IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LUCIANA BUSTOS, Plaintiff, vs. JANET NAPOLITANO, Secretary of Homeland Security; ALEJANDRO MAYORKAS, Director of Citizenship and Immigration Services; GERARD HEINAUER, Director of Nebraska Service Center; JEANNE KENT, Field Office of Citizenship and Immigration Services, Defendants.	MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS Case No. 2:12-CV-515-TS

This matter is before the Court on Defendants' Motion to Dismiss for Failure to State a Claim for Relief. The Court heard argument on the Motion on October 23, 2012. For the reasons stated below, the Court will deny Defendants' Motion.

I. BACKGROUND

Plaintiff, Luciana Bustos, (also known as Lucy S. Ascua) is a native and citizen of Argentina. She unlawfully entered the United States on February 17, 1990. On April 30, 2001, "The Herb Shop Connection" filed, on her behalf, an Application for Alien Employment Certification ("ETA 750") with the Utah Department of Workforce Services ("DWS"), the State Employment Security Agency ("SESA").

In September 2003, the DWS responded to the application by sending a REMAND OF LABOR CERTIFICATION APPLICATION ("remand notice"). The remand notice sought changes on four items in the alien employment certification application. The document noted that two sections needed to be completed, the bilingual preference for the job should be removed, and that the wage offer was below the prevailing wage for the labor market and needed to be adjusted.

The remand notice acknowledged that DWS was in receipt of an application for alien labor certification with a priority date of April 30, 2001, and noted that the case would be closed if the requested information was not received by November 14, 2003. Because Ms. Bustos never provided the requested information, in November 2003, the case was closed. Ms. Bustos alleges that her former attorney closed the case without authorization. Ms. Bustos later filed an Immigrant Petition for Alien Worker, which was granted. She then filed an application for adjustment of status, which on August 26, 2009, was denied because United States Citizenship and Immigration Services ("USCIS") determined she failed to be grandfathered in, because she failed to establish that she filed an approvable labor certification on or before April 30, 2001. USCIS then denied a motion to reopen on February 10, 2010, for the same reason. Ms. Bustos now files this Complaint, challenging USCIS's denial of her adjustment application. Defendants move to dismiss Plaintiff's Complaint.

II. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as

the nonmoving party.[1] Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face,"[2] which requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[3] "A pleading that offers 'labels and conclusion' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[4] "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."[5] As the Court in *Iqbal* stated,

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.[6]

When considering the adequacy of a plaintiff's allegations in a complaint subject to a motion to dismiss, a district court not only considers the complaint, but also "documents incorporated into the complaint by reference, and matters of which a court may take judicial

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[1] *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

[3] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[4] *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration in original).

[5] *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

[6] *Iqbal*, 556 U.S. 677–78 (alteration in original) (internal quotation marks and citations omitted).

Under this standard, Plaintiff will have to show that, if her application had not been abandoned and subsequently closed, her labor certification could have been approved.[31] Plaintiff has presented a plausible claim under this standard.

IV. CONCLUSION

It is therefore ORDERED that Defendants' Motion to Dismiss (Docket No. 6) is DENIED.

DATED October 29, 2012.

BY THE COURT:

TED STEWART
United States District Judge

[31] *In re Jara Riero*, 24 I. & N. Dec. 267 (BIA 2007) (noting that denial of the petition is not dispositive of whether the petition was meritorious in fact and noting that on a marriage-based visa petition, the alien must not only prove that he was married, but also prove that the marriage was bona fide at its inception.)