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5 UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7 OAKLAND DIVISION

8 TATIANA FRIDERICI,

9 Plaintiff,

10 vs.

11 JANET NAPOLITANO, Secretary of the
12 Department of Homeland Security;
13 ROSEMARY MELVILLE, District Director of
14 U.S. Citizenship and Immigration Services;
15 ROBERT BARRETT, Field Office Director;
16 ERIC H. HOLDER, JR., United States Attorney
General,

17 Defendants.

Case No: C 09-4170 SBA

**ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

Docket 9

18 Plaintiff Tatiana Friderici previously obtained approval of a Form I-130 Petition for
19 Alien Relative ("I-130") on behalf of her husband, Jaswinder Singh Saini ("Saini"). The
20 Department of Homeland Security, United States Citizenship and Immigration Service
21 ("USCIS"), subsequently revoked its approval of the I-130 on the ground that Saini's marriage
22 to Plaintiff was invalid because he had not divorced his wife in India.

23 Plaintiff brings the instant action seeking judicial review of the USCIS's decision,
24 pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. The parties are
25 presently before the Court on Defendants' motion for summary judgment. Having read and
26 considered the papers submitted, and being fully informed, the Court DENIES the motion. The
27 Court adjudicates the instant motion without oral argument. Fed.R.Civ.P. 78(b).
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1 **I. BACKGROUND**

2 Saini entered the United States in or about February 6, 1996. AR 17. At some point,
3 Saini became the subject of a removal hearing, and on August 12, 1998, was determined to be a
4 “deportable alien who has engaged in terrorist activity.” Compl. ¶ 12.¹ On January 24, 2004,
5 while his adjustment proceedings were pending, Saini married the Plaintiff. AR 23. On March
6 24, 2004, Plaintiff filed an I-130 Petition on behalf of Saini. AR 17. The Petition alleged that
7 Saini had divorced his wife Gurdeep Kaur in India on December 23, 2003, and included a copy
8 of the divorce decree, which is signed by a “District & Session Judge, Moga.” AR 27-29. The
9 copy of the decree is “certified” by a “Superintendent.” AR 30. The USCIS approved the I-
10 130 on August 11, 2006. AR 2.

11 Despite its approval of the I-130, the USCIS investigated whether Saini was, in fact,
12 divorced from Mrs. Kaur. On September 26, 2008, the USCIS office in New Delhi received a
13 letter from Virendar Kumar, a District and Sessions Judge for Faridkot District in the state of
14 Punjab, India. AR 34-35. In this letter, Judge Kumar states that “this office has been asked
15 regarding the genuineness of the alleged judgment [i.e., the divorce decree].” AR 34. The
16 letter states that “neither there is nor there has ever been a post of the District and Sessions
17 Judge” or “Superintendent” in Moga. Id. In addition, Judge Kumar indicates that he received
18 a report from “Mrs. Amarjot Bhatti, Additional District Judge, Moga, [that] no such decree of
19 divorce has ever been passed at Moga against aforesaid number.” Id. The “aforesaid number”
20 is referenced as “23.12.2002.” Id. (emphasis added). The letter makes no mention of Judge
21 Kumar or Judge Bhatti’s role in the Indian court system to demonstrate the basis of their
22 respective statements. Nor are any facts disclosed regarding the nature, method or scope of
23 their investigation.

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26 ¹ According to the Complaint, the “terrorist activity” involved Saini’s providing diesel
27 fuel to militants so that they would leave his property. Compl. ¶ 2. Saini was concerned that if
28 the militants or others died while on his property, both he and his family would be implicated.
Id. Saini appealed this ruling to the Ninth Circuit, but later dismissed his appeal on January 24,
2005 after the Board of Immigration Appeals reopened and remanded to the Immigration Judge
for further proceedings in connection with his adjustment of status application. Id.

1 On January 9, 2009, the USCIS issued a Notice of Intent to Revoke (“Notice”) on the
2 basis that Plaintiff’s marriage to Saini was invalid based on Judge Kumar’s finding that the
3 divorce decree from India was fraudulent. AR 4-5. The Notice states, in relevant part:

4 An overseas investigation has found the divorce decree to be fake
5 and fictitious. There is no post of District and Sessions Judge in
6 Moga. Moreover, the Additional District Judge in Moga has
7 confirmed that no such divorce decree has ever been passed at
8 Moga. Furthermore, no such post of Superintendent exists or has
9 ever existed at Moga.

10 AR 4. Plaintiff did not respond to the Notice within the thirty day time-period and the I-130
11 was revoked on March 20, 2009. AR 1-2. Plaintiff commenced the instant action in this Court
12 on September 8, 2009, to seek judicial review of the USCIS’s decision to revoke its prior
13 approval of the I-130. Defendants now move for summary judgment, pursuant to Federal Rule
14 of Civil Procedure 56.

15 **II. LEGAL STANDARD**

16 Rule 56(c) authorizes summary judgment if there is no genuine issue as to any material
17 fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty
18 Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of
19 demonstrating the basis for the motion and identifying the portions of the pleadings,
20 depositions, answers to interrogatories, affidavits, and admissions on file that establish the
21 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
22 If the moving party meets this initial burden, the burden then shifts to the non-moving party to
23 present specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e);
24 Celotex, 477 U.S. at 324; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
25 586-87 (1986).

26 Under the APA, an agency action may be held unlawful and set aside if “arbitrary,
27 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.
28 § 706(2)(A). The agency’s factual findings are reviewed for substantial evidence. Herrera v.
U.S. Citizenship and Immigration Servs., 571 F.3d 881, 885 (9th Cir. 2009). “Review under the
arbitrary and capricious standard is narrow and [the court does] not substitute [its] judgment for

1 that of the agency.” Tucson Herpetological Soc’y v. Salazar, 566 F.3d 870, 875 (9th Cir.
2 2009). The agency’s action is presumed valid and should be affirmed “if a reasonable basis
3 exists for its decision.” Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir.
4 2006) (internal quotation omitted). Nonetheless, the Court’s “review still must be searching
5 and careful, subjecting the agency’s decision to close judicial scrutiny.” Containerfreight Corp.
6 v. United States, 752 F.2d 419, 422 (9th Cir. 1985) (citations and internal quotations omitted).
7 “[T]he court shall review the whole record or those parts of it cited by a party, and due account
8 shall be taken of the rule of prejudicial error.” 5 U.S.C. § 706(2)(A).

9 **III. DISCUSSION**

10 The Immigration and Nationality Act provides that “any citizen of the United States
11 claiming that an alien is entitled to ... an immediate relative status under section
12 1151(b)(2)(A)(I) of this title may file a petition with the Attorney General for such
13 classification.” 8 U.S.C. § 1154(a)(1)(A)(i). The statute requires the Attorney General to grant
14 an I-130 petition if, “[a]fter an investigation of the facts in each case ... he determines that the
15 facts stated in the petition are true and that the alien in behalf of whom the petition is made is
16 an immediate relative specified in section 1151(b) of this title[.]” 8 U.S.C. § 1154(b). Once a
17 petition has been approved, however, such approval may be revoked. “The Secretary of
18 Homeland Security may, at any time, for what he deems to be good and sufficient cause,
19 revoke the approval of any petition approved by him under section 1154 of this title. Such
20 revocation shall be effective as of the date of approval of any such petition.” 8 U.S.C. § 1155.
21 A revocation decision made under 8 U.S.C. § 1155 is subject to judicial review under the APA.
22 Herrera, 571 F.3d at 885.

23 Here, the USCIS based its decision to revoke Plaintiff’s I-130 approval based entirely
24 on an unauthenticated letter from Judge Kumar, who opined that Saini’s divorce certificate is
25 “fake and fictitious.” Defs.’ Mot. for Summ. J. at 10; AR 34-35. In general, documents
26 presented in immigration proceedings must be authenticated. See Espinoza v. INS, 45 F.3d
27 308, 309-310 (9th Cir. 1995) (noting that immigration forms must be authenticated through
28 some recognized procedure); Iran v. INS, 656 F.2d 469, 472 (9th Cir. 1981) (recognizing that

1 due process requires authentication of documents presented at a deportation hearing). Such
2 documents may be authenticated “through any recognized procedure, such as those required by
3 INS regulations or by the Federal Rules of Civil Procedure.” Vatyan v. Mukasey, 508 F.3d
4 1179, 1182 (9th Cir. 2007).

5 Regulations applicable to immigration proceedings provide that authentication may be
6 accomplished in accordance with the procedures set forth in 8 U.S.C. § 287.6. Id. Where a
7 document originates from a country that is not a signatory to the Hague Convention Abolishing
8 the Requirement of Legalization for Foreign Public Documents, subsection (b) of section 287.6
9 is germane.² Those provisions state that, “In any [immigration] proceeding ..., an official
10 record or entry therein, when admissible for any purpose, shall be evidenced by an official
11 publication thereof, or by a copy attested by an officer so authorized.... [¶] The attested copy,
12 with the additional foreign certificates if any, *must be certified* by an officer in the Foreign
13 Service of the United States, stationed in the foreign country where the record is kept.” 8
14 C.F.R. § 287.6(b)(1)-(2) (emphasis added).

15 Here, Defendants do not dispute that the letter from Judge Kumar is not certified, as
16 required by section 287.6(b). Rather, Defendants argue, without citation to any authority, that
17 this regulation is “only applicable to ‘official records’ and not non-public overseas
18 investigation reports such as the [letter] in question in this case.” Defs.’ Reply at 2. Not only
19 is this contention unsupported, it is unpersuasive. The letter states that it is being proffered *in*
20 *response to a written inquiry* (identified as “CIS-NDI-08-08/4”) by the USCIS regarding the
21 validity of a decree of divorce allegedly entered by an Indian court. AR 34. Given that the
22 letter is purported to from an official representative on behalf of the Indian court system in
23 response to a formal request from a United States government agency, it would appear to be an

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25 ² Neither party addresses whether India is a signatory to the Hague Convention
26 Abolishing the Requirement of Legalisation for Foreign Public Documents; instead, they
27 simply assume that it is not. The Court notes that the United States Department of State
28 website indicates that “[a]lthough India is a signatory to the Hague Convention Abolishing the
Requirement of Legalization for Foreign Public Documents, full implementation of the
Convention is still pending.” See http://travel.state.gov/law/info/judicial/judicial_2811.html
(last accessed April 28, 2010). Therefore, for purposes of this motion, the Court applies
subsection (b) of section 287.6.

1 “official record” within the meaning of 8 C.F.R. § 287.6(b). See Jiang v. Gonzales, 474 F.3d
2 25, 29 (1st Cir. 2007) (“The term ‘official record’ [as used in 8 C.F.R. § 287.6] would most
3 naturally appear to mean a government record” and “records kept in the ordinary course of
4 business, over and beyond governmental records”). In any event, even if the letter were *not* an
5 “official record,” that simply would mean that the letter should have been authenticated
6 through some method other than section 287.6.

7 Equally misplaced is Defendants’ ancillary assertion that section 287.6(b) is “not the
8 exclusive means of certifying documents that become part of the administrative record....”
9 Defs.’ Reply at 2. Generally speaking, that is a correct statement of the law. See Uppal v.
10 Holder, 576 F.3d 1014, 1022 (9th Cir. 2009) (“We have held that § 287.6 ‘provides one, but
11 not the exclusive, method for establishing a sufficient basis for admission of a [document] in a
12 [removal] proceeding.’”) (citation omitted). Of course, that begs the question of precisely what
13 means *other than* 8 C.F.R. § 287.6 the USCIS relied upon, if any, to authenticate Judge
14 Kumar’s letter. Tellingly, the USCIS never responds to that question. In addition, the Court’s
15 independent review of the records discloses no basis to establish that the letter was
16 authenticated in any manner. An agency decision based on unauthenticated evidence may be
17 considered arbitrary and capricious. See Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier
18 Safety Admin., 296 F.3d 1120, 1134-35 (D.C. Cir. 2002) (finding that agency’s reliance on
19 unreliable evidence “might well be” arbitrary and capricious behavior); see also Sviridov v.
20 Ashcroft, 358 F.3d 722, 728 (10th Cir. 2004) (finding that documents not authenticated under
21 section 287.6 were unreliable).

22 The fact that Judge Kumar’s letter is unauthenticated underscores the questionable
23 reliability of such evidence. As noted, the basis for Judge Kumar’s conclusion that Saini’s
24 divorce decree is “fake and fictitious” is that the decree was signed by a “District and Sessions
25 Judge, Moga,” which he claims is a non-existent post. AR 2, 34. Absent from the letter,
26 however, is any factual information demonstrating Judge Kumar’s qualifications or
27 competence to render make such a finding. Rather, Judge Kumar simply is identified as a
28 “District and Sessions Judge” in Faridkot. AR 34. In addition, no information is provided to

1 establish what method he used to verify the non-existence of a District and Sessions Judge in
2 Moga. See Balachova v. Mukasey, 547 F.3d 374, 383 (2d Cir. 2008) (conclusory consular
3 report that petitioner’s Russian birth certificate “did not conform to Russian records” deemed
4 unreliable where the report failed to disclose, inter alia, “the methods, if any, used to verify the
5 information supplied by the foreign official.”).

6 Judge Kumar also stated that based on a report he received from “Mrs. Amarjot Bhatti,
7 Additional District Judge, Moga,” no divorce decree has ever been entered in a Moga court
8 under number “23.12.2002.” AR 34. However, that is not the same identification number as
9 Saini’s divorce decree, which is “23.12.2003.” AT 29. Setting aside the lack of information
10 regarding the actions undertaken by Judge Bhatti to investigate the existence of Saini’s divorce
11 decree, the fact that she apparently relied on the wrong identification number could explain her
12 inability to locate the decree. Defendants attempt to dismiss this disparity as nothing more than
13 a typographical error, and point out that Judge Kumar referenced the correct date of the divorce
14 decree in the reference line of his letter. AR 34. However, the fact that *Judge Kumar*
15 referenced the correct date of the divorce decree does not establish that *Judge Bhatti* utilized
16 the correct information in the course of conducting her records search.³

17 Finally, Defendants contend that there is no requirement that the USCIS support its
18 decision to revoke an I-130 visa petition approval with “authenticated documentary evidence.”
19 Defs.’ Mot. for Summ. J. at 11. Again, Defendants fail to support this assertion with any
20 relevant legal authority. Nonetheless, Defendants’ assertion is unavailing. In this case, there is
21 no dispute that Plaintiff had presented evidence to show that her husband had divorced his wife
22 in India prior to marrying the Plaintiff. AR 2. The only evidence cited by the USCIS to
23 invalidate that claim is the letter report from Judge Kumar. Thus, having expressly relied on
24 documentary evidence to support its decision to revoke the approval of Plaintiff’s I-130
25 petition, it was incumbent upon the USCIS to obtain proper authentication consistent with the
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27 ³ It may well be that the reference to “23.12.2002” is a typographical error, and that
28 Judge Bhatti conducted an appropriate inquiry. However, the record as presented is devoid of
any evidence to support that conclusion. Defendants’ counsel’s opinion is not evidence.

1 provisions of 8 C.F.R. § 287.6 or through some other recognizable means. See Uppal, 576
2 F.3d at 1022. Having failed to posit any evidence that such letter was authenticated in any
3 manner, the Court cannot conclude, based on the arguments and evidence presented, that
4 Defendants are entitled to summary judgment in this action.


5 **IV. CONCLUSION**

6 For the reasons stated above,

7 IT IS HEREBY ORDERED THAT Defendants' motion for summary judgment is
8 DENIED. This Order terminates Docket 9.

9 IT IS SO ORDERED.

10 Dated: May 3, 2010


SAUNDRA BROWN ARMSTRONG
United States District Judge

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