

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NARCISO PRIMERO GARCIA,
Petitioner,
v.
WILLIAM P. BARR, et al.,
Respondents.

Case No. 20-cv-01389-NC

**ORDER GRANTING
PETITIONER’S MOTION FOR
ATTORNEYS’ FEES**

Re: Dkt. No. 36

Petitioner Narciso Primero Garcia moves for attorneys’ fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Respondents William P. Barr, Chad Wolf, Matthew Albence, and David W. Jennings contend that Primero Garcia is not entitled to attorneys’ fees under the EAJA because he is not a prevailing party, its position in the underlying litigation was substantially justified, and the requested fees are unreasonable. The Court disagrees with Respondents and GRANTS Primero Garcia’s motion for attorneys’ fees. The Court, however, reduces the fees award because counsels’ billing records reveals confusingly vague time entries and time not compensable at an enhanced billing rate.

I. Background

Primero Garcia is a Guatemalan citizen who came to the United States as an unaccompanied minor when he was 13 years old. See Dkt. No. 1 ¶¶ 20, 22. In 2018,

United States District Court
Northern District of California

1 Primero Garcia applied for Special Immigrant Juvenile (“SIJ”) status to obtain
2 immigration relief. *Id.* ¶ 27.

3 Before Primero Garcia submitted his petition, however, the Court preliminarily
4 enjoined the United States Citizenship and Immigration Services (“USCIS”), the
5 Department of Homeland Security (“DHS”), and officials in charge of those departments
6 from removing individuals with a pending SIJ petition in a related lawsuit, *J.L. v. Cissna*,
7 Case No. 5:18-cv-04914-NC, (N.D. Cal.). See *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D.
8 Cal. 2018). Respondents, however, removed Primero Garcia to Guatemala on June 13,
9 2019, where he was attacked twice over the next six months by gang members. See Dkt.
10 No. 1 ¶¶ 34–35.

11 After *J.L.* settled, the parties discovered that Primero Garcia had been removed in
12 violation of the preliminary injunction. See *J.L.*, No. 5:18-cv-04914-NC, Dkt. Nos. 228,
13 223. The Court held the *J.L.* defendants, including the Respondents in this case, in civil
14 contempt and ordered Primero Garcia’s return to the United States. *Id.*, Dkt. Nos. 249,
15 252.

16 Upon his return, USCIS granted Primero Garcia SIJ status and he sought to reopen
17 his immigration proceedings accordingly. See Dkt. No. 1 ¶¶ 37–38. Because ICE
18 indicated that it nevertheless still intended to remove him from the United States, Primero
19 Garcia sought a temporary restraining order from this Court enjoining his removal,
20 ordering his release from ICE custody, or, in the alternative, granting him a bond hearing.
21 See Dkt. No. 8.

22 The Court granted in part and denied in part Primero Garcia’s motion. See Dkt. No.
23 31. The Court denied Primero Garcia’s request for immediate release, but temporarily
24 enjoined Respondents from removing Primero Garcia and ordered Respondents to provide
25 him with a bond hearing within 60 days of the order. See *id.*

26 Primero Garcia now seeks attorneys’ fees under the EAJA in the amount of
27 \$76,524.89. See Dkt. No. 36.

28

1 **II. Legal Standard**

2 The EAJA requires a court to “award to a prevailing party other than the United
3 States fees and other expenses . . . incurred by that party in any civil action . . . unless the
4 court finds that the position of the United States was substantially justified or that special
5 circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A); see also *Ibrahim v.*
6 *U.S. Dep’t of Homeland Sec.*, 835 F.3d 1048, 1054 (9th Cir. 2016). The EAJA sets a net
7 worth limit of \$2,000,000 on prevailing parties who seek fees under the EAJA. 28 U.S.C.
8 § 2412(d)(2)(B)(i). And, subject to various exceptions, awards under the EAJA may not
9 exceed rates of \$125 per hour. 28 U.S.C. § 2412(d)(2)(A). Finally, even when a party is
10 entitled to fees under the EAJA, the court must still determine the reasonableness of the
11 requested fee. See *Ibrahim*, 835 F.3d at 1060.

12 **III. Discussion**

13 Respondents argue that Primero Garcia’s requested fees should be denied on four
14 grounds: (1) Primero Garcia is not a prevailing party; (2) its position was substantially
15 justified; (3) Primero Garcia is not warranted to enhanced rates; and (4) the requested fees
16 are unreasonable. The Court discusses each argument in turn.

17 **A. Prevailing Party**

18 A plaintiff must meet two criteria to qualify as a prevailing party. “First, he must
19 achieve a ‘material alteration of the legal relationship of the parties.’” *Carbonell v. I.N.S.*,
20 429 F.3d 894, 898 (9th Cir. 2005) (quoting *Buckhannon Bd. & Care Home, Inc. v. West*
21 *Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001)). “Second, that
22 alteration must be ‘judicially sanctioned.’” *Id.*

23 Respondents argue that Primero Garcia does not qualify as a prevailing party
24 because the Court’s temporary restraining order did not materially alter the legal
25 relationship between the parties. Respondents point out that, before the Court entered its
26 restraining order, the immigration judge overseeing Primero Garcia’s case stayed his
27 removal pending consideration of his motion to reopen. Thus, according to Respondents,
28 the Court’s restraining order merely maintained the status quo between the parties. See

1 Dkt. No. 37.

2 The Court, however, previously rejected a similar argument when it adjudicated
3 Primero Garcia’s motion for a temporary restraining order. See Dkt. No. 31 at 3–4. As the
4 Court previously noted, “there are limited procedural protections available to Primero
5 Garcia during the administrative process pending his motion to reopen.” *Id.* (citing *Sied v.*
6 *Nielsen*, No. 17-cv-06785-LB, 2018 WL 1142202, at *7–9 (N.D. Cal. 2018)). And, most
7 crucially, the immigration judge’s grant of a stay would terminate after he adjudicated the
8 motion to reopen. Given that ICE had indicated an eagerness to re-remove Primero Garcia
9 after violating previous Court orders, the Court found it necessary to enjoin Respondents
10 from removing Primero Garcia until he had exhausted his avenues for relief. See *id.* at 8.
11 Put differently, the Court expanded the length of the stay imposed by the immigration
12 judge.

13 Likewise, although the Court denied Primero Garcia’s request for immediate
14 release, Primero Garcia obtained a partial victory in the form of a court-ordered bond
15 hearing within 60 days of the order. The fact that the Ninth Circuit later imposed a 180-
16 day trigger for bond hearings in *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020)
17 does not alter Primero Garcia’s prevailing party status. At the time the Court issued its
18 order—March 9, 2020—the Ninth Circuit had yet to decide *Aleman Gonzalez*. A plaintiff
19 is a prevailing party eligible for a fee award even when “[he] wins a preliminary injunction
20 and the case is rendered moot before final judgment, either by the passage of time or other
21 circumstances beyond the parties’ control.” *Higher Taste v. City of Tacoma*, 717 F.3d 712,
22 717 (9th Cir. 2013).

23 Accordingly, the Court finds that Primero Garcia is a prevailing party for purposes
24 of the EAJA.

25 **B. Substantially Justified or Special Circumstances**

26 “The government’s ‘position’ when considered within the EAJA context includes
27 both the government’s litigation position as well as the ‘action or failure to act by the
28 agency upon which the civil action is based.’” *Ibrahim*, 835 F.3d at 1054 (quoting 28

United States District Court
Northern District of California

1 U.S.C. § 2412(d)(1)(B)). Thus, the “substantial justification” test has “two lines of
2 inquiry: one directed towards the government’s original action, and the other towards the
3 government’s litigation position defending that action.” Id. Those two lines, considered as
4 a whole, must have “a reasonable basis in fact and law.” Id. (quoting Gutierrez v.
5 Barnhart, 274 F.3d 1255, 1261 (9th Cir. 2001)).

6 Respondents persuasively note that Primero Garcia’s petition raised novel and close
7 questions of jurisdiction. But, as the Court explained above, the “substantial justification”
8 inquiry is not limited to Respondents’ litigation position and instead also considers the
9 reasonableness of their original action. See Ibrahim, 835 F.3d at 1054. And Respondents’
10 original action—removing Primero Garcia from the United States in violation of the
11 Court’s preliminary injunction in J.L.—was assuredly not justified. Respondents’ lengthy
12 discussion in their brief regarding Primero Garcia’s detention by ICE upon his Court-
13 ordered return and ICE authority to remove him pending the adjudication of his motion to
14 reopen misses the point. The “original action” giving birth to this case is not Primero
15 Garcia’s detention in February 2020, but his removal in 2018. Respondents’ contemptuous
16 conduct in violating this Court’s order undermines whatever justification it may otherwise
17 have had.

18 Respondents’ contention that the parties’ settlement in J.L. precludes EAJA fees
19 here is also not well taken. The parties’ settlement in J.L. resolved fees relating to work
20 the parties “expended or will expend relating to the Joint Notice of Removals (ECF No.
21 223) and the Court’s Order to Show Cause (ECF No. 224) regarding individuals N.P.G.,
22 E.A., and R.M.N. (see ECF No. 227), in connection with the October 24, 2018 Preliminary
23 Injunction (ECF No. 49)” Case No. 5:18-cv-04914-NC, Dkt. No 237-1, Ex. A ¶¶ 7.
24 The settlement clarifies that it only covers fees expended for work done in J.L. See id.
25 ¶¶ 8, 9. Primero Garcia seeks fees for work conducted in this case, which do not address
26 the Joint Notice of Removals (J.L., Dkt. No. 223) or the Order to Show Cause (J.L., Dkt.
27 No. 224).

28 Accordingly, the Court finds that Respondents’ position was not substantially

1 justified and an award of fees would not be unjust.

2 **C. Enhanced Rates**

3 The EAJA permits fee awards “based upon the prevailing market rates for the kind
4 and quality of the services furnished.” 28 U.S.C. § 2412(d)(1)(D)(2)(A). Rates, however,
5 are usually capped at \$125 per hour, “unless the court determines that an increase in the
6 cost of living or a special factor, such as the limited availability of qualified attorneys for
7 the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(1)(D)(2)(A). In the
8 Ninth Circuit, courts may authorize enhanced EAJA rates (i.e., above inflation-adjusted
9 rates) where there was a “limited availability of qualified attorneys for the proceedings
10 involved” and the attorneys had “distinctive knowledge” and “specialized skill” that was
11 “needful to the litigation in question” and “not available elsewhere at the statutory rate.”
12 *Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009) (citations omitted).

13 Here, Primero Garcia requests enhanced rates for three of attorneys. He seeks \$600
14 per hour for attorney Bree Bernwanger, \$590 per hour for attorney Mary Tanagho Ross,
15 and \$625 per hour for attorney Sara Van Hofwegen. Respondents do not oppose the
16 inflation- and cost-of-living-adjusted rates of \$206.77 for Primero Garcia’s remaining
17 attorneys.

18 Respondents argue that enhanced rates are not warranted because Primero Garcia
19 failed to establish that his attorneys had knowledge and skills needful to the litigation and
20 that his counsel’s expertise was unavailable at the statutory rate. The Court disagrees.

21 Although the J.L. lawsuit primarily concerned different subject areas, this case was
22 factually intertwined with J.L. Bernwanger, Tanagho Ross, and Van Hofwegen’s
23 participation in J.L. provided them with knowledge of the background and context leading
24 to Primero Garcia’s initial removal that was critical in this case. Moreover, Primero
25 Garcia does not only rely on his attorneys’ participation in J.L. to justify enhanced rates;
26 he points to their extensive experience litigating immigration cases, as well. Bernwanger,
27 for example, has experience representing detained asylum seekers in expedited removal
28 proceedings and litigating cases involving the jurisdiction-stripping statutes at issue in this

1 case. See Dkt. No. 36-2 (“Bernwanger Decl.”) ¶¶ 9, 14. Primero Garcia’s attorneys’ prior
2 experiences in similar litigation also justify enhanced rates. See *Nat’l Res. Def. Council v.*
3 *Winter*, 543 F.3d 1152, 1160–61 (9th Cir. 2008).

4 Likewise, the Court is not convinced that Primero Garcia’s attorneys’ expertise was
5 available elsewhere at the statutory rate. Primero Garcia submitted multiple declarations
6 from other attorneys attesting to Bernwanger, Tanagho Ross, and Van Hofwegen’s
7 invaluable assistance in their respective cases. See Dkt. Nos. 36-7, 35-8. Respondents
8 disagree with the statements in those declarations, but offer no evidence rebutting those
9 assertions. Moreover, Primero Garcia’s petition was especially time sensitive; he had as
10 little as eight days between his return to the United States and his re-removal. Finding
11 other counsel with the requisite expertise and understanding of his procedural history in so
12 short a time is impractical.

13 Finally, Respondents contend that Primero Garcia fails to adequately support the
14 specific rates for Bernwanger, Tanagho Ross, and Van Hofwegen. Primero Garcia,
15 however, provided an ample overview of market rates for attorneys of similar experience.
16 See Dkt. No. 36-3 (“Tanagho Ross Decl.”) ¶ 12.

17 Accordingly, the Court finds that enhanced rates of \$600, \$590, and \$625 are
18 justified for attorneys Bernwanger, Tanagho Ross, and Van Hofwegen, respectively.

19 **D. Reasonableness of Fees**

20 Respondents first argue that Primero Garcia’s counsel overstaffed this case. They
21 contend that that this case was nothing more than a routine habeas petition on a short
22 timeline. The Court is not persuaded. As Respondents acknowledge, the jurisdictional
23 issues in this case presented close questions.

24 Likewise, the Court disagrees that Primero Garcia’s counsel conducted duplicative
25 or excessive work. Although counsel spent a significant number of hours drafting several
26 filings in this case, those filings were complex and necessarily lengthy. Similarly, the
27 Court is not convinced that time spent by counsel addressing Judge Chhabria’s order to
28 show cause why this case should not be related to J.L. constitutes an unsuccessful task,

United States District Court
Northern District of California

1 given that the briefing was ordered by the Court.

2 Next, Respondents contend that Primero Garcia’s counsel’s billing records reflect
3 vague entries and clerical tasks. Respondents also argue that time spent preparing this fees
4 motion do not warrant enhanced rates. The Court agrees that some entries are too vague
5 for the Court to assess its reasonableness. In particular, counsel billed time for emailing or
6 calling co-counsel. Some of those entries noted that the email or call was related to this
7 case; other entries fail to do so. This discrepancy is confusing and leaves the Court
8 wondering whether the latter entries reflect time spent wholly on this case. Likewise, the
9 Court also agrees that time spent preparing the fees motion and conducting clerical tasks
10 do not warrant enhanced rates. See Lucas v. White, 63 F. Supp. 2d 1046, 1063 (N.D. Cal.
11 1999).

12 The Court also agrees that time spent by counsel preparing their second, unfiled
13 motion for a temporary restraining order for release from detention in late March is not
14 compensable given that the Court had already denied such relief over two weeks prior.

15 Accordingly, reviewing counsel’s records, the Court reduces fees for the following
16 entries:

Date	Timekeeper	Hours Reduced	Amount Reduced	Reason for Reduction
2/10/2020	Beier, Genna	0.5	102.63	Unreasonably vague entry
2/18/2020	Beier, Genna	0.7	143.68	Unreasonably vague entry
2/16/2020	Beier, Genna	0.5	102.63	Unreasonably vague entry
3/27/2020	Beier, Genna	0.6	123.15	Unfiled motion
3/27/2020	Bernwanger, Bree	0.5	300.00	Unfiled motion
7/28/2020	Bernwanger, Bree	1.0	394.75	Not entitled to enhanced rate
7/29/2020	Bernwanger, Bree	2.5	986.87	Not entitled to enhanced rate
7/29/2020	Bernwanger, Bree	1.5	592.12	Not entitled to enhanced rate
7/29/2020	Bernwanger, Bree	1.7	671.07	Not entitled to enhanced rate
7/30/2020	Bernwanger, Bree	1.4	552.65	Not entitled to enhanced rate

1	7/30/2020	Bernwanger, Bree	5.1	2,013.22	Not entitled to enhanced rate
2	2/10/2020	Ross, Mary Tanagho	0.5	295.00	Unreasonably vague entry
3	2/18/2020	Ross, Mary Tanagho	0.7	413.00	Unreasonably vague entry
4	2/19/2020	Ross, Mary Tanagho	0.5	295.00	Unreasonably vague entry
5	2/25/2020	Ross, Mary Tanagho	0.6	230.85	Not entitled to enhanced rate
6	3/27/2020	Ross, Mary Tanagho	0.6	354.00	Unfiled motion
7	4/21/2020	Ross, Mary Tanagho	0.2	118.00	Unreasonably vague entry
8	4/29/2020	Ross, Mary Tanagho	0.2	118.00	Unreasonably vague entry
9	5/1/2020	Ross, Mary Tanagho	1.5	577.12	Not entitled to enhanced rate
10	7/29/2020	Ross, Mary Tanagho	2.0	769.50	Not entitled to enhanced rate
11	2/11–2/18 ¹	Vega, Hector	1.0	205.30	Unreasonably vague entry
12	2/21/2020	Vega, Hector	0.6	123.18	Unreasonably vague entry
13	2/24/2020	Vega, Hector	0.2	41.06	Unreasonably vague entry
14	2/25–3/4	Vega, Hector	1.6	328.48	Unreasonably vague entry
15	3/5/2020	Vega, Hector	0.5	102.65	Unreasonably vague entry
16	3/9/2020	Vega, Hector	0.1	20.53	Unreasonably vague entry
17	3/26–4/1	Vega, Hector	0.5	102.65	Unreasonably vague entry
18	4/10–5/3	Vega, Hector	1.2	246.36	Unreasonably vague entry
19	Total Amount Reduced			\$10,323.45	

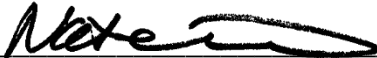
IV. Conclusion

The Court GRANTS Primero Garcia’s motion for attorneys’ fees and awards EAJA fees in the amount of **\$66,201.44**.

¹ The vast majority of time entries for Hector Vega are confusingly vague and the Court will not award fees for those entries. See, e.g., Dkt. No. 36-1 at 6 (numerous entries for “Email to Mary/Bree”). For the sake of simplicity, the Court groups those entries together.

IT IS SO ORDERED.

Dated: September 8, 2020



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28