

## Example Template

**This does not constitute legal advice. Attorneys should fully research and consider all issues involved using their independent judgment. This is not a substitute for independent research, analysis, drafting, and consideration of local practices and rules. Individuals should seek counsel from an attorney to assist them in their case.**

For more detailed information and case citations, see the practice advisory [Requesting Attorneys' Fees Under the Equal Access to Justice Act](https://immigrationlitigation.org/practice-advisories/), available at: [immigrationlitigation.org/practice-advisories/](https://immigrationlitigation.org/practice-advisories/)

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. **XX-XXXX**

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**NAME,**

Petitioner,

v.

Merrick B. GARLAND,  
Attorney General,

Respondent.

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On Petition for Review from a Decision of the Board of Immigration Appeals

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**MOTION FOR ATTORNEYS' FEES AND EXPENSES UNDER THE  
EQUAL ACCESS TO JUSTICE ACT**

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**[Attorney Name]**

**[Firm]**

**[Address]**

**[Telephone]**

**[Email]**

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## I. INTRODUCTION

Petitioner [Client Name] moves, under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), for attorneys' fees incurred in challenging [issue in petition for review for which fees are sought]. This Court [outcome of underlying proceedings]. See [Cite to underlying decision]. [Client Name] is entitled to fees and expenses in the amount of \$[Amount], including for time spent litigating the instant fee application.<sup>1</sup>

## II. RELEVANT FACTS AND PROCEDURAL HISTORY

Information regarding client, including:

- Factual background relevant to the underlying decision, especially positive equities;
- Procedural history for underlying proceedings for which fees are sought;
- Cite to record/appendix in the underlying case.

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<sup>1</sup> This fee motion is timely. The Court issued its final judgment on [Date], see [Docket cites], and this request is submitted before [30 days from the final judgment in the underlying case—generally 120 days from the date of the underlying order]. See 28 U.S.C. § 2412(d)(1)(B); *Pierce v. Barnhart*, 440 F.3d 657, 661 (5th Cir. 2006) (“[T]he thirty-day EAJA clock ‘begins to run after the time to appeal that final judgment has expired.’”) (quoting *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991)); see also *Fed. Election Comm’n v. Political Contributions Data, Inc.*, 995 F.2d 383, 385-86 (2d Cir. 1993) (holding that 30 deadline for filing an EAJA request does not begin to run until the deadline to petition for certiorari has passed); *Taylor v. United States*, 749 F.2d 171, 175 (3d Cir. 1984); *Kolman v. Shalala*, 39 F.3d 173, 175 (7th Cir. 1994); *Al-Harbi v. INS*, 284 F.3d 1080, 1083-84 (9th Cir. 2002); *Singleton v. Apfel*, 231 F.3d 853, 855 n. 4 (11th Cir. 2000).

### III. ARGUMENT

#### A. [Client Name] Is an Eligible and Prevailing Party

To qualify for an EAJA award, a petitioner first must establish that he is an eligible, prevailing party. 28 U.S.C. § 2412(d)(1)(B). [Client Name] is an eligible party under EAJA because he is a private individual whose net worth has never exceeded 2 million dollars. *See* Exhibit A (Declaration of [Client Name]), ¶ 1; 28 U.S.C. § 2412(d)(2)(B).

[Client Name] also is a prevailing party because he has achieved a “material alteration of the legal relationship of the parties” and that alteration was “judicially sanctioned.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001); *see also Walker v. City of Mesquite, Tex.*, 313 F.3d 246, 249 (5th Cir. 2002). In this case, over the government’s opposition, the Court agreed with [Client Name]’s position that [insert description of winning position; e.g. the Board of Immigration Appeals’ finding that [xx] was not based on substantial evidence; the Board of Immigration Appeals erroneously denied Ms./Mr. X’s motion to reopen, the Board of Immigration Appeals failed to [x]]. Cite to relevant portion of opinion]. The Court [insert type of relief ordered: e.g., granted the petition for review, vacated the Board’s decision, and remanded the case for further proceedings]. Cite to relevant portion of opinion. This decision directly benefits [Client Name] because [explain]. Thus, this Court’s [date] order

conferred prevailing party status. *See, e.g., W.M.V.C. v. Barr*, 926 F.3d 202, 208 n.2 (5th Cir. 2019) (“Because petitioners sought a remand to the BIA, our decision to grant such relief . . . entitles petitioners to prevailing party status.”).

**B. The Government’s Position Was Not Substantially Justified**

The government’s position in this case was not “substantially justified.” 28 U.S.C. § 2412(d)(1)(A). Congress placed a heavy burden of proof on the government to demonstrate that its position was substantially justified. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13-14 (1980) (“[T]he strong deterrents to contesting government action require that the burden of proof rest with the government.”). To meet this burden, the government must show that its position had a reasonable basis both in law and in fact. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988); *W.M.V.C.*, 926 F.3d at 209-10 (quoting *Baker v. Bowen*, 839 F.2d 1075, 1080 (5th Cir. 1988)). The government must meet this threshold twice—with regard to the agency action giving rise to the litigation *and* its litigation positions. 28 U.S.C. § 2412(d)(2)(D); *Herron v. Bowen*, 788 F.2d 1127, 1130 (5th Cir. 1986). If it cannot do both, the Court must award fees. This Court reviews the government’s position under a “totality of the circumstances” approach. *W.M.V.C.*, 926 F.3d at 209-10.

**1. The agency’s pre-litigation position was not substantially justified**

The agency’s pre-litigation position was not justified, let alone substantially justified. [Explain the outcome and reasoning of the IJ (if relevant) and BIA’s decision below and explain why the position was unjustified]

[for example]

The Board’s decision was particularly unjustified given that the agency was on notice that, years earlier, the [BIA/this Court] had held [summarize and cite to prior helpful caselaw that was violated]. Thus, the Board ruling that [xx] conflicted with precedent from [the BIA/this Court]. As such, the government’s pre-litigation position was unreasonable and not substantially justified.

or

As this Court held, the BIA failed to review [identify evidence or arguments the BIA ignored]. [Cite Opinion]. The BIA’s decision to deny [Client Name]’s [appeal/motion to reopen/reconsider] without reviewing all the legal arguments and evidence before it makes the government’s pre-litigation position demonstrably unjustified.

**2. The government’s litigation position was not substantially justified**

The government’s litigation position was also unreasonable. [Explain what Respondent argued in the answering brief and/or at oral argument and why it was

unjustified. If the Court specifically rejected those arguments, state that and cite to (and/or quote from) the portions of the opinion rejecting those arguments.]

In sum, the government's position as a whole was unreasonable.

**C. There Are No Special Circumstances That Would Make an Award Unjust**

There are no special circumstances in this case that would make an award of attorneys' fees unjust. *See* 28 U.S.C. § 2412(d)(3). The burden of proving the special circumstances rests with the government. *See, e.g., Martin v. Heckler*, 754 F.2d 1262, 1264 (5th Cir. 1985); *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989). The government is unable to do so in this case.

**D. The Fees and Expenses Sought Are Reasonable**

Counsel is submitting records documenting reasonable time spent working on the petition for review and on the instant motion, all of which is reimbursable. Exhibit B (Declaration of [Attorney Name], with attached timesheets); *Comm'r, INS v. Jean*, 496 U.S. 154, 163-65 (1990). This Court calculates hourly rates using the EAJA statutory rate (\$125/hour) adjusted for inflation based on a cost-of-living adjustment using the Consumer Price Index for All Urban Consumers (CPI-U) for the year in which the work was performed. *Perales v. Casillas*, 950 F.2d 1066, 1076-77 (5th Cir. 1992). Provided as Exhibit C is the Consumer Price Index (CPI-U) for [LOCATION]. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, [to locate the relevant CPI-U, go to: <https://www.bls.gov/bls/news-release/cpi.htm>]

(last visited **Month Day**, 202**X**). Based on these statistics, the CPI-U for services in the region where this case was litigated was **[#]** in 2019 and **[#]** 2020, when **[Client Name]** prevailed. *See* Exhibit B. As such, adjusting EAJA's statutory rate to account for inflation results in an hourly rate of **####.##** per hour for each billing attorney. In addition, provided as Exhibit D is a summary of the hours and rates, as well as expenses, for which compensation is requested. The total award sought is **####.##** at this point, but **[Client Name]** will seek additional fees if the government opposes this motion and counsel must draft a reply.

#### IV. CONCLUSION

The Court should grant **####.##** in fees and expenses, in addition to fees for any time spent preparing a reply brief if the government opposes this motion.<sup>2</sup>

Respectfully submitted,

s/ [Signature]  
**[Attorney Name]**  
**[Firm]**  
**[Address]**  
**[Telephone]**  
**[Email]**

Dated: **[Date]**

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<sup>2</sup> **[Client Name]** has assigned the payment of fees to undersigned counsel. *See* Exhibit A (Declaration of **[Client Name]**).

## CERTIFICATE OF SERVICE

I, [Attorney Name], hereby certify that on [Date], I caused the foregoing motion to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the XX Circuit using the Court's appellate CM/ECF system. Respondent's counsel is a registered CM/ECF user and will be served via the Notice of Docket Activity through this Court's CM/ECF system.

s/ [Signature]

[Attorney Name]

[Firm]

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains XXXX words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

s/ [Signature]

[Attorney Name]

[Firm]

Dated: [Date]

## INDEX OF EXHIBITS

- A. Declaration of [Client Name]
- B. Declaration of [Attorney Name], with accompanying time sheets of [Firm/Organization]
- C. Consumer Price Index data for [Location], which forms the basis of the calculation of hourly rate requested
- D. Statement of Total Amount of Fees

## EXHIBIT A

### DECLARATION OF [Name of Client]

I, [Name of Client], hereby declare and state:

1. My current residence is [ADDRESS].
2. I am a private individual and my net worth does not, nor has it ever, exceeded the amount of \$2,000,000.
3. I make this declaration in support of my motion for attorney fees and costs incurred in my successful representation before the U.S. Court of Appeals for the Fifth Circuit in [Client Name] v. *Garland*, No. [Case Number].
4. I previously retained [Attorney Name] to represent me [pro bono] in this case.
5. I authorize the recovery of fees and expenses to my attorney's office in order to compensate them for work performed on my behalf [if applicable: for which their office was not compensated].
6. I further assign payment of any award of fees and costs to [Attorney's Office/Organization] and request payment to [Attorney's Office] either via a check mailed to [Attorney's Office/Organization] at [Attorney's Address] or directly deposited into the office's account.
7. To the best of my knowledge, I do not owe any debt to the United States federal government.

I declare under penalty of perjury under the laws of the State of [State] that the above is true and correct to the best of my knowledge and belief. Executed on [DATE] at [City, State].

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[Name of Client]

**EXHIBIT B**

**DECLARATION OF [ATTORNEY NAME]**

I, [Name of Attorney], hereby declare and state:

1. I am [insert title and employer] in [location]. My [firm/organization] represented [Client Name] in a petition for review before the U.S. Court of Appeals for the Fifth Circuit in Case No. XX-XXXX.
2. In addition to myself, # other attorneys [and # paralegals] worked on the petition for review. They are [insert attorneys names]. The attached timesheet is an itemization of the time spent by us in litigating the petition and preparing a motion for attorneys' fees and costs. These hours were taken contemporaneously and are true and correct to the best of my knowledge. If the government opposes the motion for attorneys' fees and costs, then additional hours will be submitted representing any time spent on a reply.
3. I have calculated the hourly statutory rate for attorneys based on the \$125 hourly rate under the Equal Access to Justice Act (EAJA), adjusted for inflation. In calculating the hourly rate adjusted for inflation, I employed the following formulas:

$$\frac{\$125 \times \text{CPI-U for year 2019}}{155.7}$$

$$\frac{\$125 \times \text{CPI-U for year 2020}}{155.7}$$

4. In the formulas above, \$125 represents the hourly statutory rate under EAJA. The CPI-U represents that Consumer Price Index for All Urban Consumers (CPI-U) published by the U.S. Bureau of Labor Statistics for the [insert relevant location] region, which was ###.### for 2020, the year in which work was performed. The number 155.7 represents the CPI-U in March 1996, when Congress set the \$125 statutory hourly rate of attorney compensation.
5. Using the formulas in paragraph 3, the hourly statutory rate for attorneys in 2019 is \$###.## and in 2020 is \$###.##.

I declare under penalty of perjury under the laws of the State of [State] that the above is true and correct to the best of my knowledge and belief. Executed on Month #, 202# at City, State.

s/Name of Attorney  
Name of Attorney

## EXHIBIT C

### [SAMPLE] CPI-U Houston-The Woodlands-Sugar Land, TX

#### Databases, Tables & Calculators by Subject

Change Output

Options: From:  To:   include graphs  include annual averages [More Formatting Options](#)

#### a. CPI for All Urban Consumers (CPI-U)

**Series Id:** CUURS37BSA0

Not Seasonally Adjusted

**Series:** All items in Houston-The Woodlands-Sugar Land, TX, all urban consumers, not

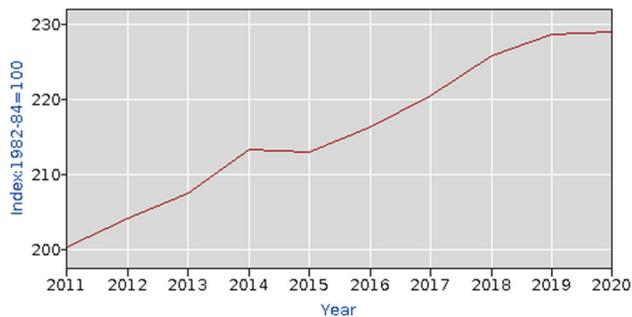
**Title:** seasonally adjusted

**Area:** Houston-The Woodlands-Sugar Land, TX

**Item:** All items

**Base:** 1982-84=100

**Period:**



Download: [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
2011		197.224		201.624		201.309		202.445		201.398		200.477	200.495	199.480	201.509
2012		204.291		206.088		204.829		203.959		204.139		202.477	204.213	204.705	203.721
2013		205.716		207.506		207.882		208.575		207.788		209.814	207.574	206.583	208.564
2014		211.745		213.309		214.668		214.102		214.791		212.169	213.365	212.835	213.895
2015		210.283		212.439		213.896		214.652		214.569		212.936	213.039	211.926	214.152
2016		214.505		215.513		217.305		216.582		218.200		217.758	216.414	215.237	217.592
2017		219.061		219.852		220.805		221.255		223.213		221.568	220.657	219.513	221.800
2018		224.711		225.116		227.393		226.307		228.070		226.557	225.927	224.763	227.091
2019		226.804		229.261		229.316		229.423		230.041		228.765	228.799	228.124	229.474
2020		230.147		226.387		228.898		228.978		229.885		230.388	229.161	228.580	229.742
2021		232.442		236.604											

**EXHIBIT D**

**Client's Name v. Garland, No. XX-XXXX**

**Statement of Total Amount of Fees and Costs**

**2019**

<b>Timekeeper</b>	<b>Total Hours</b>	<b>Hourly Rate</b>	<b>Total Fees</b>
Attorney A	#	\$2--	\$--
Attorney B	#	\$2--	\$--
Attorney C	#	\$2--	\$--
	<b>Number</b>		
<b>Costs</b>			
Filing Fee			\$500
<b>Total Fees and Costs</b>			<b>\$##,###</b>

**2020**

<b>Timekeeper</b>	<b>Total Hours</b>	<b>Hourly Rate</b>	<b>Total Fees</b>
Attorney A	#	\$2--	\$--
Attorney B	#	\$2--	\$--
Attorney C	#	\$2--	\$--
<b>Total Fees</b>			<b>\$##,###</b>

<b>Year</b>	<b>Total Fees</b>
2019	\$--
2020	\$--
Costs	\$--
<b>TOTAL FEES AND COSTS</b>	<b>\$ _____</b>