Appealed

DOCKET NO. 508511

IN RE PNM INC. D/B/A STAR TRAC #1 PERMIT NO. BQ-546823	§ § § § §	BEFORE THE TEXAS ALCOHOLIC
NUECES COUNTY, TEXAS *(SOAH DOCKET NO. 458-06-0386)*	§ §	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of June, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on November 2, 2005, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 2, 2006. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions to the Proposal for Decision were filed by the Respondent on February 14, 2006. On February 21, 2006, Petitioner filed a Reply to Respondent's Exceptions to the Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Respondent's Exceptions to the Proposal for Decision and Petitioner's Reply to Respondent's Exceptions to the Proposal for Decision, 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.

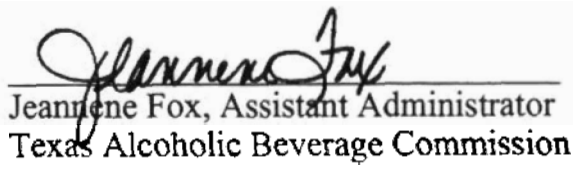
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Wine and Beer Retailer's Off-Premise Permit is hereby **CANCELLED.**

This Order will become final and enforceable on June 26, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 5th day of June, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/yt

Melissa M. Ricard
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

PNM INC.
STAR TRAC #1
RESPONDENT
P. O. Box 4627
Corpus Christi, Texas 78469
CERTIFIED MAIL NO. 7001 2510 0007 0096 9700
RETURN RECEIPT REQUESTED

Jim L. DeFoyd
ATTORNEY FOR RESPONDENT
103 Eastway
Galena Park, Texas 77547
VIA FACSIMILE: (713) 672-7420

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

DOCKET NO. 458-06-0387

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
V.	§	
	§	
PNM INC.	§	OF
D/B/A STAR TRAC #1	§	
PERMIT NO. BQ-546823	§	
NUECES COUNTY, TEXAS	§	
(TABC CASE NO. 508511)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against PNM Inc. d/b/a/ Star Trac #1 (Respondent), alleging that Respondent violated the Texas Alcoholic Beverage Code (the Code) by allowing the use or display of its beverage permit in the conduct of its business for the benefit of a person not authorized by law to have an interest in the permit. Staff further alleges that Respondent failed to provide records, documents and information requested by the TABC. Staff further alleges that the Respondent conducted its business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Staff seeks cancellation of Respondent's permit. The Administrative Law Judge (ALJ) recommends that Respondent's permit be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.05, 11.61, 44.01, 44.03, and 109.53 (the Code), and 16 TEX. ADMIN. CODE § 31.1 *et. seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to

conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There were no timely contested issues of notice or jurisdiction in this proceeding.

On November 2, 2005, a hearing convened before Administrative Law Judge (ALJ) Melissa M. Ricard, in the SOAH offices, located at 5155 Flynn Parkway, Suite 200, Corpus Christi, Nueces County, Texas.[1] TABC Staff was represented at the hearing by Judith Kennison, TABC Staff Attorney. Respondent appeared and was represented by Feroz Al Momin, president of Repondent. The record closed the same day.

II. DISCUSSION

A. Applicable Law

A wine and beer retailer's permit may be suspended or canceled if the permitee allows the use or display of the permit in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit or if the permittee conducted its business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO. BEV. CODE ANN. §§ 25.04(b), 61.71(a)(15), (17).

[1]SOAH Docket No. 458–06-0206 was convened immediately prior this matter. The case involved the same parties and witnesses. Some, but not all evidence offered and admitted into that matter were offered and admitted into this matter.

Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee is unlawful. TEX. ALCO. BEV. CODE ANN §§ 61.71(a)(1), 109.53.

The TABC may require the filing of reports and other data by persons engaged in the alcoholic beverage business which the commission finds necessary to accomplish the purposes of the Code. TEX. ALCO. BEV. CODE ANN § 5.32.

The TABC may cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Code or a rule of the commission; or if the permittee, or an officer of the permittee is not a citizen of the United States or has not been a citizen of Texas for a period of one year immediately preceding the filing of the application. TEX. ALCO. BEV. CODE ANN §§ 11.61(b) (2) and (19).

B. Staff's Evidence

Wine and Beer Retailer's Off-Premise permit BQ-546829 was issued by TABC to PNM Inc. d/b/a Star Trac #1, 5420 Leopard Street, Corpus Christi, Nueces County, Texas. The Respondent runs a convenience store at this location. Staff alleges that Respondent participates in a subterfuge in the operation of its business because it allows an illegal alien, who never established Texas residency, to have an interest in the permit, either as an officer of the Respondent or as a manager or employee. Staff further alleges that the Respondent failed to provide documents demonstrating an employee's authorization to work. Staff further alleges the Respondent conducts its business in manner against the general welfare, health, peace, morals, safety, and sense of decency of the people

1. Agent Brian Tullis

Agent Brian Tullis is assigned to the TABC's Licencing Standard Investigation division and the Federal Bureau of Investigation's joint terrorism taskforce for the TABC. Agent Tullis reviews

every TABC application that is submitted in an eight-county area to ensure the veracity of the statements made therein.

The permit at issue here was originally issued to Star Tex Oil and Gas Inc. (Star Tex) in 1997. The Respondent filed a supplemental change of corporation application on October 8, 2003, having sold the Star Tex corporate entity and wishing to have the permit changed over to PNM, Inc. This change of corporation application started Agent Tullis' investigation into the Respondent. The supplemental application indicated that Feroz Al Momin was the 51% owner and Piarali Jalbhai Prasla was the 49% owner of the Respondent. Mr. Prasla signed the document. Mr. Momin was listed as the president and Mr. Prasla as the vice president and secretary on the original change of corporation application. Sometime later, Mr. Momin submitted a new change of corporation application for the Respondent that showed Mr. Momin as the sole officer and owner of 51% of the Respondent, and Mr. Prasla only as a shareholder. PNM Inc. was granted the permit on January 14, 2004.

Through an ongoing TABC investigation and his own investigation, Agent Tullis discovered that Mr. Prasla is an illegal alien without authorization to work in the United States. Agent Tullis served Mr. Prasla with the arrest warrant and arrested him. Agent Tullis issued an administrative notice that charged the Respondent had employed an illegal alien. The Respondent agreed to pay a fine in lieu of a 15-day suspension of the permit in settlement of the charges on June 4, 2004.

Thereafter, Agent Tullis continued to investigate Respondent. On June 30, 2005, Agent Tullis made a request of the Respondent for corporate records, including minutes, stock certificates, bank signature cards, income tax records for 2003 and 2004 and the last four months of financial records. Agent Tullis asked for the documents to be provided in two weeks time.

The documents were provided. Stock certificates show Mr. Momin as the 51% owner and Mr. Prasla as the 49% owner of the Respondent. Mr. Prasla was authorized to sign on the corporation's business bank account, which was opened in 1997. Bank statements from April, May

and June of 2005 were provided. A review of the bank records shows several checks written to Mr. Prasla noted as payroll checks. Mr. Prasla also wrote checks for payroll to other employees, and he wrote checks for alcohol, gasoline, inventory, utilities, the alarm service and other miscellaneous items for the Respondent.

Agent Tullis found checks made out to Del Mar College and one check for repairs on a Suburban vehicle which Mr. Prasla drives. One check was for the amount of $38,000, made out to Mr. Prasla and signed by Mr. Prasla indicating that it was a loan refund. The records also showed that Mr. Prasla made a $5,000 cash withdraw but did not indicate why the funds were withdrawn.

The payroll checks to Mr. Prasla were for the same amount, $1308.33 issued bi-weekly. Mr. Prasla wrote at least one payroll check to himself. Other payroll checks to Mr. Prasla are signed by Mr. Shaukat K. Kadiwal, who Agent Tullis believes to be Mr. Prasla's brother-in-law. The Respondent reported wages for Mr. Prasla of $78,000 from January 2004 to February of 2005 to the State of Texas, with $13,500 reported wages paid in first two months of 2005.

After review of the records, Agent Tullis followed up with Mr. Momin. Mr. Momin stated he believed that Mr. Prasla was legally able to work in the United States since his immigration case was being appealed. Agent Tullis asked Mr. Momin to fax documentation showing his authorization to work. He never received the documentation.

On October 3, 2005, Agent Tullis observed Mr. Prasla unloading supplies (drinks, water, food, etc.) from the back of his vehicle and carrying them into the store.

Agent Tullis contacted Agent Terry Newman, Senior Patrol Agent for the U.S. Customs and Border Protection, Border Patrol, U.S. Department of Homeland Security, who confirmed that Mr. Prasla is an illegal alien without legal authorization to work in the United States.

Agent Tullis was doing general surveillance at the licensed premises on October 5, 2005, when he observed an outdoor advertising violation. He went into the establishment to issue a warning for the violation. Inside the store, he met J. Patel, a clerk. Upon inquiries by Agent Tullis, Mr. Patel stated that Mr. Prasla was the owner and manager of the store and had hired Mr. Patel. Mr. Patel did not know, and had not heard of, Feroz Al Momin.

Mr. Patel showed Agent Tullis the Respondent's check book. It contained blank checks presigned by Mr. Prasla. The register showed payroll checks and other checks signed by Mr. Prasla.

Agent Tullis issued an administrative warning for the observed outdoor advertising violation and left the store. Agent Tullis continued investigating the Respondent.

On October 5, 2005, Agent Tullis faxed the Respondent asking for Mr. Prasla to appear in the local TABC office and provide documentation of his authorization to work legally in the United States. No response was provided. A second written request was faxed on October 10, 2005, which also obtained no response.

On October 12, 2005, Agent Tullis issued a formal administrative notice stating that a case was being prepared against the Respondent for employing an illegal alien, subterfuge, and failing to provide requested documents. The notice required the respondent to meet with Agent Tullis on October 18, 2005. Mr. Momin did respond, seeking to move the meeting to Houston or to the first week in November. Since another hearing involving the Respondent and similar allegations already scheduled by the Staff for the first week in November, Agent Tullis elected to bring this matter before SOAH instead of rescheduling the meeting. Agent Tullis never received any documentation showing Mr. Prasla's immigration status from the Respondent.

Agent Tullis stated that in his opinion the corporate structure used by the Respondent is a subterfuge and he pointed specifically to the original supplemental application which showed Mr. Prasla as an officer and to the later one that showed him only as a shareholder. Agent Tullis stated

that 51/49% ownership splits are classic corporate models of subterfuge. Agent Tullis believes that the Respondent knew that the application would be denied if Mr. Prasla was listed as an officer, therefore the later supplemental application showing him only as a shareholder was submitted. However, the Mr. Prasla is clearly in control of the business, and acts as an officer. Agent Tullis believes the application was changed so that Mr. Prasla could continue his involvement with the Respondent, although it does not reflect the realities of the business.

Agent Tullis stated that TABC records show that Mr. Kadiwal and Mr. Prasla had previously been involved in submitting a false application to the TABC for a store in Kingsville. Criminal charges and an indictment were filed against Mr. Kadiwal for making a false statement and for subterfuge. Agent Tullis believes that Mr. Kadiwal is a part of the subterfuge scheme and his involvement with Mr. Prasla circumvents the Code because Mr. Kadiwal is authorized to work in the United States, while Mr. Prasla is not. Therefore, the Respondent can argue that Mr. Kadiwal runs and manages the store when, in fact, Mr. Prasla does.

2. Agent Terry Newman

Agent Terry Newman is a Senior Patrol Agent for the U.S. Customs and Border Protection, Border Patrol, U.S. Department of Homeland Security. His job duties include working with other agencies to establish the immigration status of any individuals sought by local, state and federal law enforcement.

Agent Newman was first contacted by the TABC to run an immigration check on Mr. Prasla in March 2004. Agent Newman determined that Mr. Prasla was an illegal alien without authorization. In his application for citizenship, Mr. Prasla admitted he entered the United States illegally. Mr. Prasla obtained two authorizations to work: one from September 1, 2001, to September 2, 2002, and the other from December 2, 2002, to December 3, 2003. Agent Newman testified that authorization to work does not establish legal residency in any state. Since December 4, 2003, Mr. Prasla has been in the United States illegally without proper authorization to work.

Agent Newman testified that an employer employing Mr. Prasla is in violation of federal laws regarding employment of illegal aliens.

Mr. Prasla has made many applications for citizenship, each of which has been denied. Mr. Prasla continues to make applications to delay deportation proceedings. Mr. Prasla submitted his most recent application in October of 2005 which Agent Newman indicated would be denied since Mr. Prasla does not qualify for the program he has applied for.

3. J. Patel

Mr. Patel was called as a witness by the Staff. Mr. Patel has worked for the Respondent for six months. Mr. Patel admitted that Mr. Prasla was the "boss" of the Respondent and had hired him. However, Mr. Patel indicated that Mr. Kadiwal was the manager of the store, who signs his check, schedules his hours and writes checks to vendors for the store. Mr. Patel stated that Mr. Prasla does not come to the store everyday. If he has any problem at the store, Mr. Patel calls Mr. Kadiwal.

Mr. Patel remembers talking to Agent Tullis, and telling him that Mr. Prasla was his boss. Mr. Patel indicated that Mr. Prasla used to be in charge of the store, but that had changed several months ago since Mr. Prasla was arrested for working there.

Mr. Patel believes that Mr. Kadiwal and Mr. Patel are related, but he does not know how.

C. Petitioner's Evidence

Mr. Momin stated he believes that the TABC is after Mr. Prasla and he does not understand why they are harassing him. Mr. Momin stated that he is the 51% owner of the business. Mr. Prasla is a shareholder, and he lives in Corpus Christi. Mr. Momin believes that Mr. Prasla was legal to "run the show" at some point and he continues to do so. Mr. Momin believes that Mr. Prasla's

immigration status is not the Respondent's problem and wonders why Mr. Prasla is allowed to live in the United States if he is not here legally and not appealing his status. He believes that the permit should not be cancelled and that he has the right to sell stock in his company to Mr. Prasla.

In 2002, Mr. Prasla produced for Mr. Momin an employment card which documented his ability to work legally. Mr. Momin has not seen any other documents. Mr. Momin asked Mr. Prasla for his immigration documentation when Agent Tullis asked for the documents. Mr. Prasla told Mr. Momin that Mr. Prasla's attorney was working on his status and that Mr. Prasla and his attorney would meet with Agent Tullis.

Agent Tullis issued an administrative notice April 30, 2004,to the Respondent which charged that the permitee had illegally employed an illegal alien. The Respondent agreed to a 15-day suspension of the permit in settlement of the charges on June 4, 2004. After this, Mr. Momin asked Mr. Prasla not to work at the store. Mr. Momin stated that Mr. Prasla does not work at the store, and he is not an employee, he is only a shareholder that looks after the place. Mr. Prasla is not a cashier, but he does pay bills and sign checks for the Respondent. Mr. Prasla was involved in the day-to-day business of the store previously, but since the administrative action, he is not involved in the day-to-day operation of the store. Mr. Momin does not know who buys inventory and makes deliveries to the store.

Mr. Momin stated that the check for $38,000 was a shareholder draw. Mr. Momin has always paid payroll wages to Mr. Prasla and continues to do so. Mr. Prasla earns a flat salary of $1,500 every every 15 days, regardless of what work is done.

In the morning, Mr. Kadiwal is the manager of the store, opening the store, making deposits and supervising the employees.

Mr. Momin believes that he controls the corporation despite the fact that he is in Houston. He believes that control of the company is demonstrated by who controls the cash of the operation.

III. ANALYSIS

The Staff contends that, although Mr. Prasla is the 49% record owner, his actions constitute control over the licensed premises of more than that percentage of ownership. The permit which relies on Mr. Momin's citizenship is really a subterfuge because Mr. Prasla, who runs and controls the Respondent, can not obtain a permit on his own.

Further, Staff argues that Mr. Prasla's actions constitute that of an officer of the Respondent since he signs checks and oversees the operation of the business. The Code requires all officers of a corporate permittee to be a United States citizen and citizen of the state of Texas for one year prior to the application for the permit. TEX. ALCO. BEV. CODE ANN § 11.61(b) (19).

The Code provides that the legislature intended to prevent subterfuge ownership of, or unlawful use of, a permit or the premises covered by such permit. Moreover, all provisions of the Code shall be liberally construed to carry out this intent. The Code further provides that every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to unauthorized persons is unlawful. TEX. ALCO. BEV. CODE ANN. § 109.53.

From the evidence presented, Staff has met its burden of establishing that Respondent's permit is being used improperly. Respondent argues that Mr. Prasla is only a shareholder, and

nothing more. However, the Staff established that Mr. Prasla is acting as an officer of the Respondent when he signs checks, withdraws cash and withdraws his own shareholder draw ($38,000). The Staff established that Mr. Prasla is also an employee of the Respondent who receives a salary and who performs certain duties for the business. The Staff established that Mr. Prasla maintains control over the Respondent by hiring employees, signing payroll checks, paying bills and ordering and delivering supplies and inventory. The Staff further established that Mr. Momin, the record sole officer of the Respondent, does not maintain control over the business of the Respondent.

The Respondent maintains that Mr. Prasla's role changed after it was charged with employing Mr. Prasla illegally in 2004. However, wages for Mr. Prasla were reported to the state of Texas in 2005, and payroll checks were issued in 2005 as well. Further, Agent Tullis observed Mr. Prasla working at the business in 2005. Mr. Patel's testimony in this respect is not credible. Since he had only been working for the Respondent for six months in 2005, he should have never experienced Mr. Prasla as a manager or observed Mr. Prasla performing duties for the Respondent . The Staff established that Mr. Prasla's role did not change after his arrest in 2004.

Therefore, the Staff established that Mr. Prasla, an illegal alien who never established legal residency in Texas, acts as an officer of the Respondent, in violation of TEX. ALCO. BEV. CODE ANN § 11.61(b) (19). The Staff further established that the Mr. Prasla is an employee of the Respondent in violation of TEX. ALCO. BEV. CODE ANN § 61.71(a)(17). The Staff also established that Mr. Prasla controls the business and the Respondent's corporate structure is a subterfuge in violation of TEX. ALCO. BEV. CODE ANN. § 109.53.

The Staff further argues that the Respondent did not provide documentation evidencing Mr. Prasla's immigration status when requested. Staff made one informal request, and three formal requests for such documentation. The documentation was not provided to the Staff, nor at the hearing, therefore, the Staff established that the Respondent violated TEX. ALCO. BEV. CODE ANN § 5.32.

Therefore, the ALJ recommends that Respondent's permit be canceled.

The Staff also argued that the Respondent's conduct alleged above was contrary to the general welfare, health, peace, morals, safety, and sense of decency of the people in its notice of hearing. However, no additional evidence or argument was offered at the hearing to support this allegation, therefore the Staff did not establish this contention.

IV. FINDINGS OF FACT

1. PNM Inc. d/b/a Star Trac #1 (Respondent/PNM Inc.), holds a Wine and Beer Retailer's Off-Premise permit BQ-546829 issued by Texas Alcoholic Beverage Commission (TABC) for the premises located at 5420 Leopard Street, Corpus Christi, Nueces County, Texas (Licenced Premises). The Respondent runs a convenience store at the Licensed Premises.

2. The Respondent's business operations are carried out by Piarali Jalbhai Prasla, an illegal alien.

3. Mr. Prasla has been actively involved in operating the Respondent's business over a period of several years.

4. Mr. Prasla was an officer of the former corporate entity which held the permit for the Licensed Premises, who exercised control over the Licensed Premises and the business of the Respondent.

5. Mr. Prasla is the record 49% shareholder of the Respondent, and a resident of Corpus Christi.

6. Mr. Feroz Al Momin is the record shareholder of 51% of the shares of the Respondent and its sole corporate officer. Mr. Momin lives Stafford, Texas and exercises no day-to-day control or management over the Respondent.

7. Mr. Prasla currently acts as an officer of PNM Inc. Mr. Prasla signs corporate checks, withdrawals cash and withdraws his own shareholder draws from the corporate account.

8. Mr. Prasla currently manages and controls the Licensed Premises and the business of the Respondent. Mr. Prasla exercises control over the employees of the Respondent employees, signs payroll checks, pays bills, and orders and delivers supplies and inventory.

9. Mr. Prasla is also an employee of the Respondent who receives a salary and who performs certain duties for the business of the Respondent.

10. Mr. Prasla benefits financially from the business of the Respondent.

11. The corporate structure of the Respondent is a subterfuge which allows an illegal alien, who never established Texas residency, to have an interest in the permit, either as an officer of the Respondent or as a manager or employee of the Licensed Premises.

12. The Respondent failed to provide requested documents to the TABC Staff after being properly requested to do so.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.05, 11.61, 44.01, 44.03, and 109.53.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

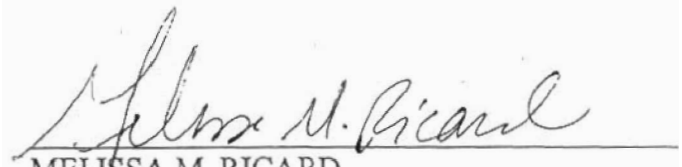
3. Respondent received adequate notice of the proceedings and hearing.

4. Based on the foregoing Findings of Fact, Respondent allowed the use or display of its Respondent's Wine and Beer Retailer's Off-Premise permit BQ-546829 in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit in violation of TEX. ALCO. BEV. CODE ANN. §§ 25.04(b), 61.71(a)(15).

5. Based on the foregoing Findings of Fact, Respondent failed to provide requested documents in violation of TEX. ALCO. BEV. CODE ANN § 5.32.

6. Based on the foregoing Findings of Fact and Conclusions of Law Nos. 11 and 12, Respondent's Wine and Beer Retailer's Off-Premise permit BQ-546829 should be canceled for cause.

SIGNED on the 2nd day of January, 2006.



MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS