

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

HERMAN O. BAILEY	)	
Appellant,	)	
	)	
v.	)	CAVC No. 19-2661
	)	EAJA
	)	
DENIS MCDONOUGH,	)	
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 **\$40,393.55**.

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*, 30 Vet.App. 61 (2018), 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 67, citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

In a precedential decision, the Court remanded that portion of the Board's March 1, 2019 decision regarding secondary service connection for diarrhea and lower extremity lymphedema due to radiation treatment for service connected prostate cancer and entitlement to TDIU because it failed to adjudicate these claims that were reasonably raised by the record. See pages 1-25 of the Decision. The mandate was issued on April 13, 2021. 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 his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. Bailey 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, Mr. Bailey 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 adjudicate claims that were reasonably raised by the record. 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*).

Eight attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Lisa Ioannilli, Danielle M. Gorini, Alec Saxe, Kevin Medeiros, Amy Odom, Barbara Cook, Dvora Louria, and Zachary Stolz.<sup>1</sup> Attorney

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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

Lisa Ioannilli graduated from George Washington University Law School in 2009 and the *Laffey Matrix* establishes that \$532.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey Matrix* establishes that \$591.00 is

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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.”).

<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 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).

the prevailing market rate for an attorney with her experience. Alec Saxe graduated from Boston College Law School in 2016 and the *Laffey* Matrix establishes that \$380.00 is the prevailing market rate for an attorney with his experience. Kevin Medeiros graduated from Suffolk University Law School in 2015 and the *Laffey* Matrix establishes that \$388.00 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 \$532.00 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 \$665.00 is the prevailing market rate for an attorney with her experience. Dvora Louria graduated from University of Connecticut Law School in 2016 and the *Laffey* Matrix establishes that \$380.00 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 \$591.00 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. Ms. Rowland has entered her appearance in multiple cases before the Court

of Appeals for Veterans Claims. The Court has found that “[I]n formulating an EAJA award to a non-attorney practitioner, once a prevailing market rate is determined for the non-attorney practitioner based on a certain skill level, reputation, and geographic area, that prevailing market rate can be adjusted over time by application of the appropriate percentage increase of the change in the appropriate consumer price index.” See *Apodackis v. Nicholson*, 19 Vet. App. 91 (2005). Therefore, based on Ms. Rowland’s court experience, Appellant seeks attorney’s fees at the rate of \$173.00 per hour for representation services before the Court for her time as a non attorney practitioner.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys’ fees at the rate of \$207.80 per hour for Ms. Ioannilli, Ms. Gorini, Mr. Saxe, Mr. Medeiros, Ms. Louria, 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 six attorneys (202.30) results in a total attorney's

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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 was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to November 2019 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).



fee amount of \$42,037.94.

Appellant seeks attorney's fees at the rate of \$200.81 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 (0.50) results in a total attorney's fee amount of \$100.41.

Appellant seeks attorney's fees at the rate of \$203.49 per hour for Ms. Odom's representation services before the Court.<sup>5</sup> This rate per hour, multiplied by the number of hours billed for Ms. Odom (20.20) results in a total attorney's fee amount of \$4,110.50.

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<sup>4</sup> Per the agreement in *Bradley v. Wilkie*, 17-3797, this rate was determined using the formula proposed by the National Veterans Legal Services Program, Veterans Benefit Manual, [1683] (Barton Stichman et al. eds. 2017-18 ed.). Specifically, the hourly rate is determined using the \$193.83 hourly rate from the last month the Cincinnati Consumer Price Index-U was available in the second half of 2017, multiplying that number using the Midwest Consumer Price Index-U for the midpoint in the case, November 2019, divided by the data from the Midwest Consumer Price Index-U for December 2017 or 230.548.

<sup>5</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 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 November 2019 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

Appellant seeks attorney's fees at the rate of \$173.00 per hour for Ms. Rowland's representation services before the Court as a non attorney practitioner. This rate per hour, multiplied by the number of hours billed for Ms. Rowland (1.90) results in a total attorney's fee amount of \$328.70.

Based upon the foregoing, the total fee amount is **\$46,577.55**. However, in the exercise of billing judgment, Appellant will voluntarily reduce the total fee amount by 30 hours for some of that time spent preparing the pleadings and preparing for the oral argument and seek a reduced fee of **\$40,343.55**.

In addition, Appellant seeks reimbursement for the following expense:

Filing Fee: \$50.00

Based upon all of the foregoing, the total fee and expense sought is **\$40,393.55**.

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,  
Herman O. Bailey  
By His Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
321 S Main St #200  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

4/14/2021

# Exhibit A

Time from 10/1/2018 to 4/14/2021

**Case No. 267368****Client: Bailey, Mr. Herman O.**

				<b><u>Hours</u></b>
3/26/2019	LISA	Reviewed and annotated BVA decision and assessed for appeal to CAVC. Suggested potential legal arguments.		0.60
4/22/2019	DANIELLE	Reviewed and emailed notice of appeal, notice of appearance for ZMS as lead counsel, and fee agreement to the Court. Received, reviewed, and saved Court confirmation email to the file. Updated file.		0.20
4/24/2019	DANIELLE	Reviewed docket to confirm docketing and to ensure proper filing and docketing of appeal documents. Updated file.		0.10
5/8/2019	ALEC	Prepared and e-filed notice of appearance. Receive and review email from the Court with confirmation that appearance was filed. Reviewed docket for procedural status. Updated client file.		0.10
5/22/2019	ALEC	Receive and review emails from the Court with BVA decision transmittal and copy of BVA decision. Ensured documents were correct. Updated client file.		0.10
5/29/2019	ALEC	Client called to discuss status of his case. Drafted memo to file summarizing call.		0.20
5/31/2019	ALEC	Receive and review email from the Court with VA counsel's Notice of Appearance. Updated client file.		0.10
6/21/2019	ALEC	Received and reviewed notice that RBA was uploaded to file. Reviewed to ensure correct BVA decision was included. Updated client file and calendar.		0.10
7/8/2019	ALEC	Receive and review email from client re: status of appeal, replied to same.		0.10
7/9/2019	ALEC	Prepared status letter to client. Updated file.		0.10
7/9/2019	ALEC	Received and reviewed notice that RBA was complete and no dispute was needed. Updated client file and calendar.		0.10
7/9/2019	EROWLAND	Reviewed RBA to determine need for dispute		1.90
7/11/2019	ALEC	Receive and review email from the Court with Notice to File Brief. Ensured document was correct, calculated due date for brief. Updated client file and calendar.		0.10
7/19/2019	ALEC	Reviewed BVA decision and screening notes, highlighted key aspects of BVA decision. Reviewed and casemapped pages 1 - 900 of the RBA for briefing purposes.		2.90
7/25/2019	ALEC	Continued reviewing RBA and casemapped pp. 901 - 2100.		2.80
7/26/2019	ALEC	Continued reviewing RBA and casemapped pp. 2101 - 3200.		2.40
7/31/2019	ALEC	Receive and review email from the Court with PBC order. Ensured document was correct. Calculated due date for PBC memo and new due date for brief. Checked for conflict with the PBC date. Updated client file and calendar reflect date of PBC and due dates for memo and brief.		0.10
8/2/2019	ALEC	Researched VA rating criteria relating to conditions of lymphedema and chronic diarrhea and researched caselaw involving service connection cases for these disabilities to determine merit to arguing that VA failed to consider secondary service connection for these conditions.		1.00
8/4/2019	ALEC	Continued reviewing RBA and casemapped pp. 1000 - 2500 for briefing purposes.		2.70
8/7/2019	ALEC	Continued reviewing RBA and casemapped pp. 2500 - 3500 for briefing purposes.		2.50
8/8/2019	ALEC	Finished reviewing RBA and casemapping for briefing purposes. Re-reviewed BVA decision. Reviewed notes in case file, casemap, and relevant parts of the RBA. Drafted outline of PBC memo and submitted to KM for review.		2.80
8/13/2019	ALEC	Reviewed BVA decision, casemap and relevant parts of the RBA for evidence to use in PBC memo. Began drafting PBC memo.		3.00
8/13/2019	KEVIN	Reviewed Alec's PBC memo outline against decision and relevant evidence; made necessary revisions and drafted memo to file re: additions/suggestions for memo.		0.90
8/14/2019	ALEC	Reviewed and incorporated KM's edits and suggestions to PBC memo, made additional arguments, and made final edits.		0.60

## Exhibit A

Time from 10/1/2018 to 4/14/2021

Case No. 267368

Client: Bailey, Mr. Herman O.

			<u>Hours</u>
8/14/2019	ALEC	Prepared PBC memo for submission. Emailed memo to VA counsel and CLS attorney. Prepared and e-filed Rule 33 Certificate of Service. Updated client file. Receive and review email from the Court with confirmation that Certificate of Service was filed. Updated client file. Prepared letter to send to client with PBC memo, sent message to correspondence re: sending letter. Updated client file.	0.60
8/14/2019	ALEC	Continued reviewing evidence in casemap and relevant parts of the RBA to draft PBC memo. Finished drafting PBC memo and submitted to KM for review.	1.00
8/14/2019	KEVIN	Substantive review of Alec's draft PBC memo for accuracy of legal arguments, organization, and flow; made necessary edits and revisions; memo to file re: edits/suggestions.	1.30
8/26/2019	ALEC	Client called to discuss PBC memo and additional arguments. Drafted memo to file summarizing call.	0.50
8/29/2019	ALEC	Reviewed PBC summary in client file. Called client to discuss PBC and case status. Drafted memo to file summarizing conversation.	0.40
10/29/2019	ALEC	Re-reviewed casemap and relevant parts of the RBA for evidence to use in opening brief. Drafted 4 pages of statement of the case in opening brief.	2.00
10/30/2019	ALEC	Prepared for and participated in briefing strategy meeting	0.40
11/5/2019	ALEC	Finished re-reviewing casemap and relevant parts of the RBA for evidence to use in opening brief and drafting statement of the case.	2.50
11/6/2019	ALEC	Researched Harper & Rice and potential effective date for TDIU.	0.30
11/6/2019	ALEC	Researched relevant case law, regulations, and briefs to draft opening brief I.a. argument. Reviewed outline and statement of the case for evidence to use in argument. Drafted 5 pages of argument.	3.00
11/6/2019	ALEC	Continued researching relevant case law, regulations, and briefs to draft opening brief argument I.a. Finished drafting I.a. argument and began drafting I.b. argument. Drafted 3 pages of argument I.b.	3.00
11/7/2019	ALEC	Finished drafting argument I.b. and drafted argument 2 on TDIU and Harper.	2.50
11/8/2019	AODOM	Began reviewing and editing brief.	1.00
11/9/2019	AODOM	Reviewed and edited Argument II and provided legal advice to Alec regarding additional edits to be made by him.	1.40
11/9/2019	AODOM	Reviewed and edited Argument I; provided legal advice to Alec regarding additional arguments to be made by him.	3.00
11/11/2019	ALEC	Continued reviewing and incorporating edits and suggestions to opening brief	3.00
11/11/2019	ALEC	Reviewed and began incorporating AO's edits and suggestions to opening brief.	3.00
11/11/2019	AODOM	Reviewed and edited revised draft of brief, provided legal advice to Alec regarding additional arguments to be added.	1.10
11/12/2019	ALEC	Incorporated additional edits and suggestions to opening brief.	1.00
11/12/2019	ALEC	Made final revisions to opening brief. Checked citations to the record and authorities. Finalized and prepared brief for e-filing. E-filed brief. Receive and review email from the Court confirming opening brief was filed. Updated client file and calendar to reflect due date for Appellee's brief.	3.00
12/6/2019	ALEC	Receive and review email from the Court with Appellee's brief. Reviewed brief for overview of Appellee's arguments and any red flags or enhanced review issues.	1.50
12/10/2019	ALEC	Reviewed pleadings, RBA and casemap, and notes to file in preparation of litigation strategy meeting. Attended litigation strategy meeting in preparation of drafting reply brief.	1.00
1/6/2020	ALEC	Reviewed opening brief and secretary's brief, litigation strategy meeting notes and notes to file and participated in conference with AO and BC regarding reply brief strategy.	1.70
1/6/2020	ALEC	Drafted outline of reply brief.	2.20

## Exhibit A

Time from 10/1/2018 to 4/14/2021

Case No. 267368

Client: Bailey, Mr. Herman O.

			<u>Hours</u>
1/7/2020	ALEC	Reviewed reply brief outline and re-reviewed relevant parts of opening brief, Appellee's brief, and the RBA to draft reply brief. Drafted DC 7528 and M21-1 argument of reply brief.	3.00
1/8/2020	ALEC	Continued drafting 3.155 argument and began drafting duty to maximize benefits argument of reply brief.	2.00
1/8/2020	ALEC	Researched 3.155 regulatory history and reviewed other firm pleadings and began drafting second argument of reply brief.	3.00
1/9/2020	ALEC	Finished drafting duty to maximize benefits argument of reply brief.	2.50
1/10/2020	ALEC	Drafted Harper and Rice argument of reply brief.	2.40
1/10/2020	AODOM	Began reviewing draft reply brief.	0.80
1/11/2020	AODOM	Began reviewing and editing brief, Parts I.A and I.B. Provided legal advice to Alec regarding additional edits and arguments to be made by him.	1.60
1/12/2020	AODOM	Reviewed and edited Sections I.c-II of reply brief; provided legal advice to Alec regarding additional edits to be made by him.	1.60
1/13/2020	ALEC	Continued reviewing AO comments on draft reply brief. Continued editing draft of reply brief.	1.60
1/13/2020	ALEC	Reviewed AO comments on draft reply brief. Began editing draft of reply brief.	2.80
1/13/2020	AODOM	Reviewed and edited revised draft of argument I.b.	0.80
1/13/2020	AODOM	Began review of revised draft of I.b, conference with and legal advice to Alec regarding same.	1.00
1/13/2020	AODOM	Reviewed and edited Sections I.c and II of revised draft of reply.	1.70
1/13/2020	AODOM	Reviewed and edited revised draft of I.a of reply brief.	2.00
1/14/2020	BARBARA	Start to review and suggest additional edits to reply	0.20
1/14/2020	BARBARA	Continued to review reply and suggest additional edits	0.30
1/14/2020	ZACH	Reviewed RBA and pleadings filed to date. Conducted legal research concerning complications of prostrate issues. Drafted memo to the file.	2.00
1/16/2020	ALEC	Made final revisions to reply brief. Checked citations to the record and authority. Finalized and prepared reply for e-filing. E-filed reply. Receive and review email from the Court confirming reply brief was filed. Updated client file.	1.30
1/17/2020	ALEC	Receive and review email from the Court with Record of Proceedings. Ensured document was correct. Calculated due date for dispute of ROP, updated client file and calendar.	0.20
1/20/2020	ALEC	Reviewed the Record of Proceedings and compared it to record citations in briefs. Determined that ROP was complete, prepared and e-filed letter to the Court accepting ROP. Receive and review email from the Court confirming response to ROP was filed. Updated client file.	0.50
1/27/2020	ALEC	Receive and review notice from the Court that Chief Judge Bartley was assigned to case. Updated client file.	0.10
4/8/2020	ALEC	Received and reviewed order from court scheduling oral argument and updated client file.	0.10
5/29/2020	ALEC	Receive and review email from the Court with VA counsel Daley's Notice of Appearance. Updated client file.	0.10
6/29/2020	DVORA	Prepared and filed notice of appearance. Updated client file.	0.10
6/30/2020	ALEC	Discussed case and conversations with client with DL.	0.20
6/30/2020	DVORA	Reviewed case notes and drafted case strategy to the file.	0.10
6/30/2020	DVORA	Reviewed email from client and conducted brief review of documents sent by him. Consulted with AS.	0.30
7/2/2020	DVORA	Compiled and printed all relevant cases, regulations, RBA pages, and pleadings.	2.30

## Exhibit A

Time from 10/1/2018 to 4/14/2021

Case No. 267368

Client: Bailey, Mr. Herman O.

			<u>Hours</u>
7/3/2020	DVORA	Received and reviewed email from Court rescheduling oral argument. Updated client file.	0.10
7/3/2020	DVORA	Reviewed facts of case and composed timeline of relevant facts. Composed list of relevant definitions. Began list of relevant questions and issues. Began list of relevant cases and laws.	3.00
7/4/2020	DVORA	Reviewed all case notes and compiled a list of matters to look into. Continued review of pleadings and adding to list of questions and issues.	2.20
7/5/2020	DVORA	Continued working on list of relevant cases and law.	1.40
7/6/2020	DVORA	Completed review of OGC brief to identify questions/issues for argument and compose list of points.	0.50
7/6/2020	DVORA	Began review of OGC brief to identify questions/issues for argument and compose list of points.	3.00
7/7/2020	DVORA	Reviewed notes from conversation with client.	0.10
7/8/2020	ALEC	Spoke with client regarding upcoming oral argument.	0.20
7/8/2020	DVORA	Received and reviewed email from OGC attorney. Updated client file.	0.10
7/8/2020	DVORA	Drafted email to OGC attorney regarding potential basis for remand. Updated client file.	0.40
7/8/2020	DVORA	Reviewed and highlighted key parts of record. Listened to part of Morgan oral argument. Discussed case strategy with KD. Participated in walkthrough. Drafted recap note to file afterward.	1.90
7/8/2020	DVORA	Reviewed reply brief to identify questions/issues for argument and compose list of points.	3.00
7/8/2020	ZACH	Reviewed record and pleadings. Participated in oral argument walk through. Helped develop joint motion offer.	2.90
7/10/2020	DVORA	Conducted in-depth review of all records cited in opening brief.	2.90
7/11/2020	DVORA	Listened to Harper argument in preparation for Bailey oral argument.	0.70
7/11/2020	DVORA	Conducted review of all records cited in OGC brief and reply brief.	1.50
7/11/2020	DVORA	Composed breakdown of all argument in opening brief with points to potentially bring up during oral argument.	2.70
7/11/2020	DVORA	Reviewed key cases including Copeland, Tropf, Esteban, AB, and Morgan, and composed notes about them.	2.80
7/12/2020	DVORA	Continued reviewing relevant cases.	0.80
7/12/2020	DVORA	Drafted Solze notice, calculated ratings differences, organized binder of most important cases and documents.	3.00
7/13/2020	DVORA	Read 79 FR 57660-01 in full.	1.40
7/13/2020	DVORA	Continued reviewing relevant cases and all relevant laws. Drafted questions for oral argument	1.70
7/14/2020	DVORA	Continued reviewing relevant cases and laws and working through possible issues.	2.00
7/14/2020	DVORA	Drafted oral argument intro. Continued reviewing and summarizing relevant cases and laws including Manzanares and Elligton.	3.00
7/15/2020	ALEC	Spoke with client to discuss email he sent me.	0.20
7/15/2020	DVORA	Received and reviewed supplemental authority submitted by OGC attorney. Updated client file.	0.10
7/15/2020	DVORA	Participated in moot and debrief.	1.50
7/15/2020	DVORA	Created new opening argument. Began creating detailed outline for argument.	3.00
7/15/2020	DVORA	Continued creating detailed outline for argument. Read Sellers and considered applicability.	3.00

## Exhibit A

Time from 10/1/2018 to 4/14/2021

Case No. 267368

Client: Bailey, Mr. Herman O.

			<u>Hours</u>
7/15/2020	ZACH	Prepared for and participated in first moot. Preparation included review of pleadings and caselaw. Participation was as "judge" with question and contribution to oral argument strategy.	3.00
7/17/2020	AODOM	Reviewed and edited Solze notice.	0.30
7/17/2020	DVORA	Made minor edits to Solze notice. Added attachment. Redacted confidential information. E-filed. Updated client file.	0.40
7/17/2020	DVORA	Added notes to file based on previous meetings. Updated draft of Solze notice. Composed 2 draft requests for remedy with explanations for the merits of each.	0.70
7/18/2020	DVORA	Listened to Payne argument and took notes.	1.10
7/18/2020	DVORA	Practiced argument.	1.50
7/18/2020	DVORA	Reviewed key record cites, parts of the opening brief, and Harper.	1.50
7/19/2020	DVORA	Reviewed every page of the RBA again to ensure that nothing was missed now that argument is more developed. Highlighted key portions.	2.50
7/19/2020	DVORA	Reviewed pleadings, noting potential issues, cases to review, points advanced and conceded	3.00
7/19/2020	DVORA	Drafted new opening. Reviewed reply brief specifically and identified issues that need to be considered further and laws/cases to review.	3.00
7/20/2020	DVORA	Participated in case strategy discussion. Drafted notes afterward.	1.30
7/20/2020	DVORA	Reviewed cases and regulatory history on separate rating versus secondary service connection. Composed notes for discussion.	2.50
7/21/2020	DVORA	Listened to portions of oral argument to prepare for second moot, including portion of Sellers argument.	0.90
7/21/2020	DVORA	Reviewed 3.155 regulatory history in full again in light of new approach to argument created on 7/20. Composed breakdown of key parts of regulatory history.	3.00
7/22/2020	ALEC	Spoke with client about recent correspondence, made note to file.	0.60
7/22/2020	AODOM	Reviewed June 2020 rating decision and Solze notice.	0.20
7/22/2020	AODOM	Participated in pre-oral argument teleconference with Court.	0.20
7/22/2020	AODOM	Prepared for and participated in second moot argument and debriefing.	1.50
7/22/2020	DVORA	Reviewed documents sent by client, and drafted Solze notice for RD.	0.70
7/22/2020	DVORA	Reviewed Sellers and Bannon and made notes regarding key cases.	1.00
7/22/2020	DVORA	Participated in second moot. Drafted notes regarding comments from afterwards.	1.20
7/22/2020	DVORA	Worked on edits to opening argument and argument outline in preparation for second moot.	3.00
7/22/2020	DVORA	Drafted questions and answers for second moot. Edited opening argument. Practiced revised argument. Assembled list of key record cites.	3.00
7/22/2020	ZACH	Prepared for and participated as "judge" in moot court. Preparation included review of record and legal research. Participated as "judge" and helped with development of oral argument strategy.	2.00
7/23/2020	DVORA	Redacted portions of RD. Filed Solze notice. Updated client file.	0.20
7/23/2020	DVORA	Listened to oral argument in Healey to prepare for Bailey argument on what the Board may be expected to do.	1.00
7/24/2020	DVORA	Edited and added to questions and answers for argument. Reviewed Sellers.	2.40
7/24/2020	DVORA	Edited and practiced argument. Revised answers to potential questions.	3.00
7/25/2020	DVORA	Continued reading and summarizing relevant case law. Listened to Manzarares argument and portion of Ellington argument and Healey rebuttle, and practiced argument.	2.00



## Exhibit A

Time from 10/1/2018 to 4/14/2021

Case No. 267368

Client: Bailey, Mr. Herman O.

			<u>Hours</u>
7/25/2020	DVORA	Reviewed OGC and reply brief and highlighted new portions based on further analysis. Reread Manzanares and considered BC's points. Reread Ross.	3.00
7/25/2020	DVORA	Edited questions and answers and argument outline further. Reviewed opening brief and highlighted new portions based on further analysis. Recalculated disability ratings for prejudice purposes.	3.00
7/26/2020	DVORA	Practiced argument, answering questions, and going over facts.	1.80
7/26/2020	DVORA	Reviewed relevant cases and regulations and added to notes to reference during argument.	3.00
7/26/2020	DVORA	Continued to review relevant cases and regulations and added to notes to reference during argument.	3.00
7/27/2020	AODOM	Prepared for and participated in oral argument as second chair.	2.00
7/27/2020	DVORA	Practiced for argument.	1.30
7/27/2020	DVORA	Participated in oral argument, including thirty minute on-call wait prior to argument.	1.90
7/27/2020	DVORA	Reviewed key documents in final preparation for oral argument.	3.00
8/17/2020	ALEC	Client called to discuss oral argument. Drafted memo to file summarizing call.	0.30
1/6/2021	ALEC	Receive and review email from the Court with memorandum decision. Ensured document was correct. Reviewed decision and compared it to arguments in opening and reply briefs. Updated client file.	0.40
1/6/2021	ZACH	Reviewed Court's precedential decision and discussed.	0.70
1/8/2021	ALEC	Drafted summary of mem dec and case for client.	0.70
1/20/2021	ALEC	Called client to discuss precedential decision and next steps in case. Explained timeline for remand. Drafted memo to file summarizing conversation. Updated client file.	0.30
1/22/2021	ZACH	Prepared letter to client concerning Court's decision.	0.50
1/28/2021	ALEC	Reviewed VA's motion for reconsideration.	0.30
2/11/2021	ALEC	Receive and review email from the Court with order denying motion for consideration. Updated client file.	0.10
2/11/2021	ALEC	Receive and review email from the Court with entry of judgment. Ensured document was correct. Updated client file.	0.10
2/12/2021	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.60
4/13/2021	ALEC	Receive and review email from the Court with notice of mandate. Ensured document was correct. Updated client file.	0.10
4/14/2021	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
4/14/2021	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.80
4/14/2021	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>
<b>ALEC</b>	<b>77.5</b>	<b>\$ 207.80</b>	<b>\$ 16,104.50</b>
<b>AODOM</b>	<b>20.2</b>	<b>\$ 203.49</b>	<b>\$ 4,110.50</b>
<b>BARBARA</b>	<b>0.5</b>	<b>\$ 200.81</b>	<b>\$ 100.41</b>

**Timekeeper Summary**

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
DANIELLE	2.3	\$ 207.80	\$ 477.94
DVORA	107.5	\$ 207.80	\$ 22,338.50
EROWLAND	1.9	\$ 173.00	\$ 328.70
KEVIN	2.2	\$ 207.80	\$ 457.16
LISA	0.6	\$ 207.80	\$ 124.68
ZACH	12.2	\$ 207.80	\$ 2,535.16
	224.9		\$ 46,577.55

Expense: Filing Fee: \$50.00

**USAO ATTORNEY'S FEES MATRIX — 2015-2021***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	2018-19	2019-20	2020-21
31+ years	568	581	602	613	637	665
21-30 years	530	543	563	572	595	621
16-20 years	504	516	536	544	566	591
11-15 years	455	465	483	491	510	532
8-10 years	386	395	410	417	433	452
6-7 years	332	339	352	358	372	388
4-5 years	325	332	346	351	365	380
2-3 years	315	322	334	340	353	369
Less than 2 years	284	291	302	307	319	333
Paralegals & Law Clerks	154	157	164	166	173	180

*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. The USAO rates for years prior to and including 2014-15 remains the same as previously published on the USAO's public website.
5. 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.
6. 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).
7. The attorney's fees matrices issued by the United States Attorney's Office are intended to facilitate the settlement of attorney's fees claims in actions in which the United States may be liable to pay attorney's fees to the prevailing party and the United States Attorney's Office is handling the matter. The United States Attorney's Office is presently working to develop a revised rate schedule, based upon current, realized rates paid to attorneys handling complex federal litigation in the District of Columbia federal courts. This effort is motivated in part by the D.C. Circuit's urging the development of "a reliable assessment of fees charged for complex federal litigation in the District." *D.L. v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). This new matrix should address the issues identified by the majority in *D.L.*, but it is expected that it will be some time before a new matrix can be prepared. In the interim, for matters in which a prevailing party agrees to payment pursuant to the matrices issued by the United States Attorney's Office, the United States Attorney's Office will not demand that a prevailing party offer the additional evidence that the law otherwise requires. *See Eley*, 793 F.3d at 104 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'").