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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 ELAZIA FRANCO BARTOLO,
12 Petitioner,

No. 2:09-cv-03188-MCE-JFM

13 v.

MEMORANDUM AND ORDER

14 JANET NAPOLITANO, Secretary,
15 United States Department of
Security, et al.,

16 Respondents.
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18 Through the present action, Plaintiff Elazia Franco Bartolo
19 ("Plaintiff") challenges the denial of her application to adjust
20 status to that of a lawful permanent resident of the United
21 States. The United States now moves to dismiss Plaintiff's
22 lawsuit on grounds that this Court lacks subject matter over the
23 action pursuant to Federal Rule of Civil Procedure 12(b)(1).¹
24 The government alternatively requests that the action be
25 dismissed under Rule 12(b)(6) for failure to state a claim upon
26 which relief can be granted.
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28 ¹ All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 As set forth below, we conclude that no jurisdiction vests to
2 this Court at the present time because Plaintiff has failed to
3 exhaust administrative remedies now available to her in the
4 course of pending removal proceedings.

5 6 **BACKGROUND**

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8 The underlying facts presented by this case are undisputed.
9 Plaintiff legally entered the United States in 2009 as the minor
10 child of an alien who was the fiancé of an American citizen.
11 Plaintiff turned twenty-one less than two months after that
12 entry, however, and while she applied for adjustment of
13 immigration status (to a lawful permanent resident) some ten days
14 before her birthday, the government ultimately denied her request
15 on grounds that she turned twenty-one before her application had
16 been adjudicated.

17 Plaintiff filed the present action on November 16, 2009 to
18 challenge the government's denial of her adjustment application.
19 Less than a month later, on December 10, 2009, removal
20 proceedings were commenced against Plaintiff.

21 22 **STANDARD**

23
24 In moving to dismiss for lack of subject matter jurisdiction
25 pursuant to Rule 12 (b) (1), the challenging party may either make
26 a "facial attack" on the allegations of jurisdiction contained in
27 the complaint or can instead take issue with subject matter
28 jurisdiction on a factual basis ("factual attack").

1 Thornhill Publishing Co. v. General Tel. & Elect. Corp., 594 F.2d
2 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan
3 Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the motion
4 constitutes a facial attack, the Court must consider the factual
5 allegations of the complaint to be true. Williamson v. Tucker,
6 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at 891.
7 If the motion constitutes a factual attack, however, "no
8 presumptive truthfulness attaches to plaintiff's allegations, and
9 the existence of disputed material facts will not preclude the
10 trial court from evaluating for itself the merits of
11 jurisdictional claims." Thornhill, 594 F.2d at 733 (quoting
12 Mortensen, 549 F.2d at 891).

13 If the Court grants a motion to dismiss a complaint, it must
14 then decide whether to grant leave to amend. Generally, leave to
15 amend should be denied only if it is clear that the deficiencies
16 of the complaint cannot be cured by amendment. Broughton v.
17 Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980).

18 19 ANALYSIS

20
21 Once removal proceedings were instituted against her, it is
22 uncontroverted that Plaintiff became able to renew her previously
23 denied application to adjust status. See 8 C.F.R.
24 § 245.2(a)(5)(ii), (d). It is equally uncontroverted that given
25 those removal proceedings, judicial review is available only as
26 to a final order of removal and only if an alien like Plaintiff
27 has exhausted "all administrative remedies available to [her) as
28 of right." 8 U.S.C. § 1252(d)(1).

1 As the Supreme Court explained in Reiter v. Cooper, 507 U.S. 258
2 (1993), "[w]here relief is available from an administrative
3 agency, the plaintiff is ordinarily required to pursue that
4 avenue of redress before proceeding to the courts, and until that
5 recourse is exhausted, suit is premature and must be dismissed."
6 Id. at 269.

7 Plaintiff nonetheless argues that this suit should be
8 allowed to proceed because it was filed some three weeks before
9 removal proceedings were initiated, at a time when there was no
10 further administrative recourse to the United States Citizenship
11 and Immigration Service's initial denial of her application to
12 adjust status. Although there admittedly is no Ninth Circuit
13 authority directly on point with respect to this particular
14 contention, out-of-circuit decisions have found that whether or
15 not removal proceedings were instituted after an initial status
16 application was denied is not dispositive with respect to whether
17 exhaustion is nonetheless required. See Walid El-Baz Abdelwahab
18 v. Frazier, 578 F.3d 817, 822 (8th Cir. 2009) (finding that
19 jurisdiction would not lie where "there were further
20 administrative remedies to be exhausted, even if those remedies
21 had appeared to be exhausted when the lawsuit was first
22 commenced"); Aguilar v. USCIS, 510 F.3d 1, 10 (1st Cir. 2007)
23 (exempting the exhaustion requirement from later-acquired
24 administrative remedies "would put an undue premium on which
25 party rushed to the courthouse first").

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1 This Court is persuaded by the reasons of Abdelwahab and
2 Aguilar and consequently finds that Plaintiff's present ability
3 to renew her adjustment of status application in removal
4 proceedings deprives this Court of jurisdiction. The United
5 States Motion to Dismiss for Lack of Jurisdiction (Docket No. 11)
6 is GRANTED.² Because this jurisdictional defect cannot be
7 remedied at the present time through any amendment of Plaintiff's
8 current pleadings, no leave to amend will be afforded. The Clerk
9 of Court is directed to close this file.

10 IT IS SO ORDERED.

11 Dated: June 30, 2010

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14 MORRISON C. ENGLAND, JR.
15 UNITED STATES DISTRICT JUDGE
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27 ² Because oral argument was not deemed to be of material
28 assistance, the Court ordered this matter submitted on the
briefing. E.D. Local Rule 230(g).