

**§ 2704.104 Eligibility of applicants.**

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and in subpart B.

(b) For purposes of awards under § 2704.105(a) for prevailing parties:

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

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

(3) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than \$2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and employs not more than 500 employees;

(iii) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purposes of awards for non-prevailing parties under § 2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 13 CFR part 121.

(d) For the purpose of eligibility, the net worth, number of employees, or annual receipts of an applicant, as applicable, shall be determined as of the date the underlying proceeding was initiated under the Mine Act.

(e) An applicant that participates in a proceeding primarily on behalf of one

or more other persons or entities that would be ineligible is not itself eligible for an award.

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**§ 2704.105 Standards for awards.**

(a) A prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, 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 proof that an award should not be made to a prevailing applicant because the Secretary’s position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the underlying proceeding or if special circumstances make the award unjust.

(b) If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant who does not prevail the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary’s demand is substantially in excess of the Commission’s decision; the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to that decision. As used in this section, “demand” means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty—