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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

El Rescate Legal Services, Inc., et al.,

Plaintiffs,

v.

Executive Office for Immigration Review, et al.,

Defendants.

CV 88-1201-Kn

ORDER Re: PLAINTIFFS' MOTION FOR FEES AND COSTS

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 1987, Plaintiffs brought a class action on behalf of all non- and limited-English-speaking people who had been or would be subject to immigration court proceedings in Los Angeles, El Centro, and San Diego immigration courts. Their complaint alleged that the Executive Office for Immigration Review ("EOIR") engaged in a policy and practice of using incompetent translators ("the competency issue") and of not interpreting many portions of immigration court hearings ("the completeness issue").

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Plaintiffs claimed that this practice deprived class members of (1) their statutory rights to present evidence, cross-examine witnesses, and be effectively represented by counsel; and (2) their constitutional rights to due process and equal protection.

After the class was certified, Plaintiffs moved for partial summary judgment on the completeness issue on August 22, 1989. The district judge granted the motion, holding that "EOIR's failure to require full interpretation of immigration court proceedings seriously undermines Plaintiff's statutory right to be present at their proceedings, their right to counsel, their right to examine evidence, and their right to confront and cross-examine witnesses." El Rescate Legal Servs. v. Exec. Office for Immigration Rev., 727 F.Supp. 557, 560 (C.D.Cal. 1989), reversed, 959 F.2d 742 (9th Cir. 1991). The district judge then issued a permanent injunction requiring EOIR to interpret all portions of the proceedings.

The Ninth Circuit reversed the district court's decision. El Rescate Legal Servs. v. Exec. Office for Immigration Rev., 959 F.2d 742 (9th Cir. 1991). The appellate court essentially held: (1) EOIR's policy allowing the immigration judge, in his or her discretion, to determine the portions of the hearing to be translated, did not facially violate the Immigration and Nationality Act's requirement of a "reasonable opportunity" to be present, examine witnesses, present evidence, and provide their own representation; and (2) neither the statute nor the EOIR's policy facially violated the Constitution. The Ninth Circuit remanded for a determination of whether the application of the policy systematically denied the class either its statutory or

constitutional rights. Id. at 752.

While the appellate litigation was taking place, the parties were attempting to resolve their differences. After Plaintiffs moved to compel compliance with the injunction on the completeness issue, the parties negotiated a Memorandum of Understanding on June 28, 1991, which set out in greater detail the parameters of the permanent injunction, and sufficiently assured Plaintiffs that Defendants would translate virtually all portions of immigration proceedings. Although they no longer felt bound to the Memorandum of Understanding after the Ninth Circuit overturned the injunction, Defendants nevertheless continued to follow the policies outlined in that memorandum.

While these actions were taking place on the completeness issue, the competency issue was also being settled through negotiation. In March of 1990, Defendants informed Plaintiffs that they had a plan to develop a certification exam for their interpreters. After several months, settlement negotiations on this issue eventually broke down, allegedly over Defendants' intention to "grandfather" the existing interpreting staff such that they would be exempt from the certification examination. In March of 1991, the district court on its own motion stayed proceedings on the competency issue in order to give Defendants an opportunity to develop and implement various remedial measures they had undertaken to improve the quality of interpretation. The court directed Defendants to share information on these remedial measures with Plaintiffs so that Plaintiffs could provide input while the measures were being implemented.

The parties recommenced settlement negotiations in May 1992, and continued to negotiate until the summer of 1993 without reaching a complete agreement. Finally, in July 1993, Plaintiffs moved for voluntary dismissal of the action because they felt they had substantially received the relief they had sought. After notice of the dismissal was provided to the class members, this Court granted Plaintiffs motion for voluntary dismissal without prejudice. Plaintiffs are now seeking an award of attorneys fees and costs.

ANALYSIS

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, provides for the award of attorneys' fees to prevailing parties in civil actions against the United States as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . ., including proceedings for judicial review of agency action brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C.§ 2412(d)(1)(A).

I. ARE PLAINTIFFS ENTITLED TO FEES?

It should be noted at the outset that Defendants do not dispute that Plaintiffs are "parties" within the meaning of §

2412(d)(2)(B).[1] Thus, for Plaintiffs to be entitled to fees under the EAJA, they must show that they are a "prevailing party" within the meaning of § 2412(d)(1)(A). If they do so, the burden shifts to the government to show that its position was "substantially justified." If it was not, Plaintiffs would be entitled to fees. Because Plaintiffs' work on the completeness issue was, for the most part, unrelated to their work on the competence issue, these distinct claims must be analyzed separately when determining whether Plaintiffs are entitled to fees. See Hensley v.Eckerhart, 461 U.S. 424, 434-35 (1983).

A. Completeness Issue

1. Are Plaintiffs a "Prevailing Party"?

When a case has not gone to final judgment, the Ninth Circuit has established a two part test for determining prevailing party status. Under this test, "the party seeking to establish 'prevailing party' status must demonstrate that: (1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiffs' claim." Andrew v. Bowen, 837 F.2d 875, 877 (9th Cir. 1988) (citing California Association of Physically Handicapped, Inc. v. FCC, 721 F.2d 667, 671-72 (9th Cir.1983), cert. denied, 469 U.S. 832 (1984)); Bullfrog Films, Inc. v. Catto, 815 F.Supp. 338, 341 (C.D. Cal. 1993).

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[1]Section 2412(d)(2)(B) provides that a "party" is (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) an organization that did not have a net worth in excess of $7,000,000 and did not have more than 500 employees at the time the civil action was filed.

a. Causation

Under the first inquiry, Plaintiffs must show that, "as a result of having brought the lawsuit, [they have] received some or all of the relief originally sought." Andrew v. Bowen, 837 F.2d at 877. Plaintiffs' lawsuit need not have been the sole cause of Defendants' action; it need only have been a "material factor" or have played a "catalytic role" in bringing about the desired result. Wilderness Soc'y v. Babbitt, 5 F.3d 383, 386 (9th Cir. 1993); Oregon Environmental Council v. Kunzman, 817 F.2d 484, 497 (9th Cir. 1987) (citations omitted).

The Court finds that Plaintiffs' lawsuit on the completeness issue was a material factor in bringing about substantially all of the relief sought. Before the lawsuit, the policy of the EOIR was that the interpreters' function was merely to "provide for the official record of the proceeding for review in English by the immigration judge who has to make the decision and ultimately for review" by reviewing courts. El Rescate, 727 F.Supp. at 560 (quoting deposition of Chief Immigration Judge William Robie). Thus, apart from direct questions to non-English speaking witnesses, interpreters would not translate anything from English to the language of the respondent/applicant, including English-speaking witnesses' testimony, arguments and objections of counsel, and the judge's decision. Id.

On May 12, 1992, after the district court's summary judgment and permanent injunction had been overturned by the Ninth Circuit, Chief Immigration Judge William Robie issued a memorandum outlining the new policy of immigration courts of Los Angeles, San Diego, and

El Centro concerning the things to be interpreted. The memo states that the testimony of each witness, discussions between the judge and counsel, and the judge's decision should all be translated for the benefit of the respondent/applicant. The only things that do not have to be simultaneously translated for the respondent are: (1) if the respondent is not represented by counsel, the judge may summarize "discussions of legal, procedural, or administrative matters" concerning the case; and (2) if the respondent is represented, the interpretation of social or extraneous matters not substantively related to the case need not be interpreted, and discussions regarding procedural and administrative matters may be summarized for the respondent.

When the pre-litigation policy of the EOIA is compared with the current policy, it is apparent that Plaintiffs have substantially received what they have requested. The entire policy of the EOIA has shifted from translating only what was necessary to have a complete English record towards translating what is necessary to ensure "all respondents/applicants [are] provided a fundamentally fair hearing." (Robie Memorandum of May 12, 1992.) This is precisely what Plaintiffs were seeking in their lawsuit.

It is also clear that Plaintiffs' lawsuit played at least a "catalytic role" or was at least a "material factor" in bringing about EOIA's change in policy. Wilderness Soc'y, supra. Particularly telling is the fact that the new policy outlined by the Robie Memorandum was expressly limited to the geographical areas covered by the litigation. Furthermore, Judge Robie entitled the subject of the memorandum "El Rescate v. EOIR," indicating he

clearly had the lawsuit in mind when formulating the new policy. Thus, Plaintiffs have sufficiently demonstrated that, at least on the completeness issue, the relief sought by the lawsuit was in fact obtained as a result of having brought the action. See Andrew v. Bowen, supra.

b. Legal Basis

> Under the second "prevailing party" requirement, the court must determine whether there was a legal basis for the claim. California Association of Physically Handicapped, Inc. v. FCC, 721 F.2d at 671-72. While this requires some evaluation of the merits, this evaluation is extremely limited. The extent of the court's inquiry is strictly limited to determining whether the claims asserted are "frivolous, unreasonable, or groundless, or [whether] the plaintiff continued to litigate after they became so." Ortiz de Arroyo v. Barcelo, 765 F.2d 275, 282 (1st Cir.1985).

Andrew v. Bowen, 837 F.2d at 877-78 (alterations in original). The purpose of this inquiry is "to ensure that the government did not act 'gratuitously in response to a frivolous or legally insignificant claim.'" Sablan v. Dept. of Finance of N. Mariana Islands, 856 F.2d 1317, 1325 (9th Cir. 1988) (citations omitted).

Plaintiffs have clearly met this test on the completeness issue. Despite the claims of Defendants, Judge Robie's formulation of the new interpretation policy was not merely "gratuitous." Despite the Ninth Circuit's reversal of the district court's summary judgement, Plaintiffs could have pursued the litigation by showing that EOIR's policy systematically violated class members'

statutory or constitutional rights. Whether or not Plaintiffs could have actually made such a showing is uncertain, but such a claim is neither frivolous nor unreasonable, and Defendants' response to the threat of this litigation was more than merely gratuitous. Thus, on the completeness issue, the burden shifts to the government to show that its position was "substantially justified."

2. Was the Government's Position "Substantially Justified"?

Under the EAJA, a prevailing party "shall" be awarded fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). This statutory language "creates a presumption of a fee award" when this standard is met. United States v. First Nat'l Bank of Circle, 732 F.2d 1444, 1447 (9th Cir. 1984). The burden is on the government to overcome this burden by showing substantial justification. Timms v. United States, 742 F.2d 489, 492 (9th Cir.1984).

In Pierce v. Underwood, 487 U.S. 552, 565 (1988), the Supreme Court held that the phrase "substantially justified" means that the government's position must have a "reasonable basis both in law and fact." The government must be "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." Id. at 566. Rather, the government's position must be "justified to a degree that could satisfy a reasonable person." Id. at 565.

In deciding whether the government's position is substantially

justified, a court must evaluate the reasonableness of the agency's conduct giving rise to the action in addition to its litigation position. Abela v.Gustafson, 888 F.2d 1258, 1264 (9th Cir. 1989); Nat'l Wildlife Federation v. Fed. Energy Reg. Comm'n, 870 F.2d 542, 546 (9th Cir. 1989); Ramon-Sepulveda v. INS, 863 F.2d 1458, 1459 (9th Cir. 1988). A finding that either the government's underlying conduct or its litigation position was not substantially justified is sufficient to support an award of fees. Andrew v. Bowen, 837 F.2d at 879-80. When examining the government's litigation position, initial opposition to the plaintiffs' position followed by eventual capitulation at some later stage in the litigation may demonstrate a lack of substantial justification. Spencer v. NLRB, 712 F.2d 539, 555-56 n. 58 (D.C. Cir.), cert denied, 466 U.S. 936 (1983).

In regards to the completeness issue, the government has not demonstrated that both its underlying conduct as well as its litigation position was substantially justified. The EOIR's pre-litigation policy led the district court to remark in his summary judgment order:

> This court is appalled by the apparent lack of concern which EOIR and the immigration judges have demonstrated for the rights of the alien respondent. Fundamental fairness and due process have taken a back seat to administrative convenience and bureaucratic guidelines.

El Rescate, 727 F.Supp. at 563. The Ninth Circuit's eventual reversal of this order does not undermine its characterization of EOIR's pre-litigation conduct. Furthermore, as to Defendants'

litigation position, the Court finds that EOIR's eventual capitulation to Plaintiffs' demands after vigorously denying that any changes needed to be made to its interpretation policy demonstrates a lack of substantial justification.

Accordingly, Plaintiffs are entitled to fees for work performed on the completeness issue.

B. Competence Issue

1. Are Plaintiffs a "Prevailing Party"?

a. Causation

To be a prevailing party, Plaintiffs must first show that, "as a result of having brought the lawsuit, [they have] received some or all of the relief originally sought." Andrew v. Bowen, 837 F.2d at 877. Defendants have previously acknowledged that Plaintiffs have substantially obtained the relief they had sought. In a request to the district court's request for a status conference on March 6, 1991, defense counsel stated, "Since this case was filed on March 7, 1988, Defendants have undertaken many significant changes that directly affect the competence of interpreters in immigration court proceedings." Hausman to Gray Letter, March 6, 1991, Plaintiffs Exh. HH, at 54. These changes included providing extensive training to the interpreters, undertaking a comprehensive training development program, and developing a plan to create a certification process for Spanish language interpreters. Declaration of Kathleen A. Reyering, Plaintiffs' Exh. HH, at 56-58. Subsequently, in their November 12, 1993 response to Plaintiffs' motion for voluntary dismissal, Defendants agreed that the competency issue had become "moot."

What Defendants do dispute, however, is that the changes that have occurred were undertaken as a result of Plaintiffs' lawsuit. To support their contention that changes were made independently of Plaintiffs' lawsuit, Defendants point to the fact that EOIR began to address the problems with interpreter competence beginning in May 1987, nearly a year before Plaintiffs' suit was filed. These pre-litigation activities of Defendants consisted of the following:

1. In May, 1987, EOIR began efforts to address the formal training needs of the interpreters.

2. In August 1987, two EOIR employees began a study of interpreter training and quality.

3. On March 2, 1988, the report from the study, entitled "Enter Talking: Interpreter Training Approaches for the Executive Office for Immigration Review," was delivered to the Director of EOIR, David L. Milhollan. EOIR Report, Defense Exh. 5, at 112-124. This report described the historical problems with the interpreter/clerk position, and urged adoption of the report's recommendation to design an interpretation test, conduct training conferences, design a post-conference proficiency test, and establish an interpreter advisory committee. Id. at 116, 121, 124.

These facts, claim Defendants, show that EOIR's efforts to address the interpreter problems were already well underway before Plaintiffs filed their lawsuit on March 7, 1988, and that the changes EOIR eventually made would have been made even without the lawsuit.

This assertion, however, is undermined by events that took

place after filing of the complaint. The report delivered to Director Milhollan described the interpreter/clerk as "the most vulnerable staff position within the immigration hearing process." Id. at 115. The report also cautioned that a "systematic method of testing and selecting new interpreter applicants" had been "historically lacking in the immigration process," and strongly urged the adoption of the report's recommendations to correct the problems. Id.

However, after reviewing the report, Director Milhollan sent a memorandum to Chief Judge Robie in which he stated:

> The following activities should not be assessed or developed at this time: 1) a nation-wide interpreters' conference; 2) qualifications for prospective employees; and 3) testing and/or certification of interpreters.

Memorandum from Milhollan to Robie, July 21, 1988, Defense Exh. 5, at 131 (emphasis added). The only actions Milhollan took in response to the report was to: identify a preliminary list of reference materials, such as dictionaries, to be provided to each interpreter; establish a preliminary list of the subject matter to be included in an interpreter's manual; identify institutions that provide training for interpreters; select an interpreter advisory committee; and "determine the feasibility of using ANSIR capabilities for future interpreter training." Id. at 130-31. Further advances in addressing the problem only came well after Plaintiffs' suit was filed.

This fact--that EOIR was reluctant to implement solutions to the problem, and only did so after Plaintiffs filed and vigorously

pursued their lawsuit--provides strong support for the conclusion that the lawsuit was at least a "material factor" or played at least a "catalytic role" in bringing about EOIA's changes concerning interpreter competence. Wilderness Soc'y, supra. Additionally, the fact that Defendants had to periodically report to and receive input from Plaintiffs means that Defendants must have had the lawsuit in mind when implementing their proposed remedial measures on the competence issue. Finally, during a deposition on January 7, 1991, Assistant Chief Immigration Judge Henry Armstrong admitted that EOIR's program to develop and improve interpreter training received "some impetus" from the district court's order issued in response to Plaintiffs' litigation. Armstrong Deposition, Plaintiffs' Exh. GG, at 41-43. Under the totality of the circumstances, it is clear that Plaintiffs' lawsuit played at least a catalytic role in bringing about the changes sought.

b. Legal Basis

Plaintiffs have also sufficiently established that they had a legal basis for their claim. Defendants have admitted that there were serious problems with the competence of interpreters that needed to be addressed. See, e.g., EOIR Report, Defense Exh. 5, at 112-24. When this factor is combined with the litigation history of the competence issue and the conduct of Defendants in response to the litigation, it is apparent that the government did not act "gratuitously in response to a frivolous or legally insignificant claim." Sablan v. Dept. of Finance of N. Mariana Islands, 856 F.2d at 1325 (citations omitted).

2. Was the Government's Position Substantially Justified?

Because Plaintiffs were a prevailing party on the competence issue, they are entitled to fees unless the government can demonstrate its position was substantially justified. Timms, 742 F.2d at 492. As was the case on the completeness issue, the government has not demonstrated that its position was substantially justified. Although the EOIR's pre-litigation conduct concerning the competence issue was not as egregious as it was on the completeness issue, and may have in fact been substantially justified given the limitations on available funds to implement effective changes, Defendants' litigation position on the competence issue was far from "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. at 565.

As Plaintiffs correctly point out, EOIR's own study, completed in March 1988, characterized the high proportion of EOIR interpreters with less than two years experience as "alarming," Report, Defense Exh. 5 at 115, and recommended a series of remedial measures including comprehensive training and the development of a certification exam. Id. at 117-122. Despite this fact, no such concern was reflected in Defendants' litigation posture or expressed by Defendants in their response to discovery.

At his deposition on April 26, 1988, Chief Immigration Judge Robie steadfastly maintained that the system being used to hire interpreters was fine and that no certification examination was necessary. Robie Deposition, Plaintiffs' Exh. DD at 39:1-15,

40:14-20, 168:1-22, 169:1-6. He also testified that the contract interpreters were providing quality interpretation and there were no problems. Id. at 143:13-22, 144:8-20, 187:12-19.

The management officers for the affected immigration courts, who were responsible for directly supervising the interpreter clerks and for interviewing and recommending applicants for the position of interpreter/clerk, were also deposed. Brown Deposition, July 1, 1988, Plaintiffs' Exh. EE at 46:12-14. Neither management officer expressed concern over the competence of the interpreters, labeling them "excellent," "outstanding," and "very qualified." Id. at 116:13-18; Perkins Deposition, Defense Exh. 16, at 400:5-7.

Similarly, Assistant Chief Immigration Judge Armstrong testified that the interpreters were doing an outstanding job, there was no need for improving the process used to screen applicants for the job of interpreter, and that he was unaware of any negative comments, other than Plaintiffs' lawsuit, concerning the quality of interpreters. Armstrong Deposition, December 12, 1988, Plaintiffs' Exh. FF at 22:5-13, 93:1-6, 114:2-5.

Not until March of 1990 did Defendants reveal to Plaintiffs their plans for a certification exam to screen applicants for interpreter positions, and interim measures to enhance the quality of interpretation. Frenzen Decl., Plaintiffs' Exh. C, at 3.[2] This

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[2]One may be curious as to how the defendants were able to keep Plaintiffs from obtaining EOIR's March 1988 Report. It seems as though despite repeated requests for production of documents that would clearly include the March 1988 Report, Defendants never turned over the report, stating that "[n]o such documents exist." These uncooperative responses to discovery, which reinforce the

repeated denial of any problem with interpreter competence, despite EOIR's own March 1988 report to the contrary, and followed by EOIR's eventual implementation of substantial new improvements to increase interpreter competence, demonstrates a lack of substantial justification for the government's litigation position. See Spencer v. NLRB, 712 F.2d at 555-56 n. 58 (stating that when examining the government's litigation position, initial opposition to plaintiffs' position followed by eventual capitulation at some later stage in the litigation may demonstrate a lack of substantial justification).

Accordingly, Plaintiffs are entitled to fees for work performed on the competence issue.

II. WHAT IS THE AMOUNT OF FEES TO WHICH PLAINTIFFS ARE ENTITLED?

A. Is the Amount of Time Spent Reasonable?

Plaintiffs' counsel have submitted detailed records of the time spent on the litigation. See Plaintiffs' Exhs. G-O. Considering the complex nature of the litigation, the Court finds that the amount of time spent by Plaintiffs' counsel was reasonable. Citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983), for the proposition that time which was "excessive, redundant, or otherwise unnecessary" should be deleted, Defendants make three objections to the amount of time spent by Plaintiffs counsel.

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district court's characterization of Defendant's discovery responses as the most "uncooperative -- inappropriately uncooperative responses to discovery [he had seen] in a long while," Transcript of Proceedings, June 19, 1989, Plaintiffs' Exh. B, at 4:11-13, provide further evidence that the government's litigation position was not substantially justified.

First, Defendants claim that no time should be allowed for work on the completeness issue. This claim is in error for the same reasons that support a finding that Plaintiffs have prevailed on this issue. Next, Defendants assert that time spent after March 1990, when plaintiffs were informed that defendants had developed a plan for interpretation improvements, should be deleted. However, this argument ignores the important contribution Plaintiffs continued to make with regard to monitoring and ensuring EOIR's implementation of its reforms.[3] Finally, Defendants claim that the time spent in meetings of co-counsel should be discounted. However, complex class action litigation such as this would commonly require multiple counsel, and Plaintiffs' counsel have already discounted the time spent in meetings of counsel by one third. The Court finds that the hours spent by Plaintiffs' counsel were reasonably expended.

B. Are Fees in Excess of the $75 Cap Warranted?

The EAJA provides that attorney's fees "shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

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[3]The district court specifically directed Plaintiffs to monitor EOIR's implementation of its changes and to give their input to the process. March 19, 1991 Reporter's Transcript, Plaintiffs' Exh. A at 8. As EOIR represented in Quarterly Reports to the court, EOIR continued to "carefully consider and adopt, where appropriate, any comments and suggestions submitted by the plaintiffs." Plaintiffs' Exh. RR at 4.

28 U.S.C. § 2412(d)(2)(A).

In Pierce v. Underwood, 487 U.S. 552 (1987), the Supreme Court held that the exception for "limited availability of qualified attorneys for the proceedings involved . . . refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question. . . ." Id. at 572. The Court gave specialization in patent law and knowledge of foreign law or language as examples of such a distinctive knowledge or specialized skill. Id. Reimbursement of attorney's fees above the cap are allowed when such specialized qualifications are necessary for the litigation and can only be obtained at rates in excess of the $75 cap. Id.; Pirus v. Bowen, 869 F.2d 536, 541 (9th Cir. 1989).

The Court finds that Plaintiffs' attorneys possessed such specialized legal expertise identified in Pierce v. Underwood. Most are fluent in Spanish -- a skill specifically identified by the Court in Pierce v. Underwood, 487 U.S. at 572. See Declarations of Counsel, Plaintiffs' Exhs. G to O.[4] Furthermore, Plaintiffs' counsel all had extensive immigration law training and experience. Such a specialization has all of the qualities identified by the Ninth Circuit as indicative of a specialization compensable under § 2412(d)(2)(A) at a rate exceeding the $75 cap: "expertise with a complex statutory scheme; familiarity and credibility with a particular agency; and understanding of the needs of a particular class of clients." Pirus v. Bowen, 869 F.2d at 541; see also Nat'l Wildlife Federation, 870 F.2d at 547

[4]All except Niels Frenzen are fluent in Spanish. Mr. Frenzen is fluent in French and Creole.

(holding environmental law as such a specialized skill because "it requires specialized legal expertise as well as the mastery of a technical subject matter gained by the investment of time and energy").

The Court also finds that such expertise was necessary for the litigation. Fluency in Spanish was necessary to enable the attorneys to communicate with the class members they were representing. Furthermore, it was the critical combination of skills possessed by counsel -- expertise in the complex administrative immigration law scheme, familiarity with the practical workings of the immigration court, and understanding through bilingual ability of the practical problems inherent in interpretation -- that enabled Plaintiffs both to pursue the litigation thoroughly and to fashion and monitor workable remedies.

Finally, the Court finds that such expertise could only be obtained at a rate in excess of the $75 cap. This of course depends on a determination of the reasonable market rate for such expertise.[5] However, Plaintiffs have provided adequate evidence as to the scarcity of practitioners in Southern California who possess the unique combination of skills and expertise possessed by Plaintiff's counsel. See Declarations of Ortiz and Mirell, Plaintiffs' Exhs. P and Q. In response, Defendants argue that the number of lawsuits that have been brought against EOIR and INS by Los Angeles attorneys evidence "an abundance of attorneys" who are

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[5]If the reasonable market rate for counsel's specialized services is determined to be $75 or less, counsel would not be entitled to fees in excess of the $75 cap.

"ready, willing and able" to bring actions such as this one. Defendants' Opp. at 33-34. Yet, as they acknowledge, the same counsel for Plaintiffs also served as counsel in many of these other actions, and Defendants only identify three other Los Angeles attorneys who have done so. Id. at 34 n.17.

Thus, fees in excess of the $75 cap are warranted under § 2412(d)(2)(A).

C. What is the Market Rate for Attorneys With Comparable Skills?

Plaintiffs have submitted two alternative methods to determine the reasonable rate for counsel's services. First, they submit a declaration from Douglas E. Mirell, partner in the Los Angeles office of Loeb and Loeb, setting forth the rates that would be used by his firm to bill for attorneys of comparable skills and experience as Plaintiffs' counsel. Plaintiffs' Exh. Q. Applying these rates to the hours involved would result in an award of $1,497,680.60 in fees. See Plaintiffs' Exh. X, Table II. Alternatively, they submit a 1992 bar association survey compiling hourly rates for some 7000 attorneys in the Los Angeles area. Plaintiffs' Exh. R. Using the median hourly rate for each attorney's date of law school graduation and applying these rates to the hours involved results in a total of $1,251,322.40 in fees. See Plaintiffs' Exh. X, Table III.

The Court does not feel that either of these methods is a particularly accurate indication of reasonable rates for counsel's specialized services -- the former is merely one individual's statement of the rates he would bill for attorneys of similar

skills, and the latter does not differentiate among areas of practice. Accordingly, PLAINTIFFS ARE **ORDERED** TO PROVIDE, WITHIN FOURTEEN (14) DAYS OF THE ISSUANCE OF THIS ORDER, ADDITIONAL BRIEFING ON THE ISSUE OF WHAT IS THE REASONABLE MARKET RATE FOR ATTORNEYS POSSESSING SIMILAR SPECIALIZED EXPERTISE. DEFENDANTS WILL THEN HAVE TEN (10) DAYS TO RESPOND.

D. Plaintiffs' Costs

EAJA also allows a prevailing party to recover "other expenses" associated with litigating its claim. The Ninth Circuit has found costs to be broadly recoverable under EAJA, including all out-of-pocket costs that are ordinarily billed to a client, such as telephone calls, photocopying, postage, air courier, and attorney travel expenses. Int'l Woodworkers of Am. v. Donovan, 792 F.2d 762, 767 (9th Cir. 1986). The costs submitted by Plaintiffs are such costs. See Plaintiffs' Exhs. U, W. Accordingly, Plaintiffs are entitled to costs in the amount of $102,355.84.

IT IS SO ORDERED.

DATED: September 29, 1994

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE