

Re: Trademark Application of :  
 Ka Wai Food Company :  
 Serial No. 74/299695 :  
 Filing Date: July 31, 1992 : On Request for Reconsideration  
 For: CHING KEE :  
 Request for Reconsideration filed: June 20, 1996 :

Ka Wai Food Company has requested reconsideration of the Commissioner's decision dated December 12, 1994, dismissing its petition to accord a constructive filing date of July 21, 1986 in connection with the above-referenced application. Although the Trademark Rules do not specifically provide for requests for reconsideration of decisions on petition, the Commissioner has the discretion to consider such requests pursuant to Trademark Rule 2.146(a)(3), 37 C.F.R. §2.146(a)(3). The request upon reconsideration is granted to the extent that the particular request is decided on the merits. The request to accord a constructive filing date of July 21, 1986 is denied.

## FACTS

The subject application was filed February 13, 1992. The mark was published for opposition on August 24, 1993. However, after publication, jurisdiction was restored to the Examining Attorney for purposes of suspending the subject application pending disposition of a prior filed application under Serial No. 74/012747. After the subject application was reassigned to a second Examining Attorney, registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

The Applicant then filed a petition to the Commissioner on April 24, 1994 (the "Petition") requesting that the suspension of the subject application be set aside and that the Commissioner accord a constructive filing date of July 21, 1986, to the subject application based on the Trademark Trial and Appeal Board's (the "Board") order issued in Cancellation Proceeding No. 18,304.<sup>1</sup> Petitioner asserted that the Board "held that applicant Ka Wai Food was the correct applicant/registrant with respect to Application no. 610,708 filed July 21, 1986." (Petition at 2).

The Petition was dismissed as moot because the subject application had been removed from suspension on January 5, 1996 by the Examining Attorney. The request to receive a constructive filing date of July 21, 1986 was addressed in a footnote and also deemed moot. The subject registration of the Cancellation Proceeding was canceled under Section 18 of the Trademark Act

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<sup>1</sup> Cancellation Proceeding No. 18,304 was instituted by Ching Kee Egg Rolls Co., Ltd. to cancel Registration No. 1,460,254 issued to respondent. Tai wing Hong Importer, Inc. on October 6, 1987, for CHING KEE for "egg rolls, biscuits and cookies." It is noted that Counsel for Petitioner also represented respondent in this proceeding. The Board ordered the Commissioner to cancel Registration No. 1,460,254 on June 16, 1992. A Request for Reconsideration was filed on June 29, 1992, by the respondent. On August 4, 1992, the Board denied the respondent's Request for Reconsideration.

because the identified applicant was not the owner of the mark when the application was filed. The canceled registration was deemed void as filed.

This request for reconsideration followed. Petitioner requests that the issue of whether Petitioner is entitled to the constructive filing date of July 21, 1986 not be dismissed as moot, but decided on the merits.

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## **DECISION**

Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), states, “The owner of a trademark used in commerce may apply to register his or her trademark under this Act....” The Applicant must be the owner of the mark for which registration is requested. If the Applicant does not own the mark on the application filing date, the application is void. *Huang v. Tzu Wei Chen Food Co., Ltd.*, 849 F.2d 1458, 7 USPQ2d 1335 (Fed. Cir. 1988).

Petitioner interprets the Board’s order in Cancellation Proceeding dated June 16, 1992 as identifying Petitioner as the owner of canceled Registration No. 1,460,254. In fact, the Board order of June 16, 1992 states: “...we are persuaded that respondent [Tai Wing Hong Importer, Inc.] is not the owner of the trademark CHING KEE, either by assignment from petitioner or Ka Wai, and therefore, Registration No. 1,460,254 is void ab initio.” The Board also stated in a footnote in the order “We, of course, make no comment on petitioner’s rights vis-à-vis any rights Ka Wai may have, such issue being beyond the scope of this proceeding.”

The Board merely decided the issue of whether the respondent in the Cancellation Proceeding was the owner of the mark. The Board found that the respondent was not the owner and that Registration No. 1,460,254 was void as filed. Therefore, as stated in the dismissal letter, Petitioner is not entitled to any constructive filing date in connection with canceled Registration No. 1,460,254 that is considered void as filed. Petitioner’s ownership rights in the mark CHING KEE were not adjudicated in that proceeding because they were beyond the scope of the Cancellation Proceeding.

The request upon reconsideration is denied. The application will be forwarded to the Examining Attorney for suspension of the application pending disposition of Cancellation No. 25249.

Philip G. Hampton, II  
Assistant Commissioner for  
Trademarks

PGH:SLC

Date:

Attorney for Petitioner:

Myron Amer, Esq.  
Myron Amer, P.C.  
114 Old Country Road  
Suite 310  
Mineola, NY 11501