

#### § 4.605

employees must be determined as of the date the proceeding was initiated.

(1) Your employees include all persons who regularly perform services for remuneration under your direction and control.

(2) Part-time employees must be included on a proportional basis.

(d) You are considered an “individual” rather than a “sole owner of an unincorporated business” if:

(1) You own an unincorporated business; and

(2) The issues on which you prevail are related primarily to personal interests rather than to business interests.

(e) To determine your eligibility, your net worth and the number of your employees must be aggregated with the net worth and the number of employees of all of your affiliates. However, this paragraph does not apply if the adjudicative officer determines that aggregation would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities.

(f) The adjudicative officer may determine that financial relationships other than those described in the definition of “affiliate” in § 4.602 constitute special circumstances that would make an award unjust.

(g) If you participate in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible, you are not eligible for an award.

#### § 4.605 Under what circumstances may I receive an award?

(a) You may receive an award for your fees and expenses in connection with a proceeding if:

(1) You prevailed in the proceeding or in a significant and discrete substantive portion of a proceeding; and

(2) The position of the Department or other agency over which you prevailed was not substantially justified. The Department or other agency has the burden of proving that its position was substantially justified.

(b) An award will be reduced or denied if you have unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

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(c) This paragraph applies to an adversary adjudication arising from an action by the Department or other agency to enforce compliance with a statutory or regulatory requirement:

(1) If the demand of the Department or other agency in the action is excessive and unreasonable compared with the adjudicative officer’s decision, then the adjudicative officer must award you your fees and expenses related to defending against the excessive demand, unless:

(i) You have committed a willful violation of law;

(ii) You have acted in bad faith; or

(iii) Special circumstances make an award unjust.

(2) Fees and expenses awarded under this paragraph will be paid only if appropriations to cover the payment have been provided in advance.

#### § 4.606 What fees and expenses may be allowed?

(a) If the criteria in §§ 4.603 through 4.605 are met, you may receive an award under this subpart only for the fees and expenses of your attorney(s) and expert witness(es).

(b) The adjudicative officer must base an award on rates customarily charged by persons engaged in the business of acting as attorneys and expert witnesses, even if the services were made available to you without charge or at a reduced rate.

(1) The maximum that can be awarded for the fee of an attorney is \$125 per hour.

(2) The maximum that can be awarded for the fee of an expert witness is the highest rate at which the Department or other agency pays expert witnesses with similar expertise.

(3) An award may also include the reasonable expenses of the attorney or expert witness as a separate item, if the attorney or expert witness ordinarily charges clients separately for those expenses.

(c) The adjudicative officer may award only reasonable fees and expenses under this subpart. In determining the reasonableness of the fee for an attorney or expert witness, the adjudicative officer must consider the following:

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(1) If the attorney or expert witness is in private practice, his or her customary fee for similar services;

(2) If the attorney or expert witness is your employee, the fully allocated cost of the services;

(3) The prevailing rate for similar services in the community in which the attorney or expert witness ordinarily performs services;

(4) The time actually spent in representing you in the proceeding;

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

(6) Any other factors that bear on the value of the services provided.

(d) The adjudicative officer may award the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on your behalf to the extent that:

(1) The charge for the service does not exceed the prevailing rate for similar services; and

(2) The study or other matter was necessary for preparation of your case.

### INFORMATION REQUIRED FROM APPLICANTS

#### §4.610 What information must my application for an award contain?

(a) Your application for an award of fees and expenses under the Act must:

(1) Identify you;

(2) Identify the proceeding for which an award is sought;

(3) Show that you have prevailed;

(4) Specify the position of the Department or other agency that you allege was not substantially justified;

(5) Unless you are an individual, state the number of your employees and those of all your affiliates, and describe the type and purpose of your organization or business;

(6) State the amount of fees and expenses for which you seek an award;

(7) Be signed by you or your authorized officer or attorney;

(8) Contain or be accompanied by a written verification under oath or under penalty of perjury that the information in the application is true and correct; and

(9) Unless one of the exceptions in paragraph (b) of this section applies, include a statement that:

(i) Your net worth does not exceed \$2 million, if you are an individual; or

(ii) Your net worth and that of all your affiliates does not exceed \$7 million in the aggregate, if you are not an individual.

(b) You do not have to submit the statement of net worth required by paragraph (a)(9) of this section if you do any of the following:

(1) Attach a copy of a ruling by the Internal Revenue Service that you qualify as a tax-exempt organization described in 26 U.S.C. 501(c)(3);

(2) Attach a statement describing the basis for your belief that you qualify under 26 U.S.C. 501(c)(3), if you are a tax-exempt organization that is not required to obtain a ruling from the Internal Revenue Service on your exempt status;

(3) State that you are a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)); or

(4) Seek fees and expenses under §4.605(c) and provide information demonstrating that you qualify as a small entity under 5 U.S.C. 601.

(c) You may also include in your application any other matters that you wish the adjudicative officer to consider in determining whether and in what amount an award should be made.

#### §4.611 What information must I include in my net worth exhibit?

(a) Unless you meet one of the criteria in §4.610(b), you must file with your application a net worth exhibit that meets the requirements of this section. The adjudicative officer may also require that you file additional information to determine your eligibility for an award.

(b) The exhibit must show your net worth and that of any affiliates when the proceeding was initiated. The exhibit may be in any form that:

(1) Provides full disclosure of your and your affiliates' assets and liabilities; and

(2) Is sufficient to determine whether you qualify under the standards in this subpart.

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if you object to public disclosure of information in