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

December 16, 2024

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2023A00052
ALICE HOTEL GROUP LLC, Respondent.	)	

Appearances: Ariel Chino, Esq., for Complainant
Ranjit Singh Lidhar, Esq., for Respondent

ORDER DENYING ALICE HOTEL GROUP LLC'S EAJA APPLICATION

On February 1, 2024, the above captioned matter was dismissed with prejudice. The parties made a joint motion requesting dismissal with prejudice because they had entered into a settlement agreement. *United States v. Alice Hotel Grp. LLC*, 18 OCAHO no. 1484b, 1 (2024). The motion complied with OCAHO regulation, and it was granted, resulting in a Final Order. *Id.* at 2.

On March 1, 2024, Alice Hotel Group LLC (Alice Hotel), through its attorney, filed an "Application for Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA)."

On March 20, 2024, the Department of Homeland Security, Immigration and Customs Enforcement (DHS), filed "Complainant's Answer to the Respondent's Application for Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA)."

I. ADMINISTRATIVE RECORD OF OCAHO Case No. 2023A00052

A. Notice of Intent to Fine and Complaint

On November 2, 2022, the Department of Homeland Security issued a Notice of Intent to Fine (NIF) to business Alice Hotel Group LLC predicated on alleged violations of § 1324(a)(1)(B). Compl. 10. The NIF identified thirty-four violations of § 1324a(a)(1)(B), with eleven of those violations pertaining to undocumented non-citizens. Compl. 13. The NIF relayed the penalty per violation, assessing a penalty of $2,106.30 per violation for the eleven undocumented non-citizen Forms I-9, and a penalty of $2,006.00 per violation for the twenty-three remaining deficient Forms I-9. Compl. 13. The total proposed penalty to be assessed was $69,307.30. Compl. 13.

On November 17, 2023, Alice Hotel timely requested a hearing. Compl. 8.

On March 28, 2023, the Department of Homeland Security filed a complaint with OCAHO, alleging one count containing thirty-four violations of 8 U.S.C. § 1324a(1)(B). Compl. 2–3. Specifically, Complainant alleged Respondent hired thirty-four individuals for employment and failed to sign the attestation in Section 2 of the Form I-9. Compl. 3.

Complainant alleged eleven of the thirty-four individuals identified were undocumented noncitizens, which would serve to aggravate its proposed penalty. Compl. 3–4. Complainant alleged a violation rate of 94% (meaning thirty-four of the thirty-six Forms I-9 were not completed correctly) which would aggravate its proposed penalty. Compl. 4. Complainant noted it considered Respondent a small business, which would mitigate its proposed penalty. Compl. 4. Complainant assigned these factors a percent value in mitigation and aggravation (+/- 5%) and then applied the adjustment to its proposed "baseline penalty." Compl. 4. The eleven undocumented noncitizen Forms I-9 were assessed a penalty of $2,106.30 per form/individual. Compl. 4. The remaining twenty-three Forms I-9 were assessed a penalty at a lower rate of $2,006.00. The total proposed penalty for thirty-four violations was $69,307.30. Compl. 5.

B. Answer

On May 16, 2023, Alice Hotel Group LLC filed an Answer, generally denying liability. In its Answer, Alice Hotel noted the Complaint did not state "when [Alice Hotel Group LLC] allegedly became aware that [some] individuals were not authorized to work in the United States." Answer 2. Later, Alice Hotel explained it "did not know that [those] individuals were not authorized for employment in the United States." Answer 6.

Alice Hotel Group LLC also "admit[ted] that unintentionally and upon good faith reliance, the hiring personnel failed to sign the attestation for Section 2 for the individuals listed in [the Count]. In consideration to remedy such error, [Alice Hotel Group LLC] . . . attached [to its] Answer . . . a

sworn affidavit . . . that the general manager . . . verified at the time of hiring such documents provided by 27 of the 34 individuals listed in [the Count]." Answer 2.

C. Joint Motion Requesting & Subsequent Referral to Settlement Officer Program (SOP)

On July 28, 2023, the Department of Homeland Security and Alice Hotel Group LLC provided a "Joint Motion and Consent to Referral to Settlement Officer Program," which stated, "the parties expressly consent to participation in the Settlement Officer Program." Aug. 2, 2023 Order Referring Case to Settlement Officer Program 1.

On August 2, 2023, the Court referred the case to the Settlement Officer Program at the request of the parties for a period of sixty days. *Id.* at 2.

D. Post-SOP Prehearing Conferences Monitoring Case Status

On November 16, 2023, after the expiration of the case in the Settlement Officer Program, the parties informed the Court they "anticipate[d] execution of a written settlement agreement shortly." Nov. 17, 2023 PHC Order 2. This representation caused the Court to set a follow-on prehearing conference to receive an update (vice setting a case schedule). *Id.*

On December 7, 2023, the Court held a prehearing conference to receive an update from the parties, and was informed the parties had yet to sign their written settlement agreement. *United States v. Alice Hotel Grp. LLC*, 18 OCAHO no. 1484a, 1 (2023). The Court reminded the parties to ensure all contemplated terms are reduced to writing in the agreement, including whether they intend to seek dismissal with or without prejudice. *Id.* at 2. Based on the posture of the case and representations of the parties, the Court, once more, set the matter for a follow-on prehearing conference to receive an update. *Id.*

E. Dismissal of Case With Prejudice at the Request (Joint) of Parties (Settlement Achieved)

On January 30, 2024, (by way of a joint oral motion in a prehearing conference) both entities moved the Court to dismiss this matter with prejudice, noting the dispute had been resolved by way of a written settlement agreement. Neither party filed the written settlement agreement with the Court, (and the Court did not request it be filed) – all of which is permissible under the forum's regulations. *See* 28 C.F.R. § 68.14(a)(2).

On February 1, 2024, the Court issued a final order, dismissing the case with prejudice. *Alice Hotel Grp. LLC*, 18 OCAHO no. 1484b, at 2. The Court made clear the Order was a "Final Order," and provided appeal information to parties. *Id.* at 2–3.

After issuance of the Final Order, this case was considered resolved and the administrative record was initially considered closed.[1]

F. Application for Attorney's Fees and Opposition

On March 1, 2024, Alice Hotel Group LLC filed its "Application for Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA)." In the Application, Alice Hotel asserts it does meet the statutory definition of a "party,"[2] and the government's position was not substantially justified. App. ¶ 6. To support this proposition, Alice Hotel relies on the delta from the NIF to the settlement agreement amount, stating the parties settled for "less than [a quarter] of what was sought originally by Complainant." *Id.* at ¶¶ 6–7. Alice Hotel also cites referral to OCAHO's Settlement Officer Program to argue the government's position was unjustified. *See id.* at ¶¶ 9–13.

Alice Hotel explained that it "was the prevailing [party] in the final disposition" because: (1) "every alleged violation in the Complaint [was] dismissed with prejudice"; (2) "public policy supports" such a finding, as otherwise "the public will be deterred by the cost of seeking review of unreasonable administrative actions and delays if they must still bear the cost"; and (3) the settlement agreement did not include any "waiver of [Alice Hotel's] right to claim fees and costs pursuant to the EAJA." App. ¶¶ 14–16. Alice Hotel declined to include the settlement agreement with its filing. Instead, it submitted anew matters already in the record (like the Complaint, and copies of previously issued orders), along with documents in support of its proposed attorney's fees (time computations and affidavits). *See id.* at 7–40.[3]

On March 12, 2024, DHS filed "Complainant's Answer to the Respondent's Application for Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA)." DHS opposed each of the assertions made by Alice Hotel. Answer to App. 1–3. Specifically, DHS argued Alice Hotel admitted liability in the settlement agreement, and the omission of a reference to attorney's fees cannot be read as DHS consenting to pay attorney's fees. *Id.*

DHS attached an executed copy of the settlement agreement, wherein Alice Hotel "admits to failing to comply with the employment eligibility requirements in violation of § 274A(a)(1)(B) of

[1] Absent motion practice pertaining to attorney's fees, the record closes at this juncture. However, 28 C.F.R. § 68.49(c) states "the Administrative Law Judge shall make part of the record any motions for attorney's fees authorized by statutes and any supporting documentation, any determinations thereon, and any approved correction to the transcript." For this reason, the filings pertaining to attorney's fees post-dismissal are part of the record.

[2] *See infra* note 9.

[3] Alice Hotel describes these supporting documents in its application as separate exhibits; however, none of the documents themselves are marked as such. Accordingly, the Court must cite the pagination of the entire PDF document when referencing this evidence.

the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), as set forth in Count I of the Complaint." Answer to App. 13.[4] The Agreement also states, "this Agreement contains the entire understanding of the parties and fully supersedes any and all other representations, agreements or understandings with respect to this action." *Id.* at 14.

II. LAW & ANALYSIS

A. Equal Access to Justice Act (EAJA) Framework[5]

As a general matter, attorney's fees (where the United States is a party), can be viewed as an issue of sovereign immunity and waiver of that immunity. *See generally Ardestani v. INS*, 502 U.S. 129 137 (1991).

The Equal Access to Justice Act, first enacted (temporarily) in 1980, and reauthorized permanently in 1985, subjects the United States to attorney's fees and costs in qualifying circumstances. *See generally* Lampe, *supra* note 5; *see also* Pub. L. No. 96-481 §§ 201–02, 94 Stat. 2321 (1980); *see also* Pub. L. No. 99-80, 99 Stat. 183 (1985) (reauthorizing and amending EAJA).

The Equal Access to Justice Act was enacted to provide recourse, for policy reasons, to parties defending against "unreasonable" government action.[6] EAJA achieves this purpose by amending

---

[4] DHS also describes its supporting documents as separate exhibits without marking them as such. Accordingly, the Court refers to the pagination of the entire PDF document when referencing this evidence.

[5] The Court finds it prudent to acknowledge it relied on the Congressional Research Service's "Attorney's Fees and the Equal Access to Justice Act: Legal Framework. Joanna R. Lampe, CONG. RSCH. SERV. (June 10, 2019), https://crsreports.congress.gov/product/pdf/IF/IF11246/2.

In its research, the Court also referenced the Federal Administrative Procedure Sourcebook, published jointly by the Administrative Conference of the United States and the American Bar Association and available at: https://sourcebook.acus.gov/wiki/Federal_Administrative_Procedure_Sourcebook/view.

[6] The "Findings and Purpose" of the Equal Access to Justice Act explain that:

> [C]ertain individuals . . . may be deterred from seeking review or, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights in . . . administrative proceedings . . . . Because of the greater resources and expertise of the United States, the standard should be different from the standard governing an award against a private litigant, in certain situations . . . [Thus], [i]t is the purpose of this title to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations, an award of attorneys fees . . . and other costs against the United States.

two different statutes, 28 U.S.C. § 2412 and 5 U.S.C. § 504. EAJA §§ 203–04, *amended by* Pub. L. No. 99-80. Between the two,[7] it is EAJA § 203, amending 5 U.S.C. § 504, which applies here (in administrative proceedings).

B. EAJA in the Context of Adversary Adjudications (5 U.S.C. § 504)

The statute at 5 U.S.C. § 504 covers "adversary adjudications"[8] conducted by agencies, and contemplates consideration of an award of certain expenses to a "prevailing party"[9] when that party litigates against the United States. 5 U.S.C. § 504(a)(1).

Section 202(a)–(c)(1).

"The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter unreasonable exercise of government authority." *Ardestani,* 502 U.S. at 138.

[7] Section 204 of EAJA, which covers awards of fees and costs in certain judicial proceedings, does not apply to OCAHO (as that section amends 28 U.S.C. § 2412, which governs "Costs and Fees" in judicial proceedings where the United States is a party).

[8] 5 U.S.C. § 504(b)(1)(C) defines "adversary adjudication" as:

> (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993.

[9] 5 U.S.C. § 504(b)(1)(B) defines "party" as:

> a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. § 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (a)(4), a small entity as defined in section 601.

An "adjudicating officer"[10] does not provide such an award when "the position of the agency was substantially justified, or [when such an award would be] unjust." 5 U.S.C. § 504(a)(1).

Such a determination on an award shall be made on the "administrative record as a whole," as it was created during the adversary adjudication. 5 U.S.C. § 504(a)(1). An award may be appropriate when the "demand of the agency[11] is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with such a decision, under the facts and circumstances of the case." 5 U.S.C. § 504(a)(4). Finally, a party seeking an award of fees must do so within thirty days of the final disposition of the matter. 5 U.S.C. § 504(a)(2).

C. OCAHO Proceedings Are Covered Adversary Proceedings

OCAHO proceedings, which are governed by the Administrative Procedure Act, are covered proceedings as they meet the statutory definition at 5 U.S.C. § 504(b)(1)(C). Such a conclusion has separately been memorialized in the forum's regulations, which state:

> A prevailing respondent may receive, pursuant to 5 U.S.C. § 504, an award of attorney's fees in unlawful employment . . . cases. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. An award of attorney's fees will not be made if the Administrative Law Judge determines that the complainant's position was substantially justified or special circumstances make the award unjust.

28 C.F.R. § 68.52(c)(9).

Separately, this determination (i.e. that the proceedings are covered adversary proceedings) is consistent with the forum's precedent. *See Gonzalez-Hernandez v. Ariz. Fam. Health P'ship*, 11 OCAHO no. 1254a, 4 (2015); *see also United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 7 (2014) ("[T]he Equal Access to Justice Act provides the authority and standard for awarding attorney's fees to a prevailing party, other than the United States, in federal administrative proceedings pursuant to 5 U.S.C. § 504.").

D. Alice Hotel Is Not a Prevailing Party [12]

[10] 5 U.S.C. § 504(b)(1)(D) defines "adjudicative officer" as "the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication."

[11] 5 U.S.C. § 504(b)(1)(F) defines "demand" as "the express demand of the agency which led to the adversary adjudication."

[12] Alice Hotel asserts it is a covered party, noting "*Applicant employs less than 500 people and has a net worth of less than $7,000,000.00*." App. 2. ICE, in its opposition to the application, does not refute Alice

As the statute makes clear, an award can only be made to a prevailing party. If the moving (or applying) party cannot show they meet the "prevailing" qualifier, then the analysis ends there, and there is no need to further consider whether the position of the agency was or was not substantially justified. For reasons that follow, Alice Hotel is not a prevailing party.

At the outset, neither EAJA nor OCAHO regulation defines the term, "prevailing party."[13] The Supreme Court, however, did provide such clarity in *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Rescs.* (where it articulated standards for defining a "prevailing party" in cases arising under federal attorney's fees-shifting statutes).[14] 532 U.S. 598 (2001). A prevailing party is one who obtained a "material alteration of the legal relationship of the parties" which resulted from some form of "judicial *imprimatur*,"[15] or court order. *Id.* at 604–05. Stated

---

Hotel's status as a covered party. The Court will, for the purpose of its analysis, assume Alice Hotel meets that statutory criteria, as the dispositive issue here centers on whether it prevailed.

[13] Black's Law Dictionary 1145 (7th ed. 1999) defines the term as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." The Supreme Court relied on this definition in part when interpreting the term "prevailing party" in *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Rescs.*, 532 U.S. 598, 603 (2001).

[14] While *Buckhannon* dealt with fee-shifting provisions in different statutes, (the Federal Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990), most circuit courts of appeals have presumed the reasoning in *Buckhannon* "appl[ies] generally to all fee-shifting statutes that use the prevailing party terminology." *Smith v. Fitchburg Pub. Sch.*, 401 F. 3d 16, 22 n.8 (1st Cir. 2005); *see also Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008) (joining the Fourth, Sixth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits in holding *Buckhannon*'s prevailing party analysis applies to EAJA applications).

More pointedly, this matter arises in the Fifth Circuit, in which a district court explained "[a]lthough the United States Supreme Court did not mention attorney's fees under the EAJA in *Buckhannon*, it strongly insisted a court respect ordinary language in its interpretation of the term 'prevailing party.'" *Alcocer v. INS*, 2001 WL 1142807 at *3 (N.D. Tex. Sept. 21, 2001). The *Alcocer* court added that "[t]he Supreme Court noted that Congress has authorized the award of attorney's fees to the prevailing party in numerous statutes in addition to those at issue in *Buckhannon*, and that it has always interpreted fee-shifting provisions consistently." *Id.* at 3 n.5 (citing *Buckhannon*, 532 U.S. at 603 n.4).

[15] Admittedly, the term "judicial imprimatur" does not typically appear in OCAHO precedent. In considering this term in the context of private settlements post-*Buckhannon*, secondary sources helpfully explain:

> To clarify the concept of imprimatur, the [Supreme] Court explained in a footnote that any resolution of a suit that lacks sufficient judicial approval and oversight would not suffice for prevailing party status. By referring to both approval and oversight in its endorsement of consent decrees, the Court implied that to sustain prevailing party status a private

a different way, there must be some Court-generated evaluation, endorsement, or involvement in an action which then changes the legal relationship of the parties.

In thinking about the level of judicial involvement or endorsement required, *Buckhannon* explains the threshold to trigger "prevailing party" status involves an "enforceable judgment on the merits and [or] court-ordered consent decrees . . . ." *Id.* at 604; *see also Palma v. Alufase USA, LLC*, 10 OCAHO no. 1213, 1 (2014) (citing *Buckhannon* in holding that "[a]bsent a decision on the merits or a consent decree, there is no sufficient alteration in the legal relationship between the parties to identify either of them as the prevailing party.").

Indeed, *Buckhannon* explicitly (and perhaps dispositively) states private settlement agreements lack "the judicial approval and oversight involved in consent decrees" and that jurisdiction to enforce a private settlement "will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." 532 U.S. at 604 n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)).

The initial (and ultimate) question here is whether this privately negotiated and executed settlement agreement, (which was never reviewed or endorsed by the Court prior to dismissal of the case) could be viewed as having sufficient judicial imprimatur as to cross the threshold of judicial involvement required to continue the "prevailing party" analysis. On this record, the answer is no.

In answering this question in the negative, it is critical to note that the record (inclusive of the application) shows the allegations were never evaluated on their merits, and that the parties (both of whom were represented by counsel) entered into a contractual agreement to settle the matter wholly outside the litigated proceedings. The Court's involvement, prior to dismissal, never went beyond executing case management and general oversight.

While the Court did exercise its discretion in referring the matter to OCAHO's mediation program, such a referral stems from the Court's recognition of the inherent value of alternative dispute resolution (not from any purported assessment of the strength or weakness of any party's position in litigation). *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416e, 14 (2023) (CAHO Order) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982) and *Bass v. Phx. Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985), among other cases, when noting the "well-established judicial policy preference in favor of settlement agreements over litigation").

---

agreement must contain both an element of enforceability and some level of judicial approval of the terms of the settlement.

Matthew B. Tenney, Comment, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 B.Y.U. L. REV. 429, 446–47 (2005) (citing *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604 n.7).

The parties here made a series of choices, which also provides context for the Court's analysis and conclusions.

For example, the parties could have negotiated over attorney's fees (and perhaps they did), but the settlement agreement is silent on this point. Whether on purpose or by oversight, that silence was a choice. Alternatively, and for the sake of context, the parties could have sought dismissal under 28 C.F.R. § 68.14(a)(1), which would have resulted in consent findings.[16] Instead, they opted for an oral motion under 28 C.F.R. § 68.14(a)(2) and did not provide at any point pre-dismissal, the executed settlement agreement. The parties' exit strategy under 28 C.F.R. § 68.14(a)(2) could be characterized as a selection of the most expeditious option (as they filed nothing and received their dismissal within 48 hours of requesting it). Whether on purpose or by oversight, selecting the most expeditious regulatory exit ramp was a choice.

While there are invariably more or other potential choices, the point here is clear. The parties in this matter chose to keep their private agreement private, something which the regulations permit them to request. The collective choice to do so means their private agreement lacks the "judicial approval or oversight" required by *Buckhannon*. Such a reality precludes any party from receiving the Court's endorsement now as a "prevailing" party. Without such "imprimatur" driving a "material alteration of the legal relationship of the parties," the Court is in no position to assign "prevailing party" status to either litigant.

Alice Hotel is not a "prevailing party;" consequently, its application fails, and it is not entitled to attorney's fees under 28 C.F.R.§ 68.52(c)(9) or 5 U.S.C. § 504 (as amended by EAJA).

The Application is DENIED.[17]

---

[16] This would perhaps have drastically changed the judicial *imprimatur* analysis as dismissal based on consent findings "[has] the same force and effect as a decision and order made after full hearing." 28 C.F.R. § 68.14(b)(1). But again, this was not the choice the parties selected.

[17] Pursuant to 5 U.S.C. § 504(c)(2),

> If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

SO ORDERED.

Dated and entered on December 16, 2024.

_____
Honorable Andrea R. Carroll-Tipton
Administrative Law Judge