

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

TANTA OPREA

DECISION

For a License as a an Esthetician

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 5, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 43-25 43rd Street, Apt. 1C, Sunnyside, New York 11104, was represented by Claude Kleefield, Esq., 200 West 51 Street, New York, New York 10019.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator William Schmitz.

ISSUE

The issue before the tribunal is whether the applicant has sufficient experience to qualify for a license as an esthetician.

FINDINGS OF FACT

1) The applicant is currently licensed as a nail technician (State's Ex. 2).

2) By application dated March 3, 1995 the applicant applied for a license as an esthetician (State's Ex. 3). She bases her application on her several years of experience enhancing the appearance of persons by means of waxing and tweezing, which experience was obtained prior to the effective date of the licensing statute.

3) Having been advised by DLS that it proposed to deny her application for want of sufficient qualifying experience, which proposed denial was based on the theory that experience limited to waxing and tweezing does not meet the requirements of the statute, the applicant requested a hearing. Accordingly, a notice of hearing was served on her by certified mail on November 1, 1995 (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that she has acquired the required experience. State Administrative Procedure Act (SAPA),

§306[1]. Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

II- The sole issue before the tribunal, one of first impression, is whether an applicant for a license as an esthetician who is relying on the "grandfathering" provisions of General Business Law (GBL) §406[d], can satisfy the requirements of that statute by showing that she has experience in some, but not all of the procedures encompassed in the definition of "esthetics."¹

GBL §406[d] provides, in pertinent part, that a license as an esthetician may be granted, without the otherwise required training and examination or equivalent licensure outside of New York State, upon a showing that the applicant "has been actively and continuously engaged in the practice of...esthetics...for at least one year prior to the effective date of this article...." In her use of waxing and tweezing for the removal of her customers' hair, the applicant has, without question, been actively and continuously engaged for more than one year in the utilization of some, but not all, of the instrumentalities of the practice of esthetics.²

In determining whether the applicant's experience is sufficient, it is necessary to consider the legislative intent "to protect the health and safety of the consumers of the services of the appearance enhancement industry...." L.1992, c. 509, §1.³ In so doing it must be

¹ "The practice of 'esthetics' means providing for a fee, or any consideration or exchange, whether direct or indirect, services to enhance the appearance of the face, neck, arms, legs, and shoulders of a human being by the use of compounds or procedures including makeup, eyelashes, depilatories, tonics, lotions, waxes, sanding and tweezing, whether performed by manual, mechanical, chemical or electrical means and instruments but shall not include the practice of electrology." GBL §400[6].

² The applicant's experience in giving manicures and pedicures is not applicable to this application, as those procedures fall under the definition of "nail specialty" (GBL §400[4]).

³ In the statement of intent, the legislature went on to say "(t)he appearance enhancement industry involves close personal contact between providers of the service and the consumer, as well as the use of chemicals, appliances and equipment which have the potential to cause severe injury. Consumers seeking the services of the appearance enhancement industry are entrusting their health and safety as well as

(continued...)

borne in mind that the applicant has not shown skill and proficiency in several of the functions of an esthetician.⁴ In particular, she apparently has no experience in the affixing of eyelashes, the use of depilatories, and sanding, each of which might result in harm to customers if done improperly.

The fact that the only functions of an esthetician in which the applicant engages are waxing and tweezing is irrelevant. Because the legislature has not provided for a distinct license for waxing and tweezing, if the applicant is granted the license for which she has applied she will be authorized to engage in procedures for which she has not demonstrated the required proficiency. Therefore, the granting of the application would be contrary to the expressed intent of the statute.

CONCLUSIONS OF LAW

The applicant has failed to establish by substantial evidence that she has been actively and continuously engaged in the practice of esthetics as defined by GBL §400[6] for at least 1 year, and, accordingly, her application must be denied. GBL §406; SAPA §306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Tanta Oprea for a license as an esthetician is denied.

³(...continued)

their appearance to those who hold themselves out as capable of providing a wide variety of appearance enhancement services and products.

The legislature further finds that the purpose of this article is to provide a system of licensure requiring adequate levels of training, examinations which test the fitness to perform license activities, and adequate health and safety requirements for licensees and appearance enhancement businesses, in order to protect the health, safety and general welfare of the consumer."

⁴ The applicant completed a course of study in the fields of cosmetology, hairstyling, manicuring, and pedicuring in Rumania (App. Ex. A). However, there is no evidence that it was an approved course of study in a school licensed pursuant to the education law (GBL§406[2][b]), or as to what procedures were actually taught. In addition, the applicant has apparently not taken and passed the appropriate examination (GBL§406[2][b]).

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel