

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under § 2200.37(d).

(d) An applicant who owns an unincorporated business shall be considered as an “individual” rather than a “sole owner of an unincorporated business” only if the issues on which the applicant prevails are related primarily to personal interests rather than business interests.

(e) For the purpose of determining eligibility under the EAJA, the employees of an applicant include all persons who regularly perform services for remuneration under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987; 62 FR 59569, Nov. 4, 1997; 70 FR 22792, May 3, 2005; 74 FR 63988, Dec. 7, 2009]

#### § 2204.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary’s position was substantially justified is on the Secretary.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding. An award shall be denied if special circumstances make an award unjust.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

#### § 2204.107 Allowable fees and expenses.

(a) Awards shall be based on rates customarily charged by persons en-

gaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) An award for the fee of an attorney or agent under these rules shall not exceed \$125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Commission shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant’s case.

[46 FR 48080, Sept. 30, 1981, as amended at 62 FR 35964, July 3, 1997]

#### § 2204.108 Delegation of authority.

The Commission delegates to each judge authority to entertain and, subject to § 2204.309, take final action on