

David A. Einhorn, Esq.
Anderson Kill & Olick
1251 Avenue of the Americas
New York, NY 10020-1182

Re: Petition to Revive Application Serial No. 74/696047
Applicant: LMB Accessory Specialist, Ltd.
For: ACCESSOROLOGIST

Dear Mr. Einhorn:

This will acknowledge receipt of the petition to revive the above-referenced application, filed May 14, 1997.

Decision: Petition to Revive DENIED.

FACTS

This application was abandoned for failure to file a Statement of Use, or Request for Extension of Time to File a Statement of Use, within six months of the Notice of Allowance, i.e., on or before February 13, 1997. Upon receipt of the Notice of Allowance, issued August 13, 1996, Counsel noted that the wording in the Notice of Allowance contained a reference to the word "the" instead of the word "that." Therefore, the description of services in the Notice of Allowance did not read properly.¹ Accordingly, Counsel filed a request for correction of the Notice of Allowance on September 10, 1996. The correction was made by the Office, however, the Applicant did not file the Statement of Use or Request for Extension of Time for filing the Statement of Use, on or before February 13, 1997, the statutory deadline. The application was abandoned, and this petition followed.

Counsel asserts that the Statement of Use, or extension request, was not filed because Counsel was awaiting a response to the request for correction in the nature of a re-issued Notice of Allowance. Counsel states further that he could not file the Statement of Use or extension request because the description of services in the Notice of Allowance was incorrect and incomprehensible.

ANALYSIS

In any petition to revive an abandoned application, the applicant must show that the delay in responding was unavoidable. Delays due to circumstances that could have been avoided with the exercise of care and attention are not considered unavoidable delays.

The term "unavoidable" means that reasonable steps had been taken, or precautionary systems were in operation which were designed to avoid the circumstances which caused the delay, but the

delay occurred despite these precautions. If there were reasonable precautions that could have been taken to anticipate and avoid the delay, and those precautions were not taken, then the delay is considered avoidable and the petition to revive the application will not be granted. TMEP §1112.05(b)(i).

In this instance, Counsel waited for a response to the request for correction of the description of services in the Notice of Allowance. Counsel could have confirmed that this correction was made by calling the Office to see that the database had been corrected. Furthermore, Counsel had the opportunity to object to the Examiner's Amendment containing this description of services, but apparently did not do so. The Notice of Allowance was neither cancelled nor should it have been in the absence of any clear error in approving the mark for publication. *See* TMEP §1105.05(c). For these reasons, the delay in filing the Statement of Use, or extension request, due to Counsel's anticipation of a new Notice of Allowance was not unavoidable.

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.

Sincerely,

Sarah Lee Chung
Staff Attorney
Office of the Assistant Commissioner
for Trademarks
(703) 308-8900 ext. 35

¹ It is noted that the description of services contained in the Notice of Allowance was identical to the description of services contained in the Examiner's Amendment dated February 12, 1996. The record does not indicate any objection raised to that Examiner's Amendment prior to issuance of the Notice of Allowance. Furthermore, TMEP §1111 states, in pertinent part:

...if the applicant or counsel wishes to object to the amendment made by the examining attorney, that should be done at once upon receiving the amendment so that attention can be given to the objection before publication or issue.