

Appealed

DOCKET NO. 609871

IN RE PNM INC.
D/B/A STAR TRAC #1
PERMIT NO. BQ-546823

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

NUECES COUNTY, TEXAS
(SOAH DOCKET NO. 458-06-0206)

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) 812-1001

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

PNM INC.
STAR TRAC #1
P. O. Box 4627
Corpus Christi, Texas 78469

2. Article Number
(Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X  Agent
 Addressee

B. Received by (Printed Name)  C. Date of Delivery
6/13/06

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

7001 2510 0007 0096 9700

DOCKET NO. 458-06-0206

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

v.

PNM INC.
D/B/A STAR TRAC #1
PERMIT NO. BQ-546823
NUECES COUNTY, TEXAS
(TABC CASE NO. 609871)

OF

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 or PNM Inc.), alleging that Respondent violated the Texas Alcoholic Beverage Code (the Code) by allowing the use or display of its permit in the conduct of its business for the benefit of a person not authorized by law to have an interest in the permit. TABC 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. (the Code) ch. 5 and §§ 6.01, 11.05, 11.61, 44.01, 44.03, and 109.53, 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 PNM Inc. 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 permittee 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. TEX. ALCO. BEV. CODE ANN. §§ 25.04(b), 61.71(a)(15).

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 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).

¹SOAH Docket No. 458-06-0387 was convened immediately after 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.

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. TABC Staff alleges that Respondent participates in a subterfuge in its business operation because it allows a person who is an illegal alien, and who has never established Texas residency, to have an interest in the permit, either as an officer of the Respondent or as a manager of the licensed premises.

1. Agent Bruce Boardman

Agent Bruce Boardman testified on behalf of TABC Staff. He is an Investigator Six for the TABC. Agent Boardman is trained to conduct subterfuge and money tracking investigations for the TABC. Agent Boardman first became involved with the Respondent when another TABC agent requested documents concerning a different permittee, Praka LLC d/b/a KP Foodmart, in Kingsville, Texas (Kingsville investigation). During the course of the Kingsville investigation, starting in February of 2004, Agent Boardman determined that Piarali Jalbhai Prasla, who had applied for the beverage permit for the KP Foodmart location was in the United States illegally.²

As part of the Kingsville investigation, Agent Boardman discovered that Mr. Prasla was involved with three additional locations, each with beverage permits issued by the TABC, under the name Star Tex Oil and Gasoline (Star Tex). One permit location was at the Respondent's location, 5420 Leopard Street, Corpus Christi (Licensed Premises). Agent Boardman believes that Star Tex listed Mr. Prasla as an officer of the corporation at the time the original permit application was filed.

²The Kingsville investigation concerned the total amount of investment and source of funds for the Praka LLC. While the Kingsville investigation was on going, Mr. Prasla withdrew his application for a beverage permit for that location. Thirty days later, a different application for the same location was filed which showed Mr. Prasla, a resident of Corpus Christi, only as a director of the corporation and a 30% shareholder of KP Foodmart.

The application listed Feroz Ali Momin as a 51% shareholder and Mr. Prasla a 49% shareholder of Star Tex. Agent Boardman believed the corporation later changed its name to PNM Inc., which also listed Mr. Prasla as an officer of the corporation. The U.S. Border Patrol confirmed Mr. Prasla's status as an illegal alien, subject to deportation, therefore Mr. Prasla was not eligible to hold a beverage permit through either corporate entity.

The corporate records show that Star Tex is a Texas corporation that was formed on October 17, 1997. The address of the corporation is 5416 Leopard Street, Corpus Christi. The initial incorporators were Mr. Prasla and Mr. Momin. Mr. Momin resides in Stafford, Texas. An assumed name certificate for the name Star Trac #1 was filed by the corporation. The assumed name certificate is signed by Mr. Prasla as an officer, manager, representative or attorney in fact and is dated May 13, 2002. The 2002 Texas Franchise Tax report shows Mr. Prasla as the Vice President and Secretary of the corporation. An inquiry to the Texas Secretary of State made on October 31, 2005, shows that three other individuals, not Mr. Momin or Mr. Prasla, are the officers of the corporation as of February 25, 2005.

PNM, Inc.'s corporate records show that the entity was formed on December 23, 2002 as a Texas corporation. Mr. Momin and Mr. Prasla were the initial directors and Mr. Prasla is the registered agent at 5412 Leopard Street. Mr. Momin is listed as the president of the corporation. 490 shares were issued to Mr. Prasla and 510 shares were issued to Mr. Momin on February 3, 2004.

Mr. Boardman testified in the Respondent's original application to change the beverage permit from Star Tex to PNM Inc., Mr. Prasla was listed as a vice president and secretary. Later, on October 3, 2003, PNM Inc. filed a supplemental application to change the corporation in which Mr. Momin was listed as the sole officer of the corporation. Subsequently, TABC reissued the permit to Respondent.

2. Agent Terry Newman

Agent Terry Newman is a Senior Patrol Agent for the U.S. Customs and Boarder Protection, Border Patrol, U.S. Department of Homeland Security. His job duties include working with other agencies to establish immigration status of any individuals sought by local, state and federal law enforcement. TABC contacted Agent Newman to run an immigration check on Mr. Prasla in March 2004. Mr. Newman determined that Mr. Prasla is an illegal alien without proper authorization to work in the United States. Mr. Prasla admitted he entered the United States illegally on his application for citizenship.

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. Since December 4, 2003, Mr. Prasla has been in the United States illegally without proper authorization to work. An employer employing Mr. Prasla is in violation of the law regarding employment of illegal aliens. Mr. Prasla has made many applications for citizenship, each of which has been denied

Agent Newman testified that authorization to work does not establish legal residency in any State.

3. Agent Brian Tullis

Agent Brian Tullis is assigned to the Licencing Standard Investigation division and the Federal Bureau of Investigation's joint terrorism taskforce for the TABC. Agent Tullis followed up on Agent Boardman's investigation.

On April 30, 2004, Agent Tullis arrived at the Licensed Premises to serve an arrest warrant on Mr. Prasla. He stated that he saw Mr. Prasla with a wrench in his hand while he was fixing the gas pumps in front of the Licensed Premises. Agent Tullis first went inside the store. Stephanie

Bernal, a cashier, indicated to Agent Tullis that her supervisor was Mr. Prasla. He had hired her. Ms. Bernal believed that Mr. Prasla was the owner of the licensed premises. An emergency contact phone number that was posted in the Licensed Premises specified that Mr. Prasla should be contacted in the event of an emergency and provided his phone number.

Agent Tullis served Mr. Prasla with the arrest warrant and arrested him. He also issued an administrative notice for the Licensed Premises, which charged that the Respondent had employed an illegal alien. On June 4, 2004, the Respondent agreed to a 15-day suspension of the permit in settlement of the charges.

C. Petitioner's Evidence

Mr. Momin stated that Star Tex was formed in 1997 and that Mr. Prasla was a 49% owner of that corporation. Mr. Momin owned 51%. Mr. Momin and Mr. Prasla sold part of the interest in that company, and then formed PNM Inc. At the time, Mr. Prasla was authorized to work in the United States.

Mr. Momin lives in Houston and visits the Licensed Premises every six months. He admits that Mr. Prasla "runs the show" at the Licensed Premises. Mr. Prasla pays the bills for the Licensed Premises and hires the employees.

Mr. Momin maintained that he is and always was the sole officer of PNM, Inc. Mr. Prasla is only a shareholder. Mr. Momin believes that Mr. Prasla is currently appealing his immigration status. Mr. Momin contends that Mr. Prasla is not an employee of the corporation but admits that he does get paid for his efforts related to the management of the licensed premises.

III. ANALYSIS

The Staff contends that, despite the fact that on record Mr. Prasla is only a shareholder in PNM Inc., he maintains sufficient control over the Licensed Premises and over the corporation that 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." The Code § 61.71(a)(15). In other words, 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 since Mr. Prasla, who runs and controls the Respondent, could not obtain a permit on his own.

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; and that 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 authorized persons shall be unlawful. The Code § 109.53.

From the evidence presented, TABC Staff has met its burden of establishing that Respondent's permits are being used improperly. Management of a business may be a decentralized operation. In this case, however, all management and control activities are centralized in one individual, Mr. Prasla. Mr. Momin admits that Mr. Prasla pays the bills and "runs the show." Mr. Momin only visits the Licensed Premises twice a year. Mr. Prasla hires employees, makes repairs, is the emergency contact and holds himself out to be the owner of the premises to the staff.

Further, Mr. Prasla's history shows that he exercised control over the business as an officer of Star Tex. He applied for the Assumed Name Certificate, and was listed as an officer on the Franchise Tax report.

Currently, Mr. Prasla is the Respondent's registered agent. Also, Mr. Prasla's involvement with the permittee in Kingsville shows a tendency to specifically tailor a corporate structure to meet the requirements of a TABC application rather than reflect the realities of the business structure. The Respondent provided no evidence that Mr. Prasla's involvement with PNM Inc. changed from his actions as an officer of the corporation or after he was ineligible for employment. Therefore, it is likely that Mr. Prasla's activities never changed over time, demonstrating a subterfuge to change the corporate structure on paper only to meet the requirements of the permit.

Being ineligible for legal employment, Mr. Momin contends that Mr. Prasla is not currently an employee, but admits that Mr. Prasla benefits from the operation of the store. Mr. Momin stated that Mr. Prasla "gets paid." Mr. Prasla clearly benefits from the permit.

If Mr. Momin argues that Mr. Prasla's actions are those of an employee, he is in violation of employment laws. If he argues that Mr. Prasla is an officer of the corporation, and be in risk of violating the Code. Mr. Momin contends that Mr. Prasla is only a shareholder. Yet Mr. Prasla operates the corporation and controls the business. Therefore, a non-officer and shareholder of the corporation is operating day-to-day management and control over the business of the corporation. Mr. Momin contends that Mr. Prasla is operating only in his capacity as a shareholder. In the corporate law context, such actions by a shareholder could lead to a piecing of the corporate veil because such actions are a subterfuge of the corporate laws. Therefore, it is not a stretch to find a corporate subterfuge under the Code when the same actions are found here.

The Staff alleged that on or about December 3, 2003, the Respondent violated the Code by "allowing the use or display of the permit in the conduct of its business for the benefit of a person

not authorized by law to have an interest in the permit.” While there is some evidence that this may have occurred prior to that date, the Staff showed by a preponderance of the evidence that Mr. Prasla was ineligible for employment after that date, Mr. Prasla continued management and control over the Respondent after that time, and corporate subterfuge occurred which violates the Code.

IV. FINDINGS OF FACT

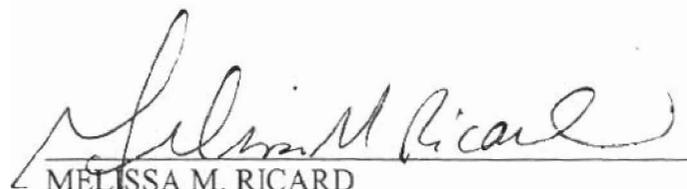
1. PNM Inc. d/b/a Star Trac #1 (Respondent, PNM Inc.), holds a Wine and Beer Retailer’s Off-Premise permit BQ-546829 issued by Texas Alcoholic Beverage Commission (TABC) for the premises located at 5420 Leopard Street, Corpus Christi, Nueces County, Texas (Licensed Premises).
2. Respondent’s business operations are carried out by Piarali Jalbhai Prasla, an illegal alien.
3. Mr. Prasla has been actively involved in operating PNM Inc. 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. He 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, Texas.
6. 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 and holds himself out to be the owner of the business. Mr. Prasla pays bills, makes repairs and is the emergency contact.
7. Mr. Feroz Al Momin is the record shareholder of 51% of the shares of PNM Inc. and its sole officer. Mr. Momin lives in Stafford, Texas and exercises no day-to-day control or management over PNM Inc.
8. Mr. Momin visits the Licensed Premises twice a year.
9. Mr. Prasla benefits financially from the business of the Respondent.
10. 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 of the Licensed Premises.

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 its 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 and Conclusion of Law No. 10, 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

MESSAGE CONFIRMATION

06/05/2006 02:42
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NO. 550 001



Alan Steen
Administrator

John T. Steen, Jr
Chairman-San Antonio
Gail Madden
Member-Dallas
Jose Cuevas, Jr.
Member-Midland

FACSIMILE COVER SHEET

Date: June 5, 2006

To:	Fax No	No. Pages (Including Cover Page)
Administrative Law Judge SOAH - Corpus Christi	(361) 884-5427	13
Jim L. DeFoyd Attorney for Respondent	(713) 672-7420	13
From:		
Judith L. Kennison Attorney for Petitioner	(512) 206-3498	

MESSAGE CONFIRMATION

06/05/2006 02:39
ID=TABC LEGAL

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06/05/2006 02:31 TABC LEGAL → 913618845427

NO. 549 001



Alan Steen
Administrator

John T. Steen, Jr.
Chairman-San Antonio
Gail Madden
Member-Dallas
Jose Cuevas, Jr.
Member-Midland

FACSIMILE COVER SHEET

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John T. Steen, Jr
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Member-Dallas
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Member-Midland

Alan Steen
Administrator

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<i>Jim L. DeFoyd Attorney for Respondent</i>	<i>(713) 672-7420</i>	<i>13</i>
From:		
<i>Judith L. Kennison Attorney for Petitioner</i>	<i>(512) 206-3498</i>	

SUBJECT: ORDER

*PNM, Inc., d/b/a Star Trac #1
 SOAH Docket No. 458-06-0206; TABC Docket No. 609871*

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