

Re: Trademark Application of :  
 Cutlery Shoppe, Inc. :  
 Serial No. 74-454123 :  
 Filing Date: November 4, 1993 : On Petition  
 For: MILLENIUM :  
 Petition Filed: April 24, 1997 :

Cutlery Shoppe, Inc., has petitioned the Commissioner to accept its second Request for Extension of Time to File a Statement of Use. The petition is denied under Trademark Rules 2.89(g) and 2.146.

## FACTS

The Notice of Allowance for the above-identified application issued on April 18, 1995. On October 17, 1995, Petitioner filed its first Request for Extension of Time to File a Statement of Use. The first extension request was granted, and Petitioner had until April 18, 1996, to file a second extension request or Statement of Use.

On April 22, 1996, Petitioner filed its second extension request.<sup>1</sup> The Applications Examiner in the ITU/Divisional Unit issued a letter on July 30, 1996, denying Petitioner's second extension request because it did not appear to be signed by the Applicant. The July 30, 1996 letter granted Petitioner 30 days in which to demonstrate that the person signing the second extension request had first-hand knowledge of the truth of the statements made in the request, and actual or implied authority to sign on behalf of the Applicant. The letter also required Petitioner to provide a substitute extension request, or an affidavit or declaration under 37 C.F.R. §2.20, signed by a person with statutory authority to sign on behalf of the Applicant, verifying the facts set forth in the second extension request.

On August 23, 1996, Petitioner responded to the July 30, 1996 Office letter. Petitioner stated that its attorney, the person who signed the second extension request, had first-hand knowledge of the statements made in the second extension request, and that its attorney had actual or implied authority to sign on behalf of the Applicant. Petitioner also provided a declaration verifying the facts set forth in the second extension request.

In a letter apparently dated March 26, 1997, the Manager of the ITU/Divisional Unit notified Petitioner that the documents submitted on August 23, 1996, did not establish that its attorney,

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<sup>1</sup> The second extension request was filed using a Certificate of Mailing under Trademark Rule 1.8, 37 C.F.R. §1.8, dated April 17, 1996. Effective December 2, 1996, Rule 1.8 was amended to permit filing of extension requests using a Certification of Mailing under Rule 1.8. See *Official Gazette* Notice of November 26, 1996 (1192 TMOG 95). However, in April, 1996, the prohibition against using a Certificate of Mailing under Rule 1.8 to file extension requests was still in effect.

Mr. Bradlee Frazer, had color of authority to sign the extension request, within the meaning of Trademark Rule 2.71(c), 37 C.F.R. §2.71(c). The extension request was denied, and the application abandoned. This petition followed.

## **ANALYSIS**

The only issue on petition is whether Petitioner has established that its attorney, Mr. Bradlee Frazer, had color of authority to sign an extension request on its behalf.

Petitioner makes two arguments in favor of granting its petition. First, Petitioner notes that its attorney also signed the first extension request. The first extension request was granted, without any question regarding the authority of the person who signed. Relying on this acceptance, Petitioner followed the same procedure for its second extension request. Petitioner also states that it fully complied with the requirements of the Application Examiner's July 30, 1996 letter, and therefore the petition should be granted.

### *Past Actions of the Office Not Controlling - Consistency Secondary to Correctness*

The propriety of the acceptance of Petitioner's first extension request is not the subject of this petition. If the Office erred in accepting the first extension request, it would be illogical and inappropriate to continue that error in this case. Consistency must be secondary to correctness of Office practice. See *In re Stenographic Machines, Inc.*, 199 USPQ 313, 317 (Comm'r Pats. 1978). While the Office regrets that Petitioner was not earlier notified of this deficiency, it is the Petitioner who is ultimately responsible for filing proper documents.

### *Establishing "Color of Authority"*

An Applicant's private attorney is ordinarily not regarded as possessing color of authority so sign on behalf of the Applicant. Private attorneys do not usually have firsthand knowledge of a client's business or the authority to act on behalf of a client, other than as a legal representative. TMEP §803. To establish color of authority, the Applicant must show that the person who signed the extension request had: (1) actual or implied authority to sign, and (2) first-hand knowledge of the truth of the statements in the extension request. Both of these elements must be satisfied in order to establish color of authority. Trademark Rule 2.71(c), 37 C.F.R. §2.71(c); TMEP §803.

Petitioner's August 23, 1996 response contained the conclusory statement that its attorney had first-hand knowledge of the statements made in the second extension request. However, Petitioner did not provide any information demonstrating that Mr. Frazer had such knowledge.

## **DECISION**

The petition is denied. The application remains abandoned. The \$200 in fees for filing the second and third extension requests will be refunded in due course.

Applicant may wish to consider filing a new application. The Office will not hold the denial of this petition to be prejudicial to the Applicant in the filing of a new application. The application filing fee is \$245.00 per class.

Philip G. Hampton, II  
Assistant Commissioner  
for Trademarks

PGH:EKM

Date:

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