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DOCKET NO. 502754

IN RE YEN NGUYEN	§	BEFORE THE
D/B/A J & J BEER & WINE	§	
PERMIT/LICENSE NOS. Q-436173,	§	
BF436174	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0039)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of February 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Michelle Kallas. The hearing convened on October 7, 2005 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 13, 2005. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions were filed in this cause.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

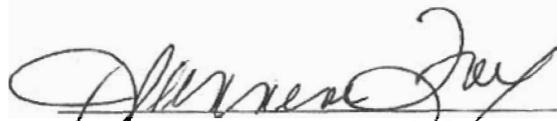
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits and licenses be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on March 2, 2006 unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED this 9th day of February 2006.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Jeannene Fox", written over a horizontal line.

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Michelle Kallas
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

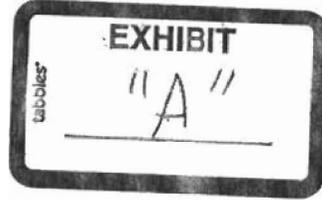
YEN NGUYEN
d/b/a J & J BEER & WINE
RESPONDENT
6535 Abrams
Dallas, Texas 75231-7207
VIA CM/RRR NO. 7001 2510 0000 7274 3182

R. Keith Walker
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14001 Goldmark Dr., Ste. 140
Dallas, TX 75240
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Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office



DOCKET NO. 458-06-0039

TEXAS ALCOHOLIC BEVERAGE COMMISSION

BEFORE THE STATE OFFICE

V.

OF

YEN NGUYEN d/b/a
J & J BEER & WINE
TABC NO. 502754

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ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Yen Nguyen, d/b/a J & J Beer & Wine (Respondent), for selling alcohol to a minor. The Administrative Law Judge (ALJ) finds that TABC proved its case and Respondent's license and permit should be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61, 106.03, 61.71, and 106.13. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On September 8, 2005, TABC issued its notice of hearing, directed to Respondent. On October 7, 2005, a hearing convened before SOAH ALJ Michelle Kallas at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. TABC was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent was present and represented at the hearing by Keith Walker, attorney. The record closed on October 21, 2005.

II. DISCUSSION

A. Applicable Law

Sections 106.03 and 106.13 of the Texas Alcoholic Beverage Code control this proceeding.

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Section 106.13 authorizes sanctions if a retailer acts with criminal negligence in selling an alcoholic beverage to a minor.

A permittee acts with criminal negligence when the permittee ought to have been aware of a substantial and justifiable risk that the circumstances exist or the result will occur. The failure to perceive the risk must constitute a gross deviation from the care that an ordinary person would exercise under the same circumstances. TEX. PENAL CODE ANN §6.03(d)

B. Evidence

1. TABC's Evidence

TABC agent Christopher Aller testified that he received an anonymous complaint regarding the sale of alcohol to minors at J & J Beer & Wine. On July 2, 2005, Agent Aller observed a dark truck (black or green) with four occupants enter the drive-thru at J & J Beer & Wine. The driver of the vehicle placed an order with Respondent and drove around to the other side of the building where the Respondent provided the alcoholic beverages¹ to the driver in exchange for an unknown amount of cash. The truck then left the store. Agent Aller testified that the driver and back seat passenger of the truck appeared youthful in nature and did not appear to be 21 years of age.

Agent Aller initiated a stop on the vehicle based on his suspicion that the driver and occupants were under 21 and had just purchased alcoholic beverages. All of the occupants of the vehicle were under 21 years of age.² The driver of the truck was identified as Jose Garcia. Mr. Garcia's date of birth is July 21, 1984.³ Agent Aller testified that none of the occupants of the truck

1 Agent Aller testified that he verified the purchases of alcoholic beverages based on the packaging and labeling. Agent Aller also stated that he knows, based on past dealings with the store, that all they sell at the store is alcoholic beverages. The alcoholic beverages consisted of a case of Budweiser, a couple bottles of Boone's Farm, and Jello shots.

2 The occupants of the truck were Jose Garcia, age 20; Kyle Wingo, age 18; Elmer Quezada, age 19, and Rodolfo Boehringer, age 18.

3 TABC Exhibit # 3, Texas Alcoholic Beverage Commission Voluntary Statement.

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were in possession of a fake ID.

After being stopped, Mr. Garcia informed Agent Aller that Respondent did not ask to see his identification prior to his purchasing of the alcoholic beverages on July 2, 2005. Mr. Garcia informed Agent Aller that, in the three years he had been purchasing alcoholic beverages at J & J Beer & Wine, Respondent had never asked to see his identification and, he did not have a fake ID because he had never needed one to purchase alcohol at that location.

Agent Aller returned to J & J Beer & Wine to speak with Respondent. Agent Aller testified that Respondent told him that if she checked a customer's identification and discovered that the customer was under 21 years of age, the customer would just go down to the next store.

2. Respondent's Evidence

Respondent testified that she has owned J & J Beer & Wine for seven years. During the duration of her ownership, her policy regarding the checking of identifications is to check the identification of all customers until such time as the customer is recognized. Once Respondent, or her employees, recognize the customer, the customer's identification is no longer checked. As a precaution, Respondent, on occasion, has photocopied the identifications and made the customer sign the photocopy which she then retains for her records.

Respondent testified that she was familiar with Mr. Garcia as he had made purchases at her store in the past and presented identification which indicated he was 21 years old. According to Respondent, Mr. Garcia had been to her store 5-6 times. She did not recall that he had been coming to her store for three years. Respondent admits that on July 2, 2005, she did not check the identifications of Mr. Garcia, or the other occupants of the truck, before selling Mr. Garcia alcoholic beverages because she remembered him.

Respondent testified that Agent Aller came to her store and told her she had sold alcohol to minors. Respondent stated that when Agent Aller showed her pictures of the occupants of the

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vehicle, she did not recognize any of the people in the pictures and told him she did not sell to a minor. Respondent testified that the store had been very busy and, she did not know who Agent Aller was talking about. She then stated "...and I remembered the guy was driving the red truck."

Mr. Long Pham and Mr. Johnny Nguyen, employees of J & J Beer & Wine, testified on Respondent's behalf. Mr. Pham and Mr. Nguyen confirmed Respondent's policy with regards to checking identifications.

C. Discussion and Recommendation

It is a defense to a sale to minor violation if the minor falsely displays an apparently valid identification card indicating the minor is 21 years old or older that contains a description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.⁴ In this case, this defense does not apply. Mr. Garcia informed Agent Aller that he did not produce any identification to Respondent on July 2, 2005, and that he was not in possession of a fake ID because he had never needed one while purchasing alcoholic beverages at that location. Agent Aller testified that none of the occupants of the vehicle were in possession of a fake ID. Furthermore, the Respondent admits that, on July 2, 2005, she did not check the identification of Mr. Garcia or any of the other passengers in the vehicle. If Respondent did not check the identifications, she is precluded from claiming this defense.

Respondent argues that she exercises policies and procedures to prevent the sale of alcohol to minors. Respondent's policy consists of checking the identification of a customer until that customer is recognized and making a photocopy of the identification. Respondent was unable to provide any evidence that she followed this policy in this case. She did not produce a photocopy of Mr. Garcia's identification which would show he was 21 years old or older. Furthermore, it is questionable as to whether Respondent, in fact, recognized Mr. Garcia. During her direct testimony, Respondent stated that, when Agent Aller came to her store and showed her pictures of Mr. Garcia

⁴ TEX. ALCO. BEV. CODE ANN. § 106.03(b).

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and the other occupants of the vehicle, she did not recognize any of the people in the pictures. She then stated "...and I remembered the guy was driving the red truck." When Respondent's attorney asked if it was a black truck, Respondent answered "no he's driving a red truck". According to Agent Aller, Mr. Garcia was driving a dark (black or green) truck. If Respondent was unable to recognize Mr. Garcia from Agent Aller's photographs and was remembering the driver of a different vehicle, she most likely did not remember who Mr. Garcia was and, therefore, should have asked to see his identification to verify his age.

The evidence establishes that Respondent is in the habit of not checking identifications. Mr. Garcia informed Agent Aller that he has been purchasing alcoholic beverages for three years at Respondent's store and has never been asked for identification. Respondent admitted to not checking Mr. Garcia's identification on July 2, 2005, as well as in the past. Also, by her own statements to Agent Aller, Respondent acknowledged that if she checked a customer's identification and discovered that the customer was too young to purchase alcohol, the customer would just go down to the next store.

Jose Garcia appeared youthful in nature and to be under 21 years old. Respondent had a policy in place where she routinely did not check identifications. Respondent should have been aware that there was a substantial and unjustifiable risk that she was selling an alcoholic beverage to a minor. Therefore, TABC proved its case.

Given the fact that this is not Respondent's first sale to minor violation⁵, the ALJ agrees with TABC that the proper punishment for this offense is cancellation of the Respondent's alcoholic beverage license and permit.

III. FINDINGS OF FACT

1. Yen Nguyen, d/b/a J & J Beer & Wine, holds a Wine Only Package Store Permit, Q 436173,

⁵ See TABC Exhibit #2, Copy of Permit, License, and Records.

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and Beer Retailer's Off Premise License, BF436174, issued by the Texas Alcoholic Beverage Commission for the premises located at 6535 Abrams, Dallas, Dallas County, Texas.

2. On July 2, 2005, Jose Garcia, whose date of birth is July 21, 1984, purchased an alcoholic beverage at J & J Beer & Wine.
3. Jose Garcia was youthful looking in nature and appeared to be under the age of 21.
4. Respondent did not ask for any identification when she sold the alcoholic beverage to Mr. Garcia.
5. Respondent had a policy in place where identifications routinely were not checked to determine the age of the customer.
6. As referenced in Findings, 2, 3, 4, and 5, Respondent should have been aware there was a substantial and unjustifiable risk that she was selling an alcoholic beverage to a minor.
7. Respondent has prior sale to minor violations.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61, 61.71, 106.03, and 106.13.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
4. Respondent sold an alcoholic beverage to a minor with criminal negligence as defined in TEX. PENAL CODE ANN §6.03(d) thereby violating TEX. ALCO. BEV. CODE ANN §§106.03.
5. Respondent's permit and license should be canceled. TEX. ALCO. BEV. CODE ANN. §§ 11.61, 61.71, and 106.13.

SIGNED December 13, 2005.

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Handwritten signature of Michelle Kallas in cursive script.

**MICHELLE KALLAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Yen Nguyen d/b/a J & J Beer & Wine

DOCKET NUMBER: 458-06-0039

AGENCY CASE NO: 502754

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RESPONDENT'S ATTORNEY
VIA FAX (469) 330-8354

as of December 13, 2005

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 13, 2005

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: Docket # 458-06-0039
TABAC VS. Yen Nguyen
D/B/A J & J Beer and Wine

Dear Ms. Fox:

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Kallas".

Michelle Kallas
Administrative Law Judge

MK/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, **Via Fax**,
R. Keith Walker, Respondent's Attorney, **Via Fax**