

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

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

VIVI LU, INC.
FULTON FOOD SHOP
1801 FULTON STREET
SAN FRANCISCO, CA 94117-1213

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-545496

Reg: 19088468

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 June 26, 2019. 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. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after August 27, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 17, 2019

RECEIVED

JUL 17 2019

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Vivi Lu, Inc.	}	File: 21-545496
Dbas: Fulton Food Shop	}	
1801 Fulton Street	}	Reg: 19088468
San Francisco, CA 94117	}	
	}	License Type: 21
Respondent	}	
	}	Word Count Estimate: 39,318
	}	
	}	Rptr: Max Contreras, CSR-13876
	}	(Atkinson-Baker Reporters)
<u>Regarding Its Type-21 Off-Sale General License Under</u>	}	
<u>the State Constitution and the Alcoholic Beverage</u>	}	
<u>Control Act.</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Francisco, California, on April 17, 2019.

Matthew Gaughan, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter, "the Department")

Richard D. Warren, attorney-at-law, represented respondent-licensee, Vivi Lu, Inc. (Hereafter, "Respondent")

After oral evidence, documentary evidence, and evidence by oral stipulation on the record were received at the hearing, the matter was argued by the parties and submitted for decision on April 17, 2019.

In the First Amended Accusation, the Department alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, Article XX, section 22, and Business and Professions Code section 24200, subdivision (a) and (b), based on the following grounds:¹

¹ All further section references are to the California Business and Professions Code unless noted otherwise.

Count 1: "On or about September 14, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: Four Loko malt beverage, to Michela Andrea [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)."

Count 2: "On or about September 14, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)."

Count 3: "On or about September 14, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)."

Count 4: "On or about November 2, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)."

Count 5: "On or about March 15, 2019, respondent-licensee's agent or employee Osama Qamer, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)."

At the hearing, the Department requested Count 3 and Count 4 be dismissed without prejudice. The Department indicated it was unable to obtain the presence of the alleged minors in those counts at the hearing as required under section 25666.

FINDINGS OF FACT

1. The Department filed the accusation on January 17, 2019. The Department received Respondent's Notice of Defense on January 30, 2019. The matter was set for a hearing. The Department subsequently filed a First Amended Accusation dated March 22, 2019.² (Exhibit 1: Pre-hearing pleadings)

² Analogous to civil procedure practice, the First Amended Accusation supersedes the original Accusation.

2. On August 8, 2014, the Department issued Respondent a Type-21 Off-Sale General license for its business known as Fulton Food Shop at 1801 Fulton Street, San Francisco, California. (Hereafter the "Licensed Premises") The Type-21 license permitted Respondent to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

3. Since being licensed, Respondent suffered the following disciplinary history:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
10-30-2014	Bus. & Prof. Code §§24200, subd.(a) and (b), 25658, subd.(a).	02/18/2015	15081991	15-day license suspension
03-03-2017	Bus. & Prof. Code §§24200, subd.(a) and (b), 25658 subd.(a).	02-27-2018	18086578	Pending

4. The the disciplinary matter under Reg.18086578 above was not yet final, but was on appeal as of the date of this hearing. The matter under Reg. 15081991 was final.

Findings Related to Count 1

5. On September 14, 2018, as Alcoholic Beverage Control Agents West, Jimenez, and Sanders drove past the Licensed Premises, Agent West noticed some youthful people exiting the Licensed Premises in possession of tall bags commonly used to carry tall cans of alcoholic beverages. The Licensed Premises was close to the University of San Francisco campus.

6. The agents promptly parked their car at a nearby shopping center and Agent West made his way across the street towards the Licensed Premises. He saw a youthful appearing female, [REDACTED] exit the Licensed Premises in possession of a bag appearing to have an item in it. (Exhibit 4: Photo of [REDACTED]) As she crossed a street, Agent West asked her if she had an alcoholic beverage in her bag and she said "yes". She indicated she had a 4-Loko.³ (Exhibit 5: Photo of 4-Loko can.) Agent West identified himself as an ABC agent and asked [REDACTED] her age. She said she was 21. Agent West asked for her identification, but [REDACTED] said she only had her school identification, but it only had her photograph and name on it. [REDACTED] eventually told Agent West her birthdate was December 12, 1999, making her 18 years old that day.

³ 4-Loko was a brand of alcoholic beverage labeled 14% alcohol by volume.

7. Agent West asked [REDACTED] to show him who sold her the 4-Loko. [REDACTED] agreed and Agent West followed her across the street into the Licensed Premises where she identified Respondent's clerk, Ahmad Rahim, (Hereafter Rahim) as the person who sold her the 4-Loko. Agent West took a photo of her identifying Rahim as the seller. (Exhibit 6: Photo of [REDACTED] identifying clerk)

8. Agent West informed Rahim he sold an alcoholic beverage to [REDACTED] who was a minor. Rahim told Agent West she showed him identification in the past. [REDACTED] denied she ever showed false identification at the Licensed Premises. [REDACTED] filled out an affidavit so stating. (Exhibit 7: Minor Affidavit)

9. Agent West had [REDACTED] open her small purse and wallet in her purse to search for any other identification she had. Agent West found no other form of identification in her purse, wallet, or on her person.

10. Agent Sanders, who assisted Agent West in the investigation, located Respondent's store video recording device on the Licensed Premises. Agent Sanders used his cell phone to make a copy of the relevant footage. Agent West later viewed the copied video which showed Rahim sell the 4-Loko to [REDACTED] who did not display any identification to him. (Exhibit 8: video recording)

11. [REDACTED] appeared at the hearing and was sworn as a witness. She indicated she had recently conferred with her own attorney who directed her to appear at the hearing. [REDACTED] conveyed she understood her criminal case related to this matter was over. She testified her birthdate was December 12, 1999 and she purchased an alcoholic beverage at the Licensed Premises on September 14, 2018 without showing any identification. However, [REDACTED] then invoked her Fifth Amendment right not to testify any further on the advice of her personal attorney.⁴ The hearing was recessed while counsel for the parties had an off-the-record phone conversation with [REDACTED] attorney. Thereafter, the parties represented to the ALJ that [REDACTED] attorney indicated [REDACTED] had not yet been formally charged with respect to her actions of September 15, 2018 at the Licensed Premises and based on the possibility that she might be criminally charged, [REDACTED] was going to invoke her Fifth Amendment privilege to refuse to testify any further regarding this matter. Based upon the representation [REDACTED] was still in jeopardy because her criminal matter or possible criminal case was unresolved and the fact that [REDACTED] did assert her

⁴ [REDACTED] private attorney was not present at the hearing. [REDACTED] appeared to be reading from a note in asserting her Fifth Amendment right not to testify and verbally indicated she was doing so at the direction and advice of her attorney.

right not to testify so as to incriminate herself, the ALJ excused her from testifying any further.⁵

Findings Related to Count 2

12. [REDACTED] was born on July 25, 2000. (Exhibit 9: photo of [REDACTED]) On September 14, 2018, she was 18 years old and went to visit some friends who attended the University of San Francisco. She and her friends went to the Licensed Premises. She had never been at the Licensed Premises on any prior occasion. Using her debit card, [REDACTED] purchased three Buzz Ballzs, a canned alcoholic beverage, from Respondent's clerk, Rahim.⁶ Rahim did not ask to see her identification and she did not show him any identification as part of her purchase. After she made her purchase, she left the Licensed Premises.

13. Once outside, [REDACTED] was promptly contacted by ABC Agent Sanders who thought she appeared youthful, possibly under 21 years old. Agent Sanders saw [REDACTED] buy the Buzz Ballzs.⁷ [REDACTED] initially told Agent Sanders she was 22 years old and presented him with a false identification. However, that identification made her only 21. Sanders checked with the California Highway Patrol, but it had no record of the license [REDACTED] presented. Agent Sanders told [REDACTED] lying to a police officer is a crime and she then admitted she was only 18 years old. [REDACTED] produced an authentic identification that confirmed she was 18 years old.

14. Agent Jimenez took [REDACTED] into the Licensed Premises where she identified Respondent's clerk, Rahim, as the person who sold her the Buzz Ballzs.

⁵ Respondent expressed its desire to cross-examination [REDACTED] especially regarding her Minor Affidavit wherein she affirmed she had never displayed any false identification at the Licensed Premises on any occasion.

⁶ "Buzz Ballz" was the brand name of an alcoholic beverage packaged in 200 ml. sealed cans that were somewhat spherical in shape with a pull top opening. [REDACTED] purchased one set of two cans that were pre-packaged together as one unit. Her purchase also included a third single Buzz Ballz can, but as it was opened by the time the agents detained [REDACTED], they discarded that can and kept the single pre-packaged two-can pack as evidence. (Exhibit 10: photo of Buzz Ballz cans, Exhibit 14: one "Buzz Ballz" pre-packaged two-can pack)

⁷ [REDACTED] made her purchase just after [REDACTED], referred to in Count 1, made her purchase.

15. [REDACTED] false identification was seized and presented at the hearing. (Exhibit A: false California Driver License). She never showed it or used it at the Licensed Premises at any time. She had used it approximately twice at other locations.⁸

16. The Licensed Premise's video surveillance footage, Exhibit 8, showed Rahim sell [REDACTED] three Buzz Ballzs. The video did not show [REDACTED] used or displayed any form of identification to Rahim in making her purchase.

Supplemental Findings

17. On November 2, 2019, Agent Sanders observed another person they suspected of being a minor purchase an alcoholic beverage at the Licensed Premises. Agent Sanders contacted Rahim about selling to that minor. Rahim denied he sold to a minor and claimed he always checked the identification of customers.

Findings Related to Count 5

18. On March 15, 2019, 20 year old [REDACTED] went to the Licensed Premises to purchase an alcoholic beverage because she heard it was easy to buy alcoholic beverages there. Once in the Licensed Premises, she selected a "Red Bull" non-alcoholic beverage and returned to the front counter. Respondent's clerk Osama Qamer (Hereafter Qamer) obtained a 200 ml. bottle of Tito's Vodka from the clerk's side of the counter and sold it and the "Red Bull" to [REDACTED]. [REDACTED] used her cell-phone to make an electronic payment. Qamer did not ask [REDACTED] for any identification and none was shown to him during that transaction. [REDACTED] then exited the store.

19. Agent Sanders witnessed [REDACTED] make her purchase. He detained [REDACTED] after she crossed a nearby street. Agent Sanders asked [REDACTED] her age and she said she was 21, however she appeared nervous to him. After some further inquiry, [REDACTED] confessed she was only 20 years old. Agent Sanders found [REDACTED] in possession of a Yurok tribal identification card that stated her true birthdate of January 27, 1999, confirming she was only 20 years old that day.

20. [REDACTED] also possessed a false identification. (Exhibit B: False identification). The false identification made [REDACTED] 23 years old. She said she did not show it to the clerk that night, but used it there a month earlier. Agent Sanders then released [REDACTED] from the scene.

⁸ Because there was no evidence [REDACTED] ever used her false identification at the Licensed Premises, it was not admitted in evidence as being irrelevant in this matter.

21. Agent Sanders went to the Licensed Premises and made contact with Qamer who he saw sell the vodka and Red-Bull to [REDACTED]. Agent Sanders did not directly question Qamer about his sale to [REDACTED]. Qamer described [REDACTED] and told Agent Sanders he knew her and that she was at least 21 years old.
22. Qamer spoke to someone on the telephone and then gave to phone to Agent Sanders. The caller identified himself as the manager and told Agent Sanders that Qamer said he knew the minor and knew she was at least 21 years old.
23. Agent Sanders saw a sign posted on the cash register that said "Ask for ID".
24. There was an electronic scanning device on/near the register. Rahim demonstrated use of the machine with his own identification to show Agent Sanders the scanner worked and read the card indicating Rahim was at least 21 years old. [REDACTED] false identification was not run through the scanner to see if it could read that card. Agent Sanders never saw anyone use the scanner at the Licensed Premises.
25. Agent Sanders filled out a Minor Affidavit based on information he learned from [REDACTED]. (Exhibit C) [REDACTED] did not sign the Minor Affidavit and was generally uncooperative in the investigation that day. She refused to identify the selling clerk to the agents.
26. At the hearing, [REDACTED] testified she lived and worked near the Licensed Premises. She made purchases at the store approximately once every two weeks. Sometimes she purchased alcoholic beverages and sometimes not. She purchased alcoholic beverages from Qamer at the Licensed Premises on approximately two prior occasions in late January or February 2019 using her false identification, Exhibit B. After that, Qamer stopped asking for her identification.
27. [REDACTED] false identification, Exhibit B, appeared to be a California Driver License. It contained [REDACTED] photo, address, name, height, weight, eye color, hair color, and her signature. It listed an inaccurate birthdate of Jan. 26, 1996. The identification was in the landscape format, had a State of California seal hologram, and had her birthdate embossed over her photo. A black magnetic strip ran across the back of the license along with a data bar. Exhibit B was in good physical condition; it was not worn, faded, bent, blurry, discolored, torn, or appear it was tampered with. There were no indications it was a false document. [REDACTED] obtained it in November 2018.
28. Respondent's clerk, Qamer, testified he worked for Respondent the past few months. He had not received any training from Respondent regarding alcoholic beverage sales procedures. On the weekends, he noticed there were more youthful customers patronizing the Licensed Premises. When he sold alcoholic beverages at the Licensed Premises he

would ask the customers' their age and ask for their identification. He checked the photo on the identification and its expiration date. He testified he ran California identifications through an electronic scanner that would indicate to him if the person was old enough to purchase an alcoholic beverage. The scanner could not read out-of-state identifications so he manually keyed in the birthdate and the machine determined if the person was old enough to purchase alcoholic beverages.

29. Qamer testified that prior to March 15, 2019, [REDACTED] was a regular customer at the Licensed Premises. He knew she worked in the area. Sometimes she purchased alcoholic beverages, sometimes other goods. However, he had already checked [REDACTED] false identification approximately three to five times and each time it indicated she was at least 21 years old.

30. Qamer testified that on March 15, 2019, he again asked [REDACTED] to present her identification, but she was wearing some kind of electronic ear-plugs in her ears and may not have heard him. She did not present any identification. As he had checked her identification in the past, he did not insist on seeing it this time and completed the sales transaction without viewing her identification.

Supplemental Findings

31. Respondent's corporate president, Tony Arouk, testified that the Licensed Premises is one of four licensed businesses it operates in San Francisco. Arouk primarily worked at one of those other sites, Nob Hill Liquors. On or near September 17, 2018, Rahim informed him he was issued a citation for selling an alcoholic beverage to a minor. Rahim told him that he had checked [REDACTED] identification and then stopped re-checking it. Arouk told Rahim to check customers' identification all the time, whether he knew the patrons or not. Sometime in November 2018, Rahim again called Arouk and indicated he may have sold to another minor. Arouk then dismissed Rahim. Respondent hired Qamer to replace Rahim. Arouk was aware Rahim still worked in the area.

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 for good cause 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 rules of the Department or 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: “(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. Business and Professions Code section 25666 states: “(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

“(b) (1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

“(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.”

6. Government Code Section 11513, subdivision (e), provides: “The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.”

7. Evidence Code Section 913, subdivision (a), states: "If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

8. Evidence Code Section 940 states: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

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 Constitution and Business and Professions Code sections 24200, subdivision (a), because on or about September 14, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: a Four-Loko malt beverage, to [REDACTED], a person under the age of 21 years, in violation of Business and Professions Code section 25658, subdivision (a)." (Findings of Fact ¶¶ 5-11)

2. The evidence established Respondent's clerk, Rahim, sold an alcoholic beverage, a can of Four-Loko, to [REDACTED] at the Licensed Premises. Agent West saw [REDACTED] exit the premises with the Four-Loko alcoholic beverage. [REDACTED] admitted to Agent West she was born on December 12, 1999, making her only 18 years old. She identified Rahim as the one who sold her the Four-Loko. The Licensed Premises video surveillance system captured Rahim selling the Four-Loko to [REDACTED] without checking her identification.

3. At the hearing, the Department called [REDACTED] as a witness for examination as required under section 25666. She testified to her birthdate and the fact she purchased an alcoholic beverage at the Licensed Premises on September 14, 2018 without showing any identification. She thereafter invoked her Fifth Amendment right not to testify further. After the parties' attorneys confirmed with [REDACTED] private counsel that the criminal aspect related to [REDACTED] was still pending and unresolved, she was not asked any further questions about what occurred that night, including any statements she made, written or otherwise, denying the use of a false identification at the Licensed Premises at any time.

4. The Fifth Amendment to the United States Constitutions states, in part: "(n)o person ... shall be compelled in any criminal case to be a witness against himself." The California Constitution, article 1, section 15, states in part: "[p]ersons may not...be compelled in a criminal cause to be a witness against themselves..." Evidence Code section 940 states:

“To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.” However, the incrimination involved is limited to incrimination in the commission of a punishable crime.” [Citation.] (*People v. Whelchel* (1967) 255 Cal.App.2d 455, 460, 63 Cal.Rptr. 258) The privilege has been extended so that it is available to a person appearing only as a witness in any kind of proceeding where testimony can be compelled. (*Gonzales v. Superior Court* (1980) 117 Cal.App.3d 57, 62, 178 Cal.Rptr. 358.) In *Kastigar v. United States*, 406 U.S. 441, 444, the United States Supreme Court determined that the privilege against self-incrimination extends to “...any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory...”

5. As [REDACTED] criminal matter was pending or she was otherwise in jeopardy of criminal prosecution, asserting her privilege not to disclose any matter that may have tended to incriminate her on advice of her private counsel seemed timely and appropriate.⁹ As such, further questioning of [REDACTED] was terminated by the ALJ and she was excused.

6. Evidence Code section 913, subdivision (a), states that when a witness asserts a privilege, the “...trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.”

7. While [REDACTED] exercised her right to not incriminate herself, and no inference may be drawn therefrom, the balance of the evidence presented at the hearing including, but not limited to, Agent West’s testimony and the video recording showing Rahim sell the Four-Loko to [REDACTED], was sufficient to establish Rahim sold [REDACTED], a person under 21 years of age, an alcoholic beverage in violation of section 25658, subdivision (a).

8. Respondent argued [REDACTED] exercise of her privilege not to testify deprived it of an opportunity to cross-examine her about what occurred that night, especially her assertion in her affidavit, Exhibit C, that she never showed any false identification at the Licensed Premises on any occasion. In light of Evidence Code 913, the ALJ, as trier of fact, could not draw any inference because [REDACTED] exercised her privilege not to incriminate herself. The fact that Respondent could not cross-examine [REDACTED] was a natural consequence of a witness rightfully exercising her privilege not to incriminate herself. Also, Respondent did

⁹ While the Department’s accusation focused on disciplining Respondent for its clerk improperly selling an alcoholic beverage to [REDACTED], she may have been subject to criminal prosecution for her actions that day such as a violation of section 25658, subdivision (b) (A minor purchasing an alcoholic beverage.); section 25658.5 (Attempted purchase of an alcoholic beverage by a minor.); or section 25662 (Possession of alcoholic beverages by a minor in public place or place open to the public.)

not provide any persuasive legal authority or added facts warranting the ALJ disallowing the privilege and directing ██████ to testify further at the hearing.¹⁰

9. As to Count 2, cause for suspension or revocation of Respondent's license does exist under article XX, section 22 of the California Constitution and Business and Professions Code sections 24200, subdivision (a), because on or about September 14, 2018, respondent-licensee's agent or employee Ahmad Touhan Abdul Rahim, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: three Buzz Ballzs , to ██████, a person under the age of 21 years, in violation of Business and Professions Code section 25658, subdivision (a). (Findings of Fact ¶¶ 12-16)

10. The evidence established Rahim sold three alcoholic beverage Buzz Ballz to 18 year old ██████ without her presenting any form of identification to him. While ██████ was later found in possession of a false identification, Exhibit A, there was no evidence she ever used it at the Licensed Premises or showed it to Rahim either prior to or on September 14, 2018. No false identification defense under 25660 was established. There was sufficient evidence to sustain Count 2.

11. As to Count 3, the Department indicated it would not be able to proceed with Count 3 and requested it be dismissed without prejudice.

12. As to Count 4, the Department indicated it would not be able to proceed with Count 4 and requested it be dismissed without prejudice.

13. As to Count 5, cause for suspension or revocation of Respondent's license does not exist under article XX, section 22, of the California Constitution and Business and Professions Code sections 24200, subdivision (a) and (b), because although on or about March 15, 2019, respondent-licensee's agent or employee Osama Qamer, at said premises, sold, furnished, gave or caused to sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to ██████, a person under the age of 21 years, in violation of section 25658, subdivision (a), a defense to the accusation under section 25660 was adequately established. (Findings of Fact ¶¶ 18-30)

14. The evidence established that on March 15, 2019, Qamer sold 20-year old ██████ a bottle of vodka, an alcoholic beverage, without checking her identification.

¹⁰ Also, Respondent did not call Rahim to testify about his September 14, 2018 transaction with ██████ or any other transactions Rahim had with her and whether those did or did not involve her use of a false identification. His hearsay statement to Agent West that he had checked or seen her identification in the past was insufficient to establish a defense under 25660. There was no evidence presented as to what he saw and whether reliance on it was reasonable.

15. Respondent argued Qamer's prior inspections of [REDACTED] false identification could be the basis of a valid false identification defense under section 25660 even if Qamer did not inspect [REDACTED] false identification on March 15, 2019.

16. The Department argued a defense under section 25660 did not apply solely because Qamer did not inspect [REDACTED] identification on March 15, 2019 in connection with her purchase of vodka. It contended Qamer's prior inspections of her false identification were irrelevant. The Department primarily relied on the plain text of 25660 and *Lacabanne Properties, Inc. v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 352.¹¹

17. Generally, section 25660 provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for, inspected, and reasonably relied on the identification provided by the customer.

18. However, section 25660 is an affirmative defense, so a licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.¹² To provide a defense, reliance on the document must be reasonable, that is, it was based on due diligence of the seller. This section applies to identifications actually issued by government agencies and identifications that are false replicas of government identifications.¹³ 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.¹⁴ The defense is also inapplicable if the

¹¹ In that case, the court indicated the false identification defense under section 25660 was not lost when one employee had checked the minor's false identification upon entry to the licensed premises just before a second employee who served the alcoholic beverage pursued an inadequate inquiry of the minor's identification. At the hearing, the Department did not cite any added authority that directly supported its position that under section 25660 an identification check must be made immediately prior to or contemporaneously with the transaction at-issue.

¹² *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).

¹³ *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).

¹⁴ *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-

appearance of the presenter does not match the description on the identification.¹⁵ 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.

19. In this instance, [REDACTED] false identification (Exhibit B) met the requirements of section 25660, subdivision (a)(1). On its face, it appeared to have been issued by a state agency, the California Department of Motor Vehicles. It contained her true name, a date of birth, her true description, and her picture.¹⁶ It appeared carefully produced and showed no signs of tampering, undue wear and tear, or indicia of being a forgery or a false document. No evidence was presented or argument made why it should not have been reasonably relied upon as proof of [REDACTED] age. Therefore, it is determined that, for purposes of section 25660, it was reasonable for Qamer to rely on it as proof [REDACTED] was at least 21 years old.

20. Based on [REDACTED] photograph and her appearance, persona, demeanor, and testimony at the hearing, it is determined that [REDACTED], although youthful, appeared as a person who could have been at least 21 years old.

21. As to the Department's primary contention that a section 25660 defense did not apply in this instance because Qamer did not inspect [REDACTED] false identification on the date of the alleged violation, the Alcoholic Beverage Control Appeals Board faced this issue in *7-Eleven* (2011)(AB-9081). (Hereafter Appeals Board) The Appeals Board reasoned that based on a 1959 change in the text of section 25660 that eliminated the words "immediately prior" as to when an identification had to be checked regarding the sale or service of an alcoholic beverage, a supporting California Attorney General's Opinion regarding that text revision¹⁷, and *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*,

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).

¹⁵ *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.

¹⁶ Obviously, Exhibit C did not contain [REDACTED] actual date of birth.

¹⁷ The California Attorney General opined that "[I]t must be concluded that by the elimination of the words "immediately prior" from section 25660 in the 1959 amendment, the time requirement for the presentation of documentary evidence has been altered. Thus, the evidence of majority and identity need no longer be shown immediately prior to the alleged offense to constitute a valid defense. However, it is clear that a defense is not made out unless it is proved that the required documentary evidence was demanded, that is was

261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968), a defense under section 25660 could be established if the minor displayed the false identification on an earlier date or dates under a narrow set of circumstances. The Appeals Board concluded that if a regular customer was: 1) well known to the appellant and its employees; 2) had shown identification multiple prior times; 3) had the appearance of one who could be 21 years old; and 4) reliance on the false identification was reasonable, a defense to the accusation under section 25660 was not lost because the identification was not shown as part of the transaction at issue.

22. While neither a statute nor a case makes the Appeals Board's opinions binding precedential authority on Department decisions, in this matter, its approach seems reasonable especially when, as in this matter, the actual false identification used was presented at the hearing so its quality could be closely examined, there was no dispute the involved clerk inspected it on prior occasions, and there was no legal authority presented that the identification check under section 25660 must occur immediately prior to or contemporaneously with the transaction at issue.

23. In this instance, [REDACTED] appeared as though she could be 21. In fact, she was 20 years old on March 15, 2019. She had shown her false identification to Qamer on two to five prior occasions when she purchased alcoholic beverages from Qamer. As she lived and worked in the immediate neighborhood, she was a regular customer of the Licensed Premises, patronizing it once every few weeks. She made additional purchases from Qamer that did not include alcoholic beverages. [REDACTED] and Qamer were familiar with one another. [REDACTED] false identification was brought to the hearing for examination by the ALJ and the parties. It contained the required features set forth in section 25660 for an identification. It appeared professionally produced with no obvious signs it was a forged or a fraudulent document. Neither evidence nor argument was presented why it should not have been relied upon as proof of [REDACTED] age. Therefore, based upon the aforementioned considerations and using the criteria set forth by the Appeals Board in *7-Eleven* (AB-9081), Respondent met its burden under section 25660 in defense to Count 5.

24. As to any further allegations raised in the accusation or defenses thereto, they are found without merit.

shown, and that the defendant-licensee, his agent or employee, was acting in good faith in reliance upon that prior showing at the time of the alleged violation." 36 Ops.Cal.Atty.Gen. 124, 126 (1960)

PENALTY

1. Section 25658.1, subdivision (b), states:” Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the department’s authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty.”

“(c) For purposes of this section, no violation may be considered for purposes of determination of the penalty until it has become final.”

2. The Department’s penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144)

3. Under rule 144, the presumptive penalty for a first violation for selling, giving, or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15 day suspension. The second violation of that section that occurs within 36 months of the initial violation specifies a 25 day license suspension. License revocation is recommended for the third violation of 25658 that occurs within 36 months of the first violation.

4. Rule 144 also permits adjustment to the presumptive penalty based on the presence of aggravating and mitigating factors, some of which are listed therein. Rule 144 indicates the list of specified aggravating and mitigating factors is a non-exhaustive list.

5. The Department argued Counts 1, 2, and 5 should be sustained and the license revoked. The Department contended there were multiple violations that occurred during a short time-frame constituting a continuous course of conduct which rule 144 specified lists as an aggravating factor. It argued there were no mitigating factors to consider and the Licensed Premises had a local reputation for selling alcoholic beverages to minors. As to Count 5, it argued Qamer’s reliance on his prior inspections of [REDACTED] false identification did not constitute a defense under section 25660. Finally, it contended the violations were due to poor management, possibly because Respondent was also managing three other licensed premises in San Francisco.

6. As to Count 1, Respondent argued it was foreclosed from examining [REDACTED] because she asserted her right not to incriminate herself. As to Count 2, Respondent pointed out [REDACTED] was in possession of a false identification. As to Count 5, Respondent argued a defense to the accusation under section 25660 was established because Rahim had checked [REDACTED] false identification on earlier occasions and it was reasonable for him to have relied on her false identification. Respondent contended the prior disciplinary action currently under appeal, Exhibit 3, should be wholly disregarded in this matter. Lastly, Exhibit 2, reflecting the only prior final disciplinary action, was four years old.

7. The evidence established that on September 14, 2018, Rahim sold alcoholic beverages to two minors, in separate transactions, without confirming either was at least 21 years old. The Licensed Premises was near the University of San Francisco, a place where many students and visitors would likely be just under or just over 21 years old and Qamer confirmed many youthful appearing persons patronized the Licensed Premises, especially on weekends. That environment, combined with at least one final disciplinary action for selling or furnishing alcoholic beverages to minors, warranted Respondent's employees to be especially careful when selling alcoholic beverages to youthful appearing persons, such as [REDACTED] and [REDACTED].

8. Respondent had one final prior disciplinary action under Reg: 15081991 as reflected in Exhibit 2. However, that accusation consisted of three counts involving Respondent's employees selling, furnishing, or giving alcoholic beverages to three different minors on two different dates in 2014. That matter should have triggered Respondent to be extremely mindful of its practices with respect to future sales of alcoholic beverages at the Licensed Premises. Respondent did not present any particular evidence regarding any added education, training, or over-sight it undertook in response to that accusation to prevent future sales of alcoholic beverages to minors. Rahim testified he did not initially receive any particular training from Respondent regarding the selling of alcoholic beverages. Respondent had some type of electronic scanner available, but it was not used with respect to the transactions involving [REDACTED] and [REDACTED]. Now, there have been five section 25658 violations in fewer than four years.¹⁸ However, the penalty below did give some mitigative weight to the fact that Rahim, at least as to minor [REDACTED], had checked her false identification with respect to her prior purchases of alcoholic beverages from him.

9. The standard penalty set out in rule 144 is not appropriate in this instance. The circumstances presented in this case warrant a higher penalty, yet short of the complete license revocation the Department sought. The penalty must include a significant incentive for Respondent's future compliance with the law and prudent exercise of license privileges. Such penalty is set forth below in the Order.


10. Except as addressed in this decision, all other assertions or arguments advanced by the parties with respect to the penalty are without merit.

¹⁸ Exhibit 3 was not admitted in evidence and the ALJ did not consider it for any purpose in this matter.

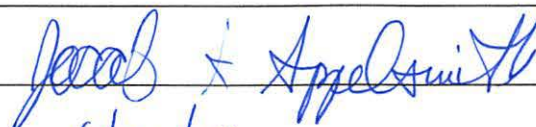
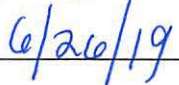
ORDER

1. Count 1 and Count 2 of the First Amended Accusation are sustained.
2. As to Counts 1 and 2, Respondent's license is revoked, however, such revocation is stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within 36 months from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate the stay order and impose the stayed penalty; and should no such determination be made, the stay shall become permanent. In addition, the license shall be suspended for 30 consecutive days.
3. Count 3 of the First Amended Accusation is dismissed without prejudice.¹⁹
4. Count 4 of the First Amended Accusation is dismissed without prejudice.
5. Count 5 of the First Amended Accusation is dismissed with prejudice.

Dated: May 14, 2019



David W. Sakamoto
Administrative Law Judge

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

¹⁹ Counts 3 and 4 were not litigated so dismissed without prejudice. Count 5 was dismissed with prejudice because it was litigated at the hearing.