IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DR. MARK SAPIR and DR. OLGA SAPIR, Plaintiffs, v. JOHN ASCHCROFT, Attorney General, and EDUARDO AGUIRRE, Acting Director of the Bureau of Citizenship and Immigration (BCIS), Defendans.	)	Case No. 3:03-0326 Judge Trauger

MEMORANDUM and ORDER

Plaintiffs have moved the court to enter an order declaring them prevailing parties in this action to compel the defendants to adjudicate the plaintiffs' applications for naturalization. (Docket No. 20) Defendants oppose the motion on the grounds that plaintiffs' action was mooted when they were sworn in as United States citizens on July 25, 2003.

Background

In 1994, plaintiffs became lawful permanent residents of the United States. On August 16, 1999, after living in the United States for five years, as required by the Immigration and Naturalization Act, 8 U.S.C.A. § 1427(a), the plaintiffs submitted applications to become naturalized citizens to the Immigration and Naturalization Service (now the BCIS). Plaintiffs were granted naturalization interviews on February 20, 2002, which should have cleared the way for approval of their applications. However, BCIS failed to timely adjudicate the plaintiffs' applications. Finally, on April 14, 2003, plaintiffs filed the instant action requesting that the

[1] This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a). FRCP, on 8/14/03 By KM

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court compel the defendants to adjudicate plaintiffs' naturalization applications. (Docket No. 1) On June 13, 2003, plaintiffs filed a Petition for a Hearing on Naturalization Application Under 8 U.S.C. § 1447(b).

On June 16, 1003, Dr. Olga Sapir was notified that she had been approved for naturalization and that she was scheduled to take the oath of citizenship on July 25, 2003. The court was advised of this development at the initial case management conference held on July 11, 2003. The court was further advised that Dr. Mark Sapir's naturalization application remained pending.

Based upon the information received at the initial case management conference, the court determined that the BCIS had inordinately delayed adjudication of Dr. Mark Sapir's naturalization application and granted his Motion for a Hearing on Naturalization. Accordingly, the court entered an Order on July 14, 2003, notifying the parties that, pursuant to 8 U.S.C.A. 1447(b), it would conduct a hearing on August 21, 2003, and that, "At this hearing, the court will either adjudicate the application for naturalization pending for Dr. Mark Sapir or remand it to the Bureau of Citizenship and Immigration Services for immediate processing." (Docket No. 18) On July 21, 2003, BCIS informed Dr. Mark Sapir that he had been approved for naturalization and that he was scheduled to take the oath of citizenship on July 25, 2003, at the same time as his wife.

Plaintiffs now request that the court enter an order designating them prevailing parties, a prerequisite to obtaining attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The government objects to plaintiffs' request on the grounds that it is premature, given the government's outstanding motion to dismiss this case as moot and the lack of a final

judgment. (Docket No. 26)[1]

Analysis

As both sides in this litigation recognize, an award of attorney's fees may be made under the EAJA only to a "prevailing party" and then only after a final judgment has been entered terminating the litigation. Thus, to the extent that plaintiffs' motion to be designated prevailing parties could be deemed a concurrent request for attorney's fees, it was premature at the time it was filed, as the government argues. However, the court does not construe plaintiffs' motion to concurrently request attorney's fees. Instead, plaintiffs desire a determination of their status as prevailing parties so that they may be entitled to submit a request for attorney's fees upon termination of this litigation.

The determination of whether plaintiffs qualify as prevailing parties must be guided by the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)), notwithstanding plaintiffs' arguments to the contrary.[2] Indeed, the Sixth Circuit has explicitly stated:

> Although *Buckhannon* involved the award of attorneys fees under a different statute than is at issue here, the Court expressly stated that all statutes-including

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[1] By Order entered August 7, 2003, the Motion to Dismiss (Docket No. 11) was denied as moot. (Docket No. 31)

[2] The lone case plaintiffs cite on this issue, *Loggerhead Turtle v. County Council of Volusia*, 307 F.3d 1318 (11th Cir. 2002), involved a statute that allowed attorney's fees to be awarded "whenever the court determines such award is appropriate," rather than a statute such as the EAJA that allows attorney's fees to be awarded only to a prevailing party. Accordingly, it is inapposite. And while Congress may be considering legislation that would allow attorney's fees to be awarded under the EAJA under a catalyst theory, that legislation is still pending. Until it is enacted into law, it can have no bearing upon the court's duty to follow Supreme Court and Sixth Circuit precedent.

> § 1988 that authorize attorney's fees to the "prevailing party" are to be treated consistently.

Chambers v. Ohio Dept. of Human Services, 273 F.3d 690, 693 n.1 (6th Cir. 2001) (citing *Buckhannon*, 532 U.S. 598, 121 S.Ct. at 1839 n. 4, 149 L.Ed.2d 855). As the Court more fully explained:

> The Supreme Court's recent opinion in *Buckhannon Bd. and Care Home, Inc. v. W.V. Dep't of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) has made clear that, to "prevail," the party must have obtained a change in the legal relationship of the parties that originated in a court order or that had at least received judicial sanction. The catalyst theory of success thus is no longer a permissible basis for awarding attorneys fees.

Chambers, 273 F.3d at 691. Typical examples of judicially sanctioned change in the relationship of parties sufficiently bearing the court's imprimatur are a judgment on the merits and a court-ordered consent decree. *See Buckhannon*, 532 U.S. at 604. However, the Sixth Circuit has recognized that interlocutory court orders that result in limited relief for the moving party may also qualify the movant as a prevailing party under *Buckhannon*. *See, e.g., Habich v. City of Dearborn*, 331 F.3d 524, 534-35 (6th Cir. 2003); *Dubuc v. Green Oak Township*, 312 F.3d 736, 753 (6th Cir. 2002). *Cf. Former Employees of Motorola Ceramic Products v. United States*, --- F.3d ----, 2003 WL 21707156, (Fed. Cir. July 24, 2003) (plaintiffs securing remand to administrative agency due to agency error may be deemed prevailing parties).

Applying the foregoing principles to the facts of this case, the court finds that only Dr. Mark Sapir may be deemed a prevailing party under *Buckhannon*. That is because the court's decision to grant his Motion for a Hearing on Naturalization amounted to a decision that his naturalization application had been wrongfully delayed and that he was entitled under the Immigration and Naturalization Act to a prompt decision on his application. The court set the matter for hearing as soon as practicable, given the court's calendar. BCIS then preempted the

hearing by expediting processing of Dr. Mark Sapir's application. However, it is clear to the court that BCIS's action was due to the court's granting the hearing, rather than simple initiation of the instant suit. Thus, the court finds that Dr. Mark Sapir qualifies as a prevailing party as to his Motion for a Hearing on Naturalization.

On the other hand, BCIS's decision to expedite processing of Dr. Olga Sapir's naturalization application occurred before the court ruled on the plaintiffs' Motion for a Hearing on Naturalization. At the time that Dr. Olga Sapir's naturalization application was approved, the court had not yet made any determination on whether her application had been wrongfully delayed. Thus, BCIS's action on her application cannot be said to bear the imprimatur of the court or be deemed to be the result of any sort of court-sanctioned change in the legal relations of the parties. Accordingly, Dr. Olga Sapir does not qualify as a prevailing party under the guidelines set forth in *Buckhannon*.

Conclusion

For the foregoing reasons, plaintiffs' Request for Order (Docket No. 20) is hereby GRANTED in part and DENIED in part. Dr. Mark Sapir is declared a prevailing party as to his Motion for a Hearing on Naturalization. However, the court finds that Dr. Olga Sapir does not qualify as a prevailing party. Counsel for Dr. Mark Sapir shall submit itemized time records and an affidavit supporting her motion for fees. Any opposition shall be filed within ten days of the filing of the motion.

It is so ORDERED.

Enter this the 13th day of August, 2003.

ALETA A. TRAUGER
United States District Judge