

SIGNED this April 7, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

JLK/bc

The Honorable Veronica S. Najera
Administrative Law Judge
State Office of Administrative
VIA FAX (915) 834-5657

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ORLANDO ADRIAN AYERS
RESPONDENT
d/b/a TIFFANY'S MIDTOWN NIGHT CLUB
1613-17 MONTANA AVENUE
EL PASO, TX 79902

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ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement District Office

SOAH DOCKET NO. 458-08-1024

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,

Petitioner

V.

ORLANDO ADRIAN AYERS
d/b/a TIFFANY'S MIDTOWN NIGHT
CLUB

Respondent

EL PASO COUNTY, TEXAS
(TABC CASE NO. 569692)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) protested the original application filed by Orlando Adrian Ayers d/b/a Tiffany's Midtown Night Club (Respondent) alleging that Respondent's original application is being used as a subterfuge scheme to evade the purposes and limitations regarding the qualifications for issuance of permits. Specifically, the allegation is that Respondent has submitted an original application for his mother, Rosa Delia Ayers, who is ineligible to receive a permit. Based on the evidence or record and applicable law, the Administrative Law Judge (ALJ) finds that Respondent's permits should not be granted.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Respondent filed an original application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for Tiffany's Midtown Night Club.¹ After Staff protested the issuance of these permits, Respondent requested a contested case hearing. The hearing was convened by ALJ Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, 401 East Franklin Avenue, Suite 580, El Paso, Texas, on January 11, 2008.

¹ Tiffany's Midtown Night Club is located at 1613-17 Montana Boulevard, El Paso, El Paso County, Texas 79902

Respondent was represented by Edward N. Lerma, attorney at law. Staff attorney Judith Kennison represented the Petitioner. The record closed on January 11, 2008. Notice and jurisdiction are addressed in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Background to the Current Protest

Tiffany's Midtown Night Club was issued its first permit in 2005. The permit was originally issued to Pablo Ayers d/b/a Tiffany's Midtown Night Club.² Pablo Ayers is Respondent's brother. The permit issued to Pablo Ayers was cancelled for cause in October 2007.³ It was found that the permittee was in possession of alcoholic beverages not covered by invoice,⁴ allowed an unauthorized person to use the permit,⁵ and failed to maintain exclusive occupancy and control of the entire licensed premises.⁶ Of relevance to this case is the subterfuge⁷ ownership violation. Pablo Ayers admitted that the real owner of Tiffany's Midtown Night Club was his mother, Rosa Delia Ayers, and as such she controlled the employees, premises and business.⁸ He stated that his mother felt she did not qualify to hold a permit due to her criminal

² See TABC Exhibit No. 3.

³ *Id.*, Waiver Order and Agreement and Waiver of Hearing regarding TABC administrative case no. 544421, regarding permit no. MB-573951.

⁴ *Id.* Respondent violated TEX. ALCO. BEV. CODE ANN. (Code) § 28.06(c) and (d) [Possession of Alcoholic Beverage Not Covered by Invoice].

⁵ *Id.* Respondent violated Code § 11.05 [Unauthorized Use of Permit], § 11.61(b)(2) [Cancellation of Permit], and § 109.53 [Subterfuge Ownership].

⁶ *Id.*

⁷ Although not defined within the provisions of the Code, "subterfuge" is commonly recognized as "a clever plan or idea used to escape, avoid or conceal something." Black's Law Dictionary 1161 (7th ed. 2000).

⁸ See TABC Exhibit No. 5, Incident Report, Voluntary Statement of Accused Pablo Ayers. The declaration states: "I am not the real owner of the Tiffany's Midtown. The real owner is my mother Rosa Delia Ayers. The way this all came about is that in December 2004 I was visiting my mother for her birthday. I was visiting from California. While

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record⁹ and residency status.¹⁰ Furthermore, Mrs. Ayers, herself, admitted to the subterfuge ownership.¹¹ Respondent is also Mrs. Ayers' son.

Thereafter, one month after the October 2007 permit cancellation, Respondent filed the original application at issue.

B. Allegations and Applicable Law

The legislature has charged the Commission with the duty of preventing subterfuge ownership,¹² and Staff alleged that Respondent's application will result in the unlawful use of the permit. Further, the Code § 11.61 authorizes the Commission to refuse to issue an original permit.¹³ The first ground alleged by Petitioner under this section is that Respondent's domicile

visiting, my mother expressed interest in buying the Emperador Midtown Bar which is now Tiffany's Midtown. My mother asked me if I could apply for the beverage permit to operate the bar." Further, Pablo Ayers states that "the loan was actually for my mother and I never paid any money, my mother paid them off herself. The bills to the bar were also in my mother's name and she had final say over all business decisions."

⁹ Mrs. Ayers' arrest record in El Paso County is as follows: 05-06-1992 for delivery of marijuana over 50 lbs/under 200 lbs; 11-06-1993 for possession of marijuana over 5 lbs/under 50lbs; 03-07-1994-sentenced to two years for possession of marijuana; 08-26-1995 for a probation violation; and 01-31-1996-for delivery of marijuana over 50 lbs/under200 lbs. See TABC Exhibit No. 5.

¹⁰ Mrs. Ayers' residency status is not clarified in the evidence of record.

¹¹ See TABC Exhibit No. 5, Voluntary Statement of Delia Ayers. The declaration states "the application for a new bar was submitted using my son, Pablo Ayers, in order to obtain the permit as if he were the owner. I was afraid that I would not qualify for the permit because of my record and residency status. In fact, I was the owner." [Mrs. Ayers' voluntary statement which was written in the Spanish language as part of Exhibit No. 5, was translated by a certified language interpreter into the record and incorporated into Exhibit No. 5 in written form].

¹² Code at § 109.53, states that it is the intent of the legislature to prevent subterfuge ownership or unlawful use of a permit or the premises covered by such permit; and all provisions of the Code shall be liberally construed to carry out this intent, and it shall be the duty of the commission to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices. Further, the Code states that every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of storage, distribution, possession, and 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 persons other than the permittee shall be unlawful.

¹³ See Code at § 11.46 [General Grounds for Refusal].

prohibits the issuance of the permits because he is residentially domiciled with a person whose permit has been cancelled for cause within the 12 months immediately preceding the date of the application at issue.¹⁴ Petitioner further alleged that Respondent falsely completed the original permit application,¹⁵ and that the place and manner in which the applicant may conduct his business warrants the refusal.¹⁶

C. Petitioner's Case

At the hearing, TABC agents involved with the investigations and cases involving Tiffany's Midtown Night Club testified. Agent Harold Nanos testified that he took the voluntary statement given by Pablo Ayers, Respondent's brother, which led to the subterfuge finding. Agent Robert Wiest testified that he reviewed the original application at issue and concluded that the subterfuge pattern found in prior cases reappears in the current application. Agent Wiest specifically pointed to the fact that Mrs. Ayers is named as the original source of investment on the current application. Respondent received \$15,000.00 from Mrs. Ayers.¹⁷ She is in fact the only source providing the investment capital.¹⁸ Mrs. Ayers is also listed as a person who holds encumbrances against the assets of the business or guaranteed financial assistance.¹⁹ Mrs. Ayers is also the listed lessee.²⁰ Agent Wiest stated that in his opinion, the facts of the current application follow the same pattern previously exhibited in the case against Respondent's brother by giving Mrs. Ayers an interest in, and proximity to, the management of the bar.

¹⁴ *Id.* at § 11.46 (a)(13).

¹⁵ *Id.* at § 11.46 (a)(4), states that the commission may refuse to issue an original permit if the applicant failed to answer or falsely or incorrectly answered a question in the original or renewal application.

¹⁶ *Id.* at § 11.46 (a)(8).

¹⁷ TABC Exhibit No. 2. Application for Retailer's Permit or License, financial information, number 11.

¹⁸ *Id.* at section I.

¹⁹ *Id.* at section I.

²⁰ TABC Exhibit No. 4. Commercial Lease for Tiffany's Midtown Night Club.

Agent Oscar Menchaca testified that he also participated in the investigation regarding the case against Respondent's brother, and that he took Mrs. Ayers's statement on September 22, 2006, in which she admits to the subterfuge ownership. In addition, he testified about another investigation involving a bar known as La Morena Night Club, in which Mrs. Ayers took over the management of the bar using a TABC permit issued to another person. The agent testified that the permittee of La Morena Night Club, Lizette Sandoval, gave a voluntary statement in which she recounts the financial difficulties she experienced which led to Mrs. Ayers taking control and management of the club.²¹ La Morena Night Club received an administrative notice for refilling and subterfuge violations.²² La Morena Night Club's permit number MB-639956 expired in September 2007 and was not renewed.

D. Respondent's case

Respondent did not counter the subterfuge allegation beyond stating that he is the applicant, not his mother. He testified that he managed Tiffany's Midtown Night Club and "ran the bar" for two years. His mother paid him a salary. He denied any involvement with La Morena Night Club, although he was implicated in the statement given by the club's permittee.²³ He said that he has not opened an account for the bar and has no line of credit. He said he is a full time student at the University of Texas at El Paso. He confirmed that he lives with his mother, Mrs. Ayers.

²¹ TABC Exhibit No. 6, Voluntary Statement of Lizette V. Sandoval. Mrs. Sandoval states "from the beginning business was not good and we struggled to pay the rent to Mrs. Ayers. Mrs. Ayers threatened to take my house and other things if I did not comply with the contract. Since I was unable to pay the rent, Mrs. Ayers suggested that she keep the bar to pay the rent. Basically, Mrs. Ayers took control of and managed the bar using my TABC permit." [Mrs. Sandoval's voluntary statement which was written in the Spanish language as part of Exhibit No. 6, was translated by a certified language interpreter into the record and incorporated into Exhibit No. 6 in written form].

²² TABC Exhibit No. 7, Incident Report of La Morena Night Club, case number 255233, March 3, 2007.

²³ Sandoval stated that the bottles were being refilled by either Mrs. Ayers or her son, Orlando. See TABC Exhibit No. 6, Voluntary Statement of Lizette V. Sandoval.

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III. ANALYSIS

The history of the bar is relevant to the decision of this case. Based on the evidence of record, it is the opinion of the ALJ that the factors which gave rise to Petitioner's protest are not merely incidental to the operation of such business, but are the *modus operandi* of such business entity. Thus, there is a pattern of subterfuge involving Mrs. Ayers and her sons, whereupon they participate in unlawful permitting schemes.

The ALJ agrees with Staff that Respondent's original application should be denied. The ALJ finds there is sufficient evidence to support the finding that Respondent's application is being used as a subterfuge to evade the purposes and limitations of the TABC Rules regarding the qualifications for issuance. This conclusion is based on:

- the prior subterfuge finding involving Respondent's brother and mother;
- the unauthorized use of La Morena Night Club's permit by Respondent's mother;
- the fact that Respondent worked at Tiffany's Midtown Night Club in a management capacity during the unlawful use of permit MB-573951;
- the fact that Respondent was implicated in the refilling violation at La Morena Night Club during the unlawful use of permit MB-639956;
- and on the facts that Respondent's mother is the only source of investment, holds encumbrances against the assets of the business, has guaranteed financial assistance, and is the listed lessee.

Further, Respondent's original application indicates that Respondent lives with his mother.²⁴ This alone is sufficient to deny the application since she was the actual owner of permit number MB-573951 via subterfuge ownership. Respondent's domicile prohibits the issuance of the permits because he is residentially domiciled with a person, Mrs. Ayers, whose permit was cancelled for

²⁴ TABC Exhibit No. 2, Application for Retailer's Permit or License, personal history sheet

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cause within the 12 months immediately preceding the date of the application at issue.²⁵ In the ALJ's opinion, no further analysis is needed.

IV. FINDINGS OF FACT

1. On September 25, 2007, Orlando Adrian Ayers (Respondent), filed an original application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for Tiffany's Midtown Night Club.
2. After Staff protested the issuance of these permits, Respondent requested a contested case hearing.
3. Tiffany's Midtown Night Club was issued its first permit in 2005. The permit was issued to Pablo Ayers d/b/a Tiffany's Midtown Night Club.
4. Pablo Ayers is Respondent's brother.
5. Rosa Delia Ayers is Respondent's mother.
6. Mrs. Ayers was involved in a subterfuge ownership scheme with her son Pablo Ayers regarding permit MB-573951 issued to Pablo Ayers d/b/a Tiffany's Midtown Night Club.
7. Mrs. Ayers controlled the employees, premises and business of Tiffany's Midtown Night Club under permit MB-573951.
8. Permit MB-573951 was cancelled for cause in October 2007.
9. Mrs. Ayers was also the subterfuge owner of La Morena Night Club which operated under permit number MB-639956 issued to Lizette V. Sandoval d/b/a La Morena Night Club.
10. Mrs. Ayers controlled the employees, premises and business of La Morena Night Club under permit MB-639956.
11. Permit MB-639956 expired in September 2007 and was not renewed.
12. Respondent's application lists Mrs. Ayers as the original source of investment for Tiffany's Midtown Night Club.

²⁵ Code at § 11.46 (a)(13).

13. Respondent received \$15,000.00 from Mrs. Ayers.
14. Mrs. Ayers is the only source providing the investment capital to Respondent.
15. Mrs. Ayers holds encumbrances against the assets of Tiffany's Midtown Night Club and has guaranteed financial assistance to the club.
16. Mrs. Ayers is also the listed lessee.
17. Respondent worked at Tiffany's Midtown Night Club in a management capacity during the unlawful use of permit MB-573951.
18. Respondent was implicated in the refilling violation at La Morena Night Club during the unlawful use of permit MB-639956.
19. Respondent is residentially domiciled with his mother.
20. Mrs. Ayer is a person whose permit number MB-573951 was cancelled for cause within the 12 months immediately preceding the date of the application at issue.
21. A notice of hearing was sent to Respondent via his attorney of record on December 12, 2007, and included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
22. The hearing was convened by ALJ Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, 401 East Franklin Avenue, Suite 580, El Paso, Texas, on January 11, 2008. Respondent was represented by Edward N. Lerma, attorney at law. Staff attorney Judith Kennison represented Petitioner.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042(5).

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3. Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and Code § 11.63.
4. Respondent's original application is being used as a subterfuge scheme to evade the purposes and limitations of the TABC Rules regarding the qualifications for issuance of permits, as detailed in the Findings of Fact Nos. 3-18, in violation of Code § 109.53.
5. Respondent is residentially domiciled with his mother, Rosa Delia Ayers, a person whose permit number MB-573951 was cancelled for cause within the 12 months immediately preceding the date of the application at issue, as detailed in Findings of Fact Nos. 19-20, in violation of Code § 11.46(a)(13).
6. Based on the Findings of Fact and Conclusions of Law, Respondent's permits should be denied.

SIGNED March 10, 2008.



**VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE**