

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JACK L. STOVER)	
Appellant,)	
)	
v.)	CAVC No. 20-5580
)	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 **\$33,268.13**.

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).

After oral argument, in a precedential decision, the Court set aside and remanded the Board's June 10, 2020 decision based upon the Board's failure to provide an adequate statement of reasons or bases. Specifically, based upon the Board's failure to explain its understanding of "near the perimeter" standing alone. See pages 1-38 of the Decision, which includes a concurrence. The Court issued mandate on October 4, 2022. 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. Stover 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. Stover 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 or

the 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. The Board failed 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: Bradley Hennings, Danielle M. Gorini, Shawn Wright, Paige Ingram, Alyse Galoski, David Giza, Kaitlyn Degnan, Barbara Cook, Amy Odom, and Zachary Stolz.¹ Attorney Bradley Hennings graduated from Rutgers University

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

Law School in 2006 and the *Laffey* Matrix establishes that \$532.00 is the prevailing market rate for an attorney with his experience.² Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$591.00 is the prevailing market rate for an attorney with

Cir. 1988); *see also* *Baldrige 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 Baldrige*, 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.”).

²The 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).

her experience. Shawn Wright graduated from University of Miami Law School in 2019 and the *Laffey* Matrix establishes that \$369.00 is the prevailing market rate for an attorney with his experience. Paige Ingram graduated from Syracuse University Law School in 2019 and the *Laffey* Matrix establishes that \$369.00 is the prevailing market rate for an attorney with her experience. Alyse Galoski graduated from Roger Williams University Law School in 2014 and the *Laffey* Matrix establishes that \$388.00 is the prevailing market rate for an attorney with her experience. David Giza graduated from Boston University Law School in 2018 and the *Laffey* Matrix establishes that \$369.00 is the prevailing market rate for an attorney with his experience. Kaitlyn Degnan graduated from Syracuse University Law School in 2017 and the *Laffey* Matrix establishes that \$380.00 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. 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. 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.

Nick Scriptor is a 2020 graduate of Northeastern University Law School, and at the time his work was performed, he was admitted to practice as a non-attorney practitioner. Mr. Scriptor has entered his 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 Mr. Scriptor’s Court experience, Appellant seeks attorney’s fees at the rate of \$180.00 per hour for representation services before the Court for his time as a non attorney practitioner before he was admitted to practice law.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys’ fees at the rate of \$213.60 per hour for Mr. Hennings, Ms. Gorini, Mr. Wright, Ms. Ingram, Ms. Galoski, Mr. Giza, Ms. Degnan, and Mr. Stolz for representation services before the Court.³ This rate per

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

hour, multiplied by the number of hours billed for these eight attorneys (117.50) results in a total attorneys' fee amount of \$25,098.00.

Appellant seeks attorney's fees at the rate of \$207.03 per hour for Ms. Cook's representation services before the Court.⁴ This rate per hour, multiplied by the number of hours billed for Ms. Cook (14.00) results in a total attorney's fee amount of \$2,898.42.

Appellant seeks attorney's fees at the rate of \$209.11 per hour for Ms. Odom's representation services before the Court.⁵ This rate per hour, multiplied by

was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to March 2021 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).

⁴ 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, March 2021, divided by the data from the Midwest Consumer Price Index-U for December 2017 or 230.548.

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 March 2021 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).

the number of hours billed for Ms. Odom (22.80) results in a total attorney's fee amount of \$4,767.71.

In addition, Appellant seeks attorney's fees at the rate of \$180.00 per hour for representation services before the Court for Mr. Scriptor's time. This rate per hour, multiplied by the number of hours billed (2.80) results in a total fee amount of \$504.00.

Based upon the foregoing, the total fee sought is **\$33,268.13**.

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,
Jack L. Stover
By His Attorneys,
CHISHOLM CHISHOLM & KILPATRICK
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10/5/2022

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846

Client: Stover, Mr. Jack L.

			<u>Hours</u>
7/22/2020	BRADLEY	Reviewed Board decision, researched caselaw, recommended an appeal to CAVC, and proposed legal arguments.	0.60
8/10/2020	SWRIGHT	Reviewed documents for CAVC appeal. Ensured consistency and accuracy. Submitted documents for CAVC appeal.	0.10
8/13/2020	SWRIGHT	Reviewed docket to ensure appeal had been processed. Updated client file	0.10
8/25/2020	PAIGE	Prepare and file notice of appearance; updated client file.	0.10
9/10/2020	PAIGE	Received and reviewed copy of BVA decision and transmittal. Updated client file.	0.10
9/25/2020	PAIGE	Received and reviewed OGC notice of appearance and updated client file.	0.10
10/13/2020	PAIGE	Received and reviewed RBA notice; updated client file.	0.10
10/20/2020	NSCRIPTE	Reviewed RBA pages 1-260 for disputes.	1.20
10/21/2020	NSCRIPTE	Reviewed RBA pages 261-582 for disputes.	0.80
10/21/2020	NSCRIPTE	Reviewed RBA pages 583-1097 for disputes.	0.80
10/28/2020	PAIGE	Draft and send status letter to client; updated client file.	0.10
11/3/2020	PAIGE	Received and reviewed briefing order; calculated deadline; updated client file.	0.10
11/25/2020	AGALOSKI	Prepared and e-filed entry of appearance. Updated client file.	0.10
11/25/2020	PAIGE	Received and reviewed PBC order; ensured no conflicts; calculated memo due date; updated client file.	0.10
12/1/2020	PAIGE	Reviewed RBA pp. 1 - 1097 for briefing purposes	1.10
12/3/2020	PAIGE	Drafted PBC outline - focused on organization of arguments; drafted memo to file	1.10
12/7/2020	AGALOSKI	Reviewed argument outline and suggested case strategy. Updated client file.	0.30
12/7/2020	PAIGE	Began drafting pbc memo	3.00
12/8/2020	PAIGE	Continued drafting pbc memo.	2.50
12/9/2020	AGALOSKI	Reviewed and revised PBC memo for legal and grammatical accuracy. Made suggestions to strengthen PBC memo. Suggested additional legal arguments to explore. Updated client file.	1.40
12/9/2020	PAIGE	Draft and send pbc memo letter to client.	0.10
12/9/2020	PAIGE	Reviewed and implemented edits to pbc memo; extract and redact relevant rba pages; submit memo and extract to cls; prepare and file rule 33 certificate of service.	2.40
12/9/2020	PAIGE	Finished drafting pbc memo.	2.90
12/23/2020	PAIGE	Spoke with client about pbc and next steps; updated client file.	0.10
12/23/2020	PAIGE	Prepped for pbc- reviewed case notes and memo; participated in pbc; posted recap to file.	0.70
12/29/2020	ZACH	Participated in discussion of litigation strategy for opening brief.	0.20
1/15/2021	DGIZA	Reviewed docket, case file, and case notes to assess status of appeal and issues on appeal. Prepared and e-filed notice of appeal. Updated client file.	0.20
1/25/2021	DGIZA	Reviewed Board decision and PBC memo to prepare for drafting opening brief. Drafted outline of arguments for opening brief. Updated client file.	0.70
1/28/2021	DGIZA	Reviewed case notes in anticipation of briefing strategy meeting later this afternoon.	0.20
1/28/2021	DGIZA	Discussed case at Thailand exposure strategy meeting. Discussed future arguments regarding M21-1 and how to show exposure at Thailand air force bases. Updated client file.	0.40
2/9/2021	DGIZA	Reviewed RBA to assess factual and procedural history of case on appeal. Drafted outline of procedural history. Drafting opening brief - statement of the case	1.50

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846

Client: Stover, Mr. Jack L.

			<u>Hours</u>
2/10/2021	DGIZA	Continued drafting opening brief. Drafted summary of the case and standard of review. Began drafting argument section.	1.70
2/11/2021	DGIZA	Continued draft of argument section.	2.10
2/12/2021	DGIZA	Continued draft of opening brief. Reviewed caselaw regarding adverse credibility findings. Drafted arguments about why the Board's negative credibility finding regarding the Veteran was erroneous.	1.70
2/17/2021	DGIZA	Finished draft of opening brief.	2.60
2/23/2021	KDEGNAN	Reviewed DG's opening brief for legal and factual accuracy. Made edits to improve clarity and persuasiveness. Identified additional distinctions to make.	1.20
2/24/2021	DGIZA	Reviewed KDEGNAN's feedback on first draft of opening brief. Began incorporating feedback into revised draft of opening brief.	2.00
2/25/2021	DGIZA	Continued incorporating edits and feedback into revised draft of opening brief. Reviewed Thailand exposure cases and presumptive service connection. Reviewed opening brief for grammar and argument structure.	2.00
3/5/2021	AODOM	Began reviewing and editing brief.	0.90
3/6/2021	AODOM	Finished reviewing and editing draft brief.	1.30
3/8/2021	DGIZA	Reviewed and incorporated additional feedback on opening brief. Proof read updated draft for grammar and revised argument flow.	2.60
3/8/2021	DGIZA	Incorporated proof reading edits into final draft of opening brief. Conducted final review of the opening brief, made edits, and prepared opening brief for filing. Filed brief and updated client file.	1.30
5/7/2021	DGIZA	Received, reviewed, and responded to OGC's request for additional time to file their brief.	0.10
5/7/2021	DGIZA	Received and reviewed notice of OGC e-filing motion to extend time to file brief. Updated client file.	0.10
5/7/2021	DGIZA	Received and reviewed notice of Court granting OGC's motion to extend time to file brief, updated client file.	0.10
6/22/2021	DGIZA	Received notice of OGC e-filing their reply brief, saved copy of brief to client file. Reviewed OGC's brief and cited caselaw to being outlining responses to their arguments for reply.	1.50
6/23/2021	DGIZA	Began drafting outline of OGC's arguments and initial thoughts for reply arguments.	1.10
6/24/2021	DGIZA	Finished outlining OGC's brief and drafting initial thoughts for reply. Updated client file.	0.90
7/7/2021	DGIZA	Reviewed recent precedential decision, <i>Andrews v. McDonough</i> , regarding binding nature of M21-1 when cited and relied upon by the Board, in order to develop reply brief arguments. Updated client file.	0.30
7/8/2021	DGIZA	Reviewed Board decision, opening brief, and OGC brief to prepare for reply brief strategy meeting. Discussed reply brief strategy and arguments on reply with AODOM and ALEC. Updated client file.	1.10
7/20/2021	DGIZA	Began reviewing suggested model draft pleadings regarding Thailand Air Force base herbicide exposure and definitions of "near the perimeter" to begin outlining reply brief arguments.	0.60
7/26/2021	DGIZA	Spoke with client, updated him on status of appeal, working on reply brief, discussed Thailand exposure provisions. Updated client file.	0.30
8/5/2021	DGIZA	Began drafting reply brief.	2.10
8/10/2021	DGIZA	Continued on draft of reply brief. Continued on arguments regarding intent, plain meaning, and practical application of M21-1 Thailand exposure provision.	3.00
8/10/2021	DGIZA	Continued on draft of reply brief. Finish argument regarding plain meaning, intent, and prior application of M21-1 provision.	1.00
8/11/2021	DGIZA	Continued on draft of reply brief. Drafted arguments regarding why reversal of denial of service connection is the appropriate remedy.	1.20

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846

Client: Stover, Mr. Jack L.

			<u>Hours</u>
8/12/2021	DGIZA	Continued on draft of reply brief. Continued drafting arguments regarding why the Secretary is incorrect that the Board properly disregarded the Veteran's credible evidence.	0.70
8/12/2021	DGIZA	Continued on draft of reply brief. Outlined arguments about why OGC is wrong that credible evidence isn't enough to show service near the perimeter. Began drafting arguments of the same.	3.00
8/13/2021	DGIZA	Finished draft of reply brief. Finished initial draft of arguments, drafted conclusion of reply brief. Proofread reply brief	2.80
8/18/2021	DGIZA	Reviewed recent memorandum decisions in comparable cases regarding M21-1 Thailand exposure provision. Reviewed pleadings from those cases. Messaged AODOM to discuss impact of those decision on reply brief arguments. Updated client file.	0.60
8/19/2021	AODOM	Reviewed and analyzed Andrews v. McDonough, drafted argument that M21-1 was binding authority under Andrews.	1.60
8/19/2021	AODOM	Reviewed parties' briefs and prepared notes in advance of reviewing and editing draft reply brief.	2.00
8/19/2021	AODOM	Reviewed and edited David's draft reply brief arguments; provided legal advice to him regarding additional edits to make.	2.40
8/19/2021	DGIZA	Received and reviewed AODOM's edits and feedback on draft of reply brief. Began reviewing suggested caselaw and incorporating her edits	0.60
8/20/2021	AODOM	Reviewed revised draft of reply brief; conference with David regarding Souzzi argument; edited reply brief.	0.60
8/20/2021	DGIZA	Made final revisions to reply brief. Checked citations to record and authorities. E-filed.	0.70
8/20/2021	DGIZA	Reviewed and incorporated additional edits on reply brief	0.20
8/23/2021	DGIZA	Reviewed record of proceedings to ensure that all the necessary documents were included. Drafted and e-filed response to record of proceedings.	0.60
8/25/2021	DGIZA	Received and reviewed notice of Judge Greenberg being assigned as judge to case. Updated client file.	0.10
11/2/2021	AODOM	Reviewed Court's order for Secretary to submit supplemental briefing; compared against arguments raised in brief.	0.50
11/2/2021	DGIZA	Received and reviewed the Court's order to OGC requesting supplemental briefing. Memo to file re: order	0.50
11/3/2021	DGIZA	Received and reviewed message about missed call from client. Called client, explained issue on appeal, why diabetes but not rash was appealed, what impact of appeal will be, and current status of appeal. Updated client file.	0.30
12/9/2021	AODOM	Listen to oral argument in MVA v. Secretary and identify issues relevant to questions in CAVC order.	0.80
1/4/2022	DGIZA	Received and reviewed response from OGC to Court's order regarding definition and application of terms in M21-1 Thailand provision.	1.00
1/18/2022	DGIZA	Received and reviewed Court order assigning case to panel for decision. Drafted memo to the file regarding same. Updated client file.	0.30
1/20/2022	DGIZA	Received and reviewed notice of Court order scheduling oral arguments in case. Updated client file.	0.10
1/31/2022	ZACH	Researched Thailand cases in general and history of VA M21 challenges.	0.70
3/8/2022	DGIZA	Status phone call to client with current status of appeal. No answer, left voicemail. Updated client file.	0.10
3/10/2022	DGIZA	Spoke with client. Explained what upcoming oral arguments will entail. Confirmed contact information and marriage status. Updated client file.	0.20
3/13/2022	ZACH	Began preparation for oral argument. Reviewed all pleadings and record in detail. Worked on oral argument outline.	2.40
3/22/2022	BARBARA	Reviewed OGC and reply briefs in prep for walk through for oral argument	0.60
3/22/2022	ZACH	Continued preparation for oral argument. Focus on cases cited in all pleadings.	3.00

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846

Client: Stover, Mr. Jack L.

			<u>Hours</u>
3/22/2022	ZACH	Continued preparation for oral argument. Focus on M21 provisions related to Thailand herbicide exposure and Secretary's suggested reading. Also research into multiple Latin legal concepts and their use in regulatory and statutory interpretation. Further research into their use in sub regulatory interpretation.	3.00
3/23/2022	AODOM	Prepared for and participated in oral argument walk-through.	1.40
3/23/2022	ZACH	Prepared for first walk through of oral argument. Continued researching interpretation canons of law and the effect of M21 provisions at the agency.	2.90
3/23/2022	ZACH	Participated in oral argument walk through. Continued research concerning all legal issues presented in case. In depth review of photographic evidence submitted by veteran and Internet research into RTAFBs.	3.00
3/24/2022	BARBARA	Discuss oral argument issues with Zach	0.30
3/24/2022	BARBARA	Reviewed BVA decision and Vet statements re: whether he walked along the perimeter	0.30
3/24/2022	BARBARA	Assess OGC's argument as to perimeter; research ejusdem generis and read Thiess to see if argument on that aspect is possible	1.10
3/24/2022	ZACH	Email exchange with Court and VA counsel concerning logistics of oral argument.	0.20
3/24/2022	ZACH	Research re: the meaning of key phrases in case, such as "on or near," "evidence," "perimeter," etc.	2.50
3/25/2022	AODOM	Participated in second oral argument walk-through; discussed questions to be answered during argument.	1.00
3/25/2022	AODOM	Prepared notes regarding reviewed and analyzed memorandum decisions.	1.20
3/25/2022	AODOM	Reviewed and analyzed memorandum decisions regarding M21-1 Thailand to identify trends and themes applicable to issues in this case.	3.00
3/25/2022	BARBARA	Draft possible outline of questions that may be asked at oral argument	0.30
3/25/2022	BARBARA	Walk through oral argument points	1.20
3/25/2022	BARBARA	Read OGC supp pleading, case notes, read RBA pages cited for "near;" analyze issues and develop possible approach	2.50
3/25/2022	ZACH	Continued preparation for oral argument. Further discussion and research concerning the interpretation canons proffered by Secretary.	3.00
3/28/2022	AODOM	Prepared and filed notice of appearance; updated flie.	0.20
3/28/2022	AODOM	Reviewed notes and prepared memo to the file regarding survey of memorandum decisions	0.30
3/29/2022	BARBARA	Research 3.102 argument, note possible questions	1.40
3/29/2022	ZACH	Continued preparation for oral argument. Focused on VA's application of the M21 strictly reading its provisions to deny as many Thailand veterans as possible who were not explicitly "on" the perimeter as defined by the small class of duties found in the M21.	1.50
3/30/2022	AODOM	Participated in first moot and post-moot strategy discusison.	1.40
3/30/2022	BARBARA	Reviewed BVA decision for rationales and reviewed opening brief for arguments	0.40
3/30/2022	BARBARA	Review materials and participate in moot and post-moot discussion	1.50
3/30/2022	ZACH	Participated in first full moot. After moot, participated in strategy session. Continued to review cases concerning Thailand and credibility findings made by BVA. Worked to find plain meaning definitions to counter Secretary's proffered very strict meanings.	2.80
3/30/2022	ZACH	Continued preparation for oral argument. Prepared for first full moot. Drafted opening statement and made outline of all the most relevant record citations. Focus on the photographs of evidence and the Board's credibility findings.	2.90
3/31/2022	BARBARA	Draft memo to the file about argument, including possible reversal path and notes on Hauck and Stegall	1.20

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846

Client: Stover, Mr. Jack L.

			<u>Hours</u>
3/31/2022	ZACH	Continued oral argument prep. Focus on the Board's inconsistent and non-existent analysis of buddy statements and location of sleeping quarters. Continued focus on Secretary's application of ejusdem generis canon and whether that is appropriate for M21, which was allegedly to ensure understandable adjudications at Agency level.	3.00
4/1/2022	AODOM	Prepared for and participated in second moot and post-moot conference regarding strategy.	2.20
4/1/2022	BARBARA	Review RBA for citations as to location, review briefs re: arguments related to maps and hootch; review Buchanan	0.80
4/1/2022	BARBARA	Participate in moot and post-moot discussion	1.20
4/1/2022	ZACH	Participated in second full moot. Additional time spent re: discussion oral argument strategy and responses to Secretary's restrictive treatment of and application of law regarding Thailand veterans.	2.80
4/1/2022	ZACH	Continued oral argument prep. Focus on the Board's inconsistent and non-existent analysis of buddy statements and location of sleeping quarters. Continued focus on Secretary's application of ejusdem generis canon and whether that is appropriate for M21, which was allegedly to ensure understandable adjudications at Agency level. Additional attention paid to overall themes of argument in preparation for second full moot.	3.00
4/2/2022	BARBARA	Consider specific relief and draft possible openings and closings	0.50
4/3/2022	ZACH	Continued preparation for oral argument. Continued review of Secretary's latest response	2.50
4/4/2022	BARBARA	Review and suggest edits to opening and outline	0.70
4/4/2022	ZACH	Continued oral argument preparation. Edited opening statement and refined outline. Reviewed dozen or so most recent memorandum decisions concerning Thailand veterans.	2.90
4/4/2022	ZACH	Reviewed Secretary's latest response and performed research on possible deference to sub-regulatory manuals.	3.00
4/5/2022	AODOM	Prepared for and participated in oral argument, pre-argument conference, and post-argument conference.	2.00
4/5/2022	ZACH	"Last minute" preparation for oral argument, including finalizing opening statement, final research, gathering of thoughts. Participated in oral argument.	3.00
4/11/2022	DGIZA	Phone call to client post-oral arguments to recap the arguments, update file.	0.30
7/11/2022	DGIZA	Began reviewing precedential memorandum decision to ensure all briefed and argued issues were included. Updated client file.	0.60
7/11/2022	DGIZA	Received and reviewed notice of Court issuing favorable precedential decision. Associated copy of decision with client's file. Updated client file.	0.10
7/11/2022	ZACH	Reviewed Court's lengthy favorable precedential decision, pleadings, and notes in case. 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.	1.00
7/13/2022	DGIZA	Finished reviewing precedential decision. Drafted memo to litigation strategy team recapping issues and outcomes on case on appeal. Updated client file.	0.70
7/15/2022	DGIZA	Called client to discuss recent favorable precedential decision, no answer, left voicemail with brief explanation and callback request. Updated client file.	0.20
7/18/2022	DGIZA	Spoke with client about recent precedential Court decision, status of claims, and issues remanded. Updated client file.	0.20
8/2/2022	DGIZA	Received and reviewed notice of Court entering judgment on recent favorable decision. Updated client file.	0.10
8/15/2022	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
8/24/2022	DGIZA	Spoke with client about recent judgment remand letter, timeline remaining on appeal, potential impact of PACT Act, and likely timeline upon remand to Board. Discussed case below with team members working on those proceedings. Updated client file.	0.40
10/4/2022	DGIZA	Received and reviewed notice of Court order entering mandate on recent precedential decision. Updated client file.	0.10

Exhibit A

Time from 10/1/2018 to 10/5/2022

Case No. 288846**Client: Stover, Mr. Jack L.**

			<u>Hours</u>
10/5/2022	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
10/5/2022	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	2.00
10/5/2022	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.40

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
AGALOSKI	1.8	\$ 213.60	\$ 384.48
AODOM	22.8	\$ 209.11	\$ 4,767.71
BARBARA	14.0	\$ 207.03	\$ 2,898.42
BRADLEY	0.6	\$ 213.60	\$ 128.16
DANIELLE	2.2	\$ 213.60	\$ 469.92
DGIZA	46.9	\$ 213.60	\$ 10,017.84
KDEGNAN	1.2	\$ 213.60	\$ 256.32
NSCRIPT	2.8	\$ 180.00	\$ 504.00
PAIGE	14.6	\$ 213.60	\$ 3,118.56
SWRIGHT	0.2	\$ 213.60	\$ 42.72
ZACH	50.0	\$ 213.60	\$ 10,680.00
	157.1		\$ 33,268.13

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'").