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

CHARO'S CORPORATION, d/b/a Charo's Restaurant, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	Case No. 95E00046[1]
UNITED STATES OF AMERICA, Respondent.	)	

FINAL DECISION AND ORDER REGARDING CLAIM FOR ATTORNEY'S FEES AND COSTS UNDER EAJA
(May 19, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Peter Anthony Schey, Esq.
Carlos Holquin, Esq.
Gerhard Frohlich, Esq.
for Complainant

Kendall Warren, Esq.
Dayna M. Dias, Esq.
for Respondent

I. *Procedural History and Introduction*

On August 29, 1991, a final decision and order was issued in this case holding that Count I of the Complaint was dismissed with prejudice and that Charo's Corporation (Charo's or Complainant) was liable in

[1] United States v. Charo's Corp., 3 OCAHO 402 (1992), the case which asked for attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 following a final decision and order on the merits was assigned case number 90100149. The Administrative Law Judge's (ALJ) denial of attorney's fees was reversed and remanded, and the case transferred to me. A new OCAHO docket number 95E00046 was assigned to this ancillary proceeding. In addition, the style of the case was changed from United States v. Charo's Corp. to Charo's Corp. v. United States reflecting Charo's fee shifting appeal to the Ninth Circuit Court of Appeals.

Counts II, III and IV for violations of 8 U.S.C. § 1324a(a)(1)(B).[2] Prior to that decision, on May 15, 1991, Complainant filed an EAJA request for attorney's fees and costs for its successful defense of Count I pursuant to 8 U.S.C. § 1324a(e)(3)(B) and 5 U.S.C. §§ 504(a)(1) and (b)(1)(C).[3]

In order to recover fees and costs in an EAJA claim, the moving party must:

1. establish that he is an eligible party for recovery under 5 U.S.C. § 504(b)(1)(B); and
2. establish that he is a prevailing party; and
3. prove that the government's position was not substantially justified.[4]

Charo's, 3 OCAHO 402 at 5 (citing to 5 U.S.C. § 504).

On January 22, 1992, Judge Frosburg issued an Order in which he denied Complainant's request for attorney's fees and costs because "based . . . on the totality of the circumstances . . . [Charo's] did not show that it was an eligible party under the statute . . . and the government's position was substantially justified." Id. at 24-5.

On February 4, 1992, ALJ Frosburg notified the Chief Administrative Hearing Officer (CAHO) "that a number of documents which had been filed by . . . [Charo's] had been inadvertently overlooked and thus not considered by the ALJ in issuing his final decision in the EAJA proceeding." United States v. Charo's Corp., Case No. 90100149, at 3 (Feb. 19, 1992) (unpublished) (Action by the Chief Administrative Hearing

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[2] This case was originally assigned to ALJ E. Milton Frosburg and transferred to me on March 14, 1995.

[3] Charo's originally filed its EAJA request under 28 U.S.C. § 2412 which empowers the traditional federal judiciary to grant attorney's fees and costs. Although Respondent correctly noted that an ALJ has no authority to grant such EAJA awards, Judge Frosburg ruled that Charo's "made a technical error and intended to file under 5 U.S.C. § 504." Charo's Corp., 3 OCAHO 402 at 4. Accordingly, Respondent's EAJA request was in effect amended by the ALJ to assert a claim under 5 U.S.C. § 504. Id. at 5. Section 504(b)(1)(C) provides that an "'adversary adjudication' means (i) an adjudication under section 554 of this title." (Emphasis added). As § 1324a(e)(3)(B) requires that hearings "be conducted in accordance with the requirements of section 554 of Title 5," EAJA awards under 5 U.S.C. § 504 are clearly sanctioned in § 1324a cases.

[4] In addition to these requirements, a party must make a timely application for attorney's fees and costs which requires that the EAJA application be filed within 30 days of a final adjudication. 5 U.S.C. § 504(a)(2). Complainant in this case made a timely EAJA filing. Charo's, 3 OCAHO 402 at 2.

Officer Remanding the Administrative Law Judge's Decision and Order). Because the documents were timely filed, the CAHO remanded this case to ALJ Frosburg in order that he take them into consideration. Id.

There was a "second" Final Decision and Order dated October 27, 1992[5] which did not deviate from the trial judge's original finding against Charo's on its fee-shifting claim. Subsequently, the United States Court of Appeals for the Ninth Circuit reversed and remanded on Charo's appeal with respect to the jurisdictional requirement of "party eligibility." Although the Ninth Circuit did not refer to Judge Frosburg's findings on the issues of "prevailing party" and "substantial justification," the remand requires the conclusion that it intended these issues to be revisited de novo. The Ninth Circuit was unequivocal, remanding "for a determination of the motion [for attorney's fees] on the merits." Charo's Corp. v. United States, No. 92-70807 at 2 (9th Cir. 1994) (unpublished). I am, however, bound by the Ninth Circuit's determination that Charo's is an eligible party to receive an EAJA award, in terms of number of employees and, as found by Judge Frosburg, jurisdictional net worth.[6] Charo's, 3 OCAHO 467 at 12. Accordingly, this Decision and Order undertakes a de novo review of the issues of "prevailing party" and "substantial review."[7]

II. *Discussion*

A. Prevailing Party

Although he did not find that Respondent was an eligible party in either his first or second Final Decisions and Orders and, therefore, could have dismissed the case at either point, Judge Frosburg's first decision addressed the other elements required to prevail on an EAJA

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[5] United States v. Charo's Corp., 3 OCAHO 467 (1992).

[6] The general rule of the Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(2), is that unpublished decisions are neither precedential nor binding on lower courts. An exception to the rule is when the court's unpublished decision is in the case at hand, as here. See, e.g., the Ninth Circuit Rule 36-3: "[a]ny disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinion, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." (Emphasis added).

[7] Between ALJ Frosburg's second final decision and transfer to me, this case was assigned by the CAHO to ALJ Schneider on September 7, 1994.

application. Once found eligible, an applicant must establish that it is a "prevailing party."

In order to be considered a "prevailing party" for purposes of an EAJA application, it must be determined whether (1) a party has "substantially received the relief sought," and whether (2) "defense of the suit [can] be considered a catalyst that motivated the INS to provide the requested relief." United States v. Mester Mfg. Co., 1 OCAHO 44, 271 (1989) (Administrative Review and Final Agency Order Vacating Administrative Law Judge's Decision and Order), aff'd, 900 F.2d 201 (9th Cir. 1990) (citing Comm'r Court of Medina County, Texas v. United States, 683 F.2d 435 (D.C. Cir. 1982)).

"In order to satisfy the first prong, the fee claimant must show that the objective sought to be accomplished by the suit has been obtained." Mester, 1 OCAHO 44 at 271. In this case, it is clear that Charo's obtained the objective sought in defending the suit, i.e., dismissal of Count I of the Complaint was dismissed.[8]

As to the second prong of the Mester test for prevailing party, "when it is the defendant (as Charo's was originally) who seeks fees, the query is not whether the lawsuit was a catalyst in achieving the result, for the respondent did not institute the suit." Id. Rather,

> [t]he Court must make an objective assessment of the proceedings to determine whether the defense of the suit, e.g., the promise of an aggressive defense strategy or the spectra of extended litigation, led Plaintiffs to take the action that resulted in the mooting of the case. Because this portion of the inquiry involves facts that are totally within the control of the Plaintiffs, the Court must rely on whatever objective data are available.

Id. (citing Comm'r Court of Medina County, Texas v. United States, 683 F.2d 435, 442 (D.C. Cir. 1982)).

INS moved to dismiss Count I of Charo's Complaint during the evidentiary hearing, ostensibly as a result of evidence submitted and/or cast doubt upon by Charo's defense. Judge Frosburg concluded that:

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[8] That Charo's did not prevail on all of the Counts the Complaint is not indicative of whether the "prevailing party" requirement has been met. Although "an insignificant technical victory which achieved this result would be insufficient to support prevailing party status . . .; [the] claimant need not prevail in every aspect of the case to be a prevailing party under the statute." 3 OCAHO 402 at 9 (citing to Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989) and Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988)). See also United States v. G.L.C. Restaurant, Inc., 3 OCAHO 439 (1992); Hewitt v. Helms, 482 U.S. 755, 761 (1987); Mester, 1 OCAHO 44, 273.

> [i]t is clear that the Service's Motion to Dismiss Count I was a result of . . . [Charo's] cross-examination of . . . [INS's] witness and that the relationship between the Service and . . . [Charo's] changed with the dismissal of the charges since there was no longer any case as far as Count I was concerned.

Charo's, 3 OCAHO 402 at 11.

Judge Frosburg's summary of the hearing is on point:

> At hearing, the Service intended to call at least four (4) witnesses in its case-in-chief. They included the Service's Special Agent Dennis Smith who conducted a portion of the underlying investigation prior to the filing of the Complaint, Maria Gabriella Rodriguez, an individual whom the Service alleged was knowingly hired without valid work authorization and named in Count I, and the Hernandez brothers, who were also allegedly knowingly hired without proper work authorization and also named in Count I.
>
> At hearing, although Special Agent Smith testified, the Service could not present the Hernandez brothers for examination as their whereabouts were unknown. Further, during . . . [Charo's] cross-examination of Ms. Rodriguez, it became clear that her testimony was not credible. Since the testimony of one of its crucial witnesses had been destroyed on cross-examination, and two of its witnesses could not be produced, the Service made an oral motion in chambers for dismissal of Count I.

3 OCAHO 402 at 10-11.

It is clear from the record and the trial judge's characterization of the testimony that Charo's has met the two-prong test for prevailing party status set out in Mester and proven that there is a "causal link" between the dismissal and Charo's defense, particularly examination of Ms. Rodriguez. Jasso v. Danbury Hilton & Towers, 3 OCAHO 566 at 5 (1993) (Final Decision and Order Regarding Respondent's Motion for Attorney's Fees and Costs). Accordingly, I do not disturb Judge Frosburg's determination that Charo's is a prevailing party.

B. Substantial Justification

A determination that the Government's position is substantially justified defeats fee shifting. 5 U.S.C. § 504. In order to conclude that its position is substantially justified, the government's case must have a "reasonable basis both in law and fact." G.L.C., 3 OCAHO 439 at 11 (citing to H.R. REP. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4989). The government bears the burden of proving substantial justification by a "'strong showing.'" Id. However, "it does not follow that the government is automatically liable for attorney's fees whenever it suffers a litigation loss." Id. See also Nguyen v. ADT Engineering, Inc., 3 OCAHO 489 at 19 (1993)

(citing United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985)). Nevertheless, "1985 EAJA revisions sharpened the reasonableness rule . . . [and] [s]everal courts have held correctly that 'substantial justification' means more than merely reasonable. . . ." G.L.C., 3 OCAHO 439 at 11 (quoting in part H.R. REP. No. 99-120, p.9 (1985) U.S. CODE CONG. & AD. NEWS 1985, pp. 132, 138) (citing Pierce v. Underwood, 487 U.S. 552, 566 (1988)).

OCAHO case law divides the reasonableness standard into a three-part test espoused in United States v. Yoffe, 775 F.2d 447 (1st Cir. 1985). Mester, 1 OCAHO 44, 275. See also Pierce, 487 U.S. 552 (finding that the three-part test in Yoffe is equivalent to a reasonableness standard used by many courts in determining substantial justification). The "Yoffe test" requires that the government prove (1) that it had "a reasonable basis for the facts alleged; . . . (2) that it had "a reasonable basis in law for the theories advanced"; . . . and (3) that "the facts support its theory." Mester, 1 OCAHO 44, 275 (citing Yoffe, 775 F.2d 447, 450)). On "substantial justification," Judge Frosburg answered all three questions in favor of the government. Charo's, 3 OCAHO 402 at 14-24.

1. Reasonable Basis for the Facts Alleged?

This question is answered by showing that INS had legitimate factual reasons for prosecuting the allegations contained in Count I, and that "a reasonable person would have come to the same belief, given the same set of circumstances." Mester, 1 OCAHO 44, 275.

Section 504 further defines the Government's burden of proof to require substantial justification with regard to both the adjudication and "the action or failure to act by the agency upon which the adversary adjudication is based. . . ." 5 U.S.C. § 504(b)(1)(E). The Federal Circuit has interpreted the burden of proof as "clearly reasonable . . .[, stating that] [t]he Government must show that it has not 'persisted in pressing a tenuous factual or legal position albeit one not wholly without foundation.'" Gavette v. Office of Personnel Management, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (emphasis added). Moreover, "[i]t is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.'" Id. It follows that Respondent may be entitled to fee shifting if the Government's pursuit of the allegations in Count I was unreasonable either prior to or during the hearing.

Count I alleged that three individuals, Maria Gabriella Rodriguez (Rodriguez), Ruben Hernandez-Elorriaga and Ricardo Hernandez-Elorriaga ("the Hernandez Brothers"), all of whom were unauthorized aliens, were knowingly hired by Respondent in violation of 8 U.S.C. § 1324a(a)(1)(A). Deciding that the Government did have legitimate factual reasons to move forward with Count I, Judge Frosburg stated that after the individuals were apprehended by INS,

> all three gave separate sworn statements to the Service in which they admitted that they were employed by Charo's Restaurant . . ., that they had entered the United States illegally, that they did not have work authorization and that Carmen Lesher, Charo's sister and agent of the corporation, was aware that they were illegal aliens and did not have work authorization.

Charo's, 3 OCAHO 402 at 15 (citing to INS Exhibits 2, 3, and 33).

I agree that at the time of apprehension of the three unauthorized aliens, there was sufficient basis in law and fact for INS to proceed with Count I. All three individuals were unauthorized aliens. Whether the owners/managers of Charo's knew the individuals were unauthorized is the only element INS needed to prove in order to prevail in Count I. The only issue therefore is whether INS was reasonable in continuing both its investigation and/or its preparation for hearing on the basis of information/evidence regarding Charo's alleged knowledge of the aliens' lack of employment eligibility.

Charo's asserts that

> INS possessed "no credible testimony or evidence . . . to show that there was any knowledge, either actual or constructive, on the part of the respondent as to the unauthorized status of the three complaining witnesses contained in count 1 . . ." 551:9-14. INS's insistence on proceeding with Count 1 was unreasonable--a complete waste of the tax-payers' money and INS's limited budget.

Supplemental Memorandum of Law in Support of [Charo's] Motion for Attorney's Fees and Costs at 2 (June 24, 1991) [hereinafter Supplemental Memorandum].

Charo's argues that INS engaged in a shoddy investigation pertaining to the Hernandez Brothers' statements that they had informed Respondent, in particular Charo's sister, Carmen Lesher, in charge of hiring, of their lack of authorization prior to employment. Specifically, Charo's questions investigatory tactics of INS:

> INS special agent Smith did not ask how Ruben [Hernandez] knew what Carmen Lesher allegedly told his brother, he did not ask from whom the Hernandez brothers allegedly purchased their "green cards," he did not ask how the brothers located the

> person from whom they allegedly purchased the cards, whether Ruben ever went with his brother to Charo's home in Los Angeles, if so who else was present, nor did he ask whether Charo or her husband, the officers of the Respondent employer, ever knew that the brothers had allegedly purchased "green cards" in order to work at the restaurant. In fact, agent Smith never even questioned the veracity of the statement that the brother's obtained fake "green cards" for just $15--they must have found a fire-sale on "green cards."

Supplemental Memorandum at 7.

While Charo's questions may be relevant and pertinent, the fact that INS failed to ask certain questions deemed significant by the party under investigation does not per se imply that INS was so negligent in conducting its investigation as to predicate a finding of lack of substantial justification. Hypothetically, suppose that INS were understood to have been negligent in failing to make certain inquiries. Even so, I am not prepared to conclude that having determined that the individuals listed in Count I were unauthorized aliens employed by Charo's who all gave corroborating testimony that Charo's had knowledge of their status, INS did not have sufficient evidence to move forward with its case. Disproving knowledge on Charo's part is not the Government's obligation; it is Charo's, a burden which it sustained, at which point INS dropped Count I. That Charo's overcame INS's Count I evidence does not render the Government's case less than substantially justified.

Charo's also argues that INS was not substantially justified because the Hernandez Brothers disappeared shortly after they were released from detention. INS therefore proceeded to hearing without the benefit of witnesses to testify to the allegations in Count I. I disagree with Charo's assertion that without the Hernandez Brothers, this case should not have gone forward. Aside from the fact that INS had other witnesses to prove the allegations involving the Hernandez Brothers, including INS investigators, there was additional evidence in the testimony of Ms. Rodriguez. That this additional evidence later proved not to be credible was not a bar to pursuing the claim that Charo's violated the prohibition against hiring unauthorized aliens.

2. Reasonable Basis in Law for the Theories Advanced?

As Judge Frosburg points out, "[t]he Service alleged in Count I that Charo's had knowingly employed three named individuals when they were unauthorized to work in the United States, or in the alternative, continued to employ these people after learning that they were unauthorized to work in the United States." Charo's, 3 OCAHO 402 at 15. I agree. Title 8 U.S.C. § 1324a(a)(1)(A) confirms that the allegations of the Complaint conform to the statute.

3. Facts Support the Theory?

This prong of the three-part test is essentially an application of the first prong to the second. As such, where one prong is already found to be deficient, the third prong falls apart. However, as already stated, Judge Frosburg found in favor of INS for both of the first two prongs. Accordingly, he also found in INS' favor for this prong.

In support of its position, INS argues that the facts did support the legal theory presented in Count I, "at least, until Ms. Rodriquez [sic] uttered false statements under oath," at which point INS moved to dismiss. Prior to the hearing, "testimony of Ms. Rodriquez [sic] would support the allegations of the Complaint." INS's Memorandum of Points and Authorities in Opposition to Motion for Attorney's Fees and Costs at 11. In particular, INS states:

> Ms. Rodriquez' [sic] testimony at trial not only reduced her own credibility, but also prevented her from effectively corroborating the testimony of other witnesses. Her earlier statements, along with the initial statement of Mariano Juarez Hernandez had lent credence to the sworn statements of Ricardo and Ruben Hernandez, who could not be located for trial. Later, Mr. Juarez recanted his testimony, and then refused to accept service to appear when the Government sent an ALJ subpoena to his attorney. Therefore, the impact of Ms. Rodriquez' [sic] perjury took on heightened significance.

Id. at 12, n.7.

Charo's argues that both prehearing and during the hearing, INS was not only lacking in substantial justification but also "reckless." Supplemental Memorandum at 13. Charo's main arguments center around the unreliability of INS witnesses, the Hernandez Brothers and Rodriguez. Charo's states that it provided INS with information proving their unreliability but that INS repeatedly ignored such evidence. Specifically, Charo's maintains the evidence it allegedly provided to INS would have proven that the witnesses INS intended to use to prove Count I had obtained fraudulent employment documentation prior to working for Charo's. Therefore Complainant argues there was no way for Charo's to have known that these individuals were unauthorized. Furthermore, had INS investigated properly, it would have found out that the witnesses had lied when stating that they were told by Charo's staff to obtain fraudulent documentation.

I agree with Judge Frosburg that the fact that certain information could have been investigated does not make the Government's case frivolous or lacking in substantial justification. The Judge analyzed in detail Charo's arguments on substantial justification. I concur with him that "[t]he government is not obligated to follow every lead or

theory offered by the defense . . .; [s]ervice counsel has the right to conduct her case as she deems necessary, adhering to ethical and legal considerations." 3 OCAHO 402 at 19-20. While the Judge concluded and I agree that some of the decisions made by INS "might not have been my strategy if I had prosecuted the case, . . ." the INS decision to file the Complaint is understandable and substantially reasonable. Id. at 22.

III. *Ultimate Findings, Conclusions and Order*

For the reasons discussed above, I hold and conclude that Charo's is not entitled to EAJA relief. Any motions or requests not previously disposed of are denied.

This Final Decision and Order Regarding Claim for Attorney's Fees and Costs Under EAJA is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv). As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to a party adversely affected. See 8 U.S.C. §§ 1324a(e)(7), (8) and 28 C.F.R. § 68.53.

SO ORDERED.

Dated and entered this 19th day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge