

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Reinstatement
of Pharmacy Technician License Filed by:

NOU CHAI THAO,

Petitioner.

Case No. 6051

OAH No. 2017030762

DECISION

This matter was heard before a quorum of the Board of Pharmacy (Board) in Sacramento, California, on March 30, 2017. Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings (OAH), presided.

Joshua A. Room, Deputy Attorney General, appeared pursuant to Government Code section 11522.

Petitioner Nou Chai Thao appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on March 30, 2017.

FACTUAL FINDINGS

1. On October 4, 2007, the Board issued California Pharmacy Technician License Number TCH 78290 to petitioner.
2. *Accusation:* On January 4, 2011, in Case Number 3786, the Board filed an Accusation against petitioner's license, based on his January 12, 2010, no contest plea to a misdemeanor conviction for violating Vehicle Code section 23152, subdivision (b) (driving a motor vehicle with a blood alcohol content (BAC) of 0.08% or more), with admitted enhancement allegations of having a BAC of 0.15 percent or more, pursuant to Vehicle Code section 23578.
3. *Decision:* On April 13, 2011, petitioner signed a Stipulated Settlement and Disciplinary Order, in which he admitted the allegations in the Accusation. The underlying

offense occurred on October 15, 2009, when petitioner was observed driving at a high rate of speed in Sacramento. When stopped by law enforcement, petitioner failed field sobriety tests and submitted a blood test which measured .19 percent BAC.

On June 27, 2011, the Board adopted the Stipulated Settlement and Disciplinary Order as its Decision in Case No. 3786, with an effective date of July 27, 2011. Pursuant to this Decision, petitioner's license was revoked, but revocation was stayed. Petitioner was placed on probation for four years, subject to terms and conditions, which included that he: (a) reimburse the Board \$1,190 for the cost of investigation and enforcement; (b) participate in random drug and alcohol testing; (c) abstain from use of drugs and alcohol; and (d) engage in community service.

4. *Petition to Revoke*: On January 17, 2013, in Case Number 4412, the Board filed a Petition to Revoke Probation, based on petitioner's alleged: (1) failure to report and submit to random testing, six positive ETG/ETS (alcohol) screens, and license suspensions based upon these positive tests; (2) failure to abstain from alcohol use; and (3) failure to commence community service.

5. *Default Decision and Order Revoking License*: On May 21, 2013, the Board issued a Default Decision on the Petition to Revoke in Case Number 4412. The Board determined that petitioner had been properly and timely served with the Petition to Revoke and failed to file a notice of defense, thus waiving his right to an evidentiary hearing. The allegations in the Petition to Revoke were determined to be true, reflecting petitioner's violation of Probation Condition 17 (random drug/alcohol screening); Condition 19 (abstain from drug and alcohol use); and Conditions 20 (community service program) and 13 (comply with probation/violation of probation). Petitioner's pharmacy technician license number TCH 78290 was revoked, effective June 20, 2013.

6. *Petition to Reinstate License*: More than three years later, on July 28, 2016, the Board received the Petition for Reinstatement of Certificate to Practice Pharmacy (Petition), assigned as Case No. 6051. The Petition was supported by verified recommendations from three licensees as well as two other individuals. Although not a requirement for reinstatement, petitioner provided proof of completing 31.5 hours of continuing education. Petitioner has paid some of the costs of investigation and enforcement originally ordered, and a balance of \$695 remains to be paid.

Petitioner's Evidence

7. Petitioner received his Associate of Science degree from Western Career College in June 2008. From November 2007 through April 2012, he worked as a pharmacy technician at Kaiser Permanente Hospital Foundation – Sacramento Inpatient Pharmacy (Kaiser). From 2011 through 2014, petitioner took courses at American River and Cosumnes River Colleges, which were prerequisites to a Radiography Program he may apply for next year.

After his license was revoked, petitioner was unemployed for approximately 18 months. Since August 2013, he has been employed full-time at Sprouts Farmers Market. Petitioner was initially hired as a produce clerk and then promoted to produce manager. After work, petitioner reviews his pharmacy school materials and pharmacy law updates. He last worked as a pharmacy technician in 2012 and realizes he is not up-to-date on some topics. He has been preparing to take the Pharmacy Technician Certification Board Examination (PTCB). If his license is reinstated, petitioner hopes to return to work with patients in a hospital setting.

Petitioner believes he has matured substantially since his initial discipline and the revocation of his license. He did not take his use of alcohol seriously and he used poor judgment by partying and driving after drinking. As part of his criminal probation, he completed a drinking driver program, which made him realize how lucky he was not to have harmed himself or others. He attributes his previous failure to comply with his Board probation to a similar immaturity and a general failure to understand the consequences of his actions. Petitioner is not proud of his past. Once he "lost everything," he understood the value of what he had lost. He did not give up, but became more responsible. He has a desire to be a better role model in the future. Pharmacy has always been petitioner's "thing," and he requests the opportunity to return to this work. He would comply with probationary terms.

8. *Recommendations:* Petitioner submitted letters of recommendation in support of the Petition from three licensees, who were aware of the conduct that resulted in his license revocation. Jocelyn Karyautomo, Pharm D., is the lead inpatient pharmacist at Kaiser and worked as petitioner's direct supervisor for five years. She described petitioner as knowledgeable and having a "great passion and dedication to his job." While aware that petitioner's license has been revoked for the past three years, she believes him to be bright, motivated and ready to tackle the rigorous curriculum of a pharmacy technician again. Steven Santos, Jr., Pharm. D., is an inpatient pharmacist at Kaiser and was petitioner's direct supervisor for over two years, ending in November 2011. He characterized petitioner as "one of our outstanding" inpatient pharmacy technicians, who was motivated, worked effectively and efficiently, and had good interpersonal skills. He urges that petitioner be given another chance in light of his intervening maturity, as demonstrated in his managerial position at Sprouts Market.

Similar accolades were offered by Pharmacy Technician Irma Lumbang, who worked with him at Kaiser. In her experience, she could always count on petitioner to carry out his duties "both effectively and efficiently" and she admired "his positive attitude, strong work ethic, and professional demeanor. . . ." In his July 25, 2016 letter, Brandon Todd, Assistant Store Manager, Sprouts Farmers Market, wrote that petitioner has shown dedication, responsibility, and maturity on the job. While he would hate to see petitioner leave his job, he realizes it is an opportunity for petitioner to return to the career he loves. Friend Ying Xiong has known petitioner since 2010 and described him as "a lifelong learner who strives to improve himself. Every mistake was an opportunity to learn and to grow."

Discussion

9. Petitioner was 20 years old when he received his pharmacy technician's license, and 22 years old when he engaged in the conduct that resulted in his conviction. Petitioner's original offense involved excessive use of alcohol while driving. There was never any evidence that petitioner used or abused drugs. Five years have passed since his last positive tests for alcohol. Petitioner is now 29 years old and he has matured considerably. Petitioner holds a full-time job and has been promoted to manager. He has pursued continuing education units in pharmacy-related topics, as well as college course prerequisites for career advancement in the medical field. He understands the value of what he lost by failing to take his previous Board probation seriously. When all the evidence is considered, petitioner demonstrated sufficient rehabilitation to warrant the reinstatement of his license, subject to a condition precedent that he become certified as a pharmacy technician as required by Business and Professions Code section 4202, subdivision (a)(4), with probationary conditions which include random testing, abstaining from drug and alcohol use, and completing payment of the previously ordered costs of investigation and enforcement.

LEGAL CONCLUSIONS

1. Petitioner has the burden of proving that he is entitled to reinstatement of his license, and he must do so by clear and convincing evidence. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398; *Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315.) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability* [citations]." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899; italics original.)

2. A person whose license has been revoked or suspended or who has been placed on probation may petition the Board for reinstatement or modification of penalty, including termination of probation, after three years have elapsed from the effective date of the decision disciplining the license. (Bus. & Prof. Code, § 4309, subd. (a)(1).) A petition shall not be considered: (1) while the petitioner is under sentence for any criminal offense, including any period during which the petitioner is on court-imposed probation or parole, or (2) while there is an accusation or petition to revoke probation pending against the person. (Bus. & Prof. Code, § 4309, subd. (g).)

3. The petition "shall be accompanied by two or more verified recommendations from holders of licenses issued by the board to which the petition is addressed, and two or more recommendations from citizens, each having personal knowledge of the disciplinary penalty imposed by the board and the activities of the petitioner since the disciplinary penalty was imposed." (Bus. & Prof. Code, § 4309, subd. (b).) Four of the five letters of recommendation were verified by the Board.

4. In considering reinstatement or modification of penalty, the Board may consider factors including, but not limited to, the following: (1) petitioner's activities since the disciplinary action was taken; (2) the offense for which petitioner was disciplined; (3) petitioner's activities during the time the license was in good standing; (4) petitioner's documented rehabilitative efforts; and (5) petitioner's general reputation for truth and professional ability. If the Board reinstates the license, it may impose necessary terms and conditions on the licensee. (Bus. & Prof. Code, § 4309, subd. (f).)

5. As set forth in the Factual Findings and Legal Conclusions as a whole, the Petition was filed three years after the imposition of discipline, was supported by verified recommendations, and there is no basis for not considering it on the merits. Petitioner established sufficient rehabilitation to authorize reinstatement of his license, after he obtains certification as a pharmacy technician, on a probationary basis. Subject to conditions precedent, legal cause is established to grant the Petition and to reinstate his license, subject to the terms and conditions set forth below.

ORDER

The Petition for Reinstatement is GRANTED. Upon satisfaction of the following conditions precedent to licensure, Pharmacy Technician License Number TCH 78290 will be reinstated:

- a. Petitioner shall become certified as a pharmacy technician as provided by Business and Professions Code section 4202, subdivision (a)(4), within one (1) year of the effective date of this order. Failure to obtain certification within one (1) year of the effective date of this order shall invalidate the order granting the petition for reinstatement, petitioner shall be deemed to have failed the conditions precedent for re-licensure, and License Number TCH 78290 shall remain revoked.
- b. Petitioner must pay all applicable application and licensing fees to obtain certification.

Upon completion of the foregoing conditions precedent, petitioner's license shall be reinstated and immediately revoked, with revocation stayed and petitioner placed on probation for a period of three (3) year(s) on the following terms and conditions:

1. **Obey All Laws:** Petitioner shall obey all state and federal laws and regulations. Petitioner shall report any of the following occurrences to the Board, in writing, within seventy-two (72) hours of such occurrence:

an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;

a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;

a conviction of any crime;

discipline, citation, or other administrative action filed by any state or federal agency which involves petitioner's pharmacy technician license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

2. **Report to the Board:** Petitioner shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, petitioner shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

3. **Interview with the Board:** Upon receipt of reasonable prior notice, petitioner shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior notification to Board staff, or failure to appear at two (2) or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

4. **Cooperate with Board Staff:** Petitioner shall cooperate with the Board's inspection program and with the Board's monitoring and investigation of petitioner's compliance with the terms and conditions of his probation. Failure to cooperate shall be considered a violation of probation.

5. **Notice to Employers:** During the period of probation, petitioner shall notify all present and prospective employers of the decision in Case Number 2017030762 and the terms, conditions and restrictions imposed on petitioner by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of petitioner undertaking any new employment, petitioner shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during petitioner's tenure of employment) and owner to report to the Board in writing acknowledging that the listed individual(s) has/have read the decision in case number 2017030762 and the terms and conditions imposed thereby. It shall be petitioner's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the Board.

If petitioner works for or is employed by or through a pharmacy employment service, petitioner must notify his direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 2017030762 in advance of the petitioner commencing work at each pharmacy. A record of this notification must be provided to the Board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of petitioner undertaking any new employment by or through a pharmacy employment service, petitioner shall cause his direct supervisor with the pharmacy employment service to report to the Board in writing acknowledging that he or she has read the decision in case number 2017030762 and the terms and conditions imposed thereby. It shall be petitioner's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the Board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the Board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for employment, whether the petitioner is considered an employee, independent contractor or volunteer.

6. **Reimbursement of Board Costs:** As a condition precedent to successful completion of probation, petitioner shall pay to the Board the balance of its costs of investigation and prosecution in Case Number 3786 (originally \$1,190) in the amount of **\$695**. Petitioner shall make said payments on a schedule agreed to by the Board. Once established, there shall be no deviation from this schedule absent prior written approval by the Board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

The filing of bankruptcy by petitioner shall not relieve petitioner of his responsibility to reimburse the Board its costs of investigation and prosecution.

7. **Probation Monitoring Costs:** Petitioner shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

8. **Status of License:** Petitioner shall, at all times while on probation, maintain an active, current pharmacy technician license with the Board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If petitioner's pharmacy technician license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication petitioner's license shall be subject to all terms and conditions of this probation not previously satisfied.

9. **License Surrender While on Probation/Suspension:** Following the effective date of this decision, should petitioner cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, petitioner may tender his pharmacy technician license to the Board for surrender. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, petitioner will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the petitioner's license history with the Board.

Upon acceptance of the surrender, petitioner shall relinquish his pharmacy technician license to the Board within ten (10) days of notification by the Board that the surrender is accepted. Petitioner may not reapply for any license, permit, or registration from the Board for three (3) years from the effective date of the surrender. Petitioner shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

10. **Notification of a Change in Name, Residence Address, Mailing Address or Employment:** Petitioner shall notify the Board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Petitioner shall further notify the Board in writing within ten (10) days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the Board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

11. **Tolling of Probation:** Except during periods of suspension, petitioner shall, at all times while on probation, be employed as a pharmacy technician in California for a

minimum of 20 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, petitioner must nonetheless comply with all terms and conditions of probation.

Should petitioner, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 20 hours per calendar month in California, petitioner must notify the Board in writing within ten (10) days of cessation of work and must further notify the Board in writing within ten (10) days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for petitioner's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of work" means calendar month during which petitioner is not working for at least 20 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which petitioner is working as a pharmacy technician for at least 20 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

12. Violation of Probation: If a petitioner has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over petitioner, and probation shall automatically be extended, until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If petitioner violates probation in any respect, the Board, after giving petitioner notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against petitioner during probation, the Board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

13. Random Drug Screening: Petitioner, at his own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the Board or its designee. Petitioner may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the Board or its designee. At all times, petitioner shall fully cooperate with the Board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics,

dangerous drugs or other controlled substances as the Board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the Board or its designee, petitioner shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the petitioner. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by petitioner. Petitioner may not resume work as a pharmacy technician until notified by the Board in writing.

During suspension, petitioner shall not enter any pharmacy area or any portion of or any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Petitioner shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall petitioner manage, administer, or assist any licensee of the Board. Petitioner shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Petitioner shall not resume work until notified by the Board.

Petitioner shall not direct, control or perform any aspect of the practice of pharmacy. Subject to the above restrictions, petitioner may continue to own or hold an interest in any licensed premises in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

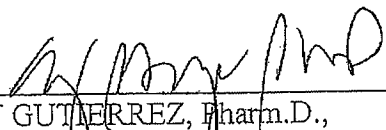
Failure to comply with this suspension shall be considered a violation of probation.

14. Notification of Departure: Prior to leaving the probationary geographic area designated by the Board or its designee for a period greater than twenty-four (24) hours, petitioner shall notify the Board verbally and in writing of the dates of departure and return. Failure to comply with this provision shall be considered a violation of probation.

15. Abstain from Drugs and Alcohol Use: Petitioner shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board or its designee, petitioner shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the petitioner. Failure to timely provide such documentation shall be considered a violation of probation. Petitioner shall ensure that he or she is not in the same physical location as individuals who are using illicit substances even if petitioner is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

16. Completion of Probation: Upon written notice by the Board indicating successful completion of probation, petitioner's pharmacy technician license will be fully restored.

DATED: JUL 19 2017



AMY GUTIERREZ, Pharm.D.,
President, Board of Pharmacy