

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOSEPHINE T. ARCHULETA)	
Appellant,)	
)	
v.)	CAVC No. 17-1404
)	EAJA
)	
ROBERT L. WILKIE,)	
SECRETARY OF)	
VETERANS AFFAIRS,)	
Appellee)	

APPELLANT'S APPLICATION FOR AN
AWARD OF ATTORNEYS FEES AND EXPENSES
PURSUANT TO 28 U.S.C. 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$28,389.06**.

The basis for the application is as follows:

Grounds for an Award

This Court has identified four elements as being necessary to warrant an award by the Court of attorneys' fees and expenses to an eligible party pursuant to the EAJA. These are: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government's position is not substantially justified; and (4) an itemized statement of the fees sought. *Owens v. Brown*, 10 Vet. App. 65, 66 (1997) (*quoting Bazalo*, 9

Vet. App. at 308). *See also* 28 U.S.C. §§ 2412(d)(1)(A),(B).

As will be demonstrated below, Appellant satisfies each of the above-enumerated requirements for EAJA.

1. THE APPELLANT SATISFIES EACH OF THE REQUIREMENTS
FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. *The Appellant Is a Prevailing Party*

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct 1835 (2001) ("Buckhannon"), the Supreme Court explained that in order to be a prevailing party the applicant must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. 532 U.S. at 603-605. The Federal Circuit adopted the *Buckhannon* test in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) and applied it to an EAJA applicant. The Federal Circuit explained in *Rice Services, LTD. v. United States*, that "in order to demonstrate that it is a prevailing party, an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those." 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006), this Court explained that the Federal Circuit case of *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005) "did

not change the focus for determining prevailing party status from a standard that looks to the basis for the remand to one that looks to the outcome of the remand. *Akers* simply did not involve a remand that was predicated on an administrative error." 19 Vet. App. at 547. (internal quotations omitted). The Court held in *Zuberi* that *Motorola* provided the proper test for prevailing party. *Id.* Next in *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006), the Federal Circuit held that:

To be considered a prevailing party entitled to fees under EAJA, one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits. [W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party ... without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.

Id. at 1353 (internal citations and quotations omitted).

Most recently, this Court in *Blue v. Wilkie*, __ Vet.App. __ (2018), No. 15-1844(E), 2017 WL 1407530, laid out the following three-part test relating to when an appellant is considered a prevailing party under the EAJA:

An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.

Id. at WL 1407530, at *3, citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

In this case, the parties agreed to a joint motion terminate the appeal subsequent to Appellant's motion for Panel Review with Oral Argument and the Court's grant of same. The parties agreed to award Appellant service connection for PTSD effective April 11, 1980 and agreed to assign a one hundred percent disability rating for Appellant's service connected PTSD effective April 11, 1980. See pages 1-5 of the Joint Motion to Terminate. The mandate was issued on September 12, 2018. Based upon the foregoing, and because the three-part test promulgated in *Blue* is satisfied, Appellant is a prevailing party.

B. Appellant Is Eligible For An EAJA Award

Appellant also satisfies the EAJA requirement that her net worth at the time her appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Ms. Archuleta had a net worth under \$2,000,000 on the date this action was commenced. See Paragraph 3 of the fee agreement filed with the Court. Therefore, Ms. Archuleta is a person eligible to receive an award under the EAJA.

C. The Position of the Secretary Was Not Substantially Justified

In *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2004) the Federal Circuit applied the totality of the circumstances test and noted that "EAJA requires that the record must supply the evidence of the Government's substantial justification." 412 F.3d at 1316. The Secretary's position during proceedings before the Agency was

not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at the administrative or litigation stage in this case. Moreover, there is no evidence that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A).

2. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

Appellant has claimed a reasonable amount of attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997) (quoting *Elczyn*, 7 Vet. App. at 176-177).

Twelve attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Jenna Zellmer, Bradley Hennings, Jordyn Coad, Dale Ton, Nicholas Phinney, Robert Chisholm, Amy Odom, Maura Clancy, Sarah McCauley, Barbara Cook, Danielle M. Gorini, and Zachary Stolz.¹ Attorney Jenna Zellmer

¹"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); *see also Baldridge v. Nicholson*, 19 Vet.App. 227, 237-38 (2005)("the fees sought must be 'based on the distinct contribution of each individual counsel.'"). "The use in involved litigation of a team of attorneys who divide up work is common today for both plaintiff and defense work." *Johnson v.*

graduated from Boston University Law School in 2013 and the *Laffey Matrix* establishes that \$346.00 is the prevailing market rate for an attorney with her experience.² Bradley Hennings graduated from Rutgers University Law School in 2006 and the *Laffey Matrix* establishes that \$483.00 is the prevailing market rate for an attorney with his experience. Jordyn Coad graduated from American University Washington College of Law in 2016 and the *Laffey Matrix* establishes

Univ. Coll. of Univ. of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir. 1983) *holding modified by Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). Careful preparation often requires collaboration and rehearsal [.]” *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. *See Baldridge*, 19 Vet.App. at 237 (“An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct contribution of each counsel.”).

² The US Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by the years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part by* 746 F.2d. 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). This Court has approved the use of the Laffey Matrix for determining the prevailing market rate for EAJA fees. *See, e.g., Wilson v. Principi*, 16 Vet.App. 509, 213 (2002) (finding the Laffey Matrix a “reliable indicator of fees...particularly as to cases involving fees to be paid by government entities or determined under fee-shifting statutes”), *vacated on other grounds by* 391 F.3d 1203 (Fed. Cir. 2004); *see also Sandoval*, 9 Vet. App. at 181 (using the Laffey Matrix an indicator of prevailing market rate and holding that once a prevailing market rate is established, the government has the burden of producing evidence to show that the rate is erroneous.) *See* Exhibit B (Laffey Matrix).

that \$334.00 is the prevailing market rate for an attorney with her experience.

Dale Ton graduated from American University Washington College of Law in 2018 and the *Laffey* Matrix establishes that \$302.00 is the prevailing market rate for an attorney with his experience. Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience. Robert Chisholm graduated from Boston College Law School in 1988 and the *Laffey* Matrix establishes that \$563.00 is the prevailing market rate for an attorney with his experience. Amy Odom graduated from University of Florida Law School in 2006 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with her experience. Maura Clancy graduated from Roger Williams University Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Sarah McCauley graduated from Suffolk University Law School in 2018 and the *Laffey* Matrix establishes that \$302.00 is the prevailing market rate for an attorney with her experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$602.00 is the prevailing market rate for an attorney with her experience. Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that

\$483.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$201.31 per hour for Ms. Zellmer, Mr. Hennings, Ms. Coad, Mr. Ton, Mr. Phinney, Mr. Chisholm, Ms. Clancy, Ms. McCauley, Ms. Gorini, and Mr. Stolz for representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for these ten attorneys (138.50) results in a total attorney's fee amount of \$27,881.41.

Appellant seeks attorney's fees at the rate of \$193.83 per hour for Ms. Cook's representation services before the Court.⁴ This rate per hour, multiplied by

³ This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date of the EAJA rate), to January 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

⁴ This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to January 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

the number of hours billed for Ms. Cook (8.00) results in a total attorney's fee amount of \$1,550.66.

Appellant seeks attorney's fees at the rate of \$197.95 per hour for Ms. Odom's representation services before the Court.⁵ This rate per hour, multiplied by the number of hours billed for Ms. Odom (2.20) results in a total attorney's fee amount of \$435.49.

Based upon the foregoing, the total fee amount is **\$29,867.56**. However, in the exercise of billing judgment, Appellant will voluntarily reduce the total fee amount by ten hours for additional oral argument preparation time and seek a reduced fee of **\$27,854.46**.

In addition, Appellant seeks reimbursement for the following expenses:

Filing Fee: \$50.00

Roundtrip airfare for oral argument – RVC: \$376.40

One way airfare for oral argument – MC \$108.20

⁵ This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Washington-Arlington-Alexandria, DC-MD-VA-WV. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to January 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

Based upon all of the foregoing, Appellant seeks a total fee and expenses in the amount of **\$28,389.06.**

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,
Josephine T. Archuleta
By Her Attorneys,
CHISHOLM CHISHOLM & KILPATRICK
/s/Zachary M. Stolz
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Providence, Rhode Island 02903
(401) 331-6300
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Exhibit A

		<u>Hours</u>
4/24/2017 JZ	Reviewed BVA decision. Gave opinion and recommendation for an appeal to Court.	0.60
5/18/2017 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Zachary Stolz as lead counsel, and Fee Agreement with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file.	0.20
5/22/2017 DMG	Reviewed emails from Court with docketed appeal documents. Posted emails to the file. Checked Court docket sheet to ensure Notice of Appeal, Notice of Appearance for Zachary Stolz as lead counsel, and Fee Agreement were properly docketed. Updated case information and case file.	0.20
7/13/2017 JZ	Was assigned case for appeal. Prepared and filed notice of appearance. Reviewed docket for procedural status. Updated client file	0.20
7/19/2017 JZ	Reviewed and responded to OGC request for position on motion to extend filing RBA. Reviewed motion as filed and clerk's stamp granting motion. Updated client file.	0.20
8/31/2017 JZ	Reviewed CAVC email re: RBA notice filed. Updated client file	0.10
9/5/2017 JZ	Received and reviewed notice that RBA was received and uploaded to the file. Ensured correct BVA decision was included and noted length of RBA. Updated client file and calendar.	0.10
9/5/2017 NP	Reviewed RBA to determine need for dispute	1.70

Exhibit A

		<u>Hours</u>
9/20/2017 JZ	Reviewed CAVC email re: brief order docketed. Calculated brief due date. Updated client file	0.10
9/21/2017 JZ	Reviewed and casemapped RBA through page 1308	1.20
9/22/2017 JZ	Continued review of RBA to identify record citations to support appeal and in preparation of drafting PBC memo	0.40
9/22/2017 JZ	Continued review of RBA and drafted argument re: settlement. Reviewed, revised and finalized argument, including record citations. Emailed early intervention remand argument to OGC	3.00
10/3/2017 JZ	Reviewed CAVC email re: CLS order. Calculated memo due date. Updated client file and calendar	0.10
10/17/2017 JZ	Reviewed email to OGC requesting settlement and used that as a basis for memo. Reviewed RBA for additional record citations to add to argument. Added language and record cites to memo. Conducted additional legal research and found recent mem dec on similar issue. Finalized memo and emailed to OGC and CLS. Prepared and filed Rule 33 cert of service.	1.50
10/31/2017 JZ	Included additional medical evidence in email to OGC post PBC. Sent email following up on PBC to OGC	0.30
10/31/2017 JZ	Reviewed record and memo in preparation for conference. Participated in conference, note to file on outcome, updated client calendar	0.40
10/31/2017 JZ	Reviewed case map of RBA and researched Young and mem dec that CLS sent. Drafted follow-up email to OGC	1.10

Exhibit A

		<u>Hours</u>
11/28/2017 MJC	Prepared and e-filed notice of appearance. Updated client file.	0.10
12/6/2017 MJC	Reviewed BVA decision and case file notes in preparation for drafting opening brief. Began to draft issues presented and statement of the case for opening brief. Updated client file.	2.20
12/7/2017 MJC	Continued to draft statement of case for opening brief. Updated client file.	2.00
12/8/2017 MJC	Continued to draft opening brief. Completed draft of statement of the case, issues presented, and summary of the argument. Began to draft argument section of brief. Updated client file.	2.30
12/8/2017 MJC	Continued to draft argument section of opening brief. Researched law regarding the application of 3.156c and adjudicating reopened claims. Updated client file.	2.60
12/11/2017 MJC	Continued to draft argument sections of opening brief. Completed draft of earlier effective date arguments. Updated client file.	2.40
12/11/2017 MJC	Continued to draft opening brief and research application of 3.156(c) in earlier effective date claims. Continued to draft argument sections for opening brief. Updated client file.	3.00
12/11/2017 MJC	Continued to draft argument sections for opening brief. Updated client file.	3.00
12/12/2017 MJC	Completed conclusion and summary of argument sections for opening brief. Proofread draft of opening brief and added citations to the medical evidence of record.	1.20

Exhibit A

		<u>Hours</u>
12/13/2017	MJC	Began to implement suggested edits to opening brief and updated client file.
		0.20
12/13/2017	JZ	Reviewed Maura's opening brief. Made suggestions and comments for points of clarification and ways to strengthen brief.
		1.50
12/14/2017	MJC	Continued to implement edits to draft of opening brief. Revised standard of review and discussion of case law in arguments. Revised argument summary and added a reversal argument.
		1.20
12/21/2017	MJC	Prepared and sent email to OGC regarding status of settlement discussions. Updated client file and calendared next follow up with OGC.
		0.10
12/21/2017	MJC	Received and reviewed email from OGC regarding position on case. Saved to case file and updated case calendar.
		0.10
12/28/2017	BJC	review edited draft of opening brief to ensure completeness of arguments and clarity
		1.60
1/2/2018	MJC	Began to implement additional edits to brief. Updated file.
		0.50
1/5/2018	MJC	Continued to implement additional edits to opening brief draft. Began to revise misinterpretation of law argument. Updated file.
		3.00
1/8/2018	MJC	Completed revisions to misinterpretation and misapplication of law sections. Updated issues presented and conclusion sections to reflect revised order of arguments. Updated client file.
		1.60
1/9/2018	MJC	Made additional edits to reversal argument and misinterpretation of law arguments to make the legal theories clearer. Added citations to the
		0.70

Exhibit A

		<u>Hours</u>
	record to support legal contentions. Updated client file.	
1/11/2018 MJC	Performed final proofread of opening brief, made final edits. Checked accuracy of all citations to the law and the record. E-filed opening brief. Calculated deadline for OGC's brief. Updated client file and case calendar.	2.90
3/9/2018 MJC	Received notice from Court attaching OGC's motion for extension to file brief. Reviewed for accuracy and saved to case file. Updated client file.	0.10
3/9/2018 MJC	Received order from Court granting OGC's motion for extension of time to file brief. Reviewed for accuracy and saved to case file. Calculated new deadline for OGC's brief and updated client file.	0.10
3/9/2018 MJC	Exchanged emails with OGC regarding a motion for extension to file OGC's brief. Updated client file.	0.10
4/26/2018 MJC	Received notice from Court attaching OGC's brief. Reviewed for accuracy and saved to case file. Updated client file.	0.10
4/30/2018 MJC	Phone call with client to discuss OGC's brief and status of appeal in Court. Updated client file.	0.40
5/6/2018 BJC	review opening brief and OGC's brief in preparation of drafting outline for reply brief arguments	0.50
5/8/2018 MJC	Phone call with client to discuss POA issues. Documented phone call for case file.	0.20

Exhibit A

			<u>Hours</u>
5/8/2018	MJC	Exchanged additional phone calls with client regarding POA issues. Prepared notes to case file documenting all conversations.	0.30
5/21/2018	BJC	Outline arguments for reply brief	1.50
6/7/2018	MJC	Reviewed outline of arguments in preparation for drafting reply brief. Researched law of the case as it pertains to BVA findings of fact and parties' JMRs. Researched pre- and post-amended versions of the regulation. Began to draft reply brief. Updated client file.	3.00
6/11/2018	MJC	Continued to draft reply brief. Updated client file.	2.60
6/12/2018	MJC	Continued to draft reply brief. Continued drafting law of the case argument. Conducted additional research regarding law of the case and researched all cases cited in the Secretary's law of the case argument. Updated client file.	2.60
6/12/2018	MJC	Continued to draft reply brief. Completed first argument regarding Board's factual findings. Began to draft second argument regarding law of the case. Updated client file.	3.00
6/19/2018	MJC	Continued to draft reply brief. Researched Cline and Princess Cruises line of cases. Began to draft argument regarding BVA's legal determination. Updated client file.	1.80
6/20/2018	MJC	Continued to draft argument for reply brief regarding Board's application of the law. Continued to research the law regarding law of the case. Updated client file.	3.00
6/20/2018	MJC	Continued to draft argument for reply brief regarding Board's application of the law. Continued to research the law regarding	3.00

Exhibit A

		<u>Hours</u>
	amendments to regulation at issue. Updated client file.	
6/20/2018 MJC	Continued to draft argument for reply brief regarding Board's application of the law and application of Princess Cruises. Updated client file.	3.00
6/21/2018 MJC	Continued to draft third argument for reply brief regarding application of pre-amended regulation. Updated client file.	1.30
6/24/2018 BJC	Reviewed reply brief and suggested edits to law of the case argument	1.50
6/25/2018 MJC	Performed additional edits to reply brief. Updated client file.	0.30
6/25/2018 MJC	Phone call with client's niece to discuss status. Answered her questions. Documented phone call for case file.	0.40
6/25/2018 MJC	Made final edits to reply brief and proofread reply brief. Checked accuracy of all citations to the law and the record. E filed brief. Updated client file.	0.80
6/25/2018 ZMS	Reviewed record and notes on case. Reviewed pleadings. Reviewed reply drafted by Maura Clancy and suggested additional edits to same. Discussed pros and cons of moving for panel and oral argument.	1.30
6/25/2018 MJC	Added argument regarding implausible finding by BVA to reply brief. Updated client file.	2.60
6/26/2018 MJC	Researched for and began to draft motion for oral argument. Updated client file.	0.50

Exhibit A

			<u>Hours</u>
6/26/2018	MJC	Researched names of directors at VAMCs to gain information for client's family in pursuing protective order. Phone call with client's family to relay such and documented phone call for case file.	0.60
6/27/2018	MJC	Phone call with client to obtain consent for motion for panel and oral argument. Documented phone call for case file.	0.20
6/28/2018	ZMS	Reviewed pleadings and motion for panel and oral argument. Emailed VA counsel for position.	1.50
6/29/2018	MJC	Received notice from Court assigning case to judge. Reviewed for accuracy and saved to case file. Updated client file.	0.10
6/29/2018	MJC	Implemented edits to motion for panel and oral argument to improve clarity of draft. Proofread, finalized, and e-filed motion. Updated client file.	0.30
6/29/2018	MJC	Reviewed ROP as filed by OGC. Compared ROP against record citations in pleadings to ensure completeness of ROP. Prepared and e-filed ROP acceptance letter. Updated client file.	0.40
8/6/2018	MJC	Phone call to client to discuss status of appeal in Court. Left voicemail and calendared next follow up contact with client. Updated client file.	0.10
8/6/2018	MJC	Received and reviewed order from Court submitting case to panel. Updated client file.	0.10
8/6/2018	MJC	Phone call with client to discuss status of appeal in Court and submission of case to panel. Documented phone call for case file.	0.20

Exhibit A

			<u>Hours</u>
8/9/2018	MJC	Received order from Court granting motion for oral argument. Reviewed for accuracy and saved to case file. Updated client file.	0.10
8/10/2018	MJC	Phone call with client to discuss Court's oral argument order. Documented phone call for case file.	0.20
8/14/2018	MJC	Phone call with client to discuss scheduled oral argument. Documented phone call for case file.	0.10
8/14/2018	MJC	Received notice from Court scheduling oral argument. Reviewed for accuracy and saved to case file. Updated client file.	0.10
8/15/2018	ZMS	Telephone conversation with VA counsel about upcoming oral argument. Note to file.	0.10
8/17/2018	RVC	Began review of the record for oral argument prep. Reviewed BVA decision and Appellants opening brief	0.80
8/18/2018	RVC	Continued review of the file. Reviewed reply brief and ROP in preparation for oral argument	1.50
8/20/2018	MJC	Researched relevant case law, regulations, and proposed regulatory changes in preparation for oral argument. Added all pertinent cases, regulations, and pleadings into oral argument preparation folder. Updated client file.	0.60
8/20/2018	RVC	Reviewed line of 3.156(c) cases including Emerson, Cline, Mayhue, Vigil and Shipley in preparation for oral argument	2.20
8/21/2018	RVC	Oral Argument preparation - began preparing outline of important dates in the case, BVA decisions and Court Appeals	1.80

Exhibit A

		<u>Hours</u>
8/24/2018 BJC	Walk through of oral argument in preparation for same	0.90
8/24/2018 BJC	Review pleadings in preparation for oral argument walk through	0.90
8/24/2018 JC	Participated in oral argument walk through	1.00
8/24/2018 BH	Participated in oral argument walk through. Discussion of case strategy for oral argument.	1.00
8/24/2018 RVC	Prepared for and participated in oral argument walk through	1.20
8/24/2018 JZ	Reviewed case file notes and pleadings. Participated in oral argument walk through to discuss issues.	1.30
8/24/2018 ZMS	Prepared for and participated in first walk through of oral argument preparation. Preparation included research on 3.156(c) cases and the binding nature of Court-ordered JMRs.	3.00
8/25/2018 RVC	Continued to review the file to prepare for oral argument. Reviewed Young , Saunders, and McGrath cases	2.40
8/26/2018 RVC	Reviewed BVA decision from 2017 and began taking notes in preparation of oral argument	1.60
8/27/2018 MJC	Researched CAVC and Federal Circuit cases that discuss whether the Secretary can cross-appeal favorable portions of a BVA decision on appeal. Documented research for case file in preparation for oral argument	0.70

Exhibit A

		<u>Hours</u>
8/30/2018 MJC	Met with SM to discuss case strategy and questions to ask during oral argument moot. Updated client file.	0.30
8/30/2018 SM	Reviewed case in preparation of moot.	0.90
8/30/2018 RVC	Continued to outline argument for oral argument and prepared for first moot	2.50
8/30/2018 JC	Reviewed Cline v. Shinseki and Emerson v. McDonald, pleadings, record, and appendix to Appellee's brief to prepare for oral argument moot. Added to outline for VA's argument. Completed additional research regarding findings of law versus fact and incorporated same into argument.	3.00
8/31/2018 BJC	Participated in first moot	1.00
8/31/2018 JZ	Participated in first oral argument moot	1.00
8/31/2018 SM	Participated in first moot of oral argument.	1.00
8/31/2018 JC	Participated in first moot of oral argument	1.00
8/31/2018 RVC	Participated in first moot of oral argument	1.00
8/31/2018 MJC	Participated in first oral argument moot and updated client file.	1.00
8/31/2018 ZMS	Participate in first moot court.	1.00
8/31/2018 BH	First moot in preparation for oral argument.	1.00
9/1/2018 MJC	Researched the CAVC decisions and BVA decisions that have cited to Emerson since its issuance. Made notes to case file regarding whether those cases discussed 3.156(c) and	0.70

Exhibit A

		<u>Hours</u>
	reconsideration of reopened claims. Updated file in preparation for oral argument	
9/5/2018 DT	Researched relevant case law and added to oral argument binder with findings	1.10
9/5/2018 RVC	Added to the outline for the arguments in preparation for oral argument	1.40
9/6/2018 DT	Continued legal research for oral argument and added findings to binder	1.70
9/6/2018 DT	Continued legal research and added additional case law to oral argument binder	1.80
9/7/2018 AO	Conduct legal research regarding Federal Circuit's decision in Kisor v. Shulkin and possible application to issues on appeal.	0.20
9/7/2018 AO	Prepared for and participated in second moot court.	1.80
9/7/2018 MJC	Phone call to OGC to discuss upcoming OA. Left voicemail and calendared next follow-up with OGC. Updated client file.	0.10
9/7/2018 MJC	Phone call with OGC to discuss upcoming oral argument Documented phone call for case file.	0.10
9/7/2018 MJC	Participated in second oral argument moot.	1.00
9/7/2018 JC	Participated in second oral argument moot.	1.00
9/7/2018 DT	Participated in second moot	1.00
9/7/2018 ZMS	Prepared for and participated in second moot court with Robert, Maura, Barb, and Brad. Preparation included review of all cases and	3.00

Exhibit A

		<u>Hours</u>
	recent decisions on 3.156 and binding effect of JMRs.	
9/7/2018 RVC	Participated in second moot court.	1.00
9/8/2018 MJC	Researched the law regarding remedies (remand versus reversal) in preparation for oral argument.	0.20
9/10/2018 MJC	Phone call with client to discuss status of appeal in Court. Documented phone call for case file.	0.10
9/10/2018 MJC	Received email from OGC. Reviewed and saved to case file. Updated client file.	0.10
9/10/2018 MJC	Conference call with client to discuss OGC's settlement offer. Answered client questions regarding specifics of offer and obtained client consent for counteroffers. Documented phone call for case file.	0.20
9/10/2018 MJC	Follow-up phone call with OGC, RVC, and ZMS to discuss counteroffers to OGC's initial settlement offer. Documented phone call for case file and calendared next follow up contact with OGC. Updated client file.	0.20
9/10/2018 RVC	Spoke to OGC, Called client and spoke to her and called back OGC	0.50
9/10/2018 MJC	Phone call with RVC and OGC to discuss OGC's settlement offer. Documented phone discussion for case file. Documented discussions for case file.	0.60
9/10/2018 RVC	Continued to review file in preparation for Oral Argument. Reviewed file in response to telephone call from OGC	1.30

Exhibit A

		<u>Hours</u>
9/11/2018 MJC	Reviewed email exchanges between RVC and OGC. Documented all discussions for case file in preparation for discussing status of settlement offers with client. Updated client file.	0.20
9/11/2018 RVC	Telephone calls with OGC re potential resolution of case.	0.30
9/11/2018 MJC	Received and reviewed email from OGC with settlement counteroffer. Teleconference with OGC to discuss Appellant's counteroffer. Documented all discussions and phone calls for case file in preparation for discussing status of settlement negotiations with client.	0.40
9/11/2018 MJC	Teleconference with client to discuss most recent settlement offer and to present counteroffer to OGC. Discussed status of settlement after teleconference with OGC with RVC and ZMS. Documented all settlement communications for case file.	0.80
9/11/2018 RVC	Continued preparation for oral argument including reviewing case law and statutes	1.20
9/11/2018 ZMS	Continued settlement discussions with VA counsel. Memo to file.	1.30
9/12/2018 MJC	Phone call to client to provide update regarding Court's grant of joint motion to terminate and settlement. Left voicemail and calendared next follow-up contact with client.	0.10
9/12/2018 MJC	Received notice from Court granting joint motion to terminate appeal. Reviewed for accuracy and saved to case file. Updated client file.	0.10

Exhibit A

		<u>Hours</u>
9/12/2018 MJC	Received order from Court revoking OA order and canceling scheduled oral argument. Reviewed order for accuracy and saved to case file. Updated client file.	0.10
9/12/2018 MJC	Received notice from Court that joint motion to terminate was docketed. Reviewed docket to ensure accuracy of filed joint motion to terminate and stipulated agreement. Saved Court's docketing notice for case file and calculated expected date for Court's order granting joint motion. Updated client file.	0.20
9/12/2018 MJC	Received drafted settlement offer from OGC. Reviewed offer. Received and reviewed second draft of settlement offer from OGC. Saved all drafts to case file.	0.40
9/12/2018 MJC	Phone call with client to discuss settlement. Answered questions regarding terms of offer, timeline for conclusion of appeal in Court, and timeline for implementation of settlement. Documented phone call for case file.	0.50
9/12/2018 ZMS	Discussed final offer for settlement with VA counsel. Phone conversation with VA counsel. Reviewed written settlement offer.	1.00
9/13/2018 RVC	Spoke to OGC about proposed resolution; continued to prepare for argument and reviewed final documents once we reached resolution. Analyzed proposed resolution	2.20
9/14/2018 BJC	Drafted motion to enter mandate	0.10
9/14/2018 AO	Review joint motion for mandate and judgment and suggested inclusion of additional substance	0.20

Exhibit A

		<u>Hours</u>
9/14/2018 RVC	Reviewed Joint Motion to Enter Judgment and Mandate, edited same, and filed same with the Court.	0.50
9/17/2018 MJC	Received notice from Court granting joint motion to enter mandate. Reviewed for accuracy and saved to case file. Updated client file.	0.10
9/17/2018 MJC	Received notice from Court entering judgment. Reviewed for accuracy and saved to case file. Updated client file.	0.10
9/17/2018 MJC	Received notice from Court entering mandate. Reviewed for accuracy and saved to case file. Updated client file.	0.10
9/17/2018 MJC	Phone call with client to discuss judgment, mandate, and conclusion of appeal in Court. Documented phone call for case file.	0.20
9/17/2018 DMG	Prepared and e filed Notice of Appearance. Received, reviewed, and saved Court confirmation email. Checked docket sheet to ensure proper filing. Updated case file.	0.20
9/17/2018 ZMS	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.50
9/17/2018 DMG	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.50
		<u>Amount</u>
		148.70 \$29,867.56

Exhibit A

Expenses

	<u>Amount</u>
Airfare for oral argument - MC	108.20
Airfare for oral argument- RVC	376.40
Filing Fee	50.00
Total Expenses	<u>\$534.60</u>
	<u>148.70 \$30,402.16</u>

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Amy Odom	2.20	197.95	\$435.49
Barbara J. Cook	8.00	193.83	\$1,550.66
Bradley Hennings	2.00	201.31	\$402.62
Dale Ton	5.60	201.31	\$1,127.34
Danielle M. Gorini	2.10	201.31	\$422.75
Jenna Zellmer	13.10	201.31	\$2,637.15
Jordyn Coad	6.00	201.31	\$1,207.86
Maura Clancy	70.00	201.31	\$14,091.67
Nicholas Phinney	1.70	201.31	\$342.23
Robert V. Chisholm	23.40	201.31	\$4,710.66
Sarah McCauley	1.90	201.31	\$382.49
Zachary M. Stolz	12.70	201.31	\$2,556.64

USAO ATTORNEY'S FEES MATRIX — 2015-2018

Revised Methodology starting with 2015-2016 Year

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18
31+ years	568	581	602
21-30 years	530	543	563
16-20 years	504	516	536
11-15 years	455	465	483
8-10 years	386	395	410
6-7 years	332	339	352
4-5 years	325	332	346
2-3 years	315	322	334
Less than 2 years	284	291	302
Paralegals & Law Clerks	154	157	164

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. See *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).
5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.
6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.
9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia

have relied on the USAO's *Laffey* Matrix, rather than the so-called "*Salazar* Matrix" (also known as the "LSI Matrix" or the "Enhanced *Laffey* Matrix"), as the "benchmark for reasonable fees" in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); see, e.g., *Joaquin v. Friendship Pub. Charter Sch.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne's Conservation Ass'n v. Dep't of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). But see, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). Since initial publication of the instant USAO Matrix in 2015, multiple courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. E.g., *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, --- F. Supp. 3d ---, 2017 U.S. Dist. LEXIS 111175, at *17 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), slip op. at 9-10 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"). The USAO contends that the *Salazar* Matrix is fundamentally flawed, does not use the *Salazar* Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.