

## 29 C.F.R. § 2204.405

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### Further proceedings.

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(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or the Secretary, or on his or her own initiative, the judge presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than whether the agency's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the Secretary was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

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