

§ 16.106

control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares of another business, or controls, *in any manner*, the election of a majority of that business' board of directors, trustees or other persons exercising similar functions, shall be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 63021, Dec. 29, 1981, as amended at 72 FR 37098, July 9, 2007]

§ 16.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Department as a party over which the applicant has prevailed was substantially justified or if special circumstances make the award sought unjust. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 16.107 Allowable fees and expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

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(2) Reasonable cost of any study, analysis, engineering report, test, or project necessary for the preparation of the party's case;

(3) Reasonable attorney or agent fees;

(b) Awards will be based on the prevailing market rates for the kind and quality of services furnished not to exceed the rates set forth in paragraph (c) of this section.

(c) No award under these rules for the fee of an attorney or agent may exceed \$125.00 per hour. No award to compensate an expert witness may exceed \$24.09 per hour.

(d) In determining the reasonableness of the fee sought, the adjudicative officer shall consider the following:

(1) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(2) The time actually spent in the representation of the applicant;

(3) The difficulty or complexity of the issues in the proceeding;

(4) Such other factors as may bear on the value of the services performed.

[46 FR 63021, Dec. 29, 1981, as amended at 72 FR 37098, July 9, 2007]

§ 16.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the Department of Labor and the other agency takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency by the adjudicative officer for the Department of Labor.

Subpart B—Information Required From Applicants

§ 16.201 Contents of application.

(a) An application for an award of fees and expenses under the Act 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 an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless

the applicant is an individual, the application shall also state the number of employees of the applicant at the time the proceeding was instituted and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth at the time the formal proceedings were instituted did not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the application shall certify that it did not have more than 500 employees at the time the formal proceedings were initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall state the amount of fees and expenses for which an award is sought.

(e) The application may also include any other matters that the applicant wishes the adjudicative officer to consider in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information

provided in the application is true and correct.

(Approved by the Office of Management and Budget under control number 1225-0013)

[46 FR 63021, Dec. 29, 1981, as amended at 47 FR 14696, Apr. 6, 1982]

§ 16.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §16.105(f) of this part) as of the date when the proceeding was initiated, i.e. the date the complaint was filed. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) The net worth exhibit shall be included in the public record of the proceeding in which an award is sought.

(Approved by the Office of Management and Budget under control number 1225-0013)

[46 FR 63021, Dec. 29, 1981, as amended at 47 FR 14696, Apr. 6, 1982]

§ 16.203 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought.

(b) The document shall include an affidavit from each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided.

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(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(Approved by the Office of Management and Budget under control number 1225-0013)

[46 FR 63021, Dec. 29, 1981, as amended at 47 FR 14696, Apr. 6, 1982]

§ 16.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, matters related to the consideration of an award of fees and expenses shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule final disposition means the later of:

(1) The date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer or intermediate re-

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view board becomes administratively final;

(2) Issuance of an order disposing of any petitions for reconsideration of this agency's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or

(4) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration, or, in the case of an abatement, the end of the abatement period or the date on which an order is issued terminating the abatement period.

(Approved by the Office of Management and Budget under control number 1225-0013)

[46 FR 63021, Dec. 29, 1981, as amended at 47 FR 14696, Apr. 6, 1982]

Subpart C—Procedures for Considering Applications

§ 16.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed with the adjudicative officer and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 16.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30 day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer