

DOCKET NO. 588500

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE TEXAS

VS.

SAMUEL RASCON
D/B/A A & M'S
PERMIT/LICENSE NO(s). BG684091, BL
EL PASO COUNTY, TEXAS
(SOAH DOCKET NO. 458-10-2043)

ALCOHOLIC

BEVERAGE COMMISSION

PROPOSED ORDER ADOPTING THE PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this the 2nd day of September, 2010, the above-styled and numbered cause.

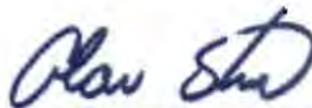
After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on the 7th day of April, 2010 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 4th day of June, 2010. The 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. Respondent's Attorney filed Exceptions to the Proposal on June 21, 2010. Staff replied to Respondent's Exceptions on June 29, 2010. The ALJ replied to both Exceptions on July 12, 2010, and recommends no substantive changes to the Proposal for Decision, but does recommend a clerical error correction to the spelling of Petitioner's witness from Belkamp to Belknap.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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 your permit and/or license is/are hereby CANCELLED.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

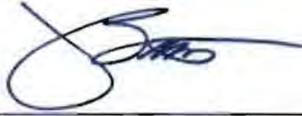
SIGNED on September 2, 2010, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that service shall be made upon all parties in the manner indicated below on this the 2nd day of September, 2010.



Joan Carol Bates, Assistant General Counsel
Texas Alcoholic Beverage Commission
Legal Services

MW/cb

Honorable Judge Veronica S. Najera
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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TABC Legal Section

Licensing Division

Lt. Salvador Moralez, Jr.
El Paso District Office
VIA E-MAIL

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 2

II. BACKGROUND AND EVIDENCE

The listed owner of A & M's Bar is Samuel Rascón. The establishment is located in the city of Socorro, County of El Paso, Texas. The TABC issued Respondent a wine and beer retailers on premise permit, which includes a retailer's on premise late hours license, in February 2008.¹

A. Breach of the peace allegation involving two homicides

1. Petitioner's case

The basis for the breach of peace allegation is a double homicide which occurred on the parking lot adjacent to the building on June 22, 2009. The establishment was closed by the TABC Administrator under a summary suspension for seven days after the incident. The El Paso Sheriff's Office originally assisted the Socorro Police Department, and eventually took over the double capital murder investigation. Sergeant James Belkamp,² with the Criminal Investigations Division, El Paso County Sheriff's Office, testified as follows:

- Sheriff's office detectives have conducted a comprehensive investigation under his supervision. The information is derived from multiple eyewitness statements corroborated by physical evidence. There is an on-going criminal double-homicide investigation involving state agencies.
- Bar manager Adrian Garcia was called by an employee before the assault inside the bar. He was informed that a large number of gang members were at the bar.

¹ Petitioner's Exhibit No. 1, custodian of records affidavit for permit BG-684091.

² Sergeant Belkamp has been in law enforcement for 28 years. He is currently employed with the El Paso Sheriff's Office. Sergeant Belkamp is commissioned by the State of Texas. He is a master police officer. He is a graduate of the FBI academy in Quantico, Virginia. He studied and is certified in forensics. He is an expert in gang activity and mentality. He has oversight of the general investigation and has reviewed all documentation of the case. The identity of witnesses was not released by the Sheriff's Office as a protection measure due to the on-going criminal investigation.

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 3

- At approximately 1:15 to 1:20 a.m. a physical altercation occurred inside the bar involving three people. As a result, security staff intervened by separating the parties. No one was removed from the bar and law enforcement was not called. Approximately 45 minutes after the assault inside the bar, some of the same people involved exited into the parking area. The confrontation continued outside involving three of the same persons, plus others.
- One man died at the scene and the second man was later pronounced dead at the hospital. Two arrests were made. A third person escaped to Mexico. The suspects were placed inside the bar prior to the murders.
- The unarmed security guard Michael Luna witnessed the homicides while performing parking lot duties. The panic alarm was used to contact the Socorro Police Department.
- The homicides were a result of rival gang activity. He said the establishment is well known among law enforcement as a gang hang-out.³
- With regard to security at the bar, the bar does not employ professional security personnel. The men who function as "security" are not uniformed personnel. They are friends or other employees who call themselves security.
- With regard to other criminal activity at the bar, recent undercover operations conducted by the Sheriff's office have resulted in the purchases of narcotics from inside the establishment.

Agent Robert Wiest testified regarding the location of the homicides. The bar's location, or premises, consists of an outside patio, smoking area, and a wall court in the rear. The parking surrounds the bar to one side and toward the rear. There is a dirt road which leads to the side rear of the bar for additional parking. The facts reveal that only the landlord and the bar personnel have keys to open the gate for additional parking.⁴ There is also a sign indicating "A&M parking" with an arrow.⁵ The bodies were located next to the dumpster, which is next to the parking lot sign approximately 75 feet from the front door.

Agent Wiest has been to the bar a couple times. He testified that "it is in their best interest to have security personnel based on their clientele which have a propensity to violence,

³ For purposes of this hearing, the ALJ has omitted detailed testimony regarding gang identification alleged to be associated with this case. Nonetheless, those details are of record.

⁴ Petitioner's Exhibit No. 3, areal map of area depicting bar and surrounding parking.

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 4

propensity to sell narcotics, and propensity to engage in criminal activity.” He said that the failure to pay taxation on narcotics was the cause for the murders. The victims have been identified as gang members. He had spoken with the bar’s manager and recommended the implementation of a dress code and security measures such as pat downs and bonded certified security. The bar had none on June 22, 2009. He also stated that one of the victims worked odd jobs such as maintenance, security, and sound system person for the bar. Both victims were regular patrons.

2. Respondent’s case

Michael Luna is employed as an unarmed security guard. He was outside when the men exited the bar. He saw four cars parked and about 18 men exit with weapons, guns and knives. The victims were attacked next to the dumpster. He concurred with Petitioner’s testimony as follows:

- The men killed were regular costumers. He said he found it odd that one of the men was there regularly, but never drank.
- The men killed had gang affiliations.
- He witnessed the murders during his “parking lot shift” during closing time.
- Three people from inside the bar joined the outside attack.
- He is not law enforcement, cannot arrest, does not carry a weapon, and is not a commissioned officer.

He described the assault inside the establishment as an argument between a married couple. He said the couple “made up” and happily left the bar. He also described the bar as a “country bar” with horse-racing clientele.⁶ He denied any knowledge of gang-related activity or patronage and said the issues that he dealt with were public intoxication and spousal arguments.

⁵ Petitioner’s Exhibit Nos. 5 and 6, photographs.

⁶ Sergeant Belkamp testified that the horse-racing clientele is involved in illegal gambling and horse-racing activity. He clarified that the exchange of money is the illegal act, not the horse-racing.

Adrian Garcia is the permittee's nephew. He testified that he is there full time and he manages the bar in conjunction with his mother Ofelia Marmolejo. He said they are in charge. He said "we decide who gets what at the end of the day." He testified as follows:

- He hires the men and Ms. Marmolejo hires the women.
- He opens and closes the bar.
- He places the orders.
- No personnel records are kept.
- No personnel manual is in existence.
- Mr. Rascón receives a quota from the sales.
- He gets paid a percentage of the sales at the end of the day.
- He determines his take-home-pay for the day.
- Ms. Marmolejo determines her take home pay for the day.
- All transactions are done in cash.
- The business does not have any kind of banking accounts.
- There is no end-of-the-day closing system in place. He and Ms. Marmolejo pay the waitresses and take the remaining cash.
- He had known the men killed since they were in school.

He testified in Spanish, as follows "Samuel Rascón va en vez and cuando. Casi nunca esta ahí. Tiene otro trabajo." [Samuel Rascón goes once in a while [referring to the bar]. He is hardly ever there. He has another job.]

B. Other Breach of the Peace Activity

The evidence shows that Respondent, through Mr. Luna, has filed three breach of the peace reports since 2008. The June 2009 incident report was filed at the directive of the TABC after it was notified by the police of the homicides. The other two reports are incomplete in that

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 6

they do not provide the required detailed information.⁷ The reports do not match the level of police activity at bar:⁸

Date	Activity	Report filed
05-02-07	Aggravated assault inside	No
08-18-08	Assault inside	Yes-no details
10-05-08	Assault/fight disturbance with gun inside	No
11-06-08	Assault/fight inside and outside	No
01-28-09	Assault/fight disturbance inside	No
05-11-09	Assault/group fight outside	No
05-25-09	Assault inside	Yes-incomplete
06-22-09	Assault inside and homicides outside	Yes-per TABC
07-10-09	Public intoxication/disturbance inside	No
08-01-09	Public intoxication inside	No
08-17-09	Assault inside	No
09-07-09	Stabbing inside	No
10-05-09	Public intoxication inside	No
11-09-09	Disturbance inside	No
11-12-09	Narcotic activity inside	No
12-07-09	Disturbance inside	No

III. DISCUSSION AND ANALYSIS

In addressing the allegations which form the basis of this cause, the ALJ bears in mind that a permit issued by the TABC is not a matter of right but rather a matter of privilege which may be renewed, extended, limited, or denied. It is the permittee's responsibility to conduct his business in such a manner that warrants that privilege. In the instant case, the TABC has authority to cancel a permit if it is found that the permittee engaged in any of the listed

⁷ Petitioner's Exhibit No. 8, breach of the peace reports for 08-18-08, 05-26-09 and 06-22-09. The 2008 report states "No one saw anything of what happened."

⁸ Petitioner's Exhibit No. 7, police reports; Petitioner's Exhibit No. 9, computerized police reports; and Petitioner's Exhibit No. 11, summary of calls for service and breach reports.

prohibited acts enumerated in the Code.⁹ Whether an applicant has conducted his business so as to jeopardize the peace, morals, health, or safety of the general public cannot be determined by a set formula. It is in this context that this analysis is undertaken.

A. June 22, 2009 homicides

1. Breach occurred on licensed premises

Neither party contests the fact that a double homicide occurred in the parking lot adjacent to the bar. Respondent argued that the parking lot is not part of the licensed premises and that it is owned by someone else. Respondent further argued that the bodies were found "across the street." The ALJ concludes it is an incorrect characterization of the location. There is a makeshift dirt roadway which leads to rear parking, but it is not a street or public highway. The deceased was next to the dumpster.¹⁰ Photos taken after the police secured the area show patrons' vehicles parked in this area. The facts reveal that the patrons park precisely on the parking lot at issue as directed by a large sign which states "A&M bar parking."¹¹ Employees of the bar, specifically Mr. Luna and Mr. Garcia, control and direct the ingress and egress from the parking lot.

Based on the facts and the applicable rules, Respondent's arguments do not have merit. The bar exercised control over the parking area. The ALJ concludes the parking lot adjacent and immediately outside of the bar's entrance is directly under the control of the permittee. The ALJ finds that a breach occurred on the licensed premises.¹²

⁹ TEX. ALCO. BEV. CODE ANN. (Code) § 61.71 [Grounds for Cancellation or Suspension: Retail Dealer]. This section lists 31 specific grounds for cancellation. Specifically, § 61.71(a)(17) provides for the cancellation based on place or manner in which the permittee conducts his business based on the general welfare, health, peace morals, and safety of the people and on the public sense of decency. Section (a)(31) provides for the cancellation if the permittee failed to promptly report to the commission a breach of the peace occurring on the licensed premises.

¹⁰ Petitioner's Exhibits Nos. 5 and 6.

¹¹ Petitioner's Exhibit No. 5.

¹² Code at § 11.49 [Premises Defined]. The Code defines "premises" as the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 8

2. Breach not beyond permittee's control

The ALJ concludes that the breach was not beyond the permittee's control¹³ if he had acted earlier, promptly and/or secured the premises to avoid escalation from an assault to homicides. The evidence reveals that management was aware that there was a large gang presence that night. Yet, after the assault, the parties were not removed from the premises and law enforcement was not called. Sergeant Belkamp opined that if law enforcement had been contacted at the time of the initial physical confrontation, or if management had removed one or all of the parties, the homicides would not have occurred. The ALJ agrees with his expert opinion. Furthermore, the physical altercation inside the bar was indeed between a man and a woman as stated by Mr. Luna. But, Sergeant Belkamp clarified that the woman was the girlfriend, or common-law wife, of one of the men arrested for the capital murder. She was underage and drinking inside the bar.

The ALJ finds unpersuasive employee statements that they were unaware of gang-related activity at the bar. There is direct contradictory evidence which shows that Mr. Luna was cognizant. He stated to the Sheriff's office:

"Approximately one month ago [May 2009] I was working the bar when an incident happened. The incident involved an individual called "Q". After the altercation "Q" was running his mouth about X gang. X gang individuals were not fond of "Qs" gestures and promised to get back at Y gang. At that time he was escorted outside of the restroom and I remember he was heavily beat up in the face area. He had a lot of lacerations on the facial area. That same night a person by the name of Pete Acosta was involved in another fight while leaving the bar. The Y gang members jumped on Acosta and beat him up when he was leaving the bar. The word on the street was that the X gang members were then going to take care of Y gang because of what happened to Pete."¹⁴

¹³ Code at § 69.13 [Breach of the Peace: Retail Establishment].

¹⁴ Petitioner's Exhibit No. 12, sworn witness statement.

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 9

This was the May 25, 2009 reported incident. The breach of the peace report simply states "two males in the place of A & M had a difference of manner. They had a fight"¹⁵ The evidence indicates that Respondent was aware of the criminal activity.

Further, the fact that the bar does not have any security personnel capable of handling such activity makes the situation more problematic. It is unlike any security personnel would be able to handle violent gang activity, but the bar's "security" personnel are a fusion of friends, untrained persons, and one unarmed security guard, all the more reason the police should have been called upon the initial assault on June 22, 2009. Respondent is required by the Code to control the licensed premises.¹⁶ The ALJ concludes Respondent exercised improper supervision of persons permitted to be on the licensed premises

B. Failure to report breach of the peace incidents

A failure to promptly report to the Commission a breach of the peace occurring on the licensed premises is a ground for cancellation under the Code.¹⁷ The evidence is quite clear that Respondent has failed in this regard. Out of the 16 reported incidents requiring police response, only three have a report on file. To this effect, the Respondent has violated the Code by failing to comply with his duty to promptly report a breach of the peace occurring on the licensed premises. This violation is designated as a health, safety and welfare violation by the agency's rules. Further, the ALJ agrees with Petitioner that a filing of a sheet, devoid of the required information, does not accomplish the task of filing a report.

C. Subterfuge and Respondent's management of the bar

The permittee did not make a formal appearance at the hearing, nor did he testify. The ALJ was informed, on the record, that "Samuel Rascón was not there [referring to the bar on

¹⁵ Petitioner's Exhibit no. 8, breach of the peace report received May 26, 2010.

¹⁶ Code at § 69.13.

¹⁷ *Id.* at § 61.71 (a)(31).

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 10

June 22, 2009] and he doesn't know anything." This is of import because it represents the permittee's involvement, or lack thereof, in the management and control of the bar.

The fact that Respondent claims he is unaware of the criminal activity at the club is noteworthy, and the ALJ finds it unpersuasive. The Code places on the Respondent the duty to manage and control all aspects of the bar's operations. It is apparent from the evidence of record, and detailed by Mr. Garcia, that the permittee's role is minimal, if any. Mr. Garcia stated to the Sheriff's Department via a sworn statement that "I am co-owner of the A & M bar. The bar is also owned and managed by my mother Ofelia Marmolejo and my uncle Samuel Rascón."¹⁸

The ALJ concludes that the permittee does not have or maintain exclusive control of the licensed premises in every phase of storage, distribution, possession and sale of alcohol beverages. The ALJ further concludes that Mr. Rascón is engaging in a scheme with his sister-in-law Ms. Marmolejo and nephew Mr. Garcia which has surrendered control of the licensed premises to other family members. This activity is unlawful.¹⁹

Based on the evidence of record and enumerated in this proposal for decision, the ALJ finds a breach of the peace occurred on the licensed premises which was not beyond the permittee's control and resulted from the improper supervision of persons on the licensed premises. The ALJ further finds the Respondent has failed to report to the commission breach of the peace incidents occurring on the premises; and further finds that permittee is engaged in subterfuge. Therefore, Respondent has conducted his business in a manner which warrants cancellation based on the peace, morals, health, or safety of the general public. The ALJ recommends cancellation of his TABC permits.

¹⁸ Peritioner's Exhibit No. 13, sworn witness statement.

SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 11

IV. FINDINGS OF FACT

1. A hearing convened on April 7, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Samuel Rascón d/b/a A & M's (Respondent).
2. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
3. Staff was represented by Martin Wilson, staff attorney. Respondent was represented by Joseph J. Rey, attorney.
4. The record closed on April 7, 2010.
5. The A & M's bar operates under the authority of a wine and beer retailers on premise permit, which includes a retailer's on premise late hours license, number BG-684091, issued in February 2008.
6. The bar is situated in Socorro City, County of El Paso, Texas.
7. A double homicide occurred in the parking lot adjacent to the building on June 22, 2009.
8. The men killed were regular costumers.
9. The men killed had gang affiliations.
10. Employees of the bar, specifically Michael Luna and Adrian Garcia, control and direct the ingress and egress from the parking lot.
11. The patrons of the bar park on the parking lot at issue as directed by a large sign which states "A&M bar parking."
12. Bar management was aware that there was a large gang presence on June 22, 2009.
13. On June 22, 2009, an assault occurred inside the bar.
14. The assault participants were not removed from the premises and law enforcement was not called.
15. The physical altercation inside the bar was between a man and a woman. The woman was the girlfriend, or common-law wife, of one of the men arrested for the capital murder. She was underage and drinking inside the bar.

¹⁹ Code at § 109.53 [Control of Premises; Subterfuge].

- 16. The bar employees one unarmed security guard.
- 17. Out of the 16 reported incidents requiring police response, only three have a breach of the peace report on file with the TABC:

Date	Activity	Report filed
05-02-07	Aggravated assault inside	No
08-18-08	Assault inside	Yes-no details
10-05-08	Assault/fight disturbance with gun inside	No
11-06-08	Assault/fight inside and outside	No
01-28-09	Assault/fight disturbance inside	No
05-11-09	Assault/group fight outside	No
05-25-09	Assault inside	Yes-incomplete
06-22-09	Assault inside and Homicides outside	Yes-per TABC
07-10-09	Public intoxication/disturbance inside	No
08-01-09	Public intoxication inside	No
08-17-09	Assault inside	No
09-07-09	Stabbing inside	No
10-05-09	Public intoxication inside	No
11-09-09	Disturbance inside	No
11-12-09	Narcotic activity inside	No
12-07-09	Disturbance inside	No

- 18. Adrian Garcia works at the bar full time and he manages the bar with his mother Ofelia Marmolejo.
- 19. Adrian Garcia's duties are:
 - He hires the men;
 - He opens and closes the bar;
 - He places orders;
 - He pays employees.
- 20. Ofelia Marmolejo's duties are:
 - She hires the women;

- She opens and closes the bar;
- She places orders;
- She pays employees.

21. The daily running of the bar is as follows:

- No personnel manual is in existence.
- Personnel records are not kept.
- Mr. Rascón receives a quota from the sales.
- Mr. Garcia gets paid a percentage of the sales at the end of the day.
- Mr. Garcia determines his take-home pay for the day.
- Ms. Marmolejo determines her take home pay for the day.
- All transactions are done in cash.
- The business does not have any kind of banking accounts.
- There is no end-of-the-day closing system in place. Mr. Garcia and Ms. Marmolejo pay the waitresses and keep the remaining cash.

22. Samuel Rascón is not regularly at the bar. He is seldom at the bar.

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 all matters relating to conducting a hearing in this proceeding, including the preparation of 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.
3. Notice of hearing was provided pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.401 and Code § 11.63.
4. Based upon the Findings of Fact, a breach of the peace occurred on June 22, 2009, on the licensed premises which was not beyond Respondent's control and resulted from Respondent's improper supervision, in violation of Code § 69.13.

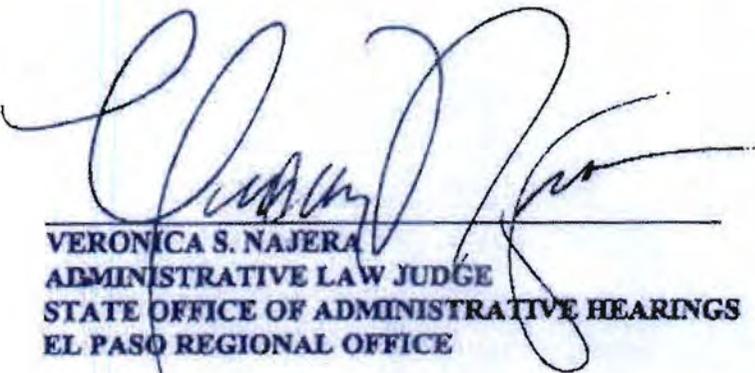
SOAH DOCKET NO. 458-10-2043

PROPOSAL FOR DECISION

PAGE 14

5. Based upon the Findings of Fact, Respondent failed to report breach of the peace incidents in violation of Code § 61.17(31).
6. Based upon the Findings of Fact, Respondent engaged in subterfuge in violation of Code § 109.53.
7. Based upon the Findings of Fact, Respondent conducted his business in a manner which warrants the cancellation of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people, pursuant to Code § 61.71(a)(17).
8. The ALJ recommends cancellation of Respondent's wine and beer retailers on premise permit, which includes a retailer's on premise late hours license, number BG-684091.

SIGNED June 4, 2010.



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