

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

EVANIE E. ATENCIO	)	
Appellant,	)	
	)	
v.	)	CAVC No. 16-1561
	)	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 **\$20,707.99**.

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) (hereafter "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).

The Appellant in the instant matter is a prevailing party. After oral argument, in a precedential decision, the Court set aside and remanded the Board's March 28, 2016 decision concerning secondary service connection for GERD based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-21 of the Decision. The mandate was issued on October 1, 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. Atencio 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. Atencio 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 and in Court was not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at either the administrative or litigation stage in this case. There thus is nothing substantially justified in the Board's failure to provide an adequate statement of reasons or bases. 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).

Ten attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Alexandra Lio, Danielle M. Gorini, Emma Peterson, Megan Ellis, Matthew Pimentel, Christian McTarnaghan, Bradley Hennings, Nicholas Phinney,

Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Alexandra Lio graduated from Roger Williams University Law School in 2010 and the *Laffey* Matrix establishes that \$410.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle

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<sup>1</sup>“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 the work is common today for both plaintiff and defense work.” *Johnson v. 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.”). The Exhibit A in this case is separated into two documents as our firm is transitioning to a new time keeping program beginning October 1, 2018.

<sup>2</sup>The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by 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

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. Emma Peterson graduated from Roger Williams University Law School in 2011 and the *Laffey* Matrix establishes that \$352.00 is the prevailing market rate for an attorney with her experience. Megan Ellis graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Matthew Pimentel graduated from Roger Williams University Law School in 2013 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with his experience. Christian McTarnaghan graduated from Suffolk University Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with his experience. 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. 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. Barbara Cook graduated from

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Laffey Matrix as 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).

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. 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.

Elizabeth Rowland is a 2014 graduate from Vassar College and began working as a paralegal for Chisholm Chisholm & Kilpatrick in November 2016. Ms. Rowland was admitted to practice as a non attorney practitioner on January 16, 2018. In *McDonald v. Nicholson*, 21 Vet.App. 257 (2007), this Court indicated that non attorney practitioners are entitled to an EAJA award at a lesser rate than the \$125.00 per hour statutory rate for attorneys, plus the cost of living adjustment.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$196.89 per hour for Ms. Lio, Ms. Gorini, Ms. Peterson, Ms. Ellis, Mr. Pimentel, Mr. McTarnaghan, Mr. Hennings, Mr. Phinney, and Mr. Stolz for representation services before the Court.<sup>3</sup> This rate per hour, multiplied by the number of hours billed for these nine attorneys (113.80) results in a total attorney's fee amount of \$22,800.03.

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<sup>3</sup>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



Appellant seeks attorney's fees at the rate of \$191.73 per hour for Ms. Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (1.60) results in a total attorney's fee amount of \$306.77.

Appellant seeks attorney's fees at the rate of \$164.00 per hour for Ms. Rowland's representation services before the Court. This rate per hour, multiplied by the number of hours billed for Ms. Rowland (0.80) results in a total attorney's fee amount of \$131.20.

Based upon the foregoing, the total fee amount is **\$23,237.97**. However, in the exercise of billing judgment, for the argument briefed and argued, but not won, Appellant will voluntarily reduce the total fee amount by eighteen hours and seek a reduced fee of **\$19,693.98**.

In addition, Appellant seeks reimbursement for the following expenses:

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was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to December 2016 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

<sup>4</sup> 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 December 2016 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

Airfare to and from Washington DC – CM: \$286.40

Airfare to Washington DC – BH: \$136.96

Hotel in Washington DC – CM: \$378.23

Travel expenses in Washington DC– CM: \$173.42

Parking at the Providence Airport – CM: \$39.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$20,707.99.**

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,  
Evanie E. Atencio  
By Her Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
One Turks Head Place, Ste. 1100  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

## Exhibit A

		<u>Hours</u>
4/1/2016 MP	Reviewed BVA decision. Researched law. Gave opinion and recommendation for an appeal to Court.	0.70
5/6/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file	0.20
5/9/2016 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 Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case file.	0.20
5/13/2016 NP	Prepared & filed appearance; updated file.	0.10
5/13/2016 MP	Prepare and file notice of appearance with the court. Review docket sheet for procedural status and update client file.	0.20
6/3/2016 MP	Review email from the court with the copy of the BVA decision and the transmittal confirmation. Update client file.	0.10
6/20/2016 MP	Review email from the court with the Appellee's notice of appearance. Update client file.	0.10
7/1/2016 MP	Review email from the court with the RBA certificate of service. Update client file and calendar.	0.10

## Exhibit A

		<u>Hours</u>
7/6/2016 MP	Review RBA for legibility. Note length. Update client file.	0.10
9/9/2016 AL	Review order to file brief. Calculate brief due date. Update client file	0.10
9/14/2016 AL	Prepare and efile notice of appearance; updated file.	0.10
9/14/2016 AL	Review PBC order. Calculate memo due date. Update file.	0.10
9/16/2016 AL	Review BVA decision and notes in file. Outline issues for SOI	0.70
9/20/2016 AL	Prepare status letter to client.	0.30
9/22/2016 AL	Began drafting memo	1.30
9/23/2016 AL	Make edits to memo	1.50
9/29/2016 AL	Email CLS and GC copy of summary of issues. Prepare and efile certificate of service.	0.20
10/11/2016 AL	Returned Client's call and left message; note to file.	0.10
10/12/2016 AL	Called veteran back regarding claim and status	0.10
10/13/2016 AL	Review file notes and prepare for PBC. Participate in conference. Update file notes.	1.40
12/20/2016 AL	Begin draft of opening brief. Research Federal Register and cases involving GERD and 3.317.	1.80
12/21/2016 AL	Draft third argument portion of brief.	1.50

## Exhibit A

		<u>Hours</u>
12/21/2016 AL	Review notes in file and draft second argument for brief.	2.70
12/21/2016 AL	Draft statement of the case portion of brief. Draft issues presented, summary of the argument, standard of review and conclusion .	3.00
12/22/2016 MP	Review Appellant's opening brief for AOL. Suggest edits prior to filing.	0.60
12/23/2016 AL	Make final edits to brief. Check citations to authority and record cites. Efile. Update client file.	0.60
1/31/2017 NP	Prepared & filed appearance; updated file.	0.10
2/21/2017 NP	Email from VA atty. re: extension for brief; emailed reply	0.10
2/21/2017 NP	Received & reviewed order granting VA extension for brief; updated client file	0.10
2/21/2017 NP	Discussed status of appeal with client & wrote memo to file	0.40
3/24/2017 NP	Email from VA atty. re: staying case; emailed reply	0.10
3/24/2017 NP	Emailed VA atty. re: stay	0.10
4/1/2017 NP	Wrote response to VA's motion for stay	1.50
4/3/2017 NP	Finalized & filed opposition to stay	0.20
4/7/2017 NP	Received & reviewed email with VA's brief; calculate reply brief deadline & updated client file	0.10
4/11/2017 NP	Called from client re: VA's brief	0.10

## Exhibit A

		<u>Hours</u>
4/14/2017 NP	Call to client re: VA's brief	0.20
4/20/2017 NP	Received & reviewed Court order saying case; updated client file	0.10
4/20/2017 NP	Called client re: staying of case	0.10
4/27/2017 NP	Call from client's husband re: stay of case	0.20
9/27/2017 NP	Email from VA atty. re: supplemental briefing; note to file.	0.20
10/2/2017 BJC	Review draft response to Court Order & suggested additions.	0.20
10/2/2017 ZMS	Reviewed pleadings, Court order and notes on case. Prepared and filed response to Court order.	3.00
10/31/2017 CM	Continue to review documents for briefing strategy. Meeting about briefing strategy.	0.80
10/31/2017 CM	Review opening brief for legal arguments presented. Review supplemental memo of law on Goodman and DAV for legal arguments presented. Review VA's brief for responses to arguments pled in opening brief. Take notes on issues in preparation for reply strategy discussions.	2.50
10/31/2017 CM	Begin to draft reply brief. Begin to draft first section of reply brief about interpretation of 3.317.	2.50
10/31/2017 ZMS	Reviewed record and notes on case. Conducted legal research concerning MUCMIs and GERD as well as Law of the Case. Discussed case strategy with Christian McTarnaghan.	3.00

## Exhibit A

		<u>Hours</u>	
11/1/2017	CM	Continue to draft and reivew reply argument section on the misinterpretation of 3.317. Begin to draft reply to VA's argumnet that the Veteran's GERD does not meet the definition of a MUCMI.	2.80
11/2/2017	ER	Reviewed Reply Brief for proofreading purposes and corrected typos and grammatical errors	0.80
11/2/2017	CM	Continue to draft and revise entirety of reply brief.	1.50
11/2/2017	CM	Conintue to draft reply to inadeuqate examination argumnet.	2.50
11/2/2017	CM	Conintue to draft argumnet about inadequate medical examinations.	2.50
11/3/2017	CM	Prepare and file notice of appearance. File reply brief. Update file.	0.10
11/3/2017	ZMS	Reviewed notes on case. Reviewed and suggested revisions to reply drafted by Christian.	2.00
11/20/2017	CM	Receive ROP. Ensure filed for proper client. Update client file.	0.10
11/20/2017	CM	Review ROP. Compare to all record pages cites in all briefs. Draft and file letter accepting ROP.	0.30
11/27/2017	CM	Receive and review judicial assignment. Update client file.	0.10
11/29/2017	CM	Receive and review VA notice of appearance. Update client file.	0.10
11/29/2017	CM	Receive VA's motion to stay. Ensure filed for proper client. Update client file. Udpate client calendar.	0.10

## Exhibit A

		<u>Hours</u>
11/29/2017	CM	Review Stewart case. Review docket for case at bar. Draft and edit motion in opposition to VA's motion to stay case. Finalize motion. File motion.
		1.50
12/5/2017	CM	Receive and review Court's denial of VA's motion to stay case. Update client file.
		0.10
1/18/2018	CM	Receive and review Court's panel order. Memo to client file.
		0.30
1/22/2018	CM	Meet to discuss merits of case and whether to move for oral argument.
		1.00
1/22/2018	CM	Review pleadings. Review BVA decision. Review federal register in preparation of oral argument
		1.00
1/22/2018	ZMS	Reviewed record and notes on case. Conducted legal research concerning 38 C.F.R. 3.317. Discussed strategy and moving for oral argument with Brad Hennings, Kerry Baker, Christian McTarnaghan, Megan Ellis, and Barb Cook.
		3.00
1/30/2018	BJC	Review draft motion for oral argument prior to filing to ensure completeness
		0.10
1/30/2018	CM	Email VA to ascertain position on motion for oral argument.
		0.10
1/30/2018	CM	Telephone call with client to discuss case.
		0.20
1/30/2018	CM	Finalize and file motion for oral argument.
		0.20
1/30/2018	CM	Draft motion for oral argument.
		0.30
2/5/2018	CM	Receive and review VA's opposition to motion for oral argument.
		0.30



## Exhibit A

		<u>Hours</u>
2/6/2018 CM	Receive and review Court's grant of motion for oral argument. Update client file.	0.10
2/7/2018 CM	Receive and review Court's oral argument order. Update calendars with date and time of argument.	0.10
2/14/2018 CM	Telephone call with client about status of case.	0.10
3/22/2018 CM	Receive and review VA's notice of appearance. Update client file.	0.10
4/2/2018 BJC	Participate in walk through for oral argument	0.30
4/2/2018 BH	Prepared and filed notice of appearance. Updated file.	0.10
4/2/2018 BH	Participated in oral argument walk through	1.00
4/2/2018 ME	Reviewed case notes and pleadings in preparation for oral argument walk through, participated in oral argument walk through	1.10
4/2/2018 EP	Reviewed BVA decision and all pleadings in prep for walk through of oral argument. Participated in walk through for oral argument	1.40
4/2/2018 BH	Reviewed Board decision and all pleadings in preparation for oral argument and participation as second chair	1.40
4/2/2018 CM	Continue to prepare for oral argument walk through. Meet to walk through case in preparation for oral argument.	1.80
4/2/2018 ZMS	Prepared for and participated in oral argument walk through Conducted legal research concerning 3.317.	2.50

## Exhibit A

		<u>Hours</u>
4/2/2018 CM	Prepare for walk through for oral argument. Participate in walk through	2.70
4/6/2018 CM	Begin to prepare for first moot.	1.10
4/10/2018 BH	M-21 research in preparation for argument. Captured current provisions and looked into impact of structural GERD provisions.	0.20
4/10/2018 CM	Continue to prepare for first moot of oral argumnet. Focus on the federal register in supporting misinterpretation argumnet.	1.30
4/10/2018 CM	Continue to prepare for first moot. Continue to outline argument. Read Kisor case. Apply to case. Review Goodman and Stewart case.	2.30
4/10/2018 CM	Continue to prepare for first moot of oral argument. Review regulation and statue. Begin to formulate argument outline on misinterpretation argument.	2.50
4/11/2018 BJC	Participate in first moot	1.00
4/11/2018 BH	First moot in preparation for oral argument.	1.00
4/11/2018 CM	Finish preparations for first moot. Participate in first moot	1.40
4/11/2018 CM	Continue to prepare for first moot. Conitnue to edit and revise argumnet outline. Review 2003 act.	1.50
4/11/2018 EP	Reviewed all pleadings and record in prep for moot for oral argument. Prepared outline of potential arguments to be made by the Secretary and participated in first moot	1.80

## Exhibit A

		<u>Hours</u>
4/11/2018	CM	Make final preparations for first moot. 2.30
4/13/2018	CM	Begin to prepare for second moot based on notes given from first moot 1.60
4/14/2018	CM	Continue to review legislative history of 3.317 and continue to prepare for second moot. 1.30
4/16/2018	CM	Continue to draft and revise oral argumnet outline for second moot. 1.20
4/16/2018	CM	Continue to prepare for second moot. Review relevant statute. Continue to review legislative history of 3.317. 2.20
4/16/2018	CM	Continue to prepare for second moot. Review issue preclusion section of opening brief and VA's brief. Brief all cases VA cited in law of the case section. Research other mem decs on this issue. Review Carter case. Review evidence submitted and prior BVA decision. 2.80
4/18/2018	CM	Continue to prepare for second moot. Review argument outline. Review all briefs filed again to ensure all points are incorporated. 2.30
4/22/2018	CM	Continue to prepare for argument. 1.00
4/24/2018	EP	Participated in second moot argument with CMC, ZMS, BJC, and BWH 0.70
4/24/2018	BH	Participate in second moot in preparation for Oral Argument. 0.70
4/24/2018	CM	Prepare for and participate in second and final moot. 0.80

## Exhibit A

			<u>Hours</u>
4/25/2018	CM	Cab from Reagan to hotel.	0.30
4/25/2018	CM	Prepare for argument - review ourline	0.60
4/25/2018	CM	Drive to Logan Airport for flight to DC for oral argument	1.00
4/25/2018	CM	Fly from Boston to DC	1.50
4/26/2018	CM	Cab from CAVC to Reagan.	0.30
4/26/2018	CM	Cab from hotel from CAVC.	0.30
4/26/2018	BH	Cab from CAVC to Reagan National.	0.30
4/26/2018	BH	Cab from Providence airport to home.	0.40
4/26/2018	CM	Prepare for argument - review briefs	0.60
4/26/2018	BH	Bus and metro from hotel in DC to CAVC.	0.80
4/26/2018	CM	Wait for argument. Meet with Greg Block about argument.	1.00
4/26/2018	BH	Wait for argument. Meet with clerk of the Court about the argument.	1.00
4/26/2018	CM	Participate in argument.	1.10
4/26/2018	BH	Participate as second chair in argument.	1.10
4/26/2018	CM	Drive from Logan home.	1.30
4/26/2018	CM	Fly from DC to Boston.	1.50
4/26/2018	BH	Fly from DC to Providence.	1.50

## Exhibit A

		<u>Hours</u>
4/27/2018 CM	Telephone call with client about oral argument. Send email to client with link of oral argument audio recording.	0.20
5/2/2018 CM	Receive and review notice that argument was docketed. Update client file.	0.10
7/9/2018 CM	Carefully review precedential decision.	0.60
7/9/2018 ZMS	Reviewed Court's precedent decision, pleadings, and notes in case. Discussed decision with colleagues. Prepared letter to client concerning Court's decision. Ensured case file was updated with necessary letters, pleadings, and correspondence so that client could be properly informed of case progress, disposition, and next steps.	1.10
7/16/2018 CM	Long telephone call with client about case and precedential decision.	0.30
7/17/2018 CM	Telephone call with client's husband to discuss case at client's request.	0.30
7/30/2018 CM	Receive and review judgment. Ensure filed for proper client. Update client file.	0.10
8/1/2018 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30
9/25/2018 CM	Telephone call with client about status of case.	0.20
9/25/2018 CM	Telephone call with client's husband about case.	0.20
		<u>Amount</u>
		116.20 \$22,844.22

## Exhibit A

### Expenses

	<u>Amount</u>
Airfare for oral argument - BH	136.96
Airfare for oral argument - CM	286.40
Hotel - Oral Argument - CM	378.23
Parking at airport - CM	39.00
Travel expenses in DC - CM	173.42
Total Expenses	<hr/> \$1,014.01
	<hr/> 116.20 <hr/> \$23,858.23

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alexandra Lio	15.50	196.89	\$3,051.81
Barbara J. Cook	1.60	191.73	\$306.77
Bradley Hennings	9.50	196.89	\$1,870.47
Christian McTarnaghan	62.90	196.89	\$12,384.48
Danielle M. Gorini	0.40	196.89	\$78.76
Elizabeth Rowland	0.80	164.00	\$131.20
Emma Peterson	3.90	196.89	\$767.87
Matthew Pimentel	1.90	196.89	\$374.09
Megan Ellis	1.10	196.89	\$216.58
Nicholas Phinney	3.70	196.89	\$728.52
Zachary M. Stolz	14.90	196.89	\$2,933.67

# Exhibit A

Time from 10/1/2018 to 10/2/2018

**Case No. 231450**

**Client: Atencio, Ms. Evanie E.**

			<b><u>Hours</u></b>
10/1/2018	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.30
10/1/2018	DANIELLE	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
10/1/2018	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.50

## Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
DANIELLE	<b>1.50</b>	<b>\$ 196.89</b>	<b>\$ 295.33</b>
ZACH	<b>0.50</b>	<b>\$ 196.89</b>	<b>\$ 98.45</b>
<b>Totals:</b>	<b>2.00</b>		<b>\$ 393.78</b>

## 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.