

## Burgos, Alexander N

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**Subject:** FW: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

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**From:** Johnny Loper <jloper@loper-law.com>  
**Sent:** Wednesday, September 11, 2024 4:28 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>  
**Subject:** RE: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

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Many thanks.

Johnny

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Wednesday, September 11, 2024 4:08 PM  
**To:** Rules, Oah <[oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov)>  
**Cc:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** FW: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

Good afternoon,

It is my intention to recommend approval of the attached rule as revised at the September RRC meeting.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## Burgos, Alexander N

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**Subject:** FW: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC  
**Attachments:** 21 NCAC 42B .0202.docx

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**From:** Janice Peterson <janice@ncoptometry.org>  
**Sent:** Wednesday, September 11, 2024 3:48 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Johnny Loper <jloper@loper-law.com>; exdir@ncoptometry.org; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** Re: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

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Good afternoon, Mr. Peaslee.

Thank you for your email. I have placed strikethroughs through line 7, "comments (if any)". Attached is the corrected document.

As always, thank you for your help.

Janice K. Peterson,  
Administrative Associate  
Please note new address:  
521 Yopp Rd.  
Suite 214 #444  
Jacksonville, NC 28540  
(910) 285-3160  
Fax: (910) 285-4546  
[janice@ncoptometry.org](mailto:janice@ncoptometry.org)

21 NCAC 42B .0202 is adopted with changes as published in 38:24 NCR 1649 as follows:

**21 NCAC 42B .0202      BRANCH OFFICE**

(a) A branch office is any location, facility, or mobile facility, other than an optometrist's primary office location, in which the optometrist provides professional optometric services as provided in G.S. 90-114 (1)-(3).

(b) Before opening or beginning practice in a branch office, an optometrist ~~must shall~~ obtain a ~~duplicate branch~~ license ~~to which shall~~ be displayed in ~~the branch office.~~ accordance with G.S. 90-118.2. The application for a branch office license must be made ~~on Form BEO-3, which can be acquired from the Board.~~ through the individual licensee's portal on the Board's website. The application requires the applicant furnish the following information:

- (1) office name;
- (2) phone number;
- (3) fax number;
- (4) date beginning practice at this location;
- (5) whether this location is exclusively or primarily a telemedicine office;
- (6) address, city, state, zip code, county; and
- (7) ~~comments (if any)~~

(c) Each branch office ~~must shall~~ comply with the requirements for maintaining appropriate medical equipment and record keeping in accordance with 21 NCAC 42E .0102(2) and 42E .0102(5).

~~If in the opinion of the Board Rules 42E .0102(2) and 42E .0102(5) of this Chapter are met, the Board shall notify the optometrist making application of the approval of the request and upon~~ Upon receipt of a the completed branch office application and the required fee required by G.S. 90-123, the Board, subject to G.S. 90-121.2, shall issue such ~~duplicate branch office license.~~ license shall be issued by the Board for the purpose of display in the branch office for which it is issued in compliance with G.S. 90-118.2 and 90-118.4. A ~~duplicate branch office~~ license is not transferable from one practice location to another, nor from one practitioner to another. ~~Within the meaning of this Rule a nursing home is considered a branch office when there is an agreement between the optometrist or his representative that he will provide optometric services on a scheduled basis within the nursing home; provided however, any optometrist who accepts a request to make emergency calls to patients at a nursing home within 20 miles of his practice location(s) as reflected in the Board records is not required to obtain a duplicate license for that location.~~

(d) A branch office license ~~must shall~~ be renewed annually. Failure to do so may result in disciplinary action by the Board.

~~(e) Failure to meet any of the requirements set forth in this rule may result in disciplinary action pursuant to G.S. 90-121.2(a).~~

*History Note:* Authority G.S. 90-117.5; 90-114; 90-118.2; 90-118.4; 90-118.10; 90-118.11; 90-121.2; 90-123  
Eff. February 1, 1976;  
Readopted Eff. May 30, 1978;  
Amended Eff. April 1, 1993; June 1, 1989; September 30, 1981;

1  
2  
3  
4  
5

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,  
2015.  
Eff. October 1, 2024*

## Burgos, Alexander N

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**From:** Johnny Loper <jloper@loper-law.com>  
**Sent:** Wednesday, September 11, 2024 11:38 AM  
**To:** Peaslee, William W; Burgos, Alexander N  
**Subject:** FW: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

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Update: Jan is at a doctor's appointment, but should be back by 3:00, and she'll revise and send to you then.

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**From:** Johnny Loper  
**Sent:** Wednesday, September 11, 2024 11:12 AM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** RE: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

Thanks for this. Will get this back to you promptly.

Johnny

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Wednesday, September 11, 2024 10:58 AM  
**To:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

Thank you for your email.

Please strike line 17 as it is not a requirement but an option. The agency can have comments as an option on the application and it does not have to be in the rule. However, if the agency is requiring information in the comments, then it need to be in the rule and the substantive requirements must be stated therein.

Thank you in advance for your prompt response.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

**From:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>  
**Sent:** Tuesday, September 10, 2024 3:22 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>  
**Subject:** [External] Optometry Board RE: 21 NCAC 42B .0202 RFC

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Mr. Peaslee:

Thank you for the reminder.

Attached is the Board's proposed revision of **21 NCAC 42B .0202** based on your prior comments, for your review. Line references below are to the version you commented on, not the attached version.

- As indicated below, we have made the minor wording changes you suggested to **Lines 7, 11, and 23**.
- For **Line 6**, we have added the proposed language which you indicated would be acceptable: "as provided in G.S. 90-114(1)-(3)." And we have added a citation to G.S. 90-114 to the Authority section.
- For **Lines 8 and 15**, we interpreted your comments as meaning we should list the information required in the application once, not in both places, so we did that **beginning on Line 10** . Let us know if we got this wrong. We also changed the "a" on Line 14 to "the" to make it more clear that this language refers to that same application.
- **Lines 24-25:** We have deleted the proposed paragraph (e).

Please let us know if you have any additional comments or questions.

Thanks.

Johnny

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Monday, September 9, 2024 1:07 PM  
**To:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>  
**Subject:** RE: [External] RE: 21 NCAC 42B .0202 RFC

Good afternoon,

Please reply no later than COB September 11, 2024.

Thank you.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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**From:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>  
**Sent:** Thursday, August 22, 2024 1:54 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>  
**Subject:** RE: [External] RE: 21 NCAC 42B .0202 RFC

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Received/ thanks.

Johnny

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Thursday, August 22, 2024 1:44 PM  
**To:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>  
**Subject:** RE: [External] RE: 21 NCAC 42B .0202 RFC

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
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**From:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>  
**Sent:** Thursday, August 22, 2024 1:13 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Cc:** [exdir@ncoptometry.org](mailto:exdir@ncoptometry.org); Janice Peterson <[janice@ncoptometry.org](mailto:janice@ncoptometry.org)>  
**Subject:** [External] RE: 21 NCAC 42B .0202 RFC

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Mr. Peaslee:

We have received your request for changes to the above-cited rule. We have a couple of questions, as noted below (we have copied and pasted your recommendations, followed by our comments and questions in red font).

Thanks,

Johnny

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In reviewing this Rule, the staff recommends the following changes be made:

*Line 6: Define "professional optometric services." The practice of optometry is defined in G.S. 90-114. On line 6, could we add to "...provides professional optometric services" the following language: "...as provided in G.S. 90-114(1)-(3)"? Or perhaps reword line 6 to read "which the optometrist practices optometry as defined in G.S. 90-114." ?*

Either would do.

*Line 7: Change "must" to "shall." We will make this change.*

*Line 8 and Line 15: Identify the Rule which states the contents or substantive requirements of the application. See G.S. 150B-2(8a)d. Please help me out here. I understand G.S. 150B-2(8a)d provides that a "form" is not a "rule." I don't understand why that fact requires that there be a rule that repeats the contents of a form/ document that doesn't purport to be a rule and which document is available online for our licensees. The reference to the specific form to be used and that form's availability online would seem to be a sufficient "prescribing" under (8a)d since this rule "lays down the rule or course of action to be followed." (See Dictionary.com [PRESCRIBE Definition & Meaning | Dictionary.com](#) ) If my argument doesn't fly with you, can you tell me whether we have to include verbatim here the whole substance of the application, or is a summary sufficient? Thanks.*

If the agency is requiring certain information from applicants, the information required needs to be adopted by rule. An agency cannot require the governed to do anything without adopting a rule pursuant to the APA. While some agencies adopt the form itself, most simply list the information required. By way of illustration, you could state in a rule "name, current address, telephone number" or describe these as "current contact information." The easiest way is to look at your current form and draft accordingly. Beware of being too ambiguous. "All relevant information" will not work.

Please see Chapter 8 of the [RRC Style Guide](#). This is a good document to bookmark.

One other thing of which to be cautious. An agency requires a copy of an applicant's Certificate of Completion, but no other rule requires that the applicant to obtain a Certificate of Completion. It's a backdoor way of placing a requirement by adding it to a form. Contextually, it may or may not be subject to an objection but I would offer it is a bad practice always.

Line 11: Change "must" to "shall." We will make this change.

Line 11: Define or strike "appropriate." We will strike the word "appropriate."

Line 23: Change "must" to "shall." We will make this change.

Line 24-25: Explain why this Paragraph is necessary when the agency has G.S. 90-121.2(a)(6). We agree that, strictly speaking, this proposed new paragraph is not necessary. However, we have found that a "belt and suspenders" approach often is helpful to our licensees, who otherwise may not make the connection between this rule and G.S. 90-121.2(a) and/or otherwise take the time to read G.S. 90-121.2(a)--and even having read it may not otherwise understand that it applies to the failure to comply with this rule.

It appears to be unnecessary pursuant to GS 150B-21.9(a)(4). Further, if you include it in this rule but not others does that mean that the failure to meet the requirements of the other rules is not subject to discipline?

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Wednesday, August 21, 2024 4:43 PM  
**To:** Johnny Loper <[jloper@loper-law.com](mailto:jloper@loper-law.com)>  
**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** 21 NCAC 42B .0202 RFC

Good afternoon,

Attached please find the request for changes on the above captioned rule which will be considered at the September RRC meeting.

As always if you have any questions please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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