

COUNSEL

Brent W. Renison, Parker, Bush & Lane, P.C., Portland, Oregon, for the plaintiff-appellant.

Craig J. Casey, Assistant United States Attorney, Portland, Oregon, for the defendants-appellees.

OPINION

GOULD, Circuit Judge:

Jose Perez-Arellano appeals the district court's denial of his petition for attorney's fees and costs under the Equal Access

the DUI that had occurred more than two decades earlier. The District Adjudications Officer requested that Perez-Arellano submit court-certified copies of his 1977 conviction for drunk driving. Perez-Arellano submitted that disposition to the INS. It indicated that Perez-Arellano was required to pay a \$375 fine, to be paid at \$40 per month. Perez-Arellano did not pay the fine until May 4, 1999, twenty-one years after the conviction and one week after his appeal hearing with the INS. The INS upheld the denial of naturalization on appeal, for lack of good moral character.

[2] Although the parties do not address whether Perez-Arellano was a "prevailing party" for purposes of an award under the statute, a recent Supreme Court case calls into question Perez-Arellano's "prevailing party" status.¹ The United States Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 1838 (2001), holds that a "party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct " is **not** a "prevailing party" under federal statutes allowing courts to award attorney's fees and costs to the "prevailing party."

In Buckhannon

based on the merits of the claim. Id. The latter is acceptable -- even without an admission of liability -- because it is a "court-ordered `chang[e] [in] the legal relationship' " between the parties. Id. (quoting Tex. State Teachers Ass'n, 489 U.S. at 792).

The dispositive issue here is whether we should apply the

tion marks omitted).

Here, the panel did not litigate to judgment the initial federal court action seeking review of the INS' denial of Perez-Arellano's 1997 application for naturalization. The action was held in abeyance by the court upon agreement of counsel. During the period while the action was deferred,

