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. 89100063
G.L.C. RESTAURANT, INC.	)	
d/b/a CAPPRICCIO RESTAURANT	)	
Respondent.	)	
	)	

DECISION AND ORDER ON APPLICATION FOR AWARD
OF ATTORNEY'S FEES AND OTHER EXPENSES
(July 15, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Donald R. Davis, Esq. Angel Lahera, Esq., for Complainant.
Joel Stewart, Esq., for Respondent

I. *Background*

A. The Procedural History of the Underlying Employer Sanctions Case

By Notice of Reassignment dated March 19, 1992 the Chief Administrative Hearing Officer (CAHO) transferred this case previously pending before Administrative Law Judge (ALJ) Nancy M. Sherman. More than three years earlier, on November 18, 1988, INS issued a Notice of Intent to Fine (NIF) to Respondent, G.L.C. Restaurant, Inc., d/b/a Capriccio Restaurant (GLC). The Immigration and Naturalization Service (INS) issued the NIF after

(1) receiving a copy of GLC's Department of Labor (DOL) ETA Form 750, Application for Alien Employment Certification, showing that Onaga was an alien employed at that time by GLC,

(2) going to GLC's place of business to look for Onaga on May 27, 1988 and

(3) interviewing Onaga on June 3, 1988. During that interview Onaga stated unequivocally that he was a GLC employee and showed documentation indicating that he was in the United States illegally. Onaga had counsel present during the interview.

On January 10, 1989, the Immigration and Naturalization Service (INS or Complainant) filed a complaint alleging that GLC had violated the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324a. Specifically, INS alleged that GLC knowingly hired and/or continued to employ Mario Onaga, an alien not authorized as to that employment in the United States. INS alleged also that GLC had violated the paperwork requirements of IRCA by failing to properly complete the employee authorization verification form (INS Form I-9) for that employee. The complaint demanded a civil money penalty in the amount of $1500.00 and a cease and desist order.

Extensive motion practice followed, primarily arising from GLC's resistance to discovery efforts by INS to obtain access to GLC's personnel records. Pursuant to Judge Sherman's letter/order of January 2, 1990, Respondent eventually tendered certain documents. Shortly thereafter, INS filed a January 23, 1990 motion to dismiss the complaint. Complainant's motion stated in pertinent part,

> After having inspected the employment records submitted by respondent, Complainant concedes that these records do not indicate that Mr. Marion Onaga [sic] was actively working for respondent without work authorization, after May 31, 1988. . . . Even though Complainant maintains that based on Mr. Onaga's sworn statement, Complainant had a legal basis for issuing the Notice of Intent to Fine, Complainant concedes that it is in the best interest of all parties that the above captioned action be dismissed at this time.

Motion to Dismiss Complaint and Cancel Hearing Date, (1/23/90).

In response to the motion to dismiss, Judge Sherman issued an order to show cause on January 29, 1990. On February 20, 1990, GLC filed its response. GLC agreed, but urged that dismissal should be with prejudice in order to obtain "res judicata effect" and bar INS from filing another case "upon the same claim." Without explanation, GLC maintained its disagreement that INS had "a legal basis for issuing the NIF."

INS did not respond to GLC's filing. Judge Sherman dismissed the *complaint with prejudice on March 15, 1990.*

B. Procedural History of Attorney's Fees Litigation

On May 14, 1990, GLC filed its initial request for award of attorney's fees with Judge Sherman. GLC asserted that the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, applies to cases under 8 U.S.C. §1324a. It requested $9,124.90, calculating the fee at the EAJA hourly rate of $75.00. In reply to INS' motion to deny GLC's claim, GLC amended on July 18, 1990. GLC sought attorney's fees incurred on behalf of the fee shifting claim. On July 14, 1990, GLC

amended its claim to $12,087.00. GLC attributed the increase to its attorney's rate of $100.00. GLC asserted that the limited availability of attorneys in the immigration law specialty justified the higher rate. On September 8, 1990, GLC amended its claim to $14,120.00, on the basis of additional activities in pursuit of its EAJA claim. Most recently, GLC filed a February 24, 1992 amendment, increasing the claim to $18,115.00 to reflect time expended litigating the fee shifting issue at the $100.00 hourly rate.

INS objected to the fee requests. INS never asserted, however, that GLC's fee shifting claim was untimely.

On August 10, 1990, Judge Sherman directed sua sponte that

> the parties . . . show cause why respondent's request for attorney's fees should not be dismissed on the ground it was untimely submitted and, therefore [the judge had] no jurisdiction to entertain it.

Order, 1 OCAHO 270 (11/20/90).

After receiving the pleadings required by the August 10 order, Judge Sherman dismissed the fee shifting claim for lack of jurisdiction on November 20, 1990. Treating the claim as one under EAJA, she held the application was untimely, as having been filed more than thirty days after final disposition of the underlying case. 5 U.S.C. §504(a)(2). The judge held that the March 15, 1990 decision to dismiss the sanctions complaint was the final disposition of the administrative adjudication for EAJA timely filing requirements. She reached that conclusion notwithstanding CAHO jurisdiction to modify or vacate a final ALJ order for thirty days after entry. 8 U.S.C. §1324a(e)(7).

Upon administrative review, the CAHO affirmed the ALJ's decision rejecting the fee shifting claim as untimely. Action by the Chief Administrative Hearing Officer Affirming the Administrative Law Judge's Decision and Order, 1 OCAHO 280 (12/18/90). On January 4, 1991, Respondent filed an appeal in the Eleventh Circuit.

While the appeal was pending in the Eleventh Circuit, the Ninth Circuit issued a decision in an unrelated employer sanctions case. The Ninth Circuit held that under 8 U.S.C. §1324a, an ALJ's decision becomes final thirty days after it is rendered rather than at the time of entry. A-Plus Roofing Inc. v. I.N.S., 929 F.2d 489 (9th Cir.1991). In light of A-Plus Roofing, INS filed an unopposed motion for dismissal of the Eleventh Circuit appeal and sought remand to the CAHO. By

order dated July 12, 1991, the Eleventh Circuit granted the motion. GLC Restaurant Inc. v. I.N.S., No. 91-5003, (11th Cir. July 12, 1991). On remand the CAHO held that under A-Plus Roofing, GLC's fee shifting application was timely, having been filed within thirty days of the thirty day period after the date of the ALJ final order dismissing the complaint. Accordingly, the CAHO remanded the fee shifting claim to the ALJ. U.S. v. G.L.C. Restaurant, Inc., 2 OCAHO 389 (12/12/91). Transfer of the case to me having been effected on March 19, 1992, pursuant to 28 C.F.R. §68.29 (1991), this Decision and Order disposes on the merits of the attorney's fee application.

II. *Analysis*

A. The Purpose of EAJA

The rationale for EAJA is aptly summarized by the United States Court of Veterans Appeals.

> [The purpose of EAJA is] [t]o a certain extent, . . . [to] implement the 'English rule' where the loser pays the legal fees and costs of the winner. The aim is to eliminate for the average person the financial disincentive to challenge unreasonable governmental action. Commissioner, INS v. Jean, 110 S. C. 2316, 2319 (1990).

Jones v. Derwinski, 2 Vet. App. 231, 1992 U.S. Vet. App. LEXIS 60, 4 (March 13, 1992). See also Ardestani v. INS, __U.S.__, 112 S. C.. 515 (1991); Gavette v. Office of Personnel Management, 785 F.2d 1568, 1571 (Fed Cir. 1986); Cornella v. Schweiker, 728 F.2d 978, 981 (8th Cir. 1984); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4984.

B. EAJA Applies to Employer Sanctions Cases

Nothing contained in IRCA explicitly authorizes fee shifting in em-ployer sanctions cases. However, 8 U.S.C. §1324a necessarily implicates fee shifting in cases where the government fails to prevail. EAJA is triggered by the requirement of subsection 1324a(e)(3) that every employer sanctions hearing "shall be conducted before an administrative law judge . . . in accordance with the requirements of section 554 of title 5, United States Code."

EAJA is made applicable to administrative adjudications by 5 U.S.C. §504. Subsection 504(a)(1) requires that 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.

An "adversary adjudtion" is deficained, inter alia, as "an adjudication under section 554 . . ." 5 U.S.C. §504(b)(1)(C).

Recently the D.C. Circuit, citing Ardestani, 112 S. Ct. at 519 reiterated that EAJA applies to adjudications under §554. Dart v. United States, No. 91-1137 (D.C. Cir. Apr. 24, 1992).

IRCA caselaw confirms that EAJA applies to cases under 8 U.S.C. §1324a. In a case of first impression, the ALJ explained the basis for applying EAJA to administrative adjudications under 8 U.S.C. §1324a, holding that,

> EAJA applies to proceedings before administrative law judges under 8 U.S.C. 1324a [where an adversary adjudication under 5 U.S.C. 554 has taken place] because those proceedings are 'adversary adjudication[s]' within the meaning of 5 U.S.C. 504(b)(1)(C).

U.S. v. Mester Mfg. Co. [Mester II], 1 OCAHO 44, at 2-4 (1/25/89) rev'd on other grounds by CAHO (2/23/89), aff'd Mester Mfg. Co. v. I.N.S., 900 F.2d 201 (9th Cir. 1990) (Failing to discuss whether EAJA applied, but addressing reviewability by the CAHO, status of the employer as a prevailing party and whether the INS case was substantially justified, both the CAHO and the court necessarily concurred in that conclusion of the ALJ.)

As held in Mester II, and implicitly upheld by the Ninth Circuit on appeal, prevailing parties in employer sanctions cases have standing within the scope of EAJA to apply for awards of attorney's fees. EAJA provides the analytical framework for decision on the merits of such an application. The ALJ Decision and Order in Mester II also stands for the proposition that access to such relief is not dependent on whether the agency has included employer sanctions cases in its inventory of proceedings for which it has established EAJA procedures. Mester II, 1 OCAHO 44, at 4-5.

The parties are in agreement that EAJA is applicable to IRCA cases. They dispute the proper application of that law to the case at bar.

C. EAJA's Burden of Proof Requirements, Generally

EAJA has a two-pronged burden of proof requirement. The fee shifting applicant has the initial burden of proof. As applied here, GLC must establish that it was a prevailing party in the underlying litigation. After the EAJA applicant has established prevailing party status, the burden of proof passes to the government. As succinctly

explained by the First Circuit, "EAJA requires both that the private litigant prevail and that the government's position lacks substantial justification." Guglietti v. Secretary of Health and Human Services, 900 F.2d 397, 402 (1st Cir. 1990). See also Mester II, 1 OCAHO 44, at 12; Commissioner, I.N.S. v. Jean, _ U.S. __, 110 S. C.. 2316 (1990); Canady v. Sullivan, 893 F.2d 1241, 1243 (11th Cir. 1990); U.S. v. 640.00 Acres of Land in Dade County, Fla., 756 F.2d 842 (11th Cir. 1985); Utu Utu Gwaitu Paiute Tribe v. Dept. of Interior, 773 F. Supp. 1383, 1385 (E.D.Cal 1991) 5 U.S.C. §504 (a)(2).

As applied here, unless it can show special circumstances, INS must establish that it was substantially justified in bringing the action.

D. EAJA's Burden of Proof Requirement Applied

The EAJA application filed by GLC's attorney asserted prevailing party status, alleged that the INS litigation position was not substantially justified and included an itemized fee statement.[1] According to submitted tax returns, the size of the enterprise was within EAJA jurisdictional limits. 5 U.S.C. §504(3)(B).

(1) GLC Meets Its Burden of Proof: GLC Is a Prevailing Party

(a) The Medina Framework Substantial Relief and a Catalytic Factor

EAJA does not expressly define prevailing party. Therefore, INS argues that the appropriate methodology for determining prevailing party status is to analogize EAJA to other fee shifting statutes, speci-fically the Voting Rights Act of 1965, §§5, 14(e) as amended 42 U.S.C.A. §§1973c, 1972 (amended 1975) and the Civil Rights Attorney Fees Act, 42 U.S.C.A.§1988 (1976). See, e.g., 640.00 Acres of Land, In Dade County, Fla., 756 F.2d at 847.

[1] Complainant alleged that the EAJA application had been filed by the attorney, rather than the client. Therefore, Complainant argued, the application was defective, having been filed by an improper party. Motion to Deny Request for Attorney's Fees, Complainant's Response to Request for Attorney's Fees, June 20, 1990. On July 18, 1990, Respondent filed a Statement of Party, signed by the president of GLC, stating that its attorney is seeking attorney's fees on GLC's behalf. Subsequently, the Complainant withdrew the defective application allegation and Complainant now concedes that GLC, and not its attorney, is the applicant. Notice of Appearance, Resubmission of Motion to Deny Request/Response to Request and Motion to Strike, January 14, 1992 and Objection to Submission of Supplemental Pleadings to EAJA Application and Motion to Strike, March 5, 1992. See also Myers v. Sullivan, 916 F.2d 659, 667 (11th Cir. 1990); Prettyman v. Heckler, 577 F. Supp. 997 (D. Montana 1984).

IRCA jurisprudence contains precedent for borrowing EAJA analysis from other fee shifting statutes. See, e.g., Mester II, 1 OCAHO 44 at 16. Mester II relied on Commissioner Court of Medina County, Texas v. U.S., 683 F.2d 435 (D.C. Cir. 1982), applying the prevailing party standard of the Voting Rights Act to 8 U.S.C. §1324a.

The Medina court stated,

> 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.
>
> Medina, 683 F.2d at 442 as quoted by the INS Motion to Deny Request for Attorney's Fees, Complainant's Response to Request for Attorney's Fees, June 21, 1990. See also Mester II, 1 OCAHO 44; Guglietti, 900 F.2d at 399 (". . . in order to constitute a litigant as 'prevailing,' the legal relationship must be altered in one of two ways: the party either must have enjoyed some bottom-line litigatory success or her suit must have had a catalytic effect in bringing about a desired result.")

INS concedes that GLC survives the first hurdle of the Medina test. However INS argues that by resisting discovery, GLC impeded its eventual relief, rather than promoting it. INS contends that GLC failed to survive the second Medina hurdle and, therefore, cannot be a prevailing party in the context of EAJA.

I agree that GLC's resistance to discovery functioned as an impediment, rather than a catalyst, for the eventual disposition of the underlying case. However, INS fails to address other aspects of GLC's litigation activity. Respondent's February 20, 1990 Response to Order to Show Cause is significant. In that pleading, GLC generally agreed to INS' prior motion for dismissal, but motioned the court to dismiss the complaint "with prejudice." It wrote,

> [a] dismissal without prejudice has no res judicata effect and does not bar the plaintiff from bringing another action based upon the same claim.

Id.

Complainant misperceives the significance of an order of dismissal with prejudice. It incorrectly asserts,

> . . . the fact that Complainant can issue respondent a Citation despite this Honorable Court's dismissal order, is a clear indication that respondent has not achieved the purpose of its defense.

Motion to Deny Request for Attorney's Fees, Complainant's Response to Request for Attorney's Fees, June 21, 1990.

On March 15, 1990, Judge Sherman issued a final order to dismiss with prejudice. Such an order is a bar to further prosecution by INS based on identical facts.

Applying the Medina test to the case at bar, I hold that Respondent survived not only the first but also the second hurdle of that test. Respondent's motion was "a catalytic, necessary [and] substantial factor in attaining" the order to dismiss with prejudice. Medina, 683 F.2d at 442.

(b) Trial on the Merits not a Prerequisite to Satisfy the Significant Issue Test

INS contends that success on the basis of procedure is insufficient to confer prevailing party status under EAJA. Complainant argues that the exclusive basis for achieving prevailing party status is success on the merits. INS cites a line of cases which it claims hold, that a procedural victory cannot cloak a party with "prevailing party" status in the EAJA context. Hanrahan v. Hampton, 446 U.S. 754 (1980); Escobar v. Bowen, 857 F.2d 644 (9th Cir. 1988). In effect, INS asserts that a pre-evidentiary hearing procedural victory cannot be a premise for an EAJA award.

In contrast, GLC argues that the definition of prevailing party status under EAJA should be broadly construed. Inherent in such a construction is the potential for achieving prevailing party status without the requirement of the procedural culmination of a full evidentiary hearing.

I find Complainant's analysis of Hanrahan and its procedural victory doctrine flawed. Instead I read this line of cases to stand for the proposition that, fee shifting is not available to a party whose procedural victory does not impact the merits of the case. The case at bar is parallel to a Ninth Circuit case which applies the Hanrahan rule. In Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986), attorney's fees were awarded on the basis of an interlocutory motion, because that motion afforded the party and the class she represented substantial relief. Here, the central substantive issue in the underlying case at bar dealt with the employment and work authorization status of Mario Onaga. GLC's dismissal with prejudice embodied a resolution of that very issue.

GLC's broad construction argument is more persuasive. EAJA's legislative history confirms that the term prevailing party should not be limited "to a victor only after entry of a final judgment following full trial on the merits." H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11,

reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4953, 4984, 4990. Judicial decisions have remained faithful to congress' expressed intent. The Supreme Court has confirmed that the prevailing party test, as first enunciated in Nadeau v. Helgemoe, is success on "any significant issue." Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978); Hensley v. Eckerhart, 461 U.S. 424 (1983); Texas State Teachers v. Garland Indep. School D., 489 U.S. 782 (1989). The Court articulated the prevailing party concept as follows,

> a typical formulation [of prevailing party] is that [such a party] may be considered [a] 'prevailing part[y]' for attorney fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought. . . .

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983), quoting Nadeau v. Helgemoe, 581 F.2d at 278-279; Hewitt v. Helms, 482 U.S. 755, 761 (1987) ("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)"); Texas State Teachers Association v. Garland Independent School District et al, 489 U.S. at 782; Maher v. Gagne, 448 U.S. 122 (1980); Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990); Bradley v. Heckler, 785 F.2d 954, 956 (11th Cir. 1986); Austin v. Dept. of Commerce, 742 F.2d 1417, 1420 (Fed. Cir. 1984); Iranian Students Ass'n. v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979).

Significantly for the present case, under the facts presented in an Eleventh Circuit case that court deemed a party to have prevailed even where its case was dismissed without prejudice. Bradley, 785 F.2d at 956. Clearly then, GLC prevailed when it obtained an order to dismiss the complaint with prejudice.

(c) GLC is a Prevailing Party Under Either Analysis

Having passed the more stringent Voting Rights and Civil Rights Act test enunciated in Medina and the EAJA prevailing party test set out in Hensley, 461 U.S. at 434, quoting Nadeau v. Helgemoe, 581 F.2d at 278-279, I hold and conclude that Respondent is a prevailing party. However, as the Supreme Court wrote in the seminal Hensley decision,

> [prevailing party status] brings the [party] only across the statutory threshold. It remains for the . . . court to determine what fee is 'reasonable'.

Hensley, 461 U.S. at 433.

(2) INS Meets Its Burden of Proof

(a) Substantial Justification Generally

The parties fundamentally share the same conceptual understanding regarding EAJA's substantial justification component. However, they argue disparate applications of the concept to the specifics of this case.

Application of the substantial justification standard is an elusive process. As observed by the Eleventh Circuit,

> [t]he "substantially justified" standard is a difficult and flexible one. . . . [A] certain amount of crystal ball gazing is required, coupled with an honest evaluation of the strengths and weaknesses of one's case. The EAJA requires the government to make such an evaluation, ignoring the advantages inherent in its position of unlimited financial resources and its capacity for intransigence.

U.S. v. 640.00 Acres of Land, More or Less in the County of Dade, State of Florida, 756 F.2d 842, 850 (11th Cir. 1985).

Once a party has been found to have prevailed, the EAJA fee shifting mechanism requires the judge to determine whether the government's position was substantially justified. Trust Company of Columbus v. United States, 776 F.2d 270, 272 (11th Cir. 1985). From the beginning, EAJA has been understood to require that "[t]he government bear the burden of showing that its position was substantially justified." Stratton v. Bowen, 827 F.2d 1447, 1449-50 (11th Cir. 1987); Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081 (2d Cir. 1983); H.REP. NO. 1418, 96th Cong., 2d Sess 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4997.[2]

However, in the 1985 reenactment of EAJA as revised, Congress made clear that "position" refers to agency action taken both prior to and during the litigation itself. 5 U.S.C. §504 (a)(3)(E). See also Gavette, 785 F.2d at 1568. Earlier holdings on the proper construction of the EAJA term "position" were statutorily overtaken. In the case at bar, therefore, it is appropriate to scrutinize INS actions undertaken in conjunction with the filing of the initial complaint.

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[2] Historically, analysis of the substantial justification issue took the form of two sequential steps: "the meaning of 'the position of the United States,' and the meaning of 'substantially justified'. . . " Ashburn v. United States, 740 F.2d 843 (11th Cir. 1984). Prior to 1985, the circuits split as to the appropriate construction of the term "position." Some circuits construed "position" to include the government's underlying actions and others construed position to focus only on the government's litigation position. Environmental Defense Fund, Inc., 722 F.2d at 1084. The Eleventh Circuit, with some reservations, adopted the latter posture. Ashburn, 740 F.2d at 848.

The proper construction of the substantially justified standard is

> essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.

H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4989.

The legislative history instructs that the Government must make a "strong showing" to meet its burden. Id. "To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness;" Pierce v Underwood, 487 U.S. 552 (1988). Of course, it does not follow that the government is automatically liable for attorney's fees whenever it suffers a litigation loss.

> Since fees are awarded only to a prevailing party, it follows that the fact that the government lost does not create a presumption that its position was not substantially justified.

United States v. Yoffe, 775 F.2d 447 (1st Cir. 1985); see also Ashburn, 740 F.2d at 850 (11th Cir. 1984); Essex Electro Engineers, Inc. v. United States, 757 F.2d 247 (Fed. Cir. 1985).

Conversely, the government cannot automatically make its position substantially justified and avoid any fee liability by the expedient of settling or obtaining a dismissal. Environmental Defense Fund, Inc., 722 F.2d at 1081.

The 1985 EAJA revisions sharpened the reasonableness rule. As the Supreme Court noted, Several courts have held correctly that "substantial justification" means more than merely reasonable. . . . H.R. Rep. No. 99-120, p. 9 (1985). U.S. Code Cong. & Admin. News 1985, pp. 132, 138. (footnote omitted).

Pierce v. Underwood, 487 U.S. at 566.

In a seminal case regarding the appropriate construction of the substantial justification standard, the Eleventh Circuit following Pierce, has interpreted the substantial justification standard.

The standard for substantial justification is one of reasonableness. The government must show that its case had a reasonable basis both in law and fact.

Stratton v. Bowen, 287 F.2d at 1447.

See also Pierce v. Underwood, 487 U.S. at 565 (the government's position is "substantially justified" when it has a "reasonable basis both in law and fact."); Hudson v. Secretary of Health and Human Services, 839 F.2d 1453, 1456 (11th Cir. 1988) (Aff'd and remanded Sullivan v. Hudson, 490 U.S. 877 (1989)("The government must show that its case had a reasonable basis both in law and fact. The test is 'more than mere reasonableness.'"); Reese v. Sullivan, 925 F.2d 1395, 1396 (11th Cir. 1991); Canady v. Sullivan, 893 F.2d 1241, 1243 (11th Cir. 1990); Taylor v. Heckler, 835 F.2d 1037 (3d Cir. 1987) ("In EAJA cases in this circuit, a government position is 'substantially justified' if it is solid and well-founded."); Gavette, 785 F.2d at 1579 ("substantially justified" means "clearly reasonable. . . . The Government must show that it has not 'persisted in pressing a tenuous factual or legal position albeit one not wholly without foundation.' It is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.'").

(b) Substantial Justification Applied

An examination of the INS rationale for issuing its NIF and complaint is pertinent to substantial justification analysis. Such issuance was subsequent to the aggregation of three events, i.e. receipt of DOL's ETA Form 750, the visit to GLC and the interview with Onaga. Therefore, I conclude that INS had a reasonable basis in fact and law, in other words substantial justification, for issuing the NIF and complaint.

GLC's counter to the INS articulated justification is flawed. Referring to the ETA Form, GLC argues that the Employer informed Onaga that he could not work after May 31, 1988 without obtaining a work permit. GLC premises its argument on a mischaracterization of the statutory citation period as a "grace period." GLC appears to draw the incorrect conclusion that until May 31, employers were entitled to violate IRCA without liability. The statute granted employers no such leniency.

Rather, IRCA enacted a transitional citation period which ended on May 31, 1988. Prior to that date, INS was obliged to issue a warning citation prior to initiating an enforcement action, i.e., issuing an NIF. After May 31, 1988, INS was no longer required to issue citations, even in the event that the NIF was based on alleged violations occurring before May 31, 1988.

Here, where reasonable cause did not arise until after May 31, 1988 and where the complaint did not issue until January 10, 1989, the

employer was vulnerable i.e., subject to IRCA enforcement, without regard to issuance of a citation implicating employment of Onaga both prior to and subsequent to June 1, 1988. 8 U.S.C. 1324a §5 (i)(2). Mester II, 1 OCAHO 44, at 2-4; U.S. v. Widow Brown's, 3 OCAHO 399 (1/15/92) at 13, 14; U.S. v. New El Rey Sausage, 1 OCAHO 66 (7/7/89), modified on other grounds by CAHO, 1 OCAHO 78 (8/4/89).

There is no basis for an inference that INS should have been aware of the alleged IRCA violation early enough in time to have required a citation as a condition precedent to its action here. Mester II, 1 OCAHO 44, at 2-4; Widow Brown's, 3 OCAHO 399, at 13, 14; New El Rey Sausage, 1 OCAHO 66.

Additionally, Respondent suggests that a reason to find a lack of substantial justification is that INS established only that Onaga was "employed" by GLC and not that he "worked" for GLC. That distinction is simply inapposite to cases arising under 8 U.S.C. §1324a. The thrust of §1324a is to address employment of unauthorized aliens. The statutory text relies exclusively on the term "employ" and its derivatives, not the term "work." Therefore, by establishing that GLC employed Onaga during the relevant time period, INS satisfied an essential element of 8 U.S.C. §1324a.

Applying the substantial justification standard as enacted by the 1985 EAJA amendments and interpreted by the courts, I hold that INS has met its burden. Far from being frivolous, INS has shown that its actions vis a vis GLC had a reasonable basis in fact and law.

(3) Both Parties Have Met Their Burden of Proof: Fee Shifting Fails

GLC has met its burden, by showing that it was the prevailing party in the underlying litigation and INS has met its burden of showing that its actions were substantially justified. Eleventh Circuit jurisprudence mandates that under these circumstances, attorney's fees cannot be awarded.

> If the district court concludes that the government's positions were 'substantially justified' -- i.e., all of the government's arguments possessed a 'reasonable basis both in law and fact,' Jean v. Nelson, 863 F.2d at 767, quoting Pierce v. Underwood, 487 U.S. at 565, 108 S. C.. at 2550--then, notwithstanding the fact that the claimant ultimately prevailed in the litigation, the claimant is not entitled to receive attorney's fees.

Myers v. Sullivan, 916 F.2d at 666.

The standard for determining EAJA fee shifting in administrative adjudication is no different in this respect than the standard for determining EAJA fee shifting in Article III adjudications.

Accordingly, having "determined on the basis of the administrative record, as a whole," that the position of INS was substantially justified, I deny GLC's attorney's fees application. 5 U.S.C. §504(a)(1).

(4) No Special Circumstances Exist

Assuming that a party has attained prevailing party status, EAJA forbids the shifting of fees under two alternate circumstances. These circumstances are substantial justification of the agency position, as discussed above, or special circumstances which would make an award unjust. 5 U.S.C. §504(a)(1). It is my opinion that no special circumstances exist in this case which would bar fee shifting. Nevertheless, since I deny Respondent's application for fee shifting on the basis that INS' position was substantially justified, it is unnecessary to address in a detailed fashion the disjunctive special circumstance alternative.

III. *Conclusion*

For the reasons discussed above, I hold and conclude that GLC is not entitled to EAJA relief. Any motions or requests not previously dis-posed of are denied. This is the final action of the adjudicative officer. 5 U.S.C. §504(b)(1)(D), §504(c)(2). See also Mester II, 1 OCAHO 44.

SO ORDERED.

Dated and entered this 15th day of July 1992.

MARVIN H. MORSE
Administrative Law Judge