Vacated by CAHO (2/23/89) Ref. No. 44

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

United States of America, Complainant, v. Mester Manufacturing Co., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 87100001.

# DECISION AND ORDER ON APPLICATION FOR AWARD OF ATTORNEY'S FEES AND OTHER EXPENSES

MARVIN H. MORSE, Administrative Law Judge

Appearances: MARTIN D. SOBLICK, Esq. ALAN S. RABINOWITZ, Esq. IGNACIO P. FERNANDEZ, Esq., and MICHAEL J. CREPPY, Esq., for Complainant. PETER N. LARRABEE, Esq., for Respondent.

TABLE OF CONTENTS

I. Introduction, including procedural background.

Procedures adopted by the Department of Justice implementing the Immigration Reform and Control Act of 1986 (IRCA), particularly section 101 which enacted section 274(A) of the Immigration and Nationality Act, 8 U.S.C. 1324a, provide an option to an employer confronted with an assessment of civil money and other penalties by the Immigration and Naturalization Service (INS, or the government) for alleged violation of employer sanctions requirements enacted by that section. The employer may elect to comply with the assessment notification, denominated by INS as a notice of intent to fine (NIF), or may exercise the statutory opportunity to obtain a hearing before an administrative law judge. Title 8 U.S.C. section 1324a(e)(3) makes clear that if the employer requests a hearing, the penalties are abated pending outcome of the hearing procedure thus initiated.

In the instant case, INS served a notice of intent to fine, dated October 2, 1987, on Mester Manufacturing Company (Mester, respondent, or applicant); Mester requested a hearing. The proceeding was initiated by INS when it filed its November 16, 1987 complaint against respondent; the prior notice of intent to fine and request for hearing were incorporated by reference into the complaint.

By notice of hearing issued November 25, 1987, the Office of the Chief Administrative Hearing Officer (OCAHO) advised Mester of the pendency of the action thus initiated. After pretrial procedures, an evidentiary hearing, and post-hearing procedures, my decision and order, issued June 17, 1988, found in favor of the government as complainant on six counts and against the government on the remaining eleven counts. By action dated July 12, 1988, the Chief Administrative Hearing Officer adopted that decision and order.

Respondent, by an application dated August 10, 1988, filed August 11, with attachments in support and accompanied by a memorandum of points and authorities, asserts it was the prevailing party on the eleven counts found against the government and seeks an award of fees and costs in the sum of $25,801.03. Respondent's application is before me pursuant to the Equal Access to Justice Act (EAJA), Pub. L. 96-481, October 21, 1980, 94 Stat. 2325 as amended by Pub. L. 99-80, Secs. 1(a)-(e), August 5, 1985, 99 Stat.

183 and Pub. L. 99-509, October 21, 1986, 100 Stat. 1948, codified at 5 U.S.C. 504.

Shortly before filing the EAJA application here, respondent on August 1, 1988, lodged a petition for review of the decision and order of the administrative law judge in the United States Court of Appeals for the Ninth Circuit, case no. 88-7296. Subsequently, by a pleading filed September 12, 1988, the government oppose respondent's EAJA claim that it was the ``prevailing party.'' The government contended, alternatively, that if respondent were held to be the prevailing party, the government's position, nevertheless, was ``substantially justified'' so as to defeat the application, and argued also that the application was defective. The government did not oppose or demur to the application on the ground that an appeal was pending in the circuit court.

EAJA, as amended, provides at 5 U.S.C. 504(a)(2) that when the United States appeals the underlying merits of an administrative adjudication, the EAJA application before the agency abates until ``a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal. . . .'' The case at hand is not the conventional one where an agency adjudication finds in favor of a party other than the United States, and the United States appeals; here, the results before the administrative law judge were mixed, and the respondent appealed. No part of the underlying decision forming the basis for the EAJA application is also before the court of appeals. See 5 U.S.C. 504(c)(1).

The rationale for staying the application where the United States appeals and may obtain a reversal does not pertain here. Nevertheless, that provision, although not literally applicable, suggests that one or another party might have preferred I stay my hand pending disposition of the appeal. Accordingly, I issued on October 20, 1988, an Order Inviting Comments on Suspension of Respondent's Application for Attorney's Fees and Other Costs. In response, neither the INS nor respondent took exception to disposition by me of the application without awaiting the outcome of the Mester appeal in court. Instead, both parties reiterated their basic positions on the merits of respondent's claim to fees and other costs.

## II. Employer sanctions proceedings before administrative law judges are adversary adjudications: EAJA applies to proceedings under 8 U.S.C. 1324a.

I suggested in the October 20, 1988 order and speculated in the June 17, 1988 decision and order (at page 5) that EAJA relief was

presumptively available under 8 U.S.C. 1324a to a prevailing party other than the United States. However, the present Mester application presents a question of first impression on the applicability of EAJA to administrative adjudications under section 101 of IRCA.

Title 8 U.S.C. section 1324a, section 101 of IRCA, is silent as to fees and costs in contrast to 8 U.S.C. 1324b(h) which provides for fee awards under IRCA anti-discrimination provisions. Considering the particularized fee shifting provision of section 1324b(h) for section 102 cases, the silence of section 101 is, nevertheless, consistent with availability of EAJA in light of the requirement that hearings be held ``in accordance with the requirements of'' 5 U.S.C. 554, a requirement which I summarily concluded in the October 20 order triggers EAJA's applicability.

Unmistakably, moreover, the differences between sections 101 and 102 of IRCA are numerous. Compare, e.g., as to finality of administrative law judge decisions, subsections 1324a(e)(6) and 1324b(g)(1), and, as to judicial review, subsections 1324a(e)(7) and 1324b(i). The discrepancies between the two sections are sufficient to deny any predicate for concluding that introduction of a specific fee shifting mechanism in section 102 overtakes the usual rule that silence (as in section 101) on fee shifting necessarily implies applicability of EAJA wherever 5 U.S.C. 554 is implicated. There is no basis for a contrary inference to be drawn from IRCA or its legislative history.

Title 8 U.S.C. section 1324a(e)(3)(B) requires that in an employer sanctions case ``[t]he hearing shall be conducted in accordance with the requirements of '' 5 U.S.C. 554. EAJA provides for an award of fees and other expenses to a prevailing party other than the United States. 5 U.S.C. 504(a)(1).

Title 5 U.S.C. section 504(a)(1) limits availability of EAJA in an administrative proceeding to a case involving an agency ``adversary adjudication.'' Section 504(b)(1)(C) informs that an ``adversary adjudication means'' . . . [inter alia] ``an adjudication under'' 5 U.S.C. 554 while 8 U.S.C. 1324a(e)(3)(B) refers not to a hearing under 554 but rather ``in accordance with the requirements of section 554. . . . '' I am unaware, however, of any rationale of which to differentiate between the two statutory formulae, ``under as against in accordance with.'' I conclude, therefore, that we are confronted with a distinction without a difference.

The conclusion that EAJA applies to adjudications under section 101 of IRCA is consistent also with the view of the original version of EAJA (similar in all relevant respects to the current reenactment) expressed by the Chairman of the Administrative Conference of the United States (ACUS) in the preamble, final rulemaking,

``Equal Access to Justice Act: Agency Implementation,'' 46 Fed. Reg. 32900, et seq., June 25, 1981. Those views are 504(c)(1) to establish ``uniform procedures for the submission and consideration of applications'' under EAJA only ``[a]fter consultation with the Chairman [of ACUS] . . . '' 5 U.S.C. 504(c)(1). (Emphasis added.) The advice to agencies by ACUS is exactly on point, suggesting they take ``a broad interpretation of the reference to adjudications `under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit.'' 46 Fed. Reg. at 32901, supra.

There is additional support for the conclusion that EAJA applies to section 101 IRCA proceedings before administrative law judges in the recent holding by the Ninth Circuit that ``subsection 504(a) of the EAJA applies to deportation proceedings . . . , Escobar Ruiz v. I.N.S., 813 F.2d 283, 293 (9th Cir. 1987), Opinion On Rehearing of Escobar Ruiz v. I.N.S., 787 F.2d 1294 (9th Cir. 1986). In its 1987 Opinion On Rehearing, the court noted that its initial decision ``is the first by any court to consider the question whether the EAJA applies to immigration proceedings . . . ,'' 813 F.2d at 286. The question in the case at hand presents an affortiori case, at least in the Ninth Circuit, in light of the court's acknowledgment, id. at 287, that the Supreme Court has held ``that the hearing provisions of the A[dministrative] P[rocedure] A[ct] do not apply to deportation hearings.'' See Marcello v. Bonds, 349 U.S. 302, 310 (1955).

Any lingering doubt that in the Ninth Circuit our case might not fit within EAJA is resolved by the decision, en banc, which affirmed the 1987 panel, Escobar Ruiz v. I.N.S., 838 F.2d 1020, 1030 (En Banc, 1988):

> Deportation proceedings are covered by the EAJA because they are required by statute to be determined on the record after opportunity for a hearing and therefore constitute adjudications under section 554 of the APA.

Application of the court's rationale compels a finding that EAJA applies to the current case. Unlike the statutory treatment of deportation proceedings which is silent as to the APA, the hearing provision of section 1324a, as already noted, commands that ``[t]he hearing shall be conducted in accordance with the requirements of section 554 of Title 5,'' United States Code, 8 U.S.C. 1324a(e)(3)(B). It is axiomatic, considering the interplay between 5 U.S.C. 554 and 8 U.S.C. 1324a(e)(3) that employer sanctions proceedings are ``required by statute to be determined on the record after opportunity for a hearing . . . '' Escobar Ruiz v. I.N.S., 838 F.2d at 1030; see 5 U.S.C. 554(a).

In view of all the foregoing, I find and conclude that EAJA applies to proceedings before administrative law judges under 8

U.S.C. 1324a because those proceedings are ``adversary adjudication[s]'' within the meaning of 5 U.S.C. 504(b)(1)(C).

III. Absence of Department of Justice implementation of EAJA, as reenacted, is no bar to recovery of fees and costs.

The Department of Justice has established procedures for the submission and consideration of EAJA applications at 28 C.F.R. Part 24. Pending amendment to the rules establishing those procedures in order to add proceedings under section 101 of IRCA, 8 U.S.C. 1324a, the rules provide a guideline for the disposition of such claims. See 28 C.F.R. 24.103(a) (the list not yet amended to include employer sanctions proceedings, and not updated to reflect the reenactment of EAJA); see particularly 28 C.F.R. 24.104. Part 24 is the department's implementation of the requirement to provide procedures with respect to covered fee and cost applications arising out of adversary adjudications required by statute to be conducted by the department under 5 U.S.C. 554. Certainly, it would be unjust to preclude EAJA entitlement to fee shifting because the department had not yet perfected an implementing mechanism.

I hold that the procedures available to prevailing litigants in proceedings catalogued at 28 C.F.R. 24.103 (1988) are no less available to respondents in proceedings pursuant to 8 U.S.C. 1324a. Failure to update the regulation to reflect the reenactment of EAJA is no bar to recovery under EAJA. That conclusion is consistent with the view of the Ninth Circuit which in Escobar Ruiz v. I.N.S., 838 F.2d 1020 (9th Cir. 1988), supra, held that EAJA is applicable to deportation proceedings dehors the necessity for any regulation on implementation of EAJA.

IV. The application is timely: the EAJA 30 day statutory limitation does not begin to run until the earlier of either the action by the Attorney General to vacate or modify the underlying decision and order or expiration of the 30 day period for administrative appellate review.

EAJA provides that the ``adjudicative officer'' of the agency for the purpose of a decision on an application to recover fees and other expenses is ``the deciding official . . . who presided at the adversary adjudication.'' 5 U.S.C. 504(b)(1)(D); I am that deciding official. In order to qualify for an EAJA award, Mester must establish that it was a party whose application was timely filed. No issue has been raised by the INS response in opposition to the application with respect to that threshold consideration, nor does the record suggest any infirmity in that respect, and I so find.

It may be argued, however, that the decision and order of the administrative law judge is the ``final disposition in the adversary adjudication'' following which a party seeking an award of fees and other expenses must submit its EAJA application (under 5 U.S.C. 504(a)(2)) within thirty days. The rules of practice and procedure governing proceedings under section 101 of IRCA add support to such an argument by providing as follows (28 C.F.R. 68.52(a)(1)):

> If the Chief Administrative Hearing Officer issues no order, the Administrative Law Judge's order becomes the final order of the Attorney General. If the Chief Administrative Hearing Officer modifies or vacates the order, the order of the Chief Administrative Hearing Officer becomes the final order.

In the case at hand the June 17 decision and order not having been modified or vacated it may be suggested that it constitutes the final disposition of the adversary adjudication which, under EAJA, triggers the thirty day filing requirement. If so, the pending application is clearly out of time, having been filed more than thirty days after June 17, i.e., on August 11, 1988. This is so because, as the courts have made clear, the thirty day limitation on filing timely EAJA fee applications is jurisdictional, see, e.g., Columbia Mfg. Corp. v. N.L.R.B., 715 F.2d 1409 (9th Cir. 1983); J.M.T. Machine Co., Inc. v. United States, 826 F.2d 1042 (Fed. Cir. 1987).

To hold an EAJA application in a section 101 case untimely because not filed within thirty days of a final disposition, viz, the administrative law judge's decision and order, would not, however, comport with common sense or sound administrative adjudication. The IRCA regime for administrative appellate review of the judge's decision and order provides that the trial judge's decision and order becomes final unless within thirty days it is modified or vacated by the Attorney General. That regime renders the parties and the forum unable within that time frame, generally, to know whether the outcome of the litigation as adjudicated by the administrative law judge is in fact the outcome as determined upon administrative appellate review. In the section 101 context it is impractical, therefore, for the thirty day periods to run concurrently; a contrary conclusion would invite anticipatory filings.

It follows that generally the prevailing party before the agency cannot be identified until the period for administrative appellate review has run its course, i.e., thirty days after the decision and order of the administrative law judge. Accordingly, the thirty day limit on EAJA applications arising out of proceedings under 8 U.S.C. 1324a, must be understood not to commence until the statutory period for administrative appellate review under 8 U.S.C. 1324a(e)(6) has run its course.

The conclusion that the thirty day periods provided by the two statutes run consecutively is subject to the caveat that if the statutory action of the Attorney General is taken prior to the end of the thirty days authorized for administrative review, the date of that action presumably triggers the thirty day period in which a timely EAJA application may be filed. No reason comes to mind not to treat the commencement of the EAJA limitations as running from the earlier of either (1) the thirtieth day after the administrative law judge's decision or (2) the date of the Attorney General's action to vacate or modify upon administrative appellate review of that decision.

Applying these principles to Mester, it is clear, and I so hold, that the respondent's EAJA application was timely filed, If there had been no action upon administrative appellate review, an application would have been timely if filed within thirty days after the thirtieth day following the decision and order dated June 17, 1988. In fact, the application was filed on August 11, 1988, a date within thirty days of the July 12, 1988 action upon administrative appellate review.

In prescribing that the Attorney General's order and not the trial judge's ``shall become a final order'' for purposes of administrative finality in section 101 cases only where the Attorney General ``modifies or vacates the decision and order'' of the judge, 8 U.S.C. 1324a(e)(6), the statute does not preclude other action by the Attorney General upon exercise of the administrative appellate review authority.

The statute does not foreclose the opportunity in exercise of that authority for the Attorney General to reflect departmental policy in respect to a particular decision and order under review by, for example, adopting or affirming it. See, e.g., 28 C.F.R. 68.52(a) authorizing the Chief Administrative Hearing Officer, as the Attorney General's delegate to ``issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.'' (Emphasis added.) In any event, regulatory introduction of a power to adopt or affirm does not affect the finality of the judge's decision and order within the meaning of IRCA which contemplates that only if the Attorney General modifies or vacates does it lose its role as ``the final agency decision and order,'' 8 U.S.C. 1324a(e)(6).

Since the EAJA application was filed within thirty days of July 12, I have noted but do not need to answer the question whether an action on review which affirms or adopts the decision and order of the trial judge cuts short the EAJA filing period to the same extent as would an action which modifies or vacates such a decision and order. I hold only that an EAJA application arising

out of a proceeding before an administrative law judge under 8 U.S.C. 1324a is timely if filed within thirty days after the thirtieth day following a judge's decision and order which, not having been modified or vacated by the Attorney General, is ``the final agency decision and order . . .,'' 8 U.S.C. 1324a(e)(6), for purposes of administrative finality under IRCA but which is not the ``final disposition in the adversary adjudication . . .,'' 5 U.S.C. 504(a)(2), for purposes of EAJA.

V. The administrative law judge decision on the EAJA application in a proceeding under 8 U.S.C. 1324a is the final administrative action subject only to judicial review.

An additional procedural consideration which must be resolved in this first EAJA disposition under 8 U.S.C. 1324a is the question of finality of the trial judge's decision on the EAJA fee application. The Equal Access to Justice Act, as codified, provides that ``[t]he decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.'' 5 U.S.C. 504(a)(3). EAJA, in the next sentence, explains that ``[t]he decision of the agency on the application for fees and other expenses shall be the final administrative decision . . .,'' id. The statute, however, fails to require or otherwise instruct whether the agency is expected to provide administrative appellate review of the trial judge's EAJA decision.

The Department of Justice regulatory implementation is not controlling because according to its terms it applies only to adjudications pending on or before September 30, 1984, and therefore, if for no other reason, omits any mention of IRCA proceedings. In addition, it fails to provide a clear answer to the question whether administrative appellate review applies to EAJA applications in proceedings under 8 U.S.C. 1324a. The section on administrative review, 28 C.F.R. 24.307, concludes with the statement that ``[t]he Department will issue the final decision on the [EAJA] application.'' Doubt as to the effect of that provision, assuming its applicability to IRCA proceedings, on the Mester case is cast by the sentence immediately preceding (id.): ``The decision of the adjudicative officer will be reviewed to the extent permitted by law by the Department in accordance with the Department's procedures for the type of proceeding involved.'' (Emphasis added.)

No conclusion to be reached on the question of finality of the trial judge's decision on EAJA fee applications in IRCA proceedings can be free of doubt. It may be suggested, for example, that the IRCA authorization to the Attorney General to modify or

vacate the underlying decision and order ``permits'' review of an EAJA fee decision to like effect. In addition, as discussed above, the OCAHO rules of practice and procedure, 28 C.F.R. 68.52(a), constituting, in the lexicon of the outdated implementation of the earlier EAJA at 28 C.F.R. 24.307, ``the Department's procedures for the type of proceeding involved,'' contemplate that in IRCA section 101 proceedings the review ``permitted by law'' may lead also to ``an order which'' adopts or affirms the judge's decision in the substantive proceeding. For the reasons discussed below, however, I am unable to find in IRCA any implication that EAJA decisions arising out of section 101 cases are subject to administrative appellate review.

The hearing mechanism of section 101 is not the typical one where an agency required to conduct adjudications under the Administrative Procedure Act may achieve that result by either appointing administrative law judges to conduct its hearings or by having the head(s) of the agency preside. In our case no person other than an administrative law judge is empowered to conduct the hearing, 8 U.S.C. 132a(e)(3)(B), and the decision and order of the judge becomes the final agency decision and order except in the limited situation where the Attorney General modifies or vacates the judge's decision and order.

Given the direct statutory grant to the judge to conduct the hearing and to render a decision and order which becomes the final agency action, subject only to the authority of the Attorney General to modify or vacate within thirty days after the judge acts, it may be supposed that duties which devolve upon the judge integral to the adjudicative function under section 101 are only subject as a matter of law to administrative appellate review to the extent provided (gratuitous actions to affirm or adopt aside).

There is additional support for the conclusion that that the department, not having taken advantage of opportunities to require administrative review has failed to express a preference for that review in cases such as ours.

In its original form, EAJA provided, as does the reenacted, current version that the ``decision of the adjudicative officer . . . shall be made a part of the record containing the final decision of the agency . . .,'' 5 U.S.C. 504(a)(3)(former). The statute was silent as to administrative appellate review, and continued the following provision for judicial review (5 U.S.C. 504(c)(2)(former)):

> A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from

the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion. (Emphasis added.)

On circulating draft model regulations for federal agency implementation, ACUS contemplated that an adjudicative officer's decision would be reviewable by the agency under ordinary standards, but provided that ``. . . the decision as to certain issues explicitly assigned in the Act to the adjudicative officer is reversible only for abuse of discretion.'' See, preamble to final rule promulgating model rules, ``Equal Access to Justice Act: Agency implementation,'' 46 Fed. Reg. 32900, 32910, June 25, 1981.

Following receipt of public comment, ACUS rejected the use by analogy of the ``abuse of discretion'' standard of judicial review ACUS recited that ``[t]he Justice Department, while expressing no opinion, noted that the Act can be read to provide that the adjudicative officer's decision is unreviewable except in court.'' Acknowledging that ``. . . the Act can admittedly be interpreted as the Justice Department has suggested . . .,'' id. at 32910, ACUS nevertheless concluded that ``[o]n reflection, we agree with those agencies that believe the standard of review in 5 U.S.C. 557 applies to decisions on applications for attorney fees, and does not include a special standard of review.'' Id. Clearly, ACUS had in mind ``. . . customary agency practice in adjudications under the Administrative Procedure Act. . . .'' Id.

Asserting at the outset of its rulemaking that EAJA mandated the establishment of uniform procedures, ACUS conceded that ``. . . the Act does not empower the Chairman to compel other agencies to adopt specific procedures or interpretations. . . .'' Id. at 32900. In response to questions raised concerning ``the section's provision that agency review is discretionary . . .,'' id. at 32910, the commentary expressed the belief that ``these concerns are related to problems unique to particular agencies and situations, and should accordingly be handled by the agencies involved.'' Id. Model section 0.308 authorizes both the applicant and agency counsel to seek review and contemplates sua sponte review on the agency's initiative, absent which after a time certain, the trial judge's decisions becomes final.

This department, given the option of adopting the model provision published by ACUS, rejected the first opportunity to make clear that the trial judge's actions was reviewable. Instead of adopting the ACUS model, section 0.308, the department chose to go its own way, consistent, however, with the ACUS invitation to do so.

This Justice Department's regulatory response must be understood in context of its previously expressed caveat that EAJA did

not contemplate administrative appellate review and in light of the ACUS commentary: The final agency action for purposes of qualifying for judicial review is that of the department, not the adjudicative officer, ``to the extent permitted by law . . . in accordance with the Department's procedures for the type of proceeding involved.'' 28 C.F.R. 24.307. (Emphasis added.)

Reenactment of EAJA and the consequential model rules published by ACUS provided another opportunity for the department to make clear any intent it might have to mandate administrative appellate review. The reenactment added new text to 5 U.S.C. 504(a)(3), as follows: ``[t]he decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.'' Pub. L. 99-80, sec. 1(a)(3), Aug. 5, 1985. The House Judiciary Committee explained this provision, House Report (Judiciary Committee) No. 99-120, Part I (page 14):

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency. (Emphasis added.)

The amendment being exactly consistent with its prior position as reflected at section 0.308 of the model rules, there was no need for the ensuring ACUS rulemaking to amend section 0.308 generally. ACUS, however, in its implementation of the amended law, by which for the first time EAJA became applicable to certain proceedings before agency boards of contract appeals, recognized that such decisions are not administratively reviewable.

In its proposed rulemaking, ``Equal Access to Justice Act: Agency Implementation,'' 50 Fed. Reg. 46250, November 6, 1985, ACUS suggested as follows:

> ``[i]n these circumstances, it would be inappropriate to interject a level of ``agency'' review when the ``agency'' does not review the substantive decisions involved. Thus, we believe the final decision of the ``agency'' referred to in Pub. L. 99-80 should, in this case, be the final decision of the agency board of contract appeals.

Following public comment, ACUS, recognizing the reality of contract appeals practice and procedure, recommended ``that the . . . boards' EAJA decisions be unreviewable by agencies. . . .'' ``Model Rules for Implementation of the Equal Access to Justice Act,'' 51 Fed. Reg. 16659, 16664, May 6, 1986. ACUS left undisturbed the subsisting section 0.308, adding only an alternative for use by contract appeals boards to authorize the parties to seek reconsideration. Id. at 16668.

Promulgation in May 1986 of model rules in recognition of the reenacted EAJA provided a further opportunity to this department

to make more explicit its reasons, if any, for not conforming to the model on the subject of administrative appellate review. And, of course, a further opportunity, as well as a continuing one, was provided by enactment of IRCA. However, 28 C.F.R. Part 24 has not been amended to accommodate IRCA.

As already noted, the direct authorization of IRCA to administrative law judges to conduct hearings is atypical. Given that statutory arrangement, disposition of EAJA fee applications in IRCA proceedings do not inherently fit the paradigm. The House Judiciary Committee report, as quoted above, recognized that generally the trial judge's decision is not final until adopted by the agency. Cases under 8 U.S.C. 1324a do not fit that general rule. ACUS has recognized that ``problems unique to particular agencies and situations'' should be handled outside the model rules. 46 Fed. Reg. at 32910.

Accordingly, absent clear guidance in statute or regulation, I conclude that the decision of the administrative law judge, as the adjudicative officer seized with the case, is not subject to administrative appellate review but is, instead, in the final decision on the application for EAJA fees and costs in a proceeding arising under 8 U.S.C. 1324a. [In this decision and order the terms costs and expenses are used interchangeably.]

VI. The Mester application satisfies EAJA requirements.

Title 5 U.S.C. section 504(a)(1) provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

Following an ``adversary adjudication,'' the burden of proof falls on the applicant, here the respondent, to demonstrate that it meets the statutory prerequisites so as to establish a prima facie case of eligibility for an award of attorney's fees and costs under EAJA. First, the applicant must establish its status as a ``party'' as defined by 5 U.S.C. 504(b)(1)(B). Second, the applicant must show that it is a ``prevailing party,'' 5 U.S.C. 504(a)(2). Third, the applicant must show ``the amount sought, including an itemized statement from any attorney, agent, 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.'' Id. Fourth, the applicant seeking an award of fees must also allege that ``the position of the agency was not substantially justified.'' Id.

If the applicant successfully establishes a prima facie case of eligibility for fees and costs, the burden of proof shifts to the agency to prove that an attorney's fee award should not be made under EAJA. See Charter Management, Inc. v. N.L.R.B., 768 F.2d 1299 (11th Cir. 1985). The agency can meet its burden and thus foreclose an award of fees by demonstrating either that its position was ``substantially justified or that special circumstances make an award unjust.'' 5 U.S.C. 504(a)(1).

A. Mester is a party within the meaning of EAJA.

In the instant action, the respondent in its August 10, 1988 application asserts by a declaration of Mester's chief executive officer that it is a ``party'' within the meaning of 5 U.S.C. 504(b)(1)(B). INS has not objected to the assertion in the declaration that the applicant's net worth was less than one million dollars in October 1987. That amount, neither objected to by INS nor inconsistent with the evidence of record in the underlying proceeding, is accepted as being within EAJA jurisdictional limits. 5 U.S.C. 504(c)(1)(B).

In its application, however, the respondent fails to address the requirement that it ``had not more than 500 employees at the time the adversary adjudication was initiated . . ., '' 5 U.S.C. 504(b)(1)(B). This omission is mitigated by the evidentiary record: As mentioned in my decision and order (at page 17) the number of ``employees at [respondent's] El Cajon [facility] average about 70 in number, sometimes ranging between 80 and 90.'' In addition, there were ``150 or so'' employees at respondent's facility in Tijuana, Mexico. (Tr. 684). Consequently, I am satisfied that respondent had less than 500 employees at the time the adversary adjudication was initiated.

Respondent includes as an attachment to its August 10, 1988 application a five page summary itemizing the hours expended and hours for which reimbursement of fees and costs is sought. Without suggesting that the filing here was substantively deficient, it is obvious that it is lacking in that it failed to satisfy the detailed requirements for submission of information.

Both counsel and the judge have been required to practice and decide this first EAJA fee application in a new venue in reliance on guidelines and precedents abstracted from other contexts. While conceding the dearth of controlling guidance, it will be helpful, pending issuance of current departmental regulations, if applicants, and the INS in response, were to focus on the detailed instructions in the statute and of 28 C.F.R. Part 24, so far as they inform as to the content expected in EAJA applications. In the

future, I will expect greater adherence to those instructional sources than I have demanded in this proceeding.

B. Mester is a prevailing party within the meaning of EAJA.

INS does not agree with the assertion by Mester that the latter is a prevailing party. INS maintains that Mester cannot qualify as such by virtue of dismissal on the merits of counts 4 and 8 for insufficient evidence and dismissal of the paperwork counts 8-17 based upon a finding of failure to state a cause of action upon which a determination may be made of a violation of 8 U.S.C. 1324a(b).

Although EAJA itself fails to explicitly define what it means to be a ``prevailing party,'' both case law and legislative history are instructive. Case law under analogous fee shifting statutes demonstrates that a party may be deemed ``prevailing'' even though it succeeded on only some of its claims for relief. See Hensley v. Eckerhart, 461 U.S. 424 (1983) (partial or limited success in asserting claims held to affect amount of reasonable attorney's fees awarded under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, but not to foreclose any entitlement to award because of resulting failure on other claims). In assessing what standard was to be utilized in determining ``prevailing party'' status under 42 U.S.C. 1988, the Supreme Court in Hensley noted that: ``[a] typical formulation is that `plaintiffs may be considered ``prevailing parties'' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' '' 461 U.S. at 433. (Citation and footnote omitted.)

In the memorandum supporting its application for fees and costs, Mester asserts that in determining ``prevailing party'' status the focus is on whether relief sought has been primarily obtained. In support, Mester cites Iranian Students Association et al. v. Edwards, 604 F.2d 352 (5th Cir. 1979) (where a group of students which had obtained a temporary restraining order enjoining a university's interference with the students' planned demonstration and which subsequently entered into a consent agreement approved by the district court was held to be a ``prevailing party'' within the meaning of 42 U.S.C. 1988), and Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986).

In Mantolete, the defendant sought reconsideration of an interim award of attorney's fees to the plaintiff, an unsuccessful applicant for a position with the Postal Service. The defendant contended that the plaintiff was ineligible for fee shifting because she had failed to achieve ``prevailing party'' status: the issue of whether the

defendant had improperly denied her a job due to her handicap had yet to be determined by the district court (on remand following the court of appeal's affirmance in part, reversal in part and remand, and holding that the lower court should have applied more stringent standards in making its determination). On motion for reconsideration of the interim attorney's fee award, the court of appeals rejected the defendant's argument, and upheld the fee award: ``[a]lthough this particular issue remains to be decided, Ms. Mantolete has already prevailed on several significant issues that directly benefit her and other handicapped individuals.'' 791 F.2d at 786.

Similarly, in vacating and remanding the district court's denial of plaintiff's attorneys' request for an award of attorney fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. 1988, and Equal Access to Justice Act, 28 U.S.C. 2412, the Eleventh Circuit in Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985), stated that:

> [t]he prevailing party test is ``whether he or she has received substantially the relief requested or has been successful on the central issue,'' Watkins v. Mobile Housing Board, 632 F.2d 565, 567 (5th Cir. Unit B 1980), or, stated another way, whether ``plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation.'' Robinson v. Kimbrough, 652 F.2d 458, 465 (5th Cir. 1981).

In Martin, where plaintiffs' statutory claims to benefits under the Aid to Families with Dependent Children (AFDC) program were mooted by remedial action taken by the defendant subsequent to the lawsuit, the court expressed no doubt that plaintiffs were prevailing parties. The court recognized that a party may be considered to have prevailed where litigation is successfully resolved by consent decree, an out-of-court settlement, voluntary cessation of an unlawful practice, or other mooting of a case where a party has vindicated its right. The Martin court, went on to state that (773 F.2d at 1149):

> Nothing in the language of [section] 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that ``for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'' S. Rep. No. 94-1011, p. 5 (1976); [1976 U.S. Code Cong. & Ad. News 5908, 5912.] (Citation omitted.)

In Mester, the government in its Opposition cites Miller v. Staats, 706 F.2d 336, 343, n. 38 (D.C. Cir. 1983), for support of its position that victories on insignificant issues are generally not sufficient to justify an award of attorney's

fees. The footnote cited by the government does suggest that the net result obtained in some cases might be so insignificant as to render it unjust to award attorney's fees. In the case at hand, of course, the counts on which I held against the government were hardly insignificant, either on a relative or an absolute basis, comprising one of seven unlawful employment charges and all ten paperwork charges.

The principal text of the court's opinion and the result reached by the court in Miller, however, are far more instructive for our purposes. Upon remanding the case to the district court for reconsideration of the petition for attorney's fees under Title VII, the Miller court relied on the ``prevailing party'' test articulated in Commissioners Court of Medina County, Texas v. United States, 683 F.2d 435 (D.C. Cir. 1982) and stated as follows (706 F.2d at 340-41):

> In Medina the court endorsed granting attorney fees to defendant-intervenors whose case had become moot under the Voting Rights Act of 1965. Medina outlined a liberal, two-pronged test for determining fee claimants' ``prevailing party'' status. In the first prong the court must determine that the fee claimant has substantially received the relief sought. Id. at 440. Fee claimants can satisfy this inquiry by showing that the ``final result represents, in a real sense, a disposition that furthers'' their interests. Id. at 441. In the second prong the court must determine that ``the lawsuit was a catalyst motivating defendants to provide'' the requested relief, id. at 442 (emphasis in original), or that the ``lawsuit was a necessary factor in obtaining the relief.'' Id. To satisfy this second prong fee claimants must demonstrate that their claims were ``not wholly insubstantial'' and that these claims contributed to their obtaining the resulting relief. Having satisfied these two prongs, fee claimants are entitled to attorney fees unless the court finds special circumstances that would render the award unjust. Id. (Footnotes omitted.)

The D.C. Circuit in Miller, supra, 706 F.2d at 341-42, noted that the district court found that the plaintiffs had achieved their objective and were the cause of the results obtained, but had erroneously denied them fee shifting benefits. Finding that the district court had applied an improper standard to the petition for attorney fees by requiring claimants to prove that the defendants were guilty of the alleged discrimination where allegations of discrimination had led to a negotiated result, the D.C. Circuit remanded for further proceedings on the fee claimant's petition.

Citing both Hanrahan v. Hampton, 446 U.S. 754 (1980), and Hewitt v. Helms, 107 S.Ct. 2672 (1987), the government, in its Opposition, asserts that in order to be a ``prevailing party,'' the applicant must demonstrate that it prevailed on the merits of its claims, and that Mester's failure to so demonstrate necessarily precludes it from achieving ``prevailing party'' status.

Three points merit discussion.

First, as to counts 4 and 8 it is clear that Mester prevailed ``on the merits.'' Finding of fact and conclusion of law number 10 at page 45 of my decision and order is explicit: ``[t]hat counts 4 and 8 are dismissed on the merits for failure of proof.''

Second, as discussed in my decision and order, the dismissal of counts 9-17 as well as of count 8 was based on the failure of the INS to meaningfully inform not only the respondent but also the forum with regard to the charges intended to be alleged and resultant confusion in citing inconsistent as well as nonexistent provisions of law. The flaw was far more than merely a technical failure, but rather was pervasive and the result so defective and deficient as to be incurable by subsequent amendment.

As stated on pages 41-42 of my decision and order ``traditional principles of fair notice and fair hearing demand, perhaps even more than in time-tested venues, an alertness to the need for scrupulous adherence to basic principles. It is obvious in retrospect that confusion engendered by the pleadings infected the hearing; the parties at one or another time appear to have tried the case on one or another theory of an 8 U.S.C. 1324a(b) violation.''

The decision and order concluded: ``[t]hat counts 8 through 17 are dismissed for failure to state a cause of action upon which a determination may be made of a violation of 8 U.S.C. 1324a(b).'' (Finding of fact and conclusion of law number 11 at page 45). That counts 8-17 were dismissed without my having recited a factual determination as to the alleged violations of 8 U.S.C. 1324a(b), does not foreclose Mester from attaining ``prevailing party'' status. See Miller, supra, (failure of plaintiffs to prove discrimination by defendants did not preclude them from attaining ``prevailing party'' status under Title VII).

Third, both Hanrahan and Hewitt are distinguishable from the instant action. In Hanrahan, the plaintiffs who were denied ``prevailing party'' status had succeeded on an issue of procedure, i.e., reversal of a directed verdict, and not substance. The Ninth Circuit found just such a distinction in Mantolete, supra, 791 F.2d at 787. Like the plaintiff in Mantolete, Mester has prevailed on issues of substance, not merely procedure. The due process implications which compelled the result in the underlying proceeding as to counts 8-17 are substantive, as well as procedural.

In Hewitt, a plaintiff inmate who filed suit under 42 U.S.C. 1983 against prison officials was denied ``prevailing party'' status under 42 U.S.C. 1988. The plaintiff had alleged violation of due process based on lack of a prompt hearing on his misconduct charges and conviction for misconduct based on hearsay testimony, but the defendants successfully asserted qualified immunity. Consequently, the inmate had not obtained a damages award, declaratory judgment, consent decree, settlement, or any other relief.

The Supreme Court in Hewitt recognized that: ``[i]t is settled law, of course, that relief need not be judicially decreed in order to justi-

fy a fee award under [section] 1988.'' 107 S.Ct. at 2676. The majority opinion, in a sharply divided court, concluded that ``a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a `prevailing party,' '' id. at 2677. The court recognized, however, that (id. at 2676):

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces the payment of damages, or some specific performance, or the termination of some conduct. * * * The ``equivalency'' doctrine is simply an acknowledgment of the primacy of the redress over the means by which it is obtained. (Emphasis added.)

The court went on to say that ``a judicial statement that does not affect the relationship between the plaintiff and the defendant is not an equivalent . . .'' of a judicial judgment. Id.

Unlike the plaintiff in Hewitt, the respondent here obtained dismissal of eleven of the seventeen counts; respondent obtained more that a mere favorable judicial statement and this litigation did result in part in its favor. Furthermore, the Hewitt court's recognition of the ``equivalency'' doctrine, which acknowledges the ``primacy of the redress over the means by which it is obtained,'' id. at 2676, supports Mester's claim to be a prevailing party. Accordingly, the primacy of Mester's redress, i.e., dismissal of counts 8-17, is recognized without regard to the premise on which such redress was obtained, i.e., failure to state a cause of action.

The cases aside, the government asserts here (1) that the trial judge did not reject the paperwork counts for lack of proof; (2) that there was no ruling made as to the underlying merits of those alleged paperwork violations; (3) that respondent in fact never raised or litigated the issue on which the paperwork counts were dismissed; (4) that the judge's ruling did not imply insufficient evidence of the government to establish paperwork violations under another subsection; (5) that the majority of the judge's decision addressed the allegations of knowingly continuing to hire unauthorized aliens; and (6) that in order to prevail, a party must succeed on significant issues while dismissal of counts 4 and 8 for lack of evidence was at best a minor victory for the respondent.

The government is correct in asserting that I did not reject the paperwork counts 9-17 for lack of proof, and that I did not rule on whether or not the respondent had violated 8 U.S.C. 1324a(b) with respect to those counts. The government, however, attributes more significance to that fact than is reasonably due.

Finding that the counts alleging paperwork violations were fatally flawed such that they failed to state a cause of action or mean-

ingfully inform the respondent (and the forum) as to what statutory and regulatory provisions the respondent was charged with violating, it was not only impractical but also impossible for me to evaluate the quantum of proof as to its adequacy or to make a determination as to whether the paperwork provisions of IRCA had in fact been violated as alleged. Inability of the judge to make a determination of culpability, however, due to the defects in the pleadings does not detract from the fact that the ruling made, i.e., dismissal of counts 9-17, did significantly benefit the respondent. The result achieved was the result sought in respondent's decision to defend against the allegations of the complaint.

The government's assertion that respondent neither raised nor litigated the issue on which the paperwork counts were dismissed is overshadowed by the fact that the defects in counts 8-17 were so pervasive as to have ``infected the hearing'' (Decision and Order, p. 42) such that ``the parties at one or another time appear to have tried the case on one or another theory of an 8 U.S.C. 1324a(b) violation.'' Id. Regardless of whether respondent raised the issue, it was judicially determined from the pleadings, briefs, testimony and evidence adduced at the evidentiary hearing that respondent was not adequately notified of the violations which it was alleged to have violated.

Whether or not INS had evidence which could have proven a properly pleaded statutory violation is not an appropriate subject for speculation. It is sufficient that counts 9-17 were dismissed on due process grounds.

INS contends that the unlawful employment charges constitute the ``crux of the litigation.'' Government's Opposition, p. 10. INS implies that the attention given to the alleged paperwork violations is virtually de minimus. Without debating the relative weight to be accorded unlawful employment violations on the one hand, and paperwork violations on the other hand, it cannot be doubted that a significant amount of attention was focused on the paperwork charges. Evidentiary submissions, examination of witnesses, discussion on brief and in the decision and order make clear that the paperwork violation allegations were a subject of intense and extensive attention.

In addition, it cannot be ignored that Mester's aggregate exposure on the paperwork counts comprised $2,500.00 of a total of $6,000.00 in civil money penalties sought by the INS.

INS takes comfort in the fact that the judge devoted significantly more of the decision to analysis of the unlawful employment counts than to the paperwork counts. It should be obvious, however, that, recognizing the outcome of the decision, the unlawful employment

allegations required fact-specific discussion and detailed analysis of the law as applied to each count; counts 9-17 which were commonly defective warranted joint treatment.

I cannot reconcile the INS characterization of dismissal of counts 4 and 8 for lack of evidence as a ``minor victory'' for Mester with the very extensive attention given to the evidence involving those counts at hearing, on brief, and in the decision and order. The portion of the entire proceeding concerning counts 4 and 8 involving the witness Arriaga was overwhelmingly disproportionate to any other charges before me.

The outcome of litigation involving those counts and the others on which I found against the government warrant the conclusion that Mester was the prevailing party within the meaning of EAJA. Mester certainly obtained a significant benefit, half of the $6,000.00 civil money penalty having been dismissed when the counts on which they were based were dismissed.

In sum, it is clear that an applicant for attorney's fees need not have prevailed on all issues in order to qualify for status as a prevailing party. See Hensley, supra. The fact that the respondent in the instant action clearly lost on six unlawful employment counts does not preclude a finding that Mester is a ``prevailing party'' eligible for EAJA relief. I so find.

C. The government's burden described.

EAJA requires an award to an eligible prevailing party whose application is timely, subject to discretion accorded to the adjudicative officer to find either (or both) that the position of the agency was substantially justified or that special circumstances make an award unjust. Having concluded that the respondent has established a prima facie entitlement to attorney's fees under EAJA by virtue of having proven ``prevailing party'' status, the burden of proof shifts to the government to establish that its position was substantially justified or that special circumstances exist which would make an award of fees unjust.

The government in its Opposition, claims that even if respondent were found to qualify as a ``prevailing party,'' the government's position was, nevertheless, substantially justified and that special circumstances exist so as to make an award of fees unjust. The government correctly points out that neither the phrase ``substantially justified'' nor the phrase ``special circumstances'' is defined in EAJA, 5 U.S.C. 504, and thus resort to case law and legislative history is necessary to ascertain the intended meaning of both.

1. The government's position was not substantially justified.

The INS effort to relitigate the underlying proceeding is misplaced. Simply put, no characterization of a defective pleading on the part of a federal enforcement agency is sufficient, substantially or reasonably, to force a member of the public to a civil penalty hearing.

In United States v. Yoffe, 775 F.2d 447 (1st Cir. 1985), relied upon by the government in its Opposition, the court set forth a three-part test of reasonableness utilized by virtually all circuits in determining whether the government's position was ``substantially justified'' so as to preclude an award of attorney's fees under EAJA. The court stated that (775 F.2d at 450):

> [t]he test breaks down into three parts: did the government have a reasonable basis for the facts alleged; did it have a reasonable basis in law for the theories advanced, and did the facts support its theory. . . . This represents a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous. (Citations omitted.)

The majority of circuits have adhered to a ``reasonableness'' standard, e.g., Albrecht v. Heckler, 765 F.2d 914 (9th Cir. 1985). Prior to the 1985 reenactment of EAJA the District of Columbia Circuit, virtually alone among the circuits, held the government to a greater burden to persuade that its position was substantially justified, Cinciarelli v. Reagan, 729 F.2d 801, 804 (D.C. Cir. 1984) (``slightly more stringent than one of reasonableness''). Since the 1985 reenactment, however, additional circuits appear to have required more than reasonableness. See, e.g., Haitian Refugee Center v. Meese, 791 F.2d 1489, 1497 (11th Cir. 1986) (``more than mere reasonableness''), vacated in part on reh'g on other grounds, 804 F.2d 1573 (11th Cir. 1986).

Slightly more than a year ago the Ninth Circuit commenting that ``[t]his court has never squarely addressed the 1985 legislative history,'' and finding for the government on the question of substantial justification, concluded that ``[w]e need not determine whether more than mere reasonableness is required, for we find the government met the higher standard, ``Edwards v. McMahon, 834 F.2d 796, 802 (9th Cir. 1987). On June 27, 1988, reviewing a decision of the Ninth Circuit, the Supreme Court in Pierce v. Underwood, 108 S.Ct. 2541, 2550 (1988), adhered to the view:

> . . . that as between the two commonly used connotations of the word ``substantially,'' the one most naturally conveyed by the phrase before us here is not ``justified to a high degree,'' but rather ``justified in substance or in the main''--that is, justified to a degree that could satisfy a reasonable person. That is no different from the ``reasonable basis both in law and fact'' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.

One of two concurring opinions took strong exception to the majority analysis: `` `substantially justified' means more than merely reasonable. . . .'' 108 S Ct. at 2556.

The teaching of Pierce would seem to have settled the matter. As appears below, I apply the more relaxed standard, i.e., a ``reasonable basis both in law and fact.''

The government suggests that it has met the Yoffe test and maintains that ``[t]here is no basis to argue that the Government's position throughout this litigation did not have a clearly reasonable basis in both fact and law.'' Government's Opposition, p. 14. I cannot agree.

Without reaching the question of whether the government had a reasonable basis in fact for its position, it is all too clear that it has not established an adequate basis in law for the position it took with regard to the paperwork violations (counts 8-17).

Recognizing the government's failure to accurately specify in the NIF, incorporated into the complaint, the provisions of law alleged to have been violated by the respondent and thus unsure of the legal theories sought to be asserted by the government, I am unable to make an informed judgment that the government's position had a reasonable basis in fact or law. By premising its allegations on inconsistent as well as nonexistent statutory and regulatory authority, however, the government cannot satisfy its burden of establishing that its position was ``substantially justified.''

Furthermore, the government's claim that any discrepancies in the NIF with regard to the exact subsection of law relied upon can be amended by the evidence presented is unavailing. As recited in the decision and order (at pages 41-42):

> The defects in counts 8 through 17 cannot be cured by reference to Rule 15 of the Federal Rules of Civil Procedure on amended and supplemental pleadings. The flaw here is too basic. I grant that all concerned are early on the learning curve in the development of a new substantive body of law. However, traditional principles of fair notice and fair hearing demand, perhaps even more than in time-tested venues, an alertness to the need for scrupulous adherence to basic principles. It is obvious in retrospect that confusion engendered by the pleadings infected the hearing; the parties at one or another time appear to have tried the case on one or another theory of an 8 U.S.C. 1324a(b) violation.
>
> * * * * * * *
>
> * * * it is unclear, as the result of the ambiguous statutory citation, considered in light of the nonexistent regulatory citation, what was intended to be alleged and tried. It is not for the trial judge to speculate as to which among the statutory imperatives is at issue.
>
> This is not a case where the judge can substitute an obviously omitted portion of a regulatory citation; it is absolutely unclear what citation to substitute because among the three elements, the factual allegation, the statutory specification

> and the regulatory specification, no two are consistent as charged. Clearly, the complaint must be adequate to provide notice. 5 U.S.C. 554(b)(2) and (3); 8 C.F.R. 274a.9(c)(1)(i). This complaint did not adequately do so. To hold otherwise would be to ignore the statutory purpose of the APA whose requirement for notice is real, not formalistic.

Amendment of the pleadings to conform to the evidence could not have cured a defect so pervasive as to vitiate counts 8-17.

It has been suggested that where credibility is the issue which disposition of the charge turns, as in counts 4 and 8, the government's position is per se substantially justified, e.g., that the judge finds an opponent's witness more credible than the government's ``does not mean necessarily that the General Counsel was wrong to issue a complaint . . .,'' Charter Management Inc. v. N.L.R.B., supra, 768 F.2d at 1302, (11th Cir. 1985) (Emphasis added.) INS relies on this score on Temp Tech Industries v. N.L.R.B., 756 F.2d 586 (7th Cir. 1985).

In Temp Tech the court, on appeal by an applicant from a denial of EAJA benefits by the administrative law judge (who was affirmed by the NLRB), understood that appellant was not ``arguing that the ALJ erred in determining that the General Counsel's position . . . had a basis in fact and law. Rather, the Company takes issue with the ALJ's ruling that the EAJA was not intended as a vehicle to test the complaint issuing or settlement posture of an agency.'' Id. at 589. The court did comment, continuing its analysis, however, that ``. . . the fact that an ALJ might make an adverse finding on a credibility issue does not, in and of itself, deprive the General Counsel's position of a basis in fact.'' Id. at 590. (Emphasis added.)

I agree with the language quoted from the precedents immediately above. However, they only instruct that an agency action is not ``necessarily'' or ``in and of itself'' not substantially justified where it fails on credibility grounds. That is not to say that it cannot lack substantial justification when it so fails.

It is my judgment that in the instant action the INS acted recklessly in producing so inherently unreliable a witness as the putative employee, Arriaga, to prove counts 4 and 8. It would have been more prudent not to have done so. In my judgment, therefore, the conclusion that the government lost on count 4 on credibility grounds (and count 8 on both that and its defective pleading) does not compel a determination that the government's position was substantially justified as to counts 4 and 8.

Moreover, both Charter Management Inc. and Temp Tech Industries arose under the earlier version of EAJA when judicial review of adjudicative officer determinations turned on an abuse of discretion standard, 5 U.S.C. 504(c)(2) (former). (EAJA, as reenacted,

5 U.S.C. 504(c)(2) adopted the substantial evidence standard affording greater latitude to reviewing courts.) Under the standard of review then in force, the courts declined to find that the trial judges had abused their discretion in finding that the agency had been substantially justified in maintaining its litigation. That is not to say what might have been had the trial judges found to the contrary.

INS cites also United States v. Buel, 765 F.2d 766 (9th Cir. 1985). In Buel, the Ninth Circuit agreed with the district court's denial of prevailing party status to unsuccessful petitioners for intervention in three cases. In the fourth case, the court agreed with the district court, applying the abuse of discretion standard for review, that the government's case was substantially justified where the government had done all that could have been expected of it procedurally. Id. at 769.

The government, in its Opposition, page 9, argues that ``novel but credible extensions of law'' provide a basis for me to find against the applicant as ``special circumstances'' that would make an award unjust. However, the cases cited by INS involve ``substantial justification'' and not ``special circumstances.'' In any event, in the instant action, INS did not present ``novel but credible extensions of law.''

It is agreed that a new statute was enforced in the underlying proceeding. Exercise of new statutory authority does not, however, per se, advance ``novel but credible extensions of law.'' I agree with respondent's assertion that, instead, this was a ``straight APA proceeding requiring the usual considerations of proper pleading, . . .'' Respondent's Points and Authorities, page 8.

Consistent with the foregoing discussion, I am unable to conclude that the government has sustained its burden of proving the reasonableness of its position on counts 4 and 8 through 17 in order to establish that such position was substantially justified.

2. No special circumstances shown to exist to make an award unjust.

None of the factors cited by the government in support of its assertion that ``special circumstances'' exist rise to the level which in my judgment would make an award unjust. The government points to the sua sponte nature by which the deficiencies in the NIF were raised and suggests that the fact that new legislation and litigation is involved justifies the errors found. It is acknowledged that, regrettably, errors may result in the course of fine-tuning enforcement procedures on implementing a new statue. That circumstance, however, does not lessen the responsibility of the govern-

ment to adequately inform the respondent of the charges against it or otherwise remedy the pervasive defects.

The government also asserts that the ``special circumstances'' exception operates as a safety valve to avoid producing a chilling effect on the government's efforts to enforce the statute. It is a commonplace, new statute or old, however, to require the enforcement agency to adhere to sound principles of pleading and to adequately inform the respondent of charges against it. To adhere to fundamentals can scarcely be said to chill the government's enforcement efforts. To require less would compromise traditional principles of fairness and equity.

Finally, the government asserts that the disdain for the employer sanctions program manifested by the respondent's principal officer/stockholder is in itself a ``special circumstance'' which makes an award of fees unjust. INS cites but one case which turns on the special circumstances analysis, i.e., Oguachuba v. INS, 706 F.2d 93 (2nd Cir. 1983). There, the court affirmed denial by the district court of EAJA relief where the applicant had prevailed on his habeas corpus petition. The Second Circuit expressed outrage (706 F.2d at 99):

> . . . For four years Oguachuba has violated American law in numerous ways hoping to cause a technical error by the INS which would allow him to remain in this country. While he prevailed in his petition for a writ of habeas corpus, he would not have been incarcerated in the first place but for his notorious and repeated violations of United States immigration law. Moreover, at all times during the incarceration in question, Oguachuba was free to end his detention by voluntarily returning to Nigeria.

The court concluded that it would be inequitable to allow the applicant ``to flout American law in this fashion and then to require the public fisc to support his legal bills to terminate his detention through a quirk in American law. . . . In classic equity terms, Oguachuba is without clean hands.'' Id. The court had previously cited the report of the House Judiciary Committee, reporting out EAJA, to the effect that special circumstances provided both a safety valve and also ``. . . discretion to deny awards where equitable considerations dictate an award should not be made. H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11, reprinted in 1980 U.S. Code Cong. & Ad. News, 4953, 4984, 4990 (emphasis added). . . .'' Id. at 98.

The instant action does not parallel Oguachuba. Here the government lost before me not through any ``quirk'' in American law; Mester's conduct does not invoke the imagery recited by the Second Circuit. Ours is not a case of special circumstances.

VII. Fees and other expenses awarded.

Finding that the respondent has met its burden of proof in establishing its status as a ``prevailing party,'' finding that the government has failed to sustain its burden of providing that its position was ``substantially justified,'' and finding no ``special circumstances'' to exist which would make an award unjust, I hereby conclude that respondent is entitled to an award of attorney's fees and costs.

Applicant requests an award of $24,200.00 in attorney's fees, plus $1,601.03 in miscellaneous expenses.

A. Attorney's fees.

The attorney's fee calculation reflects a computation of time, aggregating 215.5 hours, expended by Peter N. Larrabee, counsel for respondent in the underlying proceeding, in that representation.

As noted by the Ninth Circuit, citing Hensley v. Eckerhart, supra, 461 U.S. at 433, ``[t]he starting point for determining an award of attorney's fees is the so-called `lodestar' amount, the hours `reasonably expended' on the litigation times a reasonable hourly rate.'' Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 221 (9th Cir. 1987).

The claim submitted shows activity on behalf of respondent on more than 40 calendar days between October 19, 1987 and May 11, 1988, and five days after June 17, 1988, the date of the decision and order of the administrative law judge. It is necessary to determine whether Mr. Larrabee's hours claimed, totalling 193.6 hours, were ``reasonably expended'' and to determine also what is a ``reasonable hourly rate.''

The first date of services for which recovery is sought preceded the November 16, 1987 complaint by the INS which initiated this proceeding before me. In my view, however, any activity on behalf of respondent claimed as relevant to this case and subsequent to the INS Notice of Intent to Fine dated October 2, 1987, is within bounds since it is our practice in employer sanctions cases, as in this proceeding, to accept complaints which incorporate by reference the notices of intent to fine. See decision and order in Mester (June 17, 1988), pp. 7-10.

Also clearly within bounds is the time spent in preparing the EAJA claim, subsequent to the June 17 decision. Gavette v. Office of Personnel Management, 785 F.2d 1568 (Fed. Cir. 1986). Less clear is the portion of the total time spent by Larrabee on this case which properly is allocable to the eleven counts on which I have found respondent to have been the prevailing party. Were the issues, e.g., the counts against Mester, so intertwined that the liti-

gation ``. . . cannot be viewed as a series of discrete claims,'' it would be appropriate to consider an award for attorney's work on the case as a whole, Haitian Refugee Center, supra, 791 F.2d at 1500 (quoting Hensley, supra, 461 U.S. at 435).

The Ninth Circuit instructs that where a party succeeds in part only, the trial court is expected to apply one or another of two ``approaches'' (in allocating an EAJA fee award under the counterpart provision to 5 U.S.C. 504 applicable to judicial proceedings, i.e., 28 U.S.C. 2412), Greater Los Angeles Council on Deafness, supra, (813 F.2d at 222):

> The Supreme Court offers two different approaches for setting reasonable fees in cases where a plaintiff's success is limited. Where a suit includes separable legal claims, fees may be awarded only for work on claims that were successful. To do this, a ``district court may attempt to identify specific hours that should be eliminated.'' Hensley, 461 U.S. at 436, 103 S.Ct. at 1941. The district court correctly ruled that this approach was inappropriate here. Plaintiffs' claims were difficult to separate because they ``involved a common core of facts based on related legal theories.'' But the district court erred by not exercising its discretion to use the alternative approach described in Hensley: ``simply reduce the award to account for the limited success.'' Id. at 436-37, 103 S.Ct. at 1941.

``To measure the extent of plaintiffs' success . . .,'' 813 F.2d at 222, the court refused to ``use a mathematical ratio of winning claims to losing claims, an approach criticized in Hensley. See 461 U.S. at 435 n. 11, 103 S.Ct. at 1940 n. 11.'' Id. Instead, the Ninth Circuit, quoting Hensley, compared `` `the significance of the overall relief obtained' to all the claims and remedies plaintiffs pursued in the litigation . . .,'' id., and awarded a judgmental percentage allocation out of the total lodestar amount claimed.

Mester here is in the shoes of the plaintiffs in Greater Los Angeles Council. I find it of no importance that there, and in many EAJA precedents, the case out of which the fee application evolved involved judicial and not administrative proceedings, 28 U.S.C. 2412(d), and not 5 U.S.C. 504. Nor is it significant that the representation here was of a commercial entity rather than a pro bono type representation as frequently encountered in the EAJA precedents.

I find that applicant's fee request turns on separable legal claims. It would not be reasonable, however, to have expected that an attorney in this first section 101 proceeding to go to hearing would have segregated his time records as among the counts at issue, either one by one or generically as between allegations of unlawful employment and of paperwork violations. However, there is no reason the judge cannot judgmentally allocate to the applicant that measure of the time spent on legal claims on which Mester prevailed.

From the ``Summary of Attorney's Fee Request'' attached to his application, I calculate as follows: that of the 215.5 hours he contends he devoted to this case, Mr. Larrabee shows 203 hours before June 17, 1988, 12.5 hours after that date. Of the pre-decision 203 hours, and post-decision 12.5 hours, he suggests by footnote that he has reduced the aggregate hours claimed in two respects: (1) by eliminating 2.6 hours out of a total of 14.6 hours worked over two days' time as having been devoted to counts found by the judge in the government's favor, and (2) by discounting by 35% of a total of 54.3 hours, over nine days (including 2.5 hours post-decision). The result is to reduce the total time spent by another 29.3 hours ``to reflect 11 of 17 allegations won;'' he concludes that he is entitled to 193.6 hours at $125.00 per hour.

I am unable to replicate the calculation by which he reduces the 215.5 hours [203+12.5] to 193.6 hours. Comparison of the two columns denominated ``TOTAL HRS.'' and ``HRS. CLAIMED'' shows, in addition to reductions in hours claimed as aggregated above, only one variation between the two columns: obviously unintended, the time claimed for preparation of a motion to supplement the record and of a response to a motion to strike on May 9, 1988, is 2.9 hours although the ``total hours'' is reported to have been the lesser amount of 2.5 hours.

Granted that the claim might have been submitted in a more sophisticated and comprehensive form with greater specificity to bespeak its bonafides. Nevertheless, although INS is strident in its objection to any award, the hours claimed stand unrebutted. Even more importantly, to my view they reflect a modest time expenditure, measured by the precedential cast to the first hearing under section 101 and the prodigious amount of materials produced by counsel. While, for the reasons discussed below I am unable to concur in the claim for enhancement of the hourly award above $75.00, I do agree that the experience Mr. Larrabee brought to this litigation enhanced his participation and assisted the judge, particularly in the hearing room.

Certainly, an attorney who performs more efficiently and, in consequence, more economically should not be disadvantaged in evaluating the element of time in analyzing ``the complex amalgam which is the basis of a reasonable fee . . .,'' Stuart M. Speiser, Attorneys' Fees (1973), section 8:6, p. 310. In sum, I conclude that the quantum of counsel's activity evidenced by the whole record amply supports the calculation of aggregate time expended, as confirmed by the litany of specific activities, day by day, and is, as such, sufficient to overcome any perceived deficiencies in the submission before me.

While this case reflects separable legal claims it does not invite an easy conclusion as to how to separate time spent in defending against charges some of which were found in favor of the government. Clearly, the amount by which the aggregate hours must be reduced because the government prevailed on counts 1, 2, 3, 5, 6 and 7 is greater than the difference, as asserted by Mr. Larrabee, between 215.5 and 193.6. The pre-decision hours compute to 203 and 181.6 (with the latter reduced by .4 (to yield 181.2) to account for the presumed overstatement of May 9, 1988 (or else, the total of 203 would be in error); the post-hearing hours are 12.5 and 12 respectively. The pre-decision discount, 181.2/203, or 10.7%, is insufficient to reflect the trial judge's findings in favor of the government on six unlawful employment counts.

I do not suggest that for purposes of sorting out time expended in defending one or another category of section 101 allegations of wrongdoing that greater weight attaches to an unlawful employment charge than to one involving only paperwork violations. Indeed, the focus on paperwork violations in this case was extensive. Moreover, respondent prevailed on count 4, the unlawful employment charge which drew the most attention, the only one on which the alien involved was produced, in effect as a surprise witness.

Without slavishly counting 11/17 in favor of respondent, for a discount of 35.3%, approximately what the application suggests (but does not appear to support), a division of 40/60 appears reasonable. Accordingly 60% of the 203 reported pre-decision hours are allocable: 121.8. Since, by definition, virtually all the post-decision hours are allocable, I accept the calculation in the application, i.e., 12 of 12.5, for a total of 133.8 creditable hours.

Applicant requests an hourly ``lodestar'' award at $125.00 per hour for Mr. Larrabee's services in lieu of the $75.00 specified in EAJA. The claim for an enhanced hourly rate alleges Larrabee's efficiency in the hearing as the result of his special qualifications by virtue of prior, personal experience as an INS employee, his professional standing in the specialized immigration bar said to be lawyer-short, and the increased cost of living in the San Diego, California area. While I reject the main thrust of the INS reply that the Larrabee fee claim is unsupported, INS is correct that the claimant has failed to establish <u>any measure</u> for award of an enhanced fee even supposing that a predicate had been laid for exceeding the $75.00 level.

The application falls short in respect of the claim to an enhanced hourly award. Without taking anything away from the quality of representation, INS correctly recalls that it was the judge who,

after hearing, identified the pervasive deficiency in the statement of the charges in the paperwork counts. Nor am I persuaded on this record that there is a shortage of qualified attorneys to handle immigration-related matters in the San Diego area. Indeed, Mr. Larrabee's professional standing is attested to by four immigration practitioners active in that community, and while he suggests there are ``only approximately ten who commit a substantial majority of their practice to all phases of immigration-related cases,'' he candidly acknowledges that, in San Diego, ``there are approximately fifty lawyers who are somewhat involved in this area of law . . . .'' Respondent's Points and Authorities, p. 11.

Were I disposed to grant an enhanced award, I would be unable to do so for lack of authority. The controlling EAJA provision is explicit (5 U.S.C. 504(b)(1)(A)):

> . . . (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

As previously noted in this decision, I do not consider the department's only regulation on the subject, 28 C.F.R. Part 24, to be controlling, being hopelessly out of date. However, the fact that neither that regulation nor any other ``determines'' that any circumstance ``justifies a higher fee'' means that a fee in excess of $75.00 an hour is precluded by EAJA according to its terms.

Section 504(b)(1)(A) as originally enacted in 1980 contained text identical to the reenacted version quoted above. The department's implementing regulation did not take up the opportunity to invite fee requests at enhanced levels.

I am satisfied that the absence of any or a current regulation generally implementing a remedial statute does not preclude relief on the part of presumptively eligible litigants such as Mester is here. See, e.g., League of United Latin American Citizens v. Pasadena Independent School District, 662 F. Supp. 443 (S.D. TX 1987). I am no less certain, however, that I lack authority to grant relief which flies in the face of a statutory imperative [``fees shall not be awarded in excess of . . .''] which can only be avoided by positive agency action [``unless the agency determines by regulation . . .'']. 

Stated differently, I draw no inference as to the intent of the department, or the efficacy of such intent, with respect to the failure to update its EAJA implementation generally, or as to IRCA in particular. But the consequence of the failure to satisfy the statutory precondition for fee enhancement of adopting an implementing regulation is inescapable: the $75.00 fee ceiling remains in effect.

The Mester application fails to satisfy the detailed requirements of the regulation for submission of an EAJA application. Nevertheless, I am satisfied that the prerequisites have been substantially satisfied, and that the data tendered in support, coupled with my opportunity to observe and participate throughout the proceeding, suffices to premise an EAJA award. See ACUS, ``Equal Access to Justice Act: Agency Implementation,'' supra, 46 Fed. Reg. at 32910 (Congress wanted to ensure that EAJA rulings were ``made by someone with direct knowledge of the underlying proceeding'').

Additionally, I am satisfied both from Mester's submission that Mr. Larrabee's ``usual fee is well in excess of $125.00 per hour . . .'' and from my general understanding of the lawyer marketplace which is sufficient to form a basis for official notice, that the ``prevailing market rates for the kind and quality of services furnished,'' 28 C.F.R. 24.107(b), are not less than $75.00 per hour.

Accordingly, I find that applicant is entitled to an award of attorney's fees calculated as 133.8 creditable hours at $75.00 per hour, for a total of $10,035.00.

Respondent's counsel assertedly retained another attorney, Anthony Atenaide, who made no appearance before the judge but whose claimed participation is not questioned by INS. In addition to his ``declaration'' filed in support of the billing for four hours of service, Atenaide's filing of one of the four attestations to Larrabee's professional standing reflects his own expertise through leadership of a segment of the immigration bar. His role appearing to have been reasonable, I am satisfied that an award is proper. Some element of his service might be allocable to the other counts. However, I am satisfied that his activity performed February 9-11, 1988, during the evidentiary hearing, sufficiently involved the witness Arriaga, and enough of the time attributable to counts 9-17, so as to be allowable in full. Accordingly, the claim for associated attorney services, four hours at $75.00, a total of $300.00 is allowed.

B. Other expenses.

It is not clear whether the department in adopting its regulation, 28 C.F.R. Part 24, contemplated allowance of expenses beyond those catalogued at section 24.107. Arguably the negative implication of the recitation that ``[t]he following fees and other expenses are allowable . . .'' is that only those items catalogued may be paid. Alternatively, the department not having used restrictive language, the statute being remedial in nature, the adjudicative officer may award reasonable out-of-pocket expenses. Absent proper restriction on my exercise of discretion, I opt for the latter. See,

e.g., Oliveira v. United States, 827 F.2d 735 (Fed. Cir. 1987) (reversal of Claims Court for failure to consider other expenses).

Routine office and related expenses are typically reflected in an attorney's hourly billing rate, and in the EAJA context, in the attorney's fee award. The Mester application assigns certain clerical costs, however, to the need to mobilize resources to meet the unexpected dynamics of the hearing. I am satisfied that the costs shown on page 5 of the ``Summary'' attached to the application are appropriate for the reason asserted; appearing to be fair, they are allowed. Because the costs appear to have been occasioned by the appearance and testimony of the witness Arriaga as to whom counts 4 and 8 pertained, and accordingly the clerical services supplied could not reasonably have been anticipated, they are allowed in full, $70.00.

I also allow the out-of-pocket expenses, consisting of toll telephone, copy, delivery (postal or commercial express) and transcript costs. Without discounting these cost claims item by item, I discount them by the same 40% applied to the attorney's fee request: Total of $891.23 less 40% equals $534.74 allowed.

I do not allow the expert witness costs both because there is no showing as to the prevailing rate for such a witness and I am unable to form a judgment as to what that rate might be, but also because, as I understand the witness' testimony, it went not to the issues on which respondent prevailed but, rather, to the counts on which the government was successful at hearing.

## VIII. Ultimate findings, conclusions and order.

ACCORDINGLY, in addition to the findings and conclusions above stated, and on the basis of the foregoing, it is FOUND, CONCLUDED AND ADJUDGED, as follows, that:

1. Mester Manufacturing Co., is the prevailing party on counts 4 and 8 through 17 of the complaint in this proceeding;

2. This proceeding, an enforcement action initiated by complaint filed against Mester by the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. 1324a, not being an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, constitutes an adversary adjudication under 5 U.S.C. 554 and, accordingly, is within the scope of the Equal Access to Justice Act, 5 U.S.C. 504;

3. As the deciding official who presided at the adversary adjudication, I am the adjudicative officer properly seized with the application for attorney's fees and costs;

4. Considering the administrative record, as a whole, which was made in this proceeding, the position of the INS was not substantially justified as to counts 4 and 8 through 17;

5. With respect to those counts, there are no special circumstances which make an award unjust;

6. The application was timely filed, having been received within thirty days after the thirtieth day following the decision and order of the deciding official, i.e., the administrative law judge, and, in any event, within thirty days of the action of the Attorney General's delegate as reviewing official in adopting the judge's decision as the decision of the Attorney General;

7. Mester, not having engaged in conduct which unduly and unreasonably protracted the final resolution of this case, there is no reason to reduce or deny an award on such account;

8. Mester is a party within the meaning of 5 U.S.C. 504(b)(1)(B)(ii), being a corporation with a net worth which did not exceed $7,000,000 and which did not have more than 500 employees at the time this proceeding was initiated;

9. The Department of Justice has not determined by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for such a proceeding as this one (or for any), permits an award of attorney's fees at a rate in excess of $75.00 per hour; neither can I find on this record that there has been such an increase nor such a factor as to justify a higher fee;

10. The attorney's fee award, at the rate of $75.00 per hour, is within the prevailing market rate for the kind and quality of services furnished. The amount awarded is $10,035.00 allocable to services rendered by attorney Peter N. Larrabee, and is $300.00 allocable to services rendered by attorney Anthony Atenaide, the award reflects 133.8 hours and four hours, respectively, for services on behalf of Mester on the counts on which Mester prevailed;

11. No award is made for the expert witness' fees in the absence of any showing as to the prevailing market rate for the kind and quality of such individual's services and also because his testimony dealt essentially with counts on which Mester did not prevail;

12. Out-of-pocket costs and special costs are allowed in the sums of $70.00 and $534.74, respectively;

13. The INS will be expected to assist the applicant, by counsel, to obtain payment of the award, in the aggregate sum awarded at paragraphs 10 and 12 above, of $10,939.74. The pendency of an appeal in the court of appeals by Mester of the counts on which it did not prevail in the administrative adjudication is not an impediment to obtaining payment; and

14. This ``decision and order on application for award of attorney's fees and other expenses'' is the final administrative decision under 5 U.S.C. 504(a)(3).

**SO ORDERED.**

Dated this 25th day of January, 1989.

MARVIN H. MORSE
Administrative Law Judge

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**
**ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER VACATING ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**
**FINAL AGENCY ORDER NO. 12**

United States of America, Complainant v. Mester Manufacturing Company, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 87100001.

Vacation by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision and Order on Application for Award of Attorney's Fees and Other Expenses

The Honorable Marvin H. Morse, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued an Order on an Application for Award of Attorney's Fees and Other Expenses on January 24, 1989. The application was filed by the respondent in the above-styled proceeding pursuant to the Equal Access to Justice Act. The Order was issued on this matter subsequent to an administrative hearing held in San Diego, California, commencing on February 9, 1988.

Pursuant to Title 8, United States Code, Section 1324a(e)(6) and Section 68.2(k) of the applicable rules of practice and procedure, appearing at 52 Fed. Reg. 44972-85 (1987) (hereinafter Rules) (to be codified at 28 C.F.R. Part 68), the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order, and in accordance with the controlling section of the Immigration Reform and Control Act of 1986 (hereinafter IRCA), supra, vacates the Administrative Law Judge's Order.

On November 16, 1987, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS) filed a Complaint against the respondent, Mester Manufacturing Company (hereinafter Mester). The INS charged the respondent with violations of IRCA. The INS alleged seventeen violations of the provisions of Title 8, United States Code, Section 1324a, for knowingly continuing to employ unauthor-

ized aliens (Counts 1-7), and for failing to fill out employment eligibility verification forms (Counts 8-17).

On December 22, 1987, the respondent, through its counsel, filed an Answer to the Complaint and denied the alleged violations of IRCA set forth therein.

On November 25, 1987, the Chief Administrative Hearing Officer assigned this matter to the Administrative Law Judge. The hearing was held in San Diego, California beginning on February 9, 1988. The Administrative Law Judge's decision and order, issued on June 17, 1988, found in favor of the government as to six counts, found in favor of the respondent on the merits as to counts 4 and 8 for failure of proof, and dismissed the remaining nine counts because they failed to state a cause of action upon which a determination as to a violation of 8 U.S.C. 1324a(a)(b) could be made. The Chief Administrative Hearing Officer adopted that decision and order on July 12, 1988. On August 1, 1988, respondent filed a petition for review of that order in the United States Court of Appeals for the Ninth Circuit. Respondent filed an application, pursuant to the Equal Access to Justice Act (hereinafter EAJA), with the Administrative Law Judge on August 11, 1988. Respondent asserted that it was prevailing party on the eleven counts that had been dismissed and sought an award of fees and costs in the sum of $25,801.03. The government filed an opposition to the respondent' claim on September 12, 1988. The government disputed respondent's assertion that it was the prevailing party and contended that even if respondent was found to be the prevailing party, the government's position was ``substantially justified'' thus respondent's application for costs should be rejected.

On January 25, 1989, the Administrative Law Judge issued a Decision and Order on the Respondent's Application for Award of Attorney's Fees and Other Expenses.

The Administrative Law Judge concluded in part that:

1. Mester was the prevailing party on Counts 4, and 8 through 17;

2. that the position of the INS on Counts 4, and 8 through 17 was not substantially justified;

3. that there are no special circumstances that make an award unjust;

4. that the application was filed in a timely fashion having been received within thirty (30) days after the 30th day following the decision and order of the deciding official, i.e., the Administrative Law Judge and within thirty (30) days of the Chief Administrative Hearing Officer's action in adopting the Judge's decision as the decision of the Attorney General;

5. the amount awarded was $10,035.00 allocated to attorney's fees for Peter N. Larrabee and $300.00 in attorney's fees to Anthony Atenaide;

6. out of pocket costs and special costs were allowed in the sums of $70.00 and $534.74, respectively; and,

7. that the decision and order on application for award under EAJA was to be the final administrative decision under Title 5, United States Code, Section 504(a)(3).

The Chief Administrative Hearing Officer has conducted an administrative review on this order and finds the following:

1. The attached memorandum is incorporated into and made a part of this Order.

2. The Administrative Law Judge's Decision and Order on Application for Award of Attorney's Fees and Other Expenses dated January 25, 1989, is hereby vacated.

3. The Chief Administrative Hearing Officer has jurisdiction to review the decision and order of the Administrative law Judge pursuant to 8 U.S.C. 1324a(e)(6) of IRCA and 5 U.S.C. 504(a)(3) of the Equal Access to Justice Act.

4. The INS filed their appeal of the Administrative Law Judge's Decision and Order on Application for Award of Attorney's Fees and Other Expenses in a timely manner pursuant to 68.5(a), 68.5(d)(2) and 68.52 of the applicable rules of practice and procedure.

5. That the Respondent Mester was not the prevailing party with respect to counts 9 through 17.

6. That the INS was substantially justified in bringing each enumerated count against the respondent Mester.

Based on the findings and conclusions as set forth in the attached memorandum in support of this order, I hereby vacate the Administrative Law Judge's Decision and Order on Application for Award of Attorney's Fees and Other Expenses of January 25, 1989, pursuant to 8 U.S.C. 1324a(e)(6), and deny Respondent's Application for Award of Attorney's Fees and Other Expenses under the Equal Access to Justice Act in its entirety.

**SO ORDERED:**

Dated: February 23, 1989.

RONALD J. VINCOLI,
Acting Chief Administrative Hearing Officer

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

United States of America, Complainant v. Mester Manufacturing Company, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 87100001.

## MEMORANDUM OF LAW IN SUPPORT OF FINAL AGENCY ORDER NO. 12 BY THE CHIEF ADMINISTRATIVE HEARING OFFICER

### I. SYNOPSIS OF PROCEEDING

On November 16, 1987, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS), filed a complaint with the Office of the Chief Administrative Hearing Officer. The INS charged Respondent, Mester Manufacturing Company (hereinafter Mester) with violations of the Immigration Reform and Control Act of 1986 (hereinafter IRCA). The INS alleged seventeen violations of the provisions of Title 8, United States Code, Section 1324a, for knowingly continuing to employ unauthorized aliens (Counts 1-7), and for failing to present employment eligibility verification forms (Counts 8-17).

On December 22, 1987, the respondent, through its counsel, filed an Answer to the Complaint and denied the alleged violations of IRCA set forth therein. In addition, the respondent asserted that the Complainant did not act in good faith by refusing assistance and information to respondent on ``gray'' areas and conducting abusive inspection tactics.

On November 25, 1987, the Chief Administrative Hearing Officer assigned this matter to the Honorable Marvin H. Morse, Administrative Law Judge. The hearing was held in San Diego, California, beginning on February 9, 1988, after due notice to both parties. The Administrative Law Judge's Decision and Order (hereinafter Decision and Order), issued on June 17, 1988, found in favor of the government as to six counts, found in favor of the respondent as to counts 4 and 8 on the merits, and dismissed the remaining nine counts because they failed to ``state a cause of action upon which a determination as to a violation of 8 U.S.C. 1324a(a)(b) could be

made.'' Decision and Order at 45. He held that ``the Notice of Intent to Fine is fatally flawed when it specifies a different statutory violation than the one reasonably embraced by the factual allegations, where the regulation specified to have been violated is non-existent, and it may only be speculated as to which regulation was intended to be specified.'' Decision and Order at 42. The Chief Administrative Hearing Officer adopted that Decision and Order on July 12, 1988. On August 1, 1988, respondent filed a petition for review of that Order in the United States Court of Appeals for the Ninth Circuit. Respondent then filed an application, pursuant to the Equal Access to Justice Act (hereinafter EAJA), with the Administrative Law Judge on August 11, 1988. Respondent asserted that it was the prevailing party on the eleven counts that had been dismissed and sought an award of fees and costs in the sum of $25,801.03. The government filed an opposition to the respondent's claim on September 12, 1988.

On January 25, 1989, the Administrative Law Judge issued a Decision and Order on the Respondent's Application for Award of Attorney's Fees and Other Expenses (hereinafter Decision and Order on the EAJA Application).

## II. COMPLAINANT'S CONTENTIONS

The INS maintains that: (1) The Chief Administrative Hearing Officer has jurisdiction to review the Administrative Law Judge's Decision and Order on the EAJA Application; (2) Mester is not the prevailing party; (3) the INS' argument was substantially justified; and, (4) special circumstances make an award under EAJA unjust. They urge that most of the counts were dismissed because of an ``easily correctable error not brought out either before or during the hearing, but only sua sponte, after trial by the Administrative Law Judge.'' INS Request for Review at 5. The INS argues that Mester ``knew precisely what it was defending against and given full due process.'' Id. at 5. Finally, the Complainant contends that the Administrative Law Judge issued his ruling, after a lengthy pretrial period and hearing, on a ``minor error'' never raised by the respondent. The INS requests that the Administrative Law Judge's decision regarding EAJA fees not be upheld.

## III. RESPONDENT'S CONTENTIONS

Mester maintains that only judicial review of the Administrative Law Judge's Decision exists in the absence of regulatory authority. The respondent questions whether the INS' appeal was filed in a timely fashion. They contend that even if the Chief Administrative Hearing Officer has review authority, that authority is limited to a determination of whether the award was ``unsupported by substan-

tial evidence.'' 5 U.S.C. 504(c)(2). Mester requests that the appeal be dismissed for lack of jurisdiction.

## IV. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

The Administrative Law Judge issued his Decision and Order on the EAJA Application on January 25, 1989. the Administrative Law Judge concluded in part that:

1. Mester was the prevailing party on Counts 4 and 8 through 17;
2. the position of the INS on Counts 4 and 8 through 17 was not substantially justified;
3. there are no special circumstances that make an award unjust;
4. the application was filed in a timely fashion having been received within thirty (30) days after the 30th day following the Decision and Order of the deciding official, i.e., the Administrative Law Judge and within thirty (30) days of the Chief Administrative Hearing Officer's action in adopting the Judge's decision as the decision of the Attorney General;

5. the amount awarded was $10,035.00 allocated to attorney's fees for Peter N. Larrabee and $300.00 in attorney's fees to Anthony Atenaide;

6. out of pocket costs and special costs were allowed in the sums of $70.00 and $534.74, respectively; and,

7. the Decision and Order on application for award under EAJA was to be the final administrative decision under Title 5, United States Code, Section 504(a)(3).

## V. REVIEW AUTHORITY OF THE OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Section 8 U.S.C. 1324a(e)(6) of IRCA speaks to administrative appellate review:

> The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

The statute gives the Attorney General review authority over the Decision and Order of an Administrative Law Judge. The Attorney General in turn delegated this power to the Chief Administrative Hearing Officer, an official having no review authority over other immigration related matters. 28 C.F.R. 68.2(d).

The Applicable Rules of Practice and Procedure, appearing at 52 Fed. Reg. 44972-85 (1987) (hereinafter Rules) (to be codified at

28 C.F.R. Part 68) provide that an order ``means the whole or any part of a final procedural or substantive disposition of a matter by the Administrative Law Judge.'' 28 C.F.R. 68.2(k). According to the statute, the Attorney General may, within thirty days from the date of the decision, issue an order which modifies or vacates the Administrative Law Judge's Order. Thus, the statute and rules contemplate that the Administrative Law Judge's Decision is an initial decision in conformance with Section 557 of the Administrative Procedure Act. The Administrative Law Judge's Decision becomes final unless it is modified or vacated by the Chief Administrative Hearing Officer. This policy acknowledges the strong possibility in this new area of developing law that a proceeding may represent a test case and that the Administrative Law Judge's Decision will be tantamount to developing policy in an area that is largely unsettled. A provision that provides for review authority contemplates this scenario and insures that policy decisions will be made by the agency head.

The Equal Access to Justice Act acknowledges Section 557 of the Administrative Procedure Act and the fact that Administrative Law Judge's in most cases do not make final decisions. 5 U.S.C. Section 504(a)(3) of EAJA states that:

> The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section. (emphasis added)

This emphasized provision was explained further in a report by the House Judiciary Committee:

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency.

House Report (Judiciary Committee) No. 99-120, Part I (page 14). Cases under 8 U.S.C. 1324a are encompassed by this provision. Under IRCA, the Administrative Law Judge's Decision and Order is final unless the Attorney General modifies or vacates the Decision and Order. This is an accordance with Section 557(b) of the Administrative Procedure Act which states:

> When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

Thus, the Chief Administrative Hearing Officer has jurisdiction to review the Decision and Order of the Administrative Law Judge pursuant to the controlling statute and EAJA, notwithstanding the Administrative Law Judge's decision to the contrary.

VI. THE REQUEST FOR REVIEW OF THE DECISION AND ORDER OF THE EAJA APPLICATION WAS TIMELY FILED

Section 68.52 of the Rules grants a party the right to file a request for administrative review of a Decision and Order, along with supporting arguments, with the Chief Administrative Hearing Officer. This request for review must be made within five days of the date of the decision.

In addition, section 68.5(a) of the Rules states that ``(w)hen the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.'' The prescribed period being five days, this subsection is applicable when computing the filing time for a request for administrative review.

Section 68.5(d)(2) of the Rules gives a party an additional five days when the document (in this case a decision and order of an administrative law judge) is served by mail:

> Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice, or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

The Administrative Law Judge's Decision and Order having been served upon the parties by mail, section 68.5(d)(2) applies to this computation.

The Administrative Law Judge's Decision and Order on the EAJA Application was signed and mailed on January 25, 1989. Pursuant to sections 68.52 and 68.5(d)(2) of the Rules, the parties had ten days to file a request for review, together with supporting arguments, with the Chief Administrative Hearing Officer. The computation of the ten days does not include intermediate Saturdays, Sundays, and holidays. Section 68.5(a) of the Rules. Based on this formula, either party had until February 8, 1989, in which to file a request for review. The Office of the Chief Administrative Hearing Officer received the INS' request for review on ⌊February 7, 1989. Accordingly, the request was timely filed.

VII. THE RESPONDENT MESTER IS NOT THE PREVAILING PARTY

The issue at hand is whether Mester can be classified as a prevailing party where nine of the eleven counts it ``prevailed'' upon

were dismissed by the Administrative Law Judge because the INS failed to state a cause of action.

The standard to determine whether a party is prevailing under EAJA is closely analogous to the standards used for awarding fees under the Voting Rights Act and the Civil Rights Act. Commissioner Court of Medina County, Texas v. United States, 683 F.2d 435 (D.C. Cir. 1982). The United States Court of Appeals in the District of Columbia noted that the courts have developed a two prong test to govern the inquiry into whether a fee claimant has prevailed:

> first, the party must have substantially received the relief sought, and, second, the lawsuit must have been a catalytic, necessary or substantial factor in attaining the relief

Id. at 440. In order to satisfy the first prong, the fee claimant must show that the objective sought to be accomplished by the suit has been obtained. As for the second prong, when it is the defendant who seeks fees, the query is not whether the lawsuit was a catalyst in achieving the result, for the respondent did not institute the suit. Instead:

> [t]he Court must make an objective assessment of the proceedings to determine whether the defense of the suit, e.g., the promise of an aggressive defense strategy or the spectre of extended litigation, led Plaintiffs to take the action that resulted in the mooting of the case. Because this portion of the inquiry involves facts that are totally within the control of the Plaintiffs, the Court must rely on whatever objective data are available.

Id. at 442.

The issue then is a two part one: (1) has Mester substantially received the relief sought; and, (2) can Mester's defense of the suit be considered a catalyst that motivated the INS to provide the requested relief. The factual circumstances in this case are somewhat unusual in that counts 9 through 17 were dismissed by the Administrative Law Judge after a full hearing based on the INS' failure to cite the proper provisions of the statute. The Administrative Law Judge dismissed nine of the counts for failure to state a cause of action upon which a determination could be made of a violation of 8 U.S.C. 1324a(b).

In the Administrative Law Judge's Decision and Order on the EAJA Application, he elaborates on the dismissal due to the INS' defective pleading:

> Finding that counts alleging paperwork violations were fatally flawed such that they failed to state a cause of action or meaningfully inform the respondent (and the forum) as to what statutory and regulatory provisions the respondent was charged with violating, it was not only impractical but also impossible for me to evaluate the quantum of proof as to its adequacy or to make a determination as to whether the paperwork provisions of IRCA had in fact been violated as alleged. Inability of the judge to make a determination of culpability, however, due to the

> defects in the pleadings does not detract from the fact that the ruling made, i.e., dismissal of counts 9-17, did significantly benefit the respondent. The result achieved was the result sought in respondent's decision to defend against the allegations of the complaint.

Decision and Order on the EAJA Application at 19. The Administrative Law Judge concluded that Mester was the prevailing party on these nine counts and rejected the government's argument put forth by the government that the dismissal of the counts based on the defective pleading by the INS was an issue of procedure. He contended that the ``due process implications which compelled the result in the underlying proceeding as to counts 8 (sic) through 17 are substantive, as well as procedural.'' Decision and Order on the EAJA Application at 17. The Administrative Law Judge admits in his Decision and Order on the merits that ``where the factual allegations are not consistent with the specification of law said to have been violated the flaw is pervasive. Here, where the legal specification cannot be identified with certainty, for the reasons discussed below, the flaw is fatal to the charge.'' Decision and Order at 39. Despite this defective pleading and two prehearing conferences, the counts were litigated and eventually dismissed. If as the Administrative Law Judge concludes ``no such `law' could, therefore have been violated,'' Decision and Order at 39, can Mester be considered a prevailing party under the test set forth in Medina given the fatal flaw in the INS' complaint? It is unclear why these counts were not either dismissed or amended prior to the hearing if they in fact failed to provide the respondent with notice.

The analysis under the first prong of Medina calls for a finding that the fee claimants have accomplished an objective sought by the defense of the action. Here Mester prevailed on the merits as to counts 4 and 8 and counts 9 through 17 were dismissed by the Administrative Law Judge sua sponte. The final result then appears to be a disposition that furthered the interests of Mester. Mester need not show that they prevailed on every aspect of the case. Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988).

Under the second prong, however, the inquiry is more complex. It must be determined whether the defense of a suit was ``a causal, necessary, or substantial factor in obtaining the result.'' Medina at 442. Thus, the focus of the inquiry should be on the accomplishments of the fee claimant. In this case, Mester received a benefit solely because of INS' miscitation of the law and not because of its own accomplishments. The defense of the suit was not a causal, necessary, or substantial factor in obtaining the dismissal based on the INS' failure to state a cause of action. Mester's defense regarding counts 9 through 17 did not figure into the Administrative Law

Judge's analysis in dismissing those counts; there was no ruling on the merits. In that respect it is similar to Goodro v. Bowen in that the social security claimant there received the disputed benefits after the filing of his lawsuit because Congress implemented new regulations and not because of the original merits of his claim. 854 F.2d 313 (8th Cir. 1988). Here Mester is capitalizing on INS' defect in pleading_there was no ruling on the merits of Mester's argument.

Even if Mester had met the second prong of the prevailing party test, the dismissal of counts 9 through 17 because of defective pleading constitutes a procedural victory that merely implicates substantive rights. It is not sufficient to make Mester the prevailing party under EAJA. Escobar v. Bowen, 857 F.2d 644 (9th Cir. 1988). The Court in Escobar noted that under EAJA a party is prevailing only if they succeed on the substantive merits of their action. See Hanrahan v. Hampton, 446 U.S. 754 (1980). The district court in Escobar did vindicate the appellee's right to counsel in an administrative hearing. However under the law of the Ninth Circuit ``even a significant procedural victory which implicates substantive rights is not sufficient to make a party a prevailing party under EAJA.'' Escobar, 857 F.2d at 644.

The Administrative Law Judge in this case never reached the merits of Mester's defenses. Mester prevailed because of INS' error in citation which resulted in the defective pleading of counts 9 through 17. Under Hanrahan, a party who does not establish entitlement to some relief on the merits of the claim is not entitled to fees. The Administrative Law Judge distinguished both Hanrahan and Hewitt v. Helms, 107 S.Ct. 2672 (1987), maintaining that Mester prevailed on issues of substance, not merely procedure, like the plaintiff in Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986). However, in Mantolete the decision directly benefited both Mantolete and other handicapped individuals by imposing specific obligations on federal employees to avoid discrimination against handicapped individuals. Thus, the Court concluded that Mantolete had achieved significant success even though the particular issue as to whether Mantolete was improperly denied a job had not yet been decided. The Court noted that the significance of this decision went ``well beyond the particular facts of this case.'' 791 F.2d at 787. All of the issues on which Mantolete prevailed involved significant legal principles which affected the substantive rights of all handicapped individuals. Such is not the case here. Although counts 9 through 17 were dismissed by the Administrative Law Judge and Mester benefited from the Administrative Law Judge's determination, no substantive right was vindicated through the sua sponte

dismissal of counts 9 through 17. The significance of this decision does not extend beyond the facts of this case.

Although in Hewitt the Supreme Court noted that ``[t]he `equivalency' doctrine is simply an acknowledgement of the primacy of the redress over the means by which it is obtained'' the court continued:

> If the defendant under the pressure of a lawsuit pays over a money claim before the judicial judgment is pronounced the plaintiff has `prevailed' in his suit because he has obtained the substance of what he sought . . . (t)hat is the proper equivalent of a judicial judgment that would produce the same effect.

107 S. Ct. at 2676. In Hewitt, the plaintiff was denied prevailing party status by the Supreme Court because the interlocutory ruling, that the complaint should not have been dismissed for failure to state a constitutional claim, did not amount to relief on the merits of the plaintiff's claim. The situation in this case is most closely analygous to Hewitt in that the dismissal of counts 9 through 17 did not amount to relief on the merits of Mester's claim. Thus Mester cannot be considered the prevailing party with respect to counts 9 through 17. And even if respondent is considered a prevailing party with respect to counts 4 and 8, the INS was substantially justified in bringing each enumerated count.

## VIII. THE INS' POSITION WAS SUBSTANTIALLY JUSTIFIED AS TO ALL COUNTS AND ALLEGATIONS STATED IN THE COMPLAINT FILED AGAINST THE RESPONDENT MESTER

According to EAJA, an administrative agency is required to award attorney's fees to a litigant prevailing in an agency adjudication if the position of the government is not ``substantially justified.'' Pierce v. Underwood, 108 S. Ct. 2541, 2547 (1988). The INS' contentions, if found to be substantially justified by the administrative agency, would defeat any application by a party for attorney's fees even if they had been the prevailing party. The EAJA states:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. 504(a)(1).

In the Pierce decision, the Supreme Court elaborated on EAJA's substantially justified test. The Supreme Court held that the government must show that their argument was ``justified in substance or in the main.'' Id. at 2550. While this test allows for some judicial interpretation, the Court specifically points out that the government must be ``justified to a degree that could satisfy a rea-

sonable person.'' Id. at 2550. As the Administrative Law Judge stated in his Decision and Order on the EAJA Application, ``(t)he majority of circuits have adhered to a `reasonableness' standard.'' Decision and Order on the EAJA Application at 21 (citation omitted).

In Pierce, the Supreme Court saw no distinction in the ``reasonableness'' standard and the test espoused in United States v. Yoffe, 775 F.2d 447 (1st Cir. 1985). The First Circuit in Yoffe sets out a three-part reasonableness test designed to represent ``a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous.'' Id. at 450 (citations omitted). Apparently, it is not enough that the government lose because a prevailing party cannot rely solely on such a victory. The prevailing party must show that the position of the government was not substantially justified. Washington v. Heckler, 756 F.2d, 959, 961 (3d Cir. 1985).

The three-part Yoffe test places the burden of proof upon the government by asking:

> did the government have a reasonable basis for the facts alleged; did it have a reasonable basis in law for the theories advanced; and did the facts support its theory?

Id. at 450.

To determine whether the INS satisfies the Yoffe test in this case, each of the foregoing questions must be answered.

1. Did the INS have a reasonable basis for the facts alleged?

The burden this question places on the INS can be satisfied by showing the factual reasons for the government alleging the Counts that were eventually dismissed, i.e. Counts 4 and 8 through 17. Most importantly, the INS must have had a legitimate belief that Mester had violated a provision of 8 U.S.C. 1324a. It must then be shown that a reasonable person would have come to the same belief, given the same set of circumstances.

The Administrative Law Judge's opinion indicates that Mester did violate the provisions of 8 U.S.C. 1324a, stating that Mester is ``an employer clearly failing in its responsibilities during the very earliest days of program implementation under the Act.'' Decision and Order at 43.

Mester did not educate itself on the workings of the IRCA; as the Administrative Law Judge stated, ``respondent (Mester) failed to recognize the need to respond with timely and specific inquiry and, as appropriate, to come promptly into compliance.'' Id. at 43. However, this particular review is not conducted to decide Mester's guilt or innocence on the merits. We need only determine the justification for the INS' allegations.

Count 4, charging Mester with the continued employment of Ernesto Arriaga-Lopez, an alien not authorized to work in the United States, was dismissed by the Administrative Law Judge on the merits for failure of proof. Id. at 45. The Administrative Law Judge did not find the testimony of Arriaga-Lopez to be convincing. ``Arriaga, under whatever name, is not a stalwart witness, [and] . . . is, moreover, suspect in his testimonial capacity.'' Decision and Order at 25. But, the dismissal does not mean that the INS did not have substantial justification for bringing this charge. ``(T)he fact that an ALJ might make an adverse finding on the credibility issue does not, in and of itself, deprive the General Counsel's position of a basis in fact.'' Temp Tech Industries v. N.L.R.B., 756 F.2d 586 (7th Cir. 1985). The INS had a reasonable belief that Arriaga-Lopez was in fact told by Mester to falsify records, making it appear as though he were an authorized worker. Tr. 159. Whether the Administrative Law Judge felt that Arriaga-Lopez' testimony was persuasive does not address the issue at hand. The INS chose to call Arriaga-Lopez as a witness. The fact that Arriaga-Lopez testified that he was an alien unauthorized to work in the United States and his testimony stating that he was an employee of Mester, leads to the conclusion that the INS had a reasonable basis in fact for count 4. Tr. at 151, 152.

Arriaga-Lopez had testified that he had received, from Mester, a paycheck under the name of Ernesto Arriaga-Lopez. Tr. at 155. In response, Mester proffered company records to refute this testimony, showing that no employee with that name was on their payroll during the relevant period of time. Decision and Order on EAJA Application at 27. The record also suggests some confusion as to whether or not Arriaga-Lopez had previously used another name for employment documentation. Tr. at 151-203 and Decision and Order at 24-29. Additionally, the INS had reason to suspect that Mester had violated 8 U.S.C. 1324a:

> It could reasonably be argued that Respondent did have a motivation to continue hiring Arriaga, namely using cheap labor force who, because of their illegal status, can never complain about conditions of employment, salary, unions, etc. Indeed, it may well be argued that there was sufficient evidence, given the many violations by Respondent on the more serious knowing employment charges and Arriaga's prior employment history with Respondent, to support the proposition that, regardless of whether the records showed Arriaga's name or his latest alias, Respondent's personnel division probably knew who Arriaga was and that he was having problems with INS.

INS' Opposition to Application to Attorney's Fees, September 9, 1988. Based on the foregoing statement by INS and the testimony of Arriaga-Lopez, it is evident the INS had a reasonable basis to

suspect that Mester was employing Arriaga-Lopez, in violation of 8 U.S.C. 1324a(a).

Count 8, charging Mester with a paperwork violation pertaining to the employment of Arriaga-Lopez, was also dismissed for failure of proof. Mester again argued that no individual by the name of Arriaga-Lopez was in their employ during the relevant period. Decision and Order at 27. In response, the INS contended that whatever name was used by Arriaga-Lopez at the time of employment, he was an unauthorized alien employed by Mester and they did not present a proper I-9 form. Tr. at 151-172.

Counts 9 through 17 all allege some violation of 8 U.S.C. 1324a(b), the section dealing with the employment verification system. Under this section, the employer must fill out and retain the form (designated as form I-9) and make it available for inspection by the INS. 8 U.S.C. 1324a(b) (1) and (3).

The INS conducted an initial investigation on the premises of Mester Manufacturing Company on September 2, 1987. During this investigation, the INS notified Mester that three of their employees possessed ``bad'' green cards. Tr. at 289. In addition, the INS found additional violations of 8 U.S.C. 1324a. Decision and Order at 14. On September 25, 1987, the INS conducted a second investigation. According to INS Agent Stephen A. Shanks, this investigation revealed that Mester had not presented I-9 forms for ten employees. Tr. at 299, 300. The INS also found that the three individuals with ``bad'' green cards continued to be employed by Mester. Tr. at 289.

Based on the evidence obtained during the two investigations by the INS, it must be concluded that the INS did have a reasonable basis in fact for counts 4 and 8. The testimony of Arriaga-Lopez gave credence to the allegations asserted as a result of the prior investigations by the INS. The INS alleged that Mester continued to employ Arriaga-Lopez after it was apparent that he was an alien unauthorized to work in the United States. They also contended that Mester failed in its duties to properly present an I-9 form for Arriaga-Lopez. The Administrative Law Judge did not agree with this and dismissed the counts based on failure of proof. Nevertheless, the INS did have a reasonable belief that such a violation did occur.

The INS also had a reasonable basis in fact in alleging counts 9 through 17. Through the testimony of Agent Shanks, the INS was able to show their reasons for alleging the paperwork violations. According to the INS, Mester failed to provide them with ten I-9 forms for certain employees. The Administrative Law Judge did not address the merits of this argument, choosing instead to dismiss these counts based on failure to state a cause of action.

2. Did the INS have a reasonable basis in law for advancing its theories?

The INS alleged in count 4 that Mester continued to employ Arriaga-Lopez after having obtained information that he was an alien not authorized to work in the United States. The statutory provision which applies to this is 8 U.S.C. 1324a(a)(2). In the complaint, the INS properly charged Mester with a violation of this statute.

The INS alleged in counts 8 through 17 that Mester failed to present I-90 forms for ten employees. The pertinent statutory provision is 8 U.S.C. 1324a(b)(3). In the complaint, however, the INS improperly cited Mester with violating the subsection dealing with the failure of an employer to fill out the I-9 form [8 U.S.C. 1324a(b)(1)]. However, this improper citation does not alter the allegations set forth in the complaint.

The allegations were failure to present the I-9 forms; a violation of 8 U.S.C. 1324a(b)(3). The Yoffe test requires that there be a reasonable basis in law for the INS' contentions. The allegations conform to the statutory provision. Thus, there is a basis in law for Counts 8 through 17.

3. Did the facts support the INS' theory?

The INS argued this case under both 8 U.S.C. 1324a(a) and 8 U.S.C. 1324a(b), i.e., employment of aliens not authorized to work in the United States and paperwork violations. The facts surrounding the alleged employment of unauthorized aliens show that Mester had continued to employ unauthorized aliens at the time of the September 25, 1987, investigation by INS. As the Administrative Law Judge stated:

> I determine, upon the preponderance of the evidence, that respondent violated 8 U.S.C. 1324(a)(2), by continuing to employ in the United States the aliens identified in counts 1, 2, 3, 5, 6, and 7, knowing them to be, or to have become, unauthorized aliens with respect to those employments by respondent during a period of time which ended approximately on or about September 25, 1987.

Decision and Order at 44. It is obvious (and not a issue here) that the facts surrounding counts 1 through 3 and 5 through 7 support the INS' theories. Count 4, the only unlawful employment allegation to be dismissed by the Administrative Law Judge, was argued by the INS under the same theory as the successful counts enumerated above. The INS alleged that Mester employed Ernesto Arriaga-Lopez (the employee mentioned in Count 4) after they had knowledge that he was not authorized to work in the United States. Complainant's Findings of Fact, Conclusions of Law, and Order, April 14, 1988, at 11-12. This theory was based on the testimony of Arriaga-Lopez and INS Agent Stephen Shanks. Tr. at 67-82 and 205-399. Their testimony clearly supports the allegations

made by the INS in Count 4, as they both attest to Arriaga-Lopez' status as an unauthorized alien employed by Mester. Tr. at 67-82 and 205-399. Although the Administrative Law Judge did not find these facts to be persuasive, it can be concluded that these facts support the INS' theory.

The facts surrounding the paperwork violations remain consistent throughout the proceedings. Initially, the INS alleged (through the Complaint) that Mester failed to present I-9 forms for ten employees (Counts 8 through 17). The fact that the INS cites the statutory provision regarding an employer's failure to fill out the I-9 [8 U.S.C. 1324a(b)(1)] does not imply that they intended to argue both provisions. It is evident that the INS was mistaken in the citation, but no where does the record show that the INS actually tried to prove both a failure to present and a failure to fill out.

During the hearing itself, the INS called Agent Shanks. Through his testimony, the INS continued to show that no I-9 forms were presented for the ten employees. Tr. at 296, 297. He specifically states that Mester failed to present, after a request by INS, I-9 forms for all employees. Tr. at 297.

The INS further argues the Respondent's failure to present the I-9 forms in their Findings of Fact, Conclusions of Law, and Order, at 11-33. Here the INS concludes that because no I-9 forms were presented for these employees, Mester has violated 8 U.S.C. 1324a(b). While there is some mention of possible violations of other subsections under 8 U.S.C. 1324a(b), it is clear that the pervasive central issue is the failure of Mester to present the I-9 forms.