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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KHAM SINGMOUNGTHONG,)	1:09cv1328 DLB
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFF'S
v.)	SUPPLEMENTAL PETITION FOR FEES
)	(Document 58)
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	

This matter is before the Court on a Supplemental Petition for Attorneys' Fees under the Equal Access to Justice Act (EAJA), [28 U.S.C. § 2412\(d\)](#), filed on September 13, 2011, by Plaintiff Kham Singmounthong ("Plaintiff").

The matter is currently before the Court on the parties' briefs, which were submitted to the Honorable Dennis L. Beck, United States Magistrate Judge.¹

BACKGROUND

Plaintiff filed his Complaint challenging the denial of benefits on July 29, 2009.

On September 17, 2010, the Court granted Plaintiff's Complaint and remanded the action for further proceedings.

¹ The parties consented to the jurisdiction of the United States Magistrate Judge.

1 Plaintiff filed his EAJA fee petition on December 16, 2010. After briefing was
2 completed, the Court, *sua sponte*, ordered the parties to submit additional briefing as to attorney
3 Ralph Wilborn's entitlement to EAJA fees. Specifically, on February 10, 2011, the Court
4 ordered Plaintiff to address whether Mr. Wilborn, who is not a member of the California Bar or
5 the Bar of this Court, was entitled to fees under EAJA.

6 Plaintiff filed additional briefing on April 4, 2011. Defendant filed a reply on April 6,
7 2011, indicting that EAJA would not preclude an award of fees under the circumstances.

8 After a hearing on April 8, 2011, the Court issued a decision on July 13, 2011. The Court
9 found that Mr. Wilborn's involvement was not a "special circumstance" under EAJA that would
10 make an award unjust. The Court awarded a total of \$8,236.38 for time spent by both Mr.
11 Wilborn and attorney Sengthiene Bosavanh.

12 On September 13, 2011, Plaintiff filed this Supplemental Petition, seeking fees for time
13 spent preparing the EAJA reply² and time spent responding to the Court's request for additional
14 briefing. Plaintiff requests \$5,591.73 for time spent in preparation of the EAJA reply. This
15 request is specific to the instant action and relates to work performed by Mr. Wilborn and Ms.
16 Bosavanh.

17 As for time spent in preparation of the Court-requested briefing, Plaintiff seeks a total of
18 \$23,938.69. This amount represents work performed by Mr. Wilborn, Ms. Bosavanh and
19 attorney Linda Ziskin. Plaintiff explains that this work benefitted the three Plaintiffs involved in
20 the additional litigation and suggests that the \$23,938.69 either be applied solely to Plaintiff
21 Singmuongthong or divided amongst these three Plaintiffs.³

22
23
24 ² The Court recently expressed its preference for including the request for EAJA reply-related fees in the
25 actual EAJA reply, though Plaintiff did not have the benefit of this opinion at the time of filing the EAJA reply.
26 *Belcher v. Astrue*, 1:09cv1234 DLB. The Court explained that its preference did not make the request procedurally
27 improper, though including the request in the reply briefing would save both the resources of the Court and the
28 parties involved. Having already decided the issue, the Court applies the same rationale to this request and finds that
it is not procedurally improper.

³ The other actions involved in the additional fee issue were *VonBerckefeldt v. Astrue*, 1:09cv1927 DLB
and *Roberts v. Astrue*, 1:09cv1581 DLB.

1 Defendant opposed the request on October 26, 2011, and Plaintiff filed a reply on
2 November 9, 2011.

3 DISCUSSION

4 Under the EAJA, a prevailing party will be awarded reasonable attorney fees, unless the
5 government demonstrates that its position in the litigation was “substantially justified,” or that
6 “special circumstances make an award unjust.” [28 U.S.C. § 2412](#) (d)(1)(A). An award of
7 attorney fees must be reasonable. [Sorenson v. Mink, 239 F.3d 1140, 1145 \(9th Cir. 2001\)](#).
8 “[E]xcessive, redundant, or otherwise unnecessary” hours should be excluded from a fee award,
9 and charges that are not properly billable to a client are not properly billable to the government.
10 [Hensley v. Eckerhart, 461 U.S. 424, 434 \(1983\)](#). A court has wide latitude in determining the
11 number of hours reasonably expended. [Cunningham v. County of Los Angeles, 879 F.2d 481,](#)
12 [484 \(9th Cir. 1988\)](#).

13 A. Timeliness of Petition

14 Defendant first argues that the Supplemental Petition, filed almost one year after the
15 September 17, 2010, judgment, is untimely.

16 EAJA requires that the party seeking an award “shall, within thirty days of final judgment
17 in the action,” submit an application to the Court. [28 U.S.C. § 2412\(d\)\(1\)\(B\)](#); [Melkonyan v.](#)
18 [Sullivan, 501 U.S. 89 \(1991\)](#). In civil cases to which the federal government is a party, the time
19 for appeal does not end until sixty days after entry of judgment. [Fed. R. App. P. 4\(a\)](#). Therefore,
20 to be considered timely, an EAJA petition in Social Security cases must be filed within ninety
21 days of the district court’s entry of judgment. [Hoa Hong Van v. Barnhart, 483 F.3d 600, 604](#)
22 [\(9th Cir. 2007\)](#).

23 There is no issue as to the timeliness of Plaintiff’s first EAJA petition. Rather, the issue
24 has arisen because Plaintiff has chosen to treat this request for EAJA fees as a new motion. To
25 be fair, the fees related to the Court’s request for additional briefing could not have been brought
26 in the original application, so the timeliness issue, for practical purposes, is only relevant to the
27 request for fees related to the EAJA reply.

1 Plaintiff's argument for timeliness is based on the characterization of Court's July 13,
2 2011, EAJA order as the "judgment" from which the time begins to run. As the application was
3 filed within ninety days of that order, Plaintiff contends that it is timely.

4 Plaintiff is correct that he could not have brought the request for EAJA reply fees in the
5 original December 16, 2010, petition, filed on the last day of the ninety-day period, because the
6 fees had not yet been incurred. It is not clear, however, whether Plaintiff's decision to engage in
7 a second round of motion practice, rather than request the fees in the EAJA reply, renders the
8 second application timely. In any event, because the Court has determined that this decision was
9 not procedurally improper and, more importantly, because the timeliness of an EAJA application
10 is not jurisdictional, the Court will proceed to the merits. [Hoa Hong Van, 483 F.3d 603, n. 2.](#)

11 B. EAJA Reply Fees

12 There is no dispute that work performed in preparing an EAJA reply is compensable.
13 Indeed, Defendant's argument that the request is unjust is aimed at the request for fees related to
14 the additional briefing and will be discussed below. As to the time requested for work performed
15 on the EAJA reply, Defendant contends that the requested amount is unreasonable.

16 Plaintiff requests 29.75 hours for work performed by Mr. Wilborn and 1.4 hours for work
17 performed by Ms. Bosavanh. Plaintiff contends that this time was not related to the additional
18 orders of the Court.

19 *Mr. Wilborn's Time*

20 Based on Mr. Wilborn's declaration, he spent a total of 28.50 hours on "Plaintiff's EAJA
21 Response Brief." The Court agrees that this request is excessive, but it also recognizes that the
22 issue of duplication of effort by Mr. Wilborn and Ms. Bosavanh raised in the opposition had not
23 yet been fully addressed by the Court. Nonetheless, 28.50 hours spent researching and drafting a
24 reply is simply unreasonable. Taking into consideration that certain aspects of the opposition
25 raised novel issues relating to Mr. Wilborn's involvement in this action, the Court finds that the
26 time should be reduced to 15 hours.

27 Mr. Wilborn also requests 1.25 hours spent on August 11, 2011, drafting the portion of
28 this Supplemental Application "that applies to Ralph Wilborn." This description does not

1 support a finding that this time was related to request for EAJA reply fees, however. Moreover,
2 as explained in more detail below, the request for EAJA reply fees should not have required a
3 separate round of briefing. Thus, although the Court allowed reduced fees for time spent in
4 preparation of the actual reply, it will not require Defendant to pay Plaintiff's attorneys' fees
5 where the work performed was unnecessary.

6 *Ms. Bosavanh's Time*

7 The declaration submitted in support of Ms. Bosavanh's 1.4 hours shows time billed in
8 March and July 2011, long after the EAJA reply briefing was completed. Although she submits
9 that this time was not related to the Court's request for supplemental briefing, the fact that it was
10 performed months *after* the January 26, 2011, reply does not support such a finding. Moreover,
11 the descriptions of the work performed are vague, i.e., "Teleconference with client and
12 interpreter" and "Conference with client re: EAJA matter and interpreter," and do not
13 demonstrate that the work was related to the January 2011 briefing.

14 Accordingly, Ms. Bosavanh's request for 1.4 hours is denied.

15 C. Plaintiff's "Second Application for Supplemental Attorneys Fees"

16 After the conclusion of Plaintiff's reply briefing, Plaintiff makes a "Second Application
17 for Supplemental Attorneys Fees" for 12 hours of time spent by Mr. Wilborn in preparation of
18 the November 9, 2011, reply. The reply was related to the instant Supplemental Application.⁴

19 Plaintiff's attorneys made a similar request in *Belcher v. Astrue*, 1:09cv1234 DLB, where
20 Mr. Wilborn sought fees for work performed in defending a Supplemental Application and
21 preparing a Second Supplemental Application. On August 30, 2011⁵, the Court denied the
22 request:

23 Now, Plaintiff comes before the Court yet again to request even more fees. The
24 Court denies the request. First, and as previously suggested by the Court, Plaintiff's
25 decision to seek fees in an entirely new round of briefing should not render the
26 Commissioner responsible for the fees incurred. Although the Court did allow reduced
27 fees for time spent in preparation of the reply to the original EAJA application, there is
28 simply no basis for allowing fees here. The Court will not require the Commissioner to
pay Plaintiff's attorneys' fees where the work performed was simply unnecessary.

⁴ Plaintiff also requests that this 12 hours be split amongst the three Plaintiffs.

⁵ Plaintiff has appealed the August 30, 2011, Order.

1 Second, absent unusual circumstances, an attorney’s entitlement to fees should
2 end with time spent in replying to the initial EAJA application. Allowing Plaintiff to
3 continue to request fees for work performed on supplemental applications would permit a
4 never-ending cycle of EAJA fee requests.

5 The same rationale applies here. Defendant should not be responsible for fees incurred
6 where the work performed was unnecessary. The 12 hours will not be allowed.

7 C. Time Spent in Preparation of Additional Briefing

8 The bulk of Plaintiff’s request relates to work performed in connection with the Court’s
9 request for additional briefing. He requests 72 hours for Mr. Wilborn (\$12,924.72), 26.7 hours
10 for Ms. Bosavanh (\$4792.92) and 34.6 hours for Ms. Ziskin (\$6,211.05), for a total of
11 \$23,928.69. Plaintiff also requests reimbursement for Ms. Ziskin’s expenses incurred in
12 traveling to Fresno for the April 8, 2011, hearing (\$432.55).

13 Defendant opposes any reimbursement for work related to the Court’s February 20, 2011,
14 order, arguing that special circumstances make such an award unjust. [28 U.S.C. §](#)
15 [2412\(d\)\(1\)\(A\)](#). Defendant argues that “[i]t would be unjust to make the government pay for time
16 Plaintiff’s counsel spent responding to an issue that it did not raise nor contest.” Opposition, at
17 3.

18 Plaintiff does not believe that Defendant can raise a “special circumstance” at this
19 juncture of EAJA briefing. The Court need not decide, however, whether the request should be
20 denied as unjust. As explained above, fee awards must be *reasonable*. Quite simply, it would be
21 *unreasonable* to hold Defendant accountable for fees related to an issue that it did not raise or
22 contest. The Court raised the licensing issue based on a justifiable concern as to Mr. Wilborn’s
23 practice before this Court. Defendant participated minimally in the briefing and at the hearing
24 because he believed that Mr. Wilborn was entitled to recover his fees. As the Court noted at the
25 April hearing, Defendant did not “have a dog in this fight.” Opposition, at 3.

26 Plaintiff attempts to characterize this time as time spent litigating the entitlement to an
27 EAJA fee award, as contemplated by [Comm’r INS v. Jean, 496 U.S. 154 \(1990\)](#). In *Jean*, the
28 parties engaged in substantial litigation over EAJA fees. Although the INS conceded that fees
for time and expenses incurred in applying for fees are appropriate, it argued that a party is
ineligible for such fees unless the Court finds that the INS’ position in the fee litigation itself was

