

DOCKET NO. 612272

IN RE MOHAMMAD FARRUKH	§	BEFORE THE
NAEEM SIDDIQUI	§	
D/B/A SID'S FOOD MART	§	
PERMIT/LICENSE NOS. BQ511009	§	
	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-4925)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 6th day of October, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Wendy K. L. Harvel. The hearing convened on June 28, 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 August 26, 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 have been filed in this cause.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, the changes to the Findings of Fact and Conclusions of Law recommended by the Administrative Law Judge contained in a letter dated September 26, 2005 (**attached hereto as Exhibit "B"**), 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, as modified in accordance with the changes recommended by the Administrative Law Judge in a letter dated September 26, 2005, 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 /or licenses are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on October 27, 2005, 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 6th day of October, 2005, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

CGG/bc

The Honorable Wendy K. L. Harvel
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

William Dufour
ATTORNEY FOR RESPONDENT
VIA FAX (512) 478-2438

Mohammad Farrukh Naeem Siddiqui
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Licensing Division

Austin District Office

DOCKET NO. 458-05-4925

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**MOHAMMAD FARRUKH NAEEM
SIDDIQUI D/B/A SID'S FOOD MART
PERMIT/LICENSE NO. BQ511009
TRAVIS COUNTY, TEXAS
(TABC CASE NO. 612272)**

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BEFORE THE STATE OFFICE



ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

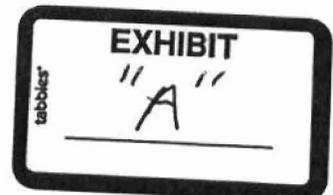
I. INTRODUCTION

The Staff of the Texas Alcoholic Beverage Commission (Staff/Commission) sought cancellation of the permit held by Mohammed Farrukh Naeem Siddiqui d/b/a Sid's Food Mart (Respondent) because Respondent falsely or incorrectly answered a question in an original or renewal application concerning whether Respondent is a citizen or a legal resident of Texas in violation of the Commission's rules and regulations. The Staff recommends the cancellation and revocation of Respondent's permit. The Administrative Law Judge (ALJ) recommends that Respondent's permit be canceled and revoked.

II. NOTICE, JURISDICTION AND PROCEDURAL HISTORY

On March 28, 2005, Staff issued a Notice of Hearing in this case. On June 28, 2005, ALJ Wendy K. L. Harvel convened the hearing. The Staff was represented by Christopher Gee, an attorney with the Commission's Legal Division. Respondent was represented by Christopher Gunter, attorney. The hearing concluded, and the record closed that same day.

Neither jurisdiction nor adequacy of notice were contested issues. Therefore, these elements are discussed in the Findings of Fact and Conclusions of Law below.



III. BACKGROUND AND EVIDENCE PRESENTED

Mr. Siddiqui applied for and received a Beer and Wine Retailer's Permit from the Commission on March 12, 2002. Mr. Siddiqui applied for the permit and relied on an attorney, William Dufour, to complete the application. On the application, Mr. Siddiqui did not answer the question that asked whether he had been a legal resident of Texas for one year. Rather, Mr. Dufour testified that his legal assistant filled in the answer "yes" after Mr. Siddiqui signed the application.

In 2004, Mr. Siddiqui filed an application for a second store. At that time, the Commission raised the issue about his legal status. Mark Gohlke, an enforcement agent for the Commission, testified that he investigated Respondent's second application. He contacted the Bureau of Immigration and Customs Enforcement (Bureau). He was informed by the Bureau that Mr. Siddiqui is not a legal resident of the United States. Based on that information, Mr. Gohlke determined that Mr. Siddiqui had not been a legal resident of Texas for one year prior to the time he filed his application in 2002. He recommended that Respondent's permit be canceled.

On cross-examination, Mr. Gohlke admitted that the term "legal resident" is not defined in the Commission's statute or rules. He also admitted that at the time Mr. Siddiqui filed his application, the Commission had no written policy defining legal resident. Instead, Mr. Gohlke relies on the Bureau to determine whether someone is a legal resident of Texas.

Kevin Duberstein, a special agent of the Bureau, testified that he investigated Mr. Siddiqui to determine his residency status. Based on his investigation, he determined that Mr. Siddiqui entered the country on January 26, 2000, under a tourist visa. After July 31, 2001, his visa expired and he became a non-immigrant overstay. On March 18, 2003, Mr. Siddiqui registered under the National Security Entry-Exit Registration System (NSEERS).¹ At the time of his registration, the

¹ NSEERS was a registration program established after September 11, 2001, which required men in the United States from certain countries to register with the Bureau.

Bureau determined he had overstayed his visa. His deportation hearing was scheduled for August 15, 2005.² Mr. Duberstein could find no records indicating that Mr. Siddiqui is allowed to work in the United States. On cross-examination, Mr. Duberstein admitted that Mr. Siddiqui applied for an alien employment certification in March 2001, and that while that certification was pending, Mr. Siddiqui filed his application for his beer and wine permit.

Thomas Esparza, Mr. Siddiqui's immigration attorney, testified that he has represented Mr. Siddiqui since March 2003 when he registered under the NSEERS program. Mr. Esparza indicated that Mr. Siddiqui's application for asylum and withholding of removal are pending. He indicated that Mr. Siddiqui is in the United States under color of law until an immigration judge makes a decision on his asylum petition.

The Staff alleges Respondent violated the Texas Alcoholic Beverage Code and the rules of the Commission when he failed to answer or falsely answered a question in the original or renewal application, in violation of TEX. ALCO. BEV. CODE § 61.71(a)(4).³ Specifically, the Staff alleges that Respondent is neither a citizen nor a legal resident of Texas as required by the Commission's rules and regulations. TEX. ALCO. BEV. CODE §§ 1.07, 6.03, 11.46(a)(11), 61.42(a)(5), 61.47.

IV. ANALYSIS

The Commission must cancel a wine and beer retailer's off-premise permit if it finds that an applicant is ineligible to hold a permit in accordance with the Commission's rules and regulations found in TEX. ALCO. BEV. CODE §§ 61.42(a)(5), and 61.47. The Commission may also cancel or suspend a permit if the applicant makes false or incorrect statements on the application for such a permit.

² The ALJ is unaware of the resolution, if any, of the deportation hearing.

³ Staff cited this provision in its Notice of Hearing. Respondent argued that this section of the Alcoholic Beverage Code applies to Commission-issued licenses, rather than permits. Staff demonstrated that sections of the Alcoholic Beverage Code that apply to licenses also apply to permits. *See* TEX. ALCO. BEV. CODE § 26.03.

Staff contends that Mr. Siddiqui lied on his application when he checked the box that he had been a legal resident of Texas for one year prior to filing his application. Mr. Siddiqui counters first that he did not answer the question, and furthermore that it was his understanding that he was a legal resident as that term is understood. Mr. Dufour testified that his legal assistant filled in the box after the application was signed. The ALJ finds Mr. Dufour's testimony credible, and it was uncontroverted. Mr. Siddiqui did, however, as the applicant, have the responsibility for the answers on his application form. That being said, the ALJ does not find that Mr. Siddiqui intentionally lied on his application. Rather, the application was filled in without his knowledge. The ALJ finds that the statement on the application was not fraudulent. Therefore, the issue remaining in this case is a legal one: whether Mr. Siddiqui is a legal resident of Texas.

The Staff maintains that, in this instance, Respondent was ineligible to hold a permit because he was not a legal resident of Texas for one year prior to his filing the application. The term legal resident is not defined. Staff asserted that the definition of legal resident of Texas should be equated to the definition of legal resident under federal law, someone who has permission from the federal government to reside in the United States. Respondent asserted that legal resident should be defined as it is defined in the Texas Civil Practice and Remedies Code, which provides:

'Legal resident' means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual's country of citizenship or national origin.⁴

The ALJ finds that the statute requiring a permittee to be a legal resident of Texas for one year prior to filing the application is ambiguous. The term legal resident is not defined, and it is subject to differing interpretations. When construing a statute, the ALJ may look to the administrative construction of the statute as well as the legislature's intent.⁵

⁴TEX. CIV. PRAC. & REM. CODE §71.051(h)(1).

⁵TEX. GOV'T CODE § 311.023.

The Commission has had difficulty defining what is meant by legal resident of Texas, and how it should be applied to license and permit applicants. In a memorandum dated February 16, 2005, from Lou Bright to Gayle Gordon, David Garza, Amy Harrison, and Carolyn Beck (Memorandum), Mr. Bright mentions that the Commission has received some comments regarding its proposed legal residency policy.⁶ Mr. Bright also describes the issue as tortured, and he indicates that a common fact pattern the agency sees is an alien entering the country under an immigration status that does not authorize him to work, then subsequently applying for a new status authorizing him to work. The pending new status is then used to apply for a permit.⁷ The Memorandum recommends that a person should be considered to lawfully reside in Texas if the person is a United States citizen, holds a valid permanent, resident alien status, holds a status that permits work in the alcoholic beverage business, or holds a valid employment authorization document. The Memorandum does not, however, indicate what the Commission's interpretation of the term "legal resident" was, if any, when the Commission granted Mr. Siddiqui his permit.

The Texas Alcoholic Beverage Code codifies the intent of the legislature for requiring a permittee to be a Texas resident for one year prior to licensing. The Code indicates that the purpose of having a residency requirement was originally to ensure that the licensee or permittee was not involved in organized crime and to ensure that individuals were known in and had ties to their communities.⁸ The legislature was attempting to remove organized crime from the alcoholic beverage business following the repeal of prohibition. The legislative history does not, however, help define the term legal resident.

Although the definition of legal resident is ambiguous, Mr. Siddiqui does not meet any of the definitions that may be applicable. He does not have legal status in the United States. Rather, he has currently overstayed his visa. He is subject to removal from the country, but he is permitted

⁶ Resp. Ex. 5.

⁷ Resp. Ex. 5.

⁸ TEX. ALCO. BEV. CODE. § 6.03.

to remain the country until an immigration judge makes a decision on his asylum and deportation. Mr. Siddiqui currently does not have permission to work in the United States. Even if the Civil Practice and Remedies Code definition of legal resident is applied in this case, the ALJ can only speculate about Mr. Siddiqui's intent to reside in Texas. Although there is some evidence of his intent in that he has established a home with his family and is running a business, Mr. Siddiqui did not testify. Therefore, the ALJ cannot find that he intends to maintain Texas as his permanent residence.

V. CONCLUSION

The ALJ concludes that Mr. Siddiqui is ineligible to hold a permit because he was not a legal resident of Texas for one year prior to filing his application. Therefore, Mr. Siddiqui's permit should be canceled and revoked.

VI. FINDINGS OF FACT

1. Mohammed Farrukh Naeem Siddiqui d/b/a Sid's Food Mart (Respondent) was issued a Wine and Beer Retailer's Off-Premise Permit No. BQ-511003.
2. Respondent inadvertently made an error in filling out his application for a Texas Alcoholic Beverage Commission (Commission) permit when he failed to answer the question asking whether he had been a legal resident of Texas for one year.
3. Respondent is not a United States citizen nor a legal resident.
4. Mr. Siddiqui has overstayed his visitor's visa and is subject to deportation and removal pending a decision from an immigration judge.
5. Respondent's visa does not authorize him to live or work in the United States.
6. Respondent was not a legal resident of Texas for a minimum of one year prior to filing his application for a permit with the Commission.

7. On March 28, 2005, Commission Staff issued a notice of hearing notifying all parties that a hearing would be held and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters at issue in this proceeding.
8. On June 28, 2005, Administrative Law Judge Wendy K. L. Harvel convened an evidentiary hearing at the State Office of Administrative Hearings, 300 West 15th Street, Austin, Texas. The hearing was concluded, and the record closed on that same date.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact, Respondent inadvertently made an error in his application for a permit for a wine and beer retailer's off-premise permit when he failed to answer the question on his application asking whether he had been a legal resident of Texas for one year.
5. Based on the above Findings of Fact, Respondent is ineligible to hold a permit for a wine and beer retailer's off-premise permit because he is not a legal resident of the United States or Texas, in accordance with TEX. ALCO. BEV. CODE §§ 1.07, 6.03, 11.46(a)(11), 61.42(a)(5), and 61.47.
6. Based on the above Findings of Fact and Conclusions of Law, Respondent's permit should be canceled.

SIGNED August 26, 2005.



**WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 26, 2005

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA FACSIMILE 512/206-3350

**RE: Docket No. 458-05-4925; Texas Alcoholic Beverage Commission vs
Mohammad Farrukh Naeem Siddiqui d/b/a Sid's Food Mart (TABC Case
No. 612272)**

Dear Mr. Steen:

I have reviewed the parties' exceptions filed on September 8 and 16, 2005. After reviewing the exceptions, I have determined that the following changes need to be made to the Proposal for Decision:

Finding of Fact No. 2A: An individual, other than Respondent, answered Question 7B on Respondent's application after the application had been signed and notarized. The individual provided a false answer to the question asking whether Respondent had been a legal resident of Texas for one year prior to filing the application.

Finding of Fact No. 2B: Respondent, as the applicant, is responsible for all answers on his application.

EXHIBIT

Mr. Alan Steen, Administrator
Texas Alcoholic Beverage Commission
September 26, 2005
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Conclusion of Law No. 4: Based on the above Findings of Fact, Respondent is responsible for the false statement made on his application on his behalf. The false statement is a violation of TEX. ALCO. BEV. CODE § 61.71(a)(4).

Sincerely,



Wendy K. L. Harvel
Administrative Law Judge

WKLH/s

xc: Docket Clerk, State Office of Administrative Hearings - **VIA HAND DELIVERY**
Christopher Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA FACSIMILE 512/206-3498**
Gayle Gordon, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA FACSIMILE 512/206-3498**
William C. Dufour, Law Office of William C. Dufour, P.C., 409 West 14th Street, Austin, TX 78701 - **VIA FACSIMILE 512/478-2438**
Christopher Gunter, Attorney, 600 West Ninth Street, Austin, TX 78701-2212 - **VIA FACSIMILE 512/476-2497**