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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

| | | |
|---------------------------------------|---|------------------------|
| YICK HUNG SIM, |) | No. C-04-4643 CW |
| |) | |
| Petitioner, |) | MOTION FOR ATTORNEYS' |
| |) | FEEES UNDER THE EQUAL |
| v. |) | ACCESS TO JUSTICE ACT |
| |) | AND MEMORANDUM IN |
| U.S. CITIZENSHIP AND |) | SUPPORT OF APPLICATION |
| IMMIGRATION SERVICES, <u>et al.</u> , |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

I. INTRODUCTION

Petitioner Yick Hung Sim, hereby files this motion for an award of attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). Petitioner seeks to recover fees and costs he incurred in litigating the petition for review he filed on November 2, 2004.

In that petition, Mr. Sim sought review of the determination by the naturalization unit of the U.S. Citizenship and Immigration Services ("USCIS") agency within the Department of

Homeland Security ("DHS") that he was ineligible for naturalization because did not qualify for a Form N-648 disability waiver in that his vision and hearing impairments were not severe enough to grant such a waiver. As a result, Mr. Sim was not permitted to respond to questions in his native Cantonese language, and was not exempted from the English language and history and government requirements.

Only after this petition was filed did the government respondents decide to grant Mr. Sim a disability waiver. After Mr. Sim was re-examined on May 25, 2005, he passed the naturalization examination on that date and was sworn in as a United States citizen on June 21, 2005. The government defendants moved to dismiss the petition as moot, and on July 5, 2005 the Court granted the motion in the Court's amended order.

Because the government respondents' agency position was not substantially justified, and in fact was abandoned only after Mr. Sim filed his petition for review with this Court, Mr. Sim is entitled to attorneys' fees and costs under the EAJA.

II. REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES UNDER THE EAJA

The EAJA provides that "a court *shall* award to a prevailing party ... fees and other expenses ... incurred by that party in any civil action ... including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds

that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

The EAJA mandates an award of attorneys' fees if each of the following requirements are met: (1) petitioner is a non-governmental party to the action, 28 U.S.C. § 2412(d)(1)(A); (2) the petitioners' net worth does not exceed \$2 million dollars, 28 U.S.C. § 2412(d)(2)(B); the underlying action is a civil one, 28 U.S.C. § 2412(d)(1)(A); (4) petitioner prevailed in the underlying action, 28 U.S.C. § 2412(d)(1)(B); (5) the government's position in the underlying action was not "substantially justified," 28 U.S.C. § 2412(d)(1)(A); (6) there are no "special circumstances" that would make the award unjust, 28 U.S.C. § 2412(d)(1)(A); and (7) the application for attorney's fees is filed within "thirty days of the final judgment in the action," 28 U.S.C. § 2412(d)(1)(B). As demonstrated below, petitioners meet all these requirements and are, therefore, entitled to recover attorneys' fees.

III. PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT

The EAJA was designed to "ensure the vindication of rights by parties who might otherwise be precluded from the adjudicatory process due to the prohibitive cost of seeking justice." Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 352 n. 6 (D.D.C. 1982). Because the enormous expenses involved in securing the

vindication of rights deterred parties with limited means from seeking judicial redress, Congress designed EAJA to reduce the disparity in resources between individuals, small businesses, and the federal government. H.R. Rep. No. 99-120, 99th Cong., 1st Sess. (1985).

This case is precisely the type that EAJA was meant to address. Mr. Sim filed disability waivers that were based on solid medical certifications, establishing that he is legally blind with a 99 percent hearing deficit in both ears. Petition for Review of Naturalization Decision at ¶ 16. Awarding the petitioner attorneys' fees and costs will not only compensate him and their attorneys for the time and energy expended in having to litigate before this court, but will also help ensure that the government will more carefully review disability waivers in naturalization proceedings.

IV. ARGUMENT

A. THE EQUAL ACCESS TO JUSTICE ACT APPLIES TO PETITIONER

1. Petitioner Is A Non-Governmental Party Whose Net Worth Does Not Exceed 2 Million Dollars

The petitioner is a private individual "whose net worth did not exceed \$2,000,000 at the time" this petition for review was filed. (Declaration of Yick Hung Sim, Exhibit 1.) He therefore meets the eligibility requirement of 28 U.S.C. § 2412(d)(2)(B).

2. Petitioner's Application for Attorney's Fees Is Timely

A party seeking attorney's fees and other expenses must file the application within "thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). This thirty day period begins to run only when the judgment is no longer appealable. Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987), reversed on other grounds, 884 F.2d 442 (9th Cir. 1989) (judgment is final when no longer appealable); H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 18 n. 26 (1985) (defining "final judgment as judgment that is final and not appealable"). Because petitioners motion is being filed before such 30-day period expires, it must be deemed timely.

B. EAJA REQUIRES AN AWARD OF FEES AND COSTS IN THIS CASE

1. Petitioner Prevailed on His Petition for Review

To qualify for attorneys' fees under EAJA, petitioner must be a "prevailing party." The term "prevailing party" has been liberally construed by the courts to further the remedial purposes of the EAJA. Bradley v. Heckler, 785 F.2d 954 (11th Cir. 1986). To satisfy this requirement, the petitioner must have "succeeded on any significant issue in litigation, which achieve[d] some benefit ... sought in bringing the suit." Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 791-92 (1989). It is well-established,

however, that a party need not obtain relief on every claim to prevail. Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988).

There can be little doubt that petitioner prevailed in the litigation before this court. But for filing his petition for review with this court, the Respondent USCIS would not have "reconsidered" Mr. Sim's medical certifications and approved the disability waivers. In short, he would not have become a naturalized United States citizen. He must, therefore, be considered a prevailing party. See Abela v. Gustafson, 888 F.2d 1258, 1261-64 (9th Cir. 1989) (EAJA applies to naturalization petitions filed in district court; EAJA fees upheld on motions to calendar final naturalization hearings before former INS); Rueda-Menicucci v. INS, 132 F.3d 493 (9th Cir. 1997) (alien who obtains a remand for further agency action on applications for asylum and withholding of deportation is a "prevailing party" for purposes of the EAJA).

Although the government may argue that Mr. Sim's naturalization was the result of its voluntary decision and not compelled by the district court, Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002), the fact is that the court did intervene by issuing an order, albeit proposed by the government, to reopen the naturalization application for favorable adjudication. See Court's Order dated February 22, 2005. The court's order compelled the government to act. Thus, there was

sufficient court intervention to render the petitioner as the prevailing party.

2. The Government Cannot Meet Its Burden of Establishing That Its Position Was Substantially Justified

Unless the government establishes that its position was substantially justified, the Court must award attorney's fees to the petitioner. The burden of proof is a heavy one. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13-14 (1980). The government cannot meet its burden, because it is undisputed that its agency position was to deny a disability waiver to a naturalization applicant who is legally blind with a 99 percent hearing deficit in both ears. See Petition for Review of Naturalization Decision at ¶ 16.

C. There Are No Special Circumstances That Would Make an Award of Attorney's Fees Unjust

Once a party's eligibility is proved, an award of fees is mandatory under EAJA unless special circumstances exist that would make that fee award unjust. 28 U.S.C. §§ 2412(d)(1)(A); Love v. Reilly, 924 F.2d 1492, 1495 (9th Cir. 1991). The government has the burden of showing special circumstances. Id. In the instant case, the government has not alleged special circumstances, nor could it establish any.

D. Calculating Attorney's Fees

Title 28 U.S.C. § 2412(d)(2) provides that "attorneys fees shall not be awarded in excess of \$125 per hour unless the court

determines that an increase in the cost of living ... justified a higher fee." This court determines the cost-of-living adjustment by multiplying the basic EAJA rate (\$125 per hour) by the consumer price index for urban consumers (CPI-U) for the year in which legal work was performed, and then dividing the product by the CPI-U for March 1996 (155.7). Sorenson v. Mink, 239 F.3d 1140, 1148 (9th Cir. 2001). See also Ramon-Sepulveda v. INS, 863 F.2d 1458, 1463 (9th Cir. 1988). Under this formula, petitioner is entitled to attorneys' fees at the following rates:

| RATE | YEAR |
|-----------|------|
| \$ 151.65 | 2004 |
| \$ 155.11 | 2005 |

As shown below, these rates would entitle petitioners to \$ 1,576.04 in attorney's fees.¹ Declaration of Robert G. Ryan, Exhibit 2 and Declaration of Eugene C. Wong, Exhibit 3.

ROBERT G. RYAN

| YEAR | HOURS | RATE | TOTAL |
|------|-------|-----------|-----------|
| 2004 | 3.75 | \$ 151.65 | \$ 571.29 |
| 2005 | 5.5 | \$ 155.11 | \$ 853.11 |

EUGENE C. WONG

| YEAR | HOURS | RATE | TOTAL |
|------|-------|-----------|----------|
| 2004 | .25 | \$ 151.65 | \$ 37.91 |
| 2005 | .75 | \$ 155.11 | \$116.78 |

¹See Appendix A.

CONCLUSION

Because the government has failed to establish that its position in this case was substantially justified, petitioner is entitled to attorney's fees and costs under the EAJA. This court should, therefore, grant the instant motion and award petitioners' \$ 1,576.04 in attorney's fees.

Dated: August 4, 2005

Respectfully submitted,

EUGENE C. WONG
ROBERT G. RYAN

By: /s/ Robert G. Ryan
ROBERT G. RYAN

Attorneys for Petitioner