

DOCKET NO. 614563

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Protestant/Petitioner	§	
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF	§	
JANITZIO SEAFOOD LLC	§	
D/B/A OSTIONERIA MICHOCAN #7 FOR	§	ALCOHOLIC
FOR PERMITS MB, LB, CERTIFICATE FB,	§	
Applicant/Respondent	§	
	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-13-1702)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of June, 2013, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Lindy Hendricks presiding. The hearing convened on January 25, 2013 and the SOAH record closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on March 13, 2013. 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. Exceptions were filed by Petitioner on March 28, 2013. Respondent replied on April 10, 2013. On April 18, 2013, the ALJ responded to the exceptions and filed an Amended Proposal for Decision.

After review and due consideration of the Proposal for Decision, exceptions and reply, and the Amended Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Amended Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

In discussing the significance of “restrained” cases under Alcoholic Beverage Code (Code) §106.14, the ALJ incorrectly cites the applicable provision of the Commission’s rules applying that Code provision. The correct citation, as stated in Petitioner’s Exceptions, is Rule §34.4, Attribution of Actions of Employee to License or Permit Holder. Former Rule 50.10 was repealed and replaced with a new Rule 50.10, Requirements for Records, Reports and Notices

applicable to seller server training. The repeal of the old Rule 50.10 and the adoption of the new Rule 34.4 were effective on January 1, 2011. The details of the different rules applying Code §106.14 are not determinative of this case since the ALJ relies on the Code provision itself in finding that “those restrained cases carry little weight in determining denial of a permit”.

All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

THEREFORE, IT IS ORDERED that the application of Janitzio Seafood LLC d/b/a Ostioneria Michoacan #7 for original Mixed Beverage and Mixed Beverage Late Hours Permits and for an original Food and Beverage Certificate be **GRANTED**.

This Order will become **final and enforceable** on the 4th day of July, 2013, **unless a Motion for Rehearing is filed by the 3rd day of July, 2013.**

SIGNED this the 10th day of June, 2013, at Austin, Texas.



Sherry K-Cook, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 10th day of June, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

Janitzio Seafood LLC
d/b/a Ostioneria Michoacan #7
APPLICANT/RESPONDENT
8235 Mission Estates
Houston, Texas 77083
VIA FIRST CLASS MAIL, CERTIFICATION NO. 7012 0470 0001 3300 7531

Ronald Monshaugen
Albert Van Huff
ATTORNEYS FOR RESPONDENT
1225 North Loop West, Suite 640
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Ramona Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: ramona.perry@tabc.state.tx.us

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 13, 2013

Sherry Cook
Acting Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-13-1702; Texas Alcoholic Beverage Commission v. Original Application of Janitzio Seafood LLC d/b/a Ostoneria Michoacan #7

Dear Ms. Cook:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

LH/dg
Enclosure

xc Ramona Perry, Texas Alcoholic Beverage Commission, 427 20th Street, Suite 600, Houston, TX 77008 -
VIA REGULAR MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731 - **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731 - **VIA REGULAR MAIL** (with Certified Evidentiary Record and _Hearing CD/s)
Ronald Monshaugen and Van Huff Law Office, 1225 North Loop West, Ste 640, Houston, TX 77008 -
VIA REGULAR MAIL

RECEIVED

MAR 18 2013

TABC HOUSTON
LEGAL

2020 North Loop West Suite 111 Houston, Texas 77018
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Al Van Huff. Staff was represented by Ramona Perry, staff attorney. The record closed at the conclusion of the hearing that day. Issues of notice and jurisdiction are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

Staff protests the original application on the basis of Section 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code), which provides that 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:

- the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency.

Staff also alleges that the Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so in violation of Code § 11.46(a)(10).

As related to the sale of alcohol to minors, the Code allows certain administrative violations to be “restrained” and the permittee is exempt from administrative action under Section 50.10 of the Texas Alcoholic Beverage Rules (Rules). Section 106.14 of the Code provides that the actions of an employee shall not be attributable to the employer if:

- (1) The employer requires its employees to attend a commission-approved seller training program;
- (2) The employee has actually attended such a training program; and
- (3) The employer has not directly or indirectly encouraged the employee to violate such law.

As stated in Section 34.1 of the Rules, a permittee’s violation history may be reviewed for the purposes of determining sanctions offered in settlement and before filing a contested case. The review period is 36 months for health and safety violations and 24 months for regulatory violations.

In a protest hearing, the burden of proof is on the protesting party to show by a preponderance of the evidence that the permit or permits should not be issued.

B. Arguments and Evidence

1. Protestant's Case

Staff opposes the issuance of the permits because it alleges that Applicant will operate its business in a manner that is contrary to the general health and safety of the people. Staff presented the testimony of Agent Peter Gonzales. Agent Gonzales testified that Applicant is seeking a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Food and Beverage Certificate for a location at 1817 Wirt Road in Houston, Texas. According to Agent Gonzales and as reflected in the original application, Juan Jaimes is the president and sole member/manager of Janitzio Seafood LLC. The original application states that this business would be a restaurant.

Agent Gonzales testified that Staff is protesting this original application due to the violation history of permits held by Mr. Jaimes. Evidence was presented that Mr. Jaimes is the holder of permits for Huracan Ballroom and Bravo Night Club. Agent Gonzales testified that administrative violations are categorized as either public safety (health and safety) violations or non-public safety (regulatory) violations. He explained that violations involving the sale or possession of alcohol by minors are considered health and safety violations. Agent Gonzales testified that Huracan Ballroom and Bravo Night Club have multiple health and safety violations and that Mr. Jaimes was present when four such violations occurred.

Documentary evidence shows that Huracan Ballroom obtained its permits in June 2001. Mr. Jaimes was employed as a manager in July 2000, and in August 2009, he became the owner. This establishment has incurred eleven violations since 2004. After Mr. Jaimes became the owner, Huracan Ballroom had three regulatory violations. The health and safety violations involved minors possessing alcohol and occurred in 2004 and 2005.

Bravo Night Club obtained its permits in September 2009. Its violation history shows eleven violations, and six of those violations involved the sale, consumption, or possession of alcohol by a minor. Four of those violations were “restrained” pursuant to Code § 106.14. A “sale to minor” violation was settled in 2010 for a \$1,500 civil penalty and a “permitting minor to possess” violation was settled in 2012 for a \$1,800 civil penalty.

Staff argued that the permits should be denied because Mr. Jaimes will jeopardize the health, safety, and welfare of the people given his history of health and safety violations. Staff argues that his past history is evidence that Applicant will continue to operate in a manner that is detrimental to the people.

Staff also offered a criminal indictment against Mr. Jaimes and an order of deferred adjudication against Mr. Jaimes’ mother to support the allegation that Applicant will sell in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so.

2. Applicant’s Case

Applicant argues that restrained cases, health and safety violations that occurred more than 36 months ago, and regulatory violations that occurred more than 24 months ago should not be considered. Applicant describes the Huracan Ballroom and Bravo Night Club as very large nightclubs, whereas the proposed business is a restaurant. Applicant asserts that the types of violations associated with minors attempting to get alcohol in a large nightclub will not occur at a restaurant. Finally, Applicant offered a dismissal order, showing the criminal charge against Mr. Jaimes was dismissed, and argued that the indictment and deferred adjudication are not relevant to this protest. Applicant argued that Mr. Jaimes has held permits since 2001 and 2009 and has been allowed to settle every administrative case. None resulted in cancellation and, therefore, this original application does not warrant a denial.

C. ALJ's Analysis

It is the Staff's position that Mr. Jaime's history of health and safety violations, involving minors and his presence when the violations occurred indicate disregard for the law. Staff believes that Applicant will conduct his business in a manner contrary to the general welfare, peace, and safety of the people at the new business if the application is granted. Additionally, Staff argues that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so. After review of the evidence, the ALJ finds there is insufficient evidence to deny the original application.

In reviewing the violation history, the ALJ was not limited by the 24 or 36-month review period because this is a contested case regarding the protest of an original application. Therefore, the ALJ considered Applicant's entire permit history in evaluating the original application. Although restrained cases were considered as evidence of Mr. Jaimes' permit history to show that the violations occurred, the ALJ gives little weight to restrained cases. The ALJ finds that if the statute holds permittees not responsible for the actions of their employees in restrained cases and no suspension or civil penalty is assessed, then those restrained cases carry little weight in determining denial of a permit.

Under the totality of circumstances, the remaining permit history does not warrant the denial of this original application. The TABC repeatedly determined that Mr. Jaimes had taken measures to prevent the sale of alcohol to minors and exempted him from administrative action when the violations occurred. Therefore, the ALJ finds that the prior violation history does not show a propensity to disregard the law.

Additionally, the ALJ finds that the manner of operating large nightclubs will not necessarily indicate how the Applicant will operate a restaurant. The proposed business will be a restaurant with a food and beverage certificate. By statute, a food and beverage certificate requires the business to have 50% or less of the gross receipts from the sale of mixed beverages. This distinguishes the proposed business from Huracan Ballroom and Bravo Night Club. It is more likely than not that the manner of operating a restaurant will be different from a nightclub whose primary business is the

sale of mixed beverages. Therefore, the ALJ does not find that the manner in which the Applicant may conduct his business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people.

Staff offered an indictment and deferred adjudication to support the allegation that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so. An indictment is merely an allegation and not evidence that Mr. Jaimes committed an offense. The deferred adjudication was for Mr. Jaimes' mother. The evidence is not clear as to whether Mr. Jaime's mother will be involved in the business. Moreover, the indictment and deferred adjudication are unrelated to the sale of alcohol. The criminal charge from the indictment was dismissed. And collectively, the indictment and deferred adjudication do not establish the manner in which Applicant may sell liquor if the permits are granted. Therefore, the ALJ does not find the evidence sufficient to establish Applicant will sell liquor in a manner contrary to law or will knowingly permit someone to do so.

For these reasons, the ALJ recommends that the permits be granted. In support of this recommendation, the ALJ makes the following proposed findings of fact and conclusions of law.

III. PROPOSED FINDINGS OF FACT

1. Juan Jaimes, on behalf of Janitzio Seafood LLC d/b/a Ostioneria Michoacan #7, filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Food and Beverage Certificate for a premise located at 1817 Wirt Road, in Houston, Harris County, Texas.
2. TABC's Staff contested the issuance of the permits on the basis that the manner in which Applicant may conduct its business warrants the refusal of the permits based upon the general welfare, health, peace, morals, and safety of the people and the public sense of decency and that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so
3. On December 21, 2012, the TABC referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

4. On January 2, 2013, Staff issued a notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.
5. On January 25, 2013, a public hearing was convened in Houston, Texas. Administrative Law Judge (ALJ) Lindy Hendricks presided. Applicant was represented by attorneys Ronald Monshaugen and Al Van Huff. Staff was represented by Ramona Perry, staff attorney. The hearing concluded and the record was closed the same day.
6. Mr. Jaimes has operated two other TABC-permitted premises in Texas since 2001 and 2009, respectively.
7. All administrative violations attributed to those businesses have resulted in written warnings, suspensions with an opportunity to pay a civil penalty, or the cases being restrained.
8. The violation history does not show a propensity to disregard the law because Mr. Jaimes had taken measures to prevent the sale of alcohol to minors and was exempted from administrative action.
9. Mr. Jaimes' permit history for the nightclubs is insufficient to establish Applicant will operate a restaurant in a manner that would warrant refusal of the permits.
10. The proposed business will be a restaurant with a food and beverage certificate which requires the business to have 50% or less of the gross receipts from the sale of mixed beverages, whereas a nightclub's primary business is the sale of mixed beverages.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and Section 11.46(a)(8).
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 Texas Government Code Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act and Texas Government Code Sections 2001.051 and 2001.052.
4. Based on the foregoing findings of fact and conclusions of law, a preponderance of the evidence does not show that the manner in which Applicant proposes to conduct its business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people or that Applicant will sell liquor in a manner contrary to law.
5. Based on the foregoing findings and conclusions, the original application for a Mixed

Beverage Permit, a Mixed Beverage Late Hours Permit, and a Food and Beverage Certificate should be granted.

Signed March 13, 2013.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS