

**Matter of Torn v State of N.Y. Dept. of
State Div. of Licensing Servs.**

2008 NY Slip Op 32681(U)

September 10, 2008

Supreme Court, New York County

Docket Number: 116491/07

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT HON. SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 116491/2007
PECH, CHO, REM, CHANNET
VS.
STATE OF NY DEPT. OF STATE
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 116491/07
MOTION DATE 3/26/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/10/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
In the Matter of the Application of
DARA MENG TORN, CHO PECH, CHANNET REM,
CHAMROUEN MEAS, and OEM SOVANNARA,

Petitioners,

Index No.: 116491/07

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION
and ORDER

-against-

STATE OF NEW YORK DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Respondent.

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

----- X
KORNREICH, SHIRLEY WERNER, J.:

Petitioners Dara Meng Torn, Cho Pech, Channet Rem, Chamrouen Meas, and Oem Sovannara ("petitioners") bring this Article 78 proceeding against Respondent State of New York Department of State Division of Licensing Services for a judgement reversing, annulling, and setting aside an administrative law judge's September 25, 2007 decision denying petitioners a license to engage in the practice of nail specialty. Respondent cross-moves to dismiss the petition on jurisdictional grounds and alternatively requests leave to file an answer in the event the cross-motion denied.

I. *Background*

Nail specialists in New York are required to obtain a license from the Secretary of State. The Division of Licensing Services of the New York State Department of State ("DLS") is the municipal corporation charged by law with the exclusive authority to grant licensing to nail

specialists and to practitioners of other appearance enhancement activities. Petitioners all took the nail specialty examination on November 20, 2006. By letters dated December 1, 2006, DLS advised petitioners that due to "irregularities" in the examination results, it was invalidating the tests and placing a hold on their applications pending an interview. Clark Aff. ¶ 6. Then by letters dated April 27, 2007, DLS notified petitioners that it proposed to deny their applications because of "improper results derived from questionable activity during the nail specialty exam." Exh. A, Petition. The letters also advised petitioners of their right to request an administrative hearing to review the proposed denial. After petitioners requested a hearing, DLS notified them of the hearing date. As required by Section 301(3) of the State Administrative Act (SAPA), DLS included with each notice of hearing a "Guide to Statutes and Rules Relating to Hearings" (Guide). Clark Aff., Exh. 2. The Guide describes and incorporates DOS' rules of procedure for hearings, the authority of an administrative law judge (ALJ), and the taking of an administrative appeal.

The matters were consolidated because they were related, each applicant required a Cambodian translator and they were jointly represented by the same attorney. A consolidated hearing was held on July 26, 2007 before an ALJ. Petitioners appeared and the ALJ received testimony and documentary exhibits. In a decision dated September 25, 2007, the ALJ denied petitioners' applications and made extensive findings. Exh. B, Petition. Petitioners submitted the instant petition for Article 78 relief on March 5, 2008. It is undisputed that petitioners have not to date filed an appeal from the ALJ's 9/25/07 decision with the Secretary of State. Clark Aff. ¶¶ 21-23; Rosenthal Aff., ¶ 8.

II. *Conclustons of Law*

This Article 78 proceeding must be dismissed for lack of subject matter jurisdiction because petitioners failed to exhaust their administrative remedies by filing an administrative appeal with the Secretary of State pursuant to DOS regulations. CPLR 7801(1) "embodies the traditional doctrines of administrative law that ... the petitioner must exhaust his or her administrative remedies before seeking judicial relief." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7801:7. Under 9 NYCRR 400.2(k), a party may appeal the decision of an ALJ within thirty days of receipt of the decision. Petitioners chose instead to seek judicial review without first giving the Secretary an opportunity to review the record and determine the propriety of the ALJ's decision. The underlying facts of the methodology used by the ALJ and the purposes sought to be achieved are subject to administrative review as a condition precedent to the commencement of this proceeding.

Koupash v. Bahou, 85 A.D.2d 795 (3d Dept.), *appeal denied* 56 N.Y.2d 503 (1982).

As the Court of Appeals has explained,

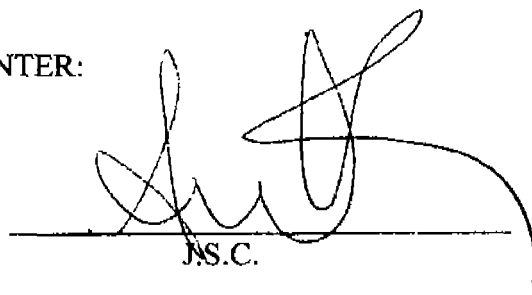
[T]he doctrine of exhaustion of administrative remedies requires "litigants to address their complaints initially to administrative tribunals, rather than to the courts, and * * * to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts" (2 Cooper, State Administrative Law, p 561). It is bottomed on the principle that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action" (*Unemployment Comm. v Aragon*, 329 U.S. 143, 155; see, also, 3 Davis, Administrative Law, § 20.06).

YMCA v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975) (lower court's dismissal of action affirmed where organization failed to exhaust administrative remedies); see *Matter of Adler v. Office of Ct. Admin. of the Unified Ct. Sys. of the State of New York*, 35 A.D.3d 260 (1st

Dept. 2006). Like the petitioner court officer in *Adler*, petitioners did not bring an administrative appeal before seeking judicial review, and they are not excused from the administrative appeal process by the bare allegation that the ALJ "exceeded her powers by amending the charges." Petition, pg. 5. Petitioners do not claim, and there is nothing in the record to support a claim that the Secretary of State would not have properly adjudicated all issues raised in an administrative appeal. *See Pfaff v. Columbia-Greene Community College*, 99 A.D.2d 887, 888 (3d Dept. 1984) (court affirmed judgment dismissing petition where administrative appeal would have provided adequate relief). Further, the decision shows that the ALJ denied the applications on alternative grounds and that her decision was based in part on findings of fact and determinations of credibility. Accordingly, it is

ORDERED that the application by petitioners seeking to vacate and annul the ALJ's September 25, 2007 decision is denied and the proceeding is dismissed.

ENTER:



J.S.C.

Date: September 10, 2008
New York, N. Y.

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