

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-9921**

File: 20-572957; Reg: 20090689

AU ENERGY, LLC,  
dba Admiral Callaghan Shell  
798 Admiral Callaghan Lane  
Vallejo, CA 94591,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: October 15, 2021  
Telephonic

**ISSUED OCTOBER 19, 2021**

*Appearances:*      *Appellant:* Jade Quintero, of Solomon, Saltsman & Jamieson, as  
counsel for AU Energy, LLC.,

*Respondent:* Sean Klein, as counsel for the Department of  
Alcoholic Beverage Control

**ORDER**

AU Energy, LLC, doing business as Admiral Callaghan Shell (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)<sup>1</sup> suspending its license for 15 days because it sold an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code section 25658(a).

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<sup>1</sup> The decision of the Department, dated June 1, 2021, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 27, 2016.

There is no record of prior departmental discipline against the license.

On December 24, 2020, the Department instituted a single-count accusation against appellant charging that on May 1, 2020, its clerk, Charles Calvin Jr. (the clerk) sold alcoholic beverages to 17-year-old G.A. (the minor).<sup>2</sup>

At the administrative hearing held on March 10, 2021, documentary evidence was received and testimony concerning the violation charged was presented by the minor and Department Agent Guadalupe Ochoa.<sup>3</sup> Matthew Makarem, loss prevention and employee development manager for appellant, testified on its behalf.

Testimony established that on May 1, 2020, between 4:00 p.m. and 5:00 p.m., the minor drove to the licensed premises with her 20-year-old cousin, Daniela, and 18-year-old friend, Aileen. The car belonged to Aileen. At the licensed premises, the minor took a 12-pack of Modelo beer and a 23.5-oz Mike's Harder Watermelon to the counter. (Exh. 2; Finding of Fact (FF) ¶¶ 5-6.)

The clerk asked for identification (ID) and the minor showed him her fake Mexican Matricula Consular ID card. The fake ID was not recovered nor entered into evidence in this matter. As part of the Department's investigation, attempts were made to obtain the fake ID but those attempts were unsuccessful. (RT 54; RRB at p. 2.) The

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<sup>2</sup> We refer to the minor by her initials only for privacy reasons.

<sup>3</sup> Agent Ochoa was alerted about the traffic accident soon after it occurred. On behalf of the Department, she participated in a follow up TRACE (Target Responsibility for Alcohol Connected Emergencies) investigation, to determine where and how the minors obtained alcoholic beverages, because the accident involved great bodily injury, alcoholic beverages, and minors.

clerk looked at the card for approximately five seconds then completed the sale without asking any age-related questions. The minor also purchased gasoline as part of the sale. After pumping gas into the vehicle, the minor departed with her two companions.

(FF ¶ 7.)

The three young women then stopped at a Bonfare Market where they purchased additional alcoholic beverages. Over the course of the next few hours, Aileen and Daniela consumed some or all of the alcoholic beverages purchased at the licensed premises and Bonfare. The minor did not consume any of these beverages.

(FF ¶¶ 8-9.)

Later that evening, at approximately 8:00 p.m., the three were joined by a friend of Aileen named “Yanna” who had previously been in a car with other people. Subsequently, the car with the four women missed a turn in the road and collided with a tree. Agent Ochoa testified that the CHP report indicated that Aileen was the driver at the time and that she was subsequently arrested for driving while intoxicated. (FF ¶¶ 10-11.)

The administrative law judge (ALJ) issued a proposed decision on March 31, 2021, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on May 21, 2021, and issued a certificate of decision eleven days later.

Appellant then filed a timely appeal contending that the clerk’s reliance on the Mexican ID was reasonable and established a defense under Business and Professions Code section 25660.

## DISCUSSION

Section 25660 provides:

(a) Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.

¶ . . . ¶

(c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

(Bus and Prof. Code §25660.) The burden in such a case is on the party asserting the defense.

In *Masani*, the court said:

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

*(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

*(2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (Masani).)*

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but

is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.<sup>4</sup>

Reasonable reliance on a fake ID cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*)). The statute provides an affirmative defense, and “[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660.” (*Ibid.*)

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra* 189, at; *5501 Hollywood, supra*, at 753.) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*, at 189; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, at 753.) Reasonable

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<sup>4</sup> California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, supra*, at pp. 753-754.)

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra*, at p. 1445; *5501 Hollywood, supra*, at pp. 753-754), and this Board may not go behind that factual finding. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Masani, supra*, at page 1437.)

In sum, the law requires three things to establish a defense under section 25660: (1) that a clerk exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances, (2) that the person presenting the ID look like they could be 21, and (3) that the clerk make a reasonable inspection of the identification offered.

The difficulty in this case, and as in many other cases involving a fake ID, is that the fake ID used by the minor is not in evidence. To establish proof that reliance was reasonable, the Appeals Board has ruled consistently that when the false identification can not be produced the section 25660 defense must fail.

Even if the minor had admitted that he possessed false identification, the absence of any evidence of what it might have been dooms appellant's section 25660 defense. With no opportunity to view the supposed false identification, neither the ALJ nor this Board could make any assessment whatsoever as to whether a clerk may have reasonably relied upon it.

(*Circle K Stores, Inc.* (2003) AB-8116, at p. 4; also see: *Ralphs* (2011) AB-9121; *NAV Food Store* (2011) AB-9071; *7-Eleven/Waraich* (2010) AB-9055; *Station 81 Holdings* (2009) AB-8822; *Fulton & Fulton, Inc.* (2008) AB-8638.)

The ALJ made the following findings on whether reliance on the fake ID in this case was reasonable:

7. Respondent had the burden of proof that all elements of 25660 were met in order to prevail with that affirmative defense. Respondent did not present any evidence that any of the Mexican identification cards, especially the type, format, and style [the minor] testified she had, did, in fact, contain physical descriptors as required under 25660. Respondent's clerk, Calvin, who still works for respondent, did not testify at the hearing so as to indicate whether or not he understood bona-fide identifications must include a physical description of the person presenting the identification for inspection and/or whether or not [the minor]'s identification had such component.

8. Also, as to a defense under section 25660, the false identification used by [the minor] was never recovered during the course of the investigation. It was not made an exhibit at the hearing and the ALJ did not have any opportunity to see it or examine it to assess whether Calvin's reliance on it was reasonable. In *Ralphs Grocery* (2011) AB-9121 p.6, the ABC Appeals Board stressed the importance of being able to examine the actual false identification stating: "It is the importance of such corroborating evidence that has led the Appeals Board to rule consistently that, when the false or spurious identification can not be produced, the section 25660 defense must fail. ( citations omitted)." As the false identification was not able to be produced in this matter so as to allow the ALJ to examine it to determine if it had all the requisite components and Calvin's reliance on it was reasonable, a defense to the accusation under section 25660 was not established.

(Determination of Issues, ¶¶ 7-8.) We agree. Without evidence that the fake ID contained a description of the minor, as well as evidence that the clerk compared that description to the person before him, any assertion that reliance is reasonable is purely

speculative. Furthermore, without the actual fake ID in the record, a 25660 defense must fail.

In *Masani*, the court reversed a decision of the Appeals Board which had, in turn, reversed a decision of the Department which had held that the seller of alcoholic beverages did not reasonably rely on false identification presented by a 19-year-old minor. “[T]he Department ALJ found, as a question of fact, there was no reasonable reliance on the particular ID in this case. In reaching the contrary conclusion the Board impermissibly reweighed the evidence and substituted its independent judgment for the Department’s.” (*Masani, supra*, at p. 1437.)

Appellant now asks the Board to do what the *Masani* court said it should not. We must decline.

#### ORDER

The decision of the Department is affirmed.<sup>5</sup>

SUSAN A. BONILLA, CHAIR  
MEGAN McGUINNESS, MEMBER  
SHARLYNE PALACIO, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>5</sup> This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# APPENDIX

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION  
AGAINST:**

AU ENERGY, LLC  
ADMIRAL CALLAGHAN SHELL  
708 ADMIRAL CALLAGHAN LANE  
VALLEJO, CA 94591

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)  
Under the Alcoholic Beverage Control Act

CONCORD DISTRICT OFFICE

File: 20-572957

Reg: 20090689

**CERTIFICATE OF DECISION**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on May 21, 2021. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after July 12, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: June 1, 2021



Matthew D. Botting  
General Counsel

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

AU Energy, LLC	}	File: 20-572957
Dbas: Admiral Callaghan Shell	}	
708 Admiral Callaghan Lane	}	Reg.: 20090689
Vallejo, CA 94591	}	
	}	License Type: 20
Respondent,	}	
	}	Word Count Estimate: 29,219
	}	
	}	Rptr: Dianne Mc Givern, CSR-7576
Regarding Its Type-20 Off-Sale Retail Beer and Wine	}	iDepo Reporting Services
License Under the State Constitution and the Alcoholic	}	
Beverage Control Act.	}	
<hr/>		<b>PROPOSED DECISION</b>

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, (hereafter the "ALJ") heard this matter via a video conference on March 10, 2021.

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on March 10, 2021.

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (hereafter "the Department")

Ralph B. Saltsman and Andrew Grassel, attorneys-at-law, of Solomon, Saltsman and Jamieson, represented licensee-respondent AU Energy, LLC. (hereafter "respondent")

As specified in the Department's accusation, it seeks to discipline respondent's license on the following grounds:

Count 1: "On or about May 1, 2020, respondent-licensee's agent or employee, Charles Calvin, Jr., sold, furnished, gave, or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: a 12-pack of beer, a 23.5 oz Smirnoff Ice Smash, and a 23.5 oz Mike's Harder Watermelon, to Gabino-Aguilar, a person under the age of 21, in violation of California Business and Professions Code section 25658(a)."<sup>1</sup> (Exhibit 1: Pre-hearing pleadings)

The evidence established the minor's full name was Angelica Asucena Gabino-Aguilar.

### **FINDINGS OF FACT**

1. The Department filed the accusation on December 24, 2020. On January 8, 2021, the Department received Respondent's Notice of Defense and Special Notice of Defense. The Department set the matter for a hearing.
2. On October 27, 2016, the Department issued respondent a type-20 off-sale retail beer and wine license for its premises as captioned above. (hereafter the licensed premises) That license permitted respondent to retail in beer and wine for consumption off the licensed premises.
3. Respondent has no record of any disciplinary action under the current license.
4. Angelica Asucena Gabino-Aguilar (hereafter Gabino-Aguilar) was born on July 17, 2002. She testified at the hearing regarding certain activities of her that occurred on May 1, 2020.
5. On May 1, 2020, at approximately 4:00 p.m. to 5:00 p.m., Gabino-Aguilar, then 17 years old, her 20-year old cousin, Daniela Gomez-Carrizales (hereafter Gomez-Carrizales), and her friend, 18-year old Aileen Vigel-Hernandez, (hereafter Vigel-Hernandez), drove to the licensed premises in Vigel-Hernandez's car.
6. At the licensed premises, a convenience market and gas station, Gabino-Aguilar took some Modelo beer and Mike's Hard, both types of alcoholic beverages, to the sales counter to purchase. Gomez-Carrizales and Vigel-Hernandez were also in the licensed premises with Gabino-Aguilar.

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<sup>1</sup> All further statutory section references are to the California Business and Professions Code unless otherwise noted.

7. Respondent's sales clerk, Charles Calvin, Jr. (hereafter Calvin), asked Gabino-Aguilar for identification. She gave him her false Mexican residency/identification card as proof of age. Calvin held and inspected the card for about five seconds. He did not ask Gabino-Aguilar any questions about her identification. He did not ask her any questions to determine her age. The sale of alcoholic beverages and some gasoline was completed and she left the licensed premises with her two companions. Once outside, after they pumped their gas, they drove away.

8. The three young women next stopped at a Bonfare market where they purchased more alcoholic beverages.

9. During the course of the next few hours, Gomez-Carrizales and Vigel-Hernandez consumed some or all of the alcoholic beverages purchased from respondent's premises and/or from the Bonfare market. Gabino-Aguilar did not consume any of the alcoholic beverages purchased at respondent's store or at the Bonfare market.

10. Later that evening, at approximately 8:00 p.m., the young women were joined by a fourth female companion, identified as "Yanna". Yanna, a friend of Vigel-Hernandez, was previously in another car with other people.

11. Approximately four or five hours after Gabino-Aguilar, Gomez-Carrizales, and Vigel Hernandez purchased their alcoholic beverages and after Yanna joined their group, the car holding the four women missed a turn in the roadway and collided with a tree. Gabino-Aguilar was not driving the car at that time. Gabino-Aguilar testified Yanna was the actual driver at the time of the accident. Gabino-Aguilar testified Yanna may have consumed some alcohol before she joined their group, but she did not consume any alcoholic beverages they purchased at the licensed premises or at the Bonfare market. Alcoholic Beverage Control Agent Ochoa (hereafter Agent Ochoa) testified the California Highway Patrol (hereafter CHP) report on the accident determined Aileen Vigel-Hernandez was the driver at the time of the accident and was arrested/charged with driving while intoxicated.

12. Agent Ochoa was alerted about the traffic accident soon after it occurred. On behalf of the Department, she participated in a follow up TRACE investigation<sup>2</sup> because the accident involved great bodily injury/death, alcoholic beverages, and minors. Based upon her investigation, that included viewing surveillance video from the licensed premises and interviewing witnesses, including Gabino-Aguilar, Gomez-Carrizales, and respondent's

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<sup>2</sup> TRACE stands for Target Responsibility for Alcohol Connected Emergencies. Agent Ochoa testified as part of that ABC program/unit, she investigates traffic accidents that involve minors and alcoholic beverages, primarily focusing on determining where and how the minors obtained alcoholic beverages.

sales clerk, Calvin, Agent Ochoa concluded Gabino-Aguilar purchased alcoholic beverages from respondent's licensed premises using a false Mexican identification and thereafter bought more alcoholic beverages at a Bonfare market.

13. Agent Ochoa interviewed Gabino-Aguilar on at least three different occasions regarding where and how Gabino-Aguilar obtained alcoholic beverages prior to the accident. Gabino-Aguilar gave conflicting or incomplete descriptions of the events that occurred that night. However, the last version she told to Agent Ochoa was most consistent with the licensed premises video and the other witnesses Agent Ochoa spoke with. On Agent Ochoa's last interview with Gabino-Aguilar, Agent Ochoa found, by way of a Google internet search, forms of Mexican identification that Agent Ochoa showed on her cellular phone to Gabino-Aguilar. Gabino-Aguilar recognized one of the Mexican identifications as the same type/format/style of false identification she showed respondent's sales clerk, Calvin.<sup>3</sup> Agent Ochoa had seen surveillance video from respondent's premises that captured Calvin's sale of alcoholic beverages to Gabino-Aguilar. The video showed Gabino-Aguilar displayed an identification to Calvin as part of that sales transaction. However, the video was not of that degree of precision/resolution to show any details about what type of identification was shown.<sup>4</sup> Agent Ochoa interviewed Calvin who did not deny he made the sale to Gabino-Aguilar.

14. The false Mexican identification contained Gabino-Aguilar's name, her photo, her address, and the city she was born in. Gabino-Aguilar testified she thought it contained her eye-color and hair color, but was very uncertain and unsure it stated her height and weight. Agent Ochoa, who was familiar with Mexican identification cards, testified the type of card Gabino-Aguilar pointed out as the type she had did not include a physical description of the person the card is issued to. The actual false identification, or any photo or facsimile thereof, was not recovered by Agent Ochoa nor presented at the hearing for examination as an exhibit. Gabino-Aguilar did not have it any more.

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<sup>3</sup> On Exhibit 2, page 26, of Agent Ochoa's report is a page containing eight various types of Mexican identifications Agent Ochoa showed to Gabino-Aguilar. The images of the various types of identifications are about 1" by 1 1/2". While they display the basic format of each type of identification, the reproduced images in the report are so small the resolution of the printing on them is difficult to see. Gabino-Aguilar selected the image of the identification shown circled in red in the lower right of the two columns of images. Agent Ochoa testified that card included the person's name, place of birth, date of birth, address, date of issuance, date of expiration and (Mexican) consulate where it was issued but did not include a physical description of the person.

<sup>4</sup> The surveillance video showing the sales transaction at the licensed premises was neither played at the hearing nor made an exhibit by any party. Agent Ochoa testified about its contents.

15. Respondent had a comprehensive training program for its new employees on various aspects, procedures, and policies of employment at the licensed premises. Part of that program focused on sales practices for age restricted products such as tobacco and alcoholic beverages. Respondent incorporated into its training relevant information posted on ABC's website. Respondent's employees were/are instructed to hold the identification to determine if it feels or looks false, to check the birthdate on the identification, to match the photo on the identification with the customer's appearance, and to make sure the physical description on the identification matches the person presenting it. Employees are instructed to scan the customer's identification through the sales register. If the register cannot electronically read the identification, the cashier is to manually enter the birthdate into the register and is encouraged to ask the customer his/her birthdate to confirm he/she is at least 21 years old. Foreign forms of government identification are examined in the same fashion as domestic forms of government identifications. However, foreign identifications cannot be read by the electronic scanner, so a manual inspection is required.

16. Respondent reviewed Calvin's performance regarding his sale of alcoholic beverages to Gabino-Aguilar and concluded Calvin did all respondent trained him to do with respect to alcoholic beverage sales, i.e. he had asked for, held, and inspected Gabino-Aguilar's identification and entered the birthdate on her identification into his sales register. In that he performed as trained, respondent concluded there was no cause to discipline him and he continues to work for respondent, but at another location. Respondent assessed Calvin as an over-all good employee. Calvin was not called by respondent as a witness at the hearing.

### **LEGAL BASIS OF DECISION**

1. Article XX, section 22, of the California Constitution and Business and Professions section 24200, subdivision (a), provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Business and Professions Code section 25660 provides that:

(a) Bona fide evidence of majority and identity of the person is any of the following:

(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.

(2) A valid passport issued by the United States or by a foreign government.

(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

5. Government Code section 11513, subdivision (d), states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

### **DETERMINATION OF ISSUES**

1. As to Count 1, cause for suspension or revocation of respondent's license does exist under Article XX, section 22, of the California State Constitution and Business and Professions Code sections 24200, subdivisions(a) and (b), because on May 1, 2020, respondent's employee, Charles Calvin, inside the licensed premises, sold beer and Mike's Harder, each alcoholic beverages, to Angelica Gabino-Aguilar, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established on May 1, 2020, respondent's clerk, Charles Calvin, sold alcoholic beverages, to-wit, beer and Mike's Harder, to Angelica Gabino-Aguilar, who was 17 years old.

3. However, respondent contended section 25660 provides a defense to a licensee or person accused of selling, furnishing, or giving an alcoholic beverage to a minor if the seller/furnisher asked for and reasonably relied on a minor's bona fide evidence of majority.

4. Section 25660 is an affirmative defense, so a licensee/seller has the burden of establishing all of its elements, namely, that bona fide evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.<sup>5</sup> To provide a defense, reliance on the document must be reasonable, that is, it was based on due diligence of the seller. Section 25660 applies to identifications actually issued by government agencies and identifications that are false replicas of government identifications.<sup>6</sup> A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or replica thereof if the appearance of the presenter of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.<sup>7</sup> The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.<sup>8</sup> Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the false identification.

5. In this instance, at the time of sale, Calvin asked for Gabino-Aguilar's identification and she presented him a false Mexican identification or consular card as proof of her age in order to purchase her alcoholic beverages. Under section 25660, the identification presented must be: "(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person." In this instance, there was insufficient persuasive evidence Gabino-Aguilar's false identification had the requisite physical "description" of her on it so as to qualify as a

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<sup>5</sup> *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

<sup>6</sup> *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

<sup>7</sup> *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

<sup>8</sup> *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155.

bona-fide identification. While Aguilar credibly testified the identification had her name, her photo, her address, a birthdate, and a city of birth, she was very uncertain whether or not it listed her height and weight.

6. The copy of the type/format of identification she indicated to Agent Ochoa she presented to Calvin, as seen in Exhibit 2, page 26 of 74, does not clearly indicate that type of identification lists the party's height, weight, or other physical descriptors. Agent Ochoa testified that, based on her experience, the Mexican identification cards she was familiar with, including the type/format Aguilar indicated she had, did not include physical descriptors of the person on the card.

7. Respondent had the burden of proof that all elements of 25660 were met in order to prevail with that affirmative defense. Respondent did not present any evidence that any of the Mexican identification cards, especially the type, format, and style Gabino-Aguilar testified she had, did, in fact, contain physical descriptors as required under 25660. Respondent's clerk, Calvin, who still works for respondent, did not testify at the hearing so as to indicate whether or not he understood bona-fide identifications must include a physical description of the person presenting the identification for inspection and/or whether or not Gabino-Aguilar's identification had such component.

8. Also, as to a defense under section 25660, the false identification used by Gabino-Aguilar was never recovered during the course of the investigation. It was not made an exhibit at the hearing and the ALJ did not have any opportunity to see it or examine it to assess whether Calvin's reliance on it was reasonable. In *Ralphs Grocery* (2011) AB-9121 p.6, the ABC Appeals Board stressed the importance of being able to examine the actual false identification stating: "It is the importance of such corroborating evidence that has led the Appeals Board to rule consistently that, when the false or spurious identification can not be produced, the section 25660 defense must fail. (citations omitted)." As the false identification was not able to be produced in this matter so as to allow the ALJ to examine it to determine if it had all the requisite components and Calvin's reliance on it was reasonable, a defense to the accusation under section 25660 was not established.

9. Based on the evidence presented, there was sufficient evidence to sustain Count 1 and insufficient evidence to establish a defense under section 25660.

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

## **PENALTY**

1. In assessing appropriate discipline for Count 1, California Code of Regulations, title 4, section 144 (hereafter “rule 144”) sets forth the Department’s penalty schedule. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.
2. Rule 144 permits imposition of a revised penalty based on the weighing of aggravating and mitigating factors. It contains a non-exhaustive list of some of those factors.
3. The Department recommended a 20 day license suspension. It argued the alcoholic beverage sale to Gabino-Aguilar involved a false Mexican identification that did not contain a physical description of her so no defense under section 25660 was established. It noted respondent did not call its clerk to testify as to what occurred involving his sale of alcoholic beverages to Gabino-Aguilar so could not establish whether his reliance on her false identification was reasonable or not. The Department also pointed out Gabino-Aguilar was only 17 years old when she made her purchase at the licensed premises and she wore sunglasses which the clerk should have asked her to remove so he could better assess her appearance/age. Further, it contended the subsequent traffic accident also warranted an aggravated penalty.
4. Respondent contended its clerk reasonably relied on the false Mexican government identification. Respondent also argued it had no prior disciplinary history and it thoroughly trained its employees responsible alcoholic beverage retailing practices. Respondent also argued Gabino-Aguilar was almost 18 years old and had used her false identification in order to secure a job at some unspecified business. Respondent contended dismissal was warranted, or, if the accusation was sustained, a 10 or 15 day license suspension was more appropriate.
5. Although the Department argued the resulting traffic accident was an aggravating factor, rule 144 does not mention that kind of occurrence as an aggravating factor. The Alcoholic Beverage Control Appeals Board in *Ralph’s Grocery* (2011) AB-9121 determined that in the case wherein a minor who purchased and consumed beer from the licensee’s store and was the driver at the time of a subsequent fatal accident, that accident did not establish a basis to aggravate a penalty for a violation of section 25658, subdivision (a). The Board concluded factors in aggravation and mitigation should focus on the transaction of the improper/illegal selling, giving or furnishing of the alcoholic beverage by the licensee to the minor and exclude events occurring sometime later and well outside the licensee’s control. The Appeals Board reaffirmed that principle in *RA Sushi Torrance Corp.* (2012) AB-9158. That case also involved a traffic accident that occurred sometime after a minor consumed alcoholic beverages at a licensee’s premises.

6. The Department did not cite any specific statute, case opinion, Department precedential decision, or regulation that expressly established a subsequent occurrence, like a traffic accident, is a factor in aggravation for an accusation charging a violation of 25658, subdivision (a).

7. However, in this case, even if a subsequent traffic accident was a basis for penalty aggravation, there was insufficient causal linkage established between the alcoholic beverages Gabino-Aguilar purchased at the licensed premises and the subsequent accident.

8. At the hearing, Gabino-Aguilar testified Yanna was driving at the time of the accident and that Yana had not consumed any of the alcoholic beverages Gabino-Aguilar purchased at the licensed premises or at the Bonfare market. Gabino-Aguilar testified Yanna may have consumed some alcoholic beverages before she joined their group.

9. Gabino-Aguilar did testify Vigil-Hernandez consumed some of the alcoholic beverages purchased at respondent's premises and/or the Bonfare market. Agent Ochoa testified Vigil-Hernandez was arrested by the CHP as the driver at the time of the accident. However, Agent Ochoa cited her report as the source of her testimony. While Agent Ochoa's report, Exhibit 2, at page 1 and page 9, indicated Vigil-Hernandez was arrested for drunk driving as a result of the CHP investigation into the accident, Agent Ochoa's report was merely citing the conclusion of the CHP report, a hearsay statement. The CHP report was not an exhibit at the hearing.<sup>9</sup> There was no evidence Agent Ochoa or ABC directly investigated the cause of the accident. The focus of the TRACE investigation resulting in Exhibit 2 was to determine where the alcoholic beverages came from, not the facts related to the later accident.

10. Respondent made a timely hearsay objection regarding Agent Ochoa's testimony regarding who the driver was at the time of the accident and Exhibit 2, especially as to that topic. Government Code section 11513, subdivision (d), indicates administrative hearsay cannot by itself, over objection, support a factual finding unless it would be admissible over objection in civil actions. Agent Ochoa's testimony about Vigil-Hernandez being the driver was taken from her ABC report which, in turn, merely recited the conclusion of the CHP's accident report. The CHP report was a hearsay statement in the form of a written document.

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<sup>9</sup> ABC's report consisted of 74 pages. Exhibit 2 consisted of pages 1 through 29 that reflected Agent Ochoa's efforts determining the source of the alcoholic beverages. Exhibit 3 was page 52 from the report, a photo image of a cashier station at respondent's premises. The balance of the report, which probably consisted of 13 attachments outlined on page 9, which included the CHP report, were not part of Exhibit 2.

11. The Department sought admission of Exhibit 2, Agent Ochoa's report, under an exception to the hearsay rule, presumably Evidence Code section 1271 as the business record of an act, condition or event or Evidence Code section 1280 as a record made by a public employee of an act, condition or event as evidence establishing, among other things, who the driver was at the time of the accident. Agent Ochoa did not investigate the accident and did not determine who was the driver at the time of the accident. No CHP report was presented at the hearing. Therefore, it was never addressed if the CHP report itself met Evidence Code section 1271's or 1280's criteria for being admitted as substantive evidence under an exception to the hearsay rule. As Agent Ochoa's testimony and Exhibit 2's discussion of who the driver was at the time of the accident was solely based on the hearsay statement/conclusion set forth in the CHP report, Exhibit 2's reciting of CHP's conclusion did not elevate it from a hearsay statement to substantive evidence under an exception to the hearsay rule. It remained a hearsay statement or, in this instance, it was admitted as and remained administrative hearsay. As there was no non-hearsay evidence presented at the hearing establishing Vigil-Hernandez was the driver at the time of the accident and no exception to the hearsay rule applied to Exhibit 2 to establish that specific fact, there was insufficient evidence identifying who the driver was at the time of the accident or how, if at all, the alcoholic beverages Gabino-Aguilar purchased at the licensed premises were connected, caused, or contributed to the accident.

12. Gabino-Aguilar was 17 years old on the date she made her purchase at respondent's premises. The "Appearance and actual age of minor" is listed in rule 144 as an aggravating factor. Obviously, Gabino-Aguilar was well under 21 years of age at the time of the sale at issue so that aggravating factor applied to this matter.

13. Rule 144 lists documented training of licensee and employees as a factor in mitigation. Respondent had an organized program for training its new employees, including detailed instructions regarding the responsible sales of alcoholic beverages and the checking of identifications related thereto.

14. Rule 144 acknowledges length of licensure without prior discipline or problems as a factor in mitigation. In this instance, respondent was only licensed since 2016, so its duration of discipline/problem free performance was not so lengthy as to warrant mitigation.

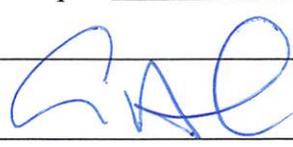
15. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the appropriate penalty had no merit.

**ORDER**

1. Count 1 of the accusation is sustained.
2. As to Count 1, respondent's license is suspended for 15 days.

Dated: March 31, 2021

  
David W. Sakamoto  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>05/21/21</u> _____