FILED
OCT - 2 2001
DEPARTMENT OF REAL ESTATE
By [signature]

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Application of SIMON AYALA, Respondent.	No. H-29066 LA L-2001060350

DECISION

The Proposed Decision dated August 29, 2001, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy of Section 11522 is attached hereto for the information of respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is attached hereto.

This Decision shall become effective at 12 o'clock noon on October 22, 2001.

IT IS SO ORDERED September 27, 2001.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

[signature]

BY: John R. Liberator
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of: SIMON AYALA 1131 Blanca Place Oxnard, CA 93030 Respondent.	Case No. H-29066 LA OAH No. L-2001060350

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, at Los Angeles, California, on August 15, 2001.

Complainant was represented by Martha J. Rosett, Real Estate Counsel.

Respondent was personally present throughout the hearing, and represented himself.

Oral and documentary evidence was received. The record was closed and the matter submitted.

The below order denying the application for license, but issuing a restricted one, is based on the following Factual Findings and Conclusions of Law:

FACTUAL FINDINGS

1. The Statement of Issues was made by Thomas McCrady, a Deputy Real Estate Commissioner of the Department of Real Estate ["DRE"], in his official capacity.

2. Respondent applied to the DRE for a license as a real estate salesperson on December 21, 2000. The application was denied by reason of his prior conviction and suspension of a license issued by Internal Revenue Service as a result of that conviction. Respondent requested a hearing, which proceeded.

3. On September 13, 1996, in the United States District Court for the Central District of California, case number CR-96-277, respondent was convicted [on his plea of guilty] on two counts of violating 26 U.S.C. § 7203 [willful failure to pay tax], a misdemeanor. Respondent' s sentence was one (1) year probation on various terms and conditions, including: a fine of $1,200.00; 120 hours of community service; provide his probation officer with accurate financial

information; and timely file and pay taxes owed for the years of the conviction and while on probation. Respondent successfully completed these terms, and his probation was terminated.

4. The acts leading to his conviction occurred in October of 1995. Respondent is a former IRS Revenue Agent. Upon leaving the IRS, he became licensed as an Enrolled Agent. This license allowed him to prepare tax forms for others and appear on their behalf before the IRS. By October 1995, respondent was over $10,000.00 delinquent on personal income and payroll taxes due [including taxes, penalties, and interest]. After failing to meet a payment plan agreed to by respondent, the IRS placed a levy on one of respondent's bank accounts and garnished his wife's wages at Oxnard School District. Respondent negotiated for a release of the bank levy by having the IRS issue a form 668-D "Release of Levy" to the bank. Respondent took a copy of that release form, whited out the information related to the bank, and replaced it with information related to his wife's employer. Respondent then faxed this falsified form to his wife's employer. Respondent admitted, in a written plea agreement leading to his conviction, as well as during the instant hearing, his intent in doctoring the form was to deceive his wife's employer into believing the garnishment was released so the IRS would not receive any more levies on his wife's wages.

5. As a result of the above-described conviction, respondent's Enrolled Agent license with the IRS was suspended for three (3) years, from August 25, 1997 to August 25, 2000. The suspension meant respondent could no longer appear before the IRS on behalf of taxpayers [he could continue to prepare tax returns]. Respondent was entitled to appeal the suspension before the federal Department of Treasury. Instead he consented to entry of the suspension order in order to complete the suspension as soon as possible. The terms of the suspension were for respondent to file all required tax returns, stay current on his taxes as incurred, and engage in no other misconduct reportable to the IRS. Respondent complied with these terms, and his suspension is now over. Respondent was required to petition the IRS for reinstatement of his license, which he did immediately upon conclusion of the suspension. According to the terms of the suspension, his petition "... will be favorably entertained..." if respondent complied with the terms of his suspension [which he did]. The IRS, despite respondent's frequent requests, has not set a hearing date.

6. Respondent is 43 years of age, married and has one teenage son. He has lived in Oxnard his entire life. He graduated from California Lutheran College in 1982 with a BA in Business Administration. Upon graduation, he worked several years in government service. He worked for the IRS as an auditor for six years, and next worked for the Department of Defense for three years. At the DOD, he was given top secret clearance for his work as a contract auditor. Since 1987, respondent has been self-employed as a tax preparer and bookkeeper. He has stayed current with his required sixteen (16) hours of annual continuing education for his Enrolled Agent license, even while suspended. Other than the above described conviction and suspension, respondent has no other criminal record, and no disciplinary action taken on his Enrolled Agent license. Respondent has never had a complaint made against him by a client to the IRS, Franchise Tax Board, or any other government agency.

7. Respondent has spent considerable time working in his community. He is a volunteer with local little league baseball and football groups. He is an usher at his family church. He has been on the Rio School District Board of Education for the past eight (8) years and is now its president. He participates in his son's school boosters club. Respondent's probation officer knew him previously from his community work. He was so impressed with respondent's community work he allowed respondent to fulfill his 120 hours of community service with the activities he was already performing.

8. His poor financial planning caused respondent's tax arrears by 1995. Respondent acknowledged making poor choices, mainly spending money on personal and household items he should have saved for tax returns. Since the conviction, respondent has realized the error of these ways. He has reduced family and personal expenses. He puts away money for tax returns, and now stays current. He realizes the very grave mistake he made in falsifying the levy form, and the ramifications it has had on his life.

9. Respondent has known Mr. Bob Rizzie, a licensed real estate broker with Forsyth & Rizzie Realtors, for the past six years. Respondent helped Mr. Rizzie with tax problems on some of his real estate sales. Mr. Rizzie recently offered to hire respondent as a salesperson, if respondent obtains a license.

10. The DRE has established criteria for an applicant's rehabilitation from conviction of a crime, found at California Code of Regulations, title 10, § 2911, subdivisions (a)-(m). Respondent has fulfilled each, except (c) [expungement of criminal record]. However, respondent appeared unaware at the instant hearing he could even move to expunge a criminal conviction.

11. Counsel for complainant argued respondent's application contained false and/or deceptive responses, indicating lack of full rehabilitation. The crux of the argument is that while respondent did disclose his conviction and suspension on his application [in response to questions number 24 and 25], he only revealed a failure to pay taxes, but did not disclose the specifics of doctoring the levy form. The argument is unpersuasive. Respondent did fully disclose the conviction and suspension, providing case numbers and fora. This allowed complainant to investigate, research and gather the related documentation, which disclosed the specific facts. Moreover, question numbers 24 and 25 do not require detailed discussion of all underlying facts supporting conviction or suspension, but rather very general information. Respondent was candid during the hearing about his actions in doctoring the forms. It is not established he was being deceptive in filling out the application.

12. Respondent appeared credible and truthful when testifying. His testimony was direct and consistent with other known facts. His demeanor was sincere. He made appropriate eye contact. He did not try to deny his prior misconduct, or minimize his egregious error. Respondent was candid about his acts leading to the convictions, and forthrightly acknowledged their gravity. He expressed believable remorse over the conduct leading to his conviction. He appeared to understand the DRE's concerns with allowing him a license, and even agreed a two year restricted license would be fair under the circumstances. This further demonstrates his understanding of the situation and his rehabilitation. It is unlikely respondent will repeat the

actions that led to his conviction. The conviction and suspension appear to have resulted from an isolated act, taken out of financial desperation, almost six years ago. Respondent has no record of subsequent misconduct. There appears to be very little else a person in respondent's position could do to further rehabilitate himself.

CONCLUSIONS OF LAW

1. The misdemeanor conviction is a crime involving moral turpitude, for purposes of Business and Professions Code §§ 480(a) and 10177(b). On its face, the crime of willful failure to file a federal income tax return does not establish the involvement of moral turpitude. *In re Rohan* (1978) 21 Cal.3d 195, 200-201. However, the California Supreme Court approves of looking beneath the conviction to the underlying acts in determining whether a conviction does involve moral turpitude. *Ibid.* In *Rohan*, the court primarily based its decision on the finding that the involved licentiate had not lied or falsified records, and did not achieve any personal financial gain by not filing his tax returns. *Ibid.* On the other hand, for example, the crime of tax evasion does involve moral turpitude, since the predicate acts do involve deceit and dishonesty. *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 469. In looking at respondent's acts leading to his conviction, it is apparent his conduct is much closer to tax evasion than willful failure to file income tax returns. Respondent admittedly falsified an official IRS levy release form to deceive his wife's employer and defraud the IRS of garnished wages to be used toward his tax arrears.

2. Even if respondent's conviction would not qualify as a crime involving moral turpitude on its face, it certainly involves acts of "... dishonesty, fraud or deceit with the intent to substantially benefit himself or another...," for purposes of Business and Professions Code § 480(a)(2). Although not a model of clarity, the Statement of Issues does include enough allegations to fairly include both sections 480(a)(1) [conviction of a crime] and section 480(a)(2), as reasons for license denial in this case.

3. The conviction substantially relates to the qualifications, functions and duties of a DRE licensee, as it included predicate acts meeting virtually all the categories set forth in California Code of Regulations, title 10, § 2910, subdivisions (a)(1), (2), (3), (4), (6), and (8).

4. Therefore, grounds exist to deny Respondent's application pursuant to Business and Professions Code §§ 480(a) and 10177(b), as set forth in Findings 3 and 4.

5. The suspension from the IRS as an Enrolled Agent is further grounds for denial of a license, pursuant to Business and Professions Code § 10177(f), as set forth in Finding 5.

6. In light of the evidence of mitigation and substantial rehabilitation, as set forth in Findings 6, 7, 8, 9, 10, 11, and 12, the public interest would not be adversely affected by the issuance to respondent of a restricted license, conditioned as set forth below.

ORDER

Respondent Simon Ayala's application for a real estate salesperson's license is denied; provided however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code. The restricted license issued to the respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code, and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of the Business and Professions Code:

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

A. The conviction of Respondent (including a plea of nolo contendere) of a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; or

B. The receipt of evidence that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.

2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two (2) years have elapsed from the date of issuance of the restricted license to respondent.

3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify as follows:

A. That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

B. That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

4. Respondent shall within eighteen (18) months of the issuance of the restricted license under the provisions of Business and Professions Code section 10153.4, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of two of the courses listed in section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If Respondent fails to present satisfactory evidence of successful completion of said courses, the restricted license shall

be automatically suspended effective eighteen (18) months after issuance of the restricted license. Said suspension shall not be lifted until Respondent has submitted the required evidence of course completion and the Commissioner has given written notice to the Respondent of lifting of the suspension.

DATED: August 29, 2001

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of)) **SIMON AYALA,**))) *Respondent(s)*	Case No. **H-29066 LA** OAH No. L-2001060350

FILED
JUN 29 2001
DEPARTMENT OF REAL ESTATE
By [signature]

NOTICE OF HEARING ON APPLICATION

To the above-named Respondent(s):

You are hereby notified that a hearing will be held before the Department of Real Estate at the Office of Administrative Hearings, 320 West Fourth Street, Suite 630, Los Angeles, CA 90013-1105 on **WEDNESDAY, AUGUST 15, 2001,** at the hour of **9:00 A.M.**, 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 are 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 subpenas 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: June 29, 2001

By Martha J. Rosett
MARTHA J. ROSETT, Counsel

cc: Simon Ayala
Rosemarie Forsyth
Sacto.
OAH

RE 500 (Rev. 8/97)

SAC

MARTHA J. ROSETT, Counsel (SBN #142072)
Department of Real Estate
320 West Fourth Street, #350
Los Angeles, CA 90013-1105

(213) 576-6982
(213) 576-6914

FILED
MAY 23 2001
DEPARTMENT OF REAL ESTATE

By [signature]

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Application of SIMON AYALA, Respondent.	No. H-29066 LA STATEMENT OF ISSUES

The Complainant, Thomas McCrady, a Deputy Real Estate Commissioner of the State of California, for Statement of Issues against SIMON AYALA ("Respondent") is informed and in his official capacity alleges as follows:

1.

Respondent SIMON AYALA made application to the Department of Real Estate of the State of California for a real estate salesperson license on or about December 19, 2000.

2.

On or about September 13, 1996, Respondent was convicted on his plea of guilty to two counts of violating 26 U.S.C. 7203 (willful failure to pay tax). The factual basis for Respondent's plea of guilty included Respondent's admission that he altered Internal Revenue Service levy forms after they were signed by the Revenue Officer and then faxed the doctored forms to his wife's place of employment. Under these facts, Respondent's convictions were for crimes and acts of moral turpitude, substantially related to the qualifications, functions and duties of a real estate licensee.

3.

On or about September 19, 1997, Respondent's license to practice accounting before the Internal Revenue Service was suspended for three years, pursuant to the provisions of 31 U.S.C. 330, and 31 Code of Federal Regulations Sections 10.76(b)(2), 10.50, 10.52, 10.70, 10.76 and 10.100, due to the convictions listed in Paragraph 3 above.

4.

Respondent's convictions set forth in Paragraph 2 above constitute grounds for the denial of Respondent's application for a real estate salesperson license pursuant to Business and Professions Code Sections 10177(b) and 480(a).

5.

Respondent's suspension from the practice of accounting before the Internal Revenue Service for acts of dishonesty and moral turpitude, as set forth in Paragraphs 2 and 3, constitutes grounds for denial of Respondent's application for a real estate license pursuant to Business and Professions Code Section 10177(f).

These proceedings are brought under the provisions of Section 10100, Division 4 of the Business and Professions Code of the State of California and Sections 11500 through 11528 of the Government 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 SIMON AYALA and for such other and further relief as may be proper under the law.

Dated at Los Angeles, California
this 23rd day of May, 2001.

Thomas McCrady

Deputy Real Estate Commissioner

cc: Simon Ayala
Sacto.
Thomas McCrady
EC