UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PETTENGILL FAMILY RESTORATION, LLC, Respondent.	Docket Nos. 23-1249, 23-1380, 23-1656 & 24-0353 (Consolidated)

Appearances:

Quinlan Moll & Megan McGinnis, U.S. Department of Labor, Office of the Solicitor, Kansas City, MO
For Complainant

John Bragg, The Law Office of John C. Bragg, P.C., Independence, MO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER ON EAJA APPLICATION

On April 22, 2025, the Court issued a *Decision and Order* vacating four Citations issued to Respondent in these matters. Now, Respondent has filed an *Application for an Award of Attorney's Fees* (*Application for Fees*), pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA) and the Commission's Rules Implementing EAJA, 29 C.F.R. § 2204.101 *et seq*. The Secretary filed her *Answer to Application* on June 6, 2025, arguing that Respondent failed to establish eligibility for attorney's fees under EAJA and that the enforcement actions were substantially justified. Respondent filed a *Reply* on June 23, 2025.

Upon due consideration, Respondent's *Application for Fees* is DENIED.

Background

Respondent was a construction company that specialized in framing panelized or "kit" houses. It was hired as a subcontractor for Framing Specialists, Inc., to assemble these houses. Framing Specialists would deliver the plans and materials for the kit houses to jobsites, and Respondent would provide workers who could assemble them.

On four separate occasions between January 11, 2023 and October 3, 2023, Compliance Safety and Health Officers (CSHOs) from the Occupational Safety and Health Administration (OSHA) observed safety violations at worksites where Respondent's workers were assembling the kit houses. Each instance resulted in an inspection, and OSHA ultimately issued four *Citations and Notifications of Penalty*, alleging multiple serious and repeat-serious violations, with proposed penalties of $78,701, collectively. Each of those Citations identified Respondent as the employer of the workers onsite.

Respondent timely contested the Citations, arguing that it was not the employer of the workers, but rather, the workers were independent contractors. Following a trial, the Court issued a *Decision and Order* applying the employment factors laid out by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The Court concluded that, on balance, most of the *Darden* factors counted in favor of the workers being independent contractors, not employees. Because the Secretary failed to meet her burden of proof, the Court vacated all four Citations. Then, as the prevailing party, Respondent filed the instant *Application for Fees*.

Discussion

"The EAJA entitles a prevailing party meeting eligibility criteria to an award for fees and other expenses incurred in connection with an adversarial proceeding, unless the Secretary was substantially justified or special circumstances make an award unjust." *Salco Constr., Inc*., No.

05-1145, 2007 WL 2127304, at *2 (OSHRC, July 18, 2007) (citing 5 U.S.C. § 504(a)(1), (b)(1); 29 C.F.R. § 2204.106). The Secretary's position is "substantially justified if it has a reasonable basis in both law and fact." *Joseph Watson, d/b/a Joseph Watson Masonry*, No. 00-1726, 2006 WL 2641337, at *2 (OSHRC, Sept. 6, 2006) (citing *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)). In other words, the Secretary's position must be "justified to a degree that could satisfy a reasonable person." *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d. 321, 325 (D.C. Cir. 2004).

Eligibility Criteria

The party applying for attorney's fees and expenses under EAJA must first meet established eligibility requirements. *See* 29 C.F.R. § 2204.301 (setting forth EAJA application requirements). "An EAJA applicant must make a three-part showing in order to establish that it is a qualified party under the EAJA: It must show that (1) its net worth was less than $7 million at the time the action was filed; (2) it did not have in its employ more than 500 persons at the time the action was filed; and (3) it was the prevailing party in the underlying action." *Al Ghanim Combined Grp. Co. Gen. Trad. & Cont. W.L.L. v. United States*, 67 Fed. Cl. 494, 496 (2005); *see also Scarborough v Principi*, 541 U.S. 401, 408 (2004) (setting forth the burden of proof for EAJA applicants).

Under Commission rules, the applying party must "provide with its application a detailed exhibit showing the net worth of the applicant . . . when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies . . . ." 29 C.F.R. § 2204.302(a). In cases before the Commission, a proceeding is initiated when the employer files a notice of contest. 29 C.F.R. § 2200.33.

Here, Respondent is the prevailing party. The Court ruled in Respondent's favor and vacated the Citations. In addition, there is evidence in the record that Respondent had fewer than 500 employees. (*See, e.g.,* Ex. C-25 at 1 (Violation Worksheet assessing a 70% reduction in penalty due to size (number of employees)). However, Respondent's application failed to present sufficient evidence that its net worth did not exceed $7,000,000 at the time the first notice of contest was filed on August 1, 2023. Specifically, Respondent submitted a "Profit or Loss from Business" tax form for 2022, the year before the notices of contest were filed. In Respondent's *Reply* on this issue, it argues that "[a] net worth in 2022 of less than $500,000 would in no way conclude it would have increased to over $7,000,000 in 2023 and 2024. Common sense would not conclude such a result." Moreover, Respondent did not include any other financial information, such as any assets it owned or any liabilities it had.

This failure to provide the Court with the required net worth information renders Respondent's application deficient. *Asphalt Supply & Serv., Inc. v. United States*, 75 Fed. Cl. 598, 601 (2007); *see also Al Ghanim Combined Group Co. v. United States*, 67 Fed. Cl. at 496 ("Failure to submit documentation of plaintiff's net worth, for the purpose of determining whether plaintiff qualifies for an award under EAJA, renders an application deficient."); *see also Wildcat Renovation, LLC*, No. 21-0387, 2023 WL 8599388, at *2-3 (OSHRCALJ, Oct. 27, 2023) (finding the respondent's EAJA application deficient where it submitted self-serving affidavits and balance sheets without evidence that the financial documents were kept in the ordinary course of business). On that basis alone, the Court would deny Respondent's *Application for Fees*. Nevertheless, the Court will evaluate whether the Secretary met her burden of proving these actions were substantially justified.

Substantial Justification

Once an eligible applicant establishes that it is the prevailing party, the Secretary bears the burden of establishing that her position was substantially justified. *Joseph Watson,* 2006 WL 2641337, at *2; *see also C.J. Hughes Constr. Inc.*, No. 93-3177, 2001 WL 1646523, at *4 (OSHRC, Dec. 20, 2001) ("The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact."). To prevail, the Secretary must show that (1) there exists a reasonable basis for the facts alleged, (2) there exists a reasonable basis in law for the theory she propounds, and (3) the facts alleged reasonably support the legal theory. *Joseph Watson*, 2006 WL 2641337, at *2.

Here, the record shows that OSHA, in the course of its investigations, learned that Respondent normally had a set pool of workers (Zachery Pettengill, Tyler Pettengill, Chase Good, Kenneth Puckett, and Jason Hoff) that it used for most construction jobs. Some of those workers, including Zachery Pettengill, had worked for Respondent and its predecessor for a lengthy period of time under independent contractor agreements of infinite duration. Additionally, at one of the inspections, Zachery Pettengill initially told the CSHO that he was Respondent's site "lead." And, Respondent's owner called Zachery Pettengill her "go to" guy. These facts could reasonably support OSHA's understanding of the relationship as one of employer and employee/supervisor. Even though the totality of circumstances in the record favored independent contractor status for Zachery Pettingill and other workers, evidence existed to reasonably support an argument that knowledge of violative conditions could have been imputed through him to Respondent.

Ultimately, upon review of the entire record, the Court concluded that the degree of Respondent's control over the workers, which is the primary focus of the Court's analysis under *Darden*, favored independent contractor status. However, one factor weighed only slightly in favor

of independent contractor status (skill required), and two others favored an employer/employee relationship (duration of relationship, whether the work was part of the regular business of Respondent). The Court's analysis of the *Darden* factors was close in many instances. Complainant simply failed to establish the factors by a preponderance of the evidence. There certainly were indicators in the record of a possible employee/employer relationship between Respondent and its workers, both in fact and law. The Court finds that there existed a reasonable basis for the legal theory pursued by the Secretary in these cases. *Joseph Watson*, 2006 WL 2641337, at *2 ("The fact that the Secretary lost her case does not automatically mean that her position lacked substantial justification within the meaning of the EAJA."). The Secretary's position was thus substantially justified. An award under the EAJA is not appropriate.

Conclusion

As noted above, Respondent failed to meet its burden to establish it was eligible for an award under the EAJA. Moreover, the Secretary met her burden to show that the Citations issued in these matters were substantially justified. Accordingly, Respondent is not entitled to recover attorney's fees or costs.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's *Application for an Award of Attorney's Fees* is DENIED.

SO ORDERED.

/s/ Brian A. Duncan

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: July 7, 2025
Denver, Colorado