

The Honorable David G. Estudillo

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ILAI KANUTU KOONWAI,

Plaintiff,

v.

ANTONY BLINKEN, Secretary of State;
U.S. DEPARTMENT OF STATE;

Defendants.

CASE NO. 3:21-cv-5474-DGE

DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT

Noted for Consideration on:
November 19, 2022

Defendants United States Secretary of State Antony Blinken and United States Department of State (collectively, "the Department"), by and through their attorneys, Nicholas W. Brown, United States Attorney for the Western District of Washington, and Michelle R. Lambert, Assistant United States Attorney for that District, move for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

I. INTRODUCTION

Plaintiff Ilai Kanutu Koonwaiyou brings this action for declaratory and injunctive relief against the Department for the alleged unlawful denial of his application for a U.S.

1 passport as a non-citizen national of the United States.¹ Dkt. No. 6, Compl., ¶¶ 1-4.
2 Plaintiff asserts causes of action under the Administrative Procedures Act (“APA”), 5
3 U.S.C. § 701 *et seq.*, and 8 U.S.C. § 1503(a). Compl., ¶¶ 39-45.² However, Plaintiff’s
4 Complaint is subject to dismissal for lack of subject matter jurisdiction and failure to state
5 a claim.

6 Specifically, Plaintiff’s APA claim must be dismissed because 8 U.S.C. § 1503
7 provides a legally adequate remedy to redress the Department’s denial of his application
8 for a U.S. passport. Additionally, Plaintiff’s § 1503 claim must be dismissed because the
9 Department lawfully denied Plaintiff’s application for a U.S. passport. The Department
10 correctly concluded that Plaintiff did not meet the eligibility requirements of 8 U.S.C.
11 § 1408(4) because his mother and father were both non-citizens at the time of his birth.

12 Since no amendment can cure these defects as Plaintiff pleads both the law and facts
13 necessary to defeat his own claim, dismissal of the Complaint with prejudice is warranted.
14

15 II. BACKGROUND

16 Plaintiff claims to be a U.S. non-citizen national pursuant to 8 U.S.C. § 1408(4).
17 Compl., ¶ 1. Section 1408(4) provides U.S. national status to eligible persons born outside
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20 ¹ Plaintiff applied for a U.S. passport using form DS-11 and appended a letter from his counsel noting his request was
21 for a certificate of non-citizen national status. Because the Department of State receives very few such requests, it
22 does not issue a special certificate document, but rather will issue U.S. passports with an appropriate endorsement.
See <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Certificates-Non-Citizen-Nationality.html> (last accessed 10/22/2021).

23 ² Plaintiff also asserts an alternative claim pursuant to the Due Process Class. Compl., ¶¶ 46-47. It is unnecessary
24 for the Court to decide that claim as the Department is not asserting that he is barred from litigating his nationality
claim due to his removal proceedings.

1 of the United States to a U.S. non-citizen national³ and a non-citizen.⁴ 8 U.S.C. § 1408(4).
 2 The main issue in this case is whether Plaintiff’s mother was a U.S. national or not at the
 3 time of his birth. In 1943, Plaintiff’s mother was born to an American Samoan⁵ parent and
 4 a Samoan parent in Western Samoa.⁶ Compl., ¶ 22. At the time of her birth, there was no
 5 statute granting her any U.S. national status. Plaintiff was born in 1967 in Western Samoa
 6 to his mother and a Samoan father. Compl., ¶ 23. There is no dispute that Plaintiff’s father
 7 was not a U.S. national at the time of his birth.

8
 9 In 1986, Congress amended 8 U.S.C. § 1408 to allow persons to acquire non-citizen
 10 nationality by virtue of their birth abroad to one non-citizen and one non-citizen U.S.
 11 national.⁷ Compl., ¶ 24; 8 U.S.C. § 1408 (Immigration and Nationality Act (“INA”) § 308
 12 and Pub. L. 99-396, § 15(a) (Aug. 27, 1986)); *see also Koonwaiyou v. Barr*, 830 Fed. Appx.
 13 566, 567 (9th Cir. 2020). Sometime after the amendment, Plaintiff’s mother was declared
 14 a U.S. national. Compl., ¶ 24.

15 On January 21, 2021, Plaintiff applied for a U.S. passport. Compl., ¶ 34. The
 16 Department denied the application on February 26, 2021, because Plaintiff’s mother “did
 17 not acquire nationality until after [his birth].” Compl., ¶ 35.
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19 ³ For this motion, the Department will refer to persons without U.S. citizenship, but still a U.S. national as “non-
 20 citizen nationals.” Persons without any status will be referred to as non-citizens.

21 ⁴ Non-citizen nationality is a special status conferred by statute which presently is only owed to persons born in
 22 American Samoa and Swains Island, or to any person who can satisfy 8 U.S.C. 1408(4). Non-citizen nationals have
 23 limited rights of citizenship as compared with citizens, but generally are entitled to free access to the United States
 24 and a U.S. Passport.

⁵ American Samoa is an unincorporated territory of the United States.

⁶ Western Samoa is now known as Samoa, a foreign nation that is near American Samoa.

⁷ Prior to the amendment, a person born abroad was required to have two U.S. non-citizen national parents to obtain
 derivative nationality at birth. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 204(b), 54 Stat. 1137, 1139.

1 Plaintiff is subject to a final order of removal from the United States to Samoa. *See*
2 Compl., ¶¶ 31-33. He is currently detained at the Northwest ICE Processing Center
3 pending removal. Compl., ¶ 6.

4 III. STANDARD OF REVIEW

5 A. Rule 12(b)(1)

6 Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an
7 action if the court lacks jurisdiction over the subject-matter of the suit. Fed. R. Civ. P.
8 12(b)(1). Because federal courts are courts of limited jurisdiction, it is “presumed that a
9 cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests
10 upon the party asserting jurisdiction.” *Vacek v. United States Postal Service*, 447 F.3d
11 1248, 1250 (9th Cir. 2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
12 375, 377 (1994)). A Rule 12(b)(1) motion may be either facial, where the inquiry is
13 confined to the allegations in the complaint, or factual, where the court is permitted to look
14 beyond the complaint to extrinsic evidence. *See Wolfe v. Strankman*, 392 F.3d 358, 362
15 (9th Cir. 2004); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
16 2003). A court should consider the Rule 12(b)(1) jurisdictional attack before addressing
17 any attack on the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-95
18 (1998).

20 B. Rule 12(b)(6)

21 A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the
22 complaint, not its merits. Fed. R. Civ. P. 12(b)(6). Under Federal Rule of Civil Procedure
23 12(b)(6), a court may dismiss a complaint for lack of a cognizable legal theory or
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1 insufficient facts pleaded to support an otherwise cognizable legal theory. *Balistreri v.*
2 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). The factual “allegations must be
3 enough to raise a right to relief about the speculative level” and a claim for relief must be
4 “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In
5 determining whether a complaint satisfied the plausibility standard, courts conduct a
6 “context-specific task that requires [them] to draw on [their] judicial experience and
7 common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

8 9 **IV. ARGUMENT**

10 **A. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER 11 PLAINTIFF’S APA CLAIM.**

12 This Court should dismiss Plaintiff’s APA claim because 8 U.S.C. § 1503(a)
13 constitutes a legally adequate remedy. Plaintiff asserts a claim for APA relief based upon
14 the Department’s denial of his application for a U.S. passport. Compl., ¶¶ 44-45.
15 However, Plaintiff is prohibited from relying on the APA’s waiver of sovereign immunity
16 because 8 U.S.C. § 1503(a) constitutes a legally adequate remedy to redress the
17 Department’s denial of his passport application. *See Moncada v. Pompeo*, 19-cv-1293,
18 2020 WL 1079301, at *3 (C.D. Cal. 2020) (dismissing APA claim on ground that Plaintiff
19 has an adequate remedy through his claim under 8 U.S.C. § 1503(a)).

20 Under the APA, “[a] person suffering legal wrong because of agency action, or
21 adversely affected or aggrieved by agency action within the meaning of a relevant statute,
22 is entitled to judicial review thereof.” 5 U.S.C. § 702. In such circumstances, where the
23 plaintiff is not seeking money damages, the APA acts as a waiver of the government’s
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1 sovereign immunity, allowing the plaintiff to proceed in federal court to rectify agency
2 action. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Yet the APA provides
3 for judicial review only where plaintiffs have “no other adequate remedy in a court.” 5
4 U.S.C. § 704; *see also Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (finding that the
5 language of 5 U.S.C. § 704 “makes it clear that Congress did not intend the general grant
6 of review in the APA to duplicate existing procedures for review of agency action”). “In
7 other words, the APA’s waiver of sovereign immunity is triggered only where there are no
8 other judicial remedies available.” *Tavera v. Harley Bell*, 09-cv-299, 2010 WL 1308800,
9 *3 (S.D. Tex. Mar. 31, 2010).

11 When a plaintiff has other adequate remedies that preclude him from proceeding
12 with a claim under the APA, dismissal under Rule 12(b)(1) or 12(b)(6) is appropriate. *See*
13 *Moncada*, 2020 WL 1079301, at *3; *see also Washington Toxics Coal. v. EPA*, 413 F.3d
14 1024, 1034 (9th Cir. 2005), *abrogated on other grounds, Cotton Env'tl. Law Ctr. v. U.S.*
15 *Forest Serv.*, 789 F.3d 1075, 1087 (9th Cir. 2015) (“Because this substantive statute
16 independently authorizes a private right of action, the APA does not govern [Plaintiff’s]
17 claims.”).

18 Section 1503(a) provides only one remedy to an aggrieved plaintiff – a judgment
19 stating that he is a U.S. national. 8 U.S.C. § 1503(a); *see also* 28 U.S.C. § 2201. Because
20 Congress chose to expressly specify a particular remedy in § 1503(a) – a declaration of
21 nationality – the statute necessarily excludes jurisdiction to grant other relief. *See Nat’l*
22 *R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“when
23 legislation expressly provides a particular remedy or remedies, courts should not expand
24

1 the coverage of the statute to subsume other remedies.”).

2 An order requiring the Department to take other actions as requested by Plaintiff
 3 goes beyond the declaratory judgment permitted by § 1503(a) and seeks relief that would
 4 bypass the relief provided for by the statute.⁸ Moreover, such an order would violate the
 5 sovereign immunity of the United States, as consent to a suit is a prerequisite to jurisdiction,
 6 and waivers of sovereign immunity should be narrowly construed in favor of the United
 7 States. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (Government’s
 8 consent to be sued “must be construed strictly in favor of the sovereign, and not
 9 enlarge[d] . . . beyond what the language requires”) (internal quotations and citations
 10 omitted). Because § 1503(a) provides a limited waiver of sovereign immunity that
 11 provides for specific relief, Plaintiff cannot pursue requests for additional forms of relief
 12 that are not otherwise contemplated by the statute.

14 Accordingly, because a legally adequate remedy exists, Plaintiff’s APA claim must
 15 be dismissed for lack of jurisdiction.

16 **B. PLAINTIFF FAILS TO STATE A CLAIM THAT THE DEPARTMENT**
 17 **UNLAWFULLY DENIED HIS APPLICATION FOR A U.S. PASSPORT.**

18 This Court should dismiss Plaintiff’s claim pursuant to 8 U.S.C. § 1503 because he
 19 fails to state a claim that the Department unlawfully denied his application for a U.S.
 20 passport. Compl., ¶¶ 39-43. Plaintiff mistakenly asserts that the Department denied his
 21 application “based on a legally erroneous interpretation of 8 U.S.C. §1408(4).” Compl.,
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23
 24 ⁸ Plaintiff requests multiple declaratory orders in addition to a declaration that Plaintiff is a U.S. national. *See* Compl.,
 Prayer for Relief.

1 ¶ 42. Section 1408(4) provides U.S. non-citizen nationality to persons born outside of the
2 United States to a non-citizen and a U.S. non-citizen national that meet certain statutory
3 requirements. 8 U.S.C. § 1408(4). The Department denied Plaintiff's application as he did
4 not qualify for U.S. nationality because, as Plaintiff concedes, his mother did not become
5 a U.S. national until at least two decades after his birth. Compl., ¶¶ 22-24. Therefore,
6 Plaintiff has not demonstrated that he was born to at least one U.S. non-citizen national
7 parent as § 1408(4) requires.

8
9 Plaintiff argues that, despite clear statutory language to the contrary which Plaintiff
10 urges this Court to ignore, his mother should retroactively be considered a U.S. national at
11 the time of his birth in 1967. *See* Compl., ¶ 11. In doing so, Plaintiff mistakenly asserts
12 that because § 1408's preamble includes "the following shall be nationals, but not citizens,
13 of the United States at birth" Plaintiff's mother was retroactively a U.S. national in 1967.
14 *Id.* This ignores the default rule that statutes are to be applied prospectively unless
15 Congress specifically states that a statute is to be applied retrospectively. *Sierra Forest*
16 *Legacy v. Sherman*, 646 F. 3d 1161, 1191 (9th Cir. 2011) (citing *Landgraf v. USI Film*
17 *Prod.*, 511 U.S. 244, 272-73 (1994) ("Clear congressional intent is required in order to
18 establish retroactive application.")). The statute does not contain a clear statement of intent
19 that supports Plaintiff's position.

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21 Instead, Congress' clear intent refutes Plaintiff's interpretation of the statute.
22 Although Congress stated that persons born before, on, or after the date § 1408 was enacted
23 are eligible to benefit from the provision, Congress provided further specific conditions
24 regarding the application of the statute to those born before the section's enactment. *See*

1 | Pub. L. 99-396, § 15(b), 100 Stat 837 (1986). Plaintiff urges this Court to discard this
2 | provision of law.

3 | Specifically, Congress stated that:

4 | In the case of a person born before the date of the enactment of this Act –
5 | (1) the status of a national of the United States shall not be considered to be
6 | conferred upon the person *until the date the person establishes to the*
7 | *satisfaction of the Secretary of State that the person meets the requirements*
8 | *of section 308(4) of the Immigration and Nationality Act.*

9 | *Id.* (emphasis added). Thus, instead of conferring status at birth, Congress explicitly
10 | conferred U.S. nationality status on the date the person is approved by the Secretary of
11 | State as a U.S. non-citizen national. Accordingly, Plaintiff’s mother was not conferred the
12 | status of a U.S. national until at least 1986, when the law was first enacted. Plaintiff’s own
13 | Complaint acknowledges his mother was not, and could not, have been so documented
14 | until well after his own birth. Compl., ¶ 24.

15 | Plaintiff highlights the fact that § 15(b) of Public Law 99-396 was not codified like
16 | § 15(a). Compl., ¶ 18. In response to this distinction, the Ninth Circuit confirmed, when
17 | considering Plaintiff’s own order of removal, that § 15(b) “remains a binding provision of
18 | positive law.” *Koonwaiyou*, 830 Fed. Appx. at 567. While the circuit was not considering
19 | Plaintiff’s mother’s status, the analysis is entirely applicable. As a result, the status
20 | conferral date pursuant to § 15(b) is binding.

21 | As no provision of law allows Plaintiff to acquire status by birth to two non-citizens
22 | in a foreign country, the Department lawfully denied his application for a U.S. passport
23 | and declined to document him as a U.S. non-citizen national. Because there is no dispute
24 | that Plaintiff’s mother did not acquire her status as a U.S. national until after 1986, any

1 amendment to the Complaint would be futile – Plaintiff was born to two non-citizens in a
2 foreign country and has no entitlement to any U.S. nationality status.

3 **CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Complaint be
5 dismissed with prejudice in its entirety.

6
7 DATED this 22nd day of October, 2022.

8 Respectfully submitted,

9 NICHOLAS W. BROWN
10 United States Attorney

11 *s/ Michelle R. Lambert*
12 MICHELLE R. LAMBERT, NY #4666657
13 Assistant United States Attorney
14 United States Attorney's Office
15 1201 Pacific Avenue, Suite 700
16 Tacoma, Washington 98402
17 Phone: 206-428-3824
18 Email: michelle.lambert@usdoj.gov
19 *Attorneys for Defendants*