**STATE OF FLORIDA**
**REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 16-00205

vs.

Referee Decision No. 0025833329-06U

Employer/Appellee

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**ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

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This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant was hired on December 26, 2014, and was separated on February 19, 2015. [The employer] employed the claimant as a full-time foreman. The claimant had been supplied with an employee handbook when he was hired. The claimant was hired on an initial 90-day probationary period. He was informed of that fact within his first seven working days. The claimant is a citizen of Honduras. He has lived and worked in the United States since 1991. He is required to be authorized to work in the United States. This authorization expires every year and must be renewed every year. No employer may legally employ him unless or until it has been re-authorized. The claimant knew this. The employer knew this. The claimant knew the re-authorization process took several months. The claimant's authorization expired on January 5, 2015. The claimant sent in the paperwork necessary to re-authorize his work permit on January 26, 2015. The employer discovered that his work permit had expired and that he was no longer legally authorized to work in the United States. They terminated his employment.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision holding the claimant disqualified is supported under Section 443.036(29)(a), Florida Statutes, and Section 443.101(13), Florida Statutes.

Section 443.036(29), Florida Statutes (2014), states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.

> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
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> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
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> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
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> (e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:
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> a. He or she did not know, and could not reasonably know, of the rule's requirements;
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> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The referee held the claimant's failure to timely renew his work authorization amounted to disqualifying misconduct under subparagraphs (b), (d), and (e) of Section 443.036(29), Florida Statutes. The Commission does not agree with this legal analysis. The record does not support the conclusion that the claimant's conduct was negligent to such a degree or recurrence to amount to misconduct under subparagraph (b); it was not established the claimant violated a standard or regulation of this state which would cause the employer to be sanctioned or have its license or certification suspended by this state under subparagraph (d); nor was there any evidence the claimant violated an employer rule under subparagraph (e). Contrary to the referee's reasoning, the claimant's actions are more appropriately analyzed under subparagraph (a) of the above statute and Section 443.101(13), Florida Statutes.

Relevant provisions of the Immigration Reform and Control Act ("IRCA") prohibit an employer from continuing to employ an employee who, to the employer's knowledge, lacks authorization to work in the United States. *See* 8 U.S.C. §1324a(a)(2); 8 C.F.R. §274a.3.; *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (summarizing the effect of these provisions thusly: "if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status"). It is also illegal to employ an individual without obtaining the federally required documentation. 8 U.S.C. §1324a(a)(1)(B), (b); 8 C.F.R. §274a.2. *See Hoffman Plastics*, 535 U.S. at 148. In sum, for an employer to lawfully employ an individual in the United States, the individual must (1) be lawfully authorized to work in the United States; *and* (2) provide appropriate documentation as to both the individual's identity and his or her authorization to be lawfully employed. *See Hoffman Plastics*, 535 U.S. at 148 ("Under the IRCA regime, it is impossible for an *undocumented* alien to obtain employment in the United States without some party directly contravening explicit congressional policies") (emphasis added). The effect of these provisions was that once the claimant's employment authorization document (EAD) expired, absent further provision of authorized documentation, the employer was *compelled* to discharge the claimant under the IRCA.

The claimant apparently contends that he was authorized to work in the United States, notwithstanding the January 5, 2015 facial expiration of his EAD, due to his status as a Honduran national. The claimant's contention may or may not be correct. Pursuant to 8 U.S.C. §1254a(a)[1] and 8 C.F.R. §244.2, the U.S. Secretary of Homeland Security may grant certain aliens "temporary protected status" ("TPS") for purposes of residency and employment. Such a declaration was made for eligible Honduran nationals in 1999 and continually renewed thereafter. *See* 79 Fed.Reg. 62170, 62171 (October 14, 2014). On October 14, 2014, the Secretary of Homeland Security announced an extension of TPS for eligible Honduran nationals from January 5, 2015 (the prior expiration) until July 5, 2016. 79 Fed.Reg. 62170. The published notice also advised that such individuals were required to timely file both (1) a re-registration of their individual TPS, and (2) an application for an extended EAD. 79 Fed.Reg. at 62171. The notice provided that the United States Citizen and Immigration Service ("USCIS") would "issue new EADs with a July 5, 2016 expiration date to eligible Honduras TPS beneficiaries who timely re-register and apply for EADs under this extension." *Id*. The notice goes on to state:

[1] *See* 6 U.S.C. §557.

> For individuals who have already been granted TPS under the Honduras designation, the 60-day re-registration period runs from October 16, 2014, through December 15, 2014. USCIS will issue new EADs with a July 5, 2016 expiration date to eligible Honduras TPS beneficiaries *who timely re-register and apply for EADs under this extension*. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on January 5, 2015. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Honduras for 6 months, through July 5, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and the E-Verify processes.
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> * * * * *
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> (Note: It is important for re-registrants to timely re-register during this 60-day reregistration period, and not to wait until their EADs expire.)

*Id.* (emphasis added).[2] Although this text implies that the automatic extension of the EAD was available only to those who timely applied for extension, the notice also stated the following in a separate section:

> *Am I eligible to receive an automatic 6-month extension of my current EAD through July 5, 2015?*
> Provided that you currently have TPS under the Honduras designation, this notice automatically extends your EAD by 6 months if you: [criteria omitted]. Although this Notice automatically extends your EAD through July 5, 2015, you must re-register timely for TPS in accordance with the procedures described in this Notice if you would like to maintain your TPS.

79 Fed.Reg. at 62174. As such, the notice was ambiguous as to whether the automatic employment authorization extension was available to those, like the claimant, who did not timely apply for an EAD extension.

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[2] USCIS provided a public announcement of this notice on their website, which linked to the Notice published in the Federal Register. It is available at https://www.uscis.gov/news/temporary-protected-status-extended-honduras (last accessed March 9, 2016).

Even assuming the claimant's authorization was extended, the claimant was still required to provide information to the employer advising it of his extended authorization. Both the notice[3] and USCIS website guidance[4] advised eligible employees to provide a copy of the notice to their employers along with their expiring EAD for purposes of documenting their continued work authorization. With that information in hand, the employer was authorized to amend the Form I-9 for the employee to update the documentation effective date to July 5, 2015. *Id*.

In this case, the credited evidence shows that the claimant failed to timely apply for an extension and did not provide the employer with the recommended notice. In short, the claimant failed to do both of the two things that might have kept him eligible to be retained as an employee. The employer had no choice but to let the claimant go. The claimant understood that the renewal process could take several months; therefore, his delay in seeking renewal and failure to provide interim documentation was in conscious disregard of the employer's interests and a "deliberate disregard of the reasonable standards of behavior which the employer expects of his or her employee" under subparagraph (a). The claimant, therefore, was discharged for misconduct connected with work.

While disqualification under Section 443.101(1)(a), Florida Statutes, requires evidence of culpability, disqualification under Section 443.101(13) does not. Instead, subparagraph (13) is a strict liability provision imposing an open-ended disqualification period in much the same manner as certain eligibility issues. The claimant can only avoid disqualification under this provision if he establishes "good cause" for his failure to renew his work authorization. The claimant's failure to timely seek renewal of his work authorization or otherwise provide the employer with the necessary documentation to demonstrate his continuing authorization to work are not "good cause" for his failure to obtain his work authorization renewal. Consequently, even if the claimant lacked the requisite culpability for a finding of misconduct as defined by Section 443.036(29)(a), Florida Statutes, he would still be disqualified under Section 443.101(13), Florida Statutes, although at a reduced penalty. The disqualification penalty imposed under this section, however, lasts only until such time as the claimant becomes reemployed.[5]

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[3] 79 Fed.Reg. at 62174.

[4] https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras.

[5] Disqualification under Section 443.036(29), Florida Statutes, does not incorporate the 17 weeks earnings or other requalification requirements of Section 443.101(1)(a)2., Florida Statutes. Under this provision, disqualification lasts until the claimant is next employed. R.A.A.C. Order No. 13-07886 (February 6, 2014), available at http://www.floridajobs.org/finalorders/raac_finalorders/13-07886.pdf.

The referee's decision, as modified, is affirmed.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on March 14, 2016, the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Ross
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*45314459 *

**Docket No.0025 8333 29-06** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

***CLAIMANT/Appellee*** ***EMPLOYER/Appellant***

APPEARANCES Employer

Claimant

## DECISION OF APPEALS REFEREE

**Important appeal rights are explained at the end of this decision.**

**Derechos de apelación importantes son explicados al final de esta decisión.**

**Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.**

**Issues Involved:**

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

**Findings of Fact:** The claimant was hired on December 26, 2014, and was separated on February 19, 2015. The employer employed the claimant as a full time Foreman. The claimant had been supplied with an employee handbook when he was hired. The claimant was hired on an initial ninety day probationary period. He was informed of that fact within his first seven working days. The claimant is a citizen of Honduras. He has lived and worked in the United States since 1991. He is required to be authorized to work in the United States. This authorization expires every year and must be renewed every year. No employer may legally employ him unless or until it has been re authorized. The claimant knew this. The employer knew this. The claimant knew the re authorization process took several months. The claimant's authorization expired on January 5, 2015. The claimant sent in the paperwork necessary to re authorize his work permit on January 26, 2015. The employer discovered that his work permit had expired and that he was no longer legally authorized to work in the United States. They terminated his employment.

**Conclusions of Law:** As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

a. Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects that the employer was the moving party in the separation. Therefore, the claimant is considered to have been discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 468 So.2d 413 (Fla. 1986). It was shown that the claimant's employment was terminated as a result of his allowing his work permit, which was required by federal law to be current in order for him to work legally in this country, to expire. It was shown that he knew the process, having lived and work in this country since 1991, and that he knew how long the re authorization process took. It was further shown that he did not bother to send in the required paperwork until three weeks after the work permit had expired. The reemployment assistance requires that a claimant must be*unemployed through no fault of his own* in order to collect benefits. The claimants' own testimony established that his unemployment was his own fault.

In this circumstance, the claimant knew, or should have known, that no employer could legally employ him while his work permit was expired. The referee considers his conduct to have been misconduct as defined in subparagraphs (b), (d) and (e), above. The fact that other employer's had let him work for them after his work permit had expired does not justify his conduct. Accordingly, since the discharge was for misconduct connected with work, the claimant is disqualified from the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the employer's witnesses to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

**Decision:** The determination dated July 7, 2015, is REVERSED. The claimant is disqualified for the week beginning February 15, 2015, plus five weeks and until he earns $4,675. Benefits paid will not be charged to the employer's account.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed/mailed to the last known address of each interested party on Agosto 26, 2015.

**S. DIMON**
Appeals Referee

By: Robyn L Deak

ROBYN L. DEAK, Deputy Clerk

**IMPORTANT - APPEAL RIGHTS:** This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

**A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.**

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

**IMPORTANTE - DERECHOS DE APELACIÓN**: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

**Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.**

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

**ENPÒTAN - DWA DAPÈL:** Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

**Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.**

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

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