



PRACTICE ADVISORY¹

June 17, 2014

REQUESTING ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

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I. INTRODUCTION

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 et seq., authorizes payment by the government of attorneys' fees and costs for successful litigation against the government in the federal courts. A successful litigant who establishes eligibility under EAJA is entitled to a fee award for both litigating the case and litigating the fee request. Fees and costs under EAJA can be awarded without regard to whether or how much the client paid. As such, attorneys who take cases on a pro bono or "low bono" basis may seek reimbursement of fees and costs under EAJA.

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The authors wish to thank Adrienne Darrow Boyd, a rising 2L at the University of Michigan Law School, for her work on updating this advisory, and Marc Van Der Hout for creating the original outline on which this advisory is based.

This advisory discusses the deadline for filing an EAJA fee application and the statutory requirements for eligibility. In addition, the advisory addresses procedural and substantive aspects of filing an EAJA fee application, including assignment of fees to counsel and documenting and calculating fees.

Highlights of this advisory include:

Preparing for Filing an EAJA Fee Application Even Before Commencing Litigation

- Have a clear, written agreement with your client (and co-counsel, if any) at the outset of the representation regarding assignment of fees in the event of a court award or settlement. As the Supreme Court's recent decision in *Astrue v. Ratliff*, 560 U.S. 586, 596-97 (2010) holds, EAJA fees belong to the client, not the attorney, absent a representation agreement to the contrary.
- Keep contemporaneous time records with descriptive billing entries on all time spent by attorneys, paralegals and law clerks preparing for and litigating the case and an itemization and description of all costs incurred.
- Pursuant to *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001), a judicially enforceable court order or settlement agreement memorializing a federal court victory is necessary to establish prevailing party status.
- Although EAJA does not require it, it may be advisable to state in the original pleadings or brief that attorneys' fees will be requested under EAJA.

Assessing Eligibility and Filing an EAJA Fee Application after Winning in Federal Court

- The fee application must be filed within 30 days of entry of final judgment in the action; i.e., within 30 days after the expiration of time for filing an appeal, or, if an appeal is filed, within 30 days of entry of final judgment by the court of appeals or Supreme Court.
- The fee application must establish that the petitioning party is a prevailing party who has met the appropriate "net worth" requirements. The application also must allege that the pre-litigation and litigation position of the government was not substantially justified and that there are no special circumstances that would make an award unjust.
- The fee application must include a statement of the total amount of fees and costs requested along with an itemized account of time expended and rates charged.
- If the fee application is for work performed in more than one court (i.e., district court and court of appeals), check the relevant case law and local court rules to see where the application should be filed.

- If seeking to have the government pay a fee award directly to counsel, consider including a declaration attesting to the assignment of fees to counsel and, if true, the absence of federal debt.

II. PROCEDURAL REQUIREMENTS

A. Overview of the Components of an EAJA Fee Application

An application for fees and costs under EAJA should include the following:

- A written motion explaining why your client is statutorily eligible (Part V)
- A signed declaration executed by each named party attesting that he/she met the appropriate net worth requirements at the time the action was filed and attesting to assignment of fees and costs to counsel (Parts V.D and V.II and sample declaration)
- Contemporaneous time records and description of costs (Part II.B.)
- Evidence of the formula used to calculate the requested fee award (Part VI)

In addition, an application may include:

- An application form, if required by local rule
- Evidence of prevailing market rates for paralegal or law clerks in your area (Part VI)
- Evidence of prevailing market rates for attorneys claiming enhanced rates based on specialized knowledge (Part VI.B)

Before filing an EAJA fee request, attorneys should have a clear, written agreement with their client (and co-counsel) regarding who is entitled to the fees in the event of a court award or settlement. Ideally, this agreement is reached at the outset of the attorney-client relationship. Fees belong to the client absent a representation agreement to the contrary.

B. Documenting Fees and Costs

1. Compensable Work

In general, fee-shifting statutes like EAJA compensate for time that is “reasonably expended *on the litigation.*” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). In preparing the fee request, the petitioning party is expected to exercise “billing judgment,” *i.e.*, “make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary....” *Hensley*, 461 U.S. at 434.

The initial work performed before the immigration agencies, the immigration court, or the Board of Immigration Appeals (BIA) is not compensable.³ However, requesting compensation for time

³ See *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989). Since *Ardestani*, courts only have allowed recovery of fees for administrative proceedings where there was a court-ordered remand and counsel’s representation was required to effectuate the court’s remand order. See *Western Watersheds Project v. U.S. Sept. of the*

preparing litigation is permissible. The Supreme Court has expressly approved compensation for time spent drafting the initial pleadings and developing the theory of the case. *Webb v. Board of Education*, 471 U.S. 234, 243 (1985) (citation omitted).⁴

A petitioning party who has established eligibility for a fee award is entitled to recover “fees on fees.” In other words, the party is entitled to compensation for time reasonably expended on litigating the fee request. *Commissioner, INS v. Jean*, 496 U.S. 154, 163-165 (1990).

2. Keeping Contemporaneous and Detailed Time Records

The EAJA fee applicant bears the burden of documenting fees and costs. *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983). A fee award may be reduced for non-contemporaneous, insufficient or inadequate documentation. For this reason, it is best to keep contemporaneous time records indicating: (1) the date; (2) the identity of the timekeeper; (3) a description of the specific task performed; and (4) the amount of the time spent on the task.⁵

Include some detail when describing the specific task performed. For example, instead of “research and drafting legal brief or motion” one might write “research for opening brief” or “drafting habeas petition.”⁶

Maintain a list containing the date and description of all costs stemming from the litigation, including, for example, filing fees, long-distance telephone and facsimile charges, messenger/courier fees, computer research, and expert witness fees.

Itemize the fees and costs incurred. This will assist the court in determining whether the hours and costs claimed are reasonable for the work performed. Thus, an EAJA fee application should

Interior, 677 F.3d 922, 926-29 (9th Cir. 2012); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887-88 (8th Cir.1995).

⁴ *But see LaPointe v. Windsor Locks Bd. of Educ.*, 162 F. Supp. 2d 10, 18 (D.Conn. 2001) (reducing fee award for pre-litigation time spent in telephone conferences with client and co-counsel, drafting memos to file, drafting correspondence to her client because, that court concluded, “none of these activities were actually spent ‘on the litigation’”).

⁵ The failure to contemporaneously document time may result in a reduction or disallowance of EAJA fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 438 n.13 (1983) (holding it was proper to reduce the hours of one attorney to account for his failure to keep contemporaneous time records); *see also Castaneda-Castillo v. Holder*, 723 F.3d 48, 79-79 (1st Cir. 2013) (citing *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984)).

The Ninth Circuit has held that, although it prefers contemporaneous time records, they are not absolutely necessary. In *Fischer v. SJB-P.D., Inc.*, the court held that fee requests “can be based on reconstructed records developed by reference to litigation files.” 214 F.3d 1115, 1121 (9th Cir. 2000).

⁶ *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (“plaintiff’s counsel ... is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures”).

include a tally of the total number of hours expended on the litigation by each timekeeper, the total amount of costs, and the total amount of combined fees and costs requested.

3. Defending Against Allegations of Improper Time Records

Once an EAJA fee application is filed, the government's response often raises objections to billing entries that it deems to be vague, imprecise or duplicative. The government will usually request that the court remedy the alleged impropriety by reducing any fee award in the exercise of discretion.

Case law addresses the degree of specificity required for billing records and whether the records, taken in context, are sufficient to identify the substance of the work done.⁷ In addition, presenting documentary or testimonial evidence from qualified attorneys who have reviewed the billing records and can attest that the records comport with general standards of timekeeping may rebut the government's allegations of vague or non-descriptive billing records.

The government also may contest a claimed EAJA fee based on duplication and similarly may request that the court reduce the award in the exercise of discretion. At least one circuit court has held that reductions for alleged duplication, however, are appropriate "only if the attorneys are *unreasonably* doing the *same* work."⁸ The burden is on the government to show specific instances of unreasonable duplication.⁹

The need for multiple attorneys to prepare briefs to ensure timely filing, share information, assign responsibilities, and plan strategy is well recognized.¹⁰

III. FILING DEADLINE

The EAJA statute requires that the successful litigant file the fee application within 30 days of "final judgment" in the action. 28 U.S.C. § 2412(d)(1)(B). If a local rule provides for a different fee application deadline, the statutory deadline controls. *See Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1082 (9th Cir. 2002) ("Thus, to the extent that Ninth Circuit Rule 39-1.6 is inconsistent with the EAJA, the Circuit Rule is inapplicable, and the EAJA controls.").

A "final judgment" means a judgment that is final and not appealable and that it includes an order of settlement. 28 U.S.C. § 2412(d)(2)(G). Thus, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal petition for certiorari. In immigration cases (where longer appeal deadlines apply because the government is always a party), the time for filing an appeal or petition for certiorari varies depending on whether the case was litigated in district or circuit court.

⁷ *See, e.g., Castaneda-Castillo v. Holder*, 723 F.3d 48, 79 (1st Cir. 2013).

⁸ *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original).

⁹ *McGrath v. County of Nevada*, 67 F.3d 248, 255-256 (9th Cir. 1995).

¹⁰ *See, e.g., Berberena v. Coler*, 753 F.2d 629, 633-634 (7th Cir. 1985); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986); *Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008).

In district court cases, a party has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 60-day time period for filing an appeal. If an appeal is taken, the district court's judgment is not final and therefore the 30-day period for filing an EAJA fee application does not begin to run until all the appellate proceedings are concluded. *Al-Harbi v. INS*, 284 F.3d 1080, 1084 (9th Cir. 2002) ("final judgment" is "the date on which a party's case has met its final demise, such that there is no longer any possibility that the district court's judgment is open to attack").

If the circuit court remands the case, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal following the district court's entry of judgment on remand.

In circuit court cases, a party has 90 days after the judgment or order is entered by the circuit court to file a petition for certiorari to the Supreme Court. Sup. Ct. R. 13(1). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 90-day time period for filing a petition for certiorari. See *Al-Harbi v. INS*, 284 F.3d 1080, 1083 (9th Cir. 2002) (collecting cases from other circuits). This post-judgment appeal period applies even if the court entered the judgment pursuant to the government's request. *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007) (citing *Hoa Hong Van v. Barnhart*, 483 F.3d 600, 612 (9th Cir. 2007)). In *Li*, the Ninth Circuit expressly held "that the thirty-day EAJA fee application period does not begin to run until ninety days after an order remanding an immigration matter to the BIA, even if such an order is at the request of the government." *Li*, 505 F.3d at 917. In that case, the Court held that a circuit mediator's remand order constituted the final judgment for purposes of calculating the EAJA filing deadline. *Id.* at 917-918. The date the mandate is issued is not relevant to calculation of the filing deadline. *Zheng v. Ashcroft*, 383 F.3d 919, 921-22 (9th Cir. 2004).

If a petition for rehearing is filed in the court of appeals, the 90-day period to file a petition for certiorari runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Sup. Ct. R. 13(3). Moreover, if the losing party files a petition for certiorari, the circuit court's judgment is not final and therefore the 30-day period for filing an EAJA fee application would not begin to run until the Supreme Court denies the petition for certiorari. In the event that the Supreme Court grants the petition for certiorari, the 30-day period would not begin to run until the Supreme Court enters judgment or, if the case is remanded, until the circuit (or possibly the district court if the circuit court orders remand) enters judgment.

In general, the government responds to EAJA fee applications by filing an opposition within the time prescribed by Federal Rule of Appellate Procedure 27(a)(3) or by requesting additional time to file a response. However, if the government fails to file a timely opposition, the court may find that the government's silence is a concession that fees are appropriate. In *Gwaduri v. INS*, 362 F.3d 1144 (9th Cir. 2004), the government filed an opposition along with a motion to accept the untimely opposition nearly six weeks after the due date. The court denied the motion to accept the untimely opposition and granted fees, stating "[t]here is simply nothing in the significantly delinquent motion for filing out of time that justifies the government's lengthy silence in this matter." 362 F.3d at 1146. The court reasoned that it was "well-within [its]

discretion” to determine that the government’s lack of a timely opposition amounted to a concession that its litigation position was not substantially justified or, alternatively, a failure to offer a basis for a finding of substantial justification. *Id.*

IV. WHERE TO FILE

The EAJA statute does not specify where to file an EAJA fee request. However, logic and common practice dictate that where only one court has considered the merits of the case, that same court should consider the merits of the EAJA fee request. In a petition for review, an EAJA fee application is properly filed in the court of appeals that adjudicated the petition. In district court actions where neither side appealed to the court of appeals, the application is properly filed in the district court where the action was adjudicated.

In district court actions where one side appeals on the merits, the issue of where to file is more complicated as the appellate court may issue the final judgment in the case when adjudicating the appeal or may remand the case for further proceedings. When an EAJA fee request includes fees for appellate work, it is advisable to review the appropriate circuit court case law and consult the court’s local rules.

Some courts have indicated a preference for district courts to adjudicate fee requests that include appellate fees.¹¹ Other courts have awarded fees for appellate work without remanding for the district court to award fees in the first instance.¹² Still other courts have suggested that either the district court or the court of appeals may adjudicate fee requests that include fees for work on

¹¹ See, e.g., *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 144-45 (1st Cir. 1991) (noting that determination of fee award by appellate court in first instance would usurp trial court function); *McDonald v. Secretary of Health and Human Services*, 884 F.2d 1468, 1481 (1st Cir. 1989) (“Plaintiffs may also apply to the district court for attorneys’ fees reasonably incurred in connection with the present appeal.”) (footnote omitted); *Garcia v. Schweiker*, 829 F.2d 396, 398 (3d Cir. 1987) (reiterating the district court should set the fees for work in both courts when representation in each was required) (citation omitted); *Smith v. Detroit Bd. of Educ.*, 728 F.2d 359, 360 (6th Cir. 1984) (per curiam) (district court more appropriate forum to award fees incurred in appeal); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 588-91 (9th Cir. 1984) (remanding to district court to reconsider award of attorney fees for appellate work); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1527 (10th Cir. 1984) (antitrust action remanded to district court to award appropriate attorney fees for appellate work), *aff’d*, 472 U.S. 585 (1985). See also *Spell v. McDaniel*, 852 F.2d 762, 766 (4th Cir. 1988) (reviewing district court award of fees for appellate work under § 1988); *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970) (stating that the amount of attorneys’ fee award for appellate services under § 4 of the Clayton Act “should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered”).

¹² See, e.g., *Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 719 (8th Cir. 1997) and cases cited therein.

appeal.¹³ In the Second Circuit, applications for appellate fees are filed directly with the court of appeals and a separate fee motion is required for work before the district court.¹⁴

Some courts have separate local rules for attorneys' fees requests in general and local rules for fee requests under EAJA. Many local rules expressly provide that the court of appeals may remand fee requests filed in the courts of appeals to the district court for adjudication upon a motion or in the exercise of the court's discretion.¹⁵

For a discussion regarding where to file an EAJA fee application for work done before the Supreme Court, see *Dague v. Burlington*, 976 F.2d 801, 803-805 (2d Cir. 1991).

V. STATUTORY REQUIREMENTS

The EAJA statute, 28 U.S.C. §§ 2412(d)(1)(A)&(B), directs that a fee application must include:

- A showing that the petitioning party is a prevailing party. 28 U.S.C. § 2412(d)(1)(A).
- An allegation that the pre-litigation and litigation position of the government was not substantially justified. 28 U.S.C. §§ 2412(d)(1)(A)&(2)(D).
- An allegation that there are no special circumstances that would make an award unjust. 28 U.S.C. § 2412(d)(3).
- A showing that the petitioning party has met the appropriate "net worth" requirements. 28 U.S.C. § 2412(d)(2)(B).

¹³ *Martin v. Heckler*, 754 F.2d 1262, 1265 n.6 (5th Cir. 1985) ("In some cases, applications for fees and expenses should be considered in the district court in the first instance. In others, we may consider them first.") (citations omitted); *Ekanem v. Health & Hosp. Corp.*, 778 F.2d 1254, 1257 (7th Cir. 1985) ("our research reveals that a petition on entitlement to appellate attorneys fees may be filed in either the district court or the court of appeals"). *Accord* 11th Circuit R. 39-2 (e) (permitting attorneys fees request to be filed in district court in lieu of court of appeals where appeal resulted in remand for further proceedings).

¹⁴ *Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) ("applications [under the EAJA] for appellate fees in this Circuit should be filed directly with the Court of Appeals"); *McCarthy v. Bowen*, 824 F.2d 182, 183 (2d Cir. 1987) (per curiam) (directing the filing of EAJA appellate fee applications in court of appeals so that it may determine whether to enlist the aid of the district court in resolving disputed issues).

¹⁵ *See, e.g.*, 1st Circuit R. 39.1(a)(2)(D) ("The court in its discretion may remit any such [EAJA fee] application to the district court for a determination."); 8th Circuit R. 47C ("On the Court's own motion or at the request of the prevailing party, a motion for attorneys fees may be remanded to the district court or administrative agency for appropriate hearing and determination."); 9th Circuit R. 39-1.8 ("Any party who is or may be eligible for attorneys fees on appeal to this Court may, . . . , file a motion to transfer consideration of attorneys fees on appeal to the district court . . . from which the appeal was taken."); 11th Circuit R. 39-2 (d) (permitting motion to transfer fee application to district court from which the appeal was taken).

- A statement of the total amount of fees and costs sought along with an itemized account of time expended and rates charged. 28 U.S.C. § 2412(d)(1)(B).

Each of these statutory requirements is discussed in detail below.

There is one additional threshold issue that litigants should consider. The EAJA statute applies to “any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action.” 28 U.S.C. § 2412(d)(1)(A). Thus, in the immigration context, EAJA fees generally are available in petitions for review, mandamus actions, Administrative Procedure Act suits, and habeas corpus actions.¹⁶

EAJA fees generally are not recoverable in actions under the Federal Tort Claims Act, though some courts have allowed recovery where the government acted in “bad faith.” *Rodriguez v. United States*, 542 F.3d 704 (9th Cir. 2008); *Campbell v. U.S.*, 835 F.2d 193 (9th Cir. 1987); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989). Moreover, EAJA fees are *not* recoverable against the government in successful damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Kreines v. U.S.*, 33 F.3d 1105 (9th Cir. 1994); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984).¹⁷ EAJA does not govern the availability of fees and costs incurred in civil rights actions filed against state or local entities under 42 U.S.C. § 1983 or actions under the Freedom of Information Act, 5 U.S.C. § 552. Those statutes each have separate provisions governing fee recovery.¹⁸

A. Prevailing Party Status

To qualify for an EAJA award, the petitioning party has the burden of proving that he is a prevailing party. A “prevailing party” is one who “has been awarded some relief by a court.”

¹⁶ See, e.g., *Gomez-Beleno v. Holder*, 644 F.3d 139, 144-45 (2d Cir. 2011) (petition for review); *Aboushaban v. Mueller*, 475 F. Supp. 2d 943, 946 (N.D. Cal. 2007) (mandamus); *Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58-59 (2d Cir. 1995) (habeas action).

¹⁷ The government previously has argued that the term “civil action” does not unambiguously encompass habeas corpus actions under 28 U.S.C. § 2241 and, thus, EAJA fees are not available in habeas cases. While some courts have accepted this argument for prisoners in *criminal* custody, importantly, no court has accepted it for noncitizens in *immigration* custody. *Vacchio v. Gonzales*, 404 F.3d 663, 668-72 (2d Cir. 2005) (rejecting government’s argument that habeas petition challenging an immigration detention does not qualify as a “civil action”); *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (same); *O’Brien v. Moore*, 395 F.3d 499, 507-08 (4th Cir. 2005) (accepting government’s “civil action” argument but expressly distinguishing habeas petitions challenging immigration detentions from habeas petitions in the criminal context); *In re Petition of Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (rejecting government’s “civil action” argument in habeas case challenging petitioner’s exclusion).

¹⁸ See 42 U.S.C. § 1998 and 5 U.S.C. § 552(a)(4)(E)(i) (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007).

Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 603 (2001).

1. Prevailing Party Status Cannot Be Based On the “Catalyst Theory”

Under the so-called “catalyst theory,” a litigant is entitled to prevailing party status if the lawsuit was a catalyst that prompted the government to voluntarily alter its conduct. For example, a party could be considered a “prevailing party” under the catalyst theory if the lawsuit prompted the government to voluntarily grant the requested relief or pass legislation that mooted the federal case.

In *Buckhannon*, the Supreme Court held that the “catalyst theory” is no longer a permissible basis for an attorneys’ fees award under the fee-shifting statutes at issue in that case. The “catalyst theory,” the Court reasoned, “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” 532 U.S. at 605. The Court held that a party can only be deemed a prevailing party, for purposes of fee-shifting statutes such as EAJA, if there has been an enforceable “alteration of the legal relationship of the parties.” *Id.* at 621. Thus, under *Buckhannon*, a party whose suit prompts the precise relief sought may be a prevailing party only if there is a judicially enforceable court entry memorializing the victory.

2. Types of Court Entries That May Prove Prevailing Party Status

Examples of court entries that may serve as the basis for an award of EAJA fees include enforceable judgments on the merits and settlement agreements that are favorable to one-side and enforceable through a consent decree. *Buckhannon*, 532 U.S. at 604-06. A consent decree is technically a judgment entered by consent of the parties whereby the government agrees to stop the alleged illegal activity without necessarily admitting guilt or wrongdoing. The three required characteristics of a cognizable consent decree under *Buckhannon* are that it is (1) “court-ordered,” (2) judicially approved, and (3) provides for judicial oversight to enforce the parties’ obligations. *Aronov v. Chertoff*, 562 F.3d 84, 90-91 (1st Cir. 2009) (en banc) (discussing *Buckhannon*’s consent decree requirements).

Post-*Buckhannon* case law has created additional examples of judicially enforceable court entries specific to immigration cases. In *Vacchio v. Gonzales*, 404 F.3d 663, 673-74 (2d Cir. 2005), the court held that an interim order directing release pending adjudication of petitioner’s habeas corpus appeal was sufficient to confer prevailing party status. In *Carbonell v. INS*, 429 F.3d 894, 901 (9th Cir. 2005), the court held that a district court order attesting to a voluntary stipulation between petitioner and INS to stay deportation pending the BIA’s adjudication of a motion to reopen conveyed “prevailing party” status because it awarded a substantial portion of the relief sought. However, in *Aronov v. Chertoff*, 562 F.3d 84, 92 (1st Cir. 2009) (en banc), the First Circuit held that a judicially approved stipulation to remand the case to the agency was not sufficient to confer prevailing party status, reasoning, in large part, that the court did not retain jurisdiction to enforce the stipulation. Remand orders are further discussed in the next section.

In *Li v. Keisler*, 505 F.3d 913, 917-18 (9th Cir. 2007), the court held an order issued by a circuit mediator granting an unopposed motion to remand after the petitioner filed an opening brief is

sufficient to satisfy *Buckhannon* where the orders advanced the petitioners' goals and constituted material alterations of the parties' legal relationship.

District courts also have held that an order granting mandamus to adjudicate an adjustment of status or naturalization application is sufficient to convey prevailing party status. *See, e.g., Aboushaban v. Mueller*, 475 F. Supp. 2d 943, 946 (N.D. Cal. 2007); *Osman v. Mukasey*, 553 F. Supp. 2d 1252 (W.D. Wash. 2008) (prevailing party status established and fees granted where district court ordered adjudication of petitioner's naturalization application pursuant to 8 U.S.C. § 1447(b)); *Liu v. Chertoff*, 538 F. Supp. 2d 1116 (D. Minn. 2008) (same); *Alghawi v. Mukasey*, 543 F. Supp. 2d 1252 (W.D. Wash. 2008) (same). Significantly, in mandamus cases, generally, a court must issue an order requiring the agency to act in order for a litigant to be eligible for fees; otherwise, the court is likely to find that the "catalyst theory" applies, which, as explained above, does not provide for recovery under EAJA.

A judicial pronouncement that the government has violated the Immigration and Naturalization Act or the Constitution without any grant of judicial relief will not serve as a basis for an award of attorneys' fees. *Buckhannon*, 532 U.S. at 606-607. In addition, changes in the actual circumstances of the parties that are not related to the federal court case may not be used as the basis for an EAJA fee award. *Id.* For example, if the BIA grants a motion to reopen or reconsider after the filing of federal lawsuit challenging the final removal order, the petitioner in the federal lawsuit is not considered a prevailing party if the federal case has been mooted out by the BIA's order. Similarly, if the agency acts after a petitioner files a mandamus action but before the district court rules, the petitioner is not considered a prevailing party because the agency's action moots the district court case. In the absence of an enforceable court ordered judgment or remedy, a court is not likely to find prevailing party status as defined by the Court in *Buckhannon*. *See, e.g., Ma v. Chertoff*, 547 F.3d 342, 344 2d Cir. 2008) (plaintiff was not a prevailing party where USCIS corrected erroneous denial of adjustment application and adjusted plaintiff's status after case filed but before court acted); *Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Servs.*, 452 F.3d 1254, 1257-58 (11th Cir. 2006) (prevailing party status was not conferred where USCIS voluntarily granted permanent resident status before the district court entered a final judgment); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (finding plaintiff was not a prevailing party where he naturalized during litigation, and district court dismissed the case as moot).

In light of *Buckhannon*, if the government grants the relief sought before the court decides the case on the merits, memorializing the victory in a court-approved order or settlement will preserve eligibility for an award of EAJA fees. In this situation, counsel also may face tactical and ethical questions, including whether to attempt to negotiate fees and costs in the order or settlement agreement or wait and file an EAJA fee request after the court approves the order or settlement agreement.

3. Court Ordered Remand

Whether a court-ordered remand to the Board confers prevailing party status can be tricky. The primary Supreme Court case on this issue is *Shalala v. Schaefer*, 509 U.S. 292 (1993). In *Shalala*, the Supreme Court held that a social security claimant who obtained a reversal and

remand of a Secretary of Health and Human Services' administrative decision pursuant to sentence four of 42 U.S.C. § 405(g) was a prevailing party. 509 U.S. at 300-301. Significantly, in cases remanded under this section, the court enters judgment in the claimant's favor immediately and the litigation is terminated. In cases remanded under another social security provision, the court postpones entering judgment until after post-remand agency proceedings have been completed and their results are filed with the court. The Court's opinion in *Shalala* relied heavily on this distinction.

Significantly, in cases involving remand orders for further proceedings, courts generally only allow EAJA fee recovery for fees and costs incurred in the federal court litigation, not for work done before the agency in remanded proceedings. *See* n.3, *supra*.

a. Remand Where the Court Enters Judgment

The Supreme Court's decision in *Shalala* supports finding prevailing party status when a court orders remand to the agency, enters a formal judgment immediately and does not retain jurisdiction over the federal court action.

In *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997), the Ninth Circuit granted the petition for review of the denial of petitioners' asylum applications and remanded their case to the BIA for further proceedings in light of its decision. The court's order terminated the proceedings, and the court did not retain jurisdiction over future appeals. Petitioners then sought fees under EAJA. The Ninth Circuit reasoned that, since it could "perceive no difference between a 'sentence four' remand under 42 U.S.C. § 405(g) (at issue in *Shalala*) and a remand to the BIA for further proceedings," petitioners who obtain such remand are prevailing parties. *Rueda-Menicucci*, 132 F.3d at 495. In *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court extended this ruling to allow the recovery of fees in cases where the government moves for remand to the BIA after briefing has commenced, although not completed, and remand is granted by a circuit mediator.

The Seventh and Third Circuits have similarly ruled that a petitioner who wins remand for further proceedings is a prevailing party within the meaning of EAJA. The courts reasoned that petitioners' situations were analogous to the Supreme Court's decision in *Shalala* and also noted that their conclusions were consistent with *Rueda-Menicucci v. INS*. *Muhur v. Ashcroft*, 382 F.3d 653, 654-55 (7th Cir. 2004); *Johnson v. Gonzales*, 416 F.3d 205, 209-10 (3d Cir. 2005). *See also Salem v. United States INS*, 122 F. Supp. 2d 980, 984 (C.D. Ill. 2000) (finding remand to the INS conferred prevailing party status under the rationale of *Rueda-Menicucci*).

As a practical matter, because the question of whether a party has prevailed on a significant issue in litigation potentially could be equated with whether the party requested the relief obtained, it is advisable to ask the court to vacate *and/or remand* the decision of the immigration service or court when drafting a request for relief.

b. Remand Where the Court Postpones Entering Judgment

If the court orders remand to the agency, postpones entering judgment until the completion of post-remand agency proceedings, and also retains jurisdiction over the federal court action, the petitioning party may be eligible for prevailing party status if they are successful before the agency on remand.¹⁹

In this situation, there is some authority suggesting that it may be possible to recover fees for administrative work on remand. In *Ardestani v. INS*, 502 U.S. 129, 135 (1991), the Supreme Court held that courts cannot award EAJA fees for initial work done in administrative immigration proceedings. Since *Ardestani*, courts generally only have allowed recovery of fees for administrative proceedings where there was a court-ordered remand and counsel's representation was required to effectuate the court's remand order.²⁰

c. Remand Orders in Naturalization Cases

In *Aronov v. Chertoff*, 562 F.3d 84, 92 (1st Cir. 2009) (en banc), the First Circuit rejected a claim that a court order granting a motion to remand the case to U.S. Citizenship and Immigration Services (USCIS) for adjudication of a naturalization application pursuant to 8 U.S.C. § 1447(b) conferred prevailing party status where the order did not resolve any aspect of the dispute between the parties. The court distinguished the situation before it from a court-ordered consent decree (which would give rise to EAJA eligibility) because there was no appraisal of the merits of the litigation, the court did not order USCIS to do anything, and the order did not contain a provision for future enforcement. *Id.* at 92-93. See also *Iqbal v. Holder*, 693 F.3d 1189, 1195 (10th Cir. 2012) (remand order for adjudication of naturalization application that favored the plaintiff but did not entitle him to some method of enforcement on the merits of his claim did not qualify him as a "prevailing party").

Significantly, however, in other naturalization cases, if the remand order satisfies the *Buckhannon* criteria of a consent decree,²¹ it will confer prevailing party status. See, e.g., *Al-Maleki v. Holder*, 558 F.3d 1200, 1206 (10th Cir. 2009) (court order instructing USCIS to administer oath of citizenship after the agency stipulated plaintiff was entitled to naturalization

¹⁹ *Shalala*, 509 U.S. 299-300 (discussing *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989)).

²⁰ *Castaneda-Castillo v. Holder*, 723 F.3d 48, 59 (1st Cir. 2013) (holding administrative proceedings conducted after remand of asylum application were so "intimately related" to judicial proceedings ordering remand that they had to be considered part of same "civil action") (quotation omitted); *Former Empls. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) ("We hold that parties who secure a consent order remanding a proceeding to an administrative agency because of an alleged error on the merits, where the court also retains jurisdiction, are 'prevailing parties' under EAJA if they succeed on the merits in the remand proceeding.") (quotation omitted); *Davidson v. Veneman*, 317 F.3d 503, 505-06 (5th Cir. 2003) (where district court ordered remanded to Farm Services Agency and stayed motion for EAJA fees pending completion of remand proceedings and plaintiff was successful in remand proceedings, plaintiff was entitled to prevailing party status).

²¹ *Aronov v. Chertoff*, 562 F.3d 84, 90-91 (1st Cir. 2009) (en banc) (discussing *Buckhannon's* requirements that consent decree must be "court-ordered," judicially approved, and provide for judicial oversight to enforce the parties' obligations).

imposed a judicially enforceable obligation that satisfies *Buckhannon*); *Lord v. Chertoff*, 526 F. Supp. 435, 438 (S.D.N.Y. 2007) (court approved consent agreement for USCIS to approve naturalization application satisfied *Buckhannon* standard because court retained jurisdiction to enforce the agreement if necessary); *Berishev v. Chertoff*, 486 F. Supp. 2d 202, 204-05 (D. Mass. 2007) (conciliatory remand order for adjudication of naturalization application satisfied *Buckhannon* Court's interpretation of "prevailing party").

B. Substantial Justification

An initial EAJA fee application must, at a minimum, *allege* that the position of the United States, which is both the agency's underlying position and its litigation position, was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).²² However, as the government routinely attempts to demonstrate that its position was substantially justified, it is advisable to fully brief this important issue in the initial fee application rather than waiting to brief it in the reply brief, when page space more limited.

Once the petitioning party establishes prevailing party status, the government can avoid payment of fees only if it can show that its pre-litigation conduct *and* litigation position were "substantially justified." In order to meet this burden of proof, the government must show that its position has a reasonable basis both in law and in fact.²³

Significantly, the government must meet this threshold twice -- it must independently establish that the agency misconduct that gave rise to the litigation was substantially justified and that its litigation positions also were substantially justified.²⁴

²² In *Scarborough v. Principi*, 541 U.S. 401 (2004), the Supreme Court held that a timely filed EAJA fee application may be amended after the 30-day filing period has run to cure an initial failure to allege that the government's position in the litigation lacked substantial justification.

²³ See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person"); *Aronov v. Chertoff*, 562 F.3d 84, 94-95 (1st Cir. 2009) (en banc) ("The [pre-litigation position] test is whether a reasonable person could think the agency position is correct") (citing *Pierce*, 487 U.S. at 566 n.2); *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir. 2010) ("it is not necessary for the Government's position to be 'justified to a high degree'" (internal citation omitted)).

²⁴ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 158-160 (1990); *Dantran, Inc. v. United States DOL*, 246 F.3d 36, 41 (1st Cir. 2001) ("To satisfy its burden, the government must justify not only its pre-litigation conduct but also its position throughout litigation."); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) ("The inquiry into the existence of substantial justification therefore must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court").

Thus, if the court finds that the government’s underlying, pre-litigation conduct lacks substantial justification, the court need not consider whether its litigation positions were substantially justified.²⁵

In some cases involving petitions for review of a BIA decision, the government has argued that the relevant “position of the United States” was the position of the Department of Homeland Security (DHS), not the position that the IJ or BIA set forth in their decisions, because the Executive Office for Immigration Review (which houses both the immigration courts and the BIA) and DHS are no longer in the same executive department following the 2002 enactment of the Homeland Security Act. In *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005), the Ninth Circuit rejected this argument, finding that it “completely lacks justification.” 428 F.3d at 873. The court affirmed that the IJ’s decision, summarily affirmed by the BIA, constituted “the action . . . by the agency upon which the civil action is based” under the plain language of the EAJA statute, and thus, the relevant pre-litigation position. 428 F.3d at 873. The court also found that nothing in the government reorganization resulting from the Homeland Security Act affected this conclusion because EOIR and DHS both “are part of the executive branch of the United States government, despite their mutual independence” and “the manner in which responsibilities are divided within the executive branch is immaterial to determining” the underlying government action upon which the petition for review was based. 428 F.3d at 873.²⁶

A court evaluates whether the government’s position is reasonable based on several factors, including the clarity of the governing law;²⁷ the foreseeable length and complexity of the litigation; the consistency of the government’s position; views expressed by other courts on the

²⁵ *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) (“The single finding that the Government’s position lacks substantial justification, like the determination that a claimant is a ‘prevailing party,’ thus operates as a one-time threshold for fee eligibility.”); *Roanoke River Basin Ass’n v. Hudson*, 991 F.2d 132, 138 (4th Cir. 1993) (“...*Jean* instructs that a single finding of governmental misconduct compelling a party to resort to litigation or to prolong litigation can open the door to recovery under the EAJA. . .”); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (stating that “once a court determines that the government’s position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute.”) (citations omitted).

²⁶ See also *Singh v. Gonzales*, 502 F.3d 1128 (9th Cir. 2007).

²⁷ However, the government’s position is not *per se* justifiable simply because the case involves a new statute or an issue of first impression. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001) (“There is no *per se* rule that EAJA fees cannot be awarded where the government’s position contains an issue of first impression”). *But see Cornella v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984) (holding government reasonable in defending a district court judgment where “all of the purely legal issues were questions of first impression”); *Vacchio v. Gonzales*, 404 F.3d 663, 675 (2d Cir. 2005) (holding that an unsettled question of law combined with a government position that was “far from unreasonable” amounted to substantial justification); *Cody v. Caterisano*, 631 F.3d 136, 142 (4th Cir. 2011) (“litigating cases of first impression is generally justifiable”); *Bah v. Cangemi*, 548 F.3d 680, 684 (8th Cir. 2008) (“The government *may*... be justified in litigating a legal question that is unsettled in [a] circuit”) (emphasis added).

merits; legal merits of the government's position;²⁸ and the stage at which the litigation was resolved. *See generally Jean v. Nelson*, 863 F.2d 759, 767-68 (11th Cir. 1988) *affirmed by Commissioner, INS v. Jean*, 496 U.S. 154 (1990). The agency's position may be substantially justified "even if a court ultimately determines the agency's reading of the law was not correct." *Aronov*, 562 F.3d at 94 (1st Cir.2009) (en banc) (citing *Pierce*, 487 U.S. at 566 n.2).

The government's position must be substantially justified as a whole.²⁹ Courts generally do not award a portion of fees by issue. *Gatimi v. Holder*, 606 F.3d 344, 349 (7th Cir. 2010). In *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), the Supreme Court established that fees for all time expended is recoverable where the litigant has achieved "excellent results" in his challenge to an agency action. The Court stated that a court's "rejection or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Id.* *Hensley* directs that a party is entitled to full recovery based on the "overall relief obtained," not merely a calculation of hours expended on a claim-by-claim basis. *Id.* at 435. *See also Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001) (plaintiffs were entitled to full recovery of fees because they "accomplished their mission") (internal quotations omitted).

However, a court may deny recovery of fees if it finds the government's position was substantially justified regarding the one issue on which the plaintiff prevailed. In *Hardisty v. Astrue*, the Ninth Circuit held that plaintiff was not entitled to EAJA fees because the government's position was substantially justified on the sole issue on which he prevailed. 592 F.3d 1072, 1077 (9th Cir. 2010). Finding there was "no basis for EAJA fee shifting," the court also refused to award fees on alternative grounds not reached by the district court. *Id.* at 1075. The court reasoned that EAJA does not provide recovery for unaddressed claims where the government was substantially justified on the issue on which the plaintiff prevailed. *Hardisty*, 592 F.3d at 1078.

In some circuits, there is case law finding a lack of substantial justification where the government's position violates the Constitution, a statute, or its own regulations. *See, e.g., Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275, 1278 *amended* 131 F.3d 842 (9th Cir. 1997) (the government's position is not substantially justified where the agency violates its own regulations that are clear and unambiguous); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that "the agency's position lacked substantial justification because it was 'wholly unsupported by the text' of the applicable regulations.") (citation omitted).

²⁸ *See, e.g., Floroiu v. Gonzales*, 498 F.3d 736, 749 (7th Cir. 2007) (holding the government's position was not substantially justified because, in part, the government provided no legal authority to support it); *Tchemkou v. Mukasey*, 517 F.3d 506, 510 (7th Cir. 2008) ("having failed to provide any support for th[eir] argument, the government also has failed to show that its position was substantially justified"); *Thangaraja v. Gonzales*, 428 F.3d 870, 875 (9th Cir. 2005) (holding Attorney General's arguments on the merits of the plaintiff's asylum and withholding of removal claims were substantially unjustified because they were "entirely unsupported by the record").

²⁹ *Commissioner, INS v. Jean*, 496 U.S. 154, 161-62 (1990).

In *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007), where the government sought and was granted a voluntary remand, the court held that an assessment of substantial justification (and special circumstances) requires the court to examine “the likely reason behind the voluntary remand in question.” The court held the petitioners are entitled to fees where the government requested a remand “to reevaluate the prior proceedings due to a misapplication of, or failure to apply, controlling law and where there is no new law or claims of new facts.” *Id.* The court distinguished such situations from cases where the government may be justified in seeking a remand “due to intervening case law, because of unclear controlling case law, or where the agency should have an opportunity to adjudicate a new claim for relief in the first instance.” *Id.*³⁰ Once the court determines that the government’s position lacks substantial justification, the prevailing party is presumptively eligible for fees for all phases of the federal case unless the prevailing party has “unreasonably protracted” a portion of the litigation, which would warrant exempting fees for that portion of the litigation from the award.³¹

C. Special Circumstances

The government has the burden of proving the existence of special circumstances that would make a fee award unjust.³² This “special circumstances” exception to awarding fees was intended as a “safety valve” to allow the government to advance “novel but credible” legal theories and to give courts discretion to deny awards for equitable considerations. This provision of the EAJA is to be narrowly construed so as to not interfere with or defeat Congress’s purpose in passing the EAJA.³³

Special circumstances include close or novel questions.³⁴ Equitable considerations can mean that the “prevailing party” acted in bad faith or has “unclean hands.”³⁵ The Ninth Circuit has held that the “the government’s request for a voluntarily remand [to the BIA] is not a ‘special circumstance’ that would relieve the government from the applicants’ statutory entitlement to EAJA fees.” *Li*, 505 F.3d at 918, 920 n.1. Rather, the court collapsed its discussion of the special circumstances exception with its substantial justification analysis, holding that the court must examine “the likely reason behind the voluntary remand in question.” *Id.* at 919.

³⁰ See also *Kholyavskiy v. Holder*, 561 F.3d 689, 691-92 (7th Cir. 2009) (holding the government’s position was substantially justified, in part, because of the uncertainty in the law arising from the novelty of the question at bar); *Hardesty v. Astrue*, 435 F. App’x 537, 540 (7th Cir. 2011) (affirming government was substantially justified in defending the position of an administrative law judge who did not have access to evidence that claimant later produced to supplement the record).

³¹ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 161 (1990).

³² 28 U.S.C. § 2412(d)(1)(A); *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989).

³³ *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

³⁴ *National Truck Equip. Ass’n v. NHTSA*, 972 F.2d 669, 671 (6th Cir. 1992); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 431 (5th Cir. 1982).

³⁵ *Taylor v. U.S.*, 815 F.2d 249, 252-254 (3d Cir. 1987); *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1392 (W.D. Mo. 1983), *aff’d*, 744 F.2d 635 (8th Cir. 1984); *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

D. Net Worth

In order to satisfy the net worth requirement under EAJA, an individual plaintiff's net worth must not exceed \$2,000,000 at the time the lawsuit was filed. 28 U.S.C. § 2412(d)(2)(B). A corporation must establish that it did not have more than 500 employees and its net worth did not exceed \$7,000,000 at the time the lawsuit was filed. 28 U.S.C. § 2412(d)(2)(B). A non-profit entity must only show that it did not have more than 500 employees at the time the lawsuit was filed.

Net worth is calculated for each individual named party to the lawsuit. Net worth should, at a minimum, be documented by submitting a signed affidavit attesting that the petitioning party met the appropriate requirements at the time the lawsuit was filed.³⁶ In light of *Astrue v. Ratliff*, 560 U.S. 586 (2010), discussed in detail below, it is advisable for such an affidavit also to attest to an assignment of any EAJA award payment to counsel and, if true, that the litigant does not owe a federal debt.

VI. CALCULATING FEES, RATES AND ADJUSTMENT FOR INFLATION

EAJA fees are based upon “prevailing market rates for the kind and quality of the services furnished, except . . . attorney fees shall not be awarded 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).

Thus, the statutory hourly rate of compensation for attorneys is \$125 for cases commenced on or after March 29, 1996. This amount can be “adjusted” or “enhanced” for inflation based on cost of living adjustments (COLA) or the presence of a special factor.

A. EAJA Statutory Rate Adjusted for Inflation

Most courts calculate the “adjustment” or “enhancement” for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U).³⁷ The CPI-U is published by the Bureau of Labor Statistics and is updated monthly. It can be located on-line at <http://www.bls.gov/cpi/home.htm>. The courts measure the COLA as of March 1996, when the statutory hourly rate of attorney compensation was raised from \$75 per hour to \$125 per hour. The March 1996 CPI-U is 155.7 and also can be located on-line at the link above.

One formula that is often used for calculating the cost of living adjustment is:

³⁶ *United States v. Heavrin*, 330 F.3d 723, 732 (6th Cir. 2003); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000).

³⁷ *See, e.g., Harris v. Sullivan*, 968 F.2d 263, 264-266 (2d Cir. 1992); *Dewalt v. Sullivan*, 963 F.2d 27, 27-30 (3d Cir. 1992); *Sullivan v. Sullivan*, 958 F.2d 574, 578 (4th Cir. 1992); *Begley v. Secretary of HHS*, 966 F.2d 196, 199-200 (6th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1463 (9th Cir. 1988).

$$\text{\$125} \times \frac{\text{(current CPI-U)}}{\text{(March 1996 CPI-U)}}$$

See Ramon-Sepulveda v. INS, 863 F. 2d 1458, 1463, n.4 (9th Cir. 1988); *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *Edwards v. Barnhart*, 214 F. Supp. 2d 700, 702, n.3 (W.D. Tex. 2002); *Walker v. Barnhart*, 302 F. Supp. 2d 1072, 1075 (S.D. Iowa 2002).

Some cases suggest that the regional CPI-U, and not the national, is appropriate to use in computing the EAJA rate adjusted for inflation.³⁸ The Ninth Circuit has clarified that the national CPI-U, and not the regional, should be used in fee applications filed in that circuit.³⁹ For individuals in areas with higher costs of living, the use of the regional CPI-U would mean a higher statutory rate of compensation.

Some courts have required that COLA calculation be done for the year of the fee award. In the equation set forth above, this would mean that the “current” CPI-U reflects the figure of the current year.⁴⁰ More recently, however, courts have applied a COLA adjustment for each year in which the work was performed.⁴¹ In the equation set forth above, this means that the hourly rate for each year attorney work was performed would require a separate COLA rate calculation using a different CPI-U figure for each year.

The Ninth Circuit posts the applicable EAJA statutory maximum hourly rate adjusted for increases in the cost of living for each year since 2001. The rate chart is located at: http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039.

B. Enhanced Rates

1. Establishing Special Factors Merit Enhanced Rates

Attorney rates also may be increased if a special factor justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A)(ii). The EAJA statute provides one example of a special factor, “the limited availability of qualified attorneys for the proceedings involved.” *Id.* The Supreme Court has addressed the meaning of this statutory phrase as follows:

³⁸ *See Chen v. Slattery*, 842 F. Supp. 597, 600 n.2 (D.D.C. 1994); *Stanfield v. Apfel*, 985 F. Supp. 927, 931 (E.D. Mo. 1997); *Peterson v. Shalala*, 818 F. Supp. 241, 245 n. 3 (S.D. Ill. 1993); *Porter v. Astrue*, CV 11-2304 (JEB), 2013 WL 5978623 at *2 (D.D.C. Nov. 12, 2013). *See also Hamblen v. Colvin*, 3:12-CV-2009-BH, 2014 WL 1516157 at 2* n.7 (N.D. Tex. Apr. 17, 2014) (discussing case law that debates whether courts should apply the national, regional, or local CPI when calculating an adjustment).

³⁹ *See Thangaraja v. Gonzales*, 428 F.3d 870, 877 (9th Cir. 2005).

⁴⁰ *See, e.g., Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Garcia v. Schweiker*, 829 F.2d 396, 401-02 (3d Cir. 1987).

⁴¹ *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001); *Wilkett v. Interstate Commerce Com.*, 857 F.2d 793, 875 (D.C. Cir. 1998); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992).

We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of general lawyerly knowledge and ability useful in litigation. An example of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

Pierce v. Underwood, 487 U.S. 552, 572 (1988).

Convincing a court to grant enhanced rates is challenging. In one case, the court acknowledged that counsel’s representation amounted to “a herculean effort” in that it lasted over two decades and required litigation before both administrative and federal courts, but nevertheless the court denied fees because counsel did not demonstrate that “distinctive knowledge” or “specialized skill” was essential to the petition for review for which he sought fees. *Castaneda-Castillo v. Holder*, 723 F.3d 48, 75 (1st Cir. 2013).

Some courts have recognized that a specialized knowledge of immigration law could warrant enhanced attorney rates.⁴² In the Ninth Circuit, an enhanced rate may be warranted if the attorney possesses distinctive knowledge and skills developed through a practice specialty; the skills are

⁴² See, e.g., *Muhur v. Ashcroft*, 382 F.3d 653, 656 (7th Cir. 2004) (noting “immigration lawyers are not *ipso facto* entitled to fees above the statutory ceiling” finding immigration expertise, “such as knowledge of foreign cultures or of particular, esoteric nooks and crannies of immigration law,” warranted a special factor rate adjustment); *Nadarajah v. Holder*, 569 F.3d 906, 914 (9th Cir. 2009) (holding enhanced rates were appropriate because the “case involved more than established principles of [immigration] law with which the majority of attorneys are familiar”); *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997) (stating “a specialty in immigration law could be a special factor warranting an enhancement of the statutory rate” if that specialty is “needful for the litigation in question”); *Pollgreen v. Morris*, 911 F.2d 527, 537-38 (11th Cir. 1990) (recognizing that a “special factor” rate adjustment might be appropriate for attorneys who have a special expertise in immigration law); *Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992) (awarding enhanced EAJA rate based, in part, on attorneys extensive experience in immigration law). *But see Johnson v. Gonzales*, 416 F.3d 205, 213 (3d Cir. 2005) (enhancement not warranted in case involving “straightforward application of the substantial evidence and asylum standards...”); *Castaneda-Castillo v. Holder*, 723 F.3d 48, 76 (1st Cir. 2013) (“no special skill or distinctive knowledge, apart from that obtained by immigration lawyers pursuant to their general experience, was necessary for the plaintiff to prevail”) (internal citations omitted); *Perales v. Casillas*, 950 F.2d 1066, 1078-79 (5th Cir. 1992) (immigration lawyers, unlike patent lawyers and experts in foreign law, are not *per se* specialized for special factor assessment purposes); *National Ass’n of Mfrs. v. United States DOL*, 962 F. Supp. 191 (D.D.C. 1997) (“Unlike patent law, no technical education is necessary to excel in either” immigration or administrative law). See also *Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (declining to adopt a *per se* rule that immigration law is a specialty area similar to practicing patent law); *Atlantic Fish Spotters Ass’n v. Daley*, 205 F.3d 488, 492-93 (1st Cir. 2000) (finding enhanced EAJA rate was improper because special experience in fisheries law was not required for competent representation in the case).

needed in the litigation; and the skills are not available elsewhere at the statutory rate. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citation omitted).

Special factors do *not* include the general limited availability of qualified attorneys, litigation that involves novel and difficult issues, the undesirability of the case, expertise of counsel, or the results obtained. These factors are considered “applicable to a broad spectrum of litigation” *Pierce*, 487 U.S. at 573.

When reviewing whether to grant enhanced rate requests, courts will want to see evidence of the attorney’s particular qualifications and how those qualifications were needed in the litigation and information regarding the lack of availability of attorneys who could litigate the case.⁴³

Declarations from other attorneys will help document a claim for enhanced rates based on expertise in immigration law. The declarations could explain why immigration law expertise was necessary to litigate the case and further attest that petitioner/s would be unable to find an attorney with the requisite immigration expertise at the \$125 EAJA statutory rate. *See, e.g., Nadarajah v. Holder*, 569 F.3d 906, 915 (9th Cir. 2009) (quoting Van Der Hout Declaration as stating “the vast majority of the immigration bar of this country does not engage in federal court litigation, and of those that do, only a very small number would be willing to take on a case of this complexity. There are no qualified attorneys to my knowledge who would have undertaken such litigation at the EAJA statutory rate of \$125, even adjusted for inflation”).

2. Establishing the Prevailing Market Rate for Attorneys

An attorney claiming entitlement to an enhanced rate based on special factors must establish the prevailing market rate for services, 28 U.S.C. § 2412(d)(2)(A)(ii). This is true regardless whether the attorney represented the client *pro bono* or for a fee, or the attorney works for a non-profit organization or a private firm. *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984); *Nadarajah*, 569 F.3d at 916.

The prevailing market rate need not reflect the rate charged to the client.⁴⁴ Therefore, counsel need not submit a copy of the fee agreement to the court for the court to determine the

⁴³ *Floroiu v. Gonzales*, 498 F.3d 746, 749 (7th Cir. 2007) (“[The court] do[es] not consider [a] blanket statement of the difficulty of the issues presented and the years of experience of the practitioner involved sufficient to justify piercing the statutory ceiling”).

⁴⁴ *See United States v. \$186,416.00 in U.S. Currency*, 642 F.3d 753, 755 (9th Cir. 2011) (“Under § 1988 and EAJA, the actual fee agreement does not act as a cap on the amount of statutory attorney fees awarded”); *Phillips v. GSA*, 924 F.2d 1577, 1582-83 (Fed Cir. 1991) (holding the prevailing party was entitled to attorney fees in excess of the \$2,500 she was obligated to pay, in light of a fee arrangement with her attorney that any additional payment obligation would be contingent upon success and based on a statutory fee award if she prevailed); *Cornella v. Schweiker*, 728 F.2d 978, 986 (8th Cir. 1984) (legislative history of EAJA clarifies that attorney fees should be based on prevailing market rate without reference to the fee arrangements between the attorney and client). *Accord Corder v. Gates*, 947 F.2d 374, 378 n.3 (9th Cir. 1991) (“[I]t is clear that an award of a ‘reasonable’ attorney’s fee [under § 1988] may

appropriateness of the EAJA fee award. *Nadarajah*, 569 F.3d at 916 (holding that government’s objections that counsel did not submit retainer agreement was “not supported by legal authority and lack merit”); *Arredondo v. Holder*, No. 08-73835, slip op. at 9 (9th Cir. Nov. 30, 2012); *Li v. Holder*, No. 07-72560, slip op. at 3 (9th Cir. July 2, 2012).

Some courts consider, or rely on, the Laffey Matrix as a source for prevailing market rate based on an attorney’s level of experience. In *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983), the court found that hourly rates for attorneys practicing civil law in the Washington, D.C., metropolitan area could be categorized by years in practice and adjusted yearly for inflation. The Department of Justice regularly updates the Laffey Matrix.⁴⁵ Some courts have adopted the Laffey Matrix, or an adjusted version of it, while others have rejected it.⁴⁶

Counsel are advised to review circuit law addressing the Laffey Matrix before relying on it to as a source of prevailing markets rates. In some geographical areas, the rates in the Laffey Matrix may fall below market rate. *See, e.g., In Re HPL Technologies, Inc. Securities Litigation*, 366 F. Supp. 2d at 921-22. The Laffey Matrix also is problematic because it does not contain prevailing market rates for an attorneys practicing in excess of 20 years.

“ . . . [P]laintiffs may also provide surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.” *See Covington v. D.C.*, 57 F.3d 1101, 1109 (D.C. Cir. 1995). Market rate surveys are available to demonstrate prevailing rates based on specialization, location, and years of experience. Sworn declarations from other attorneys of similar expertise and years of experience attesting to their individual and/or firm’s hourly rate also provide evidence of prevailing market rates. *See, e.g., Nadarajah*, 569 F.3d at

be made to a prevailing plaintiff notwithstanding the fact that the plaintiff’s attorney has agreed to accept a smaller fee, or even no fee at all”).

⁴⁵ It is available at: http://www.justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf. The Laffey Matrix consists of a table which provides hourly rates, based on years of experience, for attorneys, paralegals and law clerks in the Washington, D.C. area.

⁴⁶ *Compare Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 709 (3d Cir. 2005) (adopting Adjusted Laffey Matrix); *In Re HPL Technologies, Inc. Securities Litigation*, 366 F. Supp. 2d 912, 921-22 (N.D. Cal. 2005) (relying on Laffey Matrix but adjusting rates upwards based upon the higher costs of living in Los Angeles and other California cities) *with Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 241 (4th Cir. 2009) (finding Laffey Matrix “insufficient to carry [counsel’s] burden of proof, was not binding on a district court in the Fourth Circuit, and that counsel must present evidence of prevailing market rates for attorneys in the geographical area where counsel practices). In order to convert Laffey Matrix rates to prevailing market rates, some courts use locality-based comparability payments for federal employees set forth in Schedule 9 of 5 U.S.C. § 5332. *See, e.g., Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 950 (N.D. Cal. 2010). The court compares the locality rate with that of the Washington-Baltimore area, and applies any increase to the Laffey Matrix rate.

911-15. For example, an attorney in Los Angeles with 8-10 years of immigration experience who is claiming an enhanced rate of \$300 per hour could document the prevailing market rate for his or her services by submitting one or more declarations from other immigration lawyers in Los Angeles with 8-10 years of similar immigration experience attesting that they routinely charge an hourly rate of \$300 (or more).

C. Law Clerk, Paralegal and Expert Witness Rates

Law clerks, paralegals and expert witnesses also may be compensated under EAJA at the prevailing market rate.⁴⁷ *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). A court may reduce a fee request for clerical work done by paralegals and interns if it concludes that the work should have been subsumed in firm overhead, rather than directly billed.⁴⁸

The prevailing market rate need not reflect the rate charged to the client. However, the statute provides that expert witnesses cannot be compensated at a “rate in excess of the highest rate of compensation for expert witnesses paid by the United States.” 28 U.S.C. § 2412(d)(2)(A)(i).

Market rate surveys often contain information on prevailing rates for law students and paralegals. Counsel also can submit declarations from other attorneys attesting to the rates paid to law students and paralegals in the area to establish prevailing rates.

VII. EAJA AWARD PAYMENTS

The Supreme Court, in *Astrue v. Ratliff*, held unequivocally that an EAJA award is payable to the litigant, not his or her attorney. 60 U.S. 586, 596-97 (2010). The Supreme Court reasoned that the government’s practice of paying fees to counsel in cases where the prevailing party assigned the fee award to counsel bolstered its conclusion; such assignments would be unnecessary if the EAJA statute required payment to counsel, not the litigant. *Id.* at 597-98. In addition, the Court further concluded that any fee award is subject to offset to satisfy the litigant’s pre-existing debt to the government. *Id.*

Under *Ratliff*, an award may be payable to the attorney where there the client has no outstanding federal debt and expressly assigned the right to receive fees to their attorney.⁴⁹

⁴⁷ 28 U.S.C. § 2412(d)(2)(A); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983); *Jordan v. U.S. DOJ*, 691 F.2d 514, 522-24 (D.C. Cir. 1982).

⁴⁸ *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009).

⁴⁹ See, e.g., *Mathews-Sheets v. Astrue*, 653 F.3d 560, 565-566 (7th Cir. 2011) (interpreting *Ratliff* to suggest, “that if there is an assignment, the only ground for . . . insisting on making the award to the plaintiff is that the plaintiff has debts that may be prior to what she owes her lawyer”); *Castaneda v. Astrue*, EDCV 09-1850-OP, 2010 WL 2850778 at *3 (C.D. Cal. 2010) (holding payment of the fee award to the attorney did not violate the holding in *Ratliff* in light of the fact that claimant assigned his EAJA recovery to the attorney); *Palomares v. Astrue*, No. C-11-4515 EMC, 2012 WL 6599552 at *9 (N.D. Cal. Dec. 18, 2012) (reading *Ratliff* as “confim[ing] the common practice that an EAJA fee award is payable to the litigant and not the

Attorneys should consult with clients to determine if they owe any debt to the federal government because that amount will be reduced from any EAJA award. Courts take different approaches as to who is responsible for determining the existence of a debt. *Compare Preston v. Astrue*, No. 3:08-CV-991-J-TEM, 2010 WL 3522156 at *2 (M.D. Fla. Sept. 8, 2010) (finding it was not court's duty to assess whether the plaintiff owed a debt) *with Cowart v. Comm'r of Soc. Sec.*, 795 F. Supp. 2d 667, 671 (E.D. Mich. 2011) (ordering the Commissioner of Social Security to determine whether litigant owed the government a pre-existing debt). *See also Palomares v. Astrue*, No. C-11-4515 EMC, 2012 WL 6599552 at *9 (N.D. Cal. Dec. 18, 2012) (holding that 31 U.S.C. § 3716 requires head of an administrative agency to notify debtors of administrative off-sets).

In some cases, the government has cited to *Ratliff* to argue that the court must limit any fee award to the amount the litigant actually "incurred," or paid counsel, and to justify its request that counsel provide its retainer. *Ratliff*, however, does not limit the fee award to the amount "incurred" by the client, and attorneys should oppose any such argument. The EAJA statute states that the purpose of EAJA is to address the deterrence that litigants face in "seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings..." Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (Oct. 21, 1980). Hence, it does not matter how much the client actually paid counsel; the point of EAJA is to ensure that the client has access to counsel to defend his or her rights. Practitioners are not required to hand over their retainer agreements to the government because the amount paid by the client simply is not relevant to the amount counsel may recover.

Further, because *Ratliff* establishes that absent an agreement to the contrary, the payment is the property of the client, counsel should obtain an assignment from the client for any fee award or settlement. Many courts, however, have found that the individual attorney-client relationship, the fee agreement, and the purpose and nature of EAJA give rise to an express or implied obligation for the client to pay to his or her attorney any court-ordered EAJA fee award.⁵⁰

attorney unless the party does not owe a debt to the government and assigns the right to receive fees to the attorney"); *Williams v. Astrue*, No. 0:10-CV-00004-JMC, 2012 WL 6615130 at *3-4 (D.S.C. Dec. 19, 2012) (referencing seven cases in which courts have authorized payments directly to attorneys where the Defendant does not produce evidence of a debt owed to the government); *Watson v. Astrue*, No. CIV.A. 08-950, 2010 WL 2903955 at *1 (W.D. La. July 19, 2010) (ordering the fees be made payable to both counsel and claimant in light of counsel's "interest in ensuring her nonstatutory fee rights are satisfied"); *Way v. Astrue*, No. 1:10-CV-01134-RBH, 2012 WL 2871643 at *2 (D.S.C. July 12, 2012) (complying with *Ratliff* by ordering that the defendant make the check payable to the plaintiff but ordering that the check be mailed to the attorney, with notice to the plaintiff of the mailing).

⁵⁰ *See Turner v. Comm'r of Soc. Sec.*, 680 F.3d 721, 725 (6th Cir. 2012) (holding that "litigants 'incur' fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives, regardless of whether the court subsequently voids the assignment provision under the [Anti-Assignment Act]"); *Ed. A. Wilson, Inc. v. GSA*, 126 F.3d 1406, 1409 (11th Cir. 1997) (affirming that an EAJA fee award is appropriate where there is an express or implied agreement that any fee award will be paid to the

Post-*Ratliff*, to ensure counsel receives payment of any EAJA award, attorneys are advised to:

- Set forth an assignment of fees to counsel in the retainer agreement. The following is some suggested language:

In the event of prevailing in the litigation described above, [Client] authorizes [Counsel] to pursue a motion for attorneys' fees and expenses on [Client's] behalf. [Client] agrees to assign any fee award to [Counsel/Counsel's Office]. [Client] agrees to state in a declaration that any attorneys' fees payment should be issued to [Counsel/Counsel's Office] and mailed to either to [Counsel's] address or direct deposited into [Counsel's] bank account.

If fees and expenses were to issue to [Client], [Client] authorizes [Counsel] to endorse [Client's] name to any check, insurance draft, or settlement draft only for the purpose of depositing said check or draft into [Counsel's] account.

- With any EAJA motion, submit an affidavit from the client that attests to: (1) the client's net worth (*see* § V.D., *supra*); (2) assignment of fees; and (3) the absence of a federal debt. This should avoid the unsettling issue of having the government and court review retainer agreements. A sample declaration follows this advisory.
- In the body of the EAJA motion, ask the Court to order the government to pay any EAJA award directly to counsel.
- Separately establish with the client what portion of the fees remain the property of the attorney, and what portion are to be returned to the client or applied to future work.

legal representative); *Phillips v. GSA*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) (“[i]nherent in the [fee] agreement is an intention on the part of [the plaintiff] to be obligated to her counsel for fees properly obtainable under that statute.”). *See also Arredondo v. Holder*, No. 08-73835, slip op. at 17 (9th Cir. Nov. 30, 2012) (finding litigant's and attorneys' declarations sufficient to establish an implied agreement to pay the fee award direct to counsel).

SAMPLE NET WORTH AND FEE ASSIGNMENT DECLARATION

DECLARATION OF [Client]

I, [Name of Declarant], hereby declare and state:

1. My current residence is _____.
2. I am a private individual and my net worth does not, nor has it ever, exceeded the amount of \$2,000,000.
3. I make this declaration in support of my motion for attorney fees and costs incurred in my successful representation before the [Court] in [Case Name and Number].
4. I previously retained [Counsel] to represent me [if applicable, pro bono] in this case.
5. I authorize the recovery of fees and expenses to my [attorney, attorneys, attorney's office] in order to compensate [him/her/them] for work performed on my behalf [if applicable, for which their office was not compensated].
6. I further assign payment of any award of fees and costs to [Counsel's Office]. I would like the payment to issue to [Counsel's Office] either via a check mailed to [Mr./ Ms. /Mrs. ___'s] office address or direct deposited into [his/her] office's account.
7. To the best of my knowledge, I do not owe any debt to the United States federal government.

I declare under penalty of perjury under the laws of the State of _____ that the above is true and correct to the best of my knowledge and belief. Executed on _____, 2014 at [City, State].

[Name of Declarant]