

BEFORE THE
BUREAU FOR PRIVATE POSTSECONDARY EDUCATION
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

INSTITUTE OF BEAUTY CULTURE,
OMAR AVILES (50% Owner), SUSAN
AVILES (50% Owner),

Respondent.

Case No. 1000957

OAH No. 2016060401

DECISION AFTER REJECTION OF PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Thomas Heller, State of California, Office of Administrative Hearings, in Los Angeles, California, on January 3, 2017. Cristina Felix, Deputy Attorney General, represented complainant Joanne Wenzel, Chief, Bureau for Private Postsecondary Education (Bureau), Department of Consumer Affairs. Respondent Institute of Beauty Culture, Inc.¹ was represented by Omar and Susan Aviles, its owners. The matter was submitted on January 3, 2017, and the Proposed Decision issued on February 2, 2017.

On or about March 23, 2017, the Department of Consumer Affairs (Department or DCA) requested that the proposed decision be modified to include the technical direction necessary to address the continued operation of the institution given that the proposed decision was denying the application for renewal of the approval. No response was received from the Presiding ALJ.

On or about May 16, 2017, the Director of the Department via his designee issued a Notice of Rejection of the proposed decision. No transcript was ordered, and parties were provided the opportunity to submit written argument on any issues the parties wished to address. The Director was particularly interested in directing how and when the respondent must cease operations of the school in light of the denial of the application for renewal of the approval to operate. No written arguments were received. The Director hereby makes the following decision:

¹ Respondent is a corporation, but is not identified as one in the Statement of Issues caption.

SUMMARY

The Bureau denied respondent's application for renewal of approval to operate and offer educational programs as a non-accredited institution. Respondent appealed, and requests more time to correct the deficiencies in its renewal application. A preponderance of the evidence established that the renewal application cannot be approved in its current form. Furthermore, respondent has had ample time to correct the deficiencies, but has not. Therefore, respondent's appeal will be denied.

FACTUAL FINDINGS

Background

1. Respondent is a California corporation that offers barbering, cosmetology, esthetician, and manicurist courses for adult students in Santa Maria, California. Omar Aviles and his wife, Susan Aviles, each own fifty percent of the corporation. The Bureau's predecessor agency originally approved respondent to operate and offer educational programs to students in 2004.
2. In February 2012, respondent submitted an "Application for Renewal of Approval to Operate and Offer Educational Programs for Non-Accredited Institutions". Between March 2012 and May 2015, the Bureau and respondent corresponded intermittently about alleged deficiencies in the renewal application, with respondent providing revisions and additional information, and the Bureau identifying deficiencies that still remained.
3. On May 12, 2015, the Bureau sent Mr. and Mrs. Aviles a letter identifying four remaining deficiencies: (1) the application did not include respondent's Articles of Incorporation or bylaws; (2) the school's sample Enrollment Agreement was inadequate; (3) the application did not include adequate financial statements; and (4) the school's catalog for students was deficient. For the Enrollment Agreement and catalog, the letter enclosed checklists showing the required additional information and corrections. The letter also stated that the Articles of Incorporation, bylaws, and financial statements had to be submitted by May 22, 2015, or the Bureau would immediately deny the application. The Bureau had specifically requested those documents in a telephone call to Mr. Aviles in January 2015.
4. Mrs. Aviles replied on May 21, 2015, enclosing respondent's Articles of Incorporation, but no bylaws. She also enclosed a Profit and Loss Statement she created, showing total income to respondent of \$337,512 in 2012. There was no indication it had been independently reviewed or audited. In addition, she enclosed a revised Enrollment Agreement and revised catalog, and returned the checklists with handwritten notes indicating where those documents had been changed.

5. On June 26, 2015, the Bureau denied the renewal application, citing the missing bylaws, inadequate financial statements, continued deficiencies in the Enrollment Agreement and catalog, and incomplete annual reports for respondent for 2011, 2012, and 2013. According to the Bureau's denial letter, the Enrollment Agreement listed charges and fees not in the catalog, and lacked required language about payments from the Student Tuition Recovery Fund. The catalog also still included six alleged deficiencies: (1) incorrect information about ability-to-benefit examination requirements; (2) inadequate information about the level of English language proficiency required of students; (3) improper mention of an unapproved "Teach[er] Training" program; (4)-(5) inconsistent schedules of charges and refund policies compared to the Enrollment Agreement; and (6) conflicting information about financial aid funding. Regarding the annual reports, the Bureau had previously received a computer disc from respondent regarding its 2013 annual report, but the Bureau could not access parts of it. The Bureau informed Jose Munoz, respondent's consultant on the renewal application, of the problem in May 2015, but by June 2016, respondent had not corrected it, or provided the requested reports for 2011 and 2012.

6. On August 18, 2015, respondent requested a hearing on the denial.

7. On March 8, 2016, complainant served a Statement of Issues on respondent, requesting that the denial be upheld.

Enrollment Agreement and Catalog

8. The Enrollment Agreement submitted on May 21, 2015, included blanks for six fee categories: (1) Registration Fee (non-refundable); (2) Books; (3) Materials & Certifications; (4) Internet; (5) Student Tuition Recovery Fund Fee (non-refundable); and (6) Tuition. It did not say whether a Student Tuition Recovery Fund claim would be paid if a student did not have a social security number or taxpayer identification number. (Exhibit 4.)

9. The catalog submitted on May 21, 2015, listed charges for four categories of fees: (1) "Tuition;" (2) "Registration (Non-Refundable);" (3) "Kit & Supplies (NonRefundable);" and (4) "STRF [i.e. Student Tuition Recovery Fund]." In two places, it also referred to a "Teacher Training" course of study, which the Bureau had not approved. Under the heading "English as a Second Language," it stated: "The Institute does not provide instruction for English as a Second Language, and neither does it provide services for obtaining [a] visa. **All instruction is provided in the English language ONLY.**" It also stated: "all prospective students [must] take and pass" a "Capacity-to-Benefit-From-Instruction" test (i.e., an ability-to benefit test). Regarding financial aid, the catalog referred in one place to "[s]tudents. . receiving [federal] Title IV aid to assist in their tuition costs. . ." In another place, it stated: "**We do not participate in any State of Federal Aid Programs at this time.**" (Exhibit 4.)

Respondent's Evidence

10. Mr. Munoz testified he submitted respondent's bylaws to the Bureau in August 2012, mailed the annual reports at some later date, and also gave the annual reports to a Bureau representative during a compliance inspection. Respondent did not offer copies of any of these documents into evidence. It did offer a document entitled "By-Laws" that Mrs. Aviles prepared more recently, which recites respondent's guiding principles, such as valuing employees, leading by example, and following the law. Respondent presented no documentary evidence that those "By-Laws" have been adopted.

11. Mr. Aviles testified that respondent could correct the application deficiencies, but needs more time to do so. According to Mr. Aviles, his wife was hospitalized for three months until November 2015, and he has since assumed responsibility for fixing and finalizing the renewal application. Before her hospitalization, he focused on the "artistic" side of the business, and assumed the paperwork for the renewal application was adequate. He requests another chance to comply, and a new deadline from the Bureau. He testified that respondent has trained many students from Allan Hancock College, which pays respondent an hourly rate for the training.

12. Mrs. Aviles testified that respondent adopted the "By-Laws" document "through me." She also testified she is a certified public accountant, and produced a Profit and Loss Statement and Balance Sheet for 2015 that she recently prepared. The Profit and Loss Statement indicates respondent had \$752,213 in total income during that year.

LEGAL CONCLUSIONS

Legal Standards

1. The Bureau regulates private postsecondary institutions under the California Private Postsecondary Education Act of 2009 (Act) (Ed. Code, § 94800 et seq.),² and has adopted regulations establishing "the process and procedures whereby an institution may obtain a renewal of an approval to operate." (§ 94891, subd. (a); Cal. Code Regs., tit. 5 (Regs.), §§ 71475-71485.) For a non-accredited institution, the renewal process involves a form application, a fee, and disclosure of operational and financial information. (Regs., § 71475.) "To be granted a renewal of an approval to operate, the institution shall demonstrate its continued capacity to meet the [Bureau's] minimum operating standards." (§ 94891, subd. (b).) Those minimum operating standards are set by regulation, and are designed to ensure an institution has adequate programs, facilities, recordkeeping, and faculty, is financially sound, and has definite admission and degree policies, among other requirements. (§ 94885; Regs., § 71700 et seq.)

2. Respondent bears the burden of proving that it meets all prerequisites necessary for the requested renewal. (See *Kensington Univ. v. Council for Private Postsecondary and*

² Undesignated statutory references are to the Education Code.

Vocational Education (1997) 54 Cal.App.4th 27, 47, fn. 7.) This burden of proof requires proof by a preponderance of the evidence. (*Ibid.*; see also Evid. Code, § 115.)

Causes for Denial

3. The Statement of Issues alleges five causes for denial, all of which have merit.

FIRST CAUSE FOR DENIAL -- MISSING BYLAWS

4. A corporation applying for renewal of approval to operate a non-accredited institution must "provide copies of [its] articles of incorporation and bylaws." (Regs., § 71475, subd. (c)(6).) Mr. Munoz testified he provided respondent's bylaws to the Bureau in August 2012, but the Bureau's letter dated May 12, 2015, indicates otherwise, and respondent did not produce a copy of what Mr. Munoz forwarded. (Factual Finding 10.) The "By-Laws" that Mrs. Aviles prepared include no information about respondent's internal organization or governance, which is what bylaws typically include. (*Ibid.*; see Corp. Code, § 212.) Furthermore, respondent did not prove the "By-Laws" were properly adopted, either by all of the incorporators prior to the election of directors; a majority of the outstanding voting shares; or action of the board of directors. (Corp. Code, §§ 210, 211, 212, subd. (a).) Respondent offered no documentary evidence of their adoption (Factual Finding 10), and Mrs. Aviles' testimony that they were adopted "through me" (Factual Finding 12), was too vague to be sufficient. Furthermore, she owns fifty percent of the corporation (Factual Finding 1), not a majority of the outstanding voting shares.

SECOND CAUSE FOR DENIAL -- DEFICIENT ENROLLMENT AGREEMENT

5. A non-accredited institution seeking renewal "shall include, with its application, exemplars of all student enrollment agreements and instruments of indebtedness." (Regs., § 71475, subd. (o).) The enrollment agreement must include "[i]temization of all institutional charges and fees," and a Student Tuition Recovery Fund disclosure that "no claim can be paid to any student without a social security number or a taxpayer identification number." (Regs. §§ 71800, subd. (e), 76215, subd. (b).)

6. The itemization of charges and fees in respondent's Enrollment Agreement does not match the corresponding itemization in the catalog. The catalog includes the line item "Kit & Supplies (non-refundable)," but the Enrollment Agreement does not. (Factual Findings 8-9.) The Enrollment Agreement, in turn, includes line items for "Books," "Materials & Certifications," and "Internet," which are not in the catalog. (*Ibid.*) If "Kit & Supplies" and "Materials & Certifications" are the same, the Enrollment Agreement and catalog should say so. The Enrollment Agreement is also missing the required Student Tuition Recovery Fund disclosure about students with no social security number or taxpayer identification number. (Factual Finding 8.)

THIRD CAUSE FOR DENIAL -- FINANCIAL STATEMENTS INADEQUATE

7. A non-accredited institution seeking renewal “shall submit at the time it applies for renewal current financial statements that meet the requirements of section 74115 as follows: (1) for an institution with annual gross revenues of \$500,000 and over, statements shall be audited; (2) for an institution with annual gross revenues less than \$500,000, statements shall be reviewed.” (Regs., § 71475, subd. (e).) “A set of financial statements shall contain, at a minimum, a balance sheet, an income statement, and a cash flow statement, and the preparation of financial statements, shall comply with all of the following: (1) Audited and reviewed financial statements shall be conducted and prepared in accordance with the generally accepted accounting principles established by the American Institute of Certified Public Accountants by an independent certified public accountant who is not an employee, officer, or corporate director or member of the governing board of the institution. . (Regs., § 74115, subd. (b).)

8. The financial statements offered into evidence do not meet these standards. Mrs. Aviles, respondent’s co-owner, prepared them (Factual Findings 4, 12), and respondent did not prove an “independent certified public accountant” reviewed or audited them. (Regs., § 74115, subd. (b)(1).) Furthermore, her submission for 2012 did not include a balance sheet or cash flow statement, and her submissions for 2015 did not include a cash flow statement. (See Factual Findings 4, 12.)

FOURTH CAUSE FOR DENIAL -- CATALOG DEFICIENCIES

9. A non-accredited institution seeking renewal “shall include a copy of the institution’s catalog, in published or proposed-to-be-published form. The catalog shall meet the requirements of the Act and of section 71810.” (Regs., § 71475, subd. (bb).) The catalog must describe admissions requirements for ability-to-benefit students, which means students “who do not have a certificate of graduation from a school providing secondary education, or a recognized equivalent of that certificate.” (§§ 94811, 94909, subd. (a)(8)(A).) It must also describe “the level of English language proficiency required of students and the kind of documentation of proficiency. . that will be accepted.” (Regs., § 71810, subd. (b)(4).) In addition, it must include “[t]he schedule of total charges for a period of attendance and an estimated schedule of total charges for the entire educational program,” and “[a] statement reporting whether the institution participates in federal and state financial aid programs, and if so, all consumer information that is required to be disclosed to the student pursuant to the applicable federal and state financial aid programs.” (§ 94909, subd. (10).)

10. Respondent’s catalog incorrectly suggests every entering student, even high school graduates, must take an ability-to-benefit examination. (Factual Finding 9.) It also fails to indicate the level of English language proficiency required of students. (*Ibid.*) It references an unapproved “Teacher Training” course of study in two places, and its itemization of charges and fees does not match the corresponding itemization in the Enrollment Agreement. (Factual Findings 8, 9.) The catalog also includes conflicting information about financial aid, suggesting in one place that students can receive federal financial aid, while stating elsewhere that the institution does not participate in federal and state financial aid programs. (Factual Finding 9.)

FIFTH CAUSE FOR DENIAL -- MISSING ANNUAL REPORTS

11. A non-accredited institution is not required to submit an annual report with a renewal application. (See Regs., 71475.) But renewal requires the institution to “demonstrate its continued capacity to meet the minimum operating standards” (§ 94891 subd. (b)), and the information in an annual report assists the Bureau in determining an institution’s compliance with those standards. (See 94934; Regs., 74110.) A failure to submit annual reports, especially over time, casts doubt on an institution’s continued capacity to meet those standards.

12. Mr. Munoz testified he sent the missing annual reports to the Bureau, but respondent did not produce copies of what he sent. (Factual Finding 10.) Furthermore, the Bureau determined that the annual report information respondent sent on the compact disc was incomplete and inaccessible (Factual Finding 5), and respondent did not produce copies of what was on the disc. Thus, respondent did not establish it has submitted complete annual reports for 2011, 2012, and 2013, even though the Bureau notified respondent of that deficiency long ago. (See Factual Finding 5.) Respondent’s failure to comply with its basic reporting requirements undermines its assertion that it has the continued capacity to meet the minimum operating standards.

13. Accordingly, the Bureau may deny the renewal application for all of the reasons alleged in the Statement of Issues.

Respondent’s Request for More Time

14. None of the deficiencies described above seem insurmountable; indeed, some of them seem easy to fix. But respondent has still not fixed them. It originally applied for renewal in February 2012. (Factual Finding 2.) The Bureau has been asking for bylaws and financial statements since at least January 2015. (Factual Finding 3.) In May 2015, the Bureau asked again and described the other application deficiencies, and gave respondent a chance to correct them. (Factual Finding 3.) The same month, it also asked for the missing annual reports. (Factual Finding 5.) Respondent’s reply was inadequate, and the Bureau denied the application in June 2015, citing the same issues. (Ibid.) Since then, respondent still has not corrected the deficiencies, even though the Bureau identified them again in the Statement of Issues, and the matter proceeded to a hearing. It has now been almost five years since respondent originally applied for renewal.

15. Considering these facts, respondent did not prove it should be given more time to correct its renewal application. Mrs. Aviles’ hospitalization in part of 2015 (Factual Finding 11), does not excuse respondent’s failure to correct the deficiencies since then. The Bureau’s decision to deny the renewal application was justified.

ORDER

The appeal of respondent Institute of Beauty Culture, Inc. is denied.

Upon the effective date of this Decision and Order, Omar and Susan Aviles, Owners of The Institute of Beauty Culture shall cease operating a private postsecondary institution in California, and shall not resume operation in California unless and until approved to do so by the Bureau.

This decision shall become effective SEP 22 2017.

Dated: August 18, 2017



RYAN MARCROFT
Deputy Director, Legal Affairs
Department of Consumer Affairs