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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Victor Pianka,

10 Petitioner,

11 v.

12 Charles De Rosa,

13 Respondent.  
14

No. CV-14-02179-PHX-DGC

**ORDER**

15 On October 1, 2014, Petitioner Victor Pianka filed a pro se petition for writ of  
16 habeas corpus pursuant to 28 U.S.C § 2241. Doc. 1. On October 13, 2016, Magistrate  
17 Judge Michelle Burns issued a report and recommendation (“R&R”) that the Court  
18 dismiss the petition under the doctrine of prudential exhaustion. Doc. 43. Petitioner filed  
19 objections (Doc. 47), and Respondents did not file a response. For the reasons set forth  
20 below, the Court will adopt Judge Burns’s recommendation.

21 **I. Background.**

22 Judge Burns provided the following summary of Petitioner’s administrative  
23 proceedings and habeas corpus petition:

24 Petitioner, a native of Poland and lawful permanent resident, was  
25 taken into ICE custody on June 7, 2013 and placed in removal proceedings  
26 under Section 240 of the Immigration and Nationality Act (“INA”). (Doc.  
27 41.) Petitioner was issued a Notice to Appear, alleging that he is deportable  
28 because he is a citizen of Poland, not a citizen of the United States, and on  
July 18, 2012, he was convicted of possession of drug paraphernalia in  
Maricopa County Superior Court. (Id.)

1           On December 30, 2013, Petitioner appeared for a bond hearing  
2 before an Immigration Judge (IJ). Petitioner testified that he had obtained  
3 United States citizenship through his father, Adam Kostewicz, and that the  
4 record before the court showing that Mr. Kostewicz was neither his  
5 biological father nor his adoptive father was based on “fraudulent  
6 findings.” (Id.)

7           The IJ found that “based on the evidence of record, [Petitioner] ha[d]  
8 not met his burden” of establishing that he had derived citizenship from Mr.  
9 Kostewicz or from Petitioner’s biological mother, who had naturalized after  
10 Petitioner’s 18th birthday. (Id.)

11           Most recently, on July 25, 2016, Respondents submitted a status  
12 report to update the Court regarding Petitioner’s current custody status.  
13 (Doc. 42.) Respondents state that a bond hearing was conducted on May  
14 11, 2016 pursuant to *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).  
15 Petitioner was represented at the hearing by an appointed qualified  
16 representative. The IJ set Petitioner’s bond at \$35,000. Petitioner has not  
17 yet posted bond and is still in ICE custody. Petitioner, through his  
18 appointed qualified representative, has appealed the IJ’s bond determination  
19 to the Board of Immigration Appeals (“BIA”). Briefs were due to the BIA  
20 on August 1, 2016.

21           Regarding Petitioner’s removal status, Respondents state that  
22 Petitioner was previously ordered removed. Petitioner was then appointed  
23 counsel, appealed the removal order, and requested that the removal case be  
24 remanded to the IJ to be re-litigated with the assistance of counsel. The BIA  
25 granted the motion to remand on October 31, 2014, and the removal and  
26 relief case was reheard on various dates from December 17, 2014 through  
27 June 12, 2015. Petitioner was represented by his appointed qualified  
28 representative during the remanded proceedings. On September 1, 2015, the  
IJ denied all relief and ordered Petitioner removed. Petitioner appealed to  
the BIA. The appeal has been fully briefed and is awaiting the BIA’s  
decision.

          In his Petition for Writ of Habeas Corpus, Petitioner argues that  
under *Flores-Torres v. Mukasey*, ICE lacks jurisdiction to detain him as an  
alien. *See Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008).  
Specifically, Petitioner argues that under *Flores-Torres*, ICE lacks  
jurisdiction to detain him as an alien because he acquired derivative  
citizenship through his stepfather, Adam Dostewicz, whom Petitioner  
asserts is his birth father.

1 Doc. 43 at 1-3.

2 **A. Petitioner’s Objections to the Characterizations of His Case.**

3 Petitioner makes several objections to Judge Burns’s description of his case. First,  
4 he argues that Judge Burns “only mentions that he brought the claim of citizenship  
5 through his father and then mentions that the IJ made a finding. . . . omit[ing] that  
6 Petitioner had a claim of citizenship through three ways but that the IJ only determined  
7 two of them.” Doc. 47 at 1. Petitioner appears to be alleging that Judge Burns  
8 incorrectly represents that the IJ considered Petitioner’s claims. *See also id.* at 4.  
9 Additionally, Petitioner objects to Judge Burns mentioning “that Respondent’s Status  
10 Update attempts to detail petitioner’s bond status and about appointed counsel . . .  
11 because bond is irrelevant to the fact that petitioner is a United States Citizen in  
12 Immigration detention[,]” and because Petitioner’s counsel has an alleged “conflict of  
13 interest.” *Id.* at 2.<sup>1</sup> Whether the IJ adequately considered all of Petitioner’s claims and  
14 whether Petitioner’s appointed counsel in his administrative hearings has a conflict of  
15 interest are not issues before this Court. Rather, these are issues that Petitioner may raise  
16 before the BIA and on appeal to the Ninth Circuit once the BIA has made a final  
17 determination in his case.<sup>2</sup>

18 The only issue before this Court is whether it should exercise jurisdiction over  
19 Petitioner’s claim, and, if so, whether Petitioner’s claim that he is a U.S. citizen has  
20 merit. To the extent that Petitioner’s citizenship is being actively considered in separate  
21 administrative hearings, the existence and status of these hearings are relevant to the  
22 Court’s decision. Additionally, as an individual must be in custody in order to bring a  
23 habeas petition, Petitioner’s bond hearing and his continuous detention by ICE are also  
24 relevant. The Court finds no meaningful error in Judge Burns’s case description.

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26 <sup>1</sup> Petitioner also alleges that “counsel was erroneously appointed through multiple  
27 due process violations.” Doc. 47 at 3. He does not provide any factual support or  
28 explanation as to how appointment of counsel violated his due process rights.

<sup>2</sup> Petitioner argues that fraud claims were presented to the IJ, but not considered.  
Doc. 47 at 4. Additionally, Petitioner notes that he has already brought an ineffective  
assistance of counsel claim in his administrative proceedings. *Id.* at 6.

1           **B.     Petitioner’s Objections to the Legal Conclusions of Judge Burns.**

2           In his habeas petition, Petitioner argues that under *Flores-Torres*, ICE lacks  
3 jurisdiction to detain him because he is a U.S. citizen. Ordinarily, an individual who has  
4 been issued a final administrative removal order may only appeal that order to the circuit  
5 court. 8 U.S.C. § 1252; *Flores*, 548 F.3d at 710 (9th Cir. 2008). If the alien claims to be  
6 a U.S. citizen and the circuit court determines that a genuine issue of material fact exists,  
7 the circuit court will transfer the matter to the district court. § 1252(b)(5)(B). In line  
8 with this rule, where an individual has received a final administrative removal order, he  
9 may not bring a habeas petition before a district court challenging his detention based on  
10 allegations that he is a U.S. citizen. *Carrillo-Lozano v. Stolc*, 669 F. Supp. 2d 1074, 1078  
11 (D. Ariz. 2009) (“Because the immigration tribunals have already issued a final removal  
12 order, the Court cannot rule on Petitioner’s challenge to his detention on the basis of his  
13 nationality without directly implicating the final order of removal.”).

14           Judge Burns recognized, however, that under *Flores-Torres* an individual who has  
15 not yet received a final administrative removal order may challenge his detention through  
16 a habeas petition. Although 8 U.S.C. § 1252(b) does not deprive the Court of jurisdiction  
17 to consider this case, Judge Burns found that “*Flores-Torres* does not require the Court to  
18 exercise jurisdiction over Petitioner’s claim – the Court can exercise its discretion to  
19 decline jurisdiction and require prudential exhaustion before reaching the merits.”  
20 Doc. 43 at 4. Citing to factors set out by the Ninth Circuit, Judge Burns concluded that  
21 the Court should exercise this discretion. *Id.* (citing *Puga v. Chertoff*, 488 F.3d 812 (9th  
22 Cir. 2007)). Petitioner objects to this finding “that Petitioner still has to exhaust his  
23 remedies.” *Id.* at 5.

24           While “only an ‘alien’ is required to exhaust administrative remedies under the  
25 INA[.]” *Flores-Torres v. Mukasey*, 548 F.3d 708, 712 (9th Cir. 2008), “the judicially  
26 created, prudential exhaustion doctrine [is] applicable to all habeas petitions filed under  
27 28 U.S.C. § 2241,” *Sun v. Ashcroft*, 370 F.3d 932, 936 (9th Cir. 2004). *See also Tapia v.*  
28 *DeRosa*, No. CV-12-02393-PHX-FJM, 2013 WL 6512489, at \*2 (D. Ariz. Dec. 12, 2013)

1 (dismissing habeas petition alleging petitioner is a U.S. citizen unlawfully detained by  
2 ICE under the doctrine of prudential exhaustion).<sup>3</sup>

3 Courts may require prudential exhaustion if (1) agency expertise makes  
4 agency consideration necessary to generate a proper record and reach a  
5 proper decision; (2) relaxation of the requirement would encourage the  
6 deliberate bypass of the administrative scheme; and (3) administrative  
7 review is likely to allow the agency to correct its own mistakes and to  
preclude the need for judicial review.

8 *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

9 The Court agrees with Judge Burns that, considering the above criteria, prudential  
10 exhaustion should be required in this case. The exact issue Petitioner is asking the Court  
11 to decide – whether he is a citizen of the United States – is currently being decided in an  
12 administrative proceeding pending before the BIA, which has expertise in determining  
13 matters of citizenship and immigration. The BIA has access to an extensive record,  
14 including a decision from the IJ and full briefing from the parties. Claims of ineffective  
15 assistance of counsel notwithstanding, Petitioner is also represented by counsel before the  
16 BIA, in contrast with his *pro se* status here. The BIA is in a better position to make a  
17 determination on Petitioner’s nationality.

18 Additionally, relaxation of the exhaustion requirement would encourage deliberate  
19 bypass of the administrative scheme, as any individual with a citizenship claim could  
20 immediately file a habeas petition in federal district court challenging the legality of his  
21 confinement by ICE without having to wait for administrative determination of his status.

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23 <sup>3</sup> “The Constitution is violated when a person with a non-frivolous claim to U.S.  
24 citizenship is deported without receiving a judicial determination of that claim.” *Iasu v.*  
25 *Smith*, 511 F.3d 881, 886 (9th Cir. 2007) (quoting *Rivera v. Ashcroft*, 394 F.3d 1129,  
26 1140 (9th Cir. 2005)). Petitioner, however, will have an opportunity to appeal the final  
27 administrative determination of his nationality to the Ninth Circuit, securing a judicial  
28 determination of his claim before he is deported.

1 Finally, the IJ and BIA will not have an opportunity to remedy any incorrect  
2 determinations concerning the nationality of individuals if the issue may immediately be  
3 considered by the district court without administrative exhaustion. True, the Ninth  
4 Circuit has expressed concern “that an individual who asserts a non-frivolous claim of  
5 citizenship can be detained during immigration proceedings – which, for Torres, has  
6 already lasted over two years – without habeas review.” *Flores-Torres*, 548 F.3d at 712.  
7 But a district court may always decline to require prudential exhaustion in an appropriate  
8 case.

9 Petitioner’s claim is currently awaiting final determination by the BIA. If the BIA  
10 reverses the IJ’s ruling, this habeas proceeding will be unnecessary. If, in contrast, the  
11 BIA upholds the ruling, Petitioner may appeal to the Ninth Circuit. Should the Ninth  
12 Circuit find a genuine issue of material fact concerning Petitioner’s nationality, the case  
13 will be referred to a district court for a new determination of his nationality claim.

14 **IT IS ORDERED:**

- 15 1. Magistrate Judge Michelle H. Burns’s R&R (Doc. 43) is **accepted**.
- 16 2. The Petition for writ of habeas corpus (Doc. 1) is **denied**.
- 17 3. The Clerk of the Court is directed to **terminate** this action.

18 Dated this 19th day of December, 2016.

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23 David G. Campbell  
24 United States District Judge  
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