

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DINO MANDARINO,	:
Petitioner,	:
	:
-vs-	: Civ. No. 3:02cv255 (PCD)
	:
JOHN ASHCROFT, Attorney General, &	:
IMMIGRATION &	:
NATURALIZATION SERVICE,	:
Respondents.	:

ORDER DISMISSING COMPLAINT

Petitioner brought the present action *pro se* and *in forma pauperis* pursuant to 8 U.S.C. § 1503(a)¹ and 28 U.S.C. § 2201² seeking a declaratory judgment that he is a national of the United States, *see* 8 U.S.C. § 1101(a)(21), and a writ of mandamus pursuant to 28 U.S.C. § 1361³ ordering

¹ 8 U.S.C. § 1503(a) provides that “[i]f any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person’s status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.”

² 28 U.S.C. § 2201(a) provides in relevant part that “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

³ 28 U.S.C. § 1361 provides that “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

the respondents to release him from custody. For the reasons set forth herein, the complaint is **dismissed**.

I. BACKGROUND

Petitioner is the subject of a final order of removal dated January 12, 2001. On August 30, 2001, petitioner applied for naturalization. Petitioner filed the present complaint directly with the United States Court of Appeals for the Second Circuit which, by order dated January 25, 2002, denied the request for writ of mandamus for want of jurisdiction. Petitioner then refiled the complaint with this Court.

II. DISCUSSION

Plaintiff was granted leave to proceed *in forma pauperis*. Construing plaintiff's complaint under the liberal standard afforded *pro se* submissions, *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), this Court lacks the jurisdiction to award the relief sought by petitioner.

A district court must dismiss an *in forma pauperis* action if such action is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). An action is deemed frivolous when either the factual contentions are “clearly baseless” or when the claim is based on “an indisputably meritless legal theory.” *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (internal quotation marks omitted). A claim is premised on “indisputably meritless legal theory” when there is no arguable basis in law or a dispositive defense “clearly exists on the face of the complaint.” *See id.*

There is no arguable basis in law for the present complaint. On its face, § 1503(a) precludes the present action. Petitioner may not seek a declaration that he is a national “if the issue of such

person's status . . . (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding.” 8 U.S.C. § 1503(a). There is no question that petitioner's final order of removal preceded his application for naturalization.

The writ sought may also be interpreted as a collateral attack on the order of removal. *See Duran v. Reno*, No. 97 CIV. 3156, 1998 WL 54611, at *3 (S.D.N.Y. Feb. 10, 1998). Claims of nationality may be raised in the removal proceedings. *See* 8 U.S.C. § 1252(b)(5)(A). Issues arising from removal proceedings must be raised therein. *See* 8 U.S.C. § 1252(b)(9). As such, petitioner may not raise the question of nationality in a collateral proceeding in an attempt to attack the validity of the order of removal. Furthermore, jurisdiction over appeals on determinations of nationality arising therein vests exclusively in Courts of Appeals, *see id.*, which may then transfer such claims to a district court if fact-finding is required, *see* 8 U.S.C. § 1252(b)(5)(B). As such, this Court does not have jurisdiction to hear the present claim. Once removal proceedings are instituted, a court is without jurisdiction to issue or review the denial of a claim of nationality pursuant to § 1503(a). *See Costa v. Rogers*, 267 F.2d 921, 922 (2d Cir. 1959).

Finally, petitioner alleges that his application for naturalization is presently pending. If there is no denial of his application, then the present claim is not yet ripe for review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515-16, 18 L. Ed. 2d 681 (1967). If, however, there has been a denial of the application, petitioner is still not entitled to file a complaint directly with this Court. Section 1503(a) may only be invoked after a “final administrative denial.” Such denial imposes on petitioner a requirement that he exhaust administrative remedies prior to

seeking declaratory relief pursuant to § 1503(a). *See United States v. Breyer*, 41 F.3d 884, 891-92 (3d Cir. 1994); *Bastek v. Fed. Crop Ins. Co.*, 145 F.3d 90, 94 (2d Cir. 1998). Having failed to seek such review or indicate that the application has been denied, this Court lacks jurisdiction to hear the claim.

III. CONCLUSION

Petitioner's complaint (Doc no. 2) is **dismissed** for lack of jurisdiction. The Clerk shall close the file. Petitioner's application for bail (Doc. no. 3) is **denied as moot**. Petitioner is granted leave to file an amended complaint curing the aforementioned jurisdictional defects within thirty days.

SO ORDERED.

Dated at New Haven, Connecticut, September ____, 2002.

Peter C. Dorsey
United States District Judge