

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' REPLY

Noted for Consideration on:  
November 19, 2022

**I. INTRODUCTION**

Plaintiff Ilai Kanutu Koonwaiyou is not a non-citizen national of the United States. Defendant Department of State (the "Department") lawfully denied his application for a U.S. passport because he did not meet the eligibility requirements of 8 U.S.C. § 1408(4). Section 1408(4) provides U.S. national status to eligible persons born outside of the United States to a U.S. national and a non-citizen. 8 U.S.C. § 1408(4). Based on the facts and law

1 plead in the Complaint, neither of Plaintiff's parents were U.S. nationals at the time of his  
2 birth.

3 Accordingly, this Court should dismiss Plaintiff's claim brought pursuant to 8  
4 U.S.C. § 1503 because he fails to state a claim that the Department unlawfully denied his  
5 application for a U.S. passport.<sup>1</sup>

## 6 II. ARGUMENT

7 The undisputed facts and law necessitate dismissal here. In 1967 – the year of  
8 Plaintiff's birth, neither Plaintiff's mother nor father was a U.S. national. Compl., ¶¶ 22-  
9 23. Almost twenty years later, Congress amended 8 U.S.C. § 1408 to allow persons to  
10 acquire non-citizen nationality by virtue of their birth abroad to one non-citizen and one  
11 non-citizen U.S. national. 8 U.S.C. § 1408 (Immigration and Nationality Act (“INA”) §  
12 308 and Pub. L. 99-396, § 15(a) (Aug. 27, 1986)); *see also Koonwaiyou v. Barr*, 830 Fed.  
13 Appx. 566, 567 (9th Cir. 2020). Sometime after the amendment, Plaintiff's mother was  
14 declared a U.S. national. Compl., ¶ 24.

15 Section 1408(4) provides U.S. non-citizen nationality to persons born outside of the  
16 United States to a non-citizen and a U.S. non-citizen national that meet certain statutory  
17 requirements. 8 U.S.C. § 1408(4). For persons born before the section's enactment, like  
18 Plaintiff's mother, Congress provided further specific conditions limiting the retroactive  
19 application of the statute. *See* Pub. L. 99-396, § 15(b), 100 Stat 837 (1986).  
20

21 Specifically, Congress stated that:  
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23  
24 <sup>1</sup> Plaintiff agrees to the dismissal of his APA claim. Dkt. No. 14, Response to Mot. to Dismiss (“Opp.”), at 4 n.1. Only his claim pursuant to 8 U.S.C. § 1503 remains.

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

6 *Id.* (emphasis added).

7 The Department denied Plaintiff’s application as he did not qualify for U.S.  
8 nationality because, as Plaintiff concedes, his mother did not become a U.S. national until  
9 at least two decades after his birth. Compl., ¶¶ 22-24. Therefore, Plaintiff has not  
10 demonstrated that he was born to at least one U.S. non-citizen national parent as § 1408(4)  
11 requires.

12 Plaintiff’s arguments in his Response to the Motion to Dismiss (“Opposition”) do  
13 not demonstrate otherwise. First, Plaintiff argues that §15(b) is merely a “procedural  
14 hurdle” and that once it is met “section 15(b)’s express language mandates that individuals  
15 meeting §1408(4)’s requirements be considered nationals “at birth.” Opp., at 5-6. This  
16 interpretation diminishes the weight of § 15(b)’s directive that status is not conferred to a  
17 person “*until the date the person establishes to the satisfaction of the Secretary of State*  
18 *that the person meets the requirements* of section 308(4) of the Immigration and  
19 Nationality Act.” See Pub. L. 99-396, § 15(b)(1), 100 Stat 837 (1986) (emphasis added).  
20 Plaintiff’s interpretation does not account for this specific conferral language applied to  
21 persons born before the section’s enactment. To explain this deficiency, Plaintiff  
22 characterizes the prospective conferral language as “procedural” while wrongly depicting  
23 the term “at birth” as a retroactive grant of nationality. Opp., at 5-6.

1 Next, Plaintiff argues that § 1408(4) is retroactive to the date of birth for those born  
2 prior to its enactment. Yet § 1408 is mainly a proactive statute. It is retroactive in the  
3 sense that persons born before its enactment may be eligible for benefits. For instance, it  
4 would not be retroactive – or need to be – for those born on or after the date of its enactment.  
5 This tracks through the prospective language included in § 1408. 8 U.S.C. § 1408 (persons  
6 “shall be nationals, but not citizens, of the United States at birth” (emphasis added)).  
7 Section 15(b) demonstrates the prospective nature of § 1408 for persons born prior to the  
8 provision’s enactment by providing a specific date for conferral of status.  
9

10 Moreover, the Department’s Foreign Affairs Manual specifically states that non-  
11 citizen U.S. nationality is not retroactive to the birth date or the date of the statute’s  
12 enactment. See 8 F.A.M. 308-9-5(e), available at  
13 <https://fam.state.gov/FAM/08FAM/08FAM030809.html> (last visited Nov. 19, 2021). It  
14 describes the effect of the enactment of § 1408(4) is to allow persons “born abroad to one  
15 or two non-citizen U.S. national parents prior to the INA could be documented as non-  
16 citizen U.S. nationals.” *Id.* This Court should give deference to the Department’s  
17 interpretation as written in the FAM.

18 Furthermore, the Ninth Circuit’s decision in *Friend v. Holder*, 714 F.3d 1349 (9th  
19 Cir. 2013), is inapposite and distinguishable from the law here. *Opp.*, at 8. In *Friend*, the  
20 Ninth Circuit analyzed a claim of citizenship under § 205 of the Nationality Act of 1940.  
21 The Court found that the statute’s direction that certain sections apply “as of the date of  
22 birth” did not extend “the statute’s reach retroactively,” but instead that it “confer[red]  
23 citizenship as of the date of the child’s birth, even if the child’s paternity is not established  
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1 until years later.” *Id.*, at 1351-52. In contrast, and as described above, § 15(b) provides  
2 specific conferral language as applied to those born before § 1408’s enactment. Thus, the  
3 analysis in *Friend* does not support Plaintiff’s position here. In fact, it emphasizes the  
4 importance of the conferral language in § 15(b).

5 Finally, Plaintiff incorrectly argues that § 1408(4)’s placement within Part I of  
6 Subchapter III of Chapter 12 of Title 8 “reflects Congress’s further intent to vest national  
7 status at birth rather than on the date an individual meets section 15(b)’s procedural  
8 requirement.” *Opp.*, at 10. While Part I of Subchapter III relates to nationality at birth and  
9 collective naturalization, this does not support Plaintiff’s argument that § 15(b) is merely  
10 procedural or does not provide for the date of conferral of status for those born before the  
11 enactment of §1408. This placement of § 1408 makes sense in that status is predicated on  
12 the birth of the person in that it requires at least one parent to be a U.S. national at the time  
13 of the person’s birth. It does not nullify § 15(b)’s substantive requirement of when a person  
14 acquires his or her status.  
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16 Section 1408 did not confer status to Plaintiff’s mother as a non-citizen national  
17 until after 1986 and two decades after Plaintiff’s birth. Thus, she was not a non-citizen  
18 national at the time of Plaintiff’s birth. Accordingly, Plaintiff was born to two non-citizens  
19 in a foreign country and has no entitlement to any U.S. nationality status.  
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### 21 CONCLUSION

22 For the foregoing reasons, Defendants respectfully request that the Complaint be  
23 dismissed with prejudice in its entirety.  
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1 DATED this 19th day of November, 2021.

2 Respectfully submitted,

3  
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