

**APPELLANT'S CORRECTED SUPPLEMENT BRIEF**

**UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

**No. 21-3467**

**GARY FERKO,**

**Appellant**

**v.**

**DENIS MCDONOUGH,**

**SECRETARY OF VETERANS AFFAIRS,**

**Appellee**

July 22, 2024

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## EAJA FEE APPLICATION

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. 2412, Petitioner Gery Ferko, through Counsel, moves this Honorable Court to award Petitioner EAJA fees and costs to his attorney.

### Standard of Review

28 U.S.C. 2412 (d)(1)(B) states:

A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

Further, 28 U.S.C. 2412 (d)(2)(B) notes that the successful applicant must have a net worth of less than Two (2) Million Dollars. “Prevailing party” status is defined as any applicant who was awarded "any significant issue in [the] litigation which achieves some of the benefits the parties sought in bringing the suit." *Tex. State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989).

Petitioner must show that the Government was not *substantially justified* in its position. For the Government to prevail that it was justified, it can show it had

a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 563 (1988). *See also Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (re-affirming that the government defendant has the burden to prove that its position was substantially justified).

The Application must be timely filed pursuant to 28 U.S.C. 2412 (d)(1)(B) thirty (30) days from the final Order of the Court. On June 20, 2024, the Court entered Judgment

Counsel is entitled to time reasonably spent before the Court and also for preparation for EAJA fees. *See generally Comm'r, INS v. Jean*, 496 U.S. 154, 162-163 (1990).

Attorney's Fees are based on prevailing market rates as defined by *Loadstar* factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional

relationship with the client; and (12) awards in similar cases. The *Lodstar* rates are then adjusted for inflation<sup>1</sup> and fair market<sup>2</sup> rates.

#### I. Reasonable Fees

EAJA provides that “[t]he amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A).

##### A. Cost-of-Living Adjustment (COLA) to the statutory cap is appropriate.

EAJA provides that “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A). First, a cost-of-living adjustment is appropriate. The Consumer Price Index in Baltimore-Washington, DC, has risen over 95% since Congress imposed the \$125-per-hour cap in March 1996. *See* Attachment A (November 1996=100, May 2024 = 315.667). The Courts routinely grant such adjustments. Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 969 (D.C. Cir. 2004)(citing Gregory C. Sisk, The

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<sup>1</sup> *See Dillard v. Greensboro*, 213 F.3d 1347, 1355 (11th Cir. 2000).

<sup>2</sup> *See Blum v. Stenson*, 465 U.S. 886, 895-96 (1984).

Essentials of the Equal Access to Justice Act (Part Two), 56 LA. L. REV. 1, 128 (1995)). In Role Models, the Court noted “[w]e have granted [cost-of-living] adjustments in other cases ... and have found no case where we denied one.” *Id.* A cost-of-living adjustment is appropriate. Next, we must determine the appropriate cost-of-living adjustment for this matter.

B. COLA must be calculated for the “Relevant Community.”

To determine the cost-of-living adjustment, the court must determine the prevailing market rate for similar work in the relevant community. Conservation Force v. Salazar, 916 F. Supp. 2d 15 (D.D.C. 2013). Normally, “the relevant community is the one in which the district court sits.” Donnell v. United States, 682 F.2d 240, 251, 220 U.S. App. D.C. 405 (D.C. Cir. 1982). The appropriate CPI-U data should be taken from the relevant community where the work was performed – in this case, the District of Columbia – rather than the average data for all U.S. cities. Accordingly, the adjustment to the statutory cap of \$125 should be determined using the CPI-U for the DC-MD-VA-WV region. *See* Attachment A (snapshot of Consumer Price Index – All Urban Consumers, DC-MD-VA-WV with corresponding webpage citation provided in attachment).

C. The statutory rate should be increased by the COLA yearly for each month during which the attorney billed hours.

The COLA should be calculated for *each year* based on the available CPI data. Using a yearly multiplier “strike[s] a reasonable balance between accuracy and ease of calculation.” Gates v. Barnhart, 325 F. Supp. 2d 1342, 1347 (M.D. Fla. 2002). Courts have held that where a yearly CPI is not available, e.g., 2017, the court is to average the months for which a CPI is available. See Jawad v. Barnhart, 370 F. Supp. 2d 1077, 1091 (S.D. Cal. 2005); Knudsen v. Barnhart, 360 F. Supp. 2d 963, 974 (N.D. Iowa 2004); Gates, 325 F. Supp. 2d at 1347. Accordingly, Plaintiff has determined the appropriate statutory CPI capped rate (and the final billable rate) for 2024 for the District of Columbia.<sup>3</sup>

A rate in excess of \$125 per hour for Plaintiff's Counsel, Michael D.J. Eisenberg, is justified based on the increase in the cost of living since the EAJA

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<sup>3</sup> This calculation was obtained by determining the percentage change between the CPI-U for each month that was work done and the CPI-U for March 1996 for the DC-MD-VA-WV region. See Attachments A. The regional CPI-U uses November 1996 as the base (i.e. November 1996 CPI-U = 100). The CPI-U for March 1996 for the same region is not available. Thus, to extrapolate the CPI-U for March 1996 for the relevant community, we determined the percentage change in the national average CPI-U between March 1996 and November 1996. See <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt> (containing national averages for 1996 (base year 1982-84)). We then reduced the DC-MD-VA-WV CPI-U for November 1996 (100) by that percentage (1.82%) to obtain the appropriate CPI-U for March 1996 with a base date of November 1996. Thus, the CPI-U for March 1996 is 98.17 (November 1996 = 100).

was amended in March 1996. The \$125 attorney fee rate, adjusted for inflation for the DC area, is \$247.61 in May 2024. See Bureau of Labor Statistics Data, CPI-U for DC area (Attachment A). This rate was calculated by using the CPI-U for the DC area for inflation from March 1996 through and May 2024. During this period, the consumer price index increased by 157.27 points (the consumer price index was 158.4 in March 1996 and was 315.667 in May 2024); 99.2% increase during this period. The CPI-U increases equal a rate of \$247.61/hr for 2024 for Mr. Eisenberg. The paralegal/law clerk's rate was capped at \$100/hr which is less for the Washington, DC area's prevailing rate.

### DISCUSSION

Respondent's position was not *substantially justified*. While Petitioner, i.e., the prevailing party against the Government, does not have to prove that the Government was not *substantially justified* in its position, the burden is on the Government to prove otherwise<sup>4</sup>. Petitioner argues, through counsel, the following:

Petitioner in this matter was the prevailing party for the case at bar because the Court vacated and remanded the Board of Veterans' Appeals decision that had erroneously treated the one-year deadline for filing a Notice of Disagreement (NOD) as a jurisdictional bar. This matter was fully briefed before a Panel in this Court, Oral arguments were held, and the Panel *sua sponte* referred the matter to the

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<sup>4</sup> See 28 U.S.C. 2412 (d)(1)(B).

Court *en banc*. The Court as a whole found (in concurring opinions with no docents) as Appellant's Counsel had argued that the Veteran's NOD was for all intents and purposes timely. The Court clarified that the deadline is a mandatory claim-processing rule, not a jurisdictional barrier, and that the Board should have considered the Appellant's request for an extension based on "good cause" under 38 C.F.R. § 3.109(b). By successfully challenging the Board's legal error and obtaining a remand for further consideration, the Appellant achieved a favorable outcome, thereby qualifying as the prevailing party eligible for EAJA fees.

Petitioner, a Veteran of the United States Military, asserts through Counsel that he has a net worth value of less than TWO MILLION DOLLARS (\$2,000,000.00). Counsel for the Appellant extolled over than 86 hours<sup>5</sup> on this matter for a total of \$22,136.35 billed to the Federal Government.<sup>6</sup> Counsel's law clerk extolled over 75 hours on this matter for a total of \$7,680.

In the case at bar, Counsel has not been paid for the bulk of his services. But, now that Petitioner, due to his Counsel's assistance, is successful here in this Court, said Counsel is entitled to his reasonable attorneys' fees accrued from this Court case.

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<sup>5</sup> See Attachment B. Counsel did not charge for the time it took to prepare this Motion.

<sup>6</sup> See fn 5.



Appellant's Counsel has attached the appropriate adjustments for inflation and market rate of his *Lodstar* Rates regarding his EAJA Fees. See Attachment A. This adjustment also incorporates over 20 years of experience (since graduating law school – Class of 2002) and as an attorney located in Washington, DC. A representative list of some of Mr. Eisenberg's prevalent cases where EAJA fees were awarded include but not limited to:

- Disciplinary Appeals Board (Final Board Action June 11, 2012) In the Matter of Gwendolyn Moore, R.N. (v. Department of Veterans Affairs)
- Tina Neville, Complainant v. Michael Donley, Secretary Department of the Air Force. EEOC Case No. 460-2009-00075X. Agency No. T-0885-TXF-01-08-GH
- Disciplinary Appeals Board (Final Agency Action April 25, 2013) In the Matter of Stanley G. Kinkaid, M.D., (v. Department of Veterans Affairs)

Wherefore, Appellant, through Counsel, Moves this Honorable Court to award him Counsel reasonable attorneys' fees (along with paralegal fees) in the amount of \$29816.35 fees and \$4,949.00 <sup>7</sup>for costs.

Total Due: \$34,765.35

Respectfully Submitted,

/s/ Michael D.J. Eisenberg  
Michael D.J. Eisenberg  
Law Office of Michael D.J. Eisenberg  
700 12<sup>th</sup> Street, NW STE 700

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<sup>7</sup> See Attachment C.

Washington, DC 20005  
Attorney for Petitioner, Gary Ferko

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that July 22, 2024, a copy of the foregoing has been served on all parties e-file.

Respectfully Submitted,

/s/ Michael D.J. Eisenberg

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