

## § 16.106

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.

## 29 CFR Subtitle A (7-1-06 Edition)

(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