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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	CASE NO. 90100149
CHARO'S CORPORATION d.b.a., "CHARO'S RESTAURANT", Respondent.	)	

FINAL DECISION AND ORDER REGARDING
ACTION BY THE CHIEF ADMINISTRATIVE
HEARING OFFICER REMANDING THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND ORDER

E. Milton Frosburg, Administrative Law Judge

Appearances:
Dayna M. Dias, Esquire
Elizabeth J. Hacker, Esquire
for Immigration & Naturalization Service
Peter Anthony Schey, Esquire
Carlos Holquin, Esquire
for Respondent

TABLE OF CONTENTS Page

I. *Procedural History*

On August 29, 1991, I issued my Final Decision and Order in this case, bifurcating the issue of Respondent's motion for attorneys' fees and costs under 5 U.S.C. § 504 (1990). U.S. v. Charo's Restaurant, 2 OCAHO 369 (8/29/91). On January 22, 1992, I issued a Final Decision And Order Regarding Respondent's Claim For Attorneys' Fees And Costs Under EAJA[1] in which I denied Respondent's motion for attorneys' fees and costs as I had found that Respondent had not met the statutory requirements set out in 5 U.S.C. §§ 504(a)(2), (b)(1)(B) (1990), in that it had not shown its eligibility for fees in its EAJA application.[2] U.S. v. Charo's Restaurant, 3 OCAHO 402 (1/22/92). The instant order is the result of my notification to the Office of the Chief Administrative Hearing Officer (OCAHO) that a packet of Respondent's filed documents had been inadvertently overlooked when I had considered my January 22, 1992 Decision and the OCAHO's subsequent remand[3]. See Action By The Chief Administrative Hearing Officer Remanding The Administrative Law Judge's Decision And Order, dated February 19, 1992.

After Respondent was notified of the remand, it filed an unopposed Motion to Identify Documents Not Considered And Permitting Respondent To Brief Their Significance on March 6, 1992. Prior to my Order on that motion, Respondent filed a Memorandum Regarding Decision Of The Administrative Law Judge And Subsequent Action By Chief Administrative Hearing Officer on March 19, 1992. On that same date, I issued an Order identifying the inadvertently overlooked documentation as a packet entitled "LIST OF POST-HEARING EXHIBITS" filed by Respondent with its Supplemental Memorandum Law In Support Of Respondent's Motion For Attorneys' Fees And Costs on June 24, 1991. In addition, I granted Respondent and

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[1] Equal Access to Justice Act (5 U.S.C. § 504)(1990).

[2] See U.S. v. Charo's Restaurant, 2 OCAHO 369 (8/29/91) and U.S. v. Charo's Restaurant, 3 OCAHO 402, (1/22/92) for detailed procedural history of this case.

[3] Although I had reviewed this documentation prior to issuing my January 22, 1992 Decision and Order, it was not at my side when the Order was drafted.

Complainant time to submit briefs, if they wished, on the documents' significance in relation to the issue of EAJA fees.

On April 1, 1992, my office received Respondent's Motion For Clarification Of March 19, 1992 Order And Extension Of Time Within Which To File Brief. On April 13, 1992, Complainant wrote to this court and stated that clarification had been accomplished to the parties' satisfaction in a telephonic conversation with my office. Therefore on April 21, 1992, I issued Orders Denying Respondent's Request For Post Hearing Telephonic Conference, Granting Respondent's Request For Extension Of Time To File Brief and Granting Complainant's Request for Extension of Time.

On May 11, 1992 and May 15, 1992, for good cause shown, I granted Respondent's two Motions For Extension Of Time To File Memorandum, filed on May 8, 1992 and May 14, 1992, respectively. On May 18, 1992, Respondent filed its Memorandum Regarding Significance Of Exhibits Filed In Support Of Respondent's Motion For Attorneys' Fees And Costs. On June 19, 1992, Complainant filed its response.

On July 20, 1992, Respondent filed a Motion That The Closing Memorandum And Exhibits Accompanying This Motion Be Filed And Considered along with its Closing Memorandum And Exhibits. The Service filed its opposition motion on August 3, 1992. I ordered the record closed on August 5, 1992.

II. *Discussion*

In my Order of January 22, 1992, I made the following findings:

1. That my authority to consider Respondent's claim for EAJA fees arose under 5 U.S.C. § 504 (1990);

2. That Respondent had made a technical error when it had applied for EAJA fees and costs under 28 U.S.C. § 2412 (1990) and had inten-ded to file under 5 U.S.C. § 504 (1990);

3. That I had jurisdiction to hear Respondent's EAJA claim and that this holding was in line with U.S. v. ABC Roofing & Waterproofing, Inc., 2 OCAHO 382 (10/2/91);

4. That in order to be granted an award of EAJA costs and fees, Respondent was required to:

a. timely file its EAJA claim;

b. establish in its EAJA application that it was an eligible party as defined in 5 U.S.C. § 504 (1990);

c. establish in its EAJA application that it was a prevailing party in the underlying proceeding; and,

d. allege that the government's position was not substantially justified;

5. That it would be contrary to the Congressional intent behind the EAJA statute for the court to infer that Respondent's EAJA application had met the threshold determination of party eligibility where there had been no assertion of such by the applicant; and,

6. That Respondent had not established that it was an eligible party as defined under 5 U.S.C. § 504(b)(1)(B) (1990) and, thus, could not be awarded any attorney fees or costs under the statute.

Although my findings terminated Respondent's possibility of EAJA recovery, for the parties' benefit, I continued my January 22, 1992 Decision with a discussion of the other statutory requirements. In dicta, I found that Respondent had met the tests of prevailing party and that the government had been substantially justified in its position.

The purpose of today's Decision and Order is to determine if the documents contained in Respondent's List of Post-Hearing Exhibits, when considered with the record as a whole, affect my previous findings on Respondent's eligibility for EAJA and, if they do, whether they also affect my previous findings regarding whether Complainant's position was substantially justified. The other findings in the Final Decision and Order dated January 22, 1992 remain unchanged.

A. Respondent's EAJA Application

In order to determine Respondent's eligibility for an EAJA award, I must examine its application in light of 5 U.S.C. §§ 504(a)(2), and (b)(1)(B)(1990). Obviously, I must first determine what constitutes Respondent's application.

Respondent filed its Motion For Attorneys' Fees And Costs with a Memorandum of Points And Authorities on May 15, 1991. In its motion, it stated that the application was based on "all documents on

file in this case, (and) further filings which may be made...." I am unclear as to what Respondent meant by this statement; however, if Respondent intended that the court should consider any and all future filings to be incorporated into the EAJA application, this intention cannot be respected. My analysis is as follows.

The EAJA statutes are limited waivers of sovereign immunity which must be strictly construed. Monark Boat Co. v. N.L.R.B., 708 F.2d 1322, 1326 (8th Cir. 1983) citing to U.S. v. Sherwood, 312 U.S. 584, 590-91 (1941) and U.S. v. Mitchell, 445 U.S. 535, 538 (1980); U.S. v. Testan, 424 U.S. 392, 398-99 (1976); U.S. v. Hopkins Dodge Sales, Inc. 707 F. Supp. 1078 (D. Minn. 1989) citing to Columbia Mfg. Co. v. N.L.R.B., 715 F.2d 1409, 1410 (9th Cir. 1983)(other citations omitted). "The United States, as sovereign, is immune from suit save as it consents to be sued..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit...." Monark at 1326. "The limitations and conditions that Congress imposes on waivers of sovereign immunity must be strictly observed." Soriano v. U.S., 352 U.S. 270 (1957).

The relevant portion of 5 U.S.C. § 504 (1990) clearly states that a "party seeking an award of fees and other expenses, shall, within thirty days of a final disposition in an adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award...."(emphasis added). 5 U.S.C. §504(a)(2) (1990); Melkonyan v. Sullivan, 111 SCt 2157 (1991). Courts have consistently found that the thirty day filing deadline in the EAJA statutes is a jurisdictional prerequisite. Lord Jim's v. N.L.R.B., 772 F.2d 1446, 1448 (9th Cir. 1985) citing to Columbia Mfg. at 1410; see also Mann v. U.S., 399 F.2d 672,673 (9th Cir. 1968); Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1206 (5th Cir. 1991); Howitt v. U.S. Dep't. of Commerce, 897 F.2d 583 (1st Cir. 1990); Monark Boat Co. at 1326. It is a basic premise of law that no court, party, or agreement between the two, can establish or enlarge a court's jurisdiction.

I have carefully reviewed the court's reasoning and holding in Hopkins Dodge Sales wherein the court examined the issue of whether an incomplete EAJA application could be considered timely in light of the omission of a showing of eligible party status in the applicant's initial filing which was presented within the statutory period. The court, after statutory and legislative intent analysis, held that the showing of eligibility for EAJA was a jurisdictional requirement and that an EAJA application, which is defective due to the lack of showing eligibility, must be denied for lack of jurisdiction. Id. at 1081.

As I agree with the reasoning and holding in Hopkins Dodge Sales, I find that Respondent cannot, by way of its motion, incorporate court filings made after the thirty day time frame set out in 5 U.S.C. §504(a)(2)(1990) so as to establish its eligibility for EAJA recovery. See also In re Nofziger, 938 F.2d 1397, 1403 (D.C. Cir. 1991).

I feel it is important to point out that this finding does not affect an applicant's ability to prove its eligibility for EAJA fees after the thirty day jurisdictional limit, should the opposing party question the applicant's eligibility after the eligibility requirements have been shown in a timely EAJA application. See D'Amico on behalf of N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America, 630 F. Supp. 919, 921, 922 (D.C. Md. 1986) (although it is clear that the 5 U.S.C. § 504(a)(2)(1990) puts the burden of establishing eligibility for EAJA award on applicant, it would be unnecessarily burdensome to require applicant to prove eligibility to government's satisfaction in the initial application for fees and costs.)

B. Respondents' Eligibility For EAJA Award

> Recovery of attorney fees and costs from administrative proceedings may not be had unless the petitioner fulfills the statutory requirements in 5 U.S.C. § 504....A threshold requirement for an EAJA claim petitioner in an administrative case is to establish that he is eligible to recover under this statute. Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991).

U.S. v. Charo's Restaurant, 3 OCAHO 402 (1/22/92) at 5; see also American Hospital Ass'n v. Sullivan, 938 F.2d 216 (D.C. Cir. 1991); Brock v. Gretna Machine and Ironworks, Inc., Civil Action No. 82-1507 1989 U.S. Dist. Lexis 280 at 5 (E.D. La. 1989) (Court considered threshold issue of eligibility as dispositive of the case and, thus, considered this issue even where the parties didn't raise it.)

Showing eligibility for an EAJA award is an affirmative duty on the applicant's part that needs to be met in a timely EAJA application. 5 U.S.C. § 5 0 4(a)(2)(1990); Hopkins Dodge Sales. Should the applicant not meet this burden an EAJA award cannot be granted. Id.; Love at 1495; Brock.

In the instant case, where Respondent is a corporation, the relevant statutory language sets out a two prong requirement for eligible party status, i.e., that at the time of the initiation of the adversary proceeding, (a) the corporation's net worth did not exceed $7,000,000 and (b) the corporation did not have more than 500 employees. 5 U.S.C. § 504(b)(1)(B)(1990). In the Ninth Circuit, it is the petitioner's burden

to establish that it meets the statutory definition of "party". 5 U.S.C. §§ 504(a)(2), (b)(1)(B)(1990) Love; Thomas v. Peterson, 841 F.2d 332, 337 (9th Cir. 1988);.

I still hold to my previous reasoning and findings found in the January 22, 1992 Decision, wherein I stated:

> In considering whether Respondent is an eligible party under 5 U.S.C. § 504, I have considered whether I could, or should, infer that it meets the statutory requirements since it has not made any showing....
>
> I find it instructive that although Congress intended to limit the type of prevailing party who could recover, it did not make the showing of eligibility onerous to the claimant. In fact, it did not limit in any way the manner of establishing eligibility. The only requirement is that the Respondent "show" that it is eligible to receive the award under the statute.
>
> In this case, I hold that it would be inappropriate for me to infer that Respondent is an eligible party under 5 U.S.C. § 504. Further, due to the statute's clear language on this point, I do not believe that Congress intended this Court to infer the threshold determination of party eligibility when Respondent has all the needed information at his fingertips and can fulfill his burden with ease. See c.f. U.S.A. v. ABC Roofing & Waterproofing, Inc., 2 OCAHO 382 (10/2/91).
>
> As such, after serious consideration of all matters, I hold that an applicant for EAJA fees under 5 U.S.C. § 504 carries the burden of establishing in his application that he qualifies as a party eligible to recover. This requirement may be established by as little as an affidavit from a knowledgeable party that Respondent's net worth was less than seven million dollars ($7,000,000) at the time of the adjudication's initiation and employed fewer than five hundred (500) employees at that time.

U.S. v. Charo's Restaurant, 3 OCAHO 402 (1/22/92) at 7-8.

1. Net Worth Requirement

The statute requires that the EAJA applicant show in its EAJA application that, at the time of the initiation of the adjudication, it's net worth was seven million dollars ($7,000,000) or less. 5 U.S.C. §§ 504(a)(2),(b)(1)(B)(1990). Courts have found that where an applicant has not established that its net worth is below the statutory ceiling, the applicant is not eligible for recovery. U.S. v. 68.94 Acres of Land, 736 F. Supp. 541 (D. Del. 1990). In my previous Decision and Order, I found that Respondent had not shown that its net worth was less than the statutory ceiling and therefore was not entitled to EAJA recovery. I will now review this finding.

Respondent has argued, in its Memorandum Regarding Significance Of Exhibits Filed In Support Of Respondent's Motion For Attorneys'

Fees And Costs, filed May 18, 1992, that its EAJA application fulfilled the statutory net worth requirement. Respondent supported its argument by stating that:

1. Respondent had been operating at a loss for many years;

2. Respondent was worth far less than the statutory ceiling;

3. Respondent was found to be a small, family run business in my Order dated August 29, 1991; and,

4. Respondent's previous counsel, Mr. Frolich, had filed a sworn declaration, contained in the overlooked documents, which stated that based on his information and belief, Respondent's net worth was less than two million dollars ($2,000,000).

Complainant has not reargued its position as set out in its Memorandum Of Points And Authorities In Opposition To Motion For Attorneys' Fees And Costs, filed June 20, 1991, wherein it argued that Respondent had not met its burden of establishing its eligibility for an EAJA award as required.

Based on a review of the relevant law, the parties' arguments and the record, I make the following findings:

1. Although Respondent has submitted financial documents which show an operating loss for the corporation, this information does not show or establish net worth, nor does it fulfill the special pleading requirement of the EAJA statute;

2. My previous finding that Respondent was a small, family run business does not show the corporation's net worth at the time of the initiation of the adjudicatory proceedings, nor does it fulfill the special pleading requirement of the EAJA statute;

3. Respondent's argument is well taken that it has complied with the statute's affirmative requirement of pleading that its net worth is less than the statutory ceiling by way of Mr. Frolich's sworn declaration which is included in Respondent's List of Post-Hearing Exhibits, previously overlooked, filed on June 24, 1991 at 9. See Donahue v. Heckler, 600 F. Supp 153, 156 (E.D. Wis. 1-985)(Court accepted affidavit as substantiation for net worth requirement in EAJA case);

4. Respondent's Balance Sheet for the period January 1, 1990 through December 31, 1990, entered into evidence at the April 1991

hearing, supports Mr. Frolich's sworn declarations. See U.S. v. 88.88 Acres of Land, 907 F.2d 106 (9th Cir. 1990)(Financial statements submitted by applicant's accountant established net worth requirement.)

Based on the above findings, I conclude that Respondent has met the statutory requirement, regarding a showing, in its EAJA application, that its net worth is less than the statutory ceiling.

2. Number of Employees Requirement

In addition to showing in its EAJA application that its net worth meets the statutory requirement, an EAJA applicant must show in that application that it employed not more than 500 employees at the time of the initiation of the proceedings. 5 U.S.C. §§ 504(a)(2), (b)(1)(B)(1990); Love; Brock. In my Decision and Order of January 22, 1992, I found that Respondent had made no showing regarding the number of its employees in its EAJA application. I will now review that finding.

Respondent argues that it has met this requirement through:

1. The EAJA motion which was allegedly based on "all documents on file in this case";

2. Respondent's Answers to Interrogatories and Production of Documents, dated April 2, 1990;

3. Respondent's admissions;

4. The dollar amounts in Respondent's filed Income Statements;

5. Respondent's filed income tax returns;

6. The finding in my Decision and Order of August 29, 1991 that Respondent was a small to medium sized business;

7. The statement in my January 22, 1992 Decision and Order that all indications were that Respondent did not employ more than 500 employees at the time of the initiation of the adversary adjudication;

8. The fact that the total number of paperwork violations alleged by the government was considerably under 500 in number;

9. A declaration by Respondent's former attorney, Mr. Osterloh, contained in the overlooked documentation, that all known "former" employees numbered only 250 to 270; and,

10. The sworn declaration of its present counsel, Mr. Schey, filed on March 12, 1992, stating that Respondent, at all relevant times, has had fewer than 500 employees.

Complainant did not supplement its previous argument on this issue.

The problem with Respondent's argument is that it does not establish that, in its EAJA application, Respondent met the affirmative pleading requirement of the statute with regard to the number of employees. 5 U.S.C. § 504(a)(2)(1990); Hopkins Dodge Sales. Although Respondent states that there is support in the record that Respondent did not employ more than 500 employees, that is not sufficient for establishing eligibility. The issue is whether Respondent met the plain language of the statute requiring an affirmative showing in the application that Respondent employed fewer persons than the statutory limit ceiling at the time of the initiation of the proceedings. See Thomas v. Peterson at 337.

I have considered whether the two attorney's sworn declarations pointed to by Respondent accomplish what Mr. Frolich's declaration accomplished with regard to the net worth requirement. They do not.

Mr. Schey's declaration is an untimely supplement to the EAJA application as it was filed on March 12, 1992, which was almost one year after the EAJA motion was filed.[4] Thus, it cannot be considered as part of the EAJA application. 5 U.S.C. § 504(a)(2)(1990); see Hopkins Dodge Sales.

I am aware that my finding that Mr. Schey's declaration is untimely appears, at first, to conflict with the finding in United Church Board For World Ministries v. S.E.C., 649 F. Supp. 492 (D.D.C. 1986). In that case, the defendant raised the argument that since one of the plaintiffs had not satisfied the requirement of showing eligibility for EAJA, i.e., it had not stated that it employed fewer persons than the statutory limit that EAJA claim should be denied. However, upon notification of the deficiency, plaintiff filed its response which included

[4] I also note that Mr. Schey's declaration was filed about two months after my Final Decision and Order of January 22, 1992 which denied the EAJA award and almost one month after the OCAHO's remand of February 19, 1992.

additional affidavits which "the court stated "clearly demonstrated" its eligibility under the statute. Id. at 496; see also D'Amico on behalf of N.L.R.B. (opposition's argument that applicant had not shown eligibility for EAJA in its application and, thus, should be denied award, was mooted by additional affidavits filed in applicant's response.)

I find though, that, the situation before me is not the same as in United Church Board For World Ministries or as in D'Amico. Although here, as in the mentioned cases, Complainant raised the issue of the deficient application in its opposition motion to Respondent's motion for EAJA fees, Respondent did not address the issue in its Supplemental Memorandum Of Law filed a few days later. In fact, Respondent did not directly address the issue until counsel filed its declaration on March 12, 1992, almost one year after its original EAJA application. In addition, at the time it was filed, Respondent had had the opportunity to digest my reasoning in my January 22, 1992 Final Decision and Order in which I denied the EAJA award. Based on the above reasoning, I find that Mr. Schey's declaration, filed on March 12, 1992, does not satisfy the statutory requirement with regard to the number of persons employed by Respondent at the initiation of the adversary adjudication.

As to the second attorney's declaration, a close reading of Mr. Osterloh's declaration shows that it also does not satisfy the statute. The relevant portion reads as follows:

> At the request of Charo's corporation, I and other staff at the Damon Key Law Firm mailed by certified, return-receipt requested letters to approximately 250-270 former employees in order to correct any omissions in or failure to maintain I-9 forms for the period before the corporations' INS employer sanctions education visit in April 1989.

Respondent's Post-Hearing Exhibits at 58.

Clearly, this statement does not say that all known employees, at the time of the initiation of the adversary adjudication, numbered between 250 and 270, nor does it contain information that would establish the number of persons who were employed at that time. It is also clear that the number of violations of Section 274A of the Immigration and Nationality Act cited in the Complaint does not establish the number of persons Respondent employed.

The other arguments set forth by Respondent cannot repair the omission of a showing regarding the number of employees requirement in the EAJA application since the statute states clearly that the

applying party must affirmatively show its eligibility for EAJA in its application; it does not state that the court should search the record to ascertain if eligibility in fact exists.

As such, I must find that Respondent has not fulfilled the affirmative pleading requirement set forth in 5 U.S.C. § 504(a) (2)(1990) in that it has not shown in its application that the number of employees at the time of the initiation of the adversary proceeding was not more than 500. I must, therefore, further find that Respondent has not shown in its EAJA application that it is eligible for an EAJA award. As such, I will not revisit the issue of whether the Complainant was substantially justified in its position. Respondent's motion for an EAJA award is denied.

Therefore, based on a review of the relevant law, the record, the parties' arguments, the reasoning in this Decision, I find that:

1. Respondent's Motion That The Closing Memorandum and Exhibits Accompanying This Motion Be Filed And Considered, filed on July 20, 1992, is granted;

2. Respondent's Motion for Attorneys' Fees and Costs, filed on May 15, 1991, is denied;

3. Any Motions not previously ruled on are hereby denied.

SO ORDERED this 27 day of October, 1992, at San Diego, California

E. MILTON FROSBURG
Administrative Law Judge