

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

N-N-,

Petitioner,

v.

BRIAN MCSHANE, et al.

Respondents.

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CIVIL NO. 25-5494

ORDER

AND NOW, this ___ day of _____, 2026, upon consideration of Respondents' Response to Petitioner's Motion for Attorneys' Fees, it is ORDERED that the Motion is DENIED.

BY THE COURT:

HONORABLE KAI N. SCOTT
Judge, United States District Court

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| <i>Petitioner,</i> | : | |
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| | : | |
| <i>Respondents.</i> | : | |

**RESPONDENTS’ MEMORANDUM REGARDING PETITIONER’S
ATTORNEYS’ FEES**

Respondents submit this brief in opposition to petitioner N-N-’s petition for attorneys’ fees and costs. (Doc. No. 20). Attorneys’ fees are not available pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), because the respondents’ position—although rejected by this Court —was “substantially justified” under EAJA. In the alternative, even if this Court were to find Petitioner is entitled to EAJA fees, the demand of \$38,000 is excessive and unreasonable. Respondents respectfully ask that this Court determine that attorneys’ fees under EAJA are not warranted here, or, in the alternative, reduce the amount of attorneys’ fees to a reasonable figure.

I. Relevant Factual and Procedural History

Petitioner N-N- is a native and citizen of Nigeria. He entered the United States on a K1 visa on December 3, 2024, with authorization to remain until March 2, 2025. N-N- remained in the United States beyond his authorized period. On April 16, 2025, Upper Darby Police arrested N-N- and he was charged with Simple Assault and Harassment. On May 31, 2025, ICE Enforcement and Removal (ERO) detained N-N-, served him

with a Notice to Appear (NTA), and started removal proceedings. On August 5, 2025, an immigration judge ordered N-N-'s release upon posting \$3,000 bond. He was released on August 7, 2025, and placed under ICE's Intensive Supervision Appearance Program (ISAP) and ordered to wear an ankle monitor.

On September 24, 2025, N-N- filed his Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive relief. (ECF No. 1). On September 29, 2025, the Court issued a Rule to Show Cause why the relief N-N- sought should not be granted. (ECF No. 5). The Court ordered defendants to be served by the Clerk's office and file their response to the Order to Show Cause by October 1, 2025. On October 1, 2025, Respondents filed a response to the habeas petition and the rule to show cause. (ECF No. 8).

Following oral argument, on November 10, 2025, this Court disagreed with ICE's interpretation of the relevant statute and regulations. (ECF No. 18). The Court ordered ICE to remove the conditions not set by the Immigration Judge.

II. Legal Standard

EAJA is a limited waiver of the United States' sovereign immunity, and therefore "must be strictly construed in favor of the United States." *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991). Under EAJA, "a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded . . . , incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

“Thus, eligibility for a fee award in any civil action requires: (1) that the claimant be a ‘prevailing party’; (2) that the Government’s position was not ‘substantially justified’; (3) that no ‘special circumstances make an award unjust’; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.” *Comm’r, I.N.S., et al., v. Jean*, 496 U.S. 154, 158 (1990). EAJA only authorizes the payment of “reasonable” attorneys’ fees and expenses. 28 U.S.C. § 2412(d)(2)(A).

Here, Respondents oppose the fee petition because the government’s position was substantially justified and because petitioner’s fees are unreasonably excessive.

I. **Argument**

A. Respondents’ position was substantially justified.

Petitioner is not entitled to attorneys’ fees because respondents’ position was substantially justified. The Third Circuit recently explained the standard under EAJA in an immigration detention case:

Under the EAJA, the Government’s position was substantially justified only if its conduct was “justified to a degree that could satisfy a reasonable person.” *Johnson v. Gonzales*, 416 F.3d 205, 210 (3d Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The Government bears the burden of proving its position was justified. *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993). “To satisfy this burden and defeat a prevailing party’s application for fees, the government must . . . demonstrat[e] ‘(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.’” *Cruz*, 630 F.3d at 324 (quoting *Morgan v. Perry*, 142 F.3d 670, 684 (3d Cir. 1998)). “[I]n immigration cases, the Government must meet the substantially justified test twice”: once for its underlying conduct and once for its decisions in the ensuing litigation about that conduct. *Johnson*, 416 F.3d at 210. We do not assume the position of the Government was not substantially justified simply because it lost. *William v. Astrue*, 600 F.3d 299, 302 (3d Cir. 2009).

Michelin v. Warden Moshannon Valley Corr. Ctr., No's. 24-2990/24-3198, 2026 U.S. App. LEXIS 3264, at *28-29 (3d Cir. Feb. 2, 2026).

1. *The government's underlying conduct was substantially justified, because it is unsettled whether an immigration court may impose conditions upon release beyond the amount of bond.*

ICE has long imposed conditions of release following a bond hearing, including conditions not expressly set forth in the immigration judge's order. More recently, ICE implemented Intensive Supervision and Attendance Program (ISAP) to persons released following a bond hearing. ISAP has been found constitutional and can be implemented by ICE when it exercises its discretion to release an individual under 8 U.S.C. § 1226(a) and when an individual is under a removal order but released because they are not presently removable. *See Nguyen v. B.I. Inc.*, 435 F.Supp.2d 1109 (2006) (ISAP does not violate the Constitutional rights of an alien subject to a final removal order). In light of those authorities regarding discretionary release and release pending removal, it was substantially justified for ICE to construe its authorities as similarly allowing for it to impose a condition following release after a bond hearing.

The complication of post-release conditions arises because ICE, a component of the Department of Homeland Security, is responsible for monitoring individuals present in the United States without lawful status, but an immigration judge ordering release is part of the Executive Office of Immigration Review, a component of the Department of Justice. In light of this distinction between authority over release and monitoring, it was reasonable for ICE to understand the regulations and statute to give ICE the authority to impose conditions when a person without lawful status is released from custody at every stage of that person's immigration proceedings. 8 U.S.C. § 1226 (INA § 236(a)) and 8

C.F.R. § 1236(c).

2. *The government’s litigation position was substantially justified.*

The principal legal question raised by the petition was whether imposing an ankle monitor fell within ICE’s authority in establishing post-bond conditions, or whether such a condition must be specified by the Immigration Judge in the bond order. No circuit court has yet addressed the question, and this Court is the only one in this district to have done so. While some courts in other jurisdictions have resolved this question similar to this Court, at least one has found in the Government’s favor. *See Hernandez v. Udzenski, et al.*, No. 2:25-CV-373-RWS, 2025 WL 4093557, at *3 (N.D. Ga. Dec. 16, 2025) (“Because the parties here agree that the IJ lacked authority under the regulations to set conditions on Petitioner, it makes sense that ICE had an opportunity to set them after Petitioner was released.”)

At the time of this Court’s decision, there were two cases addressing the question whether section 1226(a) allowed ICE to use an ankle monitor to provide supervision when a non-citizen is released pursuant to a bond hearing afforded by 8 U.S.C. § 1226(a). Both decisions issued in the District of Massachusetts, who concluded that ICE is not authorized to use an ankle monitor absent a provision in the immigration judge’s order. *See Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61, 69 (D. Mass. 2025) (ruling ICE’s release conditions, including ankle monitoring, not present in the immigration judge’s order violated Due Process and the Accardi doctrine); *Flores Salazar v. Moniz*, 2025 WL 1703516 (D. Mass. June 11, 2025) (same).

However, this was far from a settled question in this Circuit at the time of the government’s opposition, as discussed in the government’s original opposition to the

habeas petition. The government's position was therefore substantially justified.

B. Petitioner's Fee Request is Excessive

Even if the Court concludes that the government's position was not "substantially justified," the Court should reduce Petitioner's claimed fees to a reasonable level. The Petitioner claims fees for *eight* attorneys to generate: 1) a petition, 2) an unopposed pseudonym motion, 3) oral argument, and 4) the petition for fees currently before the Court. Petitioner's claim includes fees for time spent conducting a moot court exercise involving five attorneys and the cost for a third attorney to travel from New York City to observe the hearing from counsel's table without participating.

The Plaintiff seeks an excessive amount of fees relative to the work involved in pursuing this case.¹ A party seeking fees must exercise billing judgment, and "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). At a minimum, counsel must exercise the same billing judgment that they would in billing a private, paying client. *See, e.g., New Jersey v. EPA*, 703 F.3d 110, 114-15 (D.C. Cir. 2012).

For example, Petitioner's fees are excessive because he seeks fees for five different attorneys spending over thirty hours drafting his thirty-page habeas petition. But only one attorney itemizes her work on the petition, specifying that she worked on the "Fact" section of the petition. The remaining four attorneys spent a little more than 30 hours working on the remainder of the petition. It is not reasonable to charge taxpayers for five attorneys' hours to collaborate on a petition that largely tracked

¹ All of the numbers are calculated from ECF 20-1 submitted in support of Petitioner's fee petition.

arguments made in the District of Massachusetts case petitioner relied upon. *See Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61, 69 (D. Mass. 2025).

Petitioner also seeks to recover fees for five attorneys participating in a moot court to prepare for an oral argument totaling 6 hours and 57 minutes. And Petitioner seeks a fee award for an attorney to travel from New York City to sit – not take lead in the argument - at counsel’s table with two other attorneys during oral argument. New York counsel served as one of two senior counsel supporting the attorney presenting Petitioner’s case. Additionally, Petitioner seeks fees for a *fourth* attorney to sit in the courtroom as a mentor. So for a single oral argument, Petitioner asks for four time multiplier of 1 hour and 32 minutes. While a single mentor is understandable, importing one from outside the jurisdiction should not be found reasonable to charge to the United States taxpayer. While EAJA fees exist to make access to legal representation attainable, it is not reasonable to charge taxpayers for three attorneys’ time when one is presenting the argument. Even should the Court consider it reasonable for a less experienced attorney to have a more experienced attorney with them – EAJA fees are not intended to provide costs and fees beyond those necessary to bring a case. *See Ernest W. v. O'Malley*, 2024 WL 1912461, at *3 (D. Utah Apr. 30, 2024) (“The court may reduce counsels’ hours “if they include ‘hours that were unnecessary, irrelevant[,] and duplicative.’”)

While Respondents argue that only one attorney should be able to charge for time spent at oral argument, certainly charging fees for four attorneys – including the travel time for one attorney from out of the district who did not argue – is not reasonable.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court determine that attorneys' fees under EAJA are not available in this matter. And, in the alternative, that the Court reduce Petitioner's claimed fees to a reasonable level.

Dated: February 25, 2026

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that on February 25, 2026, a true and correct copy of the foregoing was filed electronically via the Court's CM/ECF system and served via CM/ECF on all counsel of record.

/s/ Anthony St. Joseph
Assistant United States Attorney