

## § 2204.107

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 engaged 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;

## 29 CFR Ch. XX (7–1–11 Edition)

(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 applications for an award of fees and expenses arising from the OSH Act cases that are assigned to the judge under section 12(j) of the OSH Act, 29 U.S.C. 661(j). However, the Commission retains its right to consider an application for an award of fees and expenses without assignment to a judge or to assign such an application to a judge other than the one to whom the underlying OSH Act case is assigned. When entertaining an application for an award of fees and expenses pursuant to this section, each judge is authorized to take any action that the Commission may take under this part, with the exception of actions provided in §§ 2204.309 and 2204.310.

[46 FR 48080, Sept. 30, 1981, as amended at 74 FR 63988, Dec. 7, 2009]

## Subpart B—Information Required From Applicants

### § 2204.201 Contents of application.

(a) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified. The application also shall state the number of employees of the