

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CECIL OSAKWE,
(A#76-826-718),

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY, *et al.*

Defendants.

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CIVIL ACTION G-07-308

ORDER

Pending before the court is plaintiff Cecil Osakwe’s motion for statutory attorney’s fees. Upon consideration of the motion, all responsive pleadings, and the applicable law, the court finds that the motion should be GRANTED in part and DENIED in part.

On March 6, 2008, pursuant to the Equal Access to Judgment Act (“EAJA”), 28 U.S.C. § 2412(d), Osakwe filed a motion for attorney’s fees. Dkt. 24. On March 28, 2008, this court found Osakwe entitled to attorney’s fees and ordered the defendants to submit objections to the amount of fees requested. Dkt. 27. The defendants filed their objections and Osakwe has responded. This court now determines whether the amount of Osakwe’s attorney’s fees is reasonable.

ANALYSIS

Reasonable Number of Hours Expended

Defendants argue that the attorney’s fees requested are disproportionate to the results obtained. Dkt. 31. Courts have long recognized that “success is a crucial factor in determining the proper amount of an award of attorney’s fees.” *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct.

1933 (1983); *see also Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 161, 110 S. Ct. 2316 (1990); *Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992). In *Hensley*, the Supreme Court stated that a plaintiff may receive attorney’s fees “if he succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bring the suit.” *Hensley*, 461 U.S. at 440. Moreover, “hours spent on . . . unsuccessful claim[s] should be excluded in considering the amount of a reasonable fee.” *Id.* In the present case, Osakwe sought to compel the government to adjudicate his naturalization application. Dkt. 1. This court instructed the government to expedite Osakwe’s naturalization application process and to adjudicate his application within a specified time period. Dkt. 21. The government subsequently approved Osakwe’s naturalization application. Thus, the court believes Osakwe’s requested attorney’s fees correlate with the results his attorneys obtained.

Additionally, defendants argue that Osakwe’s request fails for inadequate billing documentation. *Id.* The EAJA provides district courts discretion in determining reasonable attorney’s fees. *See, e.g., Yoes v. Barhnart*, 467 F.3d 426, 426 (5th Cir. 2008). The court finds that Osakwe provides sufficient documentation. Osakwe has presented billing records as to the work done each day by the respective attorney. Moreover, the work descriptions are sufficient to discern the actual work performed by each attorney.

Reasonable Hourly Rate

Limited-Availability Special Factor

The EAJA empowers district courts to grant attorney’s fees, costs, and expenses “to the prevailing party in any civil action brought by or against the United States.”¹ 28 U.S.C. § 2412(a)(1).

¹ On March 28, 2008, this court ruled that Osakwe constituted a prevailing party. Dkt. 27. The court found that the government failed to demonstrate its position was “substantially justified or that special circumstances [made] the

Under the EAJA, “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(D)(2)(A). Osakwe seeks fees considerably in excess of the \$125 per hour statutory cap. Dkt. 24. Osakwe bases his request on the special factor prong of 28 U.S.C. § 2412(D)(2)(A). He argues that hourly fees ranging from \$250 to \$450 are justified given “the limited number of immigration attorneys in Houston who are qualified attorneys to handle this type of immigration case.” Dkt. 24.

Courts have interpreted the “limited availability” special factor language narrowly. *See, e.g., Estate of Cervin v. Comm’r*, 200 F.3d 351, 354 (5th Cir. 2000) (explaining that “the ‘limited-availability’ standard . . . is a very narrow exception”). In *Pierce v. Underwood*, the Supreme Court stated that the limited-availability special factor language did not apply merely when “lawyers skilled and experienced enough to try the case are in short supply.” *Pierce v. Underwood*, 487 U.S. 552, 571, 108 S. Ct. 2541 (1988). Instead, the Court found the limited-availability language applicable when attorneys required some “distinctive or specialized skill” as opposed “to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation.” *Id.* at 572. The Fifth Circuit has adopted a two-prong test to determine whether limited availability constitutes a special factor. *Estate of Cervin*, 200 F.3d at 353. Under this test, a limited-availability special factor is present when:

- (1) the number of competent attorneys who handle cases in the specialized field is so limited that individuals who have possibly valid claims are unable to secure representation; and
- (2) . . . by increasing the fee, the availability of lawyers for these cases will actually be increased.

award unjust.” Dkt. 27; 28 U.S.C. § 2412(d)(1)

Id. (quoting *Perales*, 950 F.2d at 1078). A specialized field requires nonlegal or technical training rather than “other types of substantive specializations currently proliferating within the profession.” *Perales*, 950 F.2d at 1078. Furthermore, the party seeking the special factor adjustment must provide evidence of any “nonlegal or technical abilities.” *Estate of Cervin*, 200 F.3d at 354.

In *Perales*, the Fifth Circuit determined that an immigration specialty did not constitute a limited-availability special factor under the EAJA. *Perales*, 950 F.2d at 1078. The court reasoned that although “immigration law is a specialty area requiring an extensive and current knowledge of applicable statutes and regulations, such is true for virtually any area of law, particularly those involving the intricate federal statutory schemes that typically give rise to awards under the EAJA.” *Id.* As in *Perales*, Osakwe seeks a special factor enhancement solely based upon the limited number of immigration attorneys. Osakwe has failed to provide evidence indicating that nonlegal or technical training, outside the immigration context, was required in this case. For these reasons, Osakwe’s request for a special factor enhancement is DENIED.

Cost-of-Living Adjustment

Alternatively, Osakwe requests an award of attorney’s fees adjusted for cost of living. Dkt. 24. Under the EAJA, a district court may grant an award above the statutory cap for cost-of-living adjustments. 28 U.S.C. § 2412(D)(2)(A); *see also* *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 n. 4., 122 S. Ct. 1817 (2002). Osakwe provides Consumer Price Index (“CPI”) reports compiled by the U.S. Department of Labor, Bureau of Labor Statistics as proof of an increase in the cost of living. CPI reports have been recognized as sufficient proof in justifying an award of enhanced attorney’s fees. *See, e.g.,* *Bornette v. Barnhart*, 473 F. Supp. 2d 736, 738–39 (E.D. Tex. 2007); *Chargois v.*

Barnhart, 454 F. Supp. 2d 631, 634–35 (E.D. Tex. 2006); *Sandoval v. Apfel*, 86 F. Supp. 2d 601, 614 (N.D. Tex 2000).

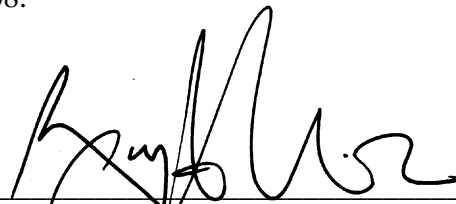
Courts typically compare the CPI index for the region where services were provided at the time the EAJA hourly rate was established with the index at the time legal services were provided. *See Bornette*, 473 F. Supp. 2d at 739. “If the CPI index in the region is greater in the year services were provided, the court calculates the percentage difference and approves an excess hourly fee corresponding to the calculated percentage.” Osakwe provides the CPI index for the Houston area for April 1996, the month after the EAJA was last amended, and December 2007. Based on a comparison of the Houston-area indices, Osakwe requested attorney’s fees amount to \$16,415.42. The government did not contest this amount. Finding his calculations reasonable, Osakwe’s request for a statutory enhancement based upon a cost-of-living adjustment is GRANTED.

CONCLUSION

For the foregoing reasons, the court finds the requested attorney’s fees, calculated pursuant to the cost-of-living adjustment, reasonable. Therefore, it is

ORDERED that defendants pay \$16,415.42 in attorney’s fees to Osakwe.

Signed at Houston, Texas on April 28, 2008.



Gray H. Miller
United States District Judge