

# **LAW OFFICES OF ERNOUF & COFFEY**

A PROFESSIONAL CORPORATION

PO Box 212314

Anchorage, AK 99521

Office Phone: (907) 274-3385

Coffey Cell Phone: (907) 306-6001

Coffey E mail: [dancoffey@gci.net](mailto:dancoffey@gci.net)

## **MEMO TO ABC BOARD**

TO: Alcohol Beverage Control Board  
CC: Erika McConnell  
Executive Director  
RE: Woodshed  
Beverage Dispensary Liquor # 1244  
Request for Reinstatement  
FROM: Dan Coffey/Sherman Ernouf  
Ernouf & Coffey PC - Attorneys for Applicant  
DATE: 4/10/2019

## **REQUEST FOR REINSTATEMENT** **BEVERAGE DISPENSARY LIQUOR LICENSE # 1244**

The Applicant is requesting reinstatement of Beverage Dispensary Liquor License # 1244 pursuant to the statutes and regulations cited herein and based on the facts and circumstances related to the failure of the Applicant to timely renew the liquor license.

### **STATE STATUTES**

#### **SECTION 1**

#### **Relevant Statutory Provisions:**

Any reinstatement request shall be made pursuant to Title 4, Alaska Statutes AS 04.11.540 and AS 04.11.550 and ABC Board Regulations 3 AAC 304.160 (e) and (f). These Statutes and Regulations are set out below followed by a description of their applicability to the present circumstance being considered by the Board.

The first statutory provision is AS 04.11.540, which address reinstatement of a liquor license in the event a licensee fails "... to file a complete application for renewal by February 28...". This provision states as follows:

- 1) "If a complete application for renewal has not been filed by February 28 .... the license expires at 12:00 midnight February 28".

This statute continues providing that, in order for the Board to reinstate the license, the board "will consider a written request to reinstate the license if the request is accompanied by" the following:

- 1) a complete application (submitted);
- 2) all required fees and penalty fees are paid (payment made); and
- 3) proof of good cause for the failure to file and pay by February 28.  
(See Section 3 below).

The second statutory provision, AS 04.11.550 states that "[o]n or before February 15, the director shall mail a notice of expiration to each licensee who has not either (1) filed an application to renew a license, along with any applicable affidavits and all fees due or (2) notified the director of an intent not to do so.

No such notice was sent to the Applicant for reinstatement although one was sent to the defaulting licensee, Brown Bag Sandwich Company. See section 3 for a discussion of the notice issue.

## **STATE REGULATIONS**

### **SECTION 2**

#### **Relevant Regulatory Provisions:**

The controlling regulatory provisions are 3 AAC 304.160 (e) and 3 AAC 304.160 (f).

- 1) Subsection 160 (e) re-states the language in the statute and further states that "... the board will consider a written request to reinstate the license if the request is accompanied by
  - i) a complete application (See Attached);
  - ii) all required fees and penalty fees are paid (payment made); and

iii) proof of good cause for the failure to file and pay by February 28<sup>th</sup>.

(See Section 3 below).

2) Subsection 160 (f) states that “[the board will deny a request for reinstatement submitted under (e) of this section if the board finds that the failure to timely file or pay was caused by....”

i) “the licensee’s failure to notify the board of a change of the licensee’s mailing address.

**Fact:** The staff communicated regularly with the Applicant multiple times over the course of the past 6 months (October 2018 thru March 2019). The bulk of the communications were via e mail exchanges most of which dealt with the transfer of ownership from a defaulting buyer (Brown Bag) to the Applicant, the prior Licensee who held a security interest in the License.

ii) “transfer of ownership of the business .... without written approval of the board....”

**Fact:** The re-transfer of the license from the defaulting licensee to the Applicant was applied for in October 2018 and was initially approved by the Board in December 2018. Subsequently, this approval was rescinded by the Board based on a post Board meeting lien claim against the license filed by the State Department of Labor.

iii) “a lease of the licensed business to another person in violation of AS 04.11.450 (c);

**Fact:** The only existing lease at the time of the default was between the Applicant and Brown Bag which was approved by the Board at the time of the initial transfer transfer of the license to Brown Bag. There was never any other lease of the premises by the Applicant at any time thereafter.

iv) “any other action of the licensee whether active or tacit that the board finds constitutes a failure to lawfully operate the business for which the license was issued.

**Fact:** The Applicant has not operated the business since the Brown Bag default. Thus, there has not been any failure to lawfully operate the business.

3) This Regulation has recently been amended as follows:

- i) 3 AAC 304. 160 (e) was amended by the addition of a requirement of a "reinstatement fee of \$1,000.00.

**Fact:** This fee is submitted with this request for reinstatement.

4) An additional amendment was recently made to 3 AAC 304.160 (f) with the addition of language relating to availability of a license. This second amendment is irrelevant to the matter at hand as are no available beverage dispensary liquor licenses in Anchorage, Alaska.

### **FACTS WHICH SUPPORT REINSTATEMENT** **SECTION 3**

The facts which led up to the current circumstance are both convoluted and critical to an understanding of this request for reinstatement. Those facts demonstrate compliance with the requirements for reinstatement and are as follows:

1) The current licensee, Brown Bag defaulted in its obligations under a Contract of Purchase and Sale. The foreclosure process began in the fall of 2018 by another Attorney (not the undersigned). During the course of that process, it was determined that the title company which had closed the initial transaction between the Applicant and Brown Bag failed to file the required UCC Financing Statement. The staff (correctly) determined that because the Financing Statement was not filed the transaction was not a secured transaction.

As a result of the Title company's mistake, the re-transfer process required the Applicant to pay several liens (Odom, K & L and the state Department of Labor). All these obligations have been fully paid.

2) During the course of the re-transfer process, one of the Applicant's principals (Mike Swalling) went to the ABC Board's offices on December 12<sup>th</sup>, 2018 for the purpose of renewing the license. He took with him, a check for \$2,800.00 for the renewal fee.

The Applicant met with a staff person (name unknown) in an effort to renew the license. Despite the fact that the applicant held an Irrevocable Limited Power of Attorney which was and still is, on file with the Board, the Applicant was told that he could not renew the license as the Applicant was not the licensee. Apparently, the staff person did not review the file and did not know of the existence of the Power of Attorney.

### **The Irrevocable Power of Attorney**

The Irrevocable POA which is on file with the Board states that the licensee and its principals (Brynn McLeod and Antoine McLeod) "Hereby Irrevocably appoint the Members of the Woodshed, LLC ... as the Current Licensees' attorney-in-fact, .... for the purpose, in the event of .... default in its payment or performance obligations, ... to take any and all steps whatsoever required or pertinent to the retransfer, renewal or operation of said license."

3) On December 13<sup>th</sup>, one day after the Applicant met with staff at the ABC Board staff and attempted to renew the license, the Applicant received written notification from staff that the staff had reviewed the re-transfer application documents for completeness and advised the Applicant that the re-transfer application would be heard at the December 2018 Board meeting.

Having received and reviewed the re-transfer application and determined that the closing title company had failed to file the UCC Financing Statement and had advised the Applicant that creditors would have to be paid, the staff should have been aware of the Power of Attorney that was in the file. However, no one from staff contacted the Applicant to advise that the Applicant did, in fact, have the authority to file for renewal and that the Applicant should submit a renewal application.

4) At its January meeting in Juneau, the Board, for the second time, considered the Applicant's request for approval of the re-transfer of the license. Having paid all of the creditors, the Applicant had satisfied all of the requirements for re-transfer.

On February 12, 2019 Board's staff sent an e mail to the Applicant advising the Applicant that the "liquor license transfer application has been deemed complete and notification was sent to the local governing body....".

Three (3) days later, on February 15<sup>th</sup>, the date that the staff is charged by the statutes and regulations with the responsibility to send out the required "notice

of expiration” to each licensee who had not yet filed for renewal, did not send any notice to the Applicant.

Staff, having worked with the Applicant for several months through two Board meetings, both of which were attended by the Applicant, must have been aware that the Applicant was in the process of re-acquiring the license and had previously attempted to renew the license. Staff had regularly communicated with the Applicant for the previous three to four months by e mail. The staff knew how to reach the Applicant, but failed to inform the Applicant that the license was in jeopardy of expiring.

5) Even though the staff had to be aware of the pending retransfer application which had been addressed at two (2) different Board meetings and having dealt with the Applicant’s principal multiple times on issues of the transfer and of creditor claims, NO NOTICE was sent to the Applicant. Instead the required notice was sent to Brown Bag at its post office box address even though the principals of Brown Bag had left Alaska several months previously and the Staff had been working exclusively with the Applicant on this license for several months.

6) The final point for the Board’s consideration involves an unusual circumstance which explains the Applicant’s lack of knowledge and understanding of the Board’s processes and procedures of operation. Although the applicant has owned the licensed facility for decades, the Applicant itself had always been a landlord, never a licensee. Only once in all these years has the Application been an actual a licensee and then for only a very short time.

When the lease to the last tenant prior to the sale of the license to Brown Bag vacated the property, he sold the beverage dispensary license to the Applicant. The transfer from that tenant to the Applicant was approved and the Applicant became the licensee. The Applicant operated the license only for a very short time for the the purpose of meeting the minimum operating requirements. The Applicant never had to renew the license due to the short duration of the Applicant being a licensee.

Within a few months of acquiring the license, the Applicant sold the license to the current defaulting licensee, Brown Bag. During its short period of ownership and operation of the license, the Woodshed never had to renew the license as it was acquired and then sold within a period of less than two years.

When one of the Applicant’s principals went to the Board’s office in December 2018 for the purpose of renewing the license with a check for \$2,800.00 in hand for the renewal fees he was told that he could not renew the license

because he was not the licensee. The Applicant did not press the issue thinking that the Woodshed would be able to renew the license once the Board approved the retransfer of the license which was scheduled to be approved at the December Board meeting, a few short days away.

Further, due to the very short time in which the Applicant was a licensee, the Applicant was not aware of the Board's expiration provisions in the statute and regulations cited above. The Applicant had never had to deal any renewal or with with these provisions.

During the period from December thru February, the Applicant focused on satisfying the liens on the license and addressing many requirements of the Municipality of Anchorage in an effort to satisfy the Board's requirements for the re-transfer imposed by the Board. In short, the Applicant was attempting to resolve all of the issues with raised by the Board and the Municipality of Anchorage without knowing that the license itself was at risk. The applicant's principals, being ignorant of the Board's processes and the statutory and regulatory provisions regarding expiration of the license, did not know that the license was on the verge of expiring and received no notice from staff that the license was at risk.

Had the staff, which had communicated numerous times by e mail with the Applicant on every other issue related to this license, provided notice to the Applicant of the pending expiration of the license, the Applicant would have promptly responded and renewed the license prior to the end of February.

Note that the staff did send notice to the Applicant after March 31 advising the Applicant that the license had expired. Too little. Too late.

## **CONCLUSION**

### **SECTION 4**

First and foremost, the Applicant has complied with all of the statutory and regulatory requirements for reinstatement set out above. In particular, Applicant has filed a completed application, has paid all of the required fees and penalty fees and has demonstrated that there is "good cause" for the applicant's failure to file and pay for a renewal by February 28<sup>th</sup>. The Applicant has not violated any of the provisions of the Statutes or Regulations which set out those conditions which warrant denial of reinstatement.

The Applicant sought to renew the license on December 12<sup>th</sup> and was told by staff that he could not do so as he was not the licensee. This statement by staff

was not accurate. The Applicant had the authority to renew the license based on the Irrevocable Power of Attorney signed by the Licensee, Brown Bag.

Secondly, the Applicant clearly is not knowledgeable in the requirements of the statutes and the regulations because the Applicant has never been in the business of operating a license long enough to have to deal with a renewal.

Thirdly, the staff is charged with having knowledge of the statutes, regulations and procedures of the Board. Staff knew that the Applicant was attempting to re-transfer the license. Numerous communications between the staff and the Applicant were occurring in October, November, December, January, February and March dealing with all aspects of this license except renewal. Staff communicated directly with the Applicant during this six-month period on many, many occasions. The only matter on which staff failed to communicate with the Applicant was on the notice requirement relating to the failure to renew.

Based on the foregoing, the Board is requested to reinstate this license for the reasons set forth above as the applicant has complied with all of the provisions in statute and regulation for reinstatement.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 11th day of April, 2019.

*J. Michael Coffey*  
P.O.A.

Ernouf & Coffey, PC

xDan K. Coffey  
Dan K. Coffey



Alcohol and Marijuana Control Office  
 550 W 7<sup>th</sup> Avenue, Suite 1600  
 Anchorage, AK 99501  
[alcohol.licensing@alaska.gov](mailto:alcohol.licensing@alaska.gov)  
<https://www.commerce.alaska.gov/web/amco>  
 Phone: 907.269.0350

Alaska Alcoholic Beverage Control Board

## Master Checklist: Renewal Liquor License Application

Doing Business As:	Brown Bag Sandwich Company	License Number:	1244
License Type:	Beverage Dispensary		
Examiner:	<i>Jonas</i>	Transaction #:	1046326

Document	Received	Completed	Notes
AB-17: Renewal Application	4/11	4/11	
App and License Fees	4/11	4/11	

Supplemental Document	Received	Completed	Notes
Tourism/Rec Site Statement			
AB-25: Supplier Cert (WS)			
AB-29: Waiver of Operation			
AB-30: Minimum Operation			
AB-33: Restaurant Affidavit			
COI / COC / 5 Star			
FP Cards & Fees / AB-08a			
Late Fee	4/11	4/11	Late & Reinstatement Fees

Names on FP Cards:	
--------------------	--

	Yes	No
Selling alcohol in response to written order (package stores)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Mailing address and contact information different than in database (if yes, update database)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
In "Good Standing" with CBPL (skip this and next question for sole proprietor)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Officers and stockholders match CBPL and database (if "No", determine if transfer necessary)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>

LGB 1 Response:

Waive   
  Protest   
  Lapsed

LGB 2 Response:

Waive   
  Protest   
  Lapsed



# Form AB-17: 2019/2020 Renewal License Application

## Section 2 – Entity or Community Ownership Information

This top subsection must be completed by any licensee that is a **corporation** or **LLC**. Corporations and LLCs are required to be in good standing with the Alaska Division of Corporations, Business & Professional Licensing (CBPL). This number is neither your EIN/tax ID number, nor your business license number. **You may view your entity's status or find your CBPL entity number by using the following site:** <https://www.commerce.alaska.gov/cbp/main/search/entities>

General partnerships and local governments should skip to the second half of this page. Licensees who directly hold a license as an individual or individuals should skip to Section 3.

Alaska CBPL Entity #:	10003468
-----------------------	----------

You must ensure that you are able to certify the following statement before signing your initials in the box to the right: Initials

I certify that this entity is in good standing with CBPL and that all current entity officials and stakeholders (listed below) are also currently and accurately listed with CBPL.

By P.O.A.

This subsection must be completed by any **community** or **entity**, including a corporation, limited liability company, partnership, or limited partnership, that is applying for renewal. If more space is needed, please attach additional completed copies of this page.

- If the applicant is a **corporation**, the following information must be completed for each **stockholder who owns 10% or more** of the stock in the corporation, and for each **president, vice-president, secretary, and managing officer**.
- If the applicant is a **limited liability organization**, the following information must be completed for each **member with an ownership interest of 10% or more**, and for each **manager**.
- If the applicant is a **partnership**, including a limited partnership, the following information must be completed for each **partner with an interest of 10% or more**, and for each **general partner**.

**Important Note:** The information provided in the below fields (including spelling of names, specific titles, and percentages held) must match that which is listed with CBPL. If one individual holds multiple titles mentioned in the bullets above, all titles must be listed for that individual on this application and with CBPL. Failure to list all required titles constitutes an incomplete application.

Name of Official:	Antoine McCloed, <del>Bygn</del>			
Title(s):	Member	Phone:		% Owned: 50%
Mailing Address:	235 F Street			
City:	Anchorage	State:	AK	ZIP: 99501

Name of Official:	Brynn McCloed			
Title(s):	Member	Phone:		% Owned: 50%
Mailing Address:	235 F Street			
City:	Anchorage	State:	AK	ZIP: 99501

Name of Official:				
Title(s):		Phone:		% Owned:
Mailing Address:				
City:		State:		ZIP:

AMCO  
APR 11 2019



# Form AB-17: 2019/2020 Renewal License Application

## Section 3 – Sole Proprietor Ownership Information

This section must be completed by any licensee who directly holds the license as an **individual or multiple individuals** and is applying for license renewal. If more space is needed, please attach a separate sheet that includes all of the required information. Entities should skip to Section 4. The following information must be completed for each licensee and each affiliate (spouse).

This individual is an:  applicant  affiliate (spouse)

Name:				Contact Phone:	
Mailing Address:					
City:		State:		ZIP:	
Email:					

This individual is an:  applicant  affiliate (spouse)

Name:				Contact Phone:	
Mailing Address:					
City:		State:		ZIP:	
Email:					

## Section 4 – Alcohol Server Education

This section must be completed only by the holder of a **beverage dispensary, club, or pub** license or **conditional contractor's permit**. The holders of all other license types should skip to Section 5.

Read the line below, and then sign your initials in the box to the right of the statement:

Initials

I certify that all licensees, agents, and employees who sell or serve alcoholic beverages or check identification of a patron have completed an alcohol server education course approved by the ABC Board and keep current, valid copies of their course completion cards on the licensed premises during all working hours, as set forth in AS 04.21.025 and 3 AAC 304.465.

  
By P.O.A.

## Section 5 – License Operation

Check a single box for each calendar year that best describes how this liquor license was operated:

2017    2018

The license was regularly operated continuously throughout each year.

  

The license was regularly operated during a specific season each year.

  

The license was only operated to meet the minimum requirement of 240 total hours each calendar year. *If this box is checked, a complete copy of Form AB-30: Proof of Minimum Operation Checklist, and all necessary documentation must be provided with this application.*

  

The license was not operated at all or was not operated for at least the minimum requirement of 240 total hours each year, during one or both of the calendar years.

  

*If this box is checked, a complete copy of Form AB-29: Waiver of Operation Application and corresponding fees must be submitted with this application for each calendar year during which the license was not operated for at least the minimum requirement, unless a complete copy of the form (including fees) has already been submitted for that year.*



# Form AB-17: 2019/2020 Renewal License Application

## Section 6 – Violations and Convictions

**Applicant violations and convictions in calendar years 2017 and 2018:**

Yes No

Have any notices of violation (NOVs) been issued to this licensee in the calendar years 2017 or 2018?

Yes  No

Has any person or entity named in this application been convicted of a violation of Title 04, of 3 AAC 304, or a local ordinance adopted under AS 04.21.010 in the calendar years 2017 or 2018?

Yes  No

If "Yes" to either of the previous two questions, attach a separate page to this application listing all NOVs and/or convictions.

## Section 7 – Certifications

Read each line below, and then sign your initials in the box to the right of each statement:

Initials

I certify that all current licensees (as defined in AS 04.11.260) and affiliates have been listed on this application, and that in accordance with AS 04.11.450, no one other than the licensee(s) has a direct or indirect financial interest in the licensed business.

By P.O.A.

I certify that I have not altered the functional floor plan or reduced or expanded the area of the licensed premises, and I have not changed the business name or the ownership (including officers, managers, general partners, or stakeholders) from what is currently approved and on file with the Alcoholic Beverage Control Board.

By P.O.A.

I certify on behalf of myself or of the organized entity that I understand that providing a false statement on this form or any other form provided by AMCO is grounds for rejection or denial of this application or revocation of any license issued.

By P.O.A.

As an applicant for a liquor license renewal, I declare under penalty of perjury that I have read and am familiar with AS 04 and 3 AAC 304, and that this application, including all accompanying schedules and statements, is true, correct, and complete. I agree to provide all information required by the Alcoholic Beverage Control Board or AMCO staff in support of this application and understand that failure to do so by any deadline given to me by AMCO staff will result in this application being returned to me as incomplete.

By P.O.A. F. Michael Swelling  
Signature of licensee

[Signature]  
Signature of Notary Public

F. Michael Swelling  
Printed name of licensee

Notary Public in and for the State of Alaska

My commission expires: w/office



Subscribed and sworn to before me this 11 day of April, 2019.

Seasonal License?  Yes  No

If "Yes" write your six-month operating period: \_\_\_\_\_

License Fee:	\$ 2500.00	Application Fee:	\$ 300.00	TOTAL:	\$ 2800.00
Miscellaneous Fees:				Late fee	500
GRAND TOTAL (if different than TOTAL):				Reinstatement	1000
				AMCO	\$4300