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# UNITED STATES PATENT AND TRADEMARK OFFICE

**SERIAL NO:** 77/036122

**MARK:** DEC



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** BetaBatt, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

B31175US

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## EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the final refusal to register the proposed mark DEC on the grounds that the mark is merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. Section 1052(e)(1); TMEP §§1209 *et seq.*

### **I. Facts**

A. On November 7, 2006 BetaBatt, Inc. (hereinafter referred to as applicant), applied for registration, based on an intent to use, on the Principal Register of the trademark DEC for “Power generating and/or storage devices, namely, batteries deriving power from nuclear decay processes” in class 9 and for “Treatment of radioactive materials and/or porous substrates for use in the fabrication of power generating and/or storage devices, namely, batteries deriving power from nuclear decay processes; Consulting and technical advisory services relating to the treatment of radioactive materials and/or porous substrates, and to the fabrication of power generating and/or

storage devices, namely, batteries deriving power from nuclear decay processes” in class 40.<sup>1</sup>

B. On March 21, 2007, registration was refused under Section 2(e)(1) of the Trademark Act. The Examining Attorney provided evidence that the proposed mark is a recognized acronym for “direct energy conversion” and explained how the proposed mark described a feature of applicant’s goods and services. The evidence included an article from Automation World explaining that direct energy conversion (DEC) devices use radiation provided by the decay of a radioisotope to generate electric power. The Examining Attorney did not directly ask the applicant whether the goods and services utilized direct energy conversion via a nuclear decay process presumably because the identification of goods and services explained that they do.

C. On September 21, 2007, the applicant responded to the refusal to register. The applicant did not deny that DEC stands for “direct energy conversion” or that the applicant’s intended goods or services would feature such. The applicant appeared to concede that the goods and services feature direct energy conversion, but contended that the meaning would not be apparent to the potential consumers so that a descriptiveness refusal would not be appropriate. Applicant also pointed out that a prior application for DEC was allowed<sup>2</sup> and that a related application, but for a different mark, had also been registered.

D. On October 12, 2007, the Examining Attorney issued a final refusal. In her action, Ms. Wood countered the applicant’s arguments, as will be discussed in detail below, and provided additional evidence regarding the relevant meaning of DEC. On

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<sup>1</sup> The application was assigned serial no. 77036122.

<sup>2</sup> Serial No. 78505187, notice of allowance issued December 27, 2005, abandoned August 29, 2006 failure to file a statement of use.

April 9, 2008, the applicant filed a notice of appeal and a request for reconsideration. On April 30, 2008 the applicant's request for reconsideration was denied and the applicant subsequently filed its appeal brief on July 8, 2008. On July 9, 2008, the appeal brief was forwarded to the Examining Attorney for her brief in accordance with Trademark Rule 2.142(b).<sup>3</sup>

## **II. Issue on Appeal: Section 2(e)(1) Descriptive Refusal**

The sole issue on appeal is whether the applicant's proposed mark, DEC, is descriptive for "Power generating and/or storage devices, namely, batteries deriving power from nuclear decay processes" in class 9 and for "Treatment of radioactive materials and/or porous substrates for use in the fabrication of power generating and/or storage devices, namely, batteries deriving power from nuclear decay processes; Consulting and technical advisory services relating to the treatment of radioactive materials and/or porous substrates, and to the fabrication of power generating and/or storage devices, namely, batteries deriving power from nuclear decay processes" in class 40, within the meaning of Section 2(e)(1) of the Trademark Act.

## **III. Overview and Arguments Regarding Section 2(e)(1) Refusal**

### **A. Overview of Section 2(e)(1) Law**

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods and/or services. *In re Gyulay*, 820 F.2d 1216, 3

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<sup>3</sup> The Office has reassigned this application to the undersigned Senior Attorney.

USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP §1209.01(b). A mark that describes an intended user of a product or service is also merely descriptive within the meaning of Section 2(e)(1). *Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ2d 1996 (TTAB 1986); *In re Camel Mfg. Co., Inc.*, 222 USPQ 1031 (TTAB 1984); *In re Gentex Corp.*, 151 USPQ 435 (TTAB 1966).

For the purpose of a Section 2(e)(1) analysis, a term need not describe all of the purposes, functions, characteristics or features of the goods and/or services to be merely descriptive. *In re Dial-a-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 U.S.P.Q.2d 1807 (Fed. Cir. 2001). It is enough if the term describes only one significant function, attribute or property. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (“[A] mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.”) (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)).

### **B. Why Applicant’s Mark Was Held to be Descriptive**

The applicant’s proposed mark, DEC, merely conveys, in significant part, a feature of the batteries in class 9 and the subject matter of the services in class 40. The applicant intends to provide “batteries featuring power from nuclear decay processes.” The class 40 services which are treatment of radioactive materials, which encompasses treatment for use in “direct energy conversion” (DEC) devices, and consulting and technical advisory services are directed to “batteries deriving power from nuclear decay

processes.” A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods and/or services.

**1. The meaning of DEC in relation to the goods and services and the evidence relating thereto**

The Examining Attorney has made of record a strong showing that DEC is a recognized acronym for “direct energy conversion”. See excerpt from [www.acronymfinder.com](http://www.acronymfinder.com) and accompanying evidence attached to the Office action of March 21, 2007. Referring to the term “direct energy conversion” or DEC with regard to batteries and energy generation via radioactive isotopes is common. The excerpted evidence from the GOOGLE research database, retrieved on March 21, 2007 and attached to the office action of that date, shows that the term “direct energy conversion” appeared 22,200 times. Only a representative sampling of hits was attached because of the large number of hits responsive to the search request and the duplicative or irrelevant nature of some of the stories. The evidence demonstrates that the term DEC is used to describe a particular type energy generation utilizing the nuclear decay of radioactive materials and to describe a type of battery that derive its energy from DEC processes.

For example, from [www.automationworld.com](http://www.automationworld.com):

Electric power is the single most difficult constraint for industrial wireless sensor design. Present day commercial products rely on chemical batteries.

Future products will supplement these with energy-harvesting technologies such as solar cells or piezoelectric generators driven by vibration. In the longer term, “nuclear” batteries that use **direct energy conversion** of nuclear radiation may provide power in sufficient quantity, and for years at a time regardless of ambient temperature....

Nuclear **direct energy conversion (DEC)** devices sound frightening, but in fact, are very similar to solar cells. Instead of solar radiation, nuclear **DECs** use radiation provided by the decay of a radioisotope embedded within the battery. This radiation fall on a semiconductor device similar to a solar cell, and directly generates electric power. (emphasis added).

This same article goes on to describe the advantages of a nuclear DEC device which include long life and that the available energy is not dependent on ambient temperatures which is the case with chemical batteries. Further, the article describes that there are two isotopes that might be suitable for such a device one being tritium with a half life of 12.3 years. Applicant's devices will apparently utilize the tritium isotope, since the applicant argues that

From the perspective of a pertinent consumer, the commercial advantage of such batteries – i.e., longer battery life – is far more important than how the device actually operates. In fact, it could be far more reasonably surmised that the typical patient wearing a hearing aid or using a heart monitor would have no idea that **tritium** could decay into beta particles in order to produce a battery through a process known as direct energy conversion, and instead would focus only on the fact that a battery sold under the mark claimed herein would not need to be replaced as frequently as other brands of batteries. (emphasis added) (applicant's September 21, 2007 response).

Additional evidence was provided in the final Office action of October 12, 2007. For example an excerpt from [www.uic.edu](http://www.uic.edu) discussed a conference in 2006 at which papers were solicited:

Paper describing current research on fluid and thermal energy conversion science and technology are hereby solicited, including... on **direct energy conversion (DEC)**. (emphasis added)

Evidence was also provided in the denial of the request for reconsideration of April 30., 2008, for example:

From [www.peak.sfu.ca](http://www.peak.sfu.ca):

## 2020 Vision – Next generation batteries

In the near future, millions of low-powered radio frequency devices will be scattered throughout our environment, serving a variety of critical roles. However, the short and unpredictable life spans of existing chemical batteries means that new power supply solutions are needed.

The **Direct Energy Conversion (DEC)** cell is a beta-voltaics based nuclear battery that can run for over a decade on the electrons generated by the natural decay of the radioactive isotope tritium. Because tritium's half life is 12.3 years, the **DEC** cell could provide a decades worth of power for many applications.

Beta-voltaic devices use radioisotopes that emit relatively harmless beta particles, rather than more dangerous gamma photons. A commercial version of the **DEC** cell will likely not be able to power a cell phone, but it would be more than sufficient for a sensor or pacemaker...(emphasis added)

From [www.core77.com](http://www.core77.com)

### Button-Batteries and DECs

Via Treehugger comes news of a watch-battery sized propane fuel cell. Pretty sweet. And over on the MIT Technology Review site is a couple pages worth of discussion about Atomic Batteries. To be honest, I didn't get past the first couple paragraphs but the following bit will have me heading back for a complete read later:

It's called the Direct energy Conversion (DEC) Cell, a betavoltaics-based "nuclear" battery that can run for over a decade on the electrons generated by the natural decay of the radioactive isotope tritium...

From: [www.advancedinformation.net](http://www.advancedinformation.net)

Watch out Eveready, the battery that keeps on going for longer may be just around the corner.

A recent article on csema.com fills us in on where the battery market may be heading. The breakthrough in long life batteries is discussed in this article, part of which can be seen below

A **direct energy conversion (DEC)** cell—also called a betavoltaics-based "nuclear battery" is not only microscopic in size, but also could run for more than a decade on the electrons generated by the natural decay of the radioactive isotope tritium. Such devices convert low levels of radiation into electricity and can have useful lives spanning decades. (emphasis added)

2. Based on the evidence DEC is merely descriptive when used in connection with applicant's goods and services.

As demonstrated by the evidence, the term DEC describes a particular type of energy generation technology ("direct energy conversion" (DEC)) and batteries that utilize this technology. It logically follows that the proposed mark DEC is descriptive of batteries that will derive their power from "direct energy conversion" (DEC) and is likewise descriptive of treatment of radioactive materials and consulting associated therewith.

For the foregoing reasons the proposed mark must be refused registration on the Principal Register. As noted in *In re Abcor Development Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978):

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

Businesses and competitors should be free to use descriptive language when describing their own goods and/or services to the public in advertising and marketing materials. *See In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001). Because consumers, businesses and competitors need to use the term DEC in relation to batteries, treatment of radioactive materials, and associated consulting all relating to or utilizing direct energy conversion (DEC), to grant to the applicant this registration would be inhibiting competition in the marketplace.

**C. Applicant's Arguments Regarding Descriptiveness Refusal and Rebuttal thereto**

**1. The applicant argues that DEC is not a recognized acronym**

The test for determining whether an initialism is merely descriptive was established by the predecessor to the CAFC in *Modern Optics, Inc. v. Univis Lens Co.*, 234 F. 2d 504, 110 USPQ 293 (CCPA 1956). In essence the test holds that while each case must be decided on its own merits, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith. 110 USPQ 293 at 295. As discussed above, sufficient evidence has been provided to show that DEC is a recognized acronym for Direct Energy Conversion. At first the applicant appears to contend that DEC is not a recognized acronym for "direct energy conversion," but then the applicant concedes this point stating:

"Applicant does not does not dispute that DEC stands for Direct Energy Conversion. However, there is no evidence submitted by the Office that indicates that the common everyday purchaser of a battery that is used in connection with hearing aids or similar medical devices will know that DEC stands for direct energy conversion. Further, as in *Nife, Inc.*, there is no evidence that other manufacturers of batteries utilize the designation DEC as the brand name of their batteries or consulting relating thereto." Applicant's brief at page 6.

The identification of goods and services makes no mention that the batteries or the consulting services are restricted to hearing aids or similar medical devices, so consequently there would be no requirement for the evidence to refer to hearing aids or similar medical devices. But even if the identification were restricted, the proffered evidence is still sufficient. The proposed mark is descriptive of any battery or other device utilizing "direct energy conversion" (DEC) or of consulting services relating to

“direct energy conversion” (DEC). An explanation of “direct energy conversion” (DEC) has been provided and the applicant’s goods and services clearly relate, as can be seen from a reading of applicant’s identification of goods and services to “batteries deriving power from nuclear decay processes.”<sup>4</sup>

To be descriptive a mark need not reveal every detail of the goods or services with which it will be used. “A mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.” *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)); TMEP §1209.01(b). It is enough if the term describes only one significant function, attribute or property. *In re Oppedahl*, 373 F.3d at 1173, 71 USPQ2d at 1371; TMEP §1209.01(b). The proposed mark at issue clearly describes a significant, and seemingly the central attribute of the goods and services, namely, that they utilize or relate to “direct energy conversion” (DEC).

**2. The applicant argues that the cases cited by the Office are distinguishable and that the provided evidence is insufficient.**

Applicant attempts to distinguish *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) (Apple Pie held descriptive) and *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986) (“Bed and Breakfast Registry” held descriptive). Applicant argues that the proposed mark DEC, “is distinguishable form the words “Apple Pie” and “Bed and Breakfast Registry,” as it does not immediately convey a description

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<sup>4</sup> There are several types of “direct energy conversion” (DEC), including the nuclear type at issue here. Some of the evidence provided by the prior Examining Attorney relates to other types of direct energy conversion, but this makes the applicant’s proposed mark no less descriptive.

of batteries that derive power from nuclear decay processes or consulting related thereto. The standard set out in the aforementioned cases regarding whether a term is descriptive is from the view point of the relevant purchasing public. The acronym, DEC will not immediately convey to the average consumer and purchaser of batteries, the thought of batteries, that derive power from nuclear decay processes or consulting related thereto. In fact, in none of the evidence cited by the Office is there any reference to companies selling batteries that utilize the acronym, DEC.” Applicant’s brief at pages 7-8.

Applicant follows up this argument with the contention that since “Apple Pie” and “Bed and Breakfast” are much more common and well known terms than DEC, that DEC cannot be descriptive. That “Apple Pie” and “Bed and Breakfast” may be more common terms in no way leads to the conclusion that DEC is not descriptive. Applicant conjectures that there would be much more available evidence for “Apple Pie” and “Bed and Breakfast.” Even if true, it doesn’t matter. Sufficient evidence has been provided to demonstrate the DEC which stands for “direct energy conversion” is descriptive. The Office bears the burden of setting forth a prima facie case in support of a descriptiveness refusal. It is believed that the Office has met this burden. The applicant has come forward with no evidence to rebut the case, but simply argues that the mark is not descriptive and that with other descriptive marks evidence may be more plentiful and readily obtainable. When the Examining Attorney sets forth a prima facie case, the applicant cannot simply criticize the absence of additional evidence supporting the refusal, but must come forward with evidence supporting its argument for registration. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed Cir. 1987).

### **3. The applicant argues that the mark is suggestive.**

The applicant argues that the mark is suggestive rather than descriptive. The applicant bases this argument on the assertions that the proposed mark does not immediately convey information about the identified goods and services, and that “a multi-stage reasoning process is required to determine attributes of the applicant’s services.” Applicant’s brief at page 8. The Examining Attorney maintains that the mark is simply a descriptive term which immediately and directly provides information about the goods and services. No multi-stage reasoning process is required. Applicant’s mark immediately describes aspects of the applicant’s goods and services.

**4. Applicant argues that the evidence does not show that DEC by itself is descriptive and that ordinary consumers would be aware of the meaning of DEC**

**a. Test for descriptiveness is not in the abstract**

Applicant argues that “most of the instances in which “DEC” appears simply describe the process of direct energy conversion, and do not describe products (batteries or otherwise) offered by sale under the mark, DEC....As such, these articles do demonstrate that DEC **by itself** is merely descriptive of the goods and services that Applicant intends to offer.” (emphasis added) Applicant’s brief at page 11. First, that an applicant may be the first and only user of a merely descriptive designation is not dispositive on the issue of descriptiveness where, as here, the evidence shows that the word or term is merely descriptive. *See In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); *In re Acuson*, 225 USPQ 790, 792 (TTAB 1985); TMEP §1209.03(c).

Second, there is no requirement that DEC, by itself, in a vacuum, would need to be shown to be descriptive. The determination of whether a mark is merely descriptive is considered in relation to the identified goods and/or services, not in the abstract. *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (C.C.P.A. 1978); TMEP §1209.01(b); *see, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061 (TTAB 1999) (finding DOC in DOC-CONTROL would be understood to refer to the “documents” managed by applicant’s software, not “doctor” as shown in dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242 (TTAB 1987) (finding CONCURRENT PC-DOS merely descriptive of “computer programs recorded on disk” where relevant trade used the denomination “concurrent” as a descriptor of a particular type of operating system). “Whether consumers could guess what the product is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

#### **b. Ordinary Consumers**

A consistent argument of applicant is that even if DEC is an acronym for “direct energy conversion” and even if the goods and services do feature “direct energy conversion” (DEC) it doesn’t matter because, “It is not clear that ordinary consumers would be aware of...” the relevant definitions. Applicant’s brief at page 11. This argument is not persuasive. A descriptiveness refusal cannot be avoided by the fact that some who encounter the mark are unaware or uninformed of the meaning. The relevant class of consumers includes both laypersons, who may be unaware of the meaning of DEC and those who are aware of the meaning of “direct energy conversion” (DEC). That a term may be technical or not part of the lexicon of laypersons does not render a descriptive term registrable. DEC is a descriptive term of art in the relevant industry.

Many who would be utilizing applicant's highly technical services and who might purchase applicant's futuristic batteries would be aware of the meaning of DEC. There is sufficiently wide knowledge of the term DEC that the test for descriptiveness is met. Because DEC is a term of art in the relevant field, prospective purchasers include the unaware as well as those with knowledge of the term, so that the average prospective purchaser of the goods and services, when encountering the mark in connection therewith, would immediately perceive a feature of the goods and services. *In re Omaha National Corporation* 2 USPQ2d 1859 (Fed. Cir. 1987). As the court stated in *In re Omaha* at 1861,

In context, "average" or "ordinary" consumers simply refers to the class or classes of actual or prospective customers of the applicant's particular goods or services. In this sense, corporate users of banking services who, appellant admits, understand the industry meaning of a "first tier" bank are "average" or "ordinary" customers. That corporate customers may constitute a smaller number of accounts than individuals is irrelevant. Descriptiveness is not determined by its meaning only to the class of regular customers with the largest head count.

Similarly, in the case at hand, corporate and scientific customers would certainly be part of the class of "ordinary consumers" for the applicant's goods and services. This is certainly true if these batteries are for use in medical devices and are incorporated into such devices by the manufacturer of such devices. It is readily apparent that the services in class 40 would be directed the scientific and/or corporate community who would be knowledgeable with regard to the meaning of DEC because those services appear to be technical and scientific and not of a type that a "John Q. Public" would seek. As aptly stated above, "Descriptiveness is not determined by its meaning only to the class of regular customers with the largest head count." *Id* at 1861.

## **5. Applicant's Prior Application For Which A Notice Of Allowance Had Issued**

Though not raised in applicant's brief, for the sake of thoroughness, applicant's previous arguments relating to consistency will be addressed. In the applicant's response of September 21, 2007, the applicant argued that for "consistency in the examination process, the present Examiner may wish to refer to (1) U.S. 78/891,408, which involves another of Applicant's applications, which was recently allowed for the mark BETA BATTERIES as used in connection with batteries powered by beta particles for a nearly identical refusal and traversal where Applicant's position was accepted by the Office, and (2) U.S. 78/505,187, which involved the exact mark and goods and services claimed in the instant application, and which was previously allowed by the Office prior to its unintentional abandonment following issuance of a Notice of Allowance."

With respect to the BETA mark, since the mark is simply different, the allowance of that mark appears to be not relevant to the case at hand. "[P]revious decisions of examiners allowing other marks are without evidentiary value and are not binding upon the agency or the Board. Each case must be decided on its own merits." (emphasis added). In re National Novice Hockey League, Inc., 222 USPQ 638,641 (TTAB 1984. Even if some prior registrations have some characteristics similar to this application, the PTO's allowance of such prior registrations does not bind the Trademark Trial and Appeal Board, see In re Busch Entertainment Corp., 60 USPQ2d 1130 (TTAB 2000); and In re Styleclick.com Inc., 57 USPQ2d 1445 (TTAB 2000), or a reviewing court, see In re Nett Designs, 236 F.3d 1339 (Fed. Cir. 2001), 57 USPQ2d 1564 (TTAB 1999).

With respect to the earlier allowance of serial no. 78505187, consistency in examination practice is an Office goal, but it is secondary to the obligation to reach the correct result in the case actually before the Examining Attorney. See, e.g., *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 Ser. No. 78568912 11 (Fed. Cir. 2001); *In re Lighthouse Inc.*, 82 USPQ2d 1471 (TTAB 2007). Cf. *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

Lastly, the applicant correctly states that any doubt must be resolved in the applicant's favor, however in this instance there is no doubt to be resolved.

**IV. Conclusion**

The applicant's proposed mark, DEC, in relation to the identified goods and services is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); TMEP §§1209 *et seq.* For the foregoing reasons, the refusal to register the applicant's proposed mark should be affirmed.

Respectfully submitted,

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