

Re: Trademark Application of :
 Hurteau & Associates Inc. :
 Serial No. 74/409381 :
 Filing Date: July 6, 1993 : On Request for
 For: FRUITS & PASSION : Reconsideration
 Request Filed: December 31, 1995 :

Hurteau & Associates Inc. has requested reconsideration of the Commissioner's decision dated December 2, 1996, denying its petition to accept a Statement of Use filed in connection with the above application. Although the Trademark Rules do not specifically provide for requests for reconsideration of DECISIONS on petitions, the Commissioner has the discretion to consider such requests pursuant to Trademark Rule 2.146(a)(3). Upon reconsideration the petition remains denied.

FACTS

A Notice of Allowance issued for the subject application on June 13, 1995. Pursuant to Section 1(d) of the Trademark Act, a Statement of Use, or Request for an Extension of Time to File a Statement of Use, was required to be filed within six months of the mailing date of the Notice of Allowance.

On September 12, 1995, Petitioner filed a Statement of Use. In an office Action dated March 24, 1996, the Applications Examiner in the ITU/Divisional Unit notified Petitioner that the papers submitted did not comply with the minimum requirements for filing a Statement of Use, because the prescribed fee, as required by Trademark Rule 2.88(e)(1), had not been submitted.

A Petition to the Commissioner was filed on May 10, 1996, in which petitioner argued that the fee for filing the Statement of Use was not included because Petitioner's agent expected a credit of \$245, the filing fee for one class of goods that was deleted from the application with the filing of the Statement of Use. He assumed this would cover the \$200 fee for filing the Statement of Use on the two remaining classes. The Petition was denied on December 2, 1996 and this request for reconsideration was filed on December 31, 1996.

DECISION

Trademark fees are required to be paid in advance, that is, at the time of requesting any action by the office for which a fee is payable. Trademark Rule 1.22. Although the rules provide that money paid in excess will be refunded, a mere change of purpose after the payment of money does not entitle a party to demand such a return. Trademark Rule 1.26.

Here, Petitioner's request that a temporary credit of \$100 be granted to cover the fee for filing a Statement of Use in order to avoid the abandonment of the application cannot be granted. The requirement that the Statement of Use be accompanied by the prescribed fee is statutory and cannot be waived. Section 1(d)(1) of the Trademark Act, 15 U.S.C. § 1051(d)(1). Petitioner was

not entitled to a refund of the money for deleting a class of goods and therefore, no credit exists upon which Petitioner can borrow in order to file the Statement of Use.

While the Commissioner has the discretion to consider requests for reconsideration pursuant to Trademark Rule 2.146(a)(3), reconsideration is not a matter of right. In some cases, the Commissioner will grant a petition upon request for reconsideration because new facts are presented which warrant equitable relief. However, the Commissioner will deny the petition where the request for reconsideration merely reiterates or expands on arguments previously presented. Inasmuch as no new facts or persuasive arguments have been raised by Petitioner, the application remains abandoned.

Philip G. Hampton, II
Assistant Commissioner
for Trademarks

PGH:JCL

Date:

Attorney for Petitioner.

Thomas J. Moore, Esq.
BACON & THOMAS
625 Slaters Lane, Fourth Floor
Alexandria, VA 22314