

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) EAJA Docket No. 14-0020
)
Le Anne Smith,)
)
)
Applicant) **Decision and Order**

PROCEDURAL HISTORY

On December 6, 2013, Le Anne Smith instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [EAJA Rules of Practice] by filing an EAJA Application for Award of Attorney's Fees and Expenses for Le Anne Smith [EAJA Application]. Ms. Smith requests an award of \$17,450 for attorney fees and \$815 for other expenses which she incurred in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026, an adversary adjudication which the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], instituted against her under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act].¹

¹EAJA Application at 3.

On March 6, 2014, APHIS filed Agency Answer to Application Filed by Le Anne Smith for Attorney's Fees and Expenses [Answer] denying the allegations in Ms. Smith's EAJA Application and requesting denial of Ms. Smith's EAJA Application.² On April 14, 2014, Ms. Smith filed a response to APHIS's Answer.³

On May 5, 2014, Administrative Law Judge Jill S. Clifton [ALJ] issued a Decision and Order Granting EAJA Fees [ALJ's Decision] awarding Ms. Smith \$15,358.33 for attorney fees and \$815 for other expenses which she incurred in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026.⁴ On June 5, 2014, APHIS appealed the ALJ's Decision to the Judicial Officer.⁵ On July 3, 2014, Ms. Smith filed a response to APHIS's Appeal Petition.⁶ On July 8, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I issue this final decision awarding Ms. Smith \$15,295.83 for attorney fees and \$815 for other expenses which she incurred in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026.

DISCUSSION

The Equal Access to Justice Act requires an agency that conducts an adversary

²Answer ¶ IV at 25.

³Applicant's Response Brief.

⁴ALJ's Decision ¶ 20 at 11.

⁵Agency's Petition for Appeal of Decision and Order Granting EAJA Fees [Appeal Petition].

⁶Le Anne Smith's Brief in Support of Decision and Order Granting EAJA Fees.

adjudication to award fees and other expenses to a prevailing party, other than the United States, as follows:

§ 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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

The ALJ found Ms. Smith was a prevailing party in *In re Craig A. Perry*, AWA Docket No. 05-0026, APHIS's position in the adversary adjudication was not substantially justified, and no special circumstances make an award to Ms. Smith unjust.⁷ While APHIS concedes Ms. Smith was a prevailing party in *In re Craig A. Perry*, AWA Docket No. 05-0026 (Appeal Pet. at 8, 14), APHIS raises eight issues on appeal and requests that I reverse the ALJ's Decision.

First, APHIS contends the ALJ erroneously concluded that Ms. Smith's EAJA Application was timely filed (Appeal Pet. at 7-13).

The Equal Access to Justice Act and the EAJA Rules of Practice provide that a party must submit an application for fees and other expenses to the agency from which the party seeks fees and other expenses within 30 days after final disposition of the adversary adjudication.⁸ The term "final disposition" is defined, as follows:

⁷ALJ's Decision ¶¶ 2, 7, 10-14 at 2, 4-7.

⁸5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a).

§ 1.193 Time for filing application.

....
 (b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b).

The ALJ held Ms. Smith and APHIS would have had 60 days after entry of the Judicial Officer's September 11, 2013, Order to seek judicial review, as follows:

3. [T]heoretically the parties would have had 60 days to seek review of the Judicial Officer's Order in the U.S. Court of Appeals (60 days from the date of the Judicial Officer's Order, 7 U.S.C. § 2149).

4. As a practical matter, the Judicial Officer spoke for the Secretary of Agriculture in his Order issued September 11, 2013, so APHIS would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. As a practical matter, Le Anne Smith won, so Le Anne Smith would not appeal the Judicial Officer's Order to the U.S. Court of Appeals.

ALJ's Decision ¶¶ 3-4 at 2-3. Sixty days after September 11, 2013, is November 10, 2013; however, because November 10, 2013, was a Sunday and Monday, November 11, 2013, was a legal holiday, Ms. Smith was required to seek judicial review of *In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. __ (Sept. 11, 2013), no later than Tuesday, November 12, 2013.⁹ Therefore, the ALJ concluded Ms. Smith was required to file her EAJA Application no later than December 12, 2013, and Ms. Smith timely filed her EAJA Application on December 6, 2013.

APHIS, relying on 7 U.S.C. § 2149(c), contends Ms. Smith's December 6, 2013, EAJA Application was not timely filed (Appeal Pet. at 7-8).

⁹See Fed. R. App. P. 26(a)(1).

The Animal Welfare Act provides that any dealer, exhibitor, research facility, intermediate handler, or operator of an auction sale aggrieved by a final order of the Secretary of Agriculture may seek judicial review, as follows:

§ 2149. Violations by licensees

....
(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Court of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

7 U.S.C. § 2149(c).

APHIS asserts Ms. Smith was not a dealer, exhibitor, research facility, intermediate handler, or operator of an auction sale aggrieved by *In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. __ (Sept. 11, 2013), and had no right to seek judicial review of the Judicial Officer's September 11, 2013, Order. APHIS contends the Judicial Officer's decision disposing of the merits of the proceeding became final and unappealable on September 11, 2013; Ms. Smith was required to file her EAJA Application no later than October 11, 2013; and Ms. Smith's December 6, 2013, EAJA Application was not timely filed.

I conclude APHIS has confused appealability in the context of the Equal Access to Justice Act with the merits of an appeal of the agency disposition of the underlying adversary adjudication. Even when an appeal of an adversary adjudication giving rise to an Equal Access to Justice Act application is nonjusticiable, if the governing statute relevant to the underlying

agency adjudication allows an appeal generally, the underlying order must be considered “appealable” for the purposes of an Equal Access to Justice Act proceeding. The 30-day deadline for filing an Equal Access to Justice Act application does not expire until 30 days after the time to appeal the underlying order has expired or the appeal has concluded.¹⁰ Because Ms. Smith could have potentially appealed *In re Craig A. Perry* (Decision as to Le Anne Smith), ___ Agric. Dec. ___ (Sept. 11, 2013), pursuant to 7 U.S.C. § 2149(c), the 30-day deadline for filing her EAJA Application did not begin to run until 60 days following the entry of the Judicial Officer’s September 11, 2013, Order and Ms. Smith’s December 6, 2013, EAJA Application was timely filed. Therefore, I reject APHIS’s contention that the ALJ’s conclusion that Ms. Smith’s EAJA Application was timely filed, is error.

Second, APHIS contends the ALJ erroneously failed to reject Ms. Smith’s EAJA Application based upon Ms. Smith’s failure to identify the APHIS position that Ms. Smith alleges was not substantially justified, as required by 7 C.F.R. § 1.190(a) (Appeal Pet. at 14-15).

The EAJA Rules of Practice require that an applicant identify the United States Department of Agriculture position which the applicant alleges was not substantially justified or show that the United States Department of Agriculture demand was substantially in excess of, and was unreasonable when compared with, the decision in the underlying adversary adjudication, as follows:

§ 1.190 Contents of application.

- (a) An application for an award of fees and expenses under EAJA shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall state the number of employees

¹⁰*Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002).

of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:

- (1) Show that the applicant has prevailed and identify the position of the Department that the applicant alleges was not substantially justified and shall briefly state the basis for such allegation; or
- (2) Show that the demand by the Department in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

7 C.F.R. § 1.190(a).

Ms. Smith identifies the APHIS position which she alleges was not substantially justified, as follows:

3. The position of the USDA was not substantially justified in bringing Le Anne Smith into this matter as is apparent by the total lack of evidence submitted by [APHIS] as to her involvement in any of the alleged violations set forth in the Government's Complaint.

EAJA Application ¶ 3 at 1-2. Ms. Smith's identification of the APHIS position which Ms. Smith alleges was not substantially justified is marked by perplexing brevity; however, Ms. Smith incorporates into the EAJA Application all of the arguments in *In re Craig A. Perry*, AWA Docket No. 05-0026, as follows:

1. This Court is familiar with the relevant facts and proceedings. To the extent that facts, law, procedural developments, trial transcript, exhibits, arguments, or circumstances other than those specifically cited in this application may be relevant, Le Anne [Smith] incorporates these by reference and asks the Court to note the same.

EAJA Application ¶ 1 at 1.

Ms. Smith's arguments in *In re Craig A. Perry*, AWA Docket No. 05-0026, identify the APHIS position which Ms. Smith alleges was not substantially justified and provide the basis for Ms. Smith's allegation. Therefore, I find Ms. Smith complied with 7 C.F.R. § 1.190(a) by incorporating the arguments presented in the underlying adversary adjudication into Ms. Smith's

EAJA Application, and I reject APHIS's contention that the ALJ erroneously found Ms. Smith identified the APHIS position that Ms. Smith alleges was not substantially justified.

Third, APHIS contends its position in *In re Craig A. Perry*, AWA Docket No. 05-0026, was substantially justified (Appeal Pet. 16-21).

The EAJA Rules of Practice provide that a prevailing party may receive an award, unless the position taken by the United States Department of Agriculture in the underlying adversary adjudication was substantially justified.¹¹ APHIS bears the burden of proving that its position in *In re Craig A. Perry*, AWA Docket No. 05-0026, was substantially justified. In order to meet its burden of proof, APHIS must show that its position had a reasonable basis in both law and fact.¹² APHIS's failure to prevail in the underlying adversary adjudication does not create a presumption that APHIS's position was not substantially justified.¹³

¹¹7 C.F.R. § 1.185(a)(1).

¹²See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (holding a substantially justified position is one that would satisfy a reasonable person and must have a reasonable basis in law and fact); *Harmon v. United States*, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, well founded in law and fact, and solid); *Frey v. CFTC*, 931 F.2d 1171, 1174 (7th Cir. 1991) (stating the standard for "substantial justification," within the meaning of the Equal Access to Justice Act, is one of simple reasonableness; to avoid an award of fees the agency must prove that the proceeding had a reasonable basis in law and fact); *Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985) (holding the test of substantial justification is a practical one, namely, whether the agency's position was reasonable both in law and fact); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.) (stating the test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

¹³*Scarborough v. Principi*, 541 U.S. 401, 415 (2004) (stating "substantially justified" is not to be read to raise a presumption that the government's position was not substantially justified simply because it lost the case); *Harmon v. United States*, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, even if it is not correct); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982) (stating the burden of showing substantial justification for a case the government lost is not

insurmountable).

In the underlying adversary adjudication, APHIS contended Ms. Smith was jointly responsible with Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. [PWR], for violations of the Animal Welfare Act because Ms. Smith was a de facto partner in the business operated by Mr. Perry and PWR or a de facto principal of PWR and played a critical role in the operation of Mr. Perry and PWR's business.

I have long held, when people act together in the exhibition of animals, they can be held jointly and severally liable for violations of the Animal Welfare Act and their relationship need not meet the requirements for a partnership or joint venture.¹⁴ Therefore, I conclude APHIS's position in *In re Craig A. Perry*, AWA Docket No. 05-0026, that Ms. Smith was jointly responsible with Mr. Perry and PWR for Animal Welfare Act violations had a reasonable basis in law.

However, in the underlying adversary adjudication, APHIS introduced almost no evidence that Ms. Smith jointly engaged in any animal exhibition. Ms. Smith, who the ALJ found to be an extremely credible witness, testified extensively and provided an affidavit regarding her minimal connection with the business conducted by Mr. Perry and PWR. Ms. Smith's testimony and affidavit were corroborated by numerous witnesses, including APHIS

¹⁴*In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). Cf. *In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

employees called by APHIS. When I examine the record in the underlying adversary adjudication, I find APHIS did not have a reasonable basis in fact for its position regarding Ms. Smith. As APHIS failed to prove that it had a reasonable basis in fact for its position regarding Ms. Smith, I conclude APHIS's position in the underlying adversary adjudication was not substantially justified.

Fourth, APHIS contends the ALJ erroneously failed to address Ms. Smith's allegation of excessive demand (Appeal Pet. at 21).

Ms. Smith alleges APHIS made an excessive and unreasonable demand in the underlying adversary adjudication.¹⁵ The EAJA Rules of Practice provide that an adjudicative officer shall award fees and other expenses related to defending against an excessive demand.¹⁶

I agree with APHIS that the ALJ did not address Ms. Smith's allegation regarding APHIS's excessive and unreasonable demand. I find the ALJ's failure to address Ms. Smith's allegation harmless error because Ms. Smith did not request fees and other expenses related to defending against APHIS's purported excessive and unreasonable demand, and I decline to remand this proceeding to the ALJ to address Ms. Smith's allegation.

Fifth, APHIS contends the ALJ erroneously failed to find special circumstances that make an award to Ms. Smith unjust. APHIS asserts Larry J. Thorson, who represented Ms. Smith in *In re Craig A. Perry*, AWA Docket No. 05-0026, also represented Mr. Perry and PWR in that proceeding, and Ms. Smith's EAJA Application does not distinguish between the legal services performed on her behalf and the legal services performed on behalf of Mr. Perry and PWR.

¹⁵EAJA Application ¶ 4 at 2.

¹⁶7 C.F.R. § 1.185(b).

APHIS contends Ms. Smith's inability to identify the attorney fees and expenses specifically attributable to her defense in *In re Craig A. Perry*, AWA Docket No. 05-0026, constitutes a special circumstance which makes an award of attorney fees and other expenses to Ms. Smith unjust. (Appeal Pet. at 22-24).

In the underlying adversary adjudication, APHIS contended Ms. Smith was jointly responsible with Mr. Perry and PWR for violations of the Animal Welfare Act because Ms. Smith was a de facto partner in the business operated by Mr. Perry and PWR or a de facto principal of PWR and played a critical role in the operation of Mr. Perry and PWR's business. Ms. Smith alleges and I find, based upon my review of the record in *In re Craig A. Perry*, AWA Docket No. 05-0026, that Ms. Smith was required to defend herself throughout the entire proceeding.¹⁷ Similarly, Mr. Thorson describes Ms. Smith's involvement in the proceeding as coextensive with the involvement of Mr. Perry and PWR, and Mr. Thorson asserts he attributed one-third of the bill for attorney fees and other expenses for the defense of *In re Craig A. Perry*, AWA Docket No. 05-0026, to Ms. Smith "because there were three defendants and this was the most sensible way to allocate the time spent on the defense" of *In re Craig A. Perry*, AWA Docket No. 05-0026.¹⁸

Based upon my review of the record in *In re Craig A. Perry*, AWA Docket No. 05-0026, I reject APHIS's contention that Ms. Smith's inability to identify the attorney fees and expenses specifically attributable to her defense in *In re Craig A. Perry*, AWA Docket No. 05-0026,

¹⁷EAJA Application ¶ 9 at 3.

¹⁸Affidavit of Larry J. Thorson in Support of EAJA Application by Le Anne Smith at 2, dated December 5, 2013.

constitutes a special circumstance which makes an award of attorney fees and other expenses to Ms. Smith unjust, and I reject APHIS's contention that the ALJ's failure to find special circumstances that make an award to Ms. Smith unjust, is error.

Sixth, APHIS contends the ALJ erroneously failed to reject Ms. Smith's EAJA Application because Ms. Smith failed to provide a net worth exhibit, as required by 7 C.F.R. § 1.191(a) (Appeal Pet. at 24-32).

The EAJA Rules of Practice require that an applicant for fees and expenses provide an exhibit showing the net worth of the applicant, as follows:

§ 1.191 Net worth exhibit.

(a) An applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1.184 of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

7 C.F.R. § 1.191(a).

The EAJA Application states Ms. Smith's net worth was less than \$100,000 at the time APHIS initiated and litigated *In re Craig A. Perry*, AWA Docket No. 05-0026.¹⁹ In support of this allegation, Ms. Smith submitted an affidavit in which Ms. Smith attests that, at the time APHIS initiated and litigated the underlying adversary adjudication, her net worth was under \$100,000 and she had no income because she is a full-time housewife taking care of her

¹⁹EAJA Application ¶ 6 at 2.

children.²⁰

The ALJ could have required Ms. Smith to file additional information to determine her eligibility for an Equal Access to Justice Act award. Instead, the ALJ found Ms. Smith's affidavit sufficient to determine her eligibility for an Equal Access to Justice Act award, as follows:

15. Le Anne Smith's net worth did not exceed two million dollars at the time of the adjudication. Evidence during the hearing proved this; Le Anne Smith's EAJA application, including her Affidavit executed December 5, 2013, further confirms this.

ALJ's Decision ¶ 15 at 7.

Based upon the ALJ's finding and Ms. Smith's uncontroverted affidavit, I decline to remand this proceeding to the ALJ to require Ms. Smith to file additional information regarding her net worth. Moreover, I find no basis on which to disturb the ALJ's determination that, at the time APHIS initiated *In re Craig A. Smith*, AWA Docket No. 05-0026, Ms. Smith's net worth did not exceed \$2,000,000.

Seventh, APHIS contends the ALJ erroneously failed to reject Ms. Smith's EAJA Application because Ms. Smith's EAJA Application was not accompanied by full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c) (Appeal Pet. at 26).

The EAJA Rules of Practice require documentation of fees and expenses, as follows:

§ 1.192 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

²⁰Affidavit of Le Anne Smith in Support of EAJA Application at 1, dated December 5, 2013.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing on behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c). Ms. Smith attached to the EAJA Application full documentation of the fees and expenses for which Ms. Smith seeks an Equal Access to Justice Act award. The documentation states the actual time expended and the hourly rate at which Mr. Thorson computed attorney fees and describes the specific services performed by Mr. Thorson and the other expenses. In support of this documentation, Ms. Smith submitted Mr. Thorson's affidavit in which Mr. Thorson attests to the accuracy of the documentation of the fees and expenses and the hourly rate at which he computed attorney fees in *In re Craig A. Perry*, AWA Docket No. 05-0026.²¹ Therefore, I find Ms. Smith's EAJA Application was accompanied by full documentation of fees and expenses attributable to Ms. Smith's defense of the underlying adversary adjudication, as required by 7 C.F.R. § 1.192(a)-(c).

Eighth, APHIS contends the ALJ awarded Ms. Smith attorney fees at the rate of \$150 an hour, which exceeds the maximum hourly rate that can be awarded in this proceeding (Appeal Pet. at 34).

²¹Affidavit of Larry J. Thorson in Support of EAJA Application by Le Anne Smith, dated December 5, 2013.

The ALJ awarded Ms. Smith attorney fees at the rates of \$125 and \$150 per hour, as follows:

16. The \$125.00 per hour maximum attorney fee under EAJA applies until March 3, 2011. The \$150.00 per hour maximum attorney fee under EAJA applies beginning March 3, 2011. 7 C.F.R. § 1.186. . . .

ALJ's Decision ¶ 16 at 7. The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed \$150 per hour, as follows:

§ 1.186 Allowable fees and expenses.

. . . .
 (b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b) (2014). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of \$150 became effective March 3, 2011.²² The final rule explicitly states the maximum hourly attorney fees rate of \$150 only applies to proceedings initiated on and after the effective date of the final rule, as follows:

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from \$125.00 to \$150.00 for covered proceedings initiated on and after the effective date of this final rule.

DATES: This final rule is effective March 3, 2011.

. . . .

²²76 Fed. Reg. 11,667 (Mar. 3, 2011).

SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from \$125.00 to \$150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

APHIS initiated the adversary adjudication for which Ms. Smith seeks attorney fees and other expenses, on July 14, 2005.²³ Therefore, the maximum hourly attorney fees rate of \$150 set forth in 7 C.F.R. § 1.186(b) (2014) is not applicable to this proceeding, and I find the ALJ erroneously awarded attorney fees at the rate of \$150 an hour. Instead, I find the maximum hourly attorney fees rate of \$125 is applicable to this proceeding.²⁴

²³*In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. ___, slip op. at 1 (Sept. 11, 2013).

²⁴7 C.F.R. § 1.186(b) (2006).

Ms. Smith seeks an award of \$17,450 for attorney fees based on the \$150 per hour rate for attorney services and \$815 for other expenses.²⁵ Ms. Smith based her request for \$17,450 for attorney fees upon 349 total hours of attorney services, with one-third of the total number of hours of attorney services attributable to Ms. Smith's defense of *In re Craig A. Perry*, AWA Docket No. 05-0026. However, the ALJ noted that the total number of hours of attorney services for the defense of *In re Craig A. Perry*, AWA 05-0026, is 369 hours, one-third of which (123 hours) the ALJ allocated to Ms. Smith.²⁶ The ALJ also found that communication with legislators is not recoverable,²⁷ and Mr. Thorson provided 1.9 hours of attorney services related to communications with legislators.

Accordingly, I award Ms. Smith \$15,295.83 for attorney fees²⁸ and \$815 for other expenses for a total of \$16,110.83 incurred by Ms. Smith in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

²⁵EAJA Application ¶¶ 7-8 at 2-3.

²⁶ALJ's Decision ¶ 19 at 9.

²⁷See *Dallas Irrigation Dist. v. United States*, 91 Fed. Cl. 689, 706 (2010) (holding fees associated with correspondence with legislators and the media are not recoverable under the Equal Access to Justice Act); *Hillensbeck v. United States*, 74 Fed. Cl. 477, 482 (2006) (holding fees associated with lobbying Congress are not recoverable under the Equal Access to Justice Act).

²⁸This award is based upon 123 hours of attorney services attributable to Ms. Smith's defense of *In re Craig A. Perry*, AWA Docket No. 05-0026, at an hourly attorney fees rate of \$125 for each hour (\$15,375) minus one-third of the amount attributable to attorney services related to communications with legislators (\$79.17).

2. Ms. Smith is an individual whose address is in Iowa.
3. On July 14, 2005, APHIS instituted an adversary adjudication, *In re Craig A. Perry*, AWA Docket No. 05-0026, against Ms. Smith.²⁹
4. At the time APHIS initiated *In re Craig A. Perry*, AWA Docket No. 05-0026, Ms. Smith had a net worth of less than \$100,000.
5. *In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. ___, (Sept. 11, 2013), became final and unappealable on November 12, 2013.
6. Ms. Smith's EAJA Application, which was filed on December 6, 2013, 24 days after *In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. ___, (Sept. 11, 2013), became final and unappealable, was timely filed.
7. Ms. Smith was a prevailing party *In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. ___, (Sept. 11, 2013).
8. APHIS's position regarding Ms. Smith *In re Craig A. Perry*, AWA Docket No. 05-0026, was not substantially justified.
9. No special circumstances make the award of fees or other expenses to Ms. Smith unjust.
10. Ms. Smith meets all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act and the EAJA Rules of Practice.

11. Ms. Smith incurred attorney fees and other expenses in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026, to which she is entitled to an award under the

²⁹*In re Craig A. Perry* (Decision as to Le Anne Smith), __ Agric. Dec. ___, slip op. at 1 (Sept. 11, 2013).

Equal Access to Justice Act and the EAJA Rules of Practice totaling \$16,110.83.

For the foregoing reasons, the following Order is issued.

ORDER

Ms. Smith is awarded \$16,110.83 for attorney fees and other expenses which Ms. Smith incurred in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026.³⁰

RIGHT TO SEEK JUDICIAL REVIEW

³⁰The process by which Ms. Smith may obtain payment of the award in this Order is set forth in 7 C.F.R. § 1.203.

Ms. Smith has the right to seek judicial review of this Decision and Order in the courts of the United States having jurisdiction to review the merits of *In re Craig A. Perry* (Decision as to Le Anne Smith), ___ Agric. Dec. ___ (Sept. 11, 2013).³¹ Ms. Smith must seek judicial review within 30 days after the determination of the award of attorney fees and other expenses in this Decision and Order.³² The date of the determination of the award of attorney fees and other expenses in this Decision and Order is January 2, 2015.

Done at Washington, DC

January 2, 2015

William G. Jenson
Judicial Officer

³¹5 U.S.C. § 504(c)(2); 7 C.F.R. § 1.202.

³²5 U.S.C. § 504(c)(2). See also *Holzbau v. United States*, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination, not from the date the party receives a copy of the determination); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).