

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0046

In re: Mitchel Kalmanson,

Petitioner

**Supplemental Decision and Order**

Appearances: Mitchel Kalmanson, *Pro Se*, Maitland, Florida, Petitioner  
Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of  
Agriculture, Washington, DC for the Respondent

**Preliminary Statement**

This action involves an Application/Motion for Equal Access to Justice Act (EAJA) Fees & Expenses filed by the Petitioner following an entry on September 24, 2012 of a Decision and Order favorable to him in a case brought against him by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture.<sup>1</sup> I entered a Decision and Order on November 28, 2012 denying his Application/Motion finding that Petitioner had failed to demonstrate eligibility for an award of EAJA fees and expenses.

On December 26, 2012, Petitioner filed a Motion for Reconsideration of my November 28, 2012 Decision. The Respondent responded arguing that (a) the matter was at that time still premature and thus not ripe for disposition, (b) a petition for reconsideration is not permitted in EAJA fee cases, and (c) that the instant filing should

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<sup>1</sup> The Decision and Order of September 24, 2012 resolved only the issues as to Mitchel Kalmanson, but not those concerning Jennifer Caudill, the only other Respondent then remaining in the case,

either be denied or stayed pending final disposition of the allegations against the Petitioner (in that case a Respondent) in Docket No. 10-0416.

Although the Motion for Reconsideration could have been considered an appeal and accordingly referred to the Judicial Officer, I had been prepared to deny the Motion for Reconsideration on the same grounds as my Decision of November 28, 2012 in which I found that the Petitioner had yet to demonstrate that he was an individual eligible for an EAJA award. Instead, in light of the Complainant's request, by Order dated January 17, 2013 I deferred ruling on the Motion and stayed the proceedings pending issuance of a final decision as to Mr. Kalmanson.

Prior to the entry of my Decision and Order of November 28, 2012, Counsel for Complainant had requested an extension of time in which to file a Petition for Appeal of the Decision and Order as to Mitchel Kalmanson in Docket No. 10-0416. In that request, Counsel invoked the interest of judicial economy and the conservation of agency resources and asked that the time for filing a Petition for Appeal as to Kalmanson be extended to a date 30 days after service on her of the Decision and Order as to Respondent Caudill. By Order entered on October 10, 2012, the Judicial Officer granted the Motion.

On February 1, 2013 I entered a Decision and Order as to Jennifer Caudill and on February 27, 2013, Counsel for Complainant filed a second request for extension of time in which to file a Petition for Appeal of both decisions. While granting the extension of time for the filing of an appeal of the decision as to Jennifer Caudill, the Judicial Officer denied the request for extension as to Mitchel Kalmanson noting that the Administrator

had already had more than 5 months in which to prepare and file an appeal of the September 24, 2012 Kalmanson decision.

No timely appeal was filed of the Kalmanson decision and on March 14, 2013, the Hearing Clerk filed a Notice of Effective Date of Decision and Order as to Mitchel Kalmanson indicating that the decision became final on November 2, 2012.

On April 1, 2013, Kalmanson filed a Renewed Application/Motion for EAJA Fees & Expenses ETC to be paid to Mitchel Kalmanson, an Individual. In the document that was filed, Kalmanson indicated “Kalmanson’s income &/or worth must not be a consideration in such that it would relieve the above actions by the above individuals as being of no consequence.” Para. 3, pg 2 Renewed Application/Motion.

The record indicates that no specific time for responding to the Renewed Application/Motion was given to Complainant; however, as the deficiencies in the application are readily apparent without the need for further input, disposition need not be delayed for a response.

In my initial decision, I discussed the “American Rule” generally requiring parties to bear the burden of their own attorney fees and the background and general requirements of the Equal Access to Justice Act (EAJA).<sup>2</sup> It thus would serve no useful purpose to repeat that discussion here. It is well settled that in the United States the federal government has sovereign immunity and may not be sued unless it has waived its immunity or consented to the type of suit that is being brought.<sup>3</sup> See, *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). As with any other limited waiver of the doctrine of sovereign immunity, strict compliance with terms and conditions of the statute and the

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<sup>2</sup> 28 U.S.C. § 2412

<sup>3</sup> Examples include the Federal Tort Claims Act, 28 U.S.C. § 2674; the Tucker Act, 28 U.S.C. § 1491; and patent infringement claims, 28 U.S.C. § 1498(a).

implementing regulations is required. As previously discussed, when the 1984 amendments to the EAJA were passed, included in the amendments was the net worth provision which the Petitioner is now seeking to evade. Absent a showing that Petitioner qualifies in all respects for an award, it simply cannot and will not be authorized or approved.

Examination and review of the record reflects that Petitioner failed to comply fully with sections 1.190, 1.191 and 1.192 of the Department's regulations. (7 C.F.R. § 1.190, 1.191 and 1.192). Section 1.190 requires demonstration that the applicant prevailed and identification of the position of the Department that the applicant alleges was not substantially justified together with a brief statement of the basis for the allegation as well as a declaration as to the applicant's compliance with the net worth provisions. 7 C.F.R. § 1.190. Section 1.191 requires inclusion of a net worth exhibit. 7 C.F.R. § 1.191. Section 1.192 set forth the documentation requirements for the requested fees and expenses. 7 C.F.R. § 1.192. Even were the contents of Petitioner's application given the benefit of doubt and generously read so as to filipendously comply (with the exception of the net worth declaration), the failure to comply and otherwise provide the necessary supporting documentation as required by the other provisions would nonetheless still be sufficient to require denial.

Accordingly, being sufficiently advised, it is **ORDERED** as follows:

1. The Motion for Reconsideration of the Decision and Order of November 28, 2012 is **DENIED** and except as modified herein that Decision and Order is **AFFIRMED**.
2. The Renewed Motion/Application for EAJA Fees and Expenses is **DENIED**.

3. No jurisdictional basis exists for entertaining any action for monetary sanctions or other relief before the Secretary for injuries to Petitioner's emotional state or professional reputation.

4. Pursuant to the applicable Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in sections 1.189(a) and 1.201 of the Rules of Practice (7 C.F.R. §1.189 and 1.201).

Copies of this Supplemental Decision and Order will be served upon the parties by the Hearing Clerk.

April 17, 2013

*Peter M. Davenport*

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**Peter M. Davenport**  
Chief Administrative Law Judge

Copies to: Mitchel Kalmanson  
Colleen A. Carroll, Esquire