

II. Discussion

Mr. Cordova-Lopez principally relies on Hurtado v. United States, 410 U.S. 578, 586 (1973), for the proposition that a material witness who has been incarcerated is entitled to compensation “for every day of confinement during the trial or other proceeding for which he has been detained.” (Doc No. 53 p.2). He also argues that “even if the need for a trial has been obviated and/or that there is no longer a need for the material witness,” he is still entitled to material witness fees. Id. (citing United States v. Lopez-Bustamante, 999 F. Supp. 1404 (D. Colo. 1998)). In response, the United States argues that Hurtado does not apply because there was no trial, which is a necessary prerequisite to award such fees. (Doc. No. 52 p.2). Mr. Cordova-Lopez emphasizes that the language “or other proceeding” also applies to his case. (Doc. No. 53 p.3 (quoting Hurtado, 410 U.S. at 586)).¹

The relevant United States Code section pursuant to which Mr. Cordova-Lopez brings this motion states as follows:

A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C. § 1821(b). However, the statute provides a number of exceptions to this rule, one in particular which directly applies to this case:

[A]n alien who either has admitted belonging to a class of aliens

¹ Though, this court cannot identify any “other proceeding” to which Mr. Cordova-Lopez refers. The only proceeding relevant to the determination of material witness fees is the now-cancelled trial in which he was scheduled to testify.

who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. § 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

Id. § 1821(e). For some reason, neither party addressed this exception in their briefing. Section 1821(e) clearly applies to Mr. Cordova-Lopez, an alien that has already been determined deportable; he simply is not eligible for material witness fees.

It should also be noted that Mr. Cordova-Lopez's arguments are unsupported by both prior and subsequent case law. In Demarest v. Manspeaker, 498 U.S. 184, 186 (1991), the Supreme Court noted that Congress' express exception of deportable aliens incarcerated as material witnesses removes all doubt as to their eligibility for fees. In United States v. Alaniz-Tejada, 150 F. Supp. 2d 1109, 1111 (D. Colo. 2001), the court criticized its earlier Lopez-Bustamante decision (upon which Mr. Cordova-Lopez also relies), holding that "the plain language of § 1821(e) . . . indicates that aliens who admit that they are deportable or are determined by INS to be deportable are ineligible for witness fees, whether or not detained as material witnesses." The district court found further support in the Code of Federal Regulations, which classifies aliens with respect to the payment of fees:

Aliens Not Entitled to Payment. . . . [A]n alien who has admitted belonging to a class of aliens who are deportable, or an alien who has been determined pursuant to 8 U.S.C. 1252(b) to be deportable . . . is prohibited from receiving fees and allowances in accordance with 28 U.S.C. § 1821(e).

28 C.F.R. § 21.3(c). The law could not be more unequivocal. Mr. Cardova-Lopez is not entitled to material witness fees under 28 U.S.C. §1821(e).

III. Conclusion

Based on the foregoing, it is **HEREBY ORDERED THAT** the motion for material witness fees, (**Doc. No. 39**), is **DENIED**.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States Magistrate Judge

Date: October 4, 2007