

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

8 HEXACTA INC., et al.,

CASE NO. C19-554 RSM

9 Plaintiffs,

ORDER AWARDING ATTORNEYS'
FEES AND COSTS

10 v.

11 KEVIN MCALEENAN, et al.,

12 Defendants.

13
14 **I. INTRODUCTION**

15 This matter is before the Court on Plaintiffs' Application for an Award of Attorneys' Fees
16 and Costs Pursuant to the Equal Access to Justice Act. Dkt. #44. Defendants,¹ after previously
17 approving Plaintiff Jose Javier Lopez de Lagar ("Lopez de Lagar") for L-1A immigration status,²
18 denied his extension petition. Plaintiffs³ sued, challenging what they maintained was an arbitrary
19 and capricious decision. Dkt. #1. Plaintiffs sought injunctive relief preventing Defendants from
20

21 ¹ Defendants include the United States Department of Homeland Security ("DHS"), the United
22 States Citizenship and Immigration Services ("USCIS"), and three individuals—named in their
official capacities—within DHS.

23 ² Lopez de Lagar's family—his wife and three daughters—were granted derivative L-2 status.

24 ³ Plaintiffs include Lopez de Lagar, his wife Flavia Paola Sosa, their three minor children, and
Lopez de Lagar's employer, Hexacta, Inc.

1 treating Lopez de Lagar and his family as unlawful residents. Dkt. #13. The Court enjoined
2 Defendants from acting on their denial of Lopez de Lagar’s extension petition and those of his
3 family. Dkt. #37. Two days later, Defendants reversed course and approved Lopez de Lagar’s,
4 and his family’s, petition. Dkt. #38 at 5–12. The action was thereafter dismissed. Dkt. #43.
5 Plaintiffs now seek an award of \$79,505.83 for attorneys’ fees and costs expended in this matter.
6 Dkt. #44 at 2.

7 **II. BACKGROUND**

8 **A. Factual Background**

9 Plaintiff Hexacta, Inc. (“Hexacta”), an Argentina company, relocated Lopez de Lagar to
10 the United States to establish and head its U.S. Hexacta subsidiary office located in the Seattle
11 area. *See* Dkt. #1 at ¶¶ 32–33. In 2017, Hexacta successfully petitioned Defendant U.S.
12 Citizenship and Immigration Services (“USCIS”) under Form I-129 Petition for Nonimmigrant
13 Worker, known as an L-1A petition, for Lopez de Lagar. *Id.* at ¶ 33. USCIS granted Lopez de
14 Lagar L-1A status under “new office” regulations for a period of one year—from January 8, 2018
15 through January 7, 2019—with an option to apply for extensions. *See id.* at ¶¶ 32–34; *see also*
16 Dkt. #13; Dkt. #15 at ¶ 7.

17 Because of Lopez de Lagar’s L-1A status, his wife, Plaintiff Flavia Paola Sosa, and their
18 three children were granted derivative L-2 status. Dkt. #1 at ¶ 34. The family moved to the
19 United States in January 2018. *Id.* In December of 2018, Hexacta petitioned for a two-year
20 extension of Lopez de Lagar’s L-1A status. *Id.* at ¶ 41. USCIS issued a Request for Evidence
21 on December 21, 2018, and Hexacta responded on February 25, 2019. *Id.* at ¶¶ 42–43. On March
22 11, 2019, USCIS denied Hexacta’s extension petition, finding Lopez de Lagar was not a manager
23 or executive in the U.S. *Id.* at ¶¶ 44–45. USCIS also denied derivative L-2 applications for Lopez
24 de Lagar’s family. *See id.*

1 and (3) no “special circumstances” must exist that make an award of attorney fees unjust.⁴
2 *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990).

3 **B. Plaintiffs Are Prevailing Parties⁵**

4 To be considered a prevailing party for the purposes of a fee award, the party must achieve
5 a “material alteration of the legal relationship of the parties” and the alteration must be “judicially
6 sanctioned.” *Carbonell v. I.N.S.*, 429 F.3d 894, 898 (9th Cir. 2005) (quoting *Buckhannon Bd. &*
7 *Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001)).
8 Conversely, where a lawsuit simply prompts a party’s voluntary change, the alteration of the
9 legal relationship “lacks the necessary judicial *imprimatur*.” *Id.* (quoting *Buckhannon*, 532 U.S.
10 at 605) (emphasis in original).

11 The Court has little problem concluding that Plaintiffs. emerged from this action as the
12 prevailing party. There was clearly a material alteration in the legal relationship between the
13 parties. Before the action, Plaintiffs were unlawfully present, subject to deportation, and accruing
14 unlawful presence. The Court’s preliminary injunction enjoined Defendants from acting on those
15 bases. Two days later, Defendants re-opened Plaintiffs’ petitions and granted Plaintiffs lawful
16 status, protecting them from removal without further, and different, proceedings.

17 The Court also finds sufficient judicial imprimatur. After rejecting Plaintiffs’ petitions
18 and seeking their removal for more than four months, Defendants reversed course two days after
19 the Court’s preliminary injunction. The Court may not have ordered Defendants to do so, but
20 the Court’s ruling was certainly an impetus. Under these circumstances, the Court concludes that

21
22

⁴ Defendants do not argue that a special circumstance makes fees unjust in this case.

23 ⁵ The parties do not dispute that Plaintiffs qualify as a “party” for purposes of the EAJA. *See* 28
24 U.S.C. § 2412(d)(2)(B) (requiring individuals to have no more than \$2,000,000 and corporations
to not have more than 500 employees or \$7,000,000 to qualify as a “party” under the statute).

1 the preliminary injunction was sufficient judicial imprimatur. *See also Watson v. Cnty. of*
2 *Riverside*, 300 F.3d 1092 (9th Cir. 2002) (“A preliminary injunction issued by a judge carries all
3 the ‘judicial imprimatur’ necessary to satisfy *Buckhannon*.”).

4 The Court also is not persuaded by Defendants’ arguments that only a judgment or a
5 consent decree is sufficient judicial imprimatur for prevailing party status. *See* Dkt. #50 at 3–4
6 (citing *Texas State Teachers Ass’n. v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 783 (1989) and
7 *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002)). But this argument runs counter to later
8 cases concluding that while *Buckhannon* cited those two actions as examples of judicial
9 imprimatur, its use was not intended to be a limitation. *See Higher Taste, Inc. v. City of Tacoma*,
10 717 F.3d 712, 715 (9th Cir. 2013) (explaining that “[j]udicial imprimatur can come in the form
11 of an enforceable judgment on the merits or a court-ordered consent decree, . . . but those are not
12 the exclusive means of satisfying the requirement” and citing cases in support).

13 Defendants argue that any success realized by Plaintiffs was “purely technical or *de*
14 *minimus*.” Dkt. #50 at 3 (quoting *Texas State Teachers Assn.*, 489 U.S. at 783) (quotation marks
15 omitted). Defendants maintain that Plaintiffs did not actually prevail because their Complaint
16 sought “to obtain a court order setting aside USCIS’s denials of their L1-A and L-2 nonimmigrant
17 visa applications.” *Id.* at 4 (citing Dkt. #1 at p. 28). But this both reads Plaintiffs’ requested
18 remedy too narrowly and overlooks the tangible victory Plaintiffs obtained. *See Wood v. Burwell*,
19 837 F.3d 969, 975 (9th Cir. 2016) (“relief need not be of ‘precisely the same character as the
20 relief sought in the complaint’ so long as it ‘serves the goals of the claim’ and ‘require[s]
21 defendants to do something they otherwise would not have been required to do’”) (citations
22 omitted). “Armed with the preliminary injunction, [Plaintiffs] forced [Defendants] to do
23 something [they] would not otherwise have had to do—namely, allow” Plaintiffs to remain in the
24 United States lawfully. *Higher Taste, Inc.*, 717 F.3d at 716–17. This victory was not

1 “ephemeral” or temporary solely because Defendants capitulated following the Court’s
2 preliminary injunction. *See id.* at 717 (Defendants’ “action in rendering the case moot ensures
3 that the injunction’s alteration of the parties’ legal relationship will not be undone by subsequent
4 rulings in the litigation”).

5 **C. Defendants’ Position Was Not Sufficiently Justified**

6 The test for determining whether the government was substantially justified is whether
7 its position had a reasonable basis both in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565
8 (1988); *Flores v. Shalala*, 49 F.3d 562, 569–70 (9th Cir. 1995). The burden is on the government
9 to prove substantial justification. *Flores*, 49 F.3d at 569. In evaluating the government’s
10 position, the Court must look at both the underlying government conduct and the positions taken
11 by the government during the litigation. *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013). If
12 the underlying agency action was not substantially justified, the court need not consider whether
13 the government’s litigation position was substantially justified. *Id.* at 872.

14 “The government’s failure to prevail does not raise a presumption that its position was
15 not substantially justified.” *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988). However, a
16 finding that the agency decision was not supported by substantial evidence is a “strong
17 indication” that the government’s position was not substantially justified. *Thangaraja v.*
18 *Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005). “Indeed, it will be only a ‘decidedly unusual case
19 in which there is substantial justification under the EAJA even though the agency’s decision was
20 reversed as lacking in reasonable, substantial and probative evidence in the record.” *Id.* (quoting
21 *Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1085 (9th Cir. 2002)); *Meier*, 727 F.3d at 872 (same).

22 The government cannot carry its burden here. As laid out in the R&R “USCIS found
23 Plaintiffs did not: (1) establish that [Hexacta’s] U.S. entity’s organization has reached a structural
24 complexity to support an executive position in the U.S.; and (2) show Hexacta is able to

1 financially support Lopez de Lagar’s executive position.” Dkt. #31 at 6. But the Court rejected
2 USCIS’s findings and conclusions, noting that they were unsupported by the administrative
3 record. Dkts. #31 and #37. The Court does not imply that Defendants’ position cannot be
4 sufficiently justified simply because the Court found Plaintiffs likely to prevail on the preliminary
5 injunction briefing. But, the result is certainly strong evidence that Defendants have not carried
6 their burden of establishing that the position was substantially justified here.

7 **D. Reasonable Award of Fees and Costs**

8 The United States Supreme Court has held that “the fee applicant bears the burden of
9 establishing entitlement to an award and documenting the appropriate hours expended.” *Hensley*
10 *v. Eckerhart*, 461 U.S. 424, 437 (1983). Further, if the government disputes the reasonableness
11 of the fee, then it also “has a burden of rebuttal that requires submission of evidence to the district
12 court challenging the accuracy and reasonableness of the hours charged or the facts asserted by
13 the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98
14 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review the submitted
15 itemized log of hours to determine the reasonableness of hours requested in each case. *See*
16 *Hensley*, 461 U.S. at 433, 436–37. “The most useful starting point for determining the amount
17 of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a
18 reasonable hourly rate.” *Id.* at 433.

19 **1. Reasonable Hours**

20 Plaintiffs request compensation for 140.40 hours and supports the request with
21 declarations and billing records. Primary counsel included a partner, Ms. Butler, and an
22 associate, Ms. McDowell, who billed 89.80 hours and 39.90 hours respectively. Dkt. #44 at 7.
23 Plaintiff also seeks compensation for the time of two additional partners—10.20 hours—for their
24

1 assistance in preparing for oral argument and for half an hour of research by a librarian. *Id.* The
2 Court finds the hours requested reasonable.

3 Defendants argue that Plaintiffs only succeed on some of their claims and should not be
4 allowed to recover for all time spent working on the case and that the time claimed is excessive.
5 Dkt. #50 at 9–10. The Court does not agree on either point. Plaintiffs obtained the relief they
6 sought and have already attempted to remove “excessive, redundant, and unnecessary” time.
7 Dkt. #51 at 6. While the Court perhaps could squabble with the division of labor and time spent
8 on individual tasks, the Court finds that, on the whole, the hours claimed are reasonable.

9 **2. Reasonable Rate**

10 Attorneys’ fees under the EAJA “shall not be awarded in excess of \$125 per hour unless
11 the court determines that an increase in the cost of living or a special factor, such as the limited
12 availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28 U.S.C.
13 § 2412(d)(2)(A). Within the Ninth Circuit, a cost of living adjustment is capped at \$204.25 for
14 work performed in 2019. *See Thangaraja*, 428 F.3d at 876–77; Ninth Circuit Rule 39-1.6.
15 Plaintiffs request hourly rates well in excess of this maximum, ranging from \$415-940 per hour,
16 to align with “the fees generally prevailing in the relevant immigration law community.” Dkt.
17 #44 at 8. As justification for this departure, Plaintiffs argue primarily that qualified attorneys
18 have limited availability and that the need for urgent relief in this action are both special factors
19 justifying an increase above the statutory maximum. *Id.* at 8–9. Plaintiff relies on declarations
20 of Ms. Butler and Mr. Klasko, a Philadelphia immigration attorney. Dkts. #45 and #46.

21 The Court finds Plaintiffs’ supporting declarations overly conclusory. Mr. Klasko
22 establishes his immigration law credentials and certainly supports Plaintiffs’ argument that Ms.
23 Butler is highly effective immigration counsel. Dkt. #46 at ¶¶ 2–11. But Mr. Klasko otherwise
24 provides few specifics. Mr. Klasko attributes Ms. Butler’s tactical decisions—naming Lopez de

1 Lagar and his family as Plaintiffs and seeking a preliminary injunction—as requiring her “special
2 skills and abilities” and her deep understanding of complex issues of immigration law and
3 “strategic alternative.” *Id.* at ¶¶ 13–14. While the Court does not dispute that Ms. Butler
4 performed admirably, Plaintiffs’ supporting declarations do not extend beyond such generalities
5 and the matter does not appear overly complex to the Court. As to the rates requested, Mr. Klasko
6 avers simply that Ms. “Butler’s rate of \$585 per hour requested in this case is reasonable and at
7 the prevailing market rate for attorneys of her experience and expertise in the areas of
8 immigration law and complex federal litigation.”⁶

9 In response, Defendants argue that the requested rates are excessive, that the case did not
10 require any particular immigration expertise, and that Plaintiffs’ counsel overstates the impact of
11 her prior experience. Dkt. #50 at 8–9. The Court is inclined to agree with Defendants that a
12 departure is not warranted here. This decision is further solidified by Plaintiffs’ decision not to
13 respond to Defendants’ arguments or pursue an enhanced hourly rate in their reply, effectively
14 conceding the issue. *See* Dkt. #51. On this record, the Court cannot conclude that Plaintiffs have
15 carried their burden to justify a departure from the cost-of-living-adjusted maximum statutory
16 rate.

17 IV. CONCLUSION

18 Accordingly, and having reviewed the briefing of the parties, the supporting declarations
19 and evidence, and the remainder of the record, the Court finds and ORDERS:

20
21
22

⁶ Similarly, and without identifying a particular market, Mr. Klasko avers that the rates charged
23 by the other attorneys involved (\$415, \$795, and \$940) are effectively “reasonable.” Dkt. #46 at
24 ¶¶ 16–17. Mr. Klasko provides no factual basis for familiarity with the other attorneys’ work or
credentials and supports his conclusions only on the basis that he is a successful immigration
attorney.

- 1 1. Plaintiffs' Application for an Award of Attorneys' Fees and Costs Pursuant to the Equal
2 Access to Justice Act (Dkt. #44) is GRANTED IN PART.
- 3 2. The Court AWARDS Plaintiffs' uncontested request for \$1,338.83 in costs.
- 4 3. The Court AWARDS Plaintiffs attorneys' fees in the amount of \$28,676.70 (140.40 hours
5 at an hourly rate of \$204.25).
- 6 4. This matter is now CLOSED.

7 Dated this 20th day of December 2019.

8 

9
10 RICARDO S. MARTINEZ
11 CHIEF UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24