UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-03805-RBJ

HERBERT ORLANDO VELAZQUEZ DE LEON,

Petitioner,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Facility, Aurora, Colorado, in his official capacity,

GEORGE VALDEZ,[1] Director of the Denver Field Office for U.S. Immigration and Customs Enforcement, in his official capacity;

MARKWYANE MULLIN,[2] Secretary of the U.S. Department of Homeland Security, in her official capacity;

TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity;

TODD BLANCHE,[3] Acting Attorney General of the United States, in her official capacity;

Respondents.

MOTION FOR AWARD OF ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

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[1] George Valdez is substituted for former Denver Field Officer Director Robert Hagan pursuant to Fed. R. Civ. P. 25(d).

[2] Markwayne Mullin is substituted for former Secretary of Homeland Security Kristi Noem pursuant to Fed. R. Civ. P. 25(d).

[3] Todd Blanche is substituted for former Attorney General Pam Bondi pursuant to Fed. R. Civ. P. 25(d).

I. Introduction

Petitioner, Hebert Orlando Velazquez De Leon ("Mr. Velazquez De Leon") moves for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Respondents unlawfully jailed Mr. Velazquez De Leon under its erroneous interpretation of 8 U.S.C. §§ 1226, 1225(b)(2). This Court granted Mr. Velazquez De Leon's Verified Petition for Writ of Habeas Corpus ("Petition"), ECF 1, on December 22, 2025. ECF 19.

Mr. Velazquez De Leon is therefore a prevailing party entitled to attorney's fees and expenses. Mr. Velazquez De Leon also meets the EAJA net worth limitation. Respondents' position was not substantially justified and there are no special circumstances that make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Mr. Velazquez De Leon, through counsel, moves the Court for an award of $4,179. The parties conferred and Respondents oppose this motion.

II. Summary of Factual and Procedural History

Mr. Velazquez De Leon has resided in the United States for five years. ECF 1, at ¶ 1. He dedicates his time to work and raising his two U.S. citizen children with his U.S. citizen wife. *Id.* He has no criminal legal contact that would subject him to mandatory detention. *Id.* Nevertheless, Immigration and Customs Enforcement ("ICE") jailed Mr. Velazquez De Leon in November of 2025 and charged him as removable for entry without inspection under 8 U.S.C. § 1182(a)(6)(A)(i). *Id.* at ¶ 2; ECF 10-2 at 2. Respondents then denied Mr. Velazquez De Leon the opportunity to request release on bond pursuant to its new interpretation of §§ 1225(b)(2), 1226. ECF 15-1 at ¶13.

Both the § 1226 and § 1225 detention provisions were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, §§ 302-03, 110 Stat. 3009-546, 3009-582 to 3009-583, 3009-585. Section 1226(a) was

most recently amended in early 2025 by the Laken Riley Act (LRA), Pub. L. No. 119-1, 139 Stat. 3 (2025). Following the enactment of the IIRIRA in 1996, EOIR wrote regulations applicable to proceedings before immigration judges ("IJ") explaining that, in general, people who entered the country without inspection (also known as "present without admission") were *not* detainable under § 1225 and instead could only be detained under § 1226(a). *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination").

Thus, in the following decades, people who entered without inspection and did not have certain criminal legal contacts were entitled to bond hearings under § 1226(a) when placed in § 1229a proceedings. That practice was consistent with additional decades of pre-IIRIRA practice, in which noncitizens who were not "arriving" or seeking entry into the United States were entitled to a custody hearing before an IJ or other hearing officer. *See* 8 U.S.C. § 1252(a) (1994); *see also* H.R. Rep. No. 104-469, pt. 1, at 229 (1996) (noting the new § 1226(a) simply "restates" the detention authority previously found at § 1252(a)).

Despite this long-standing practice and the plain text of the statute, a solitary member of the Board of Immigration Appeals ("BIA") issued a two-page unpublished and non-precedential decision on May 22, 2025 holding that noncitizens who entered the United States without inspection were subject to § 1225(b)(2) mandatory detention as "applicants for admission." On July 8, 2025, Immigration and Customs Enforcement ("ICE"), "in coordination with" the DOJ announced a new policy consistent with the unpublished BIA decision from May 22, 2025. ECF 7-1. The new ICE/DOJ policy, titled "Interim Guidance Regarding Detention Authority for

Applicants for Admission," constituted a complete upheaval of statutory interpretation, agency case law, decades of agency practice, and agency regulation, to claim that all noncitizens present within the U.S. who entered without inspection – no matter how long ago, no matter where, and no matter how – are deemed "applicants for admission" under 8 U.S.C. § 1225, and thus subject to mandatory detention under § 1225(b)(2)(A). The new policy applies regardless of when and where a person was apprehended and affects people who have resided in the U.S. for many years, like Mr. Velazquez De Leon.

Mr. Velazquez De Leon filed his Petition on November 24, 2025 asking for immediate release or a custody redetermination hearing under § 1226(a) within seven days. ECF 1, at *19. He also filed a Temporary Restraining Order and/or Preliminary Injunction ("TRO") asking for the same. ECF 10. On December 18, 2025, this Court granted Mr. Velazquez De Leon's Petition, in part, and ordered Respondents to provide Mr. Velazquez De Leon a bond hearing within ten days. ECF 189, at *9. The IJ conducted that hearing on December 30, 2025 and granted Mr. Velazquez De Leon bond in the amount of $1,500. ECF 20; ECF 21. Mr. Velazquez De Leon paid that bond and was released. *Id.* The Court entered a Final Judgment in this matter on March 3, 2026. ECF 23. This Motion follows.

III. Legal Standard for EAJA Applications

A court shall award fees and other expenses to the eligible prevailing party in an action against the United States when that party files a timely and complete application for fees, the government's position was not substantially justified, and no special circumstances exist that would make an award unjust. 28 U.S.C. § 2412(d)(1)(A)–(B); *Al-Maleki v. Holder*, 558 F.3d 1200, 1204 (10th Cir. 2009). The prevailing party must have a net worth of less than two million dollars. 28 U.S.C. § 2412(d)(2)(B)(i). These fundamental EAJA principles apply equally in a habeas

corpus action challenging immigration custody. *Daley v. Ceja, et al.*, 158 F.4th 1152, 1166 (10th Cir. 2025) (finding that "EAJA's broad language to unambiguously authorize fees in habeas actions challenging immigration detention").

IV. Argument

a. The Fee Application is Timely.

An EAJA application for fees and other expenses must be filed "within thirty days of final judgement in the action." 28 U.S.C. § 2412(d)(1)(B). The thirty-day EAJA clock does not begin to run until after the time to appeal an effective final judgement expires. *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991). In district court cases, a party has 60 days after the final judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). An EAJA fee application must be filed within 30 days after the expiration of the 60-day period for filing an appeal.

The Court entered its Final Judgment in this case on March 3, 2026. ECF 23. Ninety days from March 3, 2026 is June 1, 2026. This motion is timely filed on May 29, 2026.

b. Mr. Velazquez De Leon is an Eligible and Prevailing Party.

Mr. Velazquez De Leon is an eligible party under EAJA because he is a private individual whose net worth does not exceed $2,000,000. Exh. 1; 28 U.S.C. § 2412(d)(2)(B)(i) (requiring net worth to "not exceed $2,000,000 at the time the civil action was filed").

Mr. Velazquez De Leon is also an eligible party because he is the prevailing party. A party is the "prevailing party" when his or her suit results in a "judicially sanctioned change in the legal relationship of the parties, *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598, 604–05 (2001), such that the party "could obtain a court order to enforce the merits of some portion of the claim it made in its suit", *Biodiversity Conservation*

Alliance v. Stem, 519 F.3d 1226, 1230 (10th Cir. 2008); *see also Iqbal v. Holder*, 693 F.3d 1189, 1193–94 (10th Cir. 2012) (applying *Buckhannon* to EAJA).

Here, Mr. Velazquez De Leon is the prevailing party. ECF 19; ECF 23. This Court found that Respondents decision to jail Mr. Velazquez De Leon under § 1225(b)(2) was unlawful. ECF 19. As such, this Court granted Mr. Velazquez De Leon's petition and ordered Respondents to provide him with a bond hearing. *Id.* Because this Court granted Mr. Velazquez De Leon's habeas petition, he is a "prevailing party" for EAJA purposes.

c. Respondents' Pre-Litigation and Litigation Position is Not Substantially Justified.

As the prevailing party, Mr. Velazquez De Leon is entitled to fees because the government cannot show that its position "was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). "The position of the United States is defined in the EAJA as the position taken by the United States in the civil action [and] the action or failure to act by the agency upon which the civil action is based" *Al-Maleki*, 558 F.3d at 1206–07 (quoting 8 U.S.C. § 2412(d)(2)(D)). The government's prelitigation actions, including those of the relevant agencies, and its litigation position "are both relevant to the inquiry and must be reasonable in fact and law." *Id.* at 1207 (citation omitted); *Role Models America, Inc., v. Brownlee*, 353 F.3d 962, 967 (DC. Cir. 2004) ("The government . . . must demonstrate the reasonableness not only of its litigation position, but also of the *agency's* actions") (citation omitted, emphasis in original).

Congress placed a heavy burden of proof on the government to establish that its position was substantially justified. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13–14 (1980) ("[T]he strong deterrents to contesting government action require that the burden of proof rest with the government"). To meet this burden, the government must show that its position was both factually and legally reasonable. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988); *Al-Maleki*, 558 F.3d

at 1207 (noting that the government "bears the burden of establishing its position [as] justified to a degree that could satisfy a reasonable person"). The government's position is not justified if it violates clear, unambiguous sources of law. *E.g.*, *Role Models Am., Inc.*, 353 F.3d at 967.

Courts have found that it would be an "abuse of discretion" to find Respondents' position substantially justified if it violates the Constitution, a statute, or its own regulations. *Meinhold v. U.S. Dep't of Defense*, 123 F.3d 1275, 1278 (9th Cir. 1997). Where an agency violates its own regulations in adjudicating a case, the Court may find a per se lack of substantial justification. *Mendenhall v. National Transp. Safety Bd.*, 92 F.3d 871, 874-76 (9th Cir. 1996); *see also Role Models Am.,* 353 F.3d at 967 (D.C.) (no substantial justification when position unsupported by text of applicable regulation). A "string of losses can be indicative" of a position that is not substantially justified. *Pierce*, 487 U.S. at 569.

Here, the Court should award Mr. Velazquez De Leon fees because the government's pre-litigation and litigation positions were not substantially justified.

i. *Respondents' Pre-Litigation Position was Not Substantially Justified.*

Respondents' pre-litigation position saddling Mr. Velazquez De Leon with § 1225(b)(2) mandatory detention was not substantially justified. This Court found Respondents' decision to deny Mr. Velazquez De Leon access to bond pursuant to its interpretation of § 1225(b)(2) unlawful. ECF 19. Indeed, Respondents' decision to do so was "contrary to the agency's own implementing regulations; its published guidance; the decisions of its immigration judges (until very recently); decades of practice; the Supreme Court's gloss on the statutory scheme; and the overall logic of our immigration system." *Loa Caballero v. Baltazar*, 25-cv-03120-NYW, 2025 WL 2977650, at *8 (D. Colo. Oct. 22, 2025). It also conflicted with "the Government's own detention paperwork" suggesting that Mr. Velazquez De Leon was subject to § 1226. *Id.*

Specifically, Respondents' pre-litigation position that Mr. Velazquez De Leon is an arriving noncitizen and therefore subject to § 1225(b)(2) conflicts with the Notice to Appear ("NTA") that ICE served Mr. Velazquez De Leon. ECF 10-2. That document provides ICE the option to identify Mr. Velazquez De Leon as an "arriving [noncitizen]." *Id.* ICE did not choose that option and instead charged Mr. Velazquez De Leon as "present in the United States" without admission or parole – and thus eligible for bond under § 1226(a). *Id.* Thus, Respondents own paperwork pre-litigation determined that Mr. Velazquez De Leon was eligible for bond. Respondents' pre-litigation position reversing course and imposing § 1225(b)(2) mandatory detention on Mr. Velazquez De Leon was therefore not substantially justified.

ii. Respondents' Litigation Position was Not Substantially Justified.

The government's litigation position was equally unreasonable. The overwhelming majority of judges in this District who have considered Respondents' position have found it unlawful. *Ugarte Hernandez v. Baltazar, et al.*, 1:25-cv-04066-RBJ, *4, ECF 16 (D. Colo. Jan. 15, 2026) (attached as Exh. 2). This District's near unanimity is perhaps unsurprising since Respondents' position "has been rejected in more than 1,500 district court decisions." *Chavez Amrenta v. Noem*, No. 26-cv-00236-PAB, 2026 WL 274634, at *2 (D. Colo. Feb. 3, 2026). Such a "string of losses" is evidence of an unreasonable position. *Pierce*, 487 U.S. at 569.

That is particularly true here because an agency must "defend its actions based on the reasons *it gave when it acted* in the interest of promoting agency accountability, instilling confidence in agency decisions, and maintaining an orderly process of review." *DHS v. Regents of the Univ. of Cal.*, 591 US. 1, 24 (2020) (emphasis added). Here, because ICE did not allege Mr. Velazquez De Leon was arriving in his charging document, ECF 10-2, Respondents "cannot now be heard to change its position to claim that [he] is detained under section 1225(b)[,]" *See Marrero*

Yera v. Baltazar, et al., 1:26-cv-00476-SCK-SBP, 2026 WL 472014, at *2 (D. Colo. Feb. 19, 2026) (quotation omitted). In other words, Respondents' litigation position arguing that ICE could jail Mr. Velazquez De Leon under § 1225(b)(2) is not substantially justified.

Indeed, as this Court and district courts across the country have observed, Respondents' actions here are illegal. Respondents' about face cannot be substantially justified because it was "wholly unsupported by the text" of the statute and regulations. *See Role Models America, Inc.*, 353 F.3d at 967. Under these circumstances, including the overwhelming number of cases decided against them, "[o]ne might assume that" Respondents would acknowledge that "enforcing executive policies premised on a contrary illegal interpretation is improper." *Maldonado Bautista v. Santacruz*, ---F.Supp.3d---, 2026 WL 468284, at *3 (C.D. Cal. Feb. 18, 2026). "Remarkably, that has not been the case." *Id.* Instead, Respondents took a position that was not substantially justified, requiring Mr. Velazquez De Leon to bring this case to secure his liberty.

Mr. Velazquez De Leon merits attorney's fees because Defendant's pre-litigation and/or litigation positions were not substantially justified.

d. No Special Circumstances Exist Making an Award of EAJA Fees Unjust.

This case does not present "special circumstances" rendering a grant of an EAJA award "unjust." 28 U.S.C. § 2412(d)(1)(A). Special circumstances include the government advancing in good faith novel but credible extensions and interpretations of law. H.R. Rep. No. 1418 at 11, 86th Cong., 1980 U.S. C.C.A.N. 4984, 1990. This provision must be narrowly construed so as not to interfere with or defeat Congress' purpose in passing EAJA. *E.g.*, *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985). Like the substantial justification inquiry, the burden of proving the special circumstances rests with the government. *Id.* Respondents are unable to do so in this case.

V. The Requested Fees are Reasonable Under the EAJA.

The EAJA expressly authorizes fees in excess of the statutory rate of $125 per hour, adjusted for cost-of-living, when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii); *Pierce*, 487 U.S. at 563, 572 (acknowledging that higher fees are appropriate when "attorneys having some distinctive knowledge or specialized skill [were] needful for the litigation in question. . . . Examples . . . would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language"). It is well established that the field of immigration law is considered one of the most difficult and complex areas of law. *See Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (characterizing the immigration laws as "second only to the Internal Revenue Code in complexity.") Courts in this district have recognized that "knowledgeable attorneys are limited and that immigration issues are often complex and novel." *Barber v. Weber*, 2005 WL 1846985, at *2 (D. Colo. Aug. 1, 2005).

Here, in the interest of resolution, although counsel possesses highly specialized knowledge in this niche area of the law, Mr. Velazquez De Leon does not seek enhanced rates for the work performed in this case. Rather, counsel for Mr. Velazquez De Leon seeks an award at the statutory EAJA rate with adjustment for "an increase in the cost of living." 28 U.S.C. § 2412(d)(2)(A)(ii); *Harris v. R.R. Ret. Bd.*, 990 F.2d 519, 521 (10th Cir. 1993); *T.E. v. Kijakazi*, 2023 WL 7089901, at *4 (D. Colo. Oct. 26, 2023). The Ninth Circuit has published a calculation of EAJA hourly rates with cost-of-living adjustments for 2025 to account for the statutory EAJA rate to be $258 per hour in calendar year 2025.[4] Mr. Velazquez De Leon requests fees at the published 2025 EAJA statutory adjusted rate of $258 per hour. Mr. Velazquez De Leon also

[4] *Available at* https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/ (last checked on April 10, 2026).

requests fees in the amount of $100 per hour for paralegal time billed in this case.

Mr. Velazquez De Leon submits an affidavit summarizing the experience and qualifications of counsel in this case, which details the specialized knowledge of counsel in this area of law. Exhibit 3. Also attached are contemporaneous time records documenting the time counsel has spent on litigation of the merits of the habeas petition. Exhibit 4. Also attached are hours for EAJA the fee request. Exhibit 5. The fees sought are reasonable.

VI. In the Exercise of Billing Judgment, Mr. Velazquez De Leon Waives Certain Billing Entries and Does Not Seek to Recover Costs in This Matter.

Petitioner has further reviewed the time logs and does not seek to recover time entries for certain non-relevant time entries or administrative tasks and waives seeking costs associated with this litigation. This represents an additional reduction in fees.

VII. Conclusion

For the reasons stated above, the Court should grant Mr. Velazquez De Leon's request for attorney fees under EAJA for the habeas corpus litigation in the amount of $3,173, and for $1,006 for the EAJA litigation to date, for a total fee amount of $4,179.

Respectfully submitted this 31st day of May, 2026.

s/ Hans Meyer
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CERTIFICATE OF CONFERRAL

I certify that consistent with D. Colo. Local Rule 7.1 that before filing this motion, on May 31, 2026, I conferred with counsel for Respondents-Respondents, Thomas Isler, Assistant United States Attorney, U.S. Attorney's Office for the District of Colorado, regarding the relief requested herein. Respondents oppose this motion.

/s/ Hans Meyer
Hans Meyer

AI CERTIFICATION

Counsel certifies that AI was not used to draft this filing or any exhibits.

/s/ Hans Meyer
Hans Meyer

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notifications of such filing to all counsel of record.

/s/ Hans Meyer
Hans Meyer