

DOCKET NO. 608833

IN RE SHAIKH AFSAR MUSTAFA	§	BEFORE THE
D/B/A QUIK STOP FOOD STORE	§	
ORIGINAL APPLICATION BQ	§	
	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-6099)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of November, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cyrena Benson. The hearing convened on June 29, 2004, and adjourned on the same day. On August 18, 2004, the file was transferred to Administrative Law Judge Cindy T. Greenleaf, who made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 1, 2004. 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. As of this date no exceptions have been filed.

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.

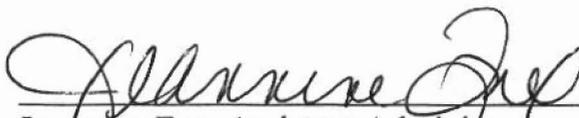
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application of Shaikh Afsar Mustafa, d/b/a Quik Stop Food Store, for a Wine and Beer Retailer's Permit be **DENIED**.

This Order will become final and enforceable on November 29, 2004, 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 on this the 8th day of November, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Shaikh Afsr Mustafa
d/b/a Quik Stop Food Store
RESPONDENT
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CERTIFIED MAIL NO. 7000 1530 0003 1902 7073
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Licensing Division - Brian Guenther

SOAH DOCKET NO. 458-04-6099

APPLICATION OF

SHAIKH AFSAR MUSTAFA D/B/A
 QUIK STOP FOOD STORE, Applicant
 (TABC Case No. 608833)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Shaikh Afsar Mustafa d/b/a Quik Stop Food Store (Applicant), seeks a Wine and Beer Retailer's Off-Premise Permit for premises located at 1311 N. Hamilton, San Antonio, Bexar County, Texas, from the Texas Alcoholic Beverage Commission (TABC or the Commission). The Commission's staff (Staff) asserted that the application should be denied due to the fact that the Applicant is neither a citizen of Texas nor a legal resident of Texas, as required by the Texas Alcoholic Beverage Code (the Code). This proposal for decision recommends the permit be denied.

I. PROCEDURAL HISTORY

On or about February 2, 2004, Applicant filed an original application with the Commission for a Wine and Beer Retailer's Off-Premise Permit. The Commission alleges that the Applicant is ineligible to hold a permit because he is neither a citizen of Texas nor a legal resident of Texas based on information provided to the Commission by the U. S. Department of Homeland Security.

Staff issued a notice of hearing on June 8, 2004, directed to the Applicant. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On June 29, 2004, a hearing convened at the San Antonio field office of the Texas State Office of Administrative Hearings (SOAH), 10300 Heritage, Suite 250, San Antonio, Bexar County, Texas, before Cyrena Benson, a SOAH Administrative Law Judge (ALJ). Staff appeared and was

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represented by Dewey A. Brackin, Commission Staff Attorney. Applicant appeared and was represented by Steven P. Redgate, Sr., Attorney. There were no challenges to the notice of hearing, jurisdiction, or venue. Following the presentation of evidence, the record closed on June 29, 2004. On August 18, 2004, the file was transferred to ALJ Cindy T. Greenleaf, who reviewed the record in its entirety and issues this Proposal for Decision.

II. JURISDICTION

The Commission has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01, 11.46, and 61.42 of the Code. TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* SOAH has authority to conduct a hearing in this matter and make recommendations to the Commission, including the issuance of a proposal for decision containing proposed findings of fact and proposed conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003 and § 5.43 of the Code.

III. DISCUSSION

A. Applicable Law

TEX. ALCO. BEV. CODE § 11.46(a)(11) provides as follows:

The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

(11) the applicant is not a United States citizen or has not been a citizen of Texas for a period of one year immediately preceding the filing of his application, unless he was issued a permit or renewal permit on or before September 1, 1948, and has at some time been a United States citizen. . . .

Additionally, §§ 61.42(a)(5) and 61.47 of the Code provide that mandatory grounds to refuse an application for a license exists for the same circumstances as listed in the above cited § 11.46(a)(11). The Code defines "citizen of Texas" and "citizen of this state" in § 1.04(20) as meaning

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“a person who is a citizen of both the United States and Texas.”

The Code does allow individuals who are not United States citizens but who have legally resided in Texas to be treated as United States citizens and as citizens of Texas. TEX. ALCO. BEV. CODE § 1.07(a). Further, if a residency requirement exists in any provision of the Code, § 1.07(b) provides that “an alien legally residing in the state satisfies the requirement if he has legally resided in the state for the prescribed period of time.”

B. Evidence

It is undisputed that Applicant is not a naturalized citizen of the United States and that his application for adjustment to permanent resident status in the United States is awaiting adjudication, thus, pending. Applicant was born in India, is married to a United States citizen, and has been issued employment authorization to work within the United States. It is also undisputed that Applicant is a resident of Texas.

1. Petitioner's Evidence

On January 14, 2003, an application for a Wine and Beer Retailer's Off-Premises permit was filed with TABC by Applicant (TABC Exhibit One). On his application, Applicant responded that he is not a United States citizen, listing his alien file registration number. Applicant also answered that he has been a legal resident of Texas for a period of one year immediately preceding the filing of his application. Based on this answer, TABC Investigator Kenneth E. Rutledge requested assistance from the U.S. Border Patrol, Department of Homeland Security, to determine applicant's immigration status.

Agent Terry L. Newman, U.S. Department of Homeland Security (DHS), Bureau of Customs and Border Protection, United States Border Patrol, completed the investigation and provided a “Memorandum of Investigation” to TABC (TABC Exhibit Two). Agent Newman retrieved information using the Immigration and Naturalization Services (INS) computerized database. Agent

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Newman's memorandum states that Applicant entered the United States as a "Visitor," has applied for adjustment of status, had been issued a "Temporary Employment Authorization," and "is not a legal permanent resident of the United States." The memorandum also states that Applicant departed the United States without authorization while his application for adjustment of status was pending. When Applicant returned to the United States prior to March 13, 2002, he was "Paroled-in" to the country due to his pending application (in the United States by permission). Agent Newman concluded in his memorandum that Applicant is and has been in the United States illegally, has applied for legal status, is in the United States by permission ("paroled-in," which is not a legal status), and that Applicant is subject to arrest and deportation in which he would be processed as an illegal alien.

Agent Newman appeared at the hearing and testified for the Petitioner. In addition to the above described information, Agent Newman's testimony elaborated and clarified much of the information contained in the Memorandum of Investigation. Specifically, Agent Newman explained that United States' policy allows individuals to be "paroled-in" to the country under certain conditions, allowing those individuals to be physically present in the United States without having legal status to be here. Agent Newman stated that "parole" is given for humanitarian reasons. In Applicant's case, Agent Newman stated that he was "paroled-in" because of his marriage to a United States citizen and because of his pending application for adjustment of status. Thus, Applicant was given permission to be physically present in this country pending the adjudication of his adjustment status application only because he is married to a United States citizen. However, Agent Newman stated that being "paroled-in" is not a legal status and does not make Applicant a legal resident of the United States.

Additionally, Agent Newman believed that Applicant's "parole" expired in March 2001. Agent Newman explained that when one's parole status expires, that person becomes illegal. Agent Newman also stated that Applicant is subject to deportation proceedings, but unless he commits a violation of law, he will not be placed in deportation proceedings due to his pending application. Also, Agent Newman explained that employment authorization has no effect on one's "legal" status and does not make a person a legal resident. Agent Newman stated that Applicant is in the United States illegally; therefore, anywhere within the United States, he is not a legal resident. Thus, Agent Newman concluded, Applicant is not a legal resident of the state of Texas or any state within the United States.

Based on information provided by Agent Newman, TABC Investigator Rutledge concluded that Applicant made a "willful material misstatement on his application and that his presence in the U[nited] S[tates] does not constitute legal residency." Thus, Investigator Rutledge recommended that the application be denied.

Staff also presented the filed application with certificates of approval from the City Secretary of the City of San Antonio, the Bexar County Clerk, and the Bexar County Judge

2. Applicant's Evidence

Applicant testified that he applied for advanced permission for travel and that he obtained advanced parole before he traveled outside of the United States in June 2003. Applicant stated that San Antonio has been his permanent residence for four years, that he has no residence in India, that he has no intention of returning to India, and that he plans to remain in the United States permanently. Applicant said that he holds a current employment authorization from DHS, which expires January 2005. Applicant testified that his application to become a permanent resident alien has not been granted.

C. Analysis, Conclusion, and Recommendation

It is undisputed that Applicant is neither a citizen of the United States nor a citizen of Texas, that Applicant has a pending application for adjustment of status to permanent resident alien of the United States, and that Applicant is a resident of Texas. The ALJ must determine whether the Applicant is a legal resident of Texas which could afford him the opportunity to obtain a Wine and Beer Retailer's Off-Premises permit through TABC.

When the Applicant responded that he had been a legal resident of Texas for one year prior to the filing of the application, the ALJ believes that he did not intend to make a willful material misstatement. Because he has been allowed to remain in the United States and lives in Texas, it appears the Applicant understands he resides in this state legally. Thus, his misunderstanding caused

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him to answer in the affirmative

Applicant argues that he is a legal resident of Texas because he has been given permission to remain in the United States due to his pending application for adjustment of status. Thus, Applicant argues, he is legally present in the United States. However, the evidence is clear that he has not obtained "legal" status. Applicant's employment authorization does not make him a legal resident. Applicant's parole status does not make him a legal resident. Also, Applicant is subject to deportation proceedings as an illegal alien.

Additionally, section 1.07 of the Code states that a person who is not a United States citizen may be treated as such in applying for a license or permit through TABC if that person has "legally resided" in the state for a specified period of time. If the only qualification was that a person be a resident of the state, the statute would state such without requiring "legal" residency.

Even though he has been allowed to remain due to humanitarian policies of the United States government, Applicant is in the United States illegally. Thus, Applicant is not a legal resident of the United States or of Texas. Therefore, Applicant is not eligible to obtain a Wine and Beer Retailer's Off-Premises permit through TABC.

Based on the evidence presented, the ALJ concludes that the Applicant is ineligible to hold a permit because he is not a United States citizen, he is not a citizen of Texas, and he is not a legal resident of Texas. Thus, the permit application for Quik Stop Food Store, 1311 N. Hamilton, San Antonio, Bexar County, Texas does not meet the Commission's requirements. Accordingly, the application should be denied.

IV. PROPOSED FINDINGS OF FACT

1. On or about February 2, 2004, Shaikh Afsar Mustafa d/b/a Quik Stop Food Store (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (the Commission) for a Wine and Beer Retailers Off-Premise Permit for the premises located at 1311 N. Hamilton, San Antonio, Bexar County, Texas.
2. The Commission asserted that the application should be denied because Applicant is neither

- a citizen of Texas nor a legal resident of Texas.
3. On June 8, 2004, Commission's Staff (Staff) issued a notice of hearing to Applicant.
 4. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
 5. A hearing convened before Cyrena Benson, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), on June 29, 2004, at the San Antonio field office of SOAH, 10300 Heritage, Suite 250, San Antonio, Bexar County, Texas. Staff appeared and was represented by Dewey A. Brackin, Commission Staff Attorney. Applicant appeared and was represented by Steven P. Redgate, Sr., Attorney. The record closed on June 29, 2004. On August 18, 2004, the file was transferred to ALJ Cindy T. Greenleaf, who reviewed the record in its entirety and issues this Proposal for Decision.
 6. Applicant is neither a United States citizen nor a citizen of the state of Texas.
 7. Applicant's application for adjustment of status to become a permanent resident alien of the United States is pending.
 8. Applicant is not a legal resident of Texas.
 9. Applicant did not make a willful material misstatement on his application when he answered in the affirmative that he has been a legal resident of Texas for one year prior to the filing of his application for a permit. Applicant's misstatement was made due to his misunderstanding of his status.

V. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01, 11.46, and 61.42 and TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. 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. Chapter 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Applicant received proper notice of the hearing, pursuant to TEX. GOV'T CODE ANN. Chapter 2001.
4. Based on the foregoing findings, a preponderance of the evidence indicates that Applicant is ineligible to hold a permit, pursuant to TEX. ALCO. BEV. CODE ANN. §§ 1.07, 6.03, 11.46(a)(11), 61.42(a)(5), and 61.47.

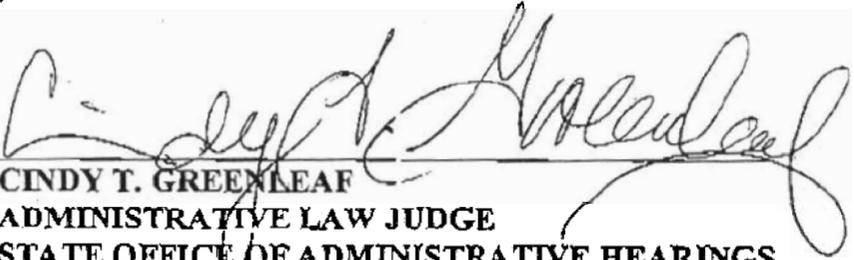
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5. The application of Shaikh Afsar Mustafa d/b/a Quik Stop Food Store for a Wine and Beer Retailer's Off-Premises Permit should be denied.

SIGNED October 1, 2004.



CINDY T. GREENLEAF
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS