

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NELSON HERNANDEZ HERRERA,

Petitioner,

v.

Case No. 25-cv-1994

SAM OLSON, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S
FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

Defendants United States Citizenship and Immigration Services (“USCIS”), United States Department of Homeland Security (“DHS”), United States Department of Justice (“DOJ”) and United States Immigration and Customs Enforcement (“ICE”) (collectively, the United States), by and through counsel Stuart Gilgannon, Special Assistant United States Attorney, respond as follows to Plaintiff Nelson Hernandez Herrera’s (“Plaintiff”) Motion for Attorney’s Fees and Expenses Pursuant to the Equal Access to Justice Act (“Motion”). (ECF 13.)

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner filed for a writ of habeas corpus under 28 U.S.C. § 2241 after he was detained by ICE officers during his removal proceedings. (ECF 1.) He claimed his detention was governed by 8 U.S.C. § 1226(a) and that he could not be detained absent an individualized bond hearing before an Immigration Judge. In response, Respondents maintained that 8 U.S.C. § 1225 governed his detention as an “applicant for admission.”

On January 28, 2026, the Court granted the petition and ordered Respondents to either release the Petitioner or grant him a bond hearing on or before February 6, 2026. (ECF 10.) On

February 23, 2026, the parties filed a joint status report indicating that an Immigration Judge granted Petitioner bond and that he had been released from custody. (ECF 12.)

Petitioner timely filed a Motion for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA). (ECF 13.)

LEGAL STANDARDS

EAJA allows for the recovery of fees to a “prevailing party other than the United States . . . 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). The United States must show that it was “‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (“[A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.”).

The Government meets this burden if: “(1) it had a reasonable basis in truth for the facts alleged, (2) it had a reasonable basis in law for the theory propounded, and (3) there was a reasonable connection between the facts alleged and the theory propounded.” *Potdar v. Holder*, 585 F.3d 317, 319 (7th Cir. 2009) (citing *Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006)). The “EAJA is not an automatic fee-shifting statute in favor of litigants who prevail against the government,” *Zapon v. United States Dep’t of Justice*, 53 F.3d 283, 284 (9th Cir. 1995). “The outcome of a case is not conclusive evidence of the justification for the government's position,” *United States v. Hallmark Const. Co.*, 200 F.3d 1076, 1079 (7th Cir. 2000).

ARGUMENT

The Respondents do not dispute that Petitioner was the prevailing party for EAJA purposes or that Petitioner timely filed her EAJA fee motion. But the Court should deny Petitioner's motion because the Respondents' position was substantially justified.

As the Seventh Circuit has stated in the immigration context, a determination that part of the BIA's decision was not supported "by substantial evidence does not foreclose the possibility that the position was substantially justified." *Howard v. Barnhart*, 376 F.3d 551, 554 (6th Cir. 2004). Rather, we must consider "the factual and legal support for the government's position throughout the entire proceeding." *Hallmark Constr. Co.*, 200 F.3d at 1080.

Here, as discussed further below, the only federal Courts of Appeals to rule on the legal issue at the heart of this case have ruled in the Government's favor. Moreover, "uncertainty in the law arising from conflicting authority or the novelty of the question weighs in the government's favor when analyzing the reasonableness of the government's litigation position." *Marcus v. Shalala*, 17 F.3d 1033, 1037 (7th Cir. 1994); *see also Dvorkin v. Gonzalez*, 173 F. App'x 420, 424 (6th Cir. 2006) (reversing the district court's attorney fee award under EAJA in an immigration habeas case where petitioner challenged the constitutionality of 8 U.S.C. § 1226(c) and the government's refusal to hold a bond hearing when he was detained after being convicted of five felonies); *Vacchio v. Ashcroft*, 404 F.3d 663, 677 (2d Cir. 2005) (holding that "despite our doubts over the INS's actions, we are not able to conclude that the Government's position was not 'substantially justified'").

Here, as contemplated in *Hallmark Constr. Co.*, the Court should find that the positions taken by Respondents have been substantially justified—both prior to and following the filing of

the present habeas petition.

1. A split within this District's precedent demonstrates that the Government's litigation position was substantially justified.

“Objective indicia of reasonableness” establish that the Government’s litigation position was substantially justified. *Griffith v. Comm’r of Soc. Sec.*, 987 F.3d 556, 563-64 (6th Cir. 2021) (identifying such indicia as “a dissenting opinion, the views of other courts, ‘a string of losses,’ . . . a ‘string of successes[,]’ [and] ‘the actual merits of the Government’s litigation position’”).

The fact that the Court ruled against the Government does not support a finding that the Government’s position was not substantially justified. *See Pierce*, 487 U.S. at 569 (stating that the Government “could take a position that is substantially justified, yet lose”). “Here as in other areas courts need to guard against being ‘subtly influenced by the familiar shortcomings of hindsight judgment.’” *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (Roberts, J.) (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)). *See also Id.* at 1174 (“a loss on the merits does not mean that legal arguments advanced in the context of our adversary system were unreasonable.”)

Here, whether to apply § 1225 or § 1226 to immigrants like Petitioner is a novel issue that has not been squarely decided by the Seventh Circuit Court of Appeals or the Supreme Court.¹ As such, first-impression issues like those presented in the present matter provide the

¹ On December 11, 2025, a Seventh Circuit Court of Appeals motions panel issued *Castanon-Nava v. U.S. Dep’t of Homeland Security*, No. 25-3050, ---F.4th---, 2025 WL 3552514 (7th Cir. 2025). In that decision, the panel considered whether Section 1225(b)(2) “covers any noncitizen who is unlawfully already in the United States as well as those who present themselves at its border.” *Id.* at *8. The panel tentatively concluded that the Government is “not likely to succeed on the merits” of its interpretation of 8 U.S.C. § 1225(b)(2)(A). *Id.* at *8-10. However, that decision is not binding precedent: “Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission.” *Johnson v. Burken*, 930 F.2d

Government “more leeway to construct its arguments.” *Griffith*, 987 F.3d at 572. And although courts in several districts—including this one—have ruled against the Respondents on the “1225/1226” mandatory detention issue,² multiple judges in this district have denied similar habeas petitions upon finding that individuals similarly situated to Petitioner were subject to mandatory detention under Section 1225. See *Cirrus Rojas v. Olson*, No. 25-cv-1437-bhl, 2025 WL 3033967 (E.D. Wis. Oct. 30, 2025), *Ugarte-Arenas v. Olson*, 2025 WL 3514451 (E.D. Wis. Dec. 8, 2025) (Griesbach, J.), *Espinoza Hernandez v. Olson et. al.*, 2026 WL 161509 (E.D. Wis. Jan. 21, 2026), *Moran Rayo v. Olson et al*, 2026 WL 594079 (E.D. Wis. Mar. 3, 2026).

In addition to the split of decisions within this District, both the federal Courts of Appeals to have addressed the issue at hand have held—consistent with the government’s arguments in this case—that Section 1225 applies to immigrants like Petitioner. First, in *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 502 (5th Cir. 2026), the Fifth Circuit rejected the argument that 8 U.S.C. § 1225(b)(2)(A) distinguishes between “applicants for admission” and aliens “seeking admission” and that mandatory detention is reserved for those aliens “actively pursuing lawful entry and submitting themselves to inspection by an immigration officer.” *Id.* at 502. The Fifth Circuit reasoned that there is “no material disjunction” between applying for something and seeking something, and it highlighted that other portions of the statute indicate that “‘applicants for admission’ are a subset of those ‘seeking admission.’” *Id.* at 502–03 (citing

1202, 1205 (7th Cir. 1991). Indeed, *Castanon-Nava* repeatedly emphasized the tentative nature of its conclusions. 2025 WL 3552514, at *8-10. For the reasons set forth in this response and in the Respondent’s Opposition to the Emergency Motion for Release Pending Appeal in *Rojas v. Olson*, Appeal No. 25-3217, at Doc. 13 (7th Cir. Dec. 19, 2025), the Seventh Circuit’s tentative conclusions should not be found persuasive.

² See e.g. *Ramirez Valverde v. Olson*, 2025 WL 3022700 (E.D. Wis. Oct. 29, 2025) (Conway, J.), *Rivas-Alonso v. Olson*, 2025 WL 3240928 (E.D. Wis. Nov. 20, 2025) (Adelman, J.) and *Lopez De La Cruz v. Schmidt*, Case No. 25-cv-1562, at Doc. 18 (E.D. Wis. Nov. 19, 2025) (Adelman, J.).

8 U.S.C. §§ 1225(a)(3) and (a)(5)). And the appellate court pointed out that other subsections in 8 U.S.C. § 1225 demonstrate that Congress knew how to use the phrase “arriving alien” when it wanted to limit the statute’s reach to those aliens geographically or temporally proximate to their entry into the country. *Id.* at 504 (citing 8 U.S.C. §§ 1225(a)(2), (c)(1), and (d)(2)). Moreover, the Fifth Circuit explained why the Supreme Court’s dicta about 8 U.S.C. § 1225 in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), supports the government’s interpretation of the statute, why past practice by executive agencies does not override the plain text, and why mandatory detention furthers Congress’s goal of putting “aliens seeking admission lawfully on equal footing with those who entered without inspection.” *Id.* at 505–08.

Second, in another opinion consistent with the government’s arguments in this case, the Eighth Circuit followed the Fifth Circuit’s reasoning in its decision last month in *Avila v. Bondi*, -- F.4th --, No. 25-3248, 2026 WL 81958 (8th Cir. Mar. 25, 2026). The facts in *Avila* closely mirror those in this case—petitioner was a Mexican national who acknowledged he had entered the United States without inspection in 2006. *Id.* at *1. The Court agreed with the Fifth Circuit “that the ordinary meanings of the phrases ‘applicant for admission’ and ‘seeking admission’ are the same,” and it noted that the petitioner’s attempt to distinguish them as imposing two separate conditions for mandatory detention would generate a “highly unnatural” reading of the statute given its grammatical structure. *Id.* at *3. The Eighth Circuit also recognized that interpreting mandatory detention under 8 U.S.C. § 1225(b)(2)(A) only to apply to those “taking ‘present-tense, affirmative action’ to gain lawful entry into the country” would render superfluous the exception expressly provided by Congress for stowaways in 8 U.S.C. § 1225(b)(2)(B). *Id.* at *4. And the Eighth Circuit explained why the government’s interpretation does not render the Laken

Riley Act superfluous, as “8 U.S.C. § 1226(c) applies a different set of penalties to a broader group of aliens than § 1225(b)(2)(A) does.” *Id.* at *5.

The Seventh Circuit has instructed that courts should conclude that the Government’s position is substantially justified if it is supported by its precedent or that of other courts. *See Krecioch v. United States*, 316 F.3d 684, 689 (7th Cir. 2003) (finding the Government’s position to be substantially justified in part because it was “supported by precedent from other federal circuits”). As such, the decisions by the Fifth Circuit in *Buenrostro-Mendez* and the Eighth Circuit in *Avila*—when combined with those of other judges of this Court in cases such as *Moran Rayo* and *Ugarte-Arenas*—strongly support a finding that Respondents’ asserted position within the present matter was substantially justified.

This has been recognized by several district courts when considering whether to award attorney’s fees under the EAJA in similar matters. For example, In *Kadidiatou*, the court reiterated its disagreement with the government’s position that § 1225(b)(2)(A) was applicable to petitioner’s detention. *Kadidiatou v. Easterwood*, No. 26-cv-1218, 2026 WL 969017, at *1 (D. Min, April 10, 2026). But, in analyzing petitioner’s claim for attorney fees the court cited the divide among district courts nationwide as well as within its own district as “strong evidence” of the government’s position being substantially justified. *Id.* at *1.

Similarly in *Garcia Lopez v. Castro* the court also rejected the government’s arguments that petitioner was subject to mandatory detention under § 1225(b)(2)(A). Case No. 25-cv-1144, 2026 WL 524082, at *35-36. The court went on to emphasize, however, that “solely because the United States’ position is incorrect is insufficient to conclude that the position is not substantially justified. *Id.* at *36. The court ultimately denied petitioner’s request for attorney fees, finding

that “[t]he Court is unable to say that a position is substantially unjustified, which requires only reasonable ness in law and in fact, when a Court of Appeals, the Fifth Circuit, as well as district courts across the country, embrace that same position.” *Id. See also Lopez v. Trump*, No. 25-cv-863, 2026 WL 114708, at *2 (D. VT, January 14, 2026) (denying EAJA fees request from prevailing habeas petitioner due to differing court decisions and lack of appellate authority); *Valdovinos v. Noem*, No. 26-cv-338, 2026 WL 948285 (D. NM, April 8, 2026) (citing the “unsettled landscape” of §§ 1225 and 1226 caselaw and finding that the government’s position had a reasonable basis in law and fact); *Chang v. Mullin*, No. 26-cv-3019, 2026 WL 915456, at *2 (D. Neb, April 3, 2026) (holding that “[t]hough this Court found the Federal Respondents’ arguments unavailing, it cannot go so far as to say they lacked a ‘reasonable basis in law and fact’”); *But cf. L.R.C. v. Maldonado*, No. 25-cv-6825, 2026 WL 946787 (E.D. NY, April 7, 2026) (granting request for EAJA fees where government’s habeas response could only cite three district court decisions within the Second Circuit to support its position, and none within the same district); *Rujano-Obeso*, No. 26-cv-3176, 2026 WL 963337, at *3, *5 (W.D. Mo, April 9, 2026) (awarding attorney fees upon finding government’s Due Process arguments in favor of petitioner’s ongoing detention to be flawed and misguided).

2. Binding BIA precedent in *Hurtado* required Petitioner’s detention after she was picked up, which substantially justified the Government’s administrative position.

Before Petitioner filed his habeas petition, at the administrative level, the BIA case *In re Matter of Yajure Hurtado*, 29 I & N Dec. 216 (B.I.A. 2025), bound the immigration judge and prevented the immigration judge from holding a bond hearing after Petitioner was detained. And, as explained above, immigrants like Petitioner are filing habeas petitions alleging the same legal issue in courts nationwide, and courts disagree about how to resolve the novel legal issue

these cases present. Accordingly, the Court should deny Petitioner’s motion for fees under EAJA because the Government’s position was substantially justified at both the administrative and litigation levels.

“[T]he position that the Government took when arguing before the BIA” and the immigration court “is fair game” when evaluating Petitioner’s EAJA fee motion. *See Amezola-Garcia v. Lynch*, 835 F.3d 553, 555 (6th Cir. 2016). As Respondents explained in their Return to the Court’s show cause order, under *Hurtado*, “immigration judges lack authority to hear bond requests or to grant bond to aliens . . . who are present in the United States without admission.” *Hurtado*, 27 I & N Dec. at 225. Thus, even though the Petitioner did not seek bond, *Hurtado*—which would bind any immigration judge presiding over Petitioner’s case—required an immigration judge to deny Petitioner a bond hearing after she was detained. *See id. Hurtado*, a BIA decision binding on immigration courts nationwide, supports denying EAJA fees here.³

Furthermore, other district courts have denied EAJA fees in immigration cases with similar circumstances. For example, in *Rosciszewski*, a lawful permanent resident was detained without a bond hearing when his deportation case reopened after being dormant for fifteen years, and he filed a habeas petition challenging his detention under 8 U.S.C. § 1226(c). *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910, 912 (E.D. Mich. 2013). The immigration judge had denied a bond hearing because of the BIA’s interpretation of § 1226(c) in *In re Rojas*, 231 I&N 117 (BIA

³ Respondents acknowledge that *Hurtado* has been the subject of a purportedly nationwide class-action in which declaratory judgments were issued in favor of class members. *Maldonado Bautista v. Santacruz*, No. 25-cv-1873, 2025 WL 3288403 (C.D. Cal. November 25, 2025). However, it was not until the district court formally granted petitioner’s motion to enforce these judgments on February 18, 2026 that its vacatur of *Hurtado* took effect. *See id.*, Order Granting Plaintiff Petitioners’ Motion to Enforce Judgment, ECF 116 (C.D. Cal. February 18m, 2026). As such, at the time of this Court’s ruling on Petitioner’s habeas petition *Hurtado* remained binding upon immigration judges.

2001), and the government relied on that BIA interpretation to support its habeas litigation position. *Id.* at 912, 914-15 (citation omitted). The court granted the petition and awarded the petitioner a bond hearing, but it denied EAJA fees in part because the government relied on the BIA's interpretation of § 1226(c). *Id.* at 916-17 (citations omitted); *see also Rosario v. Prindle*, No. 11-217, 2011 WL 6942560, at *3 (E.D. Ky. Nov. 28, 2011) (not recommending EAJA fees because of "[t]he lack of Sixth Circuit law on this critical issue" and "the BIA's decision in *Matter of Rojas*"), *R&R adopted* at 2012 WL 12920 (E.D. Ky. Jan. 4, 2012).

Similarly, in *Reeves v. Reno*, the lawful permanent resident petitioner was ordered deported after she was convicted of eight counts of violating Michigan's controlled substances laws. 61 F. Supp. 2d 661, 662 (E.D. Mich. 1999). The BIA and the government interpreted a statute that would bar her from seeking discretionary relief from deportation to be retroactive and thus applicable to her, and the petitioner argued that it was not retroactive and would not bar her from seeking a discretionary waiver of deportation. *Id.* at 664-67. Specifically, the BIA held that the statute applied retroactively to bar her waiver application in *Matter of Soriano*, Int. Dec. No. 3289 (Op. Att'y Gen. Feb. 21, 1997), and the government argued that the court should defer to *Soriano*. *Reeves*, 61 F. Supp. 2d at 664-65. The court granted the habeas petition but denied EAJA fees in part because the Sixth Circuit had not yet ruled on the retroactivity issue and because "the Attorney General's decision in *Matter of Soriano* supports the government's position." *Id.* at 667. Applying these cases, the Court should deny EAJA fees because *Hurtado*, a binding BIA decision, controlled the outcome at the administrative level here, just as *Rojas* controlled the administrative outcome in *Rosciszewski* and *Sorano* controlled in *Reeves*. *See Rosciszewski*, 983 F. Supp. 2d at 914-17; *Reeves*, 61 F. Supp. 2d at 664-67.

In sum, the Government's position "as a whole" was substantially justified such that the Court should not award EAJA fees.

CONCLUSION

The Court should deny Petitioner's EAJA motion because the government's position was substantially justified.

Dated at Milwaukee, Wisconsin this 13th day of April, 2026.

Respectfully submitted,

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