

FILED

UNITED STATES COURT OF APPEALS

JUN 28 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PROYECTO SAN PABLO; JOHN A.;
JOHN F.; JOHN T.; JOHN M.; JANE T.;
JOHN G.; JANE B., all individually and
on behalf of others similarly situated,

Plaintiffs - Appellees,

v.

DEPARTMENT OF HOMELAND
SECURITY; UNITED STATES
CITIZENSHIP AND IMMIGRATION
SERVICES; DIRECTOR OF
LEGALIZATION APPEALS UNIT;
SECRETARY OF STATE,

Defendants - Appellants.

No. 07-16215

D.C. No. CV-89-456-RCC
Arizona
(Tucson)

ORDER

Before: Peter L. Shaw, Appellate Commissioner

I
Background

Proyecto San Pablo and the other plaintiffs-appellees (collectively, “Proyecto San Pablo”) brought a class action to address the government’s adjudication of certain legalization applications. In 2001, the district court ordered the government to adjudicate on the merits the class members’ applications for waivers of inadmissibility and to produce the class members’ complete prior

deportation files. Proyecto San Pablo brought a second action to enforce the district court's order. In 2007, the district court found the government not in compliance and ordered the government to comply with the earlier order. The government appealed, and this court affirmed the district court's order. *See Proyecto San Pablo v. Dep't of Homeland Sec.*, 316 Fed. Appx. 565, 566 (9th Cir. 2008).

Proyecto San Pablo filed a motion for the award of attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The government filed an opposition, Proyecto San Pablo filed a reply, the government filed a surreply, and Proyecto San Pablo filed a sur-surreply. The court granted Proyecto San Pablo's motion for attorneys' fees and referred to the Appellate Commissioner the determination of the award amount. *See* 9th Cir. R. 39-1.9.

II Analysis

A. Attorneys' Fees

Under EAJA, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). Proyecto San Pablo requests the award of attorneys' fees in the amount

of \$30,129.41 for 84.8 hours of work by law partners Robert Gibbs and Robert Pauw at the hourly rate of \$350 and for 2.8 hours of work by associate attorneys at the hourly rate of \$172.85.

1. Number of Hours

The government objects that Proyecto San Pablo should not be awarded 17.9 hours for Gibbs's travel to San Francisco for oral argument on November 20 and 21, 2008, because Pauw alone presented the oral argument and Gibbs's role in the appeal was limited to participating in mediation and reviewing Pauw's work. This contention lacks merit.

Having two lawyers attend oral argument may appear duplicative but, in the context of this class action appeal involving unusual and complex immigration issues, the duplication was neither unreasonable nor unnecessary. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

“[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hopes of inflating their fees . . . the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case.” *Id.* “The cost effectiveness of various law firm models is an open question . . . [m]odeling law firm economics drifts far afield of the *Hensley*

calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work.” *Id.* at 114-15.

The government does not object to the time billed for Gibbs helping Pauw prepare for the oral argument. Particularly after this joint preparation, it was reasonable for Gibbs to attend the oral argument with Pauw to provide necessary advice and feedback. Accordingly, Proyecto San Pablo is awarded the requested 17.9 hours for Gibbs’s attendance at oral argument.

The government does not object to the requested hours on other grounds. A review of the briefs, case file, and time records shows that the requested hours are reasonable, and the requested hours are awarded in full. *See Hensley*, 461 U.S. at 433-34; *Moreno*, 534 F.3d at 1116.

2. Hourly Rates

EAJA provides that fees may be awarded based upon prevailing market rates for the kind and quality of the services furnished, except that attorneys’ 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 justifies a higher fee. *See* 28 U.S.C. § 2412(d)(2)(A).

a. Special Factor Enhancement

Proyecto San Pablo requests enhanced hourly rates of \$350 for Gibbs and Pauw, based on the special factor of the limited availability of qualified attorneys for the proceedings involved. The government objects to the award of enhanced hourly rates for Gibbs and Pauw. The district court awarded the \$350 enhanced hourly rate for Gibbs's and Pauw's work in the district court.

Enhanced rates are warranted where qualified counsel was not available at the statutory rate and the litigation required "distinctive knowledge" or "specialized skill." *Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988) ("Examples . . . would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language."). Courts have held that a specialty in immigration law can warrant an enhancement of the statutory rate, but have not awarded enhanced rates in immigration cases without a showing that "distinctive knowledge" or "specialized skill" was "needful for the litigation in question." *See Nadarajah v. Holder*, 569 F.3d 906, 913 (9th Cir. 2009) (collecting cases).

i. Distinctive Knowledge And Specialized Skill

Proyecto San Pablo's motion for attorneys' fees is accompanied by Pauw's declaration and resume, which show that he has practiced immigration law since 1983, is a law school professor of immigration law, has published numerous

articles on immigration law, and has represented immigrants in a number of complex federal cases.

The government concedes that Pauw possesses distinctive knowledge and specialized skill, but contends that Proyecto San Pablo has not submitted evidence of Gibbs's distinctive knowledge and specialized skill. Proyecto San Pablo's reply states that Gibbs's declaration establishing his distinctive knowledge and specialized skill is in the district court record.

Proyecto San Pablo supports the request for enhanced hourly rates with the declaration of Lisa Seifert, Esq., a leading Washington State immigration lawyer, who states that Gibbs and Pauw "have developed a specialty in handling complex immigration litigation in federal court [and that] they have the distinctive knowledge and skill necessary to handle immigration cases such as this one."

A review of the relevant materials corroborates the district court's determination that both Gibbs and Pauw possess distinctive knowledge and specialized skill.

ii. Needful For Litigation In Question

The government also contends that, even if Gibbs and Pauw possess distinctive knowledge and specialized skill, it was not needed for this particular litigation. Again, the district court already determined that distinctive knowledge

and specialized skill were needed for this litigation. Moreover, Seifert's declaration, and a review of the briefs and decision here, show that Gibbs's and Pauw's distinctive knowledge and specialized skill were necessary for the litigation. Seifert states that the case was a complex, important, and difficult matter, involving an extensive district court record and extensive background research.

Because of the unusual procedural history of this case, the interplay of the legalization and deportation processes, and the unique application of the Reform Act, "knowledge of . . . particular nooks and crannies of immigration law . . . [was] needed to give the alien a fair shot at prevailing." *Nadarajah*, 569 F.3d at 913. Proyecto San Pablo brought this action on behalf of a class that filed applications for legalization under the Immigration Reform and Control Act of 1986 in a particular region and were denied relief on the basis of an alleged deportation or exclusion after a certain date. In 2001, the district court ordered the government to reopen the class members' legalization applications, to accept and adjudicate their waiver-of-inadmissibility applications in the same manner as other legalization applications, and to provide the class members with copies of their prior deportation proceedings to permit collateral challenges where appropriate. In 2007, the district court ordered the government to comply with its earlier order.

On appeal, the government argued that the district court did not have jurisdiction to issue the 2007 order because the Reform Act vests jurisdiction to review substantive eligibility determinations solely in the circuit courts following an order of deportation. *See Proyecto San Pablo*, 316 Fed. Appx. at 566. This court held that the district court's 2001 order, which the government did not appeal, required the government to adjudicate Reform Act waiver applications on their merits and separate from the adjudication of the applicant's legalization application, and that the district court properly held that the government had not complied with the order. *Id.* The court also held that a new case on which the government relied did not support the government's position. *Id.*

Thus, this complex class action appeal "involved more than established principles of law with which the majority of attorneys are familiar." *Nadarajah*, 569 F.3d at 914. Like *Nadarajah* and the cases cited therein, *Proyecto San Pablo's* success on appeal involved more than the "straightforward application" of the rules of immigration law and appellate practice, and required Gibbs's and Pauw's combined distinctive knowledge and specialized skill. *Id.*

iii. Qualified Counsel Not Available At Statutory Rate

Proyecto San Pablo also presented evidence that representation for this particular case could not be obtained at the EAJA statutory maximum hourly rate,

adjusted for increases in the cost of living, and the government does not object on this ground. *See Pirus v. Bowen*, 869 F.2d 536, 542 (9th Cir. 1989).

Seifert describes her familiarity with the scarcity of experienced counsel in the area of immigration litigation. Seifert states that she is not aware of an attorney with the necessary knowledge and skills who would have handled this case or the appeal at the EAJA hourly rate. In Seifert's opinion, qualified counsel was not available to take on this case at the EAJA hourly rate.

In addition, the district court already determined that qualified attorneys were not available to handle the case at the EAJA hourly rates. The district court's determination is corroborated by the Appellate Commissioner's own experience evaluating EAJA fee requests in Ninth Circuit immigration cases.

b. Adjusted Statutory Maximum Hourly Rate

For the associates' work, Proyecto San Pablo requests the EAJA statutory maximum hourly rate adjusted for increases in the cost of living through 2008, when the associates' work was performed.

Cost-of-living increases are calculated by multiplying the \$125 statutory maximum hourly rate by the annual average consumer price index figure for all urban consumers ("CPI-U") for the years in which the attorneys' work was performed, and dividing by the CPI-U figure for March 1996 (155.7), the effective

date of the statutory maximum hourly rate. *See Thangaraja v. Gonzales*, 429 F.3d 870, 876-77 (9th Cir. 2005); *see also* Dep't of Labor, Bureau of Labor Statistics, Table 1A. CPI-U: U.S. city average at <http://data.bls.gov/cgi-bin/surveymost>.

Proyecto San Pablo has calculated correctly the requested \$172.85 hourly rate for the associates' work. *See* Statutory Maximum Rates at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039. The government does not object to the requested hourly rate, and it is awarded.

B. Expenses

Proyecto San Pablo requests the award of travel expenses in the amount of \$1,032.17. The government objects that the amount should be reduced by half because Gibbs's attendance at oral argument was unnecessary. As discussed earlier, Gibbs's attendance at oral argument was reasonable and necessary. Travel expenses may be awarded under EAJA. *See Int'l Woodworkers of Am. v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1986). Proyecto San Pablo is awarded travel expenses in the amount of \$1,032.17.

III
Conclusion

Attorneys' fees and expenses in the amount of \$31,161.58 are awarded in favor of Proyecto San Pablo and the plaintiff class and against the government.

This order amends the court's mandate.