BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	)	Case No. A1-2009-214
	)	
RICHARD ENCARNACION, JR.,	)	OAH No. 2010020240
	)	
Applicant for Certificate of Registration as an Apprentice Embalmer,	)	
	)	
Respondent.	)	
	)	

DECISION

The attached Proposed Decision and Order is hereby accepted and adopted as the Decision of the Director of the Department of Consumer Affairs in the above-entitled matter.

This Decision shall become effective October 15, 2010.

IT IS SO ORDERED this 15th day of September, 2010.

Doreathea Johnson
DOREATHEA JOHNSON
Deputy Director, Legal Affairs Division
Department of Consumer Affairs

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	Case No. A1 2009 214
RICHARD ENCARNACION, JR.,	OAH No. 2010020240
Respondent.	

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 15, 2010, in San Diego, California.

William A. Buess, Deputy Attorney General, represented complainant Richard L. Wallinder, Bureau Chief, Cemetery and Funeral Bureau, Department of Consumer Affairs, State of California.

Respondent Richard Encarnacion represented himself and was present throughout the hearing.

The matter was submitted on July 15, 2010.

FACTUAL FINDINGS

1. On May 4, 2009, respondent signed and thereafter filed with the bureau an application for a certificate of registration as an apprentice embalmer. By letter dated May 20, 2009, the bureau denied the application on the basis of several criminal convictions.

2. On January 5, 2010, complainant signed the statement of issues. On January 13, 2010, the statement of issues and other required jurisdictional documents were served on respondent by certified mail. On February 9, 2010, complainant served on respondent a notice of hearing.

3. On July 15, 2010, the record was opened, jurisdictional documents were received, sworn testimony was given, documentary evidence was introduced, closing argument was presented, and the matter was submitted.

4. On November 5, 2003, respondent pled guilty and was convicted of one count of violating Vehicle Code section 23152, subdivision (a), driving under the influence, a misdemeanor. Respondent was placed summary probation for five years. The terms of respondent's probation included payment of fines and fees, completion of a first-offender DUI program, and service of 30 days in jail. The conviction arose out of an incident when respondent was stopped by a peace officer and arrested for driving under the influence of crystal methamphetamine.

5. On February 6, 2004, respondent pled guilty and was convicted of one count of violating Penal Code section 422, making a criminal threat, a misdemeanor. Respondent was placed on formal probation for four years. The terms of probation included a 365-day jail term, payment of fines and fees, and a stay-away order. Later that year, respondent's probation as a result of contacting and threatening the victim of the original offense. As a result, on March 15, 2005, a charge of violating Penal Code section 12022, subdivision (b)(1), using a deadly and dangerous weapon (a knife), a felony, was reinstated.[1] Respondent was sentenced to two years in prison on the section 422 conviction, and an additional year, to run consecutively, on the section 12022 conviction. The conviction arose out of a domestic violence incident involving respondent's then girlfriend.

6. On October 12, 2004, respondent pled guilty and was convicted of one count of violating Penal Code section 415(1), disturbing the peace, a misdemeanor. Respondent was sentenced to pay fines and fees and to serve 13 days in jail. The conviction arose out of a race riot that occurred while respondent was incarcerated in the San Diego County Jail awaiting trial on other charges.

7. Respondent was born and raised in Bell Gardens (Los Angeles County). He graduated from Bell High School in 1987. His family moved thereafter to Yuma, Arizona, where respondent became involved in crystal methamphetamine use. Respondent attributes all of his above convictions to this drug use.

8. Respondent was released from prison in April 2006, and entered a group recovery home, where he stayed for six months. Respondent received substantial drug counseling and treatment both in prison and at the group home. Respondent testified that he was involved in Narcotics Anonymous while at the group home, and has since remained involved in that organization. He currently attends four NA meetings per week. He was able to state without hesitation the name of his sponsor and his sobriety date.

9. After his release from prison, respondent secured employment as a "bouncer" at a club in Chula Vista, where he worked for about two years. He met his present fiancée while working at the club, and eventually they moved in together, with his fiancée's two children, now ages four and two. Respondent was previous married twice. His first wife died; respondent and his second wife were divorced. Respondent has no children of his own.

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[1] The documentation submitted at the hearing was not entirely clear, as some of the documentation suggested that respondent's initial conviction included a section 12022 enhancement. Later documentation, however, reflects an apparent reinstatement of the enhancement.

After working for two years at the club in Chula Vista, respondent left his employment, because of increasing violence that occurred there. He secured similar employment at a club in the Hillcrest area of San Diego, where he remained for about a year, until about five months ago. He left because he received a better offer from the Holistic Café as head of security. He continues to work there today.

10. In the 1990's, respondent worked in various capacities in the funeral industry, e.g., body transportation, arrangement counselor, memorial services, and (under the oversight of a licensed director) funeral director.[2] He found his prior work in the field satisfying, and he wishes to return to that field at a different level, and hopes eventually to open his own funeral home.[3]

11. Respondent came across during his testimony as very sincere, up front and direct, and respectful of the proceedings.

12. Several individuals submitted reference letters on respondent's behalf, including a supervisor and the owner of the Holistic Café, and a friend from NA. All of these individuals spoke of respondent in highly positive terms.

LEGAL CONCLUSIONS

1. In the absence of a statute to the contrary, the burden of proof is on the applicant for a license or permit. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224-1225; *Southern California Jockey Club, Inc. v. California Horse Racing Board* (1950) 36 Cal.2d 167, 177.) The burden of proof in this matter is thus on respondent.

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) Since no statute prescribing a contrary standard of proof has been found, the preponderance of the evidence standard applies to this proceeding.

"The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, *Burden of Proof and Presumptions,* § 35 (4th ed 2000).)

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[2] Respondent's prior service as a "funeral director" raised a potential issue, as he was not licensed. The details of his service in this capacity were not clear from the record. Respondent appeared to be following the directives of the licensed director and accepted at face value that whatever the licensed director told him to do was something he could legally do. The vague evidence presented on this issue does not raise any concerns sufficient to affect the decision reached below.

[3] Findings 7 through 10 were based on respondent's testimony, which is credited.

3. Business and Professions Code section 480 provides that a board may deny a license on the ground that the applicant has been convicted of a crime that is substantially related to the qualifications, functions or duties of the business or profession for which application is made.

4. Title 16, California Code of Regulations, section 1252, provides that a crime "shall be considered to be substantially related to the qualifications, functions or duties of a licensed funeral establishment, licensed funeral director, or licensed embalmer if to a substantial degree it evidences the present or potential unfitness of a licensed funeral establishment, licensed funeral director, or licensed embalmer to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare."

5. Title 16, California Code of Regulations, section 1253, provides in pertinent part:

"(a) When considering the denial of a license under Section 480 of the code, the board, in evaluating the rehabilitation of the applicant and his/her present eligibility for a license will consider the following criteria:

(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(4) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant."

6. The Board has adopted "A Manual of Disciplinary Guidelines for Funeral Establishments, Funeral Directors, Embalmers, and Apprentice Embalmers." The guidelines appear to relate only to current licensees, and not applicants. Accordingly, the guidelines do not appear to be directly applicable to this matter. However, in light of the decision below that respondent's convictions do not preclude issuance of a probationary certificate of registration, recourse will be made to the recommended standard conditions of probation.

7. Respondent's convictions under Vehicle Code section 23152 and Penal Code sections 422 and 12022 are substantially related to the qualifications, functions or duties of an embalmer or apprentice embalmer, since to a substantial degree they evidence the present or potential unfitness of respondent to perform the functions authorized by the license or

certificate in question in a manner consistent with the public health, safety, or welfare. Accordingly, legal grounds to deny respondent a certificate of registration exist. The question, therefore, is whether denial of a certificate is necessary for the protection of the public. It is concluded that issuance of a probationary certificate of rehabilitation is consistent with the public protection.[4] The underlying convictions involved serious misconduct. However, they all arose out of respondent's abuse of crystal methamphetamine. Based on his credible testimony, he underwent substantial drug counseling and treatment, both in prison and later. He continues to participate in NA, as evidenced by his testimony, which was corroborated by one of the reference letters submitted on his behalf. Two representatives of his present employer spoke highly of him. He appears to be in a stable, healthy relationship at this time. Complainant's counsel expressed concern that little evidence of rehabilitation was presented aside from respondent's own testimony. Counsel's concern is understandable and reasonable. However, respondent's demeanor at the hearing as described above strongly impressed the administrative law judge as both honest and sincere. Accordingly, that testimony, along with the modest degree of corroboration presented at the hearing, is sufficient to meet respondent's burden of establishing rehabilitation so as to justify issuance of a probationary certificate of registration.

8. By reason of Factual Findings 1 through 12, and Legal Conclusions 1 through 7, cause exists to grant respondent's application for a certificate of registration, on a probationary basis, with appropriate conditions of probation. A certificate of registration for an apprentice embalmer is issued for up to six years, unless an embalmer certificate is conferred prior to the expiration of the six-year period. (Bus. & Prof. Code, § 7664.) A four-year period of probation appears sufficient in the present case.

Accordingly, there is hereby issued the following:

ORDER

Pursuant to Legal Conclusions 1 through 8:

The application of respondent Richard Encarnacion for a certificate of registration as an apprentice embalmer is hereby granted. Upon successful completion of applicable licensing requirements, the certificate shall be issued to respondent. Said certificate shall immediately be revoked, the order of revocation stayed and respondent placed on probation for four years on the following conditions:

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[4] This assumes that respondent completes whatever legal requirements that may exist pertaining to competency, which was not at issue in this proceeding.

1. Obey All Laws

Respondent shall comply with all conditions of probation and obey all federal, state, and local laws, and all rules and regulations governing the programs regulated by the bureau.

2. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury, in a format designated by the bureau, stating whether or not respondent has been in compliance with all the conditions of probation. Respondent shall also submit such additional written reports and verifications of actions requested by the bureau. Should the final probation report not be made as directed, the period of probation shall be extended until such time as the final report is made.

3. Interview with Bureau Representative

As necessary, respondent shall appear in person for scheduled interviews with the Director or other designated representative for the purpose of monitoring compliance with the terms of this decision.

4. Out-of-State Residence or Operation

Should respondent leave California to reside or operate outside this state, respondent must notify the bureau in writing of the dates of departure and return. Reporting in person may be waived if the respondent moves out of the state. However, respondent shall continue compliance with other terms of probation to retain California licensure. Periods of residency, business operation or employment outside California shall not reduce the probationary period.

5. Completion of Probation

Upon successful completion of probation, respondent's certificate will be fully restored.

6. Violation of Probation

Should respondent violate probation in any respect, the Director of the bureau, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the bureau shall have continuing jurisdiction until the matter is final, and the probation shall be extended until the matter is final.

7. License Issued During Probation

Any license or registration issued to respondent by the bureau during the period of probation shall be issued as a probationary license or registration and is subject to all the terms and conditions set forth herein. Respondent must comply with terms and conditions herein and demonstrate no cause for disciplinary action or denial of an application.

DATED: 7-27-10

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: **RICHARD ENCARNACION, JR.** **1225 E. 30th Street** **National City, CA 91950** **Respondent.**	Case No. A1 2009 214 **STATEMENT OF ISSUES**

Complainant alleges:

PARTIES

1. Richard L. Wallinder (Complainant) brings this Statement of Issues solely in his official capacity as the Bureau Chief of the Cemetery and Funeral Bureau, Department of Consumer Affairs.

2. On or about May 4, 2009, the Cemetery and Funeral Bureau received an application for a Certificate of Registration as an Apprentice Embalmer from Richard Encarnacion, Jr., aka Richardo Encarnacion (Respondent). On or about March 17, 2009, Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Bureau denied the application on May 20, 2009.

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JURISDICTION

3. This Statement of Issues is brought before the Director of Consumer Affairs (Director) for the Cemetery and Funeral Bureau, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 150 of the Code states: "The department is under the control of a civil executive officer who is known as the Director of Consumer Affairs."

5. Section 477 of the Code states:

"(a) 'Board' includes 'bureau,' 'commission,' 'committee,' 'department,' 'division,' examining committee,' 'program,' and 'agency.'

"(b) 'License' includes certificate, registration or other means to engage in a business or profession regulated by this code."

STATUTORY PROVISIONS

6. Section 475 of the Code states:

"(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

". . . .

"(2) Conviction of a crime.

". . . .

"(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

". . . ."

7. Section 480 states, in pertinent part:

"(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

"(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or 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.

". . . .

"(3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

"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.

". . . ."

8. Section 493 of the Code states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and 'registration.'"

REGULATORY PROVISIONS

9. California Code of Regulations, title 16, section 1252, states, in pertinent part:

"For the purposes of denial, suspension or revocation of a license pursuant to Division 1.5 (commencing with Section 475) of the Code, a crime or act shall be considered to be substantially related to the qualifications functions or duties of a licensed funeral establishment, licensed funeral director, or licensed embalmer if to a substantial degree it evidences present or potential unfitness of a licensed funeral establishment, licensed funeral director, or licensed embalmer to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include, but not be limited to, those involving the following:

". . . .

"(b) Any violation of the provisions of Chapter 12, Division 3 of the Business and Professions Code."

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10. California Code of Regulations, title 16, section 1253, states, in pertinent part:

"When considering the denial of a license under Section 480 of the Business and Professions Code, the Board, in evaluating the rehabilitation of the applicant and his present eligibility for a license, will consider the following criteria:

"(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

"(b) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.

"(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

"(d) The extent to which the applicant has complied with any termsof parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

"(e) Evidence, if any, of rehabilitation submitted by the applicant."

FIRST CAUSE FOR DENIAL OF APPLICATION

(November 5, 2003 - Conviction of a Crime - Driving Under the Influence of Alcohol and Drugs)

11. Respondent's application is subject to denial under sections 475(a)(2) and 480(a)(1) in that on or about November 5, 2003, in a criminal proceeding entitled People vs. Richard Encarnacion, Jr. in San Diego Superior Court, South County Division, Case Number S179931, Respondent was convicted by his plea of guilty of violating Vehicle Code section 23152(a) (Driving Under the Influence of Alcohol and/or Drugs), a misdemeanor. The circumstances are as follows:

a. On or about November 2, 2003, Respondent was arrested for driving a motor vehicle under the combined influence of an alcoholic beverage and a drug.

b. On or about November 5, 2003, Respondent was sentenced as follows: Respondent was placed on five years summary probation, ordered to serve 30 days in the county jail, complete a First Conviction Program by December 22, 2003, and ordered to pay $1,725 in fines and fees.

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SECOND CAUSE FOR DENIAL OF APPLICATION

(February 6, 2004 - Conviction of a Crime – Making a Criminal Threat With a Knife)

(March 15, 2005 – Conviction of a Crime – Use of a Deadly Weapon, a Knife)

12. Respondent's application is subject to denial under sections 475(a)(2) and 480(a)(1) in that on or about February 6, 2004, in a criminal proceeding entitled People vs. Richard Encarnacion, Jr., in San Diego Superior Court, Central Division, Case Number CD 180055, Respondent was convicted by his plea of guilty, of violating Penal Code section 422 (Making a Criminal Threat), a misdemeanor. The circumstances are as follows:

a. On or about January 23, 2004, Respondent was arrested for unlawfully committing an assault upon Linda R. with a deadly weapon and instrument and by means of force likely to produce great bodily injury.

b. As a result of the Respondent's plea to violating Penal Code section 422, a charge of violating Penal Code section 12022(b)(1) was dismissed and Respondent was sentenced as follows: On March 23, 2004, Respondent was placed on formal probation for four years, committed to the Sheriff for 365 days, with 91 days credit for time served, and ordered to pay fess and fines totaling $1,088, and ordered not to contact his victim. On July 21, 2004, Respondent made contact with the victim and used force/threats against the victim. Respondent was remanded to the custody of the Sheriff and an Order to Show Cause hearing was scheduled and rescheduled several times, with the OSCO hearing taking place on March 15, 2005.

c. On March 15, 2005, Respondent's charge of 12022(b)(1) was reinstated and Respondent was convicted of violating 12022(b)(1). Respondent was committed to the California Department of Corrections for two years on the Penal Code section 422 conviction, with an additional year given on the Penal Code section 12022(b)(1) conviction, to run concurrent, for a total of three years.

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THIRD CAUSE FOR DENIAL OF APPLICATION

(October 12, 2004 - Conviction of a Crime - Battery)

13. Respondent's application is subject to denial under sections 475(a)(2) and 480(a)(1) in that on or about October 12, 2004, in a criminal proceeding entitled People vs. Richard Encarnacion, Jr. in San Diego Superior Court, South County Division, Case Number S188204, Respondent was convicted by his plea of guilty of violating Penal Code section 415(1) (Disturbing the Peace/Unlawfully Fighting in Public), a misdemeanor. The circumstances are as follows:

a. On or about August 30, 2004, Respondent was arrested for using force and violence upon the person of Raymond R., in violation of Penal Code section 242.

b. As a result of the above conviction, Respondent was sentenced as follows: Respondent was denied probation and sentenced to serve 13 days custody to run concurrent with felony sentence SCD180055.

FOURTH CAUSE FOR DENIAL OF APPLICATION

(Commission of Acts Which, If Done by Licentiate, Would Be Grounds for Suspension/Revocation of License)

14. Respondent is subject to discipline under Business and Professions Code sections 475(a)(4) and 480(a)(3), in that he committed acts, which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license, as set forth in paragraphs 11 through 13, above.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

1. Denying the application of Richard Encarnacion, Jr., aka Richardo Encarnacion for a Certificate of Registration as an Apprentice Embalmer;

2. Taking such other and further action as deemed necessary and proper.

DATED: 1/5/10

RICHARD L. WALLINDER
Bureau Chief
Cemetery and Funeral Bureau
Department of Consumer Affairs
State of California
Complainant

SD2009702402
statement of issues.rtf