

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BENJAMIN LIZARDI,

Petitioner,

v.

ROBERT M. WILKINSON, Acting
Attorney General,

Respondent.

No. 18-72576

Agency No.
A205-530-611

ORDER

Filed February 9, 2021

Before: Sidney R. Thomas, Chief Judge, and Mary M.
Schroeder and Marsha S. Berzon, Circuit Judges.

Order

SUMMARY*

Attorney's Fees

The panel denied respondent's motion to stay proceedings, and granted respondent's motion for an extension of time to respond to petitioner Benjamin Lizardi's motion for attorney's fees. The panel wrote that Lizardi's motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(B), was not premature, explaining that under the EAJA, the deadline to file for attorney's fees is 30 days after a final judgment—that is, 30 days after the date when a petition for a writ of certiorari would be untimely. The panel wrote that a party need not wait until the judgment is final to move for attorney's fees, and concluded that Lizardi's motion was timely because he had already “prevailed.” To receive an extension of time to respond to an attorney's fees motion based on the deadline for seeking certiorari, the panel advised that the government should indicate that it is actually contemplating filing a petition for a writ of certiorari. As there was no such indication here, the panel granted a more limited extension.

COUNSEL

Rodrigo I. Canido, LORIC Law Firm, Mountain View, California, for Petitioner.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Jeffrey Bossert Clark, Acting Assistant Attorney General; Keith I. McManus, Assistant Director; Rosanne M. Perry, Trial Attorney; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

ORDER

The respondent's motion to stay proceedings is **DENIED**. The respondent's motion for an extension of time to respond to petitioner Lizardi's motion for attorney's fees is **GRANTED**. The response to the motion for fees is due February 25, 2021.

Lizardi's motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(B), is not premature. Although judgment is not yet final in this case until the time to seek certiorari expires, *Zheng v. Ashcroft*, 383 F.3d 919, 920 (9th Cir. 2004), Lizardi's motion is nonetheless timely because he has already "prevailed," *Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 779 F.2d 1391, 1393 (9th Cir. 1986). The EAJA grants parties a 120-day clock to file for attorney's fees after the filing of a disposition, not a 30-day clock beginning after the certiorari deadline passes. *See Zheng*, 383 F.3d at 920–21; *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007).

To receive an extension of time to respond to an attorney's fees motion based on the deadline for seeking certiorari, the government should indicate that it is actually contemplating filing a petition for a writ of certiorari. As there is no such indication here, we grant a more limited extension.