(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Biddle Sawyer Corporation	)	TSCA Appeal No. 91-5
Docket No. II TSCA TST-88-0244	)	

[Decided November 17, 1993]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

BIDDLE SAWYER CORPORATION

TSCA Appeal No. 91-5

FINAL DECISION

Decided November 17, 1993

Syllabus

Region II of the U.S. Environmental Protection Agency ("the Agency") appeals from an award of attorneys' fees and expenses to Biddle Sawyer Corporation made pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504. Biddle Sawyer was awarded fees and expenses after prevailing in an enforcement action based on alleged violations of Sections 4 and 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2603 and 2614, for failure to comply with the requirements of 40 C.F.R. §766.35(a)(1)(i). Initially, the Region asserts that the Agency lacks jurisdiction to award attorneys' fees and expenses to Biddle Sawyer. To the extent that the Agency has jurisdiction, the Region asserts that the award of fees and expenses should be denied because the position of the Region was substantially justified or, alternatively, because special circumstances exist that make the award unjust. Finally, to the extent an award is appropriate, the Region asserts that the award of certain fees and expenses is unreasonable.

Held: The Agency has jurisdiction to award attorneys' fees and expenses under the EAJA to Biddle Sawyer because Biddle Sawyer submitted a timely filed application in which it provided the requisite information to show that it was eligible for an award under the EAJA. Biddle Sawyer's failure to comply in its original application with the signature and verification requirements of 40 C.F.R. §17.11(f) was not a jurisdictional defect. Further, the ALJ did not abuse his discretion in allowing Biddle Sawyer to file an amended application which complied with the signature and verification requirements of §17.11(f) after the statutory deadline for filing an application. Finally, based on the filings made by Biddle Sawyer, the ALJ did not err by concluding that Biddle Sawyer was eligible for an award.

Under the circumstances of this case, an award of fees and expenses is appropriate because the Region's position in the underlying enforcement action was not substantially justified. Furthermore, there are no special circumstances in this case which render an award of fees and expenses unjust. Finally, with respect to the award itself, certain fees and expenses requested by Biddle Sawyer are unreasonable. The amount of the award is modified accordingly, and Biddle Sawyer is granted leave to file a supplemental request to cover fees and expenses associated with this appeal.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich, in which Judge Firestone joined. Judge McCallum filed a dissenting opinion, post p. 44:

Region II of the United States Environmental Protection Agency[1] appeals from the decision of Chief Administrative Law Judge Henry B. Frazier III ("ALJ"), on August 21, 1991, awarding attorneys' fees and expenses to Biddle Sawyer Corporation pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504. The amount of the award is $30,627.71. The Environmental Appeals Board has jurisdiction under 40 C.F.R. §§17.8, 17.27 and 22.30.[2] *See* 57 Fed. Reg. 5320 *et*

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[1] Throughout this Decision, Region II is referred to as "the Region" while the United States Environmental Protection Agency is referred to as "EPA or the Agency."

[2] An appeal from the ALJ's decision to award attorney's fees and expenses pursuant to the EAJA is governed by the procedures set forth in 40 C.F.R. Part 22. *See* 40 C.F.R. §17.27 (review of

(continued...)

seq. (February 13, 1992). For the reasons stated below, we affirm the ALJ's decision to grant the award but modify the amount awarded.

I. *BACKGROUND*

The EAJA, upon which the award to Biddle Sawyer is based, provides that an agency must award reasonable fees and expenses to an eligible prevailing party in an adversary adjudication conducted by the agency unless the position of the agency was substantially justified or special circumstances make an award unjust.[3] 5 U.S.C. §504(a)(1). Biddle Sawyer is the prevailing party in an administrative enforcement action brought by Region II pursuant to Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2615.[4] The ALJ dismissed that action in an Accelerated Decision on the grounds that Biddle Sawyer was entitled to judgment as a matter of law.[5] Upon considering Biddle Sawyer's request for attorneys' fees and expenses and the Region's opposition to such request, the ALJ concluded that an award of fees and expenses was appropriate in that Biddle Sawyer had met the EAJA's eligibility prerequisites and the Region had not shown that its position in the underlying proceeding was "substantially justified" or that "special circumstances" would make the award unjust.

A. *The Underlying Enforcement Action*

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[2](...continued)
the Presiding Officer's decision regarding an EAJA award occurs "in accordance with Agency procedures for the type of substantive proceeding involved"); 40 C.F.R. §22.01(5) (Part 22 governs adjudicatory proceedings for TSCA). Part 22 provides that a party may appeal an adverse ruling or order to the Board by properly filing the appeal within 20 days after the "initial decision" is served upon the parties. 40 C.F.R. §22.30. Here, the ALJ issued a "recommended decision" as required by 40 C.F.R. §17.26. A "recommended decision" on attorney's fees is treated as an "initial decision" for purposes of appeals from EAJA decisions under 40 C.F.R. Part 22. *In re Reabe Spraying Service, Inc.*, FIFRA Appeal No. 83-4, at 3 n.3 (CJO, May 28, 1985); *see In re Robert Ross & Sons, Inc.*, TSCA Appeal No. 82-4, at 4, n.7 (CJO, Jan. 28, 1985).

[3] The primary purpose of the EAJA is to ensure that certain individuals and organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. H.R. Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 132-133 ("1985 House Report"). The EAJA serves to encourage private parties to vindicate their rights and to curb excessive regulation and the unreasonable exercise of government authority. *See Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 110 S. Ct. 2316, 2322, 110 L. Ed. 2d 134 (1990).

[4] Section 16(a) of TSCA authorizes EPA to impose a civil penalty not to exceed $25,000 for each violation of a provision of Section 15 of TSCA, 15 U.S.C. §2614.

[5] Accelerated Decision, at 29-30; *see* 40 C.F.R. §22.20.

The adversary adjudication giving rise to Biddle Sawyer's EAJA claim may be summarized as follows. In a Complaint dated September 27, 1988, the Region charged Biddle Sawyer with a single violation of 40 C.F.R. §766.35(a)(1). Subparagraph (i) of 40 C.F.R. §766.35(a)(1) provides that:

> Persons who have manufactured or imported chemical substances listed under §766.25 between January 1, 1984, and the effective date of this part [July 6, 1987] are required to submit under §790.45 of this chapter a letter of intent to test or an exemption application. These letters must be submitted no later than September 3, 1987.

Although Biddle Sawyer had stopped importing any substances listed under §766.25 prior to Part 766's effective date, Biddle Sawyer had imported such substances during the period identified in §766.35(a)(1) and still retained a portion of such substances in its inventory, after the rule's effective date. Region II charged that Biddle Sawyer had violated §766.35(a)(1) when it failed to file a letter of intent to test or an exemption application on September 3, 1987. Region II sought a $5,000 penalty. In an Answer dated January 30, 1989, Biddle Sawyer alleged, as an affirmative defense, that it was not liable because it had not imported or manufactured the listed chemical substance on or after the effective date of Part 766.

On January 31, 1990, following the breakdown of settlement negotiations, Biddle Sawyer moved for an accelerated decision. In this motion, Biddle Sawyer argued that it was not required to comply with §766.35(a)(1)(i) because it had ceased to import the chemical substance at issue several months prior to the effective date of Part 766. Biddle Sawyer asserted that the Part 766 regulations do not apply to persons that had ceased importing the listed chemical substances prior to the rule's effective date. Because Biddle Sawyer had indisputably stopped importing such substances prior to the effective date of Part 766, Biddle Sawyer argued, §766.35(a)(1)(i) does not apply. In support of this contention, Biddle Sawyer identified §766.2 of the rule. Section 766.2 provides in relevant part:

> §766.2 Applicability and duration of this part.
>
> (a) * * * *(1) This part is applicable to each person who*, at any time *during the duration of this part, manufactures (and/or imports)*, or processes, a chemical substance identified under §766.25.

> (2) *The duration of this part* for any testing requirement for any chemical substance *is the period commencing with the effective date of this part* to the end of the reimbursement period, as defined in §766.3, for each chemical substance. * * *.

(Emphasis added.) Biddle Sawyer argued that Part 766 by its terms applies only to persons who are importing substances identified under §766.25 on or after the rule's effective date. Biddle Sawyer argued, in the alternative, that to the extent §766.35(a)(1) could be construed to apply to persons who were not importers on the rule's effective date, the rule is impermissibly retroactive under the standards articulated by the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). *Bowen* provides, essentially, that absent express congressional authorization, an agency may not promulgate rules which affect past conduct.[6] Biddle Sawyer argued that the testing provision at Section 4 of TSCA does not authorize retroactive regulations.

In its response to Biddle Sawyer's motion and in a cross-motion for an accelerated decision, the Region argued that Biddle Sawyer is liable under §766.35(a)(1) and that the rule is not impermissibly retroactive. The Region stated, in response to Biddle Sawyer's argument that §766.2 defines the rule's applicability, that §766.35(a)(1)(i) identifies the person who is required to report while §766.2(a)(2) simply defines "the duration of the Part."[7] In response to Biddle Sawyer's retroactivity argument, the Region asserted that §766.35(a)(1) implements Section 8 of TSCA rather than Section 4, and that Section 8 allows EPA to require reporting on chemicals that were imported or manufactured in the past.[8]

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[6] More particularly, the Court stated that:

> [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms. [citation omitted] Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Bowen v. Georgetown University Hospital, 109 S. Ct. at 471.

[7] Region's Response to Biddle Sawyer's Motion for an Accelerated Decision, at 16; Region's Motion for an Accelerated Decision, at 7-8.

[8] We note that this appears to be a change in the position taken by the Region up to this point. The Region did not assert in the Complaint or in the Prehearing Exchange that the failure to comply with §766.35(a)(1) was a violation of Section 8 of TSCA. Rather, in the Complaint and Prehearing Exchange, the Region took the position that Biddle Sawyer's failure to comply with 40 C.F.R.

(continued...)

On September 27, 1990, the ALJ dismissed the Complaint against Biddle Sawyer in an Accelerated Decision. The ALJ concluded that Part 766 did not apply to Biddle Sawyer because it had ceased to import the listed chemical substances before the effective date of Part 766. Accelerated Decision, at 17. The ALJ reasoned that under §766.2(a), Biddle Sawyer was not a person subject to the requirements in §766.35(a)(1)(i). *Id*. at 18. In the alternative, the ALJ concluded that even if Biddle Sawyer were arguably subject to §766.35(a)(1)(i), applying that regulation in the circumstances of this case would be impermissible under the test articulated by the Supreme Court in *Bowen v. Georgetown University Hospital*. *See id*. at 23-28.

B. *The EAJA proceeding before the ALJ*

The ALJ's decision to dismiss the Complaint was not appealed and became final on November 16, 1990.[9] Four days later, on November 20, 1990, Biddle Sawyer filed an Application for Attorneys' Fees and Costs (hereafter "Original Application"), under the EAJA. The EAJA provides, at 5 U.S.C. §504(a)(2), in pertinent part that:

> 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*, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

(Emphasis added). The EAJA further provides, at 5 U.S.C. §504(b)(1)(B), that a "party" which is a corporation is eligible to receive an award if, at the time the

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[8](...continued)
§766.35(a)(1) was a violation of Section 4 of TSCA. Complaint, at 2 ¶8; Prehearing Exchange, at 1 & 3.

[9] The ALJ's Accelerated Decision was issued on September 27, 1990. Neither of the parties appealed the decision and the Administrator elected not to review the decision *sua sponte*. Under 40 C.F.R. §22.27, a decision becomes final 45 days after service on the parties. Because service was made by mail, five additional days must be added in accordance with §22.07(c). Consequently, the Accelerated Decision became final on November 16, 1990.

adversary adjudication was initiated, it had a net worth not exceeding $7,000,000 and not more than 500 employees.

In its Original Application, Biddle Sawyer asserted that it was the "prevailing party" and that it met "the eligibility criteria for an award."[10] More specifically, the Original Application stated that on September 28, 1988,[11] Biddle Sawyer "had a net worth of less than $7 million and employed fewer than 100 employees."[12] In accordance with EPA's requirements, the Original Application contained a "net worth exhibit" which included an audited financial statement by Touche Ross reflecting that Biddle Sawyer's "Stockholders' Equity" was $4,612,158 on December 31, 1988, and $8,667,482 on December 31, 1987.[13] The "net worth exhibit" also included an unsigned statement that "[b]etween September 28, 1988 and December 31, 1988 there were no transfers of assets by Biddle Sawyer and Biddle Sawyer incurred no new obligations."[14] The Original Application stated that Biddle Sawyer sought $30,652.71 in fees and expenses.[15] In support of its fees and expenses, the Original Application contained an affidavit signed by Christopher H. Marraro, Biddle Sawyer's counsel, which set forth the time expended by each attorney who had billed time to defending the underlying enforcement action and the rate at which the fees had been computed.[16] Finally, the Original Application was signed by Christopher H. Marraro.

On December 21, 1990, the Region filed an answer to the Original Application asserting that, although the Original Application was timely filed, it was jurisdictionally defective because: (1) it did not state the exact number of the employees and describe the type and purpose of the applicant's business as required by 40 C.F.R. §17.11(c);[17] (2) it did not include "documentation specifically

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[10] Original Application, at 1.

[11] Both the Region and Biddle Sawyer have assumed that the underlying proceeding was initiated on September 28, 1988, the date the Complaint was mailed. Since service of a complaint is complete when the return receipt is signed, it could be argued that that is the proper date to use. In this case, the difference is immaterial.

[12] Original Application, at 3.

[13] *Id*. at Exh. A.

[14] *Id*.

[15] *Id*. at 7.

[16] *Id*. at Exh. B. Attached to the affidavit are the billing records from two law firms which describe services and expenses charged to Biddle Sawyer.

[17] 40 C.F.R. §17.11(c) provides:

If the applicant is a * * * corporation, * * * the application shall state that the

(continued...)

verifying the applicant's net worth on September 28, 1988, the time the proceeding was initiated" as required under 40 C.F.R. §17.12(a);[18] and (3) it did not contain the applicant's signature or verification under oath or affirmation as to its eligibility and net worth as required by 40 C.F.R. §17.11(f).[19]

The Region further argued that, in addition to the Original Application's jurisdictional defects, an award was not appropriate because the Region's position in the underlying proceeding was substantially justified. The Region argued that "the regulation one [sic] its face provided one reading of the rule while a review of the rule within the over-all statutory frame work would render a different reading."[20] It also argued that special circumstances exist which would make an award of fees and expenses unjust because Biddle Sawyer maintained control over the chemical substance subsequent to the effective date of Part 766.[21] Although the Region had not presented this latter argument in the underlying enforcement action, in response to Biddle Sawyer's EAJA claim it subsequently suggested that:

> [The ALJ] could have determined that "importation" does not cease with the specific act of entering the territorial United States; but could have interpreted "importation" under 40 C.F.R. Part 766 to mean entering the territory of the United States and possession of the imported chemical substance until it had been

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[17](...continued)

applicant did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its * * * business.

[18] 40 C.F.R. §17.12(a) provides:

Each applicant * * * must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated * * *. The exhibit may be in any form * * *. The Presiding Officer may require an applicant to file additional information to determine the applicant's eligibility * * *.

[19] 40 C.F.R. §17.11(f) provides:

The application shall be signed by the applicant with respect to eligibility * * * and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain * * * a written verification under oath or affirmation * * * that the information provided * * * is true and complete * * *.

[20] Region's Answer to Biddle Sawyer's Application for Attorneys' Fees and Costs, at 11.

[21] *Id*. at 12-13.

> sold or that the importer no longer maintained control/possession.[22]

Finally, the Region argued that certain fees were "excessive, redundant or otherwise unnecessary" and certain expenses were unreasonable.[23]

On January 10, 1991, Biddle Sawyer filed a Motion for Leave to File the Amended Application, in an apparent effort to address the Region's jurisdictional arguments. The Amended Application was identical to the Original Application except it stated that on September 28, 1988, it had employed "64," rather than "less than 100 employees."[24] Furthermore, it was signed and verified, under penalty of perjury, by Wallace Chavkin, the Chairman and Chief Operating Officer of Biddle Sawyer Corporation.[25]

The Region opposed the Motion for Leave to File an Amended Application on the grounds that it was jurisdictionally barred. More specifically, the Region argued that Biddle Sawyer, having failed to file a proper and complete application within the statutory filing deadline, could not now cure the Original Application's jurisdictional defects with an Amended Application.[26]

On August 21, 1991, the ALJ granted Biddle Sawyer's motion to file the Amended Application and issued his Recommended Decision awarding Biddle Sawyer $30,627.71. The Recommended Decision awarded Biddle Sawyer all of its requested attorneys' fees (at the statutory maximum fee rate of $75) and all of its expenses with the exception of those associated with one meal.

The ALJ rejected virtually all of the Region's objections to Biddle Sawyer's EAJA claim. The ALJ concluded that the applicant's signature was not a jurisdictional requirement.[27] He also concluded that because Biddle Sawyer "filed the original application in a timely manner and has met all of the jurisdictional

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[22] *Id*. at 13.

[23] *Id*. at 14-20.

[24] Amended Application, at 3.

[25] *Id*. at 8.

[26] *See* Region's Reply to Applicant's Motion for Leave to File Amended Application for Attorney's Fees and Costs.

[27] Recommended Decision, at 4. The ALJ also concluded that "[e]ven if the signature requirement were jurisdictional, some courts have allowed supplementation of an application to meet eligibility requirements," citing to *Dunn v. United States*, 775 F.2d 99, 104 (3d Cir. 1985). *Id*. at 5.

requirements, [he would] consider [Biddle Sawyer's] supplement to the original submission."[28]

Having concluded that Biddle Sawyer satisfied the EAJA's eligibility criteria, the ALJ went on to examine whether an award was precluded because the Region's position was substantially justified or because special circumstances would make an award unjust. The ALJ rejected the Region's position that it was substantially justified in bringing the action, because "[t]here was no reasonable basis in law and fact for EPA's position that Biddle Sawyer had violated TSCA and the implementing regulations thereunder."[29] The ALJ also rejected the Region's "special circumstances" argument. The ALJ held that the Region's contention that Biddle Sawyer could still be considered an "importer" because it retained control over the chemical substance past the effective date of Part 766 did not amount to "special circumstances" that would preclude an award of fees and expenses. *Id*. at 8. The ALJ concluded that the Region's argument did not have any support in case law or legislative history and thus it was "weak at best." *Id*.

The Region appeals from the ALJ's award of $30,627.71 in fees and expenses. In brief, the Region asserts on appeal that Biddle Sawyer did not file a proper application and the Agency, therefore, does not have jurisdiction to award attorneys' fees and expenses to Biddle Sawyer. To the extent EPA has jurisdiction, the Region asserts that the award of fees and expenses should be denied because the Region's position was substantially justified or, alternatively, because special circumstances exist which make the award unjust. Finally, to the extent an award is determined to be appropriate, the Region challenges the reasonableness of certain fees and expenses in the award.

II. *DISCUSSION*

A. *Biddle Sawyer's Original Application For Costs And Fees Was Sufficient To Satisfy EAJA's Jurisdictional Prerequisites*

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[28] *Id*. at 5.

[29] *Id*. at 7. He further noted that:

> EPA * * * sought to impose retroactively the regulatory requirement on Biddle Sawyer, who did not import or manufacture chloranil subsequent to July 6, 1987, the effective date of Part 766. Under those circumstances, I concluded that to attempt to hold Biddle Sawyer liable would be not only unreasonable and unjust, but also an impermissible retroactive application of the regulation.

Id.

Initially, we must determine whether the ALJ, acting on behalf of the Agency, had jurisdiction under the EAJA to make an award of attorneys' fees and expenses to Biddle Sawyer. The Region argues that the ALJ lacked jurisdiction to make an award because Biddle Sawyer failed to provide sufficient evidence to "show" that it was eligible for an award as required by the EAJA at 5 U.S.C. §504(a)(2) in either its Original Application or in its Amended Application. The Region further argues that even if the Original Application met the EAJA's "showing" requirement, the Original Application was jurisdictionally defective because Biddle Sawyer failed to comply with the signature and verification requirements of EPA's implementing regulations at 40 C.F.R. §17.11(f). The Region contends that because of the above-noted deficiencies, Biddle Sawyer failed to satisfy the EAJA's jurisdictional requirements within the 30-day filing period. As a consequence, the Region concludes that the ALJ erred in allowing Biddle Sawyer to "cure" the above-noted deficiencies through the filing of an out-of-time amended application. Under the Region's analysis, the ALJ did not have jurisdiction once the original 30 days allowed for filing a proper application had passed.

It is well settled, and the Region and Biddle Sawyer do not dispute,[30] that the EAJA is a waiver of sovereign immunity and therefore the terms of the government's consent to be sued should be strictly construed.[31] It is also well settled, and the parties both acknowledge,[32] that the 30-day time limitation contained in the EAJA is jurisdictional and restricts an Agency's ability to award fees and expenses against the government.[33] Finally, the parties do not dispute[34] that with respect to corporations, fees and expenses may be awarded under the EAJA only to those corporations that do not have a net worth of over $7 million or more than 500 employees on the date of initiation of the underlying adversary

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[30] *See* Region's Appellate Brief, at 4 & 9; *see also* Biddle Sawyer's Appellate Brief (no argument advanced on this issue).

[31] *Ardestani v. Immigration and Naturalization Service*, ___ U.S. ___, 112 S. Ct. 515, 520, 116 L.Ed.2d 496 (1991).

[32] *See* Region's Appellate Brief, at 10 n.34; Biddle Sawyer's Appellate Reply Brief, at 5.

[33] *See Howitt v. United States Dep't of Commerce*, 897 F.2d 583 (1st Cir. 1990), *cert. denied*, 498 U.S. 895 (1990); *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477 (2d Cir. 1988) (time limit for filing EAJA fee application could not be waived by the agency); *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211, 225, (D.C. Cir. 1984); *Monark Boat Co. v. Nat'l Labor Relations Board*, 708 F.2d 1322, 1327 (8th Cir. 1983).

[34] *See* Region's Appellate Brief, at 10; Biddle Sawyer's Amended Application, at 2.

action.[35] The parties disagree, however, over the nature of the showing of eligibility necessary to perfect a claim under EAJA, and on whether compliance with EPA's signature and verification requirements is jurisdictional.

1. *Biddle Sawyer's Original Application Was Sufficient To "Show" Eligibility*

We turn first to the Region's assertion that Biddle Sawyer's Original and Amended Applications were jurisdictionally defective because neither properly "showed" Biddle Sawyer's eligibility as required by the EAJA. The Region argues that under the EAJA, in order for an applicant to "show" that it is eligible, an applicant must "prove," that it is eligible within the 30-day time period. The Region argues that this result is mandated by EPA's EAJA implementing regulations, federal case law, and the EAJA's legislative history. The Region argues that Biddle Sawyer failed to make the requisite "showing" of eligibility under the EAJA in this case, because it failed to submit the documentation necessary to prove its eligibility in either the Original or Amended Application.

First, the Region argues that Biddle Sawyer failed to "show" its eligibility because it failed to submit any documentation to support its assertion that it had less than 500 employees on September 28, 1988, (the day the parties assume that the underlying enforcement proceeding was initiated). The Region argues that Biddle Sawyer should have submitted a copy of the payroll listing for that date to "show" this fact. Region's Appellate Brief, at 14. Instead, Biddle Sawyer stated, generally, in its Original Application, that it was eligible and that it employed less than 100 employees on September 28, 1988. Original Application, at 1 & 3. The Region does not contest the accuracy of the number of Biddle Sawyer's employees. Rather, the Region argues that statements without more were "not sufficient to *establish* eligibility." Region's Appellate Brief, at 14.

Second, the Region argues that Biddle Sawyer failed to "show" eligibility because Biddle Sawyer's documentation did not adequately specify the net worth of the company on September 28, 1988. Region's Appellate Brief, at 14-15. Biddle Sawyer's Original Application stated, generally, that Biddle Sawyer was eligible and, more specifically, that it had a net worth of less than $7 million on September 28, 1988. Original Application, at 1 & 3. That Original Application also contained a "net worth exhibit" as required under 40 C.F.R. Part 17, which

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[35] *See Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 110 S. Ct. at 2319, 110 L. Ed.2d 134 (1990).

included an audited financial statement reflecting Biddle Sawyer's net worth at $4.615 million on December 31, 1988, and an attached statement representing that there had been no transfers of assets or incurrence of new obligations between September 28, 1988, and December 31, 1988. *Id*. at Exh. A. The Amended Application repeats these statements and, again, contains the "net worth exhibit" along with a declaration under penalty of perjury that the information contained in these documents is true. Amended Application, at 1, 3, 8, & Exh. A.

The Region points out that the documentation submitted by Biddle Sawyer also reflects that on December 31, 1987, the net worth of Biddle Sawyer was $8.667 million. Region's Appellate Brief, at 14. In light of this fact, the Region argues that Biddle Sawyer's documentation of net worth on December 31, 1988, and the "unsupported claims as to its financial status around the time that the action was initiated by the Agency" are insufficient to show eligibility regarding net worth. *See id*. at 14-15. The Region argues that Biddle Sawyer should have provided documentation rather than a representation to show that its net worth on September 28, 1988, was less than $7 million. *Id*. at 15.

Biddle Sawyer argues, in response, that allegations or statements alone in an application are sufficient to "show" eligibility for an EAJA award and that an application is jurisdictionally defective only if it contains "no explicit allegation" that the applicants are eligible.[36] It maintains that the information contained in the Original Application was sufficient to establish eligibility.[37] Finally, it asserts that the EAJA allows an applicant to submit supplemental proof of eligibility after the thirty-day filing period.[38] For the reasons set forth below, we agree that Biddle Sawyer provided sufficient information in its Original Application to "show" that it met the EAJA's eligibility requirements.

EPA's procedures for implementing the EAJA at 40 C.F.R. Part 17 provide that an EAJA application must "include a *statement* that the applicant's net worth as of the time the proceeding was initiated did not exceed [the statutory amount]"[39] and must "*state* that the applicant did not have more than 500 employees

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[36] Biddle Sawyer's Appellate Reply Brief, at 8.

[37] *Id*.

[38] *Id*.

[39] The EAJA was amended in 1985 to increase the statutory limit on net worth from $5 million to $7 million for corporations such as Biddle Sawyer. Pub. L. No. 99-80, §1(c)(1), 99 Stat. 183 (1985). While the Agency has failed to update the regulatory provision at 40 C.F.R. §17.11(a) to reflect the increase in the statutory limit on net worth, this failure appears to be inadvertent and does

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at the time the proceeding was initiated, giving the number of its employees." 40 C.F.R. §17.11(b) & (c) (emphasis added). The regulations further provide that each corporate applicant "must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated." 40 C.F.R. §17.12(a). This net worth exhibit "may be in any form that provides full disclosure of assets and liabilities of the applicant and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i)." *Id*. The record shows that Biddle Sawyer fulfilled these obligations.

The Region's contention that more was required in the application itself to show eligibility is unsupported. First, the regulation requiring a net worth exhibit provides that "[t]he Presiding Officer may require an applicant to file additional information to determine the applicant's eligibility for an award." 40 C.F.R. §17.12(a). Second, the regulations provide that:

> Ordinarily, the determination of an award will be made on the basis of the written record of the underlying proceeding and the filings required or permitted by the foregoing sections of these rules. *However, the adjudicative officer may sua sponte or on motion of any party to the proceedings require or permit further filings or other action, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing*. Such further action shall be allowed only when necessary for full and fair resolution of the issues arising from the application and shall take place as promptly as possible. * * *.

40 C.F.R. §17.25(b). (Emphasis added.)

Thus, contrary to the Region's contentions, the Agency's regulations do not require that an applicant fully "prove" rather than merely assert eligibility within the thirty-day filing deadline. Indeed, if the EAJA required an applicant to *prove* eligibility within the thirty-day filing period as a jurisdictional requirement, there

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[39](...continued)
not affect the applicability of this regulatory provision. *Cf. In re Proceedings to Determine Whether to Withdraw Approval of North Carolina's Hazardous Waste Management Program,* Dkt. No. RCRA-SHWPAW-IV-01-87 (Adm'r, August 27, 1990) (EPA's failure to update 40 C.F.R. §17.4 regarding the period of time that the EAJA is applicable, as enacted in 1980, does not affect the applicability of Part 17 to EAJA claims asserted under the 1985 reauthorization of the EAJA); *In re Corson Services, Inc. d/b/a Corson Swimming Pools*, FIFRA Dkt. No. 09-0433-C-85-12 (CJO, Dec. 23, 1987) (same). Clearly, the current statutory limit on net worth controls and the Region has not argued otherwise.

would be no need for regulatory provisions allowing the submission of supplemental information since any application that did not prove eligibility within the original thirty-day period would be dismissed for lack of jurisdiction. There would be no basis for a regulation that allows for further evidence to be submitted and the matter resolved by a hearing if necessary.[40]

Here, Biddle Sawyer provided a statement in its Original Application to the effect that it employed less than 100 employees and submitted a new worth exhibit to "show" that it had a net worth of less than $7 million. In these circumstances, we find that Biddle Sawyer satisfied in its Original Application the requirement of the EAJA to "show" eligibility.

Next, we reject the Region's contention that this result is inconsistent with federal case law interpreting the EAJA. The federal courts[41] have consistently held that allegations of eligibility in an EAJA application are sufficient to comply with the application requirements of the EAJA.

One example of federal case law is *D'Amico v. Industrial Union of Marine and Shipbuilding Workers of America*, 630 F. Supp. 919 (D. Md. 1986). In that case, the NLRB challenged an EAJA petition in part arguing that the petition merely "alleged" that the applicant met the net worth and employee limits for eligibility, and that this allegation was insufficient. The NLRB argued that the applicant must submit a balance sheet showing its net worth, and that its failure to do so constituted a jurisdictional bar to eligibility. *Id*. at 922.

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[40] The regulations contemplate that the determination of eligibility can be made on the basis of "the filings required or permitted" by the regulations. 40 C.F.R. §17.25(b). Accordingly, the number of an applicant's employees on the relevant date may be shown by a "statement" of that fact in the application supported by a written verification as to the truth of the statement. *See* 40 C.F.R. §§17.11(b) & (f). Similarly, the net worth of an applicant on the relevant date may be shown by a written verification under penalty of perjury that the statements in the application and the "net worth exhibit" are true. *See* 40 C.F.R. §§17.11(a) & (f) and 17.12(a). We note that the net worth exhibit "may be in any form" that is sufficient to show eligibility. *See* 40 C.F.R. §17.12(a). Consequently, the Agency has not construed the EAJA to require "detailed documentation" rather than mere "statements" in an affidavit to show eligibility. Furthermore, even when the regulations have required "full documentation" to show fees and expenses, that requirement may be fulfilled in whole or in part by mere statements in an affidavit. *See* 40 C.F.R. §17.13.

[41] The EAJA is set forth at both 5 U.S.C. §504 and 28 U.S.C. §2412. Under Title 28, the EAJA authorizes a court in civil actions to award fees and costs against the United States while, under Title 5, the EAJA authorizes a federal agency that conducts an adversary adjudication to award fees and costs against that agency. The provision setting forth the pleading and proof requirements of the EAJA at 5 U.S.C. §504(a)(2) is virtually identical with the provision of the EAJA at 28 U.S.C. §2412(d)(1)(B).

The court rejected this argument, stating:

> While it is clear that the statute places the burden of establishing eligibility on the applicant, it would impose unnecessarily burdensome restrictions on recovery to require an applicant to prove, to the government's satisfaction and in its initial application for fees and costs under the EAJA, that the applicant met all of the eligibility requirements.

Id. The court further stated:

> Dismissing an application because the applicant, although possibly eligible, did not submit an affidavit of net worth or number of employees until such eligibility was challenged would constitute a miserly interpretation of the language of the statute and would violate the announced legislative intent of the Act. It appears more consistent with the purposes of the Act to find that, while it is advisable that applicants for EAJA fees indicate in their application, by affidavit or allegation, that they are eligible to receive such fees, the applicant need not prove such eligibility until some objection to their eligibility is raised by the government.

Id. at 922-923. Other courts have held similarly.[42]

We disagree with the Region's argument that the decision in *U.S. v. Hopkins Dodge Sales, Inc.*, 707 F. Supp. 1078 (D. Minn. 1989), mandates a different result. In *Hopkins Dodge*, the district court dismissed an EAJA application on the grounds that the applicant failed to "allege eligibility" or to "provide factual information that would show * * * eligibility." *Hopkins Dodge*,

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[42] *See Lee*, 799 F.2d at 35 (uncontested allegation in an application that the applicant had less than 500 employees was sufficient to sustain the applicant's burden of proof to show eligibility); *Dunn v. United States*, 775 F.2d 99, 103 (3d Cir. 1985) (allegation in a petition that an individual's net worth did not exceed the statutory amount established eligibility); *see also Carlisi v. Secretary of Health & Human Services*,
583 F. Supp. 135, 139 n. 7 (E.D. Mich. 1984)(court stated, in dicta, that the failure to provide information in an application regarding a plaintiff's net worth would not be a fatal error when the court can take judicial notice of a party's eligibility); *cf. J.M.T. Machine Co., Inc. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987)(request for attorney's fees in the trial brief was not a proper application for fees because it did not "allege" that a final judgment had been entered, that the applicant was a prevailing party or was eligible to receive an award, or that the position of the agency was not substantially justified).

707 F. Supp. at 1080. While an affidavit filed the day after the EAJA's thirty-day deadline had passed did allege sufficient facts to show that the applicant was an eligible party, the court refused to consider the affidavit on the grounds that it was not timely filed. *Id*. The court determined that the original application was "defective" and had the same effect as an untimely filed application. *Id*. Since waivers of sovereign immunity must be strictly construed, the court held that "the showing of eligibility [in the application] is not merely a notice requirement [but r]ather, it is jurisdictional and a prerequisite to government liability." *Id*. at 1081.

The Region argues that *Hopkins Dodge* mandates our rejection of Biddle Sawyer's Original Application because Biddle Sawyer did not submit documentation to "prove" its assertions of eligibility. We do not agree. In *Hopkins Dodge*, the petition was held insufficient because there was neither an allegation of eligibility nor factual information that would support a "showing" of eligibility. There is no dispute, however, that there must be some showing of eligibility within the EAJA's 30-day filing period to satisfy the EAJA's jurisdictional prerequisites. We do not, however, read *Hopkins Dodge* as requiring an applicant to "prove", as opposed to "show", its eligibility during that period.[43] With this distinction in mind, we find the facts of *Hopkins Dodge* wholly distinguishable from the facts in the present case. In contrast to the facts in *Hopkins Dodge*, here it is clear that Biddle Sawyer stated that it met the EAJA eligibility criteria in its Original Application. In particular, Biddle Sawyer stated that it had less than 100 employees and a net worth of less than $7 million. In addition, Biddle Sawyer submitted a net worth exhibit to support its eligibility claim. For these reasons, we conclude that *Hopkins Dodge* does not mandate rejection of Biddle Sawyer's Original Application.

Further, we also reject the Region's contention that "proof" of eligibility in an original EAJA application is required based on an examination of the EAJA's

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[43] Further, we note that other federal courts have not interpreted the EAJA as strictly as the *Hopkins Dodge Court*. *See D'Amico*, *supra*; *see also Carlisi*, *supra*; *cf. J.M.T. Machine Co.*, *supra*. For example, in *Dunn* the Third Circuit has held that:

> Congress did not intend that defects in the pleading requirements of [the EAJA] be treated as jurisdictional. So long as a fee petition is filed within the thirty-day period which puts the court, and eventually the government, on notice that the petitioner seeks fees under the [EAJA], the court may consider the petition, and may, absent prejudice to the government or noncompliance with court orders for timely completion of the fee determination, permit supplementation.

Dunn, 775 F.2d at 104.

legislative history.[44] The Region bases its argument on the distinction drawn in the 1980 House Report[45] between the words "show" and "allege" in connection with the section of the EAJA which requires the federal government to "show" that its position is substantially justified. The Report states:

> [T]he effect [of Section 504(a)] is to place the burden on the government to make a positive *showing* that the position and actions during the course of the proceedings were substantially justified or that some other circumstance makes an award unjust. * * * In order to defeat an award, the government must *show* that its case had a reasonable basis in law and fact. Absent such a *showing*, fees should be awarded unless some other circumstances make an award unjust. * * * The bill also sets out procedures in adversary adjudications (and later court actions) by which the prevailing party may apply for fees. The party must make a simple *allegation* that the United States acted without substantial justification.

1980 House Report, at 13 (emphasis added).

The Region argues that this discussion demonstrates that Congress intended a difference between a "showing" and an "allegation." Therefore, the Region concludes, because Congress used the word "show" in connection with an applicant establishing eligibility, it must have intended something more than an "allegation" of eligibility; it must have intended that eligibility be proven.

Again, we disagree. We read the discussion in the House Report to mean that once the applicant alleges a lack of substantial justification, the federal government bears the ultimate burden of proving that its position is substantially justified. The question of whether something is "substantially justified" is a subjective one, not purely a matter of objective fact. The Region has failed to show why the distinction in this context suggests anything regarding the nature of the purely factual information that must be submitted in an application to support a showing of eligibility. In any event, the Part 17 regulations do require more than an "allegation" of eligibility to satisfy the showing requirement (*e.g.*, submission of a net worth statement) and those requirements were complied with here.

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[44] Region's Appellate Brief, at 12 n.39.

[45] H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13 (1980) *reprinted in* 1980 U.S.C.C.A.N. 4984, 4992 ("1980 House Report").

Finally, we do not share the Region's concern that EPA will be prejudiced if the EAJA is not construed strictly in its favor to require documentary proof rather than "conclusory statements" in a timely filed application. Prejudice, the Region argues, would occur because EPA would be exposed "to potential liability for a much longer period than intended by Congress."[46] The Region reasons that to allow mere statements of eligibility to establish an agency's jurisdiction to entertain an EAJA claim "permits the applicant the opportunity [after] the thirty (30) day filing deadline, to show its eligibility" which, in turn, "permit[s] a court to exercise jurisdiction over a party after the time for filing a complete application has passed and is equivalent to the Court waiving the jurisdiction requirements mandated by Congress."[47]

We find this argument to be circular and unpersuasive. To conclude that there would be a waiver of jurisdictional requirements, one must first conclude that those requirements were not initially satisfied, but that is the very issue in dispute. Under EPA's rules, an applicant must submit certain information under Part 17 to "show" eligibility. We do not accept, however, that an applicant must submit *all* of the documentation necessary to "prove" it is eligible in its application in order to satisfy the jurisdictional requirements of the EAJA. Thus, we do not agree that allowing an EAJA applicant, who has submitted the information required in a timely filed application, an opportunity to prove its eligibility with additional evidence after the date for filing an application has passed, will result in prejudice to EPA. To the contrary, EPA's rules contemplate that in certain cases more evidence may be required.

Accordingly, we find that the ALJ was correct in concluding that Biddle Sawyer's Original Application satisfied the jurisdictional requirement of the EAJA to "show" eligibility within the initial 30-day period.

2. *Biddle Sawyer's Original Application Was Not Jurisdictionally Defective for Failing to Include the "Applicant's" Signature and Verification Under Oath*

We now turn to the Region's contention that the Original Application was jurisdictionally defective because it failed to comply with the signature and verification requirements of 40 C.F.R. §17.11(f). As noted above, Section 17.11(f) provides, in pertinent part, that:

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46 Region's Appellate Brief, at 20.

47 *Id*. at 21-22.

> The application shall be signed by the applicant with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain or be accompanied by a written verification under oath or affirmation or under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

Here, Biddle Sawyer's Original Application contains the signature and verification under oath of Biddle Sawyer's attorney but not the signature or verification under oath of any officer of Biddle Sawyer.[48] Biddle Sawyer's Amended Application, in contrast, was signed by Biddle Sawyer's Chairman and Chief Operating Officer, as well as by its attorney. The ALJ determined that EPA's requirement that a corporate representative of Biddle Sawyer sign the original application is "a procedural requirement and not a jurisdictional one."[49] Accordingly, the ALJ concluded that any defect in Biddle Sawyer's Original Application was not jurisdictional.

The Region argues that the signature and verification requirements implement jurisdictional requirements of the EAJA, and, therefore, the ALJ erred in concluding that the Original Application was jurisdictionally sufficient. Specifically, the Region argues that the signature requirement of §17.11(f) implements the jurisdictional requirement of 5 U.S.C. §504(a)(2) that the application show that the party is a "prevailing party." The Region reasons that[50]:

> It is the prevailing party rather than the lawyer who is entitled to the attorney's fees [citing to cases holding that the prevailing party rather than that party's attorney has standing to apply for EAJA fees and expenses]. The law is intentionally structured in this manner so as to prevent the creation of a conflict of interest when an attorney and client have independent entitlements.

The Region further argues that the verification requirement of §17.11(f) fulfills two jurisdictional purposes: (1) "the Congressional assumption that a truthful

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[48] Where the applicant is a corporation, the regulations do not identify who should sign on behalf of the corporation.

[49] Recommended Decision, at 4. The ALJ did not address the verification requirement of §17.11(f). We assume the ALJ concluded that the same reasoning applies.

[50] Region's Appellate Brief, at 28-29.

application would be submitted by the prevailing party", and (2) the jurisdictional requirement that the applicant "show" eligibility.[51]

Biddle Sawyer argues in response that the signature and verification requirements are "purely procedural."[52] It argues that "[d]efects in pleadings that are timely filed do not present jurisdictional barriers when there is no prejudice to the opposing party," citing to *Dunn*, 775 F.2d 99, 104 (3d Cir. 1985).[53] It argues that the Region was not prejudiced by Biddle Sawyer's failure to fully comply with EPA's signature and verification requirements in Biddle Sawyer's Original Application.[54]

As discussed above, we are mindful that the EAJA is a waiver of sovereign immunity and therefore the conditions of the waiver must be strictly construed. *Ardestani*, 112 S. Ct. at 520; *cf. United States v. Kubrick*, 444 U.S. 111, 118-119, 100 S. Ct. 352, 357, 62 L. Ed. 2d 259 (1979) (Federal Tort Claims Act). We are also mindful, however, that we are not to "assume the authority to narrow the waiver that Congress intended." *See Ardestani*, 112 S. Ct. at 520; *Indian Towing Company v. United States*, 350 U.S. 61, 68-69, 76 S. Ct. 122, 126, 100 L.Ed.48 (1955) (the court should not, "as a self-constituted guardian of the Treasury[,] import immunity back into a statute designed to limit [immunity]"). In other words, the Agency's rules of procedure relating to its exercise of jurisdiction under the EAJA should not enlarge or restrict the jurisdiction that Congress intended the Agency to exercise. *Cf. Ardestani*, *supra*; *Columbia Manufacturing Corp. v. National Labor Relations Board*, 715 F.2d 1409, 1410 (9th Cir. 1983) (NLRB has no authority to enlarge its jurisdiction under the EAJA). If a requirement is a rule of procedure implementing a jurisdictional requirement, as argued by the Region, it follows that this requirement may not be waived by the ALJ. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405, 2409 n.3, 101 L. Ed. 2d 285 (1988) (federal rule of appellate procedure requiring appellant to name parties to the appeal was a jurisdictional requirement that could not be waived). If, however, the Part 17 requirement that the applicant sign and

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51 Region's Appellate Brief, at 29.

52 Biddle Sawyer's Appellate Reply Brief, at 10.

53 *Id*. *See* note 43 *supra*.

54 Biddle Sawyer asserts that the Region has not represented, much less offered evidence to show, that the contents of the Original Application or Amended Application are untruthful. Biddle Sawyer's Appellate Reply Brief, at 11. It further asserts that the Region has not represented that an actual conflict of interest exists between Biddle Sawyer and its attorneys. *Id*. at 12. Biddle Sawyer also argues that it complied with the signature requirement regarding net worth because its accountant signed the net worth exhibit. *Id*. at 11.

verify the application is not considered implementing a jurisdictional requirement, than an application cannot be rejected on this basis. For the reasons set forth below, we conclude that the Part 17 signature and verification requirements are not jurisdictional.

First, the statute does not require the applicant's signature or verification under oath. The EAJA at 5 U.S.C. §504(a)(2) requires that to recover fees and expenses, an application must "show" that the applicant is the "prevailing party" and is "eligible" for an award in accordance with 5 U.S.C. §504(b)(1)(B).[55] On its face, §504(a)(2) does not require that a "party" sign or verify under oath the statements in the application.

A review of the legislative history for the EAJA reveals that Congress expressed no view on whether the application must be signed and verified under oath by the applicant.[56] Rather, the legislative history tends to suggest that Congress wanted to create "an effective legal or administrative remedy"[57] and did not want to place unreasonable barriers before parties who are eligible for fees and expenses. As such, we find nothing in the EAJA's legislative history to suggest that EPA's signature and verification requirements are jurisdictional.

This view is confirmed by our review of the signature requirement set forth in the Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings ("Model Rules") promulgated by the Administrative Conference of the United States ("ACUS") at 1 C.F.R. Part 315.[58] The Model Rules provide that the application must be signed "by the applicant *or* an authorized officer *or* attorney of the applicant." *See* 1 C.F.R. §315.201(e) (emphasis added).[59]

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[55] Section 504(a)(2) was intended by Congress to establish "procedures in adversary adjudications (and later court actions) by which the prevailing party may apply for fees." 1980 House Report, at 13.

[56] 1980 House Report; 1985 House Report.

[57] 1980 House Report, at 12.

[58] The EAJA provides that the agencies must consult with the Chairman of the ACUS before establishing "uniform procedures for the submission and consideration of applications for an award of fees and other expenses." 5 U.S.C. §504(c)(1). The Model Rules were "designed to assist agencies in adopting or amending their own regulation's for implementation of the [EAJA]." 51 Fed. Reg. 16,659 (May 6, 1986).

[59] We note that several agencies have adopted the model rule. Those agencies include the following: Federal Deposit Insurance Corporation (12 C.F.R. §§308.7(a), 10, and 169); National Aeronautics and Space Administration (14 C.F.R. §1262.201(e)); Office of the Secretary of Commerce (15 C.F.R. §18.11(e)); Securities and Exchange Commission (17 C.F.R. §201.41(e)); International

(continued...)

Since the signature provision of the Model Rules does not require the applicant's signature on the application, the Model Rules discredit the Region's position that the Agency's requirement that the "party" sign the application is jurisdictional under the statute.

For all of these reasons, we conclude that the signature requirement is not jurisdictional. We similarly conclude that the verification under oath requirement is not jurisdictional. The verification requirement serves an important purpose of assuring the validity of the information relied upon in making an EAJA determination. We are not, however, persuaded that Congress intended to bar an EAJA award to a person who makes truthful allegations as to its eligibility in the application but who fails to verify the allegations under oath within the thirty-day filing period. As discussed above, the EAJA has not been interpreted by the federal courts or by EPA regulations in Part 17 to require more than allegations to meet the applicant's burden of going forward to show eligibility.[60]

Accordingly, Biddle Sawyer's Original Application was not jurisdictionally defective even though it was not signed or verified in conformance with Section 17.11(f). We, therefore, conclude that the ALJ had the authority to allow Biddle Sawyer to file the Amended Application which conformed to the signature and verification requirements set forth under §17.11(f). We further conclude that the ALJ did not abuse his discretion in granting leave to Biddle Sawyer to file the Amended Application.

On the basis of the allegations of eligibility made in the Amended Application and information contained in the net worth exhibit submitted with that application, and Biddle Sawyer's declaration under penalty of perjury that all the

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[59](...continued)
Trade Commission (19 C.F.R. §212.10(e)); Commodity Futures Trading Commission (17 C.F.R. §148.11); Department of State (22 C.F.R. §134.11(e)); National Labor Relations Board (29 C.F.R. §147(e)); Department of Health and Human Services (45 C.F.R. §13.10(b)); Small Business Administration (29 C.F.R. §132.301(d)); Occupational Safety and Health Review Commission (29 C.F.R. §2204.201(e)); Postal Service (39 C.F.R. §960.9(e)); National Transportation Safety Board (49 C.F.R. §826.21(e)). EPA's signature requirement does not follow the model rule. It is identical to, and likely modeled after, the signature provision established by the Department of Justice ("DOJ") to implement the EAJA. *See* 28 C.F.R. §24.201(f). The preamble to the DOJ rules implementing the EAJA, like the preamble to Part 17 of EPA's regulations, provides no discussion of this signature requirement. 46 Fed. Reg. 63,021 (Dec. 29, 1981); 47 Fed. Reg. 15,774 (April 13, 1982). However, the fact that so many agencies have adopted the model rule, permitting signature by an attorney in lieu of the applicant, supports the conclusion that signature of an attorney is jurisdictionally sufficient under the statute.

[60] *See* note 42, *supra*.

information in those documents is true, we conclude that Biddle Sawyer has met its burden of proof to show it is a person eligible for an EAJA award. As a result, the ALJ had jurisdiction to determine whether Biddle Sawyer should be awarded attorneys' fees and expenses pursuant to the EAJA. Therefore, we will now turn to whether there is any bar to an award of fees and expenses.

B. *The Region Was Not Substantially Justified in Its Position in the Underlying Proceeding*

The Region argues that the ALJ erred in awarding attorneys' fees and expenses to Biddle Sawyer under the EAJA because the Region's position in the underlying enforcement action was "substantially justified." As discussed above, an EAJA award shall not be made if the "adjudicative officer of the agency finds that the position of the agency was substantially justified."[61] 5 U.S.C. §504(a)(1). The agency has the burden of proving that its position was substantially justified. *Green v. Bowen*, 877 F.2d 204, 207 (2d Cir. 1989). Whether the agency's position was substantially justified is "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 fact that the agency did not prevail does not create a presumption that the agency's position was not substantially justified. 40 C.F.R. §17.6(a); 1980 House Report, at 11. Rather, an agency's position is "substantially justified" under the EAJA if it were "justified to a degree that could satisfy a reasonable person." *See Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490 (1988).

The Region argues that the Region's "position" in the adversary adjudication was substantially justified because "a reasonable person reading the plain language of the regulation could have concluded, as the Agency did, that Biddle Sawyer was subject to 40 C.F.R. §766.35(a)(1)," and that 40 C.F.R. §766.2 (the applicability provision) defined only the rule's "duration." Region's Appellate Brief, at 44. The Region goes on to explain on appeal that the ALJ's contention that the plain language of §766.2 acted to bar the underlying action does not undercut the reasonableness of the Region's position. As noted above, Section 766.2 provides that "[t]his part is applicable to each person who * * * manufactures (and/or imports)" the subject chemicals. While the Region agrees that Biddle Sawyer stopped importing the subject chemicals before the regulation's effective date, the Region argues that because Biddle Sawyer retained a portion of the subject

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[61] The "position of the agency" means the position taken by the agency in the adversary adjudication. 5 U.S.C. §504(b)(1)(E).

chemical, it was still engaged in the act of "importation," and therefore should have tested the chemicals. The Region contends that this reading of §766.2 is not an "unreasonable reading of the regulations * * * [and that] it was not unreasonable for the Agency to seek the court's guidance in resolving this issue * * *." *Id*. at 45.

Initially, we agree that, on its face, §766.35(a)(1)(i) would appear to require any person who imported a listed chemical substance between January 1, 1984, and the effective date of Part 766 (July 6, 1987) to submit either a letter of intent to test or an exemption application. A reasonable person, however, would look to the totality of Part 766 to make a determination as to the applicability of that subparagraph.

A review of the regulatory scheme of Part 766 reveals that the applicability of Part 766 is established at §766.2(a). By its express terms, paragraph (1) of that subsection concerns the class of persons to whom Part 766 is applicable and paragraph (2) concerns the duration of that Part. A reasonable person could not read §766.2(a)(1), which speaks explicitly in terms of applicability to certain persons, without concluding that it established criteria for determining the category of persons to whom Part 766 applied.

The Region did not provide in the underlying proceeding any discussion regarding the effect of §766.2(a)(1) on the applicability of §766.35(a)(1)(i). To meet its burden to show that its position in the underlying proceeding was substantially justified, the Region must show that a reasonable person could believe that §766.2(a)(1) was either harmonious with the Region's interpretation of the applicability of §766.35(a)(1)(i) or that §766.2(a)(1) was for some reason inapplicable under the circumstances of this case. By failing to provide any argument whatsoever that a reasonable person could believe that §766.35(a)(1)(i) should be applied to a person who is not otherwise subject to Part 766, the Region has failed to make a prima facie case that its position in the underlying proceeding was reasonable in law and thus substantially justified.

The Region's contention now on appeal that its position was substantially justified because Biddle Sawyer could have been found liable based on a more expansive definition of importation must also fail. We agree that the position articulated by the Region on appeal is not necessarily "unreasonable." The test is not, however, whether the Region's position *on appeal* is substantially justified. Rather, the test under the EAJA is whether the "position of the agency," "in the adversary adjudication," was substantially justified "on the basis of the administrative record * * * made in the adversary adjudication." 5 U.S.C. §504(a)(1) and (b)(1)(E).

Our review of the administrative record made in the adversary adjudication reveals that the Region *never* advanced this interpretation of the regulations in the underlying enforcement action. Rather, this argument appears for the first time in the Region's Answer to Biddle Sawyer's Application for Fees and Other Costs. In these circumstances, the ALJ properly ignored the Region's new theory as to why §766.35(a)(1)(i) applied to Biddle Sawyer.[62]

Accordingly, we conclude that the ALJ properly determined that the Region's position in the adversary adjudication was not "substantially justified."

C. *The Region Has Not Established "Special Circumstances" Which Would Make An Award Unjust*

Next, the Region argues that the ALJ erred in awarding attorneys' fees and expenses to Biddle Sawyer because "special circumstances" exist which render an award under the EAJA unjust. Specifically, the Region argues that "special circumstances" exist because the underlying enforcement action involved two issues of first impression: (1) whether "an importer, who ceased importation but still retained [ownership of] the chemical substance on the effective date of the Rule, was subject to 40 CFR Part 766" and (2) whether 40 C.F.R. §766.35(a)(1)(i) may be applied retroactively to such a person. (Region's Appellate Brief, at 50-51.)

The EAJA provides that an award shall not be made if the adjudicative officer of the agency finds that "special circumstances make an award unjust." 5 U.S.C. §504(a)(1). The "special circumstances" exception is described in the legislative history as a:

> 'safety valve' . . . to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

1980 House Report, at 11. Thus, this exception preserves government efforts to present creative legal interpretations which, though not yet commonly accepted,

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[62] Furthermore, the Region did not argue in the EAJA proceeding before the ALJ that Biddle Sawyer should be liable under §766.35(a)(1)(i) because, by retaining possession of the subject substance, it could perform the tests required by Part 766. Indeed, the Region argued that any testing requirement of Section 4 of TSCA was irrelevant to its enforcement of §766.35(a)(1)(i).

still merit the court's careful examination. As with the "substantial justification" provision, the government has the burden of demonstrating the existence of special circumstances that would render an award unjust. *Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985).

With respect to the Region's interpretation of the term "importation," the Region argued to the ALJ, in the proceeding for EAJA fees and expenses,[63] that:

> [the ALJ] could have determined that "importation" does not cease with the specific act of entering the territorial United States; but could have interpreted "importation" under 40 C.F.R. Part 766 to mean entering the territory of the United States and possession of the imported chemical substance until it had been sold or that the importer no longer maintained control/ possession.

The ALJ concluded that "special circumstances" did not exist because the Region had offered no case law or legislative history to support its interpretation of the term "importation" and therefore its position was "weak at best." We agree with the ALJ's decision that there are no special circumstances, although we do not think it is necessary to reach the merits of the importation argument.

We recognize the legitimacy of the Agency's advancing creative (though credible) legal interpretations in its adjudications. Here, however, the Region never advanced the above-noted interpretation of the term "importation" in the underlying adjudication. Rather, the Region raised the argument for the first time in response to Biddle Sawyer's EAJA claim. We simply cannot find that special circumstances exist on the basis of the Region's advancement of a creative theory when the Region did not in fact advance that theory in the underlying proceeding.

Similarly, we need not decide the follow-up question of whether "special circumstances" exist because the Region advanced an issue of first impression regarding the Agency's authority to apply §766.35(a)(1)(i) retroactively to a person such as Biddle Sawyer. The Region did not argue in the EAJA proceeding before the ALJ that its retroactive application theory showed "special circumstances." It cannot make this argument for the first time on appeal. In these circumstances, the

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[63] Region's Answer to Biddle Sawyer's Application for Attorney's Fees and Costs, at 13.

Region has not established any special circumstances that would preclude an award of fees or expenses.[64]

D. *Whether the Fees and Expenses Awarded Are Reasonable*

Finally, the Region challenges the reasonableness of certain fees and expenses awarded by the ALJ. The Region also argues that the ALJ failed to provide a sufficient explanation of his rationale for awarding the fees. The ALJ awarded $26,823.75 for fees and $3,828.96 for expenses to Biddle Sawyer.

The EAJA provides that "fees and expenses" must be reasonable.[65] *See* 5 U.S.C. §504(b)(1)(A). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Action on Smoking and Health*, 724 F.2d at 220.

1. *Attorneys Fees*

We turn first to the Region's challenges to the ALJ's award of attorneys' fees. Biddle Sawyer sought and was awarded attorneys' fees for 357.65 hours of work, at the EAJA's maximum fee rate of $75, performed by five different attorneys: C.H. Marraro, B.A. Eisen, L.B. Novey, M. Kornreich, and B.A. Bickerman. The Region argues that the fees for some of the hours awarded to Biddle Sawyer were inadequately documented, unrelated to the proceeding, and/or duplicative.[66] The Region also argues that the fee rate for one attorney, Mr. Bickerman, should be reduced.

The EAJA requires that the application must include "an itemized statement from any attorney, agent or expert witness representing or appearing in behalf of the applicant stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. §504(a)(2). EPA regulations require the applicant to submit an affidavit containing this information and

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[64] Because we have determined that §766.2 barred this action, we do not reach the merits of the Region's retroactivity arguments. We leave that for a case where the issue is squarely presented.

[65] The Supreme Court has held that the amount of a reasonable fee is the number of hours reasonably expended on litigation multiplied by a reasonable hourly rate. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (award of fees and expenses under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988).

[66] In its Appellate Brief, the Region challenges specific hours submitted by Biddle Sawyer's attorneys and incorporates by reference its challenges to hours identified at pages 18 and 19 of its Answer to Biddle Sawyer's Application for Attorney's Fees and Costs. *See* Region's Appellate Brief, at 58.

"describing the specific services performed." 40 C.F.R. §17.13(a) & (b). With respect to fees, the applicant's affidavit must "itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours." 40 C.F.R. §17.13(b)(1).

The federal courts have also established principles for determining the reasonableness of an award of attorneys' fees. With respect to the hours expended, counsel for the prevailing party should not be awarded fees for hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434; *Action on Smoking and Health*, 724 F.2d at 220. Hours are not reasonably expended if an attorney duplicates work done earlier by another attorney or if an attorney performs tasks that are normally performed by paralegals, clerical personnel, or other non-attorneys. *Action on Smoking and Health*, 724 F.2d at 220-221. Generally, hours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority. *Hensley*, 461 U.S. at 437; *Action on Smoking and Health*, 724 F.2d at 220.

With respect to the documentation of the hours expended, an applicant's counsel is not required to record in great detail how each minute of time was expended, but counsel should identify the general subject matter of time expenditures. *Hensley*, 461 U.S. at 437. Documentation is sufficient if the submissions provide "fairly definite information as to the hours devoted to various general activities." *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 596 (3d Cir. 1984).

Initially, we note that the Region maintains that Biddle Sawyer seeks to recover attorneys' fees for work performed on matters that are unrelated to the underlying proceeding.[67] Indeed, the billing records submitted by Biddle Sawyer reflect that, during the course of the underlying enforcement proceeding, Biddle Sawyer also incurred attorneys' fees (and probably expenses) for matters that are entirely unrelated to that proceeding. Under these circumstances, when the documentation for fees and expenses reflects hours spent on both related and unrelated matters, Biddle Sawyer must show that each hour in its request for fees

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[67] The Region makes this assertion with respect to the hourly fees of Mr. Marraro, Mr. Kornreich, and Mr. Novey. Region's Appellate Brief, at 54-55, 57, and 61-62; Region's Answer to Biddle Sawyer's Application for Attorneys' Fees and Costs, at 18-19. Biddle Sawyer has provided no response to the Region's assertion other than to declare that "Biddle Sawyer provided ample documentation of the cost of defending against EPA's untenable application of its regulation." Biddle Sawyer's Appellate Reply Brief, at 20.

and all expenses sought are indeed related to the underlying enforcement proceeding rather than to an unrelated matter.[68]

We turn first to the hours of Mr. Marraro. The Region challenges the description of certain hours submitted by Mr. Marraro as inadequately documented and/or unrelated to the underlying proceeding.[69] Many of these hours clearly concern matters which may involve Biddle Sawyer but which are unrelated to the underlying enforcement proceeding, *i.e.*, references to "FDA-TSCA overlap," "Letter of Commencement of Mfg.," "intermediates," and "fee recovery from ECRA." The descriptions of work performed during other hours are too vague to enable us to determine whether those hours concern a related or unrelated matter, i.e., "Review of fax" and "Conf - W. Chavkin."[70] Despite the Region's challenge to these hours, Biddle Sawyer has not provided information to clarify that the challenged hours are indeed related to the underlying proceeding. Consequently, we agree with the Region that Biddle Sawyer has failed to show that these hours relate to the underlying proceeding.

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[68] *Cf. Hensley*, 461 U.S. at 437 (when an applicant prevails on some claims but not on others, the applicant should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims); *Action on Smoking and Health*, 724 F.2d at 220 (same).

[69] The specific hours of Mr. Marraro that are challenged by the Region are summarized as follows:

(1) 1.0 hours on December 26, 1989, for "Conference MRK re Warfarin and TSCA issues re PMN and FDA overlap."
(2) 1.5 hours on December 28, 1989, for "Conference call Chavkin re FDA-TSCA overlap and review LT Chavkin, conference MRK."
(3) 0.25 on February 20, 1990, for "Tel. Conf. w/R. Chavkin re Testing Chemical and Dye Rules."
(4) 0.5 hours on May 16, 1990, for "Conf. w/Chavkin, conf. MRK and tel. conf. EPA re PMN and Letter of Commencement of Mfg."
(5) 0.25 hours on July 3, 1990, for "Review of fax from W. Chavkin."
(6) 0.25 hours on July 10, 1990, for "Conf - W. Chavkin."
(7) 0.25 hours on August 27, 1990, for "Conf. w/R. Chavkin re intermediates."
(8) 0.5 hours on October 30, 1990, for "Rev. billings and conf. re Attorney fee recovery from ECRA."
(9) 0.5 hours on November 7, 1990, for "Conf. w/Chavkin re Dec. 28 letter on intermediaries and rev. of law."

[70] As noted earlier, Wallace Chavkin is the Chief Executive Officer and Chairman of the Board of Directors of Biddle Sawyer.

Next, the Region maintains that the hours of Mr. Marraro, the attorney of record, are duplicative with the hours of Mr. Eisen, the lead litigation attorney.[71] The Region seeks a reduction in the hours of Mr. Marraro after Mr. Eisen became involved in the case.[72] As a corollary, the Region argues that Mr. Bickerman had to report to both Mr. Eisen and Mr. Marraro during the litigation phase, thus duplicating hours worked.[73] We agree with the ALJ that the "[u]se of multiple counsel in complex cases is understandable and not grounds for reducing hours because it is common in litigation to use a team of attorneys' to divide up the work."[74] Having reviewed the documentation of Mr. Marraro's hours after the point in time that Mr. Eisen became involved in the underlying enforcement action and having considered the complexity of the issues created by the Region in the underlying proceeding, we conclude that Mr. Marraro's participation in the litigation team was not excessive or duplicative.

With respect to Mr. Eisen, the Region argues that 0.75 hours on March 8, 1990, for "filing in NY" and 0.25 hours on April 24, 1990, for "Mary Rose re petition" are unrelated to the underlying proceeding. Despite the Region's challenges before the ALJ and in this appeal to Mr. Eisen's time, Biddle Sawyer has not offered any further explanation of the relevance of this time to the underlying proceeding. As a result, Biddle Sawyer has failed to show that this time relates to the underlying proceeding.

With respect to Mr. Kornreich, the Region challenges the description of certain hours as inadequately documented and/or unrelated to the underlying proceeding.[75] The Region maintains that Mr. Kornreich worked on TSCA and

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[71] Among the hours challenged by the Region, the Region objects specifically to 0.5 hours recorded by Mr. Marraro and Mr. Eisen on August 8 and 9, 1990, as unrelated to the underlying proceeding. *See* Answer to Biddle Sawyer's Application, at 19. Biddle Sawyer's Application reflects, however, a request for only 0.25 hours on August 8, 1990, recorded by Mr. Marraro regarding "Conf. w/ B.Eisen re call to McCullough re Timing of Decision" and no request for hours on August 9, 1990, recorded by Mr. Marraro. Since Ms. McCullough is the attorney for Region II responsible for prosecuting the underlying proceeding, we conclude that the referenced discussion between Mr. Marraro and Mr. Eisen is related to the underlying proceeding.

[72] The Region maintains that Mr. Marraro's expenditure of time after Mr. Eisen became involved in the proceeding is 27.25 hours. Region's Appellate Brief, at 61. It argues that a reasonable expenditure of time on the part of Mr. Marraro after Mr. Eisen became involved should be 5.25 hours. *Id*.

[73] The Region does not specify which of Mr. Bickerman's hours are duplicative.

[74] Recommended Decision, at 10.

[75] The specific hours of Mr. Kornreich that are challenged by the Region are summarized as follows:

(continued...)

other federal laws in connection with Biddle Sawyer's import business and that this work was not directly involved with the issues litigated in the underlying proceeding. Clearly, the descriptions for some of the hours challenged by the Region do not relate to the underlying proceeding.[76] In light of the fact that Mr. Kornreich performed work on unrelated matters during this period, Biddle Sawyer had the burden of clearly establishing which hours were related to the underlying proceeding. We conclude that the descriptions for the remaining hours (with the exception of the hours recorded on January 16 and 17, 1990, as discussed below) are insufficient to show that such hours relate to the underlying enforcement action and thus Biddle Sawyer has failed to meet its burden in this regard.

On January 16, 1990, Mr. Kornreich spent 4.0 hours performing work described as follows: "Telephone Chris Marraro; confer with John Bickerman; legal research on meaning of 'process' for purposes of TSCA regulations; telephone Christine McCulloch; prepare letter to Coles Phinzy, Section Chief at Waste and Toxic Substances Section." On January 17, 1990, he spent 1.5 hours performing work described as follows: "Confer with Bruce Eisen and C. Marraro; research on

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[75](...continued)

(1) 1.5 hours spent on December 27, 1989, for "T Wallace Chavkin about exemption from TSC inventory for chemicals used in manufacture or pharmaceuticals. Discuss with Chris Marraro."

(2) 7.75 hours on December 28, 1989, for "TC W. Chavkin, H. Zeller, C. Marraro. Research on TSCA. Prepare opinion letter on whether pharmaceutical intermediate is subject to TSCA requirements. Confer with C. Marraro." (3) 4.0 hours on January 16, 1990, for "Telephone Chris Marraro; confer with John Bickerman; legal research on meaning of 'process' for purposes of TSCA regulations; telephone Christine McCulloch; prepare letter to Coles Phinzy, Section Chief at Waste and Toxic Substances Section."

(4) 1.5 hours on January 17, 1990, for "Confer with Bruce Eisen and C. Marraro; research on TSCA regulations."

(5) 3.0 hours on April 23, 1990 for "Research on significance of concentrations of hexa- and hepta-dioxins above the LOQ. Confer with Chris Marraro. Prepare memo."

(6) 8.0 hours spent on April 24, 1990, to "Prepare and revise letter to Robert Chavkin; confer with Chris Marraro. T/C to Yves Tondeur to confirm interpretation of test data as positive; t/c to EPA to confirm that the molecular structure of the heptadioxin defined as a 2,3,7,8,-HDD in TSCA section 766.3 includes a typographical error."

(7) 0.5 hours on August 13, 1990, for "Research on TSCA regulations."

On page 19 of the Region's Answer to Biddle Sawyer's Application for Fees and Costs, the Region challenges the hours of Mr. Kornreich on November 13, 1989. The billing record at Exhibit B of the Amended Application reflects that the log entry for November 13, 1989 was deleted and charged to another account.

[76] For example, the underlying proceeding did not concern activities relating to test data or chemicals used in manufacture. Also, an opinion letter is usually written in anticipation of action to be taken. The underlying proceeding did not require an opinion letter.

TSCA regulations." The only descriptions set forth on either January 16 or 17 which clearly relate to the underlying proceeding is the reference to a telephone call with the Regional Counsel prosecuting the underlying enforcement action and the preparation of a letter to Coles Phinzy. Nonetheless, we conclude that these hours of work are related to the underlying proceeding because (1) the records submitted by Biddle Sawyer reflect that Mr. Kornreich spent time on the following two days, January 18 and 19, 1990, performing work that is clearly related to the underlying proceeding[77]; (2) approximately two weeks after Mr. Kornreich performed this work in mid-January 1990, the Motion for an Accelerated Decision was filed on behalf of Biddle Sawyer; and (3) it does not appear from the record that Kornreich performed any unrelated work for Biddle Sawyer in January of 1990.[78]

With respect to Mr. Novey, the Region challenges 1.5 hours billed on December 22 and 27, 1989, as unrelated to the underlying proceeding.[79] The documentation submitted by Biddle Sawyer for these dates shows that Mr. Novey reviewed the file and conferred with Marraro regarding "EPA strategy" and "the case." While Biddle Sawyer's explanation of the time spent by Mr. Novey is abbreviated, we conclude that the hours expended for this work relate to the underlying proceeding. In this regard, we note that the records submitted by Biddle Sawyer do not reflect that Biddle Sawyer was defending any other adversarial adjudication during the relevant time period. We also note that in December 1989, the attorneys for Biddle Sawyer were changing course from settlement negotiations to the preparation of the Motion for an Accelerated Decision which was filed in January 1990. In these circumstances, the hours of Mr. Novey appear to be related to the underlying proceeding.

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[77] On January 18, 1990, Mr. Kornreich described a portion of his time as being spent "prepar[ing a] memorandum on [the] conflict between [the] 'applicability' provision (section 766.2) and [the] 'who must test' provision (section 766.20)." Amended Application, Exh. B. On January 19, 1990, Mr. Kornreich described his time as follows:

> Telephone Tim Hardy (Kirkland & Ellis) concerning his correspondence with EPA; review July 1987 correspondence between Tim Hardy and Martin Halper (EPA Exposure Evaluation Division).

Id. The referenced letter was cited in Biddle Sawyer's Motion for an Accelerated Decision. *See* Biddle Sawyer's Motion for an Accelerated Decision, at 11-12.

[78] While we have taken the liberty to draw reasonable inferences from the record, we unequivocally reject any suggestion that the Agency has an obligation to reconstruct the bills presented with an EAJA application. *See Naporano Iron and Metal Co. v. United States*, 825 F.2d 403, 405 (Fed. Cir. 1987).

[79] The Region challenged the hours of Mr. Novey in its Answer to Biddle Sawyer's Application for Attorneys's Fees and Costs and incorporated by reference that challenge in its Appellate Brief.

With respect to Mr. Bickerman, the Region challenges some hours as "inadequately documented" or as time expended on tasks that could have been performed by a paralegal. The Region also challenges generally the rate at which Mr. Bickerman's hours were compensated. First, the Region challenges 0.5 hours recorded on January 16, 1990,[80] for "Conversations with M.R. Kornreich and B. Biles." As discussed above, Mr. Kornreich's hours relating to his conversation with Mr. Bickerman on this date have been allowed. Consequently, the charge for Mr. Bickerman's end of the conversation should also be allowed.

Next, the Region argues that the fee rate for Mr. Bickerman should be adjusted downward because the research done by Mr. Bickerman[81] and other tasks described as "Organize pleadings" and "Assemble and mail"[82] could have been performed by a paralegal. The research that is challenged by the Region appears to be legal research which clearly is a task that should be done by an attorney. Furthermore, the tasks of organizing pleadings and assembling a document, especially one that will be filed with an adjudicatory body, may very well require attorney oversight. The Region's challenges to these hours are disallowed.

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[80] The Region referred to this entry as "January 1, 1990" but no hours were logged by Mr. Bickerman on that date." The hours logged on January 16, 1990 by Mr. Bickerman appear to be the ones intended by the Region.

[81] Mr. Bickerman logged 58.5 hours for the following work:

1/9/90	TSCA administrative appeal - research.
1/10/90	TSCA administrative appeal - research.
1/21/90	Affidavit, research.
1/21/90	Affidavit, research.
1/23/90	Affidavit; research; draft motion for accelerated decision; revise Wallace Chavkin affidavit.
2/8/90	Research and draft reply to prehearing [sic] exchange.
2/9/90	Research and draft reply to prehearing exchange.
3/27/90	Research reply to opposition for accelerated decision. O/C with B. Eisen; P/C C. Marraro.
3/28/90	Research reply brief to opposition to accelerated decision.
3/29/90	Research and draft reply to EPA response to motion for accelerated decision.
4/18/90	Research and draft opposition to motion to strike.

[82] These entries are recorded as follows:

2/20/90	Organize pleading file.
4/16/90	Assemble and mail request for oral argument.
4/24/90	Organize files.

Finally, with respect to Mr. Bickerman, the Region argues that the fee allowed by the EAJA for Mr. Bickerman's services, which is based on the statutory maximum of $75 per hour, should be less than the fee allowed by the EAJA for the "more senior attorneys," Mr. Eisen and Mr. Marraro, which is also based on the statutory maximum of $75 per hour. The Region reasons that since the services of Mr. Eisen and Mr. Marraro were valued at $75 under the EAJA, Mr. Bickerman's services should be valued at some lesser amount. We disagree.

The EAJA requires that the fees awarded must be based upon prevailing market rates for the kind and quality of the services furnished, except that attorney fees shall not be awarded in excess of $75 per hour. 5 U.S.C. §504(1)(A). Since the Region does not argue that the rate charged by Mr. Bickerman is in excess of the market rate, we find that the statutory rate of $75 per hour is a reasonable rate for Mr. Bickerman's services.[83]

In accordance with our discussion above, we reduce the number of hours for which Biddle Sawyer may recover attorneys' fees by a total of 26.75 hours. Since the ALJ awarded fees to Biddle Sawyer for 375.65 hours, that amount should be reduced to 348.90.[84]

2. *Expenses*

Finally, the Region asserts that certain expenses awarded by the ALJ are unreasonable. The Region argues that Biddle Sawyer did not provide sufficiently detailed information to show that certain expenses were necessary to the underlying proceeding and that certain expenses are excessive. The Region challenges the costs for photocopies, paralegal services, "federal express" and "messenger/courier

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[83] We note that the fee rates charged by Biddle Sawyer's attorneys in this case range between $145 per hour for Mr. Bickerman, $160 to $200 per hour for Mr. Kornreich, $230 and $270 for Mr. Eisen, and $150 to $260 for Mr. Marraro. According to the affidavit of Mr. Marraro, Biddle Sawyer actually paid these rates.

[84] The Region also argues that the ALJ did not provide a sufficient explanation for his decision regarding the award of attorneys' fees. We agree that the Recommended Decision could have provided more detailed explanation of the award and the reasons for rejecting the Region's challenges. However, since we have undertaken a comprehensive review as outlined in this opinion, any deficiency in the Recommended Decision has been remedied. (We note that we have undertaken this comprehensive analysis because this is the first EAJA case to be decided by the Board. In future cases where the ALJ's analysis was insufficient, we would anticipate remanding to the ALJ for a more detailed explanation.)

services," and meals. The ALJ awarded $3,803.96 for expenses after having deducted the expense of $25.00 for meals.[85]

The EAJA provides that the expenses that may be awarded include "the reasonable expenses of expert witnesses [and] the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case." *See* 5 U.S.C. §504(b)(1)(A). EPA regulations require that expenses be documented in an affidavit which states "the rate at which fees and expenses were computed" and includes "a description of any expenses" sought. *See* 40 C.F.R. §17.13(a), (b) and (c). Costs for photocopies, express mail and paralegal services are allowable expenses under the EAJA.[86] Generally, the documentation of expenses is sufficient if it enables the decisionmaker to determine that the expenses sought are reasonable and necessary. *See Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943, 948 (N.D. Cal. 1983) (expenses were not allowed because it was impossible to determine whether non-itemized expenses were reasonable expenses).

The Region argues that the copying costs requested by Biddle Sawyer are excessive. The ALJ awarded costs for photocopies in the amount of $1,102.59.[87] Biddle Sawyer has not provided information regarding the actual number of photocopies made in connection with the underlying proceeding. Nor has it provided information bearing on the reasonableness or necessity of the cost of photocopies. This information is especially critical under the circumstances of this case wherein Biddle Sawyer has submitted billing records that reflect work was done by Biddle Sawyer's attorneys for matters unrelated to the underlying proceeding. As a result, it is impossible to determine whether the amount requested for photocopies is reasonable or necessary or even related to the underlying proceeding rather than other TSCA matters under advisement to Biddle Sawyer's attorneys. Although Biddle Sawyer has failed to meet its burden to show the amount it seeks for copying expenses is reasonable, the Region has conceded that

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[85] The total expenses requested by Biddle Sawyer amount to $3,828.96.

[86] *See Levernier Construction, Inc. v. United States*, 947 F.2d 497, 503 (Fed. Cir. 1991); *Jean v. Nelson*, 863 F.2d 759, 776-778 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (1990); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir. 1986); *Int'l Woodmakers of America v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985).

[87] Biddle Sawyer requested total expenses in the amount of $3,3828.96. To support this request, it submitted documents representing the costs billed to Biddle Sawyer by the law firm of Sive, Paget & Riesel and the costs billed by the law firm of Kaye, Scholer, Fierman, Hays & Handler. The billing statement for Sive, Paget reflects "photocopy" charges totalling $57.15. The records of Kaye, Scholer reflect "duplicating" charges of $1,045.44. Together these copying charges equal $1,102.59.

Biddle Sawyer should recover some amount for copying.[88] The amount conceded by the Region is $70.20. Consequently, we conclude that the award for duplication expenses should be $70.20 and therefore the award should be reduced by $1,032.39.

Next, the Region maintains that the expense of paralegal services should not be awarded because Biddle Sawyer has not provided information showing the amount of paralegal time spent, the tasks assigned to the paralegals, or the rate charged for paralegal work. EPA regulations require that for "services," the applicant must submit an affidavit itemizing in detail the services performed by the date, number of hours per date, a description of the service performed, and the hourly rate charged for such services. 40 C.F.R. §17.13(a) & (b)(1). While it appears that the billing record of the law firm of Kaye, Scholer refers to the amount of paralegal time spent and the tasks performed by such paralegals, there is no information provided to reflect the rate charged for such paralegal work. The bills from the law firm of Sive, Paget reflect a charge for paralegal work but that charge did not disclose the time spent, tasks performed, or rate charged. Despite the Region's challenge, Biddle Sawyer chose not to submit any information in its response to the challenge. Since we cannot evaluate the reasonableness of this expense and the documentation does not comply with EPA regulations, Biddle Sawyer has failed to show that the expense of paralegal services is reasonable. Accordingly, the award of expenses should be reduced by $1,939.38.[89]

Next, the Region maintains federal express and "messenger/courier services" were not necessary to the underlying litigation. The Region argues that since 40 C.F.R. §22.05 permits service by mail, all other delivery services are unnecessary. We conclude, however, that use of such services is customary in today's legal practice and thus these expenses are reasonable and should be awarded. *See Jean v. Nelson*, *supra*; *Aston*, *supra*.

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[88] Region's Appellate Brief, at 66.

[89] According to the Region, the ALJ awarded $1,939.38 to Biddle Sawyer for paralegal services. Region's Appellate Brief, at 67. Biddle Sawyer has not disputed this assertion. Biddle Sawyer's Appellate Reply Brief, at 20-22. Nor has Biddle Sawyer provided a figure that represents the total amount that it requests for paralegal services. Amended Application, exh. B. Rather, Biddle Sawyer has submitted a total request for expenses in the amount of $3,828.96 and then represented that this total figure includes $59.50 for paralegal services at Sive, Paget and "36 hours" of paralegal services at Kaye, Scholer. As noted, Biddle Sawyer has failed to disclose the rate charged for paralegal services. Consequently, we accept the Region's representation that $1,939.38 was the amount awarded by Biddle Sawyer for paralegal services.

Finally, the Region maintains that while the ALJ deleted the cost of meals for $25.00, he should not have allowed the cost of additional meals in the amount of $46.50. We agree.

In sum, we reduce the award of expenses to Biddle Sawyer by $3,018.27. Since the ALJ awarded expenses in the amount of $3,803.96, that amount should be reduced to $810.69.

III. *AWARD OF FEES AND EXPENSES*

Accordingly, Biddle Sawyer is entitled to attorneys' fees and expenses under the EAJA. However, the amount awarded by the ALJ for attorneys' fees and expenses associated with Biddle Sawyer's defense of the underlying enforcement proceeding and its preparation of its application for fees and expenses under the EAJA is hereby modified. Biddle Sawyer is hereby awarded fees in the amount of $26,167.50 (for 348.90 hours at the rate of $75 per hour) and expenses in the amount of $810.69, for a total award in the amount of $26,978.19.

IV. *FEES AND EXPENSES OF EAJA APPEAL*

As noted, the amount awarded by this decision covers Biddle Sawyer's request for fees and expenses incurred prior to this appeal. Biddle Sawyer has requested leave to submit a petition for attorneys' fees incurred in connection with this appeal. The EAJA was intended to cover the cost of all phases of agency adjudication, including the fees and expenses incurred for successful fee adjudication. *See Commissioner, Immigration and Naturalization Service, supra*.

EPA regulations implementing the EAJA at Part 17 do not establish any specific procedures to govern the submission of a request for fees and expenses associated with the appeal from an EAJA award by the Presiding Officer. While the Board could remand this issue to the ALJ,[90] under the circumstances of this case, we conclude that the determination of fees and expenses associated with this appeal can be made most efficiently by the Board itself.

Accordingly, we conclude that since Biddle Sawyer successfully defended the ALJ's determination that an award was appropriate, Biddle Sawyer is entitled

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[90] *See* 40 C.F.R. §17.30(c), made relevant to this proceeding by 40 C.F.R. §17.27, which provides that the recommended decision in this proceeding will be reviewed in accordance with the procedures set forth at Part 22.

to the reasonable fees and expenses associated with that defense. Biddle Sawyer is hereby granted leave to file with this Board, within thirty days from the date of service of this order, the supplemental documentation required to support an increase in the award for fees and expenses. The supplemental documentation of such fees and expenses must comply with 40 C.F.R. §17.13(a)-(c). If Biddle Sawyer chooses to so file, the Region shall have thirty days thereafter to respond to Biddle Sawyer's request for additional fees and expenses based upon the supplemental documentation.

So ordered.

Dissenting Opinion by Judge McCallum:

I respectfully disagree with the Board's conclusion that a bare, unsworn allegation in an EAJA fee application is jurisdictionally sufficient to "show" the applicant's eligibility as required by the terms of the statute. I believe we are constrained by the statutory language, and by the interpretive principles that are controlling in this context, to hold that Biddle Sawyer's original fee application was jurisdictionally defective. Because it is agreed that the EAJA's thirty-day filing deadline represents a limitation upon this Agency's power to award fees to a prevailing litigant, maj. op. at 12, I would further hold that Biddle Sawyer's later submission of a complete, but untimely, amended fee application was necessarily ineffective. Accordingly, for the reasons discussed herein, I would vacate Judge Frazier's order awarding Biddle Sawyer its fees and expenses, and would direct that Biddle Sawyer's fee petition be dismissed for lack of jurisdiction.

With respect to an adversary adjudication conducted by an agency of the federal Government, the EAJA provides, in relevant part:

> 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, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. [5 U.S.C. §504(a)(2)]

I agree with the Board that this provision affords no basis for concluding that an applicant must "prove" its eligibility within thirty days of a final disposition in its favor, if by "prove" we mean the submission of evidence sufficient to outweigh whatever contrary evidence the Government might offer when it files its answer to the fee application. Indeed, it is difficult to imagine how an applicant could sustain such a burden before it knows what evidence, if any, will be offered in opposition to its claim of eligibility. For that reason, EPA's regulations sensibly allow for the introduction of additional evidence and arguments if an "issue[] arising from the application," such as the issue of the applicant's eligibility, remains genuinely controverted after the principal pleadings (*i.e.*, the application, the answer, and any "comments" thereon) have been received. 40 C.F.R. §17.25(b).

It hardly follows, however, that an EAJA fee applicant bears no evidentiary burden at the time that it submits an application to the adjudicative officer. I fear that today's majority opinion, while convincingly refuting any argument that conclusive *proof* of eligibility within thirty days is a jurisdictional prerequisite for consideration of an EAJA fee application, gives inadequate consideration to what is truly in dispute here: the significance to be attributed to the statutory insistence upon a timely "showing" of eligibility, as distinct from an "allegation" of eligibility.[91]

A requirement to "show" eligibility may not, standing alone, carry an unmistakable implication that something more than a simple allegation of eligibility is needed. But when the language "shall * * * show[]" appears in a statutory text followed immediately by the language "shall * * * allege," in reference to two elements of a single claim, it is unreasonable -- and contrary to generally applicable norms of statutory construction -- to assume that the two different terms were used inadvertently, and were not intended to impose distinct obligations.[92] That assumption is particularly unreasonable with respect to terms such as "show" and "allege," which are understood in the context of civil and administrative procedure as being anything but synonymous; indeed, Region II points out that *Black's Law Dictionary* (abridged 5th ed. 1983) defines "allegation" as an "assertion, claim, declaration or statement of a party to an action * * * setting out what he expects to

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[91] Thus, in my view, the majority creates an unrealistic dichotomy when it observes that "the Agency's regulations do not require that an applicant fully 'prove' rather than merely assert eligibility within the thirty-day deadline." Maj. op. at 15. "Fully prove" and "merely assert" surely are not the only permissible interpretations of the operative statutory term, which is to "show."

[92] *See United Technologies Corp. v. Occupational Safety & Health Admin.*, 836 F.2d 52, 53 (2d Cir. 1987) ("The use of different words in the same sentence of the statute signals * * * that Congress intended to distinguish between [them] * * *.").

prove" (at 38), whereas "show" is said to mean "to make apparent or clear *by evidence*, to prove" (at 718 [emphasis added]).[93] The distinct meaning of the two terms is further confirmed by the passage from the EAJA's legislative history quoted by the Board, maj. op. at 19-20, in which the House Committee responsible for the legislation explicitly contrasted a fee applicant's obligation to "make a simple allegation" (that the Government's position was not substantially justified) with the Government's burden to "make a positive showing" to the contrary.[94] Finally, even if it were genuinely uncertain whether or not a burden of "showing" requires something more than a burden of "allegation," the principle of strict construction applicable to waivers of sovereign immunity demands that any such uncertainty be resolved in the Government's favor, and that a distinction between showing and allegation be preserved in the implementation of the EAJA fee application process.

In my view, the Agency has correctly preserved the statutory distinction between a "showing" and a mere "allegation" by its insistence that a fee applicant's representations as to net worth and number of employees be both "signed by the applicant" and verified "under oath or affirmation or under penalty of perjury." 40 C.F.R. §17.11(f). The Agency, in short, requires that a demonstration of the fee applicant's eligibility be offered in the form of an affidavit -- a document that constitutes *evidence* of eligibility, rather than a mere pleading alleging eligibility. Absent any such evidence, it would make little sense for the Agency to call upon the Presiding Officer to issue "findings and conclusions" as to the applicant's eligibility, 40 C.F.R. §17.26(b), and ordinarily to do so based solely on the contents of the fee application and the Agency's answer, *id*. §17.25(b). I am therefore persuaded that the signature and verification requirements of the Agency's

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[93] The Board's opinion, in contrast, ultimately uses "show" and "allege" interchangeably. *See* maj. op. at 26 (concluding that EAJA does not "require more than allegations to meet the applicant's burden of going forward to show eligibility").

[94] The Board's contention that the issue of "substantial justification" is somehow unique because it involves more than "objective facts" -- and that distinct obligations are therefore created by the terms "show" and "allege" *only* in connection with that single issue -- is unpersuasive. The House Report indicates that the drafters of the EAJA legislation consciously employed two different terms and intended that they create distinct obligations, with the "showing" requirement creating a more substantial burden than the requirement to make a "simple allegation." One cannot reasonably assume that, although the two terms were meant to carry different meanings in connection with one element of an EAJA claim, they were nonetheless meant to be synonymous when used in connection with another element of the same claim. The Board therefore errs when it faults Region II for purportedly failing to demonstrate why the distinction between "show" and "allege," concededly applicable to the second sentence of Section 504(a)(2), should also apply to the first sentence of the statute. Maj. op. at 20. That proposition is intuitively correct. Plainly Biddle Sawyer bears the burden of explaining why the term "show" should be construed to mean significantly less in sentence one than it means in sentence two.

regulations are not waivable procedural hurdles, but rather are essential to implement the jurisdictional provisions of the statute that require, within thirty days of a final disposition, a "showing" of the applicant's eligibility for a fee award.

For these reasons, the statutory text compels the rejection of Biddle Sawyer's November 20, 1990 Application for Attorneys' Fees and Other Costs as jurisdictionally defective, for failure to include an evidentiary showing of eligibility through signature and verification or otherwise. I therefore respectfully dissent.