

**PRIORITY SEND**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 10-00894 VAP(DTBx)

Date: August 29, 2012

Title: TAREK HAMDY -v- UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE, et al.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard  
Courtroom Deputy

None Present  
Court Reporter

ATTORNEYS PRESENT FOR  
PLAINTIFFS:

ATTORNEYS PRESENT FOR  
DEFENDANTS:

None

None

PROCEEDINGS: MINUTE ORDER GRANTING PETITIONER'S MOTION FOR ATTORNEYS' FEES (DOC. NO. 145) (IN CHAMBERS)

Pursuant to 8 U.S.C. § 1421(c), Petitioner Tarek Hamdi sued to be naturalized as a citizen of the United States of America; after Hamdi prevailed in this suit against Respondents United States Citizenship and Immigration Services, and several government officers in their official capacities (collectively, "USCIS"), the Court ordered him naturalized. Hamdi now seeks his attorneys' fees and costs, in the amount of \$957,497.16, under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412.

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EAJA requires courts to grant fees and costs to any party that prevails in litigation against the United States (in all but tort cases), unless the United States' position was "substantially justified" or "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). USCIS presses both these exceptions, arguing first that it was substantially justified in denying Hamdi citizenship in administrative proceedings, and then in defending this lawsuit. It further argues that special circumstances would make a fee award unjust, and in any event, \$957,497.16 is an excessive sum. The Court will GRANT Hamdi's attorneys' fees, subject to the constraints discussed below, for the following reasons.

### I. BACKGROUND

The Court sets forth, briefly, the background – drawn largely from the Court's Findings of Fact and Conclusions of Law ("FFCL") (Doc. No. 130) – necessary to place the current dispute in context. Where the Court draws its facts from another source, it so indicates in the text.

Hamdi, an Egyptian citizen by birth, first came to the United States in 1977. In 2001, after having lived lawfully in the United States for approximately 14 years, marrying a United States citizen, and becoming the parent of four daughters (all citizens), Hamdi sought to naturalize. Hamdi failed to appear for the requisite interview, however, because he never received notice of its date and time. USCIS denied Hamdi's application because he failed to appear; Hamdi therefore reapplied on February 15, 2007, and the process began anew.

After reapplying, Hamdi passed the necessary examination, and on November 8, 2008, sat for an interview with USCIS Immigration Service Officer Robert Osuna. This interview proved to be a pivotal event in Hamdi's naturalization proceedings, because of conclusions Osuna reached after reading information in Hamdi's file. Hamdi and his wife had, in keeping with the tenets of Islam, made various charitable donations ("zakat"). Unfortunately, one organization to which they made their donations – Benevolence International Foundation ("BIF") – was used by one of its leaders, Enaam Arnaout, to funnel money to Chechen insurgents. The Treasury Department designated BIF a terrorist financier in 2002, and Arnaout was convicted of racketeering conspiracy in 2003; he was charged with, among other things, misleading donors into believing that BIF was doing only humanitarian work for

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refugees. Hamdi was one such donor. In 2001, he collected money from members of his mosque's congregation, amassing \$8,000 that he sent to BIF. He wrote on the memo line of the check that the \$8,000 was to be used for "Chechnya Relief," and sent it with a letter indicating it was for the "Injured Mujahadeen" (emphasis in original). Hamdi later testified that he decided to donate to BIF's Chechen relief program after seeing images of civilian casualties in Chechnya on CNN, and that the BIF program to which he was donating was called "Injured Mujahadeen."

On top of his interaction with BIF, Hamdi also had some involvement with an organization called Care International ("Care"), to which he donated money, and on behalf of which he made announcements at his mosque. Care's principals also ran afoul of the criminal laws of the United States, however, and were prosecuted for obtaining a tax exemption fraudulently for an organization that used charitable contributions "to finance mujahideen overseas." United States v. Mubayyid, 658 F.3d 35, 40 (1st Cir. 2011).

These details of Hamdi's interactions with BIF and Care were unknown to Osuna when he interviewed Hamdi. Osuna did, however, possess a declaration executed on May 12, 2005, by FBI Special Agent Michael Caputo; in it, Caputo recounted how on January 8, 2003, he interviewed Hamdi informally regarding his support of BIF. (See Decl. of Robert Osuna (Doc. No. 85-1) ¶¶ 16; Ex. B to Osuna Decl. (Doc. No. 85-4).) According to Caputo, Hamdi admitted donating to BIF, but initially denied sending money to Chechnya; Caputo then showed him the \$8,000 check for "Chechnya Relief," and the accompanying letter. (Ex. B to Osuna Decl.) Caputo stated that Hamdi then recalled sending the check and letter. (Id.) Caputo concluded by noting, based on those facts alone, that "the FBI has been unable to rule out the possibility that Mr. Hamdi may be a threat to the security of the United States." (Id.)

Osuna read Caputo's declaration, and then observed that Hamdi did not list BIF on his N-400 naturalization application when responding to the prompt: "Have you ever been a member of or associated with any organization, association, fund, foundation, party, club, society or similar group in the United States or in any other place?" (See Ex. A to Osuna Decl.) Osuna continued through Hamdi's application, making check marks in various places as he went along. As proved particularly

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relevant later in this case, Osuna made a check mark next to a question that asked Hamdi the current address of his wife and children (Hamdi wrote on the application that they lived with him) and a check mark next to a question that asked Hamdi to name his employer (Hamdi wrote that he worked for Harris & Associates). There is no other record of Hamdi's interview with Osuna to indicate what questions were asked or what answers were given.

Seven months after his interview with Osuna, USCIS denied Hamdi's application, explaining its decision – that Hamdi lacked the good moral character required to naturalize, see 8 U.S.C. § 1427(a)(3) – as follows:

You failed to reveal your affiliation with the Benevolent International Foundation, an organization based in Chicago, IL. In addition, a source of public information revealed that your last employer was LIM & Nascimento Engineering Corp., Lan Engineering Corp.. You failed to reveal the aforementioned employer on your N-400 application and at your interview. Furthermore, the same public source reveals that you are currently unemployed and have no source of income which is contrary to your statement made during the interview.

(Ex. F to Decl. of Jeffrey Bauer (Doc. No. 85-8).)<sup>1</sup>

Hamdi appealed the decision administratively, submitting a brief in which he argued he did not disclose an affiliation with BIF because he did not believe donating to a charity sufficed to make him its affiliate. (Ex. P to Decl. of Belinda Escobosa Helzer (Doc. No. 91).) Hamdi also noted that he failed to disclose his employment with LAN Engineering Corporation because he did not work there at the time Osuna interviewed him; Hamdi started working for LAN in January 2009. (See id.) Finally, Hamdi contended he was not, as USCIS wrote, unemployed when USCIS denied his application. (See id.) In connection with his appeal, Hamdi was interviewed on September 24, 2009, by USCIS Officers Elias Valdez and Cecil Clark. Again,

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<sup>1</sup> This statement is copied, with any errors, from the document Hamdi received denying his application.

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USCIS did not record the interview, and again, on April 8, 2010, USCIS denied Hamdi's application.

On June 16, 2010, Hamdi filed this suit, seeking a de novo hearing on his application for naturalization, and after a period of discovery, USCIS filed a Motion for Summary Judgment (Doc. No. 85) on October 28, 2011. In it, USCIS contended it denied Hamdi's naturalization properly, because in his interviews with Osuna, Clark, and Valdez, Hamdi told four lies for the purpose of obtaining his citizenship, each of which undermined his good moral character. First, based on Osuna's recollection and check marks he made on Hamdi's application, USCIS argued Hamdi lied about the whereabouts of his family: though Hamdi's N-400 application said they lived with him, his wife and children traveled to Egypt on one-way tickets at the end of the 2008 school year. Second, USCIS argued, Hamdi lied about his employment status, because at the time of his interview with Osuna, he was unemployed. Third, USCIS averred Hamdi lied about his connection to BIF. Finally, USCIS contended Hamdi lied about his connection to Care.

The Court denied USCIS's motion on all four grounds, determining that based on the evidence a reasonable factfinder could conclude, for each of Hamdi's four alleged lies, that Hamdi did not actually lie at all. (See Order ("MSJ Order") (Doc. No. 93) at 23-26 (regarding Hamdi's family), 27-30 (regarding his employment), 30-38 (regarding BIF), and 38 (regarding Care).) On February 25, 2012, after a two day trial, the Court reached that conclusion. Thus finding that Hamdi met the criteria for naturalization, the Court ordered USCIS to prepare the materials necessary for the Court to administer the oath of allegiance.

Having prevailed in this litigation, on June 22, 2012, Hamdi filed a Motion for Attorneys' Fees (Doc. No. 145), seeking to recover his attorneys' fees and costs under the EAJA.<sup>2</sup> USCIS filed an Opposition (Doc. No. 148) on July 20; Hamdi filed

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<sup>2</sup> On June 25, 2012, Hamdi filed an extensive Errata (Doc. No. 143) to his fee request; the Court therefore ordered Hamdi to correct the request and re-file it (see Minute Order (Doc. No. 144)), which Hamdi did on June 29. It is the June 29 filing (continued...)

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a Reply (Doc. No. 155) on August 10. The Court analyzes the parties' filings under the following standard.

## II. LEGAL STANDARD

Under the EAJA, a court "shall award" attorneys' fees, costs, and "other expenses" to a party who prevails against the United States in a civil action – other than for a tort claim, but including proceedings for review of an agency action – unless the United States' position was justified substantially, or special circumstances dictate that awarding fees would be unjust. 28 U.S.C. § 2412(d)(1)(A).

The EAJA thus creates a presumption that a prevailing plaintiff is entitled to fees from the United States ("a court shall award"), but also offers two ways for the United States to rebut that presumption. See Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001); Love v. Reilly, 924 F.2d 1492, 1495 (9th Cir. 1991); Thomas v. Peterson, 841 F.2d 332, 335 (9th Cir. 1988). First, the United States may rebut the presumption that a prevailing plaintiff is entitled to fees by showing the United States' position was "substantially justified," meaning its position had "a reasonable basis in both law and fact." Gutierrez, 274 F.3d at 1258 (citing Pierce v. Underwood, 487 U.S. 552, 565 (1988)). When the litigation in question involves the review of an agency action, the United States must demonstrate both that it "was substantially justified in taking its original action[] and . . . was substantially justified in defending the validity of the action in court." Gutierrez, 274 F.3d at 1259 (quoting Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988)).<sup>3</sup>

The United States may also avoid liability for a prevailing plaintiff's fees by

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<sup>2</sup>(...continued)  
the Court considers here.

<sup>3</sup> Even if the United States' behavior in the underlying agency action was not substantially justified, the EAJA normally allows the plaintiff to recoup only those fees and costs incurred in seeking judicial review of the action. W. Watersheds Project v. U.S. Dep't of the Interior, 677 F.3d 922, 926 (9th Cir. 2012).

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demonstrating that special circumstances would make such an award unjust. The "special circumstances" exception to the EAJA's rule is somewhat more enigmatic than the substantial justification exception, and appears generally to have evaded explication by the Ninth Circuit Court of Appeals. It seems, however, that Congress intended the exception to "provide[] a safety valve where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law." Grason Elec. Co. v. Nat'l Labor Relations Bd., 951 F.2d 1100, 1103 (9th Cir. 1991) (internal quotation marks omitted).<sup>4</sup>

Even if the United States fails to controvert the plaintiff's entitlement to attorneys' fees, however, those fees are capped by law at \$125 per hour – barring a finding by the court "that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii). The special factors a court may consider in increasing an EAJA award are limited, though, and may not be factors of "broad and general application." Pierce, 487 U.S. at 573.

Consequently, a court may not increase the statutory rate in reliance on factors such as the "'novelty and difficulty of the issues,' . . . 'undesirability of the case,' . . . 'work and ability of counsel,' and 'the results obtained,'" which "are factors applicable to a broad spectrum of litigation," and "are little more than routine reasons why market rates are what they are." Id. (citation omitted). Likewise, the court ought not increase the statutory rate out of consideration of "'customary fees and awards in other cases.'" Id. (citation omitted). But exceeding the statutory rate is

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<sup>4</sup> In United States v. Gavilan Joint Community College District, 849 F.2d 1246 (9th Cir. 1988), the court of appeals indicated the special circumstances exception could apply in a case involving "an issue on which 'reasonable minds could differ,'" or one dealing with "'an important and doubtful question.'" 849 F.2d at 1249 (quoting League of Women Voters v. Fed. Commc'ns Comm'n, 798 F.2d 1255, 1260 (9th Cir. 1986) and Minor v. United States, 797 F.2d 738, 739 (9th Cir. 1986)). However, both cases on which the court in Gavilan relied – League of Women Voters and Minor – interpreted the substantial justification exception to the EAJA, not the special circumstances exception.

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permitted when a plaintiff employs attorneys with "some distinctive knowledge or specialized skill needful for the litigation in question – as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Id.* at 572. "Examples . . . would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language." *Id.*

Having thus established the framework under which it evaluates Hamdi's Motion, the Court now turns to that task.

### III. DISCUSSION

Hamdi prevailed in this civil action by obtaining his United States citizenship after administrative proceedings in which USCIS twice denied it. USCIS now bears the burden of demonstrating both: (A) that it had a substantial justification for denying Hamdi citizenship during its administrative proceedings – *i.e.*, that it had a reasonable legal and factual basis for doing so; and (B) that it likewise had a reasonable legal and factual basis for litigating against Hamdi in this Court. Failing that, USCIS must show, (C), that special circumstances apply, such that awarding Hamdi his attorneys' fees would be an injustice. The Court examines these exceptions in turn, and concludes that USCIS fails to carry its burden as to either the substantial justification exception or the special circumstances exception to the EAJA. The Court therefore GRANTS Hamdi's Motion.

#### A. USCIS Lacked a Substantial Justification for Denying Hamdi's Application for Naturalization

USCIS twice denied Hamdi's application to naturalize, though its precise reasons for denying the application were themselves disputed in this case (and remain disputed in the litigation over the instant Motion). Hamdi argues that his application was denied because USCIS was following a closely guarded policy, which required he receive extra-legal treatment as a "national security risk." (*See* Mot. at 10-11.) USCIS takes the position that "Hamdi . . . testified . . . he had not heard of BIF, but later acknowledged that BIF was a charitable organization," thereby revealing himself as a simple prevaricator lacking the good moral character necessary for citizenship, without regard to the sensitivity of the matter about which he lied. (*Opp'n* at 7.)

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The easy – and correct – way to determine why USCIS denied Hamdi's application is to look at the reasons it gave when it did so. See Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196-97 (1947) (holding that the propriety of an agency's action should be judged "solely by the grounds invoked by the agency," which "must be set forth with such clarity as to be understandable"); Arrington v. Daniels, 516 F.3d 1106, 1113 (9th Cir. 2008) ("Post hoc explanations of agency action . . . cannot substitute for the agency's own articulation of the basis for its decision.") (citing Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974)). USCIS gave three reasons for denying Hamdi's application on the first go-round: (1) Hamdi failed to disclose his affiliation with BIF; (2) Hamdi failed to list his last employer as LIM & Nascimento Engineering Corp.; and (3) Hamdi allegedly was unemployed, contrary to a statement made during his interview. (See Ex. F to Bauer Decl.)

Hamdi appealed, and the second time USCIS denied his application, it offered the following additional reasons (while abandoning those related to Hamdi's employment status): (4) Hamdi "stated, under oath" that he lacked knowledge that "BIF had been involved in the financial support of terrorist groups and activities," and lacked knowledge that Enaam Arnaout "had been arrested and indicted for terrorism related charges," but later "revealed that [he] was indeed aware that the BIF had been accused of financing terrorism and that . . . Enaam Arnaout had been . . . convicted of racketeering;" (5) Hamdi "indicated that [he] had received money from various individuals who were unable to attend BIF meetings or did not attend due to fear of authority;" and (6) Hamdi failed to indicate he was associated or affiliated with BIF in either his interview with Osuna or his interview with Clark and Valdez,

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only mentioning BIF in the latter interview when shown a copy of the \$8,000 check he wrote to BIF. (See Ex. T to Helzer Decl.) USCIS lacked a substantial justification for denying Hamdi's application on any of these six grounds.<sup>5</sup>

### 1. Hamdi's Failure to List BIF on His Naturalization Application

USCIS argues that its denial of Hamdi's application was justified by Hamdi's failure to list BIF as an organization with which he was associated on his N-400 application – and compounded by his testimony that his N-400 contained a full list of such organizations.<sup>6</sup> (See Opp'n at 8-9.) As the Court observed previously, however, the question to which Hamdi responded on his N-400 is susceptible to such a variety of interpretations that an applicant cannot fairly be branded a liar for

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<sup>5</sup> Typically, courts reviewing an administrative agency's final decision ignore the agency's preliminary decisions, and concentrate solely on the reasoning given for its final action. Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1133-34 (9th Cir. 2011) (quoting Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659-60 (2007)). Here, USCIS's final action was its denial of Hamdi's administrative appeal, not its initial denial of his application. See 8 U.S.C. § 1421(c) (allowing judicial review only after an applicant for naturalization has the "appeal" hearing prescribed by 8 U.S.C. § 1447(a)); De Lara Bellajaro v. Schiltgen, 378 F.3d 1042, 1044 (9th Cir. 2004) (describing the decision issued after a Section 1447(a) hearing as the agency's "final decision"). Courts may, however, consider an agency's preliminary actions in some contexts. Barnes, 655 F.3d at 1134. As USCIS must provide a justification for its treatment of Hamdi at each step in the proceedings, the Court considers both USCIS's initial and final rejections of Hamdi's application. Even if the Court considered only USCIS's final rejection of Hamdi's application, however, the result here would be the same.

<sup>6</sup> The actionable "lie" cited by USCIS for the purpose of denying Hamdi's United States citizenship was not Hamdi's failure to list BIF in response to the N-400's question about affiliations; it was instead his sworn testimony that the list he wrote on the N-400 was complete and accurate. See Kungys v. United States, 485 U.S. 759, 780 (1988) (holding that to undermine an applicant's good moral character a lie must be stated orally, under oath).

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failing to disclose his charitable donations when answering it. (See FFCL at 21; MSJ Order at 35-38.)

For example, a father who solicits colleagues at his office to purchase large quantities of Girl Scout cookies from his daughter would likely be surprised to learn that, under the standard USCIS applied in this case, he would be required to list the Girl Scouts as an "organization, association, fund, foundation, party, club, society or similar group" with which he was affiliated. Hamdi responded, reasonably, by listing organizations of which he was a dues-paying member or on the boards of which he sat. He then answered truthfully, or at least, intended to answer truthfully, when he "stated, under oath, that [he was] not a member of, or associated with any organization or group other than those listed on [his] N-400 application." (Ex. T to Helzer Decl.)

USCIS nevertheless contends it had a substantial justification for denying Hamdi's application, because reasonable minds can differ over a definition of "associated," which could include Hamdi's relationship with BIF (or the cookie-hawking parent's relationship with the Girl Scouts). (Opp'n at 8 (citing Gonzales v. Free Speech Coal., 408 F.3d 613, 618 (9th Cir. 2005)).) Perhaps USCIS and Hamdi could differ as to what the phrase "associated with" means, but for USCIS to call Hamdi a liar because he did not adopt its definition of the term requires USCIS to disclose first what its definition is. Two parties do not have a reasonable disagreement as to the meaning of an ambiguous phrase if one of them proposes an absurd definition, cf. Lezama-Garcia v. Holder, 666 F.3d 518, 525 (9th Cir. 2011) (noting that deference is due only to agencies' reasonable interpretations of regulatory language), or fails to propose any definition at all. In the entire course of this litigation, including the administrative proceedings, USCIS never defined the phrase "associated with" – at one point even claiming the definition is subject to a privilege. (See MSJ Order at 37.) Indeed, this is not the first time a court has pointed out the ambiguity of the phrase as it appears on the N-400, see Atalla v. Kramer, No. CV09-1610-PHX-NVW, 2011 WL 2457492, at \*15 (D. Ariz. June 20, 2011), and it remains undefined in the instructions given to naturalization candidates, see Dep't of Homeland Sec., Instructions for Form N-400, available at <http://www.uscis.gov/files/form/n-400instr.pdf> (last visited Aug. 28, 2012).

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At bottom, all of this stands for the common sense proposition that USCIS cannot have a reasonable basis in law to claim that Hamdi lied about whether he was "associated with" BIF if, to this day, it cannot say what type of relationship an applicant must have with an organization to be "associated with" it.<sup>7</sup>

## **2. Hamdi's Failure to Disclose His Employment with LIM & Nascimento Engineering Corp.**

The next reason USCIS gave when it first denied Hamdi's application was that he did not list "LIM & Nascimento Engineering Corp." as his previous employer. As it turns out, Hamdi did not list LIM & Nascimento Engineering Corp. as his previous employer, and failed to mention it to Osuna in his interview, because Hamdi did not start his employment with that firm until after his interview with Osuna. (FFCL ¶ 45.) USCIS cannot argue plausibly that it had a reasonable basis for denying Hamdi's application just because Hamdi failed to tell Osuna about an event that had yet to occur.

## **3. Hamdi's Failure to Disclose His Unemployment**

USCIS's initial denial of Hamdi's application also stated that Hamdi failed to tell Osuna he was then unemployed. When later deposed, Hamdi claimed that he did, in fact, tell Osuna he was unemployed at the time of the interview. (See FFCL ¶ 44; MSJ Order at 27-30.)

Given these conflicting accounts of Hamdi's discussion with Osuna, the question is whether USCIS had a reasonable basis in fact for denying Hamdi's application on the grounds that he lied about his employment history. Though the

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<sup>7</sup> Moreover, because an applicant lacks the good moral character necessary to naturalize only if he lies with the subjective intent of misleading USCIS into granting him an immigration benefit, Kungys, 485 U.S. at 780; United States v. Hovsepian, 422 F.3d 883, 888 (9th Cir. 2005) (en banc), even if USCIS actually set forth a definition of "associated with," unless Hamdi could have known that definition encompassed his relationship with BIF before answering USCIS's questions, it would be unreasonable for USCIS to argue he omitted BIF from his responses for the purpose of obtaining an immigration benefit.

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Court credited Hamdi's recollection of this interview, and not Osuna's (as offered by USCIS), the Court must determine whether USCIS had a reasonable basis in fact to deny the application at the time it made the decision – not with the benefit of hindsight. See United States v. First Nat'l Bank of Circle, 732 F.2d 1444, 1447 (9th Cir. 1984) (observing that courts cannot presume the United States' position was unjustified because it lost in court); see, e.g., Hardisty v. Astrue, 592 F.3d 1072, 1078 (9th Cir. 2010) (holding that an administrative law judge's decision to deny a plaintiff benefits was justified based on evidence in the administrative record, even if the decision itself was ultimately incorrect).

The sole contemporaneous evidence of Hamdi's interview with Osuna is a copy of Hamdi's N-400 on which Osuna made some marks – mostly check marks. As the Court noted elsewhere, however, the meaning of those marks is unknown, and Osuna's account of why he made them is inconsistent. (See MSJ Order at 28-30.) Reflecting on the interview nearly three years later, Osuna claimed alternately that he had a "gut feeling" that Hamdi was unemployed, and that a conversation with another officer led him to believe that Hamdi was unemployed (see id. at 28; FFCL ¶ 44). There is no evidence in the record, contemporaneous or otherwise, recording a conversation between Osuna and any other officer.

On the basis of that evidence, and not the Court's subsequent weighing of it, the Court cannot conclude that USCIS had a reasonable basis in fact for concluding that Hamdi lied about his current employment, and therefore claiming he lacked the good moral character necessary to naturalize. The Court's conclusion is bolstered by an additional fact: when Hamdi appealed USCIS's initial decision, its lengthier final decision made no mention at all of Hamdi's employment history as a basis for denying his application. See Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1134 (9th Cir. 2011) (noting that courts are not prohibited flatly from considering agency's preliminary determinations, though it is typical to review only agency's final decisions). It is to the reasons offered by USCIS in denying Hamdi's appeal to which the Court now turns.

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#### 4. Hamdi's Knowledge of BIF and Enaam Arnaout

When it denied Hamdi's appeal, USCIS claimed Hamdi contradicted himself regarding his knowledge of BIF and its chief executive officer, Enaam Arnaout. First, USCIS claimed, Hamdi "stated . . . [he] had no knowledge that the BIF had been involved in the financial support of terrorist groups and activities," and that he "denied knowledge of the fact that [Arnaout] had been arrested and indicted for terrorism related charges." (Ex. T to Helzer Decl.) Hamdi belied his own statement, according to USCIS, by then "reveal[ing]" that he was "aware that the BIF had been accused of financing terrorism" and that he also knew that "Arnaout had been . . . convicted of racketeering in 2003 . . . ." (Id.)

Like Osuna, Clark and Valdez failed to record the interview with Hamdi that formed the basis of the USCIS decision that followed it; nor did they take contemporaneous notes of the interview. Looking to the resulting decision only, the Court concludes that USCIS lacked a reasonable basis for its conclusion that Hamdi lied in the interview.

The substance of the decision gives lie to its conclusion, for it demonstrates no contradiction between Hamdi's initial statements and what he later "revealed." For example, one may both lack knowledge that a group financed terrorism and know, simultaneously, that the group had been accused of financing terrorism – if the two were equivalent, a juror who knew that a defendant had been accused of a crime would have nothing left to do to conclude that the accused committed the crime. Indeed, if Hamdi made both statements to Clark and Valdez, it would have been consistent with what he said when Caputo interviewed him years earlier, i.e., that he had "heard of allegations" against BIF, but "did not believe these charges were true." (Ex. B to Osuna Decl.)

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Likewise, knowing someone has been "arrested, indicted, tried and convicted of racketeering"<sup>8</sup> is not the same as knowing that person "has been arrested and indicted for terrorism related charges," unless, of course, all racketeers are terrorists or terrorist-related, but see, e.g., United States v. Pica, --- F.3d ---, 2012 WL 3289824, at \*1 (2d Cir. 2012) (affirming a racketeering charge predicated on extortion); United States v. Mouzone, --- F.3d ---, 2012 WL 3039215, at \*1 (4th Cir. 2012) (affirming a racketeering charge predicated on cocaine distribution); see generally 18 U.S.C. § 1961(1) (listing racketeering activities, including sports bribery, counterfeiting, embezzlement from pension funds, peddling obscene material, murder-for-hire, and trafficking in contraband cigarettes).

Given the illogic of the claim that Hamdi changed his story regarding what he knew about BIF and Arnaout, the Court concludes USCIS acted unreasonably in relying on that rationale to label Hamdi a liar so base as to be morally unworthy of citizenship.

#### **5. Hamdi's Aggregation of Funds for BIF**

Next, USCIS averred that Hamdi aggregated \$8,000 in donations from others in his bank account, and then donated the whole amount to BIF. It does not contend that Hamdi ever denied making those donations. What is unclear, then, is why this is a basis for alleging Hamdi testified falsely, and thus a basis for denying his application to naturalize. Nothing about this statement is alleged by anyone to be false, or to belie anything else Hamdi said. Accordingly, it provides no substantial justification for denying Hamdi's application.

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<sup>8</sup> It is worth noting that the racketeering activity of which Arnaout was convicted involved "conceal[ing] from donors, potential donors, and federal and state governments that a material portion of the donations received by BIF were being used to support soldiers overseas." United States v. Arnaout, 431 F.3d 994, 998 (7th Cir. 2005). (See FFCL ¶ 28.) When USCIS faulted Hamdi for claiming not to know that BIF was involved in financing terrorism, it faulted him for not knowing exactly that which Arnaout was convicted of concealing successfully.

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## **6. Hamdi's Failure to Make "Voluntary Mention" of BIF**

The final reason USCIS gave for denying Hamdi's application administratively was that his N-400 did not mention his affiliation with BIF, and he failed to volunteer that he was "associat[ed] or affiliat[ed]" with BIF in his interview with Clark and Valdez. USCIS alleges Hamdi made no "voluntary mention of the BIF" until he was shown a copy of the \$8,000 check, "which [he] admitted to having written and signed." (Ex. T to Helzer Decl.)

This rationale is no more persuasive when asserted as to the denial of Hamdi's appeal than it was when asserted as to the initial denial of his application. In fact, it is less persuasive, because in the interim Hamdi submitted a brief in which he admitted donating to BIF. (Ex. P to Helzer Decl.) Hamdi did not disclose BIF on his N-400, he wrote, because he saw no need to list BIF as an organization with which he was "associated" just because he made a charitable donation to it years earlier. For USCIS to fault Hamdi for failing to volunteer in his interview something he argued explicitly in his brief borders on frivolous. It makes no difference that Hamdi failed to mention orally what he had written previously, until Clark or Valdez gave him reason to mention it by asking about the \$8,000 check – which Hamdi then admitted to having written (as he had already, when Caputo interviewed him six years earlier).

In sum, throughout the administrative process, USCIS denied Hamdi's application to naturalize without a reasonable basis in law or fact, and thus did so without substantial justification. The Court therefore must consider USCIS's conduct in the litigation that followed.

## **B. USCIS Lacked a Substantial Justification to Litigate Against Hamdi in this Court**

After USCIS denied his application, Hamdi sought de novo review of his application in this Court; because of the scope of the Court's review, the parties were entitled to argue facts outside the meager administrative record assembled previously. See United States v. Hovsepian, 359 F.3d 1144, 1162 (9th Cir. 2004) ("[T]he district court has the final word and does not defer to any of [USCIS's] findings or conclusions." (emphasis omitted)); see also Chan v. Ganter, 464 F.3d 289, 291 (2d Cir. 2006) (citing Hovsepian, 349 F.3d at 1162); Aparicio v. Blakeway,

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302 F.3d 437, 445 (5th Cir. 2002) (holding that judicial review of naturalization "is not limited to any administrative record"). In these proceedings, USCIS advanced several bases on which it argued Hamdi failed to carry the burden of demonstrating his entitlement to citizenship, see Berenyi v. Dist. Dir., 385 U.S. 630, 637 (1967) (holding that the burden is on the applicant "to show his eligibility for citizenship in every respect"), and now argues that given that burden, under which "doubts 'should be resolved in favor of the United States,'" id. (quoting United States v. Macintosh, 283 U.S. 605, 626 (1931)), USCIS's litigation positions were reasonable ones. (See Opp'n at 10.)

As evidence of Hamdi's alleged lack of good moral character, USCIS offered four sets of facts about which it claimed Hamdi testified falsely in administrative proceedings, or which otherwise cast doubt on his good moral character. Though the Court does not defer to USCIS's administrative findings and conclusions, Hovsepian, 349 F.3d at 1162, evidence that Hamdi lied to USCIS during the administrative process would have been evidence of a failure of moral character the Court could consider in its review. See Kim v. United States, 121 F.3d 1269, 1272 (9th Cir. 1997) (reciting that in an appeal de novo from an administrative decision, the reviewing court may consider "any relevant evidence available . . . whether or not it has been previously submitted to the agency." (quoting Redmond v. United States, 507 F.2d 1007, 1011-12 (5th Cir. 1975))). First, in addition to relying on Hamdi's alleged failures to tell Osuna, Valdez, and Clark about BIF, USCIS contended Hamdi also failed to disclose to those interviewers his affiliation with Care. Second, although Hamdi wrote on his N-400 that his wife and children lived with him – and Osuna claimed that Hamdi confirmed that orally – in fact, USCIS argued, Hamdi's wife and children moved to Egypt in 2008. Third, USCIS also renewed its allegation that Hamdi lied to Osuna about his employment, adding, fourth, that Hamdi also had been investigated previously in San Joaquin County, California, for committing benefits fraud. To meet its burden under the EAJA, USCIS must show that it had a reasonable basis in fact and law for asserting each of these "defenses" to Hamdi's naturalization.

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### 1. Hamdi's Failure to Disclose Affiliations with BIF and Care

Before this Court, USCIS amplified its position regarding Hamdi's failure to disclose his alleged affiliation with BIF by claiming that Hamdi not only failed to mention such an affiliation, but actually denied having such an association when Osuna, Clark, and Valdez asked about it specifically. Further, USCIS argued, Hamdi also failed to mention his affiliation with Care.

As an initial matter, Hamdi's omission of Care from either his N-400 or from any testimony about his organizational affiliations is as weak a reason to doubt his moral character as was his omission of BIF: if Hamdi did not sully his moral character by failing to list BIF, he likewise did not do so by failing to list Care – a charity to which he (years prior) made a few donations and for which he performed a few other voluntary tasks (e.g., stuffing envelopes with mailers about zakat). (See FFCL ¶ 38.)

More substantial is the allegation that Hamdi not only omitted BIF from his N-400, but that he denied, orally, to Osuna, Clark, and Valdez, that he donated to it: at trial, Osuna testified that Hamdi denied ever having heard of BIF, let alone having donated to it. In his deposition as USCIS's Federal Rule of Civil Procedure 30(b)(6) witness, however, Osuna made no mention of such a lie, testifying that the only reasons USCIS believed Hamdi testified falsely about his relationship with BIF were that Hamdi "didn't reveal his association with BIF" on his N-400; that in his interview with Clark and Valdez he failed to "reveal that [association] initially;"<sup>9</sup> and that Hamdi claimed not to "kn[o]w a person by the name of Arn[a]out," but "it was later discovered in the hearing that he actually did know" Arnaout. (Ex. A to Helzer Decl. at 121:25-122:24.)

Osuna's malleable recollection of his interview with Hamdi, contrasted with Hamdi's clear recollection of it, in part drove the Court's conclusion that Osuna's testimony about the interview was not very credible. (See FFCL ¶ 32.) Moreover, in

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<sup>9</sup> Of course, as the Court noted above, Hamdi already admitted to donating to BIF, in writing, in a brief he filed with USCIS before his interview with Valdez and Clark.

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addition to their spotty recollections of one interview among the hundreds that took place months before Osuna, Valdez, and Clark testified either in their depositions or at trial, the Court had before it the decisions USCIS issued in connection with its denial of Hamdi's application. While the Court was not bound by USCIS's earlier findings of fact or its conclusions in undertaking a de novo review, the Court would have been remiss to overlook the agency's failure even to mention, when denying Hamdi's application, the outright mendacity its agents attributed to him months later. (See id. ¶ 32.)

Given the weakness of its evidence that Hamdi lied to USCIS about BIF or Care – and the requirement that if he lied, USCIS must show he did so for the subjective purpose of obtaining an immigration benefit, Kungys v. United States, 485 U.S. 759, 780 (1988) – the Court concludes that USCIS lacked a reasonable basis in fact to litigate the issue through trial. The Court does so with the recognition that the burden of proving Hamdi's good moral character fell, in the first instance, to Hamdi, and that USCIS did not bear the burden of proving Hamdi a liar. That said, if Hamdi needed to carry his burden by only a preponderance of the evidence, Hovsepian, 359 F.3d at 1168, for USCIS to oppose Hamdi's naturalization with such wan evidence that he lied about his relationships with BIF and Care was simply not reasonable.

## **2. The Whereabouts of Hamdi's Wife and Children**

USCIS then argued that Hamdi lied when, in November 2008, he confirmed verbally to Osuna that his wife and children lived with him, though they had flown to Egypt with one-way tickets several months earlier. This accusation troubled the Court particularly during the summary judgment proceedings, a fact USCIS takes to mean it had a substantial justification for making it. (See Opp'n at 11.) In the end, however, USCIS fails to demonstrate that it was justified substantially in arguing that Hamdi lacked good moral character because he lied about the whereabouts of his family.

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As a general matter, that a plaintiff's case barely survives a defendant's motion for summary judgment does not suggest much about on the merits of the defendant's case – or the plaintiff's. It could be, for example, that a plaintiff survives a motion for summary judgment by the slimmest margin, only to proceed to a trial in which additional evidence is introduced in the plaintiff's favor. If it later turns out the defendant knew of the additional evidence not adduced in opposition to the summary judgment motion but introduced at trial, and decided to litigate anyway, the defendant would be hard pressed to justify its decision to litigate against the plaintiff by reasons other than malice, or perhaps a calculated decision to play the odds.

But USCIS is not in the business of litigating simply because the odds are reasonable that its position might prevail, for there are many reasons why a government entity, like any other litigant, could prevail in court – whether or not its position has a basis in fact and law. Instead, USCIS is in the business of litigating when the odds are reasonable that its position is correct. See Pierce, 487 U.S. at 566 & n.2 (framing the "substantially justified" standard as "the standard for Government litigation of which a reasonable person would approve," and noting that although a position can be justified even if ultimately incorrect, it is justified substantially "if a reasonable person could think it correct" (emphasis added)). This is not to imply that USCIS litigated this case with an improper motive. The Court must judge, however, whether USCIS's position had a substantial justification based on all the evidence that USCIS had before it when it decided to fight the case, Gonzales, 408 F.3d at 620, and persisted in litigating it – not just the evidence and briefing that the parties put before the Court at summary judgment.

Thus, though the Court was skeptical at summary judgment that Hamdi could prove he had been truthful with USCIS about the whereabouts of his family, the totality of the evidence adduced at trial was sufficient to demonstrate that Hamdi did not lie about his family's trip to Egypt, and moreover, that USCIS never had a basis in fact to show that if he did, he did so for the purpose of obtaining an immigration benefit. The last point is important, for while USCIS had a reasonable basis in fact and law to assert Hamdi's family moved to Egypt, it lacked evidence that Hamdi lied about where they were, and had no evidence that if Hamdi did lie, he did so to obtain his citizenship.

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Hamdi's wife and daughters flew to Egypt on one-way tickets at the end of the 2008 school year to spend time learning about Hamdi's (and his daughters') heritage, and to visit Hamdi's ailing mother. (FFCL ¶ 15.) As the Court observed previously, however, the absence – even the extended absence – of Hamdi's family from his place of residence is by itself insufficient to demonstrate that the family no longer lived with Hamdi. (See MSJ Order at 24 (citing United States v. Jackson, 480 F.3d 1014, 1023-24 (9th Cir. 2007) (distinguishing between visitors to a place, and domiciliaries of a place, based on their intent to remain)).) Nevertheless, if USCIS were litigating only the question whether Hamdi's family moved to Egypt, evidence of their extended absence would be enough to provide a reasonable basis of law and fact for its position.

But USCIS's task was not to demonstrate that Hamdi's wife and daughters moved to Egypt; instead, its task was to demonstrate that Hamdi lied about where his family lived at the time of his interview with Osuna, and if so, whether he did so because he thought it would help him gain his citizenship. At best, USCIS had evidence that Hamdi told Osuna, in November, that his family's "current address" was with him, a response Osuna recorded only by making a check mark on Hamdi's N-400. USCIS claimed that Osuna's actual question to Hamdi sought something more nuanced than his family's mailing address, but there is no credible evidence of what that question might have been. Osuna's failure (and Clark's and Valdez's) to record Hamdi's interviews, or even to take notes more thorough than a few check marks on Hamdi's N-400, left USCIS without a reasonable basis in fact to argue Hamdi lied about his family's residence (among other things). (See FFCL ¶¶ 17-21.) Further, even if Hamdi answered a question about his family's residence misleadingly, USCIS lacked any evidence he did so for the purpose of obtaining an immigration benefit. (See FFCL ¶ 22.)

### **3. Hamdi's Employment History**

At trial, USCIS again raised the issue of Hamdi's employment history, claiming he misrepresented it to Osuna. The Court dispensed with this line of argument briefly in its Findings of Fact and Conclusions of Law (see FFCL ¶¶ 42-45), and can do so again here. USCIS's case that Hamdi lied to Osuna about whether he was employed at the time of the interview was based solely on Osuna's recollection that Hamdi told him he still worked at Harris & Associates, the firm that laid him off

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shortly before his interview with Osuna.

Hamdi claims he told Osuna he had been laid off. The N-400 that Osuna marked contemporaneously with the interview reveals only one mark in the section about Hamdi's employment, even though Osuna testified he had other questions regarding gaps in Hamdi's employment – and a "gut feeling" that Hamdi was lying. Meanwhile, shortly after his interview, Hamdi was hired by another firm (the firm that USCIS later accused Hamdi of failing to disclose, never mind that it had yet to hire him). Given the paucity of the evidence it had to dispute Hamdi's employment history, USCIS lacked a reasonable basis in fact for pursuing the argument that Hamdi lied to Osuna about it.

#### **4. Hamdi's Receipt of Public Benefits**

Finally, USCIS raised the issue of Hamdi's withdrawn application for public benefits. Several years ago Hamdi lost his job, and the family applied for public assistance. They also received financial assistance from friends and family, and the San Joaquin County District Attorney (Hamdi's family was then living in Stockton, California) required them to disclose that assistance, lest they be investigated or prosecuted for benefits fraud. They declined to disclose the names, and instead withdrew the application for benefits. There is no evidence that in doing this, Hamdi was dishonest with anyone. Accordingly, the Court cannot find that this episode provided USCIS with a reasonable basis in fact to claim Hamdi lacked good moral character.

USCIS did not demonstrate Hamdi lacked the good moral character to naturalize in its administrative proceedings, nor did it do so at trial. More importantly, for the purpose of deciding Hamdi's instant Motion, USCIS had no reasonable basis in fact or law to make the argument that Hamdi lacked the good moral character to naturalize. Without that substantial justification for its position both in this litigation and in the underlying administrative proceedings, USCIS either must show special circumstances exist that would make a fee award unjust, or pay Hamdi's costs and attorneys' fees under the EAJA.

#### **C. There Are No Special Circumstances Counseling Against a Fee Award**

The argument that there are special circumstances counseling against a fee

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award is an afterthought in USCIS's Opposition, perhaps because there is no meaningful standard for finding such circumstances exist. Notwithstanding the brevity of the argument, the special circumstances USCIS invokes are really the crux of this entire case: USCIS argues that it made "an effort to vigorously enforce the law . . . to protect national security where there might have been potential danger." (Opp'n at 12.)

USCIS prosecuted this case vigorously because the man seeking to naturalize donated money to charitable organizations that were, after he donated to them, found to be financing terrorism. Hamdi's donations, before the fact, were not themselves culpable acts, as suspicious as they may appear in hindsight. Since USCIS could not dispel the shadow of guilt those donations cast on Hamdi, however, it looked for other reasons to deny him United States citizenship. That is not disputed; USCIS admits as much in its Opposition.<sup>10</sup> (Opp'n at 12.)

That USCIS denied Hamdi's citizenship on pretextual grounds is not to say, necessarily, that it acted wrongfully in doing so – as long as the pretextual grounds on which it based the denial actually existed. Cf. Whren v. United States, 517 U.S. 806, 811-13 (1996). The problem here is that the evidence for the pretextual grounds on which USCIS denied Hamdi's citizenship was so thin as to make its case unsupportable in fact and law, as the Court determined above.

Furthermore, although the burden was on Hamdi to demonstrate his eligibility for citizenship, that does not mean that USCIS could render Hamdi's burden impossible to carry by suggesting, with gossamer evidence, that Hamdi lied about his donations to BIF, or the whereabouts of his family. Before this Court, Hamdi demonstrated the requisite criteria for naturalization, and the Court granted him his

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<sup>10</sup> USCIS argues "it was reasonable for the Government to withhold the granting of Hamdi's naturalization to allow for a more complete factual inquiry administratively and during this litigation." (Opp'n at 12.) There is no indication, however, that such an inquiry was made. The FBI questioned Hamdi about his donations to BIF in January 2003. The trial of this case occurred in February 2012. (See Ex. B to Osuna Decl.)

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United States citizenship. USCIS failed to show that it opposed Hamdi's naturalization, in both its administrative proceedings and before this Court, with a reasonable basis in fact and law. Nor did USCIS show that special circumstances would make a fee award unjust. Accordingly, the Court GRANTS Hamdi's Motion, and turns to the question of the amount of the fees and costs to which he is entitled.

**D. Hamdi is Entitled to Fees, Capped at the Statutory Limit**

Hamdi argues his counsel, Mr. Arulanantham, Ms. Helzer, and Ms. Pasquarella, are entitled to fees in excess of the EAJA's inflation-adjusted limit, because they are "specialists in constitutional immigrants' rights litigation." (Mot. at 21.) The Court has no reason to doubt the expertise of Mr. Arulanantham, who has litigated a variety of cases of constitutional import in this judicial district and circuit, or that of Ms. Helzer and Ms. Pasquarella, who acquitted themselves admirably in this matter.

The Court does, however, doubt that this case required such specialization. While de novo proceedings under 8 U.S.C. § 1421(c) may be rare, that does not mean they require special expertise to litigate. Stripped of all the national security innuendo, this case required counsel to demonstrate that Hamdi had the good moral character necessary to naturalize – a task accomplished with relative ease – and that USCIS's assertions to the contrary were based on flimsy evidence. Contrary to Hamdi's assertion, that does not require the same level of specialization as, e.g., Mr. Arulanantham's litigation of immigration detention issues, which deal with a nuanced, lengthy, and slightly archaic jurisprudence. See, e.g., Clark v. Martinez, 543 U.S. 371 (2005); Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001); Leng May Ma v. Barber, 357 U.S. 185 (1958); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Shaughnessy v. United States ex rel. Knauff, 338 U.S. 537 (1950); Kaplan v. Tod, 267 U.S. 228 (1924); Ekiu v. United States, 142 U.S. 651 (1892); Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006). This case involved the straightforward application of a couple of statutory provisions and a handful of regulations promulgated to effect the application of those provisions.

After completing an evaluation for reasonableness of the bills submitted by Hamdi's counsel, the Court will award fees and costs subject to the EAJA's cap on

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hourly rates, adjusted in accordance with Thangaraja v. Gonzales, 428 F.3d 870, 876-77 (9th Cir. 2005). To assist the Court's determination, counsel for USCIS is directed to submit in writing, not later than September 24, 2012, objections to Hamdi's counsels' fees, in the form set out in the example appended to this Order. Hamdi's counsel may respond in writing to USCIS's objections, not later than October 8, 2012.

#### **IV. CONCLUSION**

For the foregoing reasons, Hamdi's Motion for Attorneys' Fees is GRANTED; fees and costs will be awarded, subject to the hourly rate limit established in the EAJA and the Court's evaluation of the reasonableness of the time devoted to various tasks connected with this litigation.

**IT IS SO ORDERED.**

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**APPENDIX**

Atty	Date	Description	Time at Issue	Reduce By	Objection	Reason for Objection
XYZ	8/28/2012	T/c with consultant	6.0	3.0	Vague	Fails to articulate with whom the attorney consulted and the subject of the consultation
ABC	8/27/2012	Prepare "Notice of Related Cases"	3.0	2.9	Excessive	"Notice of Related Cases" is a form document