importation of narcotics under an importer's filer code or a broker's filer code is illegal activity and effectively it represents a situation where the balance of hardships once those drugs come into the country would be adverse to the United States and the national security of the United States . . . . [N]arcotics were imported under this filer code. So Customs has every right at this juncture to be concerned about the abuse or misuse of that filer code and every right to take

every precaution available to it to insure national security for this country.

Tr. Or. Arg., Nov. 14, 2008, 8:15-9:1.

After the hearing with both sides present, the court granted plaintiff's motion for a TRO, issued an order to show cause why a preliminary injunction should not be granted, and set a hearing date. A briefing schedule was established, which was subsequently modified by the parties. Thereafter, defendants agreed to take no action against plaintiff's entry filer code until the court ruled on the preliminary injunction. See Order at 2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Dec. 23, 2008) (acknowledging defendants' consent not to suspend plaintiff's entry filer code during the time the preliminary injunction was pending); see also Order at 1, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Mar. 1, 2010) (reiterating that defendants would not suspend plaintiff's entry filer code until the court ruled on the motion for preliminary injunction).

Further, on November 13, 2008, plaintiff filed his verified complaint alleging, among other things, that he was a licensed customs broker and that Customs has "issued a notice . . . that plaintiff's entry filer code will be deactivated effective November 14, 2008." Compl. ¶ 5. Plaintiff's complaint alleged that "Customs' plan to suspend or deactivate plaintiff's entry



filer code without any explanation or hearing was effectively a revocation or suspension of plaintiff's broker's license without any showing of good cause, and without the benefit of a hearing or other due process protections." Compl. ¶ 21. In addition to the preliminary injunction, the complaint sought relief in the form of a declaratory judgment and a permanent injunction restraining the defendants "from suspending his entry filer code without a hearing providing for basic due process, in accordance with the letter or spirit of 19 U.S.C. § 1641(d)(2)(B)."<sup>3</sup> Compl.

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<sup>3</sup> Had Customs actually sought to revoke Mr. Lizarraga's broker's license it would have had to comply with 19 U.S.C. § 1641(d)(2)(B) (2006) which provides:

**Revocation or suspension**

The Customs Service may, for good and sufficient reason, serve notice in writing upon any customs broker to show cause why a license or permit issued under this section should not be revoked or suspended. The notice shall be in the form of a statement specifically setting forth the grounds of the complaint, and shall allow the customs broker 30 days to respond. If no response is filed, or the Customs Service determines that the revocation or suspension is still warranted, it shall notify the customs broker in writing of a hearing to be held within 30 days, or at a later date if the broker requests an extension and shows good cause therefor, before an administrative law judge appointed pursuant to section 3105 of title 5 [5 U.S.C. § 3105 (2006)], United States Code, who shall serve as the hearing officer. If the customs broker waives the hearing, or the broker or his designated representative fails to appear at the appointed time and place, the hearing officer shall make findings and recommendations based on the record submitted by the parties. At the hearing, the customs broker may be represented by counsel, and all proceedings, including the proof of the charges and the response thereto shall be presented

¶ 23(c).

On January 12, 2009, defendants filed their Answer to the Complaint. On January 23, 2009, defendants filed the administrative record, and on March 27, 2009, they filed their motion to dismiss and for judgment on the agency record. Thereafter, on July 13, 2009, defendants moved for a voluntary remand. In their papers seeking the voluntary remand, defendants stated:

Remand is particularly appropriate in this case, as we have been advised by Customs that upon remand, *the agency will issue a new notice of action and then allow Mr. Lizarraga to administratively challenge the agency's action. The new notice of action will include a description of the procedures Mr. Lizarraga may use to contest Custom's new notice of action.* If Mr. Lizarraga decides to administratively challenge the agency's action, the agency will review the issues presented by Mr. Lizarraga and make a new determination as to whether his entry filer code should be suspended

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with testimony taken under oath and the right of cross-examination accorded to both parties. A transcript of the hearing shall be made and a copy will be provided to the Customs Service and the customs broker; which shall thereafter be provided reasonable opportunity to file a post-hearing brief. Following the conclusion of the hearing, the hearing officer shall transmit promptly the record of the hearing along with the findings of fact and recommendations to the Secretary for decision. The Secretary will issue a written decision, based solely on the record, setting forth the findings of fact and the reasons for the decision. Such decision may provide for the sanction contained in the notice to show cause or any lesser sanction authorized by this subsection, including a monetary penalty not to exceed \$30,000, than was contained in the notice to show cause.

or deactivated.

Defs.' Mot. to Stay & for Vol. Remand ("Defs.' Remand Mot.") 3. Thus, as early as July 13, 2009, defendants acknowledged that Mr. Lizarraga was entitled to an opportunity to be heard, and that he had been denied this due process by Customs' actions.

Plaintiff objected that the proposed administrative review did not address all of Mr. Lizarraga's claims. Pl.'s Resp. to Defs.' Remand Mot. 1 ("Inherent in defendants' otherwise vague proposal for remand is an admission that [Customs] failed to provide due process to Mr. Lizarraga as required by law. . . . Under the Administrative Procedure[] Act ("APA"), the challenged agency action must be held unlawful and set aside because it was undertaken contrary to law. That result is consistent with law and Mr. Lizarraga's legitimate expectation of finality after nine months of litigation."). Therefore, because Customs' offer of an opportunity to be heard was not accompanied by a concession that Customs' previous actions should be set aside, plaintiff did not consent to the remand. On August 6, 2009, the court denied defendants' remand motion. Order at 2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Aug. 6, 2009) ("[T]he stay would not end in a determination concerning the actions already taken by [Customs].").

Subsequently, the parties briefed and the court granted defendants' request to file an amended answer, which was filed on

September 17, 2009. In their Amended Answer, defendants stated: "defendants admit that the suspension or deactivation of a broker's entry filer code must comport with 5 U.S.C. § 558." Am. Answer ¶ 22(iii); see also Tr. Or. Arg., July 15, 2010, 11:7-19 (acknowledging same). The significance of the citation to 5 U.S.C. § 558 is that this section is part of the Administrative Procedure Act, and provides for the "annulment of a licence" only after the "licensee has been given-(1) notice by the agency in writing of the facts or conduct which may warrant action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c).

Briefing of the pending motions was complete as of November 13, 2009. Oral argument was held on February 24, 2010. At the conclusion of the February 24th hearing, the court stayed proceedings until March 10 to provide the parties an opportunity to pursue settlement. Thereafter, the parties informed the court that they were unable to settle the case. On March 26, 2010, the court issued an order remanding the matter to Customs solely for the purpose of making a record before an administrative law judge with respect to plaintiff's claim that the suspension of his entry filer code would be tantamount to a revocation of his broker's license. Order at 2-4, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Mar. 26, 2010).

On April 23, 2010, defendants filed their Confession of

Judgment in plaintiff's favor and moved to stay the execution of the remand order pending entry of the judgment itself. The sole reason the defendants gave for proffering their Confession of Judgment was: "We have engaged in a cost/benefit analysis with respect to retaining and administering an ALJ, and based upon our analysis we offer the following Confession of Judgment . . . ." Confession of Judgment 2-3.

The substantive portion of the Confession of Judgment requested a "judgment granting relief in favor of plaintiff Guillermo Lizarraga (Mr. Lizarraga), as stated herein and in the proposed order, be entered." Confession of Judgment 1. Further, it offered the following "Confession of Judgment: we agree not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of the attached proposed Court order.)." Confession of Judgment 3 (footnote omitted). By these words, Customs effectively "set aside" its previous actions taken to suspend Mr. Lizarraga's entry filer code.

Further, at oral argument defendants represented to the court that Customs would not seek to summarily suspend a broker's entry filer code:

Well, we know for certain that brokers are entitled to the APA if their entry filer code is deactivated, the procedur[al] protections of the APA. So with respect to what occurred to Mr. Lizarraga in this instance, the Customs treatment of Mr. Lizarraga, it's certain that

that is not going to occur again.

Tr. Or. Arg., July 15, 2010, 10:13-18. Counsel's reference to the APA was to the provisions of 5 U.S.C. § 558.

Thereafter, in *Lizarraga*, the court found that the Confession of Judgment mooted plaintiff's motion for a preliminary injunction because it "remove[d] the threat that his business will be harmed as a result of the findings of the internal investigation." *Lizarraga*, 34 CIT at \_\_\_, Slip Op. 10-113, at 14 (Oct. 4, 2010). The accompanying judgment ordered:

judgment granting relief in favor of plaintiff is hereby entered; . . . the Remand Order dated March 26, 2010 is declared moot, and thus the parties are relieved from compliance therewith; . . . the defendants shall not suspend or deactivate plaintiff's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of this judgment); and . . . the suspension, deactivation, revocation or similar act or threat thereof of a broker's entry filer code must comport, at a minimum, with 5 U.S.C. § 558 (2006).

Judgment at 1-2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Oct. 4, 2010).

On December 21, 2010, plaintiff filed a Form 15 application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and USCIT R. 54.1, seeking a reimbursement of attorney's fees in the amount of \$223,305.83 and an additional \$2,850.16 for costs and expenses, for a total of \$226,155.99.

## DISCUSSION

## I. Equal Access to Justice Act Framework

Under EAJA, "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (2006). A position is substantially justified if it is "justified to a degree that could satisfy a reasonable person" and has a "'reasonable basis in both law and fact.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal citation omitted). The government's "position" includes the underlying actions of any administrative agency, as well as the government's litigation arguments. *Smith v. Principi*, 343 F.3d 1358, 1361-62 (Fed. Cir. 2003). Although the "position" of the government involves prelitigation conduct as well as the litigation itself, "only one threshold determination for the entire civil action is to be made." *Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 159 (1990).

Pursuant to EAJA, an application for fees and expenses must be granted when: "(1) the claimant is a prevailing party; (2) the government's position during the administrative process or during litigation was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement." *Former*

*Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 28 CIT 1571, 1577, 350 F. Supp. 2d 1075, 1081 (2004) (citing 28 U.S.C. § 2412(d)(1)(A)-(B)). Furthermore, the court "shall not . . . award[] 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)(ii).

## II. Plaintiff's Eligibility for Fee-Shifting Based on Case's Procedural History

Defendants begin their response to Mr. Lizarraga's application by arguing that the court need not engage in the four-part analysis, outlined above in *Tyco*, because the plain language of the EAJA statute demonstrates that the fee-shifting provisions do not extend to issues that were never addressed by the court:

Ultimately, the Court never reached the merits of Mr. Lizarraga's claims or the merits of the Government's dispositive motions as the Government filed a Confession of Judgment that disposed of the case prior to the effectuation of the Remand Order. Specifically, under the Confession of Judgment, the Government agreed not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event.

Defs.' Mem. in Opp. to Pl.'s Appl. ("Defs.' Mem.") 3. In other words, defendants assert that the plaintiff may seek EAJA reimbursement only for claims actually considered by the court.



Here, defendants insist that Mr. Lizarraga is not entitled to an award of fees because the court never determined if he was entitled to the full due process protections he would have received had Customs sought to revoke his broker's license.

In making their argument, defendants contend that entertaining Mr. Lizarraga's application would put the court "in the position of conducting essentially de novo review of the entire case for purposes of the fee litigation, contrary to the command against 'spawn[ing] a second litigation' of the Supreme Court and to the far more streamlined 'substantial justification review' envisioned by the EAJA itself." Defs.' Mem. 10 (quoting *Hardisty v. Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011)); see also *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001) ("We have also stated that 'a request for attorney's fees should not result in a second major litigation, and have accordingly avoided an interpretation of fee-shifting statutes that would have 'spawned a second litigation of significant dimension.'" (internal citations omitted)).

The court finds that the *Hardisty* rationale does not extend to the circumstances of this case. In *Hardisty*, the plaintiff challenged his denial of supplemental disability income by the Social Security Administration on several grounds. *Hardisty*, 592 F.3d at 1075. The district court, however, remanded solely on

the basis that the agency improperly discredited the plaintiff's testimony. In doing so, the court chose not to consider the other arguments raised by him. *Id.* When the plaintiff later sought EAJA fees, the court concluded that, because the agency was "substantially justified" in contesting Hardisty's credibility, he was not entitled to attorney's fees on the issue of his testimony. In addition, the court declined to award attorney's fees based on the other arguments that it had chosen not to reach. *Id.* at 1077 ("Nothing in these provisions extends fee-shifting to issues not adjudicated. Section 2412(d)(1)(A) provides no indication that attorneys' fees should be awarded with respect to positions of the United States challenged by the claimant but unaddressed by the reviewing court."). The Court of Appeals for the Ninth Circuit affirmed the latter ruling.

The posture of this case distinguishes it from *Hardisty*. First, as defendants themselves pointed out in their papers seeking entry of the Confession of Judgment,

[h]ere . . . we agree not to suspend or deactivate Mr. Lizarraga[']s entry filer code for any past fact or event. This is the sum of the relief that is legally available to Mr. Lizarraga regarding his challenge to the merits of [Customs'] determination to suspend or deactivate his code . . . . Accordingly, pursuant to Article III, there is no longer a justiciable case or controversy with respect to this claim.

Confession of Judgment 4. Thus, as defendants acknowledge, the question of the legality of Customs' actions in suspending Mr.

Lizarraga's entry filer code was before the court and resolved in his favor.

In addition, while defendants characterize the due process claim as being rendered moot, for purposes of this application that is not precisely the case. That is, while defendants assert that they did not concede the issue of whether Mr. Lizarraga was entitled to the procedural protections of section 1641(d), Defs.' Mem. 3, they did concede the larger due process point.

Indeed, throughout this litigation, Customs has progressively acknowledged that Mr. Lizarraga was entitled to, and denied, due process at the administrative level. Thus, in their Motion for a voluntary remand, Amended Answer, statements in open court, and Confession of Judgment, the defendants effectively conceded that Mr. Lizarraga had been denied adequate due process administratively. Defendants first made this concession by seeking a voluntary remand to revisit Customs' decision to suspend Mr. Lizarraga's entry filer code, and offering to provide him with notice and an opportunity to challenge Customs' actions. Defendants' concession became more specific by admitting that he was entitled to the protections of 5 U.S.C. § 558, Amend. Answer ¶ 22(iii), and making similar statements in open court during their motion for entry of the Confession of Judgment. Finally, in the Confession of Judgment, Customs annulled its acts at the administrative level and

provided guarantees of due process in the future. Therefore, even though the Confession of Judgment prevented the court from ruling on the exact nature of the required due process, the overarching issue (i.e., that Mr. Lizarraga was entitled to some due process protection) was admitted by Customs.

In fact, counsel for defendants conceded that not only would Mr. Lizarraga be entitled to the benefits of the APA should he again find himself in the situation presented here, but that "brokers are entitled to the APA." Tr. Or. Arg., July 15, 2010, 10:13-14. This admission was then included in the declaratory portion of the court's judgment ending the case. Judgment at 1-2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08-00400 (Oct. 4, 2010) ("the suspension, deactivation, revocation or similar act or threat thereof of a broker's entry filer code must comport, at a minimum, with 5 U.S.C. § 558 (2006).") Thus, although the court may not have ruled on the merits of the precise limits of the due process to which Mr. Lizarraga was entitled (i.e., whether he was entitled to the same level of due process that he would have been had Customs wished to revoke his broker's license), the material issues in this case were resolved in plaintiff's favor. This is demonstrated by the judgment, which granted relief with respect to Customs' acts in suspending Mr. Lizarraga's entry filer code and as to the minimum due process requirements to be afforded brokers thereafter.

Moreover, unlike the Court in *Hardisty*, the court was fully engaged with and cognizant of all of the due process arguments in this case throughout the litigation. This was not the situation in *Hardisty*, a primary concern of the Ninth Circuit:

Such an inquiry requires the district court to decide whether government positions it may not have evaluated at all were in fact substantially justified. That puts the district court in the position of conducting essentially de novo review of the entire case for purposes of the fee litigation . . . . We decline to impose such burdens on district courts.

*Hardisty*, 592 F.3d at 1078. That is not the case here, however, because the court reviewed all of the relevant facts and law in the case. Specifically, on February 24, 2010, the court conducted a hearing at which the administrative record was examined in detail. In addition, the opinion accepting defendants' Confession of Judgment discussed both the revocation of the entry filer code and due process considerations. Therefore, addressing this EAJA application will not "spawn a second litigation" that raises facts and legal issues unfamiliar to the court.

Important policy reasons also support allowing EAJA applications to proceed in cases conceded by the government before resolution by a court. As the Supreme Court emphasized, "[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the

unreasonable exercise of Government authority." *Ardestani v. Immigration & Naturalization Srv.*, 502 U.S. 129, 138 (1991). The government, therefore, should not be able to avoid liability simply by precluding decisions on the merits. In *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977), the Court, although discussing fee-shifting in the context of a Title VII case that did not advance past the filing of a complaint, noted that:

[i]f the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. Thus, a general bar to awards of fees in cases resolved before final judgment cannot be accepted by the court.

*Foster*, 561 F.2d at 343 (citations omitted). Similar concerns are present here.

Therefore, the court holds that plaintiff is not foreclosed from seeking EAJA fees for the reasons advanced by defendants. As such, a review of the four-part analysis set forth in *Tyco Electronics* is warranted.

#### A. Prevailing Party Status

The defendants do not dispute that plaintiff was the prevailing party in this action. Further, as plaintiff points out, an EAJA applicant can be the "prevailing party" for purposes of section 2412 where the requested relief is granted and the

case declared moot. Pl.'s Br. in Supp. of Mot. for Att'y's Fees & Expenses ("Pl.'s Br.") 6 (citing *Atochem v. United States*, 9 CIT 207, 209, 609 F. Supp. 319, 321 (1985); *Consol. Int'l Auto., Inc. v. United States*, 16 CIT 692, 695, 797 F. Supp. 1007, 1010 (1992)). Specifically, plaintiff cites *Consolidated International* for the proposition that "a court should look to the substance of the litigation, and not merely to the technical disposition of the case or motion." *Consol. Int'l*, 16 CIT at 695, 797 F. Supp. at 1010. Mr. Lizarraga also relies on *United States v. Hitachi Am., Ltd.*, 24 CIT 497, 101 F. Supp. 2d 830 (2000), where this Court noted that a "prevailing party" is "one who 'succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,' not success on each issue sued." *Hitachi*, 24 CIT at 498, 101 F. Supp. 2d at 832 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

With these principles in mind, plaintiff argues that he "prevailed" in this litigation because a judgment was entered in his favor; he was successful in setting aside Customs' earlier action by blocking it from deactivating his entry filer code based upon any past facts or events; and further, that the case established a minimum level of due process to which a broker is entitled before his license can be suspended or deactivated. Pl.'s Br. 8; see also *Lizarraga*, 34 CIT at \_\_\_, Slip Op. 10-113,

at 16.

The court agrees with plaintiff that he was the "prevailing party." Only the most mechanical interpretation of that term could lead to a different conclusion based on the relief initially requested by Lizarraga and the final resolution of this case. In the demand for relief in his Complaint, plaintiff sought preliminary and permanent injunctions restraining the defendants from "suspending or deactivating plaintiff's entry filer code." Compl. ¶ 23(b), (c). Likewise, the final judgment in this case ordered that defendants shall "not suspend or deactivate plaintiff's entry filer code for any past fact or event," thus effectively setting aside Customs' actions. *Lizarraga*, 34 CIT at \_\_, Slip Op. 10-113, at 14. In addition, defendants' remand request, their Amended Answer, defense counsel's representations in open court, and the judgment itself establish that, as a minimum, a broker similarly situated to Mr. Lizarraga is entitled to the benefits of the APA. *Lizarraga*, 34 CIT at \_\_, Slip Op. 10-113, at 16-17. Looking to the "substance of the litigation" then, Mr. Lizarraga clearly prevailed in ultimately securing this permanent guarantee from the defendants. He thus unquestionably "'succeed[ed] on [a] significant issue in litigation,'" and "'achieve[d] some of the benefit [he] sought in bringing suit.'" See *Hitachi*, 24 CIT at 498, 101 F. Supp. 2d at 832 (citations omitted).



Therefore, plaintiff has satisfied the EAJA "prevailing party" element.

#### B. Substantial Justification

To determine if a position is "substantially justified," the Federal Circuit "requires that the Government show that it was *clearly* reasonable in asserting its position, *including its position at the agency level*, in view of the law and the facts." *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456 (Fed. Cir. 1986); *see also Shinyei Corp. of Am. v. United States*, No. 2010-1178, 2010 WL 4146384, at \*3 (Fed. Cir. Oct. 22, 2010) (quoting *Pierce*, 487 U.S. at 565) ("A position is substantially justified if it is 'justified to a degree that could satisfy a reasonable person' and has a 'reasonable basis in law and fact.'"). The defendants bear the burden of demonstrating that their position was substantially justified. *See Nakamura v. Heinrich*, 17 CIT 119, 120 (1993) (not reported in the Federal Supplement) (citing *Gavette*, 808 F.2d at 1467).

Courts are often reluctant to award fees because they have operated so long under the American rule prohibiting fee-shifting. In fact, the reluctance of the courts to award fees prompted the adoption of the language in Rule 37 on which this standard is based. Under these circumstances, it is particularly appropriate to place the burden on the government to prove the reasonableness of its actions. To do so encourages parties to contest action which they believe to be unreasonable and thereby serves to refine public policy.

*Gavette*, 808 F.2d at 1465-66 (quoting H.R. Rep. No. 1418, at 14 (1980)).

Plaintiff insists that defendants have not met their burden primarily because of Customs' actions at the administrative level. Looking at defendants' administrative position, Mr. Lizarraga stresses that defendants failed to give him notice of Customs' proceeding, or to offer him any opportunity to defend himself. Pl.'s Br. 8. He relies on *Bonanza Trucking Corporation v. United States*, 11 CIT 436, 664 F. Supp 1453 (1987), which involved the failure to disclose an internal investigative report in proceedings to revoke a license to cart bonded merchandise. Pl.'s Br. 8. The failure led this Court to question whether "asserting such denial of due process can ever result in an *ex post facto* determination under EAJA that the position of the United States in court was substantially justified." *Bonanza Trucking*, 11 CIT at 440, 664 F. Supp at 1456.

Plaintiff then notes that, despite the alleged gravity of his action (i.e., that the national security of the country was at stake), it was revealed during the litigation that Customs compiled no contemporaneous administrative record prior to the commencement of this action. Pl.'s Br. 10. Moreover, Mr. Lizarraga was not permitted to see, review, or respond to any of the "charges" underlying the agency's action. Pl.'s Br. 10.

According to plaintiff, Customs also failed to provide him (or any other broker) with any guidance on what type of actions would constitute "misuse" of the entry filer code, and arbitrarily and capriciously denied his request for even a short delay of the effective date for deactivation. Pl.'s Br. 11. Taken together, then, Lizarraga contends that "from the point of view of a 'reasonable person,' defendants' position at the administrative level, particularly the decision to completely deny [] Lizarraga due process prior to taking action that defendants knew or should have known would destroy his business, would not be considered correct." Pl.'s Br. 12.

Defendants argue that their position regarding Mr. Lizarraga's due process claim was reasonable because: (1) it was based upon a reasoned examination of the entry process and the factors that distinguish entry filer codes from broker's licenses; (2) there is a "genuine dispute" between the parties as to whether Mr. Lizarraga should have been afforded the procedural protections of 19 U.S.C. § 1641(d) prior to the deactivation or suspension of his entry filer code; and (3) the question of what due process should be afforded customs brokers when their entry filer codes are deactivated is one of first impression, and the agency's processes were consistent with its mission of border security and protecting the integrity of the entry process. Defs.' Mem. 12.

The court concludes that defendants' position was unreasonable and that Customs has conceded as much. As noted, "only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159. That is, the measure of "substantial justification" is not made at various stages of a case, but only once. Here, it is clear that the actions taken at the agency level by Customs were not justified, and that defendants recognized that this was true early on in the proceedings before the court. First, even before filing their Amended Answer, defendants sought a voluntary remand to: (1) issue a new Notice of Action; and (2) allow Mr. Lizarraga to administratively challenge the agency's action. Defs.' Mot. to Stay & for Vol. Remand 2. Thus, at the beginning stages of the litigation, defendants recognized that Mr. Lizarraga was entitled to due process, which he had been denied when the initial determination was made.

Thereafter, defendants filed their Amended Answer which stated "defendants admit that the suspension or deactivation of a broker's entry filer code must comport with the [APA]." Am. Answer ¶ 22(iii). Thus, defendants conceded not only that Lizarraga and other brokers were owed due process, but they identified the minimum procedures to which they were entitled. Finally, in their Confession of Judgment, defendants conceded their error in suspending Mr. Lizarraga's entry filer code.

Confession of Judgment 3 (“[W]e agree not to suspend or deactivate Mr. Lizarraga’s entry filer code for any past fact or event.” ). Thus, it is clear that defendants acknowledged that Customs’ actions were not based on a “reasoned examination” of the entry process, and that there was no genuine dispute on the case’s two major issues, i.e., (1) that Customs was not legally justified in its suspension of Mr. Lizarraga’s entry filer code; and (2) Mr. Lizarraga was entitled to due process before his entry filer code could be suspended. Indeed, the only “genuine dispute” in this case was the kind of due process that plaintiff was entitled to when Customs moved against him. Based on the foregoing, it is clear that defendants have not demonstrated that their position was substantially justified.

### C. Special Circumstances

Should the court find that their position was not substantially justified, defendants argue, in the alternative, that special circumstances make a fee award unjust, as “equitable considerations weigh against awarding EAJA fees.” Defs.’ Mem. 24–25 (listing as such “equitable considerations”: (1) “the alleged misuse associated with Mr. Lizarraga’s filer code [that] was compromising the integrity of the entry process”; (2) the lack of “clear standards, by way of judicial precedent, statute, or otherwise, that could have guided the Government”; and (3)

"Mr. Lizarraga's actions that . . . unnecessarily protracted this litigation"). They note that special circumstances have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith, where the case is one of first impression, or where there is an unsettled area of the law. Defs.' Mem. 24. Characterizing their actions during the litigation as "advanc[ing] a novel and credible legal theory," defendants view an award of attorney's fees in this case as "punish[ing] the Government for advancing a plausible legal argument in good faith." Defs.' Mem. 24.

Despite defendants' arguments to the contrary, the progress of this case demonstrates that defendants never advanced any novel theories, as they quickly moved to abandon their position with respect to Customs' administrative action. Although defendants claim that the decision to confess judgment was based on a cost/benefit analysis, it is simply not credible that they would abandon the country's national security because of the cost of engaging an administrative law judge. Rather, it seems clear that defendants realized their case was untenable, and sought an accommodative result. Indeed, defendants never advanced a "plausible legal theory," but rather progressively receded from Customs' initial position until ultimately conceding error and ending the case.

As to defendants' claim that Mr. Lizarraga unnecessarily

protracted the litigation, the facts indicate the contrary. That is, plaintiff can hardly be said to have extended the case by refusing to agree to actions that were not in his best interest. For instance, had plaintiff agreed to the voluntary remand, there is no guarantee that he would have achieved the result of Customs withdrawing the suspension of his entry filer code, the very result he accomplished by continuing the case. Thus, this case presents no special circumstances that would preclude an EAJA award, rather, if the equities favor either party, it is plaintiff.

#### D. Timely Filed Itemized Statement

Under 28 U.S.C. § 2412(d)(1)(B), "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses . . . , including an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). Thus, the final component of the four-part analysis set forth in *Tyco Electronics* is whether "the fee application is timely and supported by an itemized fee statement." *Former Emps. of Tyco Elecs. v. U.S. Dep't of Labor*, 28 CIT 1571, 1577, 350 F. Supp. 2d 1075, 1081 (2004). For purposes of EAJA, an application is timely if it is filed "within thirty days of final judgment in

the action," and "'final judgment' means a judgment that is final and not appealable." 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G). Under Fed. R. App. P. R. 4(a)(1)(B), a final judgment is appealable "within 60 days after the judgment or order appealed from is entered" when "the United States or its officer or agency is a party." Therefore, for purposes of EAJA, an applicant has thirty days from the expiration of the sixty-day appeal period to file an EAJA application. See *Impresa Construzioni Geom. Domenico Garufi v. United States*, 531 F.3d 1367, 1370 (Fed. Cir. 2008) ("[T]he time for filing an EAJA request [runs] from the expiration of the time for appeal, without consideration of whether the particular final judgement would have or could have been appealed.").

Here, final judgment was entered on October 4, 2010, *Lizarraga*, 34 CIT \_\_\_, Slip Op. 10-113. Thus, the judgment was appealable until December 3, 2010 and plaintiff had until January 3, 2011 to file his EAJA application. Plaintiff filed his Form 15 application on December 21, 2010 and also provided the requisite itemized statement detailing the time expended on the case, as well as the appropriate supporting documentation demonstrating that he meets the net worth requirement of EAJA.<sup>4</sup>

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<sup>4</sup> Under 28 U.S.C. § 2412(d)(2)(B), parties eligible to recover fees and expenses under EAJA include "(i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated



Pl.'s Decl. in Supp. of Appl., Ex. A, B. The defendants do not dispute that plaintiff's application was timely filed.

Therefore, plaintiff has satisfied all four parts of the *Tyco* analysis.

### III. Amount of Award

The plaintiff's itemized statement includes (1) 671 hours of attorneys' time; (2) 19.1 hours of paralegals' time; and (3) other costs and expenses totaling \$2,850.16. Pl.'s Decl. in Supp. of Appl., Ex. A. The plaintiff thus seeks reimbursement for \$223,305.83 in combined attorney and paralegal fees, and an additional \$2,850.16 in costs and expenses, for a total of \$226,155.99. Pl.'s Decl. in Supp. of Appl. 5 ¶ 13.

#### A. Apportionment

The problem arises as to how to handle fees incurred by Mr. Lizarraga with respect to pressing his position that he was entitled to "basic due process, in accordance with the letter or spirit of 19 U.S.C. § 1641(d)(2)(B)" as demanded in his

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business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Here, plaintiff has demonstrated his eligibility through submission of an affidavit from his Certified Public Accountant. Baker Aff., Pl.'s Decl. in Supp. of Appl., Ex. B.

Complaint. Compl. ¶ 23(c). That is, in his Complaint Mr. Lizarraga insisted that, before his entry filer code could be suspended, he was entitled to all of the procedures and protections to which he would have been entitled had Customs sought to revoke his broker's license. While it is clear that defendants' suspension of Mr. Lizarraga's entry filer code at the administrative level was not substantially justified, it is also clear that the precise degree of due process to which he was entitled at the administrative level remained an open question at the close of the case. The court never reached a final decision on this issue because defendants' Confession of Judgment ended the case.

The question then becomes whether Mr. Lizarraga is entitled to legal fees for all of the time his counsel expended, or only for the time spent on the precise issues on which he received a favorable judgment. In other words, while the court has rejected defendants' claim that Mr. Lizarraga is not entitled to any legal fees because it did not reach the merits of Mr. Lizarraga's claims, this does not settle the question of whether he is entitled to fees for the issues on which he did not receive all of the relief demanded in his complaint.

The court finds that Mr. Lizarraga is entitled to attorney's fees for all of the time his lawyers put into this case for two reasons. First, as noted, the inquiries to determine (1) whether

plaintiff is a prevailing party and (2) whether there was a substantial justification for the government's actions are made once for the entire litigation, not on an issue-by-issue basis. This being the case, the Supreme Court has indicated that only one finding should likewise be made with respect to fees, unless the claims in a lawsuit are so distinct they could have been litigated in separate lawsuits. *See Hensley*, 461 U.S. at 435-36; *see also Wagner v. Shinseki*, 640 F.3d 1255, 1259 (Fed. Cir. 2011) (citing *Jean*, 496 U.S. at 160); *Barrera v. Principi*, 18 Fed. Appx. 901, 904 (Fed. Cir. 2001) (citing *Jean*, 496 U.S. at 161-62). Therefore, "a fee award presumptively encompasses all aspects of the civil action." *Jean*, 496 U.S. at 161; *see also Wagner*, 640 F.3d at 1259; *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1368 n.3 (Fed. Cir. 2003); *Barrera*, 18 Fed. Appx. at 904. Here, as discussed *supra*, the court concludes that plaintiff was the prevailing party and that the defendants' positions were not substantially justified. Having made these threshold determinations, the court is not required to further this inquiry on an issue-by-issue basis for the purposes of awarding attorney's fees under EAJA.

Second, even if the court were inclined to examine plaintiff's entitlement to fees on an issue-by-issue basis, this approach would be impracticable in this case. Indeed, apportioning the fee award here is inappropriate because the

issues were so inextricably linked that they cannot be separated in any meaningful way. In cases where "a plaintiff . . . present[s] in one lawsuit distinctly different claims for relief that are based on different facts and legal theories . . . , counsel's work on one claim will be unrelated to his work on another claim." *Hensley*, 461 U.S. at 434-35. In such cases, the "congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 435.

In other cases, however, "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.*; see also *Plyler v. Evatt*, 902 F.2d 273, 280-81 (4th Cir. 1990) (quoting *Hensley*, 461 U.S. at 435) ("[W]here the issues presented in the later proceedings or in separate claims involve the same common core of facts or related legal theories, the case 'cannot be viewed as a series of discrete claims.'"). In such cases, "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA-like other fee-shifting statutes-favors treating a case as an inclusive whole, rather than as atomized line-items." *Jean*, 496 U.S. at 161-62.

Here, the issue central to all of plaintiff's claims and all of defendants' defenses was the due process, if any, to which Mr. Lizarraga was entitled when Customs took steps to suspend his entry filer code. Thus, the issues were "overlapping and intertwined." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981). When the issues in a case are "overlapping and intertwined," a court may decline "to dissect the interlocking evidence and consider it in isolation as supporting only one claim or the other." *Williams v. Roberts*, 904 F.2d 634, 640 (11th Cir. 1990); see also *Plyler*, 902 F.2d at 280-81 (quoting *Willie M. v. Hunt*, 732 F.2d 383, 386 (4th Cir. 1984) ("Here the district court acted within its discretion in ruling that the issues . . . were so 'inextricably intermingled with the original claims in the lawsuit' that severing those proceedings for a separate analysis of 'prevailing party' status was not justified."); *Afro-Am. Patrolmen's League v. City of Atlanta*, 817 F.2d 719, 725 (11th Cir. 1987) (quoting *Jones*, 636 F.2d at 1382 ("`In fixing the fee, the district court should be mindful that in complex civil rights litigation . . . issues are overlapping and intertwined.'")).

Thus, plaintiff is entitled to fees for all of the hours spent prosecuting his case.

B. Special Factor Enhancement

When granting an application for attorney's fees, the court is directed to award "reasonable fees and expenses." 28 U.S.C. § 2412(b). Pursuant to 28 U.S.C. § 2412(d)(2)(A), "attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase of cost of living or a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

Counsel for plaintiff seeks a special factor enhancement and in the event the court does not award such increase, a cost of living fee adjustment.

According to Mr. Lizarraga's lawyers, the "special factor" enhancement applies to this case because they have "extensive experience in customs law and litigation, and distinctive knowledge and specialized skill in the representation of customs brokers," and "[t]he competent and effective prosecution of plaintiff's case required the specialized skills in customs practice and litigation and knowledge of the customs brokerage regulations and practices that are beyond what general practice lawyers would encounter." Pl.'s Br. 22-23. In other words, plaintiff believes a special factor enhancement is required here because (1) his counsel possess expertise in a specialized practice area; and (2) these specialized skills were necessary to adequately represent the client.

At the outset, it should be noted that the grant of a special factor enhancement is conditioned upon the requirement that specialized skill was actually needed for the action before the court. In *Pierce*, the Supreme Court clarified that the EAJA special factor exception for qualified attorneys "refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question." *Pierce*, 487 U.S. at 572. The Court noted, as an example of a special factor, expertise in "an identifiable practice specialty such as patent law." *Id.* The Court then listed several factors that it deemed *insufficient* to merit an increase in the statutory cap: "[t]he 'novelty and difficulty of issues,' 'the undesirability of the case,' the 'work and ability of counsel,' and 'the results obtained.'" *Id.* at 573 (internal citations omitted). The Court explained that these "are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are." *Id.*

As this Court has found in the past, for purposes of EAJA, customs law is a specialized practice area, distinct from general and administrative law. *Jazz Photo Corp. v. United States*, 32 CIT \_\_, \_\_, 597 F. Supp. 2d 1364, 1369 (2008) (citing *Nakamura v. Heinrich*, 17 CIT 119, 121 (1993) (not reported in the Federal Supplement)). It is not clear, however, that specialized customs law skills were required for competent representation in this

case. See *Jazz Photo*, 32 CIT at \_\_\_, 597 F. Supp. 2d at 1369-70 (declining to award a special factor enhancement for all issues in a customs case except for one because "specialized customs law skills" were only required for that one issue) (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004) ("Pierce made clear that an increase in the cap is justified only by work requiring specialized skills or knowledge beyond what lawyers use on a regular basis. Producing high-quality work on a short deadline hardly satisfies this standard.")).

Having been an active participant in this case throughout, the court finds that the due process arguments that were central to the case could have been made by any competent lawyer familiar with administrative law. Furthermore, the knowledge needed to make Mr. Lizarraga's arguments with respect to the importance of the entry filer code could have been conveyed to any competent attorney by plaintiff himself. This being the case, the novelty and difficulty of the issues, although they were present, did not require the attention of lawyers who specialize in customs law.

In addition, while customs law is a specialized area of law, the special factor of "the limited availability of qualified attorneys for the proceedings involved," 28 U.S.C.

§ 2412(d)(2)(A)(ii), also implies difficulty in securing qualified counsel at a reasonable rate due to scarcity or other factors. *Jazz Photo*, 597 F. Supp. 2d at 1370 (citing *Hyatt v.*



*Barnhart*, 315 F.3d 239, 249 (4th Cir. 2002)). Indeed, "the statute does not assign extra compensation by 'fields' but by asking the practical question whether in the case at hand lawyers qualified to handle the case can be found for \$125 or less." *Atl. Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 492 (1st Cir. 2000). As defendants point out, even if specialized skills were required to litigate this case, plaintiff has made no showing that he could not have secured counsel at the regular rate. Defs.' Mem. 28. Indeed, plaintiff has not even argued that there were no other attorneys available who could have handled the case. *Id.* at 29. As a result, plaintiff is not entitled to a special factor enhancement.

#### C. Cost of Living Adjustment

With respect to an increase for the cost of living, based on long-established precedent and the defendants' failure to object, the court finds that a cost of living increase is warranted. See 28 U.S.C. § 2412(d)(2)(A)(ii). The court may exercise judicial discretion in granting cost of living adjustments so as to effectuate the intent of Congress "to provide adequate compensation notwithstanding inflation." *Payne v. Sullivan*, 977 F.2d 900, 903 (4th Cir. 1992). In making a cost of living adjustment, the court may calculate the increase using the

Consumer Price Index ("CPI-U").<sup>5</sup> See *Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 194 (2d Cir. 2000) ("[T]he district court may choose to apply a cost of living adjustment to [the statutory rate], as measured by the Consumer Price Index.").

Here, the court calculates adjustments to EAJA fees using the CPI-U data for the Northeast Urban Area, available from the Bureau of Labor Statistics, for the periods in which the services were performed: the second half of 2008, all of 2009, and 2010. See *Kerin*, 218 F.3d at 194 ("[T]he hourly rate . . . should only be increased by the corresponding Consumer Price Index for each year in which the legal work was performed." (internal citation omitted)). To calculate the EAJA fee adjustment, the court makes an adjustment to the \$125 statutory EAJA amount. See *Allegheny Bradford Corp. v. United States*, 28 CIT 2107, 2114, 350 F. Supp. 2d 1332, 1339 (2004); 28 U.S.C. § 2412(d)(2)(A)(ii). The adjustment is calculated as follows: the statutory hourly rate (\$125) is multiplied by the applicable CPI-U for the time period, divided by the CPI-U for March 1996 when the EAJA statutory cap went into effect.

Accordingly, the adjusted EAJA fee rate for 2008 is \$177.15 ( $\$125 \times 230.723/162.8$ ). The adjusted rate for 2009 is \$181.83

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<sup>5</sup> "CPI-U" refers to the Consumer Price Index data for "All Urban Consumers." Consumer Price Index, U.S. Bureau of Lab. Stats., <http://www.bls.gov/cpi/tables.htm> (last visited Sept. 20, 2011).

(\$125 x 236.825/162.8). The adjusted rate for 2010 is \$184.32 (\$125 x 240.059/162.8).

#### D. Calculation

The court must next consider the number of hours requested in the EAJA application. As noted, plaintiff's itemized statement includes (1) 671 hours of attorneys' time; (2) 19.1 hours of paralegals' time; and (3) other costs and expenses totaling \$2,850.16. Pl.'s Decl. in Supp. of Appl., Ex. A.

Plaintiff has therefore requested reimbursement for 19.1 hours of paralegal time. Although "the EAJA makes no explicit provision for law clerk 'fees,'" *Nakamura*, 17 CIT at 122; see also *Masias v. Sec'y of Health & Human Servs.*, 634 F.3d 1283, 1288 (Fed. Cir. 2011), the Supreme Court has determined that "a prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). Here, plaintiff's request for paralegal time is billed at various hourly rates, ranging from \$100 to \$175, which plaintiff has affirmed is "well within the range of prevailing market rates for a specialized practice area like customs litigation." Pl.'s Decl. in Supp. of Appl. 4-5 ¶ 11. As there is no indication that these rates are not the norm and because defendants have not challenged them, they will be used to

calculate the reimbursement amount for paralegal services.

Finally, while the defendants oppose the awarding of attorney fees to plaintiff generally, they have not challenged any specific portion of plaintiff's claim or any item included on plaintiff's statement. Defs.' Mem. 28-29. Additionally, defendants have not challenged the reasonableness of any of the additional costs and expenses, totaling \$2,850.16, itemized by plaintiff.

Because defendants have failed to object to any specific cost or set of hours billed by plaintiff, and have not asked the court to exclude any charged items, all of the hours provided by plaintiff will be used to calculate the total reimbursement award according to the calculations displayed in the table below. Plaintiff, however, has not provided an annual breakdown of attorneys' hours so that the CPI-U adjusted hourly rate can be applied to yield a cost-of-living-adjusted fee rate for the second half of 2008, all of 2009, and 2010. As a result, plaintiff is directed to prepare a revised EAJA application detailing the eligible attorneys' hours by year, excluding hours for paralegal services, so that the court may determine the proper EAJA award.

Item	Rate	Calculation	Total
<b>Attorney's Fees (2008)</b>	2008 CPI-U Adjusted Rate: \$177.15 (\$125 x 230.723/162.8)	\$177.15 x ____ Hours	\$_____
<b>Attorney's Fees (2009)</b>	2009 CPI-U Adjusted Rate: \$181.83 (\$125 x 236.825/162.8)	\$181.83 x ____ Hours	\$_____
<b>Attorney's Fees (2010)</b>	2009 CPI-U Adjusted Rate: \$184.32 (\$125 x 240.059/162.8)	\$184.32 x ____ Hours	\$_____
<b>Paralegal Services</b>	Prevailing Market Rate As Determined by Plaintiff	19.1 Hours x Prevailing Market Rate (\$100 to \$175 per hour)	<b>\$1,833.00</b>
<b>Costs</b>			<b>\$2,850.16</b>
<b>TOTAL</b>			<b>\$_____</b>

