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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 HASSENE CHAABANE and SAFIYAH)
11 RIBIS,)

12 Plaintiffs,)

13 v.)

14)
15 MICHAEL C. BIGGS, United States)
16 Citizenship and Immigration)
17 Services, et al.,)

18 Defendants.)
19 _____/

2:09-CV-2376-JAM-GGH

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

20 This matter comes before the Court on Defendants Michael C.
21 Biggs's, United States Citizenship and Immigration Services, et
22 al's ("Defendants'") Motion to Dismiss Plaintiff Hassene
23 Chaabane's ("Plaintiff Chaabane's") and Plaintiff Safiyah Ribis'
24 ("Plaintiff Ribis'") (collectively "plaintiffs") Complaint
25 ("Complaint") (Doc. # 1). Defendants bring the Motion to Dismiss
26 (Doc. # 14) pursuant to Federal Rules of Civil Procedure
27 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6)
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1 for failure to state a claim upon which relief can be granted.
2 Plaintiffs oppose the motion.¹
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4 I. FACTUAL AND PROCEDURAL BACKGROUND
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6 Plaintiff Chaabane is a citizen of Tunisia, and the spouse
7 of Plaintiff Ribis. Plaintiff Ribis is a citizen of the United
8 States. On September 27, 2002 Plaintiff Chaabane filed an I-485
9 Application to Adjust Status to that of Lawful Permanent
10 Resident, on the basis of an approved I-130 Petition for Alien
11 Relative filed on his behalf by Plaintiff Ribis. On July 16,
12 2008 the application was denied by Defendants who found that
13 Plaintiff Chaabane made misrepresentations on his application.
14 On September 5, 2008 a second I-130 visa petition was approved
15 on behalf of Plaintiff Chaabane. On September 14, 2008 Chaabane
16 filed a second I-145 application to adjust status. On July 23,
17 2009 Defendants denied Plaintiff Chaabane's application, finding
18 him ineligible to adjust status pursuant to 8 U.S.C. 1255(I). On
19 August 7, 2009 a Notice to Appear for removal proceedings was
20 issued. Removal proceedings are pending.
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28 ¹ This motion was determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 230(g).

II. OPINION

A. Legal Standard

1. 12(b)(1) Dismissal

"Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction that exists despite the formal sufficiency of the complaint." Kondrachuk v. U.S. Citizenship, 2009 WL 1883720, at *4 (N.D. Cal. June 30, 2009) (internal citations omitted).

Federal courts are courts of limited jurisdiction, and possess only that power authorized by the Constitution and by statute. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (internal citations omitted). Federal courts are presumptively without jurisdiction over civil actions, and the burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time. Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d. 593, 595 (9th Cir. 1996).

Because jurisdiction is a threshold matter, a case can proceed no further if a court lacks jurisdiction to hear it. See

1 Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (“[W]hen a
2 federal court concludes that it lacks subject-matter
3 jurisdiction, the court must dismiss the complaint in its
4 entirety.” (citation omitted)).

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7 2. 12(b)(6) Dismissal

8 A party may move to dismiss an action for failure to state
9 a claim upon which relief can be granted pursuant to Federal
10 Rule of Civil Procedure 12(b)(6). In considering a motion to
11 dismiss, the court must accept the allegations in the complaint
12 as true and draw all reasonable inferences in favor of the
13 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
14 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
15 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
16 are mere “legal conclusions,” however, are not entitled to the
17 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
18 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
19 (2007). To survive a motion to dismiss, a plaintiff needs to
20 plead “enough facts to state a claim to relief that is plausible
21 on its face.” Twombly, 550 U.S. at 570. Dismissal is
22 appropriate where the plaintiff fails to state a claim
23 supportable by a cognizable legal theory. Balistreri v.
24 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).
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1 B. Discussion

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3 1. Subject Matter Jurisdiction

4 Plaintiffs argue that this Court has jurisdiction over this
5 matter pursuant to 28 U.S.C. § 1331 which states, “[t]he
6 district courts shall have original jurisdiction of all civil
7 actions arising under the Constitution, laws, or treaties of the
8 United States” and pursuant to 28 U.S.C. §§ 2201 & 2202 which
9 allows the courts to provide declaratory relief. Defendants
10 assert that Plaintiffs may not rely on these general grants of
11 jurisdiction where a statute specifically limits jurisdiction,
12 citing 8 U.S.C. §1252(2)(A) which states, “[n]otwithstanding any
13 other provision of law (statutory or nonstatutory), ... no court
14 shall have jurisdiction to review . . .” (emphasis added).
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17 Plaintiffs concede that this Court lacks jurisdiction to
18 review the discretionary denial of an adjustment of status
19 application pursuant to 8 U.S.C. § 1252(a)(2)(B)(i). While
20 Plaintiffs assert that the allegedly improper denial of
21 Chaabane’s application raises an issue of law, the Complaint
22 does not allege which law Defendants improperly applied or how
23 it was improperly applied. The Complaint states “the conflicting
24 explanations in the July 16, 2008 and the June 23, 2009 denial
25 of the petitions for adjustment of status are contradictory,
26 illogical, arbitrary and capricious in that they are not in
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1 accord with the facts and or law that governs Defendants
2 actions." (Complaint ¶ 28.) This statement does not identify a
3 question of law for this Court to adjudicate. Rather, the issue
4 before this Court is a question of fact disguised as a question
5 of law and thus this Court has no jurisdiction to review this
6 case.

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8 As Defendants argue, insofar as Plaintiffs' claim raises a
9 question of law, the challenge must be brought before the
10 appropriate court of appeals, rather than the district court,
11 pursuant to 8 U.S.C. § 1252(a)(2)(D). Kondrachuk, 2009 WL
12 1883720, at *5 ("Under § 1252 . . . an individual may seek
13 judicial review of the denial of his or her application for
14 adjustment of status only if the challenge involves either
15 "constitutional claims or questions of law" and is raised in a
16 petition for review filed in the court of appeals pursuant to §
17 1252."). The Ninth Circuit properly "retain[s] jurisdiction to
18 decide, as a matter of law, whether an alien is statutorily
19 eligible for adjustment of status" under 8 U.S.C. §
20 1252(a)(2)(D). Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1113
21 (9th Cir. 2007) (internal citations omitted).

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24 Defendants further aver that jurisdiction is precluded
25 under 8 U.S.C. § 1252(d) because Plaintiff Chaabane has failed
26 to exhaust administrative remedies available to him as of right
27 in accordance with 8 C.F.R. § 245.2. "A court may review a final
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1 order of removal only if . . . the alien has exhausted all
2 administrative remedies available to the alien as of right, . .
3 ." 8 U.S.C. §1252(d)(1). Plaintiffs assert that they do not
4 seek review of a final order of removal. In fact, a final order
5 has not been issued in this case. Rather, Plaintiffs seek review
6 of the denial of Plaintiff Chaabane's applications to adjust
7 status. Therefore, 8 U.S.C. §1252(d)(1) does not apply to this
8 case.
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10 Nevertheless, administrative exhaustion is required with
11 respect to the denial of Plaintiff Chaabane's adjustment of
12 status application. The doctrine of administrative exhaustion
13 states, "[w]here relief is available from an administrative
14 agency, the plaintiff is ordinarily required to pursue that
15 avenue of redress before proceeding to the court, and until that
16 recourse is exhausted, suit is premature and must be dismissed."
17 Reiter v. Cooper, 507 U.S. 258, 269 (1993).
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20 Plaintiffs allege that "USCIS has effectively cut off all
21 administrative review available to [Plaintiff Chaabane]."
22 (Opposition, 4: 22-23.) However, Defendants assert that
23 Plaintiff Chaabane has extensive opportunities for relief during
24 his pending removal proceedings with respect to the adjustment
25 of status application, and thus this Court does not have
26 jurisdiction to hear this case. See, e.g., Shepherd v. Gonzales,
27 218 Fed.Appx. 657, 658 (9th Cir. 2007) ("To the extent Shepherd
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1 contends he is eligible for adjustment of status, suspension of
2 deportation, cancellation of removal, or a section 212 waiver,
3 we lack jurisdiction to review these contentions because
4 Shepherd did not exhaust them before the BIA.”) (citing Barron
5 v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2004)); Chae Im Kim v.
6 Mukasey, 305 Fed. Appx. 412 (9th Cir. 2008) (“We lack
7 jurisdiction over Kim's contention that the IJ denied her due
8 process by pretermittting her adjustment of status application
9 because she did not raise the claim before the BIA (citing
10 Barron, 358 F.3d at 678) (exhaustion of claims within the
11 agency's competence is mandatory and jurisdictional)). Thus,
12 Plaintiffs must, and have failed to, exhaust all administrative
13 relief.
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16 In their Opposition, Plaintiffs aver that this Court has
17 jurisdiction over this case pursuant to the Mandamus Act which
18 states, “[t]he district courts shall have original jurisdiction
19 of any action in the nature of mandamus to compel an officer or
20 employee of the United States or any agency thereof to perform a
21 duty owed to the plaintiff.” 28 U.S.C. § 1361. However, there is
22 no action for this Court to compel. Plaintiffs argue that
23 Defendants have a duty to “record a non-citizen’s lawful
24 admission to permanent residence upon approval of an adjustment
25 application” and that “this duty implicitly requires the
26 adjudication of all applications to determine those that are to
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1 be approved." (Opposition, 8:18-21.) Defendants have considered
2 and denied Plaintiff Chabaane's application for adjustment of
3 status and they have provided Plaintiffs with the reasons why
4 the application was denied. Thus, they have performed their duty
5 and there is nothing for the Court to compel.

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7 Plaintiffs further aver that this Court has jurisdiction
8 under the Administrative Procedure Act which states, "[a]gency
9 action made reviewable by statute and final agency action for
10 which there is no other adequate remedy in a court are subject
11 to judicial review. . . . Except as otherwise expressly required
12 by statute, agency action otherwise final is final for the
13 purposes of this section whether or not there has been presented
14 or determined an application for a declaratory order, for any
15 form of reconsideration, or, unless the agency otherwise
16 requires by rule and provides that the action meanwhile is
17 inoperative, for an appeal to superior agency authority." 5
18 U.S.C. § 704. Again, while Defendants' denial of Plaintiff
19 Chaabane's application may be subject to judicial review, this
20 Court is not the proper reviewing court.
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1 2. Failure to State a Claim

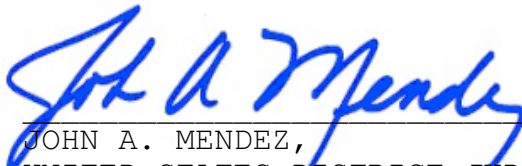
2 Because the Court does not have jurisdiction over this
3 case, the motion to dismiss for failure to state a claim upon
4 which relief can be granted is moot.
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6 III. ORDER
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8 For the reasons set forth above, Defendants' motion to
9 dismiss for lack of subject matter jurisdiction is GRANTED.
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11 IT IS SO ORDERED.

12 DATED: June 24, 2010
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 JOHN A. MENDEZ,
 UNITED STATES DISTRICT JUDGE