

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) EAJA Docket No. 12-0645
)
Craig Perry, an individual, d/b/a)
Perry's Exotic Petting Zoo; and)
Perry's Wilderness Ranch & Zoo,)
Inc., an Iowa corporation,)
)
Applicants) **Second Remand Order**

PROCEDURAL HISTORY

On January 17, 2012, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter Applicants], 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) [hereinafter EAJA Rules of Practice] by filing an Application for Award of Attorney's Fees and Expenses [hereinafter First EAJA Application]. On February 3, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a motion to strike the Applicants' First EAJA Application as premature because it was

filed before *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), had become final and unappealable (Complainant's Motion to Strike Application Filed by Respondents Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc., for Award of Attorney's Fees and Expenses).

In re Terranova Enterprises, Inc. (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), became final and unappealable on September 17, 2012. On September 27, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] granted the Applicants' First EAJA Application and awarded attorney fees and other expenses in the amount of \$16,548.83 to Larry Thorson (Miscellaneous Decision and Order Amending the Caption and Granting Attorney Fees and Costs to Larry Thorson, Esq., Counsel for Perry Respondents) [hereinafter ALJ's Decision as to the First EAJA Application].

On October 11, 2012, the Applicants filed Renewed Application for Award of Attorney's Fees and Expenses [hereinafter Second EAJA Application].¹ On November 2, 2012, the ALJ dismissed the Second EAJA Application because she had previously granted the

¹The Second EAJA Application is not merely a renewal of the First EAJA Application. The Applicants request an award of \$17,648 for attorney fees and \$603.83 for other expenses in the First EAJA Application. The Applicants request an award of \$18,540 for attorney fees and \$603.83 for other expenses in the Second EAJA Application.

First EAJA Application (Miscellaneous Decision and Order Dismissing Renewed Application for Attorney's Fees and Costs) [hereinafter ALJ's Decision as to the Second EAJA Application].

On November 5, 2012, the Administrator appealed the ALJ's Decision as to the First EAJA Application (Agency's Petition for Appeal; and Request to Amend Caption). On November 30, 2012, the Applicants filed a response to the Administrator's appeal of the ALJ's Decision as to the First EAJA Application (Applicant's Response and Resistance to Agency's Petition for Appeal and Memorandum of Points and Authorities) and appealed the ALJ's Decision as to the Second EAJA Application (Applicant's Petition for Appeal from Miscellaneous Decision and Order Dismissing Renewed Application for Attorney's Fees and Costs). On December 18, 2012, the Administrator filed a response to the Applicants' appeal of the ALJ's Decision as to the Second EAJA Application (Agency Response to Petition for Appeal).

On December 28, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DISCUSSION

The Equal Access to Justice Act sets forth the time during which an application for fees and other expenses may be submitted to an agency, as follows:

§ 504. Costs and fees of parties

(a)

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section

5 U.S.C. § 504(a)(2). Similarly, the EAJA Rules of Practice provide that an application for fees and expenses may be filed whenever the applicant has prevailed in an adversary adjudication, but no later than 30 days after final disposition of the adversary adjudication, as follows:

§ 1.193 Time for filing application.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final disposition of the proceeding by the Department.

(b) For 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(a)-(b).

The adversary adjudication for which the Applicants seek attorney fees and other expenses, *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), did not become final and unappealable until September 17, 2012. Therefore, the Applicants' First EAJA Application,

which was filed on January 17, 2012, 8 months before *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), became final and unappealable, was prematurely filed and is dismissed.² The Applicants' Second EAJA Application which was filed on October 11, 2012, 24 days after *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), became final and unappealable, was timely filed. Therefore, the ALJ's Decision as to the First EAJA Application in which the ALJ granted the Applicants' premature First EAJA Application is vacated, the ALJ's Decision as to the Second EAJA Application in which the ALJ dismissed the Applicants' timely filed Second EAJA Application is vacated, and the proceeding is remanded to the ALJ to consider the Applicants' Second EAJA Application.

For the foregoing reasons the following Order is issued.

²See *In re Bodie S. Knapp* (Ruling Granting the Administrator's Mot. to Strike Mr. Knapp's Pet. for Attorney Fees and Other Expenses), __ Agric. Dec. ____ (Jan. 31, 2012) (stating the Equal Access to Justice Act and the EAJA Rules of Practice provide that a party to an adversary adjudication may only request attorney fees and other expenses within 30 days after final disposition of the adversary adjudication and striking the applicant's Equal Access to Justice Act application filed before final disposition of the adversary adjudication); *In re Asakawa Farms*, 50 Agric. Dec. 1144, 1164 (1991) (stating a prevailing party may only request attorney fees under the Equal Access to Justice Act within 30 days after final disposition of an adversary adjudication and a request filed prior to final disposition of the adversary adjudication is premature), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

ORDER

1. The Applicants' First EAJA Application, filed January 17, 2012, is dismissed.
2. The ALJ's Decision as to the First EAJA Application, filed September 27, 2012, is vacated.
3. The ALJ's Decision as to the Second EAJA Application, filed November 2, 2012, is vacated.
4. This proceeding is remanded to the ALJ for further proceedings regarding the Applicants' Second EAJA Application in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.

Done at Washington, DC

February 22, 2013

William G. Jenson
Judicial Officer