

(vi) Civil money penalties under the Migrant and Seasonal Agricultural Worker Protection Act at 29 U.S.C. 1853(b) and 29 CFR 500.200.

(3) Office of Federal Contract Compliance Programs, Employment Standards Administration hearings prior to the denial, withholding, termination or suspension of a government contract or any portion of a contract under title VII of the Civil Rights Act of 1964, as amended, at 42 U.S.C. 2000e-17 and 41 CFR part 60-30.

(4) Office of Civil Rights:

(i) Fund termination under title VI of the Civil Rights Act at 42 U.S.C. 2000d2 and 29 CFR part 31.

(ii) Fund termination under the Age Discrimination in Federally Assisted Programs Act of 1975 at 42 U.S.C. 6104(a).

(iii) Fund termination or refusal to grant because of discrimination under 20 U.S.C. 1682.

(5) Employment and Training Administration:

(i) Proceedings under the Comprehensive Employment and Training Act at 29 U.S.C. 818, where the Department determines that a recipient of CETA funds is failing to comply with the requirements of the Act and the implementing regulations.

(ii) Conformity and compliance under the Federal Unemployment Tax Act at 26 U.S.C. 3303(b) and 3304(c).

(iii) Proceedings under section 303(b) of the Social Security Act of 1935, as amended, 42 U.S.C. 503(b).

(6) Mine Safety and Health Administration:

(i) Petitions for modification of a mandatory safety standard under the Mine Safety and Health Act at 30 U.S.C. 811(c) and 30 CFR 44.20.

(7) Occupational Safety and Health Administration:

(i) Exemptions, tolerances and variances under the Occupational Safety and Health Act at 29 U.S.C. 655 and 29 CFR 1905.3.

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to the covered issues.

[46 FR 63021, Dec. 29, 1981, as amended at 48 FR 43322, Sept. 23, 1983]

#### § 16.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party, as that term is defined in 5 U.S.C. 551(3), to an adversary adjudication for which it seeks an award; the applicant must prevail; and must meet all the conditions of eligibility set out in this subpart and subpart B.

(b) To be eligible for an award, the applicant must be:

(1) An individual with a net worth of not more than \$1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(5) Any other partnership, corporation, association or public or private organization with a net worth of not more than \$5 million and not more than 500 employees. A unit of state or local government is not a public organization within the meaning of this provision.

(c) For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who perform services for remuneration for the applicant, under the applicant's direction and 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

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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.

### § 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;

(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.

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(c) No award under these rules for the fee of an attorney or agent may exceed \$75.00 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.

### § 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