

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIV. A. NO. SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS	§	
COMMISSION, <i>et al</i>	§	
	§	
Defendants	§	

PLAINTIFF'S MOTION FOR RECOVERY OF COSTS

Plaintiff John Eakin, *pro se*, moves for recovery of costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) for expenses incurred challenging Defendants American Battle Monuments Commission and U.S. Department of Defense refusal to return the remains of Plaintiff's deceased family member, Private Arthur H. "Bud" Kelder. Plaintiff is the prevailing party, the position of the government was not substantially justified, and the costs requested are reasonable. Plaintiff makes no application for reimbursement of attorney fees or compensation for his time expended litigating this matter.

1. This request is timely.

A party seeking attorney's fees and other expenses must file the application within "thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). Congress amended the EAJA in 1985 to define "final judgment" as a "judgment that is final and *not* appealable." *Al-Harbi v. INS*, 284 F.3d 1080, 1082 (9th Cir. 2002). *quoting* 28 U.S.C. § 2412 (d)(2)(G). In the present case this Court entered judgment (ECF Doc. No. 121) on March 25, 2015. Because agencies of the U.S. Government were parties, the matter became final and not appealable 60 days after entry of the judgment. This motion is filed within 30 days from that date, and is therefore timely.

2. Plaintiff meets the requirements for an award of EAJA fees.

To qualify for an EAJA award, a party must first establish that he is the prevailing party. 28 U.S.C. § 2412(d)(1)(B)(2005). At that point, the burden shifts to the government, which may avoid fees only if it can show that its pre-litigation conduct and its litigation position were both "substantially justified." 28 U.S.C. § 2412(d)(1)(B), (2)(D). As demonstrated below, Plaintiff is indisputably the prevailing party and the government cannot meet its "heavy burden" of demonstrating "substantial justification."

A. Plaintiff is Prevailing Party.

A "prevailing party" is one who "has been awarded some relief by a court." *Bukhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 589, 603 (2001). Plaintiff is the prevailing party because he received the relief he sought, namely the recovery and identification of the remains of his family member, Arthur H. "Bud" Kelder. (ECF Doc. No. 39)

On July 8, 2014, prior to responding to Plaintiff's pending discovery requests to produce the subject remains, Defendants announced their intention to exhume the remains associated with Cabanatuan Grave 717. At that time, **Defendants informed this Court that "[t]his is exactly the relief plaintiff sought from defendants, and moots this case."** (ECF Doc. No. 64 at 3) This Court subsequently ordered this case stayed and administratively closed pending the conclusion of the disinterment and DNA testing of the remains associated with Cabanatuan Grave 717.

January 22, 2015, Defendants filed their Sixth Status Report (ECF Doc. No. 98) notifying this Court that they had identified the remains of Private Arthur H. "Bud" Kelder. This Court subsequently determined that, "[w]ith positive identification of Private Kelder's remains,

Plaintiff's claims concerning the identification and release of those remains are now moot." (R&R ECF Doc. No. 103 at 6).

B. The government's position was not substantially justified.

Unless the government can prove that its position was "substantially justified," EAJA fees must be awarded. Congress placed a heavy burden of proof on the government to demonstrate that its position was substantially justified. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13-4 (1980); *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001), *citing Meinhold v. U.S. Dep't of Defense*, 123 F.3d 1275, 1277 (9th Cir.), *amended by* 131 F.3d 842 (9th Cir. 1997). "'Substantial justification' is equated with 'reasonableness.' ... The government's position is 'substantially justified' if it 'has a reasonable basis in law and fact.'" *Thangaraja v. Gonzalez*, 428 F.3d 870, 874 (9th Cir. 2005) (*quoting Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1459 (9th Cir. 1988) (*quoting Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988))). In determining whether the government met its burden, this Court must consider, first, the reasonableness of the underlying government action at issue, and second, the reasonableness of the position asserted by the government in defending the validity of the action in court. 28 U.S.C. § 2412(d)(2)(D)(2005; *Al-Harbi v. INS*, *supra*, 284 F.3d at 1094.

As an example of Defendants' pre-litigation conduct, on January 11, 1950, they had unsuccessfully recommended identification of certain remains as those of Private Kelder on the basis of the camp burial records. On March 7, 1950, Defendants falsely informed Mr. and Mrs. Herman Kelder, parents of Private Arthur H. "Bud" Kelder, that the remains of their son were non-recoverable. (Plf Exh. 16F at 6). Documents in this same file show that Defendants were at all times aware that Private Kelder's remains were one of those recovered from Cabanatuan Grave 717 and buried as an Unknown.

Defendants' litigation position was stated on February 15, 2013 when Defendants filed their certified supplemental administrative record (ECF Doc. No. 13), including a memorandum signed by Major General Kelly K. McKeague, USAF. This memorandum stated, "this case does not meet current Department of Defense policy for the disinterment of Unknown Remains in that no reasonable association of the Unknown Remains to a specific individual can be established with a high degree of certainty prior to approval for disinterment."

On February 15, 2013 and March 3, 2013, Plaintiff filed his Motion to Compel Completion of Administrative Record (ECF Doc. No. 15) and Reply (ECF Doc. No. 23), respectively. Plaintiff therein showed that Defendant's statement was knowingly false and Defendants had deliberately withheld from this Court their own investigative reports recommending disinterment.

Additionally, after twenty-one months of litigation, Defendants' preemptive disinterment and ultimate identification of the remains of Arthur H. "Bud" Kelder conclusively demonstrated the untruthfulness of Defendants' averment that there was no reasonable association of the Unknown Remains to a specific individual.

Neither Defendants' pre-litigation conduct nor its litigation position were "substantially justified."

C. There are no special factors that warrant denial of fees in this case.

While it is the government's burden to demonstrate the existence of any special factors, Plaintiff is not aware of any factors that would suggest that attorney's fees be denied in this case.

D. Plaintiff meets the net worth requirements.

Plaintiff is an individual who at all times has had a net worth of much less than two million dollars. See Declaration of Plaintiff John Eakin, attached. Plaintiff is therefore eligible pursuant to EAJA's net worth requirements.

3. The costs claimed by Plaintiff are reasonable.

Plaintiff seeks recovery of costs of filing, postage, mileage, legal research and expert witness as itemized in Plaintiff's attached declaration. Such expenses are reasonable and necessary expenses incurred in preparation for trial of this specific case.

This case, one without economic damages and challenging an unjust government action, is precisely the type of circumstance which EAJA intended to address and for which Plaintiff, as a prevailing party, is entitled to reimbursement of expenses. For the reasons set forth in this motion, the award should be in the full amount requested, namely \$2,773.45.

Respectfully submitted,

/s/

John Eakin, *pro se*
9865 Tower View Road
Helotes, Texas 78023
Tel: 210-695-2204
jeakin@airsafety.com

List of Exhibits

1. Declaration of John Eakin
2. Form AO 291.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Susan Strawn, Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

/s/

John Eakin, *pro se*
9865 Tower View Road
Helotes, Texas 78023
Tel: 210-695-2204
jeakin@airsafety.com