

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

PHONG TRANH VU,

Respondent.

Case No. H-3844 SAC

OAH No. N2003070352

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Sacramento, California on September 10, 2003.

Larry A. Alamao, Assistant Chief Counsel, represented the Department of Real Estate.

Phong Thanh Vu appeared and was represented by Johnny L. Griffin III, Attorney at Law.

The matter was submitted on September 10, 2003.

FACTUAL FINDINGS

1. Charles W. Koenig made the allegations contained in the Statement of Issues in his official capacity only as a Deputy Real Estate Commissioner, Department of Real Estate (hereafter "the Department"), State of California. The Statement of Issues was filed on June 26, 2003. The Department has jurisdiction and authority to issue, refuse to issue or issue with restrictions any real estate license in the State of California.

2. Phong T. Vu filed an application with the Department for the issuance of a real estate broker's license on February 7, 2003. Question 25 of the application asks the applicant whether he or she has ever been convicted of any violation of law. Mr. Vu truthfully answered the question "Yes" and fully disclosed the details of the conviction set forth in detail below.

3. The Department determined, after an initial investigation of the application, to deny the issuance of the license. Mr. Vu timely filed a Notice of Defense on Application, seeking review of the Department's action to deny the issuance of the license.

4. Mr. Vu was convicted on September 13, 2000 in the United States District Court, Eastern District of California, of the crime of a violation of Title 18, United States Code section 641, bank embezzlement. Mr. Vu was sentenced to serve a 6 month term of imprisonment, followed by a six month term of supervised release, to pay a fine and an assessment. Mr. Vu made restitution of \$31,000.00 before the plea and sentencing. The funds for restitution were furnished by Mr. Vu's family.

5. Mr. Vu's conviction involved moral turpitude and is substantially related to the qualifications, functions and duties of a real estate broker. Bank embezzlement is a form of theft and necessarily involves moral turpitude. A real estate licensee owes the highest duty of trust, honesty and integrity to clients and those with whom he deals professionally. Bank embezzlement is inconsistent with these required character traits.

6. The facts and circumstances leading to Mr. Vu's conviction are unusual and occurred on November 26, 1999. Mr. Vu worked as a bank teller for California Bank and Trust from about August 1998 through November 1999. Mr. Vu issued a cash disbursement to a regular customer, a grocery store owner who operated a cash intensive business, late in the day of November 29, 1999 in the amount of \$31,000.00. Mr. Vu failed to obtain the customer's signature on a receipt for the disbursement and failed to have the customer complete a U.S. Treasury form for a cash disbursement of over \$10,000.00. Mr. Vu had signed bank disbursement forms for the withdrawal of the large sum of cash from the bank's vault, so there was no issue regarding who was responsible for the funds. The customer later disavowed being at the bank on that day or receiving the money. The bank's surveillance cameras failed, so there was no visual evidence of the transaction where Mr. Vu claimed he actually gave the funds to the customer.

7. Mr. Vu attributed the events that led to his conviction as the product of carelessness, and being naïve and overly trusting. He denied any guilt for embezzling any funds belonging to the bank, but he pointed out several times in his testimony that in his culture, he is taking responsibility for the losses suffered by the bank because he had been entrusted with the money when it was lost, and thus he was responsible for its loss. Mr. Vu pointed out that his fault was that he did not perform his job responsibilities correctly, and that he really did not fully appreciate the amount of money and his responsibility to make certain the transaction was fully documented. He noted the customer was a regular and had almost become a friend, leading him to trust the customer more than he should have.

8. Mr. Vu received his B.S. degree in Exercise Science from the University of California, Davis on March 23, 2000. He lives at home with his extended family. He has always been and remains fully employed in a variety of server jobs in local restaurants. He has fully satisfied all his supervised release and court obligations, and was released from

supervision on April 10, 2002. He is active in the Vietnamese Catholic Church, and has earned the praise of his priest for his selfless work with the youth and in planning activities.

9. Mr. Vu's mother is a real estate broker licensed by the Department. Ms. Tran did not appear and testify on behalf of her son. She did submit a letter to the Department in support of her son's application. She intends to employ Mr. Vu as an Associate Broker in her firm, GHT Realty. She stated in her letter that she intends to closely supervise Mr. Vu's activities and wrote that she will not permit anything he does or fails to do to damage the excellent reputation she has worked hard to develop over the past 12 years as a broker. Ms. Tran made note of the fact that her son has "grown up" as a result of his experience leading to his conviction and the sentence imposed, that he lost two years of his life he cannot retrieve, and that he has learned that he must be accountable for his actions. She mentioned that she has impressed upon him the need to pay attention to details, something he failed to do when he was younger.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480 provides, in pertinent part, that a board may deny a license regulated by this code on the grounds that the applicant has done one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or a verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another..."

"..."

"The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made."

2. Title 10, California Code of Regulations ("CCR") section 2910(a) provides that a criminal conviction is substantially related to the qualifications, functions and duties of a real estate licensee if the conviction involves the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

3. Mr. Vu was convicted of bank embezzlement. Mr. Vu's bank embezzlement conviction involves the fraudulent obtaining of money belonging to another, within the

meaning of Section 2910. Proof of a violation of Section 480 does not require proof that the conviction involves moral turpitude, but does require proof the conviction is substantially related to Mr. Vu's fitness for licensure. As Mr. Vu's criminal conviction is substantially related to the qualifications, functions and duties of a real estate licensee, legal cause pursuant to section 480 exists to refuse to issue him a real estate license.

4. Business and Professions Code section 10177 provides, in pertinent part, "The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

"..."

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information..."

5. A determination of whether a crime or conduct involves moral turpitude is a two part analysis; determination of whether the crime "necessarily" involves moral turpitude, as evaluated by reference to the least adjudicated elements of the crime, and, if not, whether the underlying circumstances nevertheless reveal moral turpitude. People v. Forster (1994) 29 Cal.App.4th 1746, 1757. Moral turpitude has been defined by California courts as conduct that reflects baseness, immorality, depravity or and/or a readiness to do evil, a violation of the duties owed by civilized persons one to another. People v. Castro (1985) 38 Cal.3d 301, 317. Bank embezzlement is a relatively sophisticated form of theft and necessarily involves moral turpitude.

6. As set forth above, Mr. Vu has been convicted of bank embezzlement, an offense that involves moral turpitude and is substantially related to the qualifications, functions and duties of a real estate licensee. Therefore, separate legal cause within the meaning of section 10177(b) exists to deny the issuance of a real estate license to Mr. Vu.

7. Mr. Vu has the burden of proving as an applicant by a preponderance of the evidence that he is rehabilitated and that he is a person of good character such that the license should issue, despite the existence of legal cause to deny him the license. "Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee." Harrington v. Department of Real Estate (1989) 214 Cal.App.3d 394, 402. "If (the) offenses reflect unfavorably on his honesty, it may be said that he lacks the necessary qualifications to become a real estate salesperson."

Harrington, supra p.402. "The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear." Id., Ring v. Smith (1970) 5 Cal.App.3d 197, 205. Proof of satisfactory rehabilitation is the means by which good character, honesty and fitness for licensure are proved.

8. The Department has enacted in Title 10, California Code of Regulations section 2911 a nonexhaustive list of criteria against which to weigh and evaluate an applicant's evidence of rehabilitation.

"The following criteria have been developed by the department pursuant to Section 482(a) of the Business and Professions Code for the purpose of evaluating the rehabilitation of an applicant for issuance or for reinstatement of a license in considering whether or not to deny the issuance or reinstatement on account of a crime or act committed by the applicant:

(a) The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought. (A longer period will be required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the department.)

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.

(c) Expungement of criminal convictions resulting from immoral or antisocial acts.

(d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.

(e) Successful completion or early discharge from probation or parole.

(f) Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.

(g) Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

(h) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the agency action sought.

(i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

(j) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.

(k) Correction of business practices resulting in injury to others or with the potential to cause such injury.

(l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the departmental action sought.

(n) Change in attitude from that which existed at the time of the conduct in question as evidenced by any or all of the following:

(1) Testimony of applicant.

(2) Evidence from family members, friends or other persons familiar with applicant's previous conduct and with his subsequent attitudes and behavioral patterns.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

(4) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

9. Mr. Vu was very mindful of the Department's criteria of rehabilitation and addressed the factors in his presentation. However, Mr. Vu failed to carry his burden of proof that he is rehabilitated sufficiently such that a real estate broker license should issue to him. A real estate broker is permitted by his license privilege to work alone and unsupervised. Mr. Vu has no experience in the real estate profession, and despite his expressed intention to work under his mother's supervision, the license as applied for would not require such an arrangement. A restricted real estate broker license, limiting Mr. Vu to working with his mother, was considered but rejected. Mr. Vu's rehabilitation at this point is not sufficient to warrant the issuance of such a restricted license, as set forth in more detail just below.

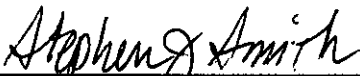
10. Mr. Vu did present some praiseworthy evidence of rehabilitation as evaluated by the Department's criteria set forth above, but it is incomplete and too early to conclude he is rehabilitated. The conviction is three years old, for conduct that occurred four years ago. The conviction was for a very serious offense involving the loss of a substantial sum of cash. Mr. Vu has verbally taken responsibility for the loss, but he contends he is not guilty of the

crime of which he was convicted. His opportunity to prove that point was in the criminal court and he declined to do so. He did not take action against the bank customer, who, if Mr. Vu's version of the facts is correct, did Mr. Vu a grievous wrong. Mr. Vu's sentence was not as light as he contends, but it was at the lower end of the Federal Sentencing Guidelines. Mr. Vu successfully completed supervised release just a little more than a year ago. Restitution was made for the loss, but it is clear Mr. Vu did not make the restitution himself, but relied upon family members to pool resources to help him. It would be more impressive to have evidence that Mr. Vu is in the process of paying them back for their satisfaction of his obligation. Since Mr. Vu denies guilt for a criminal offense, it cannot be concluded he is remorseful. Mr. Vu has a stable and very supportive family life and the circumstances that led to the conviction appear unlikely to recur. Mr. Vu has finished a higher education. He is active in his church and serves it by organizing and leading youth activities. Mr. Vu enjoys support from his proposed primary broker, his mother, who is fully informed of the conviction and its circumstances, and is willing to train and closely supervise him. On balance, the weight of the evidence in aggravation, including that the conviction is recent, for a very serious offense Mr. Vu denies, and that he has only been off supervised release for about a year outweigh the facts in rehabilitation at the present time. Particularly problematic here is that Mr. Vu seeks the privileges attendant to a broker's license. Under these circumstances, issuance of a real estate broker's license to Mr. Vu, even on a restricted basis, is not warranted. Mr. Vu is encouraged to reapply for the issuance of a real estate salesperson license, where the issue of the unsupervised exercise of the privilege of licensure is not an issue.

ORDER

The application of Phong Tran Vu to the Department of Real Estate for the issuance of a real estate broker license is DENIED, for the violations proved in the Legal Conclusions, and the action of the Department in refusing to issue the license is SUSTAINED.

Dated: October 01, 2003



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

FILED
JUL 23 2003

DEPARTMENT OF REAL ESTATE

By Kathleen Conners

In the Matter of the Application of

PHONG T. VU,

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Case No. H-3844 SAC

OAH No. N-2003070352

Respondent

NOTICE OF HEARING ON APPLICATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at

**THE OFFICE OF ADMINISTRATIVE HEARINGS
560 J STREET, SUITES 340/360
SACRAMENTO, CALIFORNIA 95814**

on **SEPTEMBER 12, 2003**, at the hour of **2:00 PM**, or as soon thereafter as the matter can be heard, upon the Statement of Issues served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you not present nor represented at the hearing, the Department may act upon your application without taking evidence.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: JULY 22, 2003

By Larry Alamao
LARRY A. ALAMAQ, Counsel

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3 Department of Real Estate
4 P. O. Box 187000
5 Sacramento, CA 95818-7000
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FILED
JUN 26 2003

DEPARTMENT OF REAL ESTATE

By *Kathleen Conteras*

8 BEFORE THE
9 DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Application of)
13 PHONG T. VU,) NO. H-3844 SAC
14 Respondent.) STATEMENT OF ISSUES
15)

16 The Complainant, CHARLES W. KOENIG, a Deputy Real
17 Estate Commissioner of the State of California, for Statement of
18 Issues against PHONG T VU (hereinafter "Respondent"), is informed
19 and alleges as follows:

20 I

21 Respondent made application to the Department of Real
22 Estate of the State of California for a real estate broker
23 license on or about February 7, 2003.

24 II

25 Complainant, CHARLES W. KOENIG, a Deputy Real Estate
26 Commissioner of the State of California, makes this Statement of
27 Issues in his official capacity and not otherwise.

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III

On or about September 13, 2000, in the U. S. District Court for the Eastern District of California, Respondent was convicted of violation of Title 18 United States Code, Section 641 (Bank Embezzlement), a crime involving moral turpitude which is substantially related under Section 2910, Title 10, California Code of Regulations to the qualifications, functions or duties of a real estate licensee.

IV

The crime of which Respondent was convicted, as alleged above, constitutes cause for denial of Respondent's application for a real estate license under Sections 480(a) and 10177(b) of the California Business and Professions Code.

WHEREFORE, the Complainant prays that the above-entitled matter be set for hearing and, upon proof of the charges contained herein, that the Commissioner refuse to authorize the issuance of, and deny the issuance of, a real estate salesperson license to Respondent, and for such other and further relief as may be proper under other provisions of law.


CHARLES W. KOENIG
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 28th day of May, 2003.