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

May 21, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96E00015
MOURAD ABU REMILEH, Respondent.	)	

SECOND ORDER DENYING RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

Procedural History

On July 27, 1994, complainant filed a two (2)-count Complaint previously at issue in OCAHO Case No. 94C00139. In Count I, complainant had averred that after November 29, 1990, respondent had knowingly and falsely made an Employment Eligibility Verification Form (Form I–9) for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA), in violation of the provisions of 8 U.S.C. §1324c(a)(1). Complainant had assessed a civil money penalty of $500 for that alleged violation.

In Count II, complainant had alleged that after November 29, 1990, respondent had knowingly used, attempted to use, and possessed the forged, counterfeited, altered and falsely made document described therein, namely, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live Birth in the name of Zachary Mohamed Armeli, for the purpose of satisfying a requirement of the INA, in violation of 8 U.S.C. §1324c(a)(2). Complainant had sought a civil money penalty of $500 for that alleged infraction, also.

On January 9, 1995, the undersigned granted complainant's December 6, 1994 Motion for Summary Decision, having determined that there were no genuine issues of material fact with regard to the violations alleged in Counts I and II. That Order further directed the parties to submit concurrent briefs addressing the sole remaining issue of the appropriate civil money penalties to be assessed for those two (2) counts.

On February 7, 1995, the Chief Administrative Hearing Officer (CAHO) issued a Modification of the undersigned's January 9, 1995 Order Granting Complainant's Motion for Summary Decision. That Modification dismissed Count I of the Complaint due to the CAHO's conclusion that "[i]t is the underlying fraudulent document, submitted to an employer [by an employee] to establish identity and/or work authorization, which is the proper basis of a section 1324c violation[,]" and that "the attestation of an employee to false information on a Form I–9 does not constitute . . . [a] violation of 8 U.S.C. §1324c." *United States v. Remileh*, 5 OCAHO 724, at 9 (1995) (as modified). As to Count II, the CAHO affirmed the granting of summary decision.

On March 9, 1995, respondent's counsel, Mr. Richard Breitman filed Respondent's Application for Attorney's Fees and Costs Under the Equal Access to Justice Act (EAJA).

On April 13, 1995, the undersigned issued an Order Denying Respondent's Application for Attorney Fees Under the Equal Access to Justice Act. EAJA requires that "[a] party seeking an award of fees and other expenses shall, within thirty days of a *final disposition* in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section." 5 U.S.C. §504(a)(2) (emphasis added). That April 13, 1995 decision was based upon a determination that, because a penalty regarding Count II had not been assessed, and because a final decision and order of the Attorney General may be appealed within 45 days to the Court of Appeals for the appropriate circuit, no final decision had been issued. Thus, respondent's application was denied without prejudice on the basis that no final disposition of the case had occurred, and respondent was advised that he could refile once a final disposition had been rendered.

On December 5, 1995, a Final Decision and Order was issued, in which respondent was assessed a civil money penalty of $500 for Count II.

On January 16, 1996, respondent's counsel filed with the United States Court of Appeals for the Eighth Circuit a Petition for Review of both the CAHO's Modification of the January 9, 1995 Order Granting Complainant's Motion for Summary Decision and the December 5, 1995 Final Decision and Order. That appeal is currently pending.

On February 6, 1996, Mr. Breitman resubmitted Respondent's Application for Attorney's Fees and Costs Under the Equal Access to Justice Act.

On February 28, 1996, complainant filed a Memorandum in Opposition to Respondent's Application for Attorney's Fees and Costs Under the Equal Access to Justice Act, and on March 29, 1996, filed a Supple mental INS Memorandum in Opposition Respondent's Application for Attorney's Fees and Costs Under the Equal Access to Justice Act. In the latter memorandum, in addition to making substantive arguments regarding the efficacy of respondent's request for EAJA fees, complainant argues that respondent's application is once again prematurely filed in light of his appeal to the Eighth Circuit.

Respondent's Application for EAJA Fees

The United States Code provides for the costs and fees of a prevailing party, other than the United States, within administrative proceedings:

§504. Costs and fees of parties

(a)(1) 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. . . .

(2) *A party* seeking an award of fees and other expenses *shall, within thirty days of a final disposition in the adversary adjudication, submit* to the agency *an application* which shows that the party is a prevailing party and is eligible to receive an award under this section. . . . *When the United States appeals the underlying merits of an adversary adjudication, no de-*

> *cision on an application for fees* and other expenses in connection with that adversary adjudication *shall be made under this section 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.
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> (c)(1). . . . *If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.*

5 U.S.C. §504 (emphasis added).

The Rules of Practice and Procedure for this Office provide that attorney's fees may be awarded, pursuant to 5 U.S.C. §504, provided that an application accompanied by an itemized statement of expenses and other fees is filed, and provided that the administrative law judge does not determine that "the complainant's position was substantially justified or [that] special circumstances make the award unjust." 28 C.F.R. §68.52(c)(3)(iii) (1995).

The key issue presented by respondent's application for EAJA fees and complainant's opposition to that request is whether or not a final decision and order of this Office in a §1324c proceeding, which has been timely appealed to the appropriate circuit court, constitutes a "final disposition" for purposes of a request for EAJA fees.

As noted in the undersigned's April 13, 1995 Order Denying Respondent's Application for Attorney Fees Under the Equal Access to Justice Act, neither the statute nor the legislative history defines the term "final disposition." Apr. 13, 1995 Order at 3. However, it is instructive to examine the case law construing the term "final disposition" under EAJA.

The Supreme Court, while analyzing the nearly identical EAJA provision applicable to courts of law, 28 U.S.C. §2412, has observed that "[t]raditionally, a 'final judgment' is one that is final and appealable. . . . Under §2412 as amended, however, a 'final judgment' is one that is 'final and not appealable.'" *Melkonyan v. Sullivan,* 501 U.S. 89, 95 (1991) (indicating that Congress added the definition of "final judgment" in 1985 in response to a split in the federal courts as to when the EAJA 30-day time period began to run). In trying to determine the timeliness of petitioner's EAJA application, the Court contrasts the EAJA provisions applicable to administrative proceedings, 5 U.S.C. §504, with those applicable to proceedings in courts of

law, 28 U.S.C. §2412, noting that a "final disposition in [an] adversary adjudication" under §504 "includes adjudication by an administrative agency," but that a "final judgment in [an] action" under §2412 "is rendered by a court," and not by an administrative agency. *Melkonyan,* 501 U.S. at 94–95.

Factually, petitioner's case in *Melkonyan* had been remanded for further administrative proceedings, but no final decision had been entered by the district court. *Id.* at 97. Further, it was unclear whether either party was entitled to return to district court for a final judgment. *Id.* at 97, 102–103. While the Court remanded the case without deciding on the timeliness of petitioner's application, it did "hold that a 'final judgment' for purposes of 28 U.S.C. §2412(d)(1)(B) means a judgment rendered by a court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." *Id.* at 96; *see also Sheely v. Wisconsin Dep't of Health & Social Servs.*, 442 N.W.2d 1, 6 (1989) (stating that "[t]he majority of federal courts . . . hold a party is eligible to receive fees and costs pursuant to EAJA only after the matter is disposed of in favor of them on remand.") By the same token, a "final disposition" for purposes of 5 U.S.C. §504(a)(2) should mean a judgment rendered by an administrative agency that terminates the proceeding for which EAJA fees may be received. Thus, the 30-day EAJA clock for adversary adjudications, like that for civil actions, begins to run after the time to appeal that "final disposition" has expired.

Further support for that definition of "final disposition" occurs in *Dole v. Phoenix Roofing, Inc.*. 922 F.2d 1202 (5th Cir. 1991). In *Phoenix Roofing*, the Fifth Circuit expressly addressed what constitutes a "final disposition" under §504 when Phoenix appealed only one (1) part of a two (2)-part citation. *Id.* at 1206. Because Phoenix did not appeal the first citation, Dole, the Secretary of Labor, had argued that "final disposition" of that citation occurred 30 days after it was docketed. *Id.* Thus, if Dole's reasoning were adopted, Phoenix's EAJA application, which was filed over a year later, would have been untimely. *Id.* The Fifth Circuit, however, rejected that reasoning:

> For the reasons we outline below, we hold that when a party appeals only part of an ALJ's decision, the entire decision is on review; the failure to appeal the decision on a particular citation item does not make the ALJ's disposition of that item a "final disposition" of that item for EAJA purposes. . . .
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> . . . . Congress prohibits an agency from making an award of fees and expenses "in connection with" an adversary adjudication when an appeal is pending.

Id.

> In support of its reasoning, the court notes:
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> Our view that there is no "final disposition" until the entire decision is final and unappealable preserves the policy of avoiding piecemeal adjudication.
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> . . . . Holding that there is no "final disposition" until the entire decision is final and unappealable avoids both the unnecessary fragmentation of the fee petitions and the waste of judicial resources that would result from filing multiple petitions in different courts for fees incurred in one case.

Id. at 1207. Although *Phoenix Roofing* is not controlling authority, its analysis of the term "final disposition" is persuasive.

Finally, §504 itself dictates that "[i]f a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code." 5 U.S.C. §504(c)(1). While it appears that that phrase contradicts earlier language in the statute stating that "no decision on an application for fees . . . shall be made under this section until a final and unreviewable decision is rendered . . . on the appeal," 5 U.S.C. §504(a)(2), it is not necessary to dovetail those two (2) seemingly contradictory statements at this time. Rather it is sufficient that the undersigned adopt the Fifth Circuit's persuasive analysis of the term "final disposition" for purposes of an EAJA fee application.

Because respondent has filed with the United States Court of Appeals for the Eighth Circuit a Petition for Review of both the CAHO's Modification of the January 9, 1995 Order Granting Complainant's Motion for Summary Decision and the December 5, 1995 Final Decision and Order, no "final disposition" of this case has occurred. Thus, Respondent's Application for Attorney's Fees and Costs Under the Equal Access to Justice Act is not timely.

Accordingly, respondent's application for fees and costs is hereby denied, without prejudice. Once a final disposition of this case occurs, and if respondent emerges as the prevailing party, his application for EAJA fees may be refiled.

SO ORDERED:

JOSEPH E. MCGUIRE
Administrative Law Judge