UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEANFRANCO ALEJANDRO FLORES SALAZAR, Petitioner, v. ANTONE MONIZ, Superintendent, Plymouth County Correctional Facility, Respondent.	Civil Action No. 25-11159-LTS

RESPONDENT'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE (Dkt. No. 26) WHY EAJA FEES SHOULD NOT BE ALLOWED

Antone Moniz, Superintendent, Plymouth County Correctional Facility ("Respondent" or the "government"), by and through his attorney, Leah B. Foley, United States Attorney for the District of Massachusetts, herein responds to the Court's Order to Show Cause (Docket No. 26) as to why attorney fees should not be allowed under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).[1] As grounds for this response the government states the following: (i) the government was substantially justified in taking petitioner into custody; (ii) petitioner was released from detention without judicial involvement; and (iii) the government was substantially justified to impose addition conditions of release since Petitioner's parole was revoked prior to his release.

1 There is a split in the Circuit Courts as to whether a petitioner is entitled to EAJA fees in habeas corpus proceedings (see: *O'Brien v. Moore*, 395 F.3d 499 (4th Cir. 2005) and *United States v. Johnston*, 258 F.3d 361 (5th Cir. 2001), as opposed to *Sotelo-Aquije v. Slattery*, 62 F.3d 54 (2d Cir. 1995). But this Court does not have to reach this issue here as the government submits that it was substantially justified in the actions taken.

A. BACKGROUND

Petitioner is a native and citizen of Venezuela. (Docket No. 1, Petition ¶ 2). On July 18, 2024, Petitioner presented himself for inspection to Customs and Border Protection ("CBP") at the Mexico/United States border and was issued a Notice to Appear ("NTA") (Ex. 1, ¶ 8, Declaration of James F. Trainor previously attached to Dkt. No. 16) and granted humanitarian parole into the United States for two years (Petition ¶¶ 2 and 3). On March 5, 2025, United States Border Patrol encountered Petitioner in Calais, Maine without any documentation on his person that would allow him to be admitted to or remain in the United States (Ex. 1., ¶ 6). On April 8, 2025, Petitioner received notice that his parole had been revoked (Petition ¶ 8). On April 29, 2025, Petitioner filed a Petition for Writ of Habeas Corpus seeking his immediate release (Petition ¶ 14). Thereafter, upon review of Petitioner's immigration and custody history, ICE determined that Petitioner was still within parole as of the time he was taken into custody, and on May 10, 2025, Petitioner was released from detention (Exhibit 2, ¶ 16, Declaration of Assistant Field Office Director Keith Chan previously attached to Dkt. No. 16). Once Petitioner's parole had been revoked on April 8, 2025 (Petition ¶ 8), and upon release from ICE detention, Petitioner was placed on a GPS monitoring device (Ex. 2, ¶ 5).

B. ARGUMENT

Petitioner requests an award of attorney's fees and costs pursuant to the EAJA. However, "the EAJA is not simply a fee shifting statute. The EAJA is ... a waiver by the government of its sovereign immunity and so must be construed strictly in favor of the government." *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009). For the reasons set forth below, Plaintiff is not entitled to EAJA fees under 28 U.S.C. §2412(d) because the government's actions were substantially justified under the facts and the law.

In order to receive an award of attorney fees and expenses under 28 U.S.C. § 2412(d), the Court must conclude: (1) that [Petitioner] is the prevailing party in the civil action; (2) that his petition was timely filed; (3) that government's position was not substantially justified; and (4) that no special circumstances make an award against the government unjust. *Castaneda-Castillo v. Holder*, 723 F.3d 48, 57 (1st Cir. 2013).

The EAJA provides in relevant part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses … 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).

(i) Petitioner is not Entitled to EAJA fees under 28 U.S.C. §2412(d) because the Government's Position was Substantially Justified

Petitioner is not entitled to an award of attorney's fees and costs because the government's actions in taking Petitioner into custody, subsequently revoking his parole and placing him on a GPS monitoring device, were substantially justified. The Supreme Court has held that the government's position is substantially justified if it is "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Aronov*, 562 F.3d at 94 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) or put another way, if "a reasonable person could think [the government's position] correct," *Dantran, Inc. v. U.S. Dep't of Lab.*, 246 F.3d 36, 41 (1st Cir. 2001) (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). "To be 'substantially justified,' it is not necessary for the [g]overnment's position to be 'justified to a high degree'; rather, the [g]overnment meets this standard if its position is 'justified in substance or in the main.' " *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir.

2010) (quoting Pierce, 487 U.S. at 565). Further, even if the government failed on the merits, its position could still have been substantially justified. See Id. The government is "substantially justified" if "it has a reasonable basis in law and fact" for its position Id. at 565 (citations omitted).

Here, on March 5, 2025, during an encounter and inspection conducted by the Border Patrol Agents, Petitioner presented a government issued Employment Authorization Document ("EAD") but did not present any immigration documents that would allow him to be admitted to or remain in the United States (Ex. 1, ¶6). Someone can be issued an EAD and still be considered undocumented or illegally present in the United States if the EAD is based on a status that is not a pathway to permanent residency. *United States v. Lucio*, 428 F.3d 519, 525 (5th Cir. 2005) ("Nothing in the record compels a finding that . . . [petitioner's] immigration status was transformed because he had been accorded employment authorization . . . ."); *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1297–98, 1299 (10th Cir. 2008) (finding a defendant was still "illegally or unlawfully in the United States" despite his receipt of an EAD) ("An alien who has filed for adjustment of status and received an EAD may in some sense be 'authorized' to be in the United States, inasmuch as he is granted a temporary reprieve from removal proceedings and permitted to work here pending the outcome of his case. But there is a distinction to be drawn between tolerating an alien's presence for a limited purpose and legalizing an alien's presence."); *United States v. Bazargan*, 992 F.2d 844, 849 (8th Cir. 1993) (noting that at the time an EAD is issued, the immigration authorities have made no determination as to the alien's status, but have simply determined that the alien's application is non-frivolous) ("because the INS does not interpret the employment authorization to have any effect on the alien's status with respect to anything other than his ability to engage in employment during the pendency of his case . . . the employment authorization did not have the effect of converting Bazargan back into a legal alien."); *Campos v. United States*, 888 F.3d 724, 733–34 (5th Cir. 2018) (finding that, regardless of what the EAD is best understood as meaning, "no regulation or statute existed to indicate that meaning in such a way as to remove the CBP officer's discretion" to arrest an illegal alien).

An EAD simply grants permission to work within the United States for a specific period and does not automatically confer legal immigration status or the right to remain in the country permanently. A records check by the Border Patrol Agents did not reveal a potential claim to legal status or citizenship within the United States (Ex 1., ¶7). A further records check of Petitioner's immigration history revealed that he was served a NTA on July 18, 2024, and based on this information Petitioner was taken into custody (Id. at ¶8). But, due to an administrative oversight, the Border Patrol Agents were unaware that the NTA was issued prior to Petitioner being granted parole issued by CBP officers at Brownsville, Texas, Port of Entry and thus, the parole was still valid and in effect (Id.).

As a result of the administrative oversight Petitioner was taken into custody. These actions were reasonable as Petitioner's EAD was not proof of legal status within the United States, and a search of Petitioner's immigration history resulted in an administrative error that although very unfortunate, led to the reasonable conclusion that Petitioner could be taken into custody without taking any additional steps to terminate his parole. Compare 8 C.F.R. §212.5 § (2)(i)(indicating that when a charging document, such as a NTA, is served on the alien, the charging document terminates parole) with Docket No. 26 (finding it implausible that the NTA in this case could have terminated Petitioner's parole). Absent said oversight, the government could have terminated parole pursuant to 8 C.F.R. §212.5(e)(2), and no question as to the lawfulness of Petitioner's detention would have existed.2 The government's actions were therefore substantially justified under the facts and the law.

(ii) Petitioner Fails to Meet the Judicial Imprimatur Requirement of the Prevailing Party test because once ICE determined that Petitioner was still under Parole he was released without a Court Order

A party does not become a prevailing party under EAJA just because the government voluntarily effectuated the relief that Petitioner was seeking through his habeas petition. *Aronov v. Napolitano*, 562 F.3d 84, 93 (2009). Petitioner cannot show that the government's action (Petitioner's release) was prompted by a "judicially sanctioned change." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605 (2001); *Aronov* 562 F. 3d. at 89.

Here, once Petitioner was placed in ICE custody a review of his immigration and custody history revealed that he was still within parole when encountered on March 5, 2025 (Ex. 2, ¶15). As a result, of the administrative oversight, Petitioner was released from detention on May 10, 2025, without an order from this Court (Ex. 2, ¶16). The relief that Petitioner was seeking in his habeas petition specifically requested his release from custody (Petition ¶ 14).

As of May 10, 2025, Petitioner was released from custody following ICE realizing that Petitioner was still under parole when initially encountered on March 5, 2025 (Ex.2, ¶15). Accordingly, as of May 10, 2025, the government contends that Petitioner's release should have caused this case to become moot, which deprived this Court of jurisdiction.3 See U.S. Const. at

2 Such termination would have been consistent with the then existing Executive Order (Ex. 3, Section 7 – Parole Policies).

3 The government contends that once Petitioner's parole was revoked on April 8, 2025, ICE had the authority to impose further terms to his conditions of release pursuant to 8 U.S.C. § 1226(a)(2). To the extent that Petitioner was seeking amelioration of the conditions under which he was released, the government contends that such relief was available administratively under 8 C.F.R. §236.1 (d) as follow:

III; see also U.S. Bancorp. Mortgage Co., 513 U.S. at 21-22 (since a case or action is moot, a federal court no longer retains jurisdiction to adjudicate the merits of a case); Ali v. Smith, Civil Action No. 17-11689-GAO, Document No. 9 (Jan. 1, 2018) (granting respondent's motion to dismiss as moot because petitioner no longer in ICE custody); accord Lopez v. Souza, Civil Action No. 18-10603-RGS, Document No. 8 (April 20, 2018) (granting respondent's motion to dismiss in light of the representation that petitioner had been released from custody); Fernandez

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(d) Appeals from custody decisions—

(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

(2) Application to the district director. After expiration of the 7–day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

(3) Appeal to the Board of Immigration Appeals. An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.
(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) Effect of filing an appeal. The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i)), nor stay the administrative proceedings or removal.

v. Moniz et al, Civil Action No. 18-10057-WGY, Document No. 11 (Feb. 5, 2018) (granting respondent's motion to dismiss as moot); Verde-Llanes v. Moniz, Civil Action No. 17-11894-LTS, Document No. 18 (Jan. 17, 2018) (" In light of the status report . . . and the supporting affidavit reflecting that ICE has released the petitioner from custody, the pending habeas petition is dismissed without prejudice as moot"); Van Dang v. McDonald, Civil Action No. 17-12293-RGS, Document No. 9 (Dec. 18, 2017) ("In light of Petitioner's release from custody, this case is now moot"); Long v. McDonald, Civil Action No. 17-10397, Document No. 15 (March 27, 2017) (granting motion to dismiss for mootness).

Thus, the change in Petitioner's detention status was not effectuated by order of this Court, but by an internal redetermination review by ICE and thus Petitioner is not a prevailing party.

(iii) Although this Court Ordered the Removal of Petitioner's GPS Monitoring System, Petitioner is still not Entitled to EAJA fees as the Government's Position was Substantially Justified

The government's authority to impose further conditions of release on Petitioner are pursuant to 8 U.S.C. § 1226(a)(2).

Arrest, Detention, and Release

On a warrant issued by the Attorney general, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General –

(1) May continue to detain the arrested alien; and

(2) May release the alien on:

(A) Bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) Conditional parole.

8 U.S.C. § 1226(a)(2).

The government's authority to place certain conditions on Petitioner is further delineated in 8 C.F.R. § 236.1 (c)(8)

> Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

Upon release from ICE detention, it was within the government's discretion, pursuant to 8 C.F.R. § 1226(a)(2), and 8 C.F.R. §236.1 (c)(8), to place certain conditions on an alien including a GPS monitoring device to provide a reasonable assurance that the alien will appear at all hearings. Although this Court ordered the removal of the GPS monitoring system, the government was still within its discretion to impose further conditions on Petitioner's release. Despite the unfortunate circumstances by which Petitioner was taken into custody, it was still within the discretion of the government to utilize a GPS monitoring system as a condition to Petitioner's release.

CONCLUSION

Wherefore, based on the foregoing, the government submits that its actions were substantially justified under the facts and the law, and Petitioner should not be awarded EAJA fees as the prevailing party.

Respectfully submitted,

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/s/ Rayford A. Farquhar
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Dated: June 23, 2025