UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-0688-WJM

GABRIEL TEMAJ LOPEZ,

Petitioner,

v.

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

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

MARKWYANE MULLIN,[1] 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;

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

I. Introduction

Petitioner, Gabriel Temaj Lopez ("Mr. Temaj Lopez") 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. Temaj Lopez under its new and erroneous interpretation of 8 U.S.C. §§ 1226, 1225(b)(2). This Court granted Mr. Temaj Lopez's Verified Petition for Writ of Habeas Corpus (ECF 1), "readily find[ing] . . . that Respondents violated his statutory and constitutional rights" by depriving him of his liberty through their unlawful interpretation of the statute. ECF 14, at *7.

Mr. Temaj Lopez is therefore a prevailing party entitled to attorney's fees and expenses. Mr. Temaj Lopez 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. Temaj Lopez, through counsel, moves the Court for an award of $4,633. The parties conferred and Respondents do not take a position on the motion at this time.

II. Summary of Factual and Procedural History

Mr. Temaj Lopez has resided in the United States for approximately seven years. ECF 1, at ¶ 4. The Department of Homeland Security ("DHS") first encountered Mr. Temaj Lopez in February of 2019, arresting him with a warrant authorized by section 236 of the Immigration and Nationality Act ("INA"). ECF 2-4. DHS then issued Mr. Temaj Lopez a Notice of Custody Determination confirming its authority to jail Mr. Temaj Lopez pursuant to 8 U.S.C. § 1226. ECF 2-5. In March of 2019, DHS released Mr. Temaj Lopez on his own recognizance, once again pursuant to § 1226. ECF 2-1. DHS served Mr. Temaj Lopez with a Notice to Appear ("NTA") charging him as a noncitizen "present in the United

States who has not been admitted or paroled" and removable under to 8 U.S.C. § 1182(a)(6)(A)(i). ECF 2-6.

While residing in the United States and released on his own recognizance, Mr. Temaj Lopez applied for asylum, ECF 2-8, and DHS issued him an employment authorization document ("EAD") valid until 2030, ECF 2-9. He worked full-time as a driver and did not have criminal legal contact subjecting him to mandatory detention pursuant to § 1226(c). ECF 1, at ¶¶ 4, 44. Nevertheless, DHS jailed Mr. Temaj Lopez in November of 2025 after Florida law enforcement stopped him for failing to drive through a weigh station. *Id.* at ¶ 44. DHS, in an abrupt about-face, then decided Mr. Temaj Lopez was subject to mandatory detention under § 1225(b)(2) instead of discretionary detention under § 1226(a). *See generally* ECF 13; ECF 13-1.

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. 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. Temaj Lopez.

Mr. Temaj Lopez filed his Verified Petition for Writ of Habeas Corpus ("Petition") on February 19, 2026 asking for immediate release or a custody redetermination hearing under § 1226(a) within seven days. ECF 1, at **20–21. He also filed a Temporary Restraining Order and/or Preliminary Injunction ("TRO") asking for the same. ECF 2. On March 6, 2026, this Court granted Mr. Temaj Lopez's Petition and denied his TRO as moot. ECF 14. The Court ordered Respondents to provide Mr. Temaj Lopez a bond hearing within seven days, finding that Respondents' application of § 1225(b)(2) violated the statute and Mr. Temaj Lopez's right to due process. *Id.* at *7. The IJ conducted that hearing on March 12, 2026, and granted Mr. Temaj Lopez's release upon payment of $3,000 bond.

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.

This Court ordered Mr. Tema Lopez to file this Motion no later than April 3, 2026. ECF 14, at *10. This motion is filed on April 3, 2026, and is therefore timely.

b. Mr. Temaj Lopez is an Eligible and Prevailing Party.

Mr. Temaj Lopez 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. Temaj Lopez 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. Temaj Lopez is the prevailing party. ECF 14; ECF 15. This Court found that Respondents decision to jail Mr. Temaj Lopez under § 1225(b)(2) was unlawful. ECF 14. As such, this Court granted Mr. Temaj Lopez's petition and ordered Respondents to provide him with a bond hearing. *Id.* Because this Court granted Mr. Temaj Lopez's habeas petition, he is a "prevailing party" for EAJA purposes.

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

As the prevailing party, Mr. Temaj Lopez 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 or misapplies a clear, unambiguous law. *E.g.*, *Role Models Am., Inc.*, 353 F.3d at 967.

Courts have also 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. Temaj Lopez 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. Temaj Lopez with § 1225(b)(2) mandatory detention was not substantially justified. Respondents' decision to jail Mr. Temaj Lopez pursuant to § 1225(b)(2) and to thereafter deny him access to bond bucked nearly thirty years of practice, violated the statute, violated agency regulations, and violated Mr. Temaj Lopez's substantive due process rights. ECF 14, at *7. It also conflicted with the documentation it produced and provided to Mr. Temaj Lopez.

Specifically, Respondents' position that Mr. Temaj Lopez is an arriving noncitizen and therefore subject to § 1225(b)(2) conflicts with its pre-litigation position of producing a Notice to Appear ("NTA") that ICE served Mr. Temaj Lopez. ECF 2-6. That document provides ICE the option to identify Mr. Temaj Lopez as an "arriving [noncitizen]." *Id.* ICE did not choose that option and instead charged Mr. Temaj Lopez as "present in the United States" without admission or parole – and thus eligible for bond under § 1226(a). *Id.* Respondents' use of § 1225(b) also conflicts with the pre-litigation position by ICE in the Notice of Custody Determination it served Mr. Temaj Lopez in March, which also

acknowledged that their authority to jail him was pursuant to § 1226. ECF 2-5. Respondents also served Mr. Temaj Lopez a warrant for his arrest pre-litigation, once again acknowledging that their authority to incarcerate him was pursuant to § 1226. ECF 2-4. Finally, Respondents released Mr. Temaj Lopez on his own recognizance also pursuant to § 1226. ECF 2-1. Respondents' pre-litigation position reversing course and arguing § 1225(b)(2) mandatory detention on Mr. Temaj Lopez was therefore not substantially justified.

ii. Respondents' Litigation Position was Not Substantially Justified.

The government's litigation position was also not substantially justified. Every Judge in the District who has considered Respondents' position has found it unlawful. *Ugarte Hernandez v. Baltazar, et al.*, 1:25-cv-04066-RBJ, *4, ECF 16 (D. Colo. Jan. 15, 2026) (previously filed as ECF 1-2). This District's 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 a litigation position that in not substantially justified. *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. Temaj Lopez was arriving in his NTA, ECF 2-6, arrested him pursuant to a warrant under § 1226, ECF 2-4, served him with a Notice of Custody Determination acknowledging that their authority to jail him was under § 1226, ECF 2-5,

and released him on his own recognizance under § 1226, ECF 2-1, Respondents "cannot now be heard to change its position to claim that he is detained under section 1225(b)[,]" *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' at the time that it acted reflected its belief that he was bond eligible and released on recognizance under § 1226, only to have Respondents later argue that ICE could jail Mr. Temaj Lopez under § 1225(b)(2). These positions are completely contrary and not substantially justified.

Indeed, as this Court and district courts across the country have observed, Respondents' actions here are illegal three times over. Respondents violated the statute; Respondents violated their own regulations; and Respondents violated substantive due process. ECF 14, at **4–6. Respondents' failure to abide by their own regulations cannot be substantially justified. *See Mendenhall*, 92 F.3d at 874–76. 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. Temaj Lopez to bring this litigation to secure his liberty.

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

d. <u>No Special Circumstances Exist Making an Award of EAJA Fees Unjust</u>.

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). Much 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. Temaj Lopez does not seek enhanced rates for the work performed in this case. Rather, counsel for Mr. Temaj Lopez 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 to the statutory EAJA rate to be $258 per hours in calendar year 2025.[2] Although the work in this case was performed in February and March of 2026, for simplicity's sake, Mr. Temaj Lopez requests fees at the Ninth Circuit's published 2025 EAJA statutory adjusted rate of $258 per hour. Mr. Temaj Lopez also requests fees in the amount of $100 per hour for paralegal and/or office assistant time billed in this case, which reflects a reasonable paralegal market rate.

Mr. Temaj Lopez 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 2. In addition, counsel submits contemporaneous time records documenting the time counsel has spent on litigation of the merits of the habeas litigation. Exhibit 3. Also attached are hours for EAJA the fee request. Exhibit 4. The fees sought are reasonable.

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

Mr. Temaj Lopez has reviewed the time logs and does not seek to recover time entries for certain administrative tasks, and also waives seeking costs in this matter.

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[2] *Available at* https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/ (last checked on April 3, 2026).

VII. Conclusion

For the reasons stated above, the Court should grant Mr. Temaj Lopez's request for attorney fees under EAJA for the habeas corpus litigation in the amount of $3,188 and $1,445 for the EAJA litigation to date, for a total fee amount of $4,633.

Respectfully submitted this 3rd day of April 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 April 3, 2026, I conferred with counsel for Respondents-Respondents, Elizabeth Ford Milani, Assistant United States Attorney, U.S. Attorney's Office for the District of Colorado, regarding the relief requested herein. Respondents take no position on the motion at this time.

/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 April 3, 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