

This Opinion is Not a
Precedent of the TTAB

Mailed: February 9, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Shrinivas Sugandhalaya
—

Serial No. 78691247
—

Patchen M. Haggerty of Perkins Coie LLP,
for Shrinivas Sugandhalaya.

Jeffrey S. DeFord, Trademark Examining Attorney, Law Office 115,
John Lincoski, Managing Attorney.

—
Before Zervas, Shaw and, Goodman
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Shrinivas Sugandhalaya (“Applicant”) seeks registration on the Principal Register of the mark NAG CHAMPA (in standard characters) for “incense sticks,” in International Class 3.¹ The application includes the following translation: “NAG’ in Hindi means snake and ‘CHAMPA’ is a type of flower.” Applicant’s specimen showing use of the applied-for mark on packaging appears below.

¹ Application Serial No. 78691247 was filed on August 12, 2005 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere on April 30, 1973 and first use in commerce on January 31, 1990.



The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the goods. When the refusal under Section 2(e)(1) was made final, Applicant appealed and requested reconsideration claiming, in the alternative, that the mark has acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f). The Examining Attorney continued the final refusal under Section 2(e)(1) and found Applicant's claim of acquired distinctiveness to be insufficient. After the Examining Attorney issued a final action refusing registration under Section 2(f), the appeal resumed.

I. Mere Descriptiveness under Section 2(e)(1)

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009-10 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev.*

Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *Coach Servs. Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1616 (TTAB 2010) (quoting *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978)), *vacated-in-part on other grounds*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012).

The Examining Attorney argues that “Applicant’s proposed mark NAG CHAMPA is merely descriptive because it identifies a feature and/or characteristic of applicant’s incense sticks. . . . [T]he wording identifies the name of a particular fragrance commonly used in incense, soap, perfume oil, essential oils, candles and other personal toiletries.”² It is the Examining Attorney’s burden to show that a term is merely descriptive of an applicant’s goods or services. *In re Gyulay*, 3 USPQ2d at 1010; *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2052 (TTAB 2012).

² Examining Attorney’s Br., p. 5; 9 TTABVUE 5.

To support of the refusal, the Trademark Examining Attorney placed into the record evidence showing use by competitors, as well as other third parties, of the term NAG CHAMPA in connection with incense and other scented products. The following examples are representative:

- A web page from the Internet site www.wisegeek.com purporting to answer the question “What is Nag Champa?” The web page states:

Nag champa is an Indian scent which is famously used in incense, although it also appears in soaps, lotions, perfumed oils, and candles, among other things. Many people think of nag champa when they think of incense, since the scent is so ubiquitous, and it is quite popular among many people all over the world. . . . This incense is part of a family of Indian scents known as champa incenses, because they are all reminiscent of the champa flower, better known to Westerners as plumeria. . . . Numerous Indian companies manufacture nag champa sticks, which tend to burn for around 30 minutes, and the incense is also available in the form of coils and cones for people who prefer these formats.³

- A web page from the online retail store www.sensia.com offering for sale a variety of “NAG CHAMPA Incense, Bath & Body, and Oils.” Notably, Applicant’s NAG CHAMPA products are offered alongside products from third parties also using the term NAG CHAMPA to describe their product’s fragrance. For example, the web site offers the following third-party products:
 - **Nag Champa Flora Incense** . . . Made in India, this incense represents the classic scent of Flora Agarbatti.

³ Examining Attorney’s Office Action, October 19, 2012, pp. 2-6.

- **The traditional Nag Champa fragrance of India in Fabulous new body products from Sensia!** Nag Champa Moisturizing Body Lotion . . . Nag Champa Body Spray . . . Nag Champa Pure Vegetable Soap.
 - **Nag Champa Perfume Oil from Triloka** . . . Triloka is a dedicated incense and essential oil company. . . .⁴
- Excerpts from two gardening websites, davesgarden.com and www.store.hawaiiantropicalplants.com, listing a common name of the tree of the species *Mesua ferrea* as Nag Champa, as well as the names Indian Iron Wood, Indian Rose Chestnut, and Cobra's Saffron, among others. The listing from www.store.hawaiiantropicalplants.com appears below.

Our Products >> *Mesua ferrea* (4x4x10 inch tree pot)- Nag Champa

| Related Items | |
|---|---------|
| Artocarpus heterophyllus (jakfruit) 4x10 tree pot | \$18.50 |
| Browneopsis ucayalina (3.5 inch square pot) | \$49.00 |
| Canaga odorata (ylang-ylang) in 3.5 inch square pot | \$19.75 |
| Ficus religiosa (2.5x10 inch tree pot) | \$14.00 |
| Sandoricum koetjape-Santol (4x4x10 inch tree pot) | \$19.50 |

Mesua ferrea (4x4x10 inch tree pot)- Nag Champa

Family: Clusiaceae. Common Names: Indian Iron Wood, Nag Champa, Nagakesara. Fragrant white flowers with prominent mass of yellow stamens in the center. New growth is deep purplish red. Mature leaves are dark green. This medium sized tree is densely branched. Growth of young trees is slow. Blooms at 5 to 6 years old. Outdoors in Zones 10 to 11. I don't know if this species will take any frost.



Click To Enlarge

Qty* Price \$27.00

* Marked fields are required.

Add To Cart

Item #: 1038

⁴ *Id.* at 7-8.

⁵ Examining Attorney's Office Action, June 10, 2013, pp. 2-6.

- A “Buying Guide” from the ebay.com auction web site titled “So What Is Nag Champa Incense Anyhow?” The guide discusses both Applicant’s incense as well as other brands, all of which use the term NAG CHAMPA:

Nag Champa Incense

Incense has grown exponentially in popularity in America. . . . Nag Champa incense is by far the most popular incense available, and you can purchase it at Incense Galore.

What Is Nag Champa

Nag Champa incense, the most popular of which is made by Satya Sai Baba, is created using a number of exotic and rare ingredients. The champa flower serves as its basis, although there are other spices and resins included to enhance the scent. . . . It’s important to note that blue box Nag Champa, while the most popular, isn’t the only Nag Champa incense on the market. Nag Champa Super Hit is another popular fragrance that is just now becoming widely used. Several other Nag Champa variations, like Rajmukut and Natraj are also available. At Incense Galore, we make it our mission to offer the most complete selection of incense.⁶

- A web page from nagchampa.com for the online retail store NAG CHAMPA SPA COLLECTION claiming to offer “the best selection of Nag Champa Products in the world!” Applicant’s NAG CHAMPA incense is offered alongside products from the “Nag Champa Spa Collection” which uses the term NAG CHAMPA to describe its product fragrance. For example, the web site offers, *inter alia*, “Nag Champa Spa Collection” NAG CHAMPA natural soap, aromatherapy oil, lotion, and massage oil:

⁶ *Id.* at 7-8.



- A web page from the Internet web site www.ehow.com purporting to answer the question “**What is Nag Champa?**” The web page describes NAG CHAMPA as a scent or a fragrance, stating:

Nag Champa is an uncommon name for a very common scent. Brought over from the Eastern world, this scent is a commonly used fragrance with deep roots in Indian spirituality.

* * *

Significance

One of the most popular incense fragrances, Nag Champa is a popular Indian scent that is also often used in lotion, perfume, oils and candles.

⁷ *Id.* at 9-14.



History

Nag Champa is part of the Champia family [sic], as it is derived from the Champa flower--a member of the Magnolia family. . . .

Identification

You may have smelled Nag Champa many times and never knew what it was called; however, you can always pinpoint the scent by its musky, earthy tones. A blend of champa flowers, oil (pure Mysore Sandalwood Oil), spices, resins, Nag Champa is among the most popular incense fragrances.⁸






- Excerpts from the ebay.com auction web site featuring a variety of third-party incense products using the term NAG CHAMPA to identify the scent or fragrance of the incense:

| Product Description | Product Image |
|---|--|
| <p>“Goloka NAG CHAMPA Agarbathi incense sticks . . . Scent: Nag Champa”⁹</p> |  |
| <p>“Om Nagchampa Incense Sticks – Strong Nag Champa Scent . . . A great strong champa scent”¹⁰</p> |  |

⁸ *Id.* at 15-17.

⁹ *Id.* at 27-28.

¹⁰ *Id.* at 42-43.

| | |
|--|--|
| <p>“TIBETAN NAGCHAMPA INCENSE described as “Nag Champa 30-Stick Bundle Ancient Tibetan Incense Sticks!”¹¹</p> |  |
| <p>“Pooja Nag Champa Incense Gold Foil Box . . . Scent: Pooja Nag Champa”¹²</p> |  |
| <p>“ASSORTED Yoga Incense Cones – Assorted Fragrances High Quality Nag Champa Amber Frankincense Sandal Patchouli etc. . . . Nag Champa is an Indian fragrance, commonly found in incense, soap, perfume, oil essential oils, candles and personal toiletries originating there.”¹³</p> |  |
| <p>“100g grams Golden Nag Champa Agarbathi Incense Sticks - Vijayshree . . . Scent: Nag Champa”¹⁴</p> |  |
| <p>“Nag Champa Incense Sticks 100 gm Red Shanthimalai”¹⁵</p> |  |

¹¹ *Id.* at 45.

¹² *Id.* at 66-67.

¹³ *Id.* at 70-73.

¹⁴ *Id.* at 101.

¹⁵ *Id.* at 108.

| | |
|--|--|
| <p>“45 Organic Nag Champa Incense Stick New Sealed Nandita Brand Pure and Natural . . . Organic Nag Champa is the true traditional recipe of the most popular Indian incense enjoyed around the world.”¹⁶</p> |  |
| <p>“Kamini Incense Cones Sampler # 1 – Nag Champa. . .”¹⁷</p> |  |
| <p>“In-Scents Bulk Nag Champa Incense Sticks: 100 gr”¹⁸</p> |  |
| <p>“Nag Champa 32 Namaste Natural Incense Cones New Bewitching floral fragrance . . . Aromatherapy Scent: Nag Champa”¹⁹</p> |  |

¹⁶ *Id.* at 112-113.

¹⁷ *Id.* at 116.

¹⁸ *Id.* at 121.

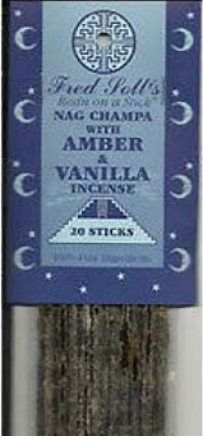
¹⁹ *Id.* at 125-126.

| | |
|--|---|
| <p>“Triloka Original Herbal Nag Champa Incense Sticks – Great Champa Scent lasting aroma: good nag champa scent . . . A great champa scent”²⁰</p> |  |
| <p>“Shanti Vana (Garden of Peace) Nag Champa Incense”²¹</p> |  |
| <p>“Gonesh Stick Incense Nag Champa 20 Sticks”²²</p> |  |

²⁰ *Id.* at 146-147.

²¹ *Id.* at 155.

²² *Id.* at 159.

| | |
|---|---|
| <p>“FRED SOLL’S RESIN INCENSE STICKS NAG CHAMPA WITH AMBER AND VANILLA . . . Scent; Nag Champa with Amber and Vanilla”²³</p> |  |
| <p>“Tulasi Nag Champa Incense Cones – 15 cones per box . . . Scent: Nag Champa . . . This incense is part of a family of Indian scents known as champa incenses, because they are all reminiscent of the champa flower, better known to Westerners as plumeria.”²⁴</p> |  |
| <p>“Nag Champa Incense New Sealed 60 Sticks Swagat Brand Health . . . Scent: Nag Champa”²⁵</p> |  |

- A copy of Trademark Registration No. 4,073,674 for the mark PPURE NAGCHAMPA (in standard characters with a disclaimer of NAG CHAMPA)

²³ *Id.* at 163-164.

²⁴ *Id.* at 168-169.

²⁵ *Id.* at 183-184.


for use on “nag champa incense and incense sticks, in International Class 3.”²⁶

- A web page from the online retail store www.azenta.com offering incense powders, sticks, cones, and logs, all in a variety of fragrances including “nag champa.”²⁷
- A web page from the online retail marketplace amazon.com offering a variety of “nag champa candles” from a number of sources, including, *inter alia*, the following products:²⁸

| | |
|--|--|
|  | Large Nag Champa Prestige Highly Scented Jar Candle by Shortie's Candle Company \$19.95 Only 1 left in stock - order soon. Product Features 16.5 Oz. Candle Burns 110+ Hours. Home & Kitchen: See all 230 items |
|--|--|

| | |
|---|--|
|  | 26 oz Apothecary Soy Candle - Nag Champa by Southern Made Candles (Oct 9, 2011) \$17.50 In stock. Usually ships within 2 to 3 days. ★★★★☆ (7) Product Features 100% Pure Soy Candle Everything Else: See all 9 items |
|---|--|

| | |
|---|---|
|  | Smoke Odor Exterminator 13 Oz Jar Candle Nag Champa by Smoke Odor Exterminator \$12.49 Prime Order in the next 4 hours and get it by Thursday, Jan 23. Only 20 left in stock - order soon. More Buying Choices \$12.49 new (3 offers) ★★★★☆ (9) FREE Shipping on orders over \$35 Home & Kitchen: See all 230 items |
|---|---|

| | |
|---|---|
|  | Earthy Body Suntouched Hemp and Soy 3 In 1 Massage Candle, Nag Champa, 4.7 Ounce by Earthly Body (Mar 3, 2011) \$15.99 \$12.71 (\$12.71/Count) In Stock More Buying Choices \$12.70 new (2 offers) ★★★★☆ (3) Product Features Fragrant natural soy-oil candle burns longer & cleaner Health & Personal Care: See all 51 items |
|---|---|

²⁶ *Id.* at 194; issued December 20, 2011.

²⁷ Examining Attorney’s Office Action, March 3, 2014, pp. 7-13.

²⁸ *Id.* at 14-17.



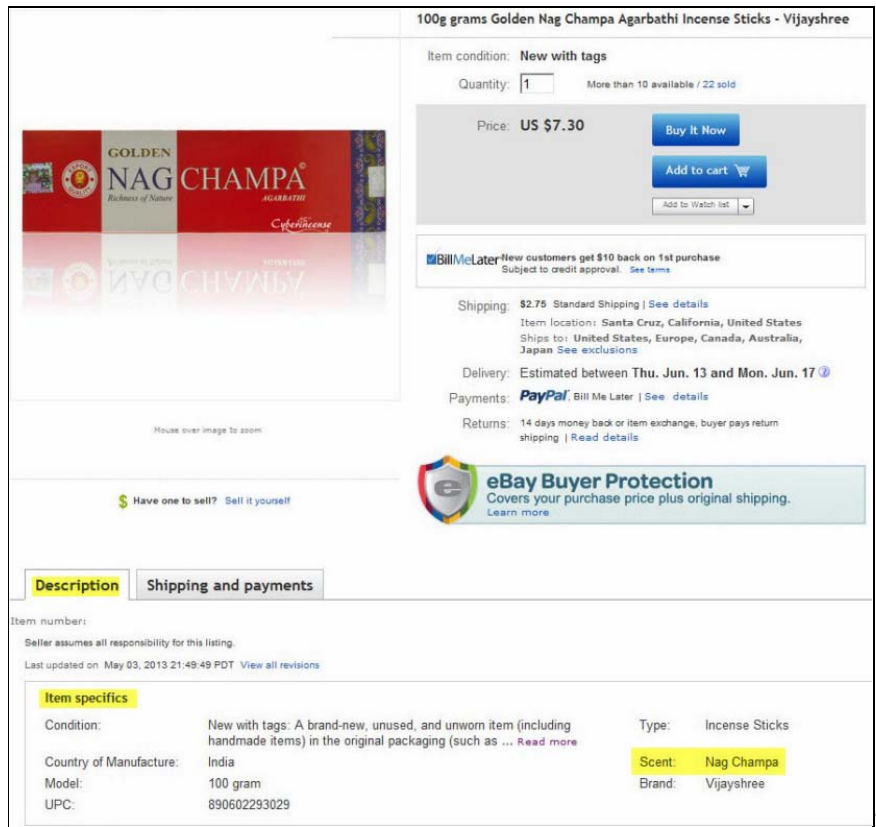
Upon careful consideration of all the evidence, we conclude that the Applicant's proposed mark is merely descriptive of a feature of Applicant's goods, namely, that it immediately describes without thought or imagination the name of a well-known scent or fragrance found in Applicant's incense.

By its very nature, incense must have a scent or fragrance, and consumers are accustomed to making their purchasing decision based on their desire for a particular scent. These scents include jasmine, patchouli, sandalwood, musk, frankincense, gardenia, vanilla, and many others.²⁹ The Examining Attorney's evidence shows that the term NAG CHAMPA is widely used to identify one such scent found not only in incense, but also in soap, perfume oil, essential oils, candles, and other personal toiletries. The exact composition of this scent varies, but it is generally considered to contain Champa flower extracts, resins, and sandalwood.³⁰ The evidence shows that NAG CHAMPA is used by numerous manufacturers and retailers of incense, as well as by general informational web sites, to describe the particular scent or fragrance. For example, many of the ebay.com web pages offering third-party NAG CHAMPA incense products include a separate tab labeled "Description" which provides specifics about the incense such as country of

²⁹ Examining Attorney's Office Action, June 10, 2013, pp. 35-40, 72-75, 87-79, and 180-181.

³⁰ Examining Attorney's Office Action, October 19, 2012, p. 7; June 10, 2013, pp. 103, 126, and 184; November, 24, 2014, pp. 25 and 42.

manufacture or type of product, and which clearly identify the scent as “Nag Champa.” In one typical example, the product description for the “Golden Nag Champa Agarbathi Incense Sticks” from Vijayshree clearly identifies the scent of the incense as “Nag Champa.” See the highlighted language below.



31

The foregoing examples of third-party uses of NAG CHAMPA on scented products demonstrate that consumers will view NAG CHAMPA as merely descriptive of a particular scent or fragrance of incense. The informational articles from ehow.com and wisegeek.com, the excerpts from “perfume glossaries,”³² and even the third-party registration disclaiming NAG CHAMPA, all corroborate the public understanding that NAG CHAMPA merely describes a scent commonly found

³¹ Examining Attorney’s Office Action, June 10, 2013, p. 101.

³² Examining Attorney’s Office Action, November, 24, 2014, pp. 25 and 42.

in incense. Based on the foregoing evidence, we find that the Examining Attorney has made a *prima facie* showing that NAG CHAMPA is merely descriptive of a scent or fragrance used in incense.

Once a *prima facie* case is established, the burden of coming forward with competent evidence in rebuttal shifts to Applicant. *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003).

Applicant argues that the applied-for mark is inherently distinctive and the Examining Attorney's evidence does not "sufficiently demonstrate that the Mark is merely descriptive."³³ Applicant introduced the following evidence to rebut the Examining Attorney's arguments, as well as to show that the applied-for mark has acquired distinctiveness:

- Definitions from the Oxford English Dictionary showing that "Nag" comes from Indian mythology and refers to a "snake" and "Champa" refers to the flowering *Champaca* tree.³⁴
- The declaration of Applicant's General Manager, Mr. Vijaya Kumaran P. V., stating, *inter alia*:³⁵

* * *

4. In roughly 1964, Applicant's founder Late Shri. K. N. S. Setty invented a perfume that he used in an incense stick. He branded the product as NAG CHAMPA Agarbatti [Incense Stick], after his son's first name NAGRAJ and his daughter's nickname CHAMPA."
5. Applicant has used the Mark in connection with incense worldwide for forty years, since at least as early as 1973.

³³ Applicant's Br., p.5; 7 TTABVUE 10.

³⁴ Applicant's Response, April 18, 2013, pp. 6-7.

³⁵ *Id.* at 8-9.

6. Applicant has used the Mark in connection with incense in the United States for over twenty years, since at least as early as 1990.
7. Applicant was the originator of the Mark NAG CHAMPA, and the initial user of that mark in the United States and worldwide.

* * *

9. Applicant's United States sales of incense under the Mark from the year 1994 to March – 2013 is as below:

| USD | EURO | GBP |
|-------------|----------|------|
| 39864436.70 | 24097.50 | 0.00 |

10. Applicant has registered the Mark in several countries worldwide, including India and UK.
- A printout of search results from the ebay.com and amazon.com online retail web sites for the term “nag champa incense.”³⁶ The search results show that Applicant's incense appears more frequently than other brands also using the term NAG CHAMPA, such as “Organic Nag Champa,” “Red Shanthimalai Nag Champa,” “Goloka NAGCHAMPA,” and “Gonesh Nag Champa,” *supra*.
 - A printout from the Merriam-Webster online dictionary showing that the term “nag champa” does not appear in the dictionary.³⁷
 - Excerpts from the wisegeek.com, ehow.com, and ebay.com web sites showing that informational articles on these sites, such as the ones discussed *supra*, are written by members of the online community or freelance writers.³⁸

³⁶ Applicant's Response, September 3, 2014, pp. 10-20 and 22-26.

³⁷ *Id.* at 28.

³⁸ *Id.* at 31-45.

- Search results from google.com for a search of Applicant's name, "Shrinivas Sugandhalaya," combined with the term "nag champa."³⁹ The search results comprise over 16,400 search hits showing a variety of Applicant's products.

Applicant argues that much of the Examining Attorney's evidence is either of "dubious probative value" or it was "not obtained from a competent source."⁴⁰ We disagree. We find the evidence accurately conveys the public's understanding of the meaning of the term NAG CHAMPA as a scent or fragrance.

With regard to the stories in wisegeek.com, ehow.com, and ebay.com, Applicant has not shown that these articles are inaccurate or do not reflect the public's understanding of the meaning of NAG CHAMPA. *See In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007). We find these articles corroborate the other evidence which shows the widespread use of NAG CHAMPA to refer to a scent. That is, we find these sites are "merely illuminative of shade and tone in the total picture confronting the decision maker." *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978).

Applicant also argues that the Examining Attorney's evidentiary showing was deficient because the Examining Attorney "did not provide any explanation of the specific meaning of the constituent terms 'Nag' and 'Champa' in the mark, or of the meaning of those terms in combination."⁴¹ Applicant is incorrect. Two excerpts show that the tree from which the incense is made is known as the Nag Champa tree. See

³⁹ *Id.* at 55-56.

⁴⁰ Applicant's Br., p. 6 and 8; 7 TTABVUE 11 and 13.

⁴¹ Applicant's Br. p. 6; 7 TTABVUE 11.

the discussion of the excerpts from the web sites davesgarden.com and www.store.hawaiiantropicalplants.com, *supra*. Applicant, citing TMEP section 710.01(b), dismisses these web sites as “unknown or obscure, and thus also of limited value.”⁴² But we see no reason to discount them absent evidence that they are somehow not available to or known by U.S. consumers. Furthermore, even assuming, *arguendo*, that consumers are unfamiliar with the Nag Champa tree, it is not necessary for the Examining Attorney to provide an “explanation of the specific meaning of the constituent terms” or a definition of the terms if the evidence, as here, establishes that the term has a well understood and recognized meaning to consumers in the United States. The fact that a term is not found in a dictionary is not controlling on the question of registrability. *See In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977).

Applicant argues that the third-party products offered on ebay.com and amazon.com “do not refute the public’s understanding of ‘Nag Champa’ as a source identifier, but instead serve as evidence of third party efforts to use ‘Nag Champa’ as a source identify [sic] for their particular goods.”⁴³ In essence, Applicant is arguing that these uses are infringing and should be discounted:

Applicant has taken numerous steps to address and stop such infringing third party activity, including sending demand letters to parties filing applications to register marks containing NAG CHAMPA, and in one case filing a lawsuit for trademark infringement. Applicant’s efforts to ensure that “Nag Champa” is not used by third-parties to

⁴² Applicant’s Br. at 10; 7 TTABVUE 15.

⁴³ Applicant’s Br. at 11; 7 TTABVUE 16.

identify the source of their incense products is relevant to establishing that the wording “NAG CHAMPA” functions as a source identifier only as to Applicant’s incense products.⁴⁴

It is certainly true that a trademark owner “is not required to act immediately against every possibly infringing use.” See *Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp.*, 680 F.2d 755, 214 USPQ 327, 336 (CCPA 1982) (“If there are numerous products in the marketplace bearing the alleged mark, purchasers may learn to ignore the ‘mark’ as a source identification.”). However, descriptive use of a mark by third parties may diminish the trademark significance of a term, and a term that was once suggestive may become, through usage, merely descriptive or even generic. *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732 (CCPA 1969).

If Applicant has sought to stop third-party use of the term NAG CHAMPA for incense, we see little or no evidence of any success in this endeavor. The record is replete with the use of NAG CHAMPA for a vast array of scented products. Accordingly, we cannot discount the third-party uses of NAG CHAMPA for incense, as Applicant suggests. Contrary to Applicant’s argument that these third parties are seeking to use NAG CHAMPA as a source identifier, nearly all of these products have other names or indicia to distinguish the sources of the incense. For example, the terms Goloka, Pooja, Kamini, Triloka, Shanti Vana, and Swagat, among others, serve to identify the source of the respective incense products, rather than the term NAG CHAMPA. We find these examples of third-party use to be strong evidence

⁴⁴ *Id.*

that the public understands the term NAG CHAPA to be descriptive of the scent or fragrance of a particular type of incense. *See In re Gyulay*, 3 USPQ2d at 1009 (APPLE PIE is merely descriptive of potpourri because it conveys the key characteristics of potpourri, its scent).

Applicant also notes that some of the Examining Attorney’s evidence shows Applicant’s products and argues that “such use undermines, rather than supports, a descriptiveness finding.”⁴⁵ We disagree. The fact that Applicant may be the largest maker of incense and that its incense is sold alongside third-party NAG CHAMPA incense does not compel the conclusion that NAG CHAMPA is not descriptive. Rather, it merely suggests that Applicant is more successful than its competitors in marketing its products. It is equally plausible that consumers look to other indicia to distinguish among competing incense products. Applicant’s packaging, *supra*, and its own excerpts from ebay.com and amazon.com show the prominent use of the name “Sai Baba” or “Satya Sai Baba” when identifying Applicant’s incense. See two such examples below.



⁴⁵ Applicant’s Br., p. 6; 7 TTABVUE 11.



Finally, Applicant claims that the term NAG CHAMPA was coined by its founder based in part on the names and nicknames of his children. But Applicant also included with the application the following translation: “NAG’ in Hindi means snake and ‘CHAMPA’ is a type of flower.”⁴⁷ Based on the evidence of record we find it more likely that consumers will recognize NAG CHAMPA to be a scent related to the CHAMPA tree, rather than as a coined term from a combination of portions of the names of Applicant’s founder’s children. In short, we are concerned with the present meaning of NAG CHAMPA inasmuch as registrability must be determined at the time registration is sought. *Thunderbird Prods*, 160 USPQ at 732.

For the foregoing reasons, we find that NAG CHAMPA is merely descriptive as used on incense.

⁴⁶ Applicant Response, September 3, 2014, pp. 10-25.

⁴⁷ Application of August 12, 2005, p. 1.

II. Acquired Distinctiveness in the Alternative

It is Applicant's burden to prove acquired distinctiveness by a preponderance of the evidence. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988); *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant."). The amount and character of such evidence depends on the facts of each case, *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34 (CCPA 1970), and more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the goods or services would be less likely to believe that it indicates source in any one party. *See In re Bongrain Int'l (American) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); *Yamaha Int'l Corp.*, 6 USPQ2d at 1008.

We begin with a determination of the level of descriptiveness of the proposed mark. The evidence in the record and described *supra* demonstrates that the applied-for mark is a highly descriptive term used by a large number of incense producers and retailers, as well as used on other scented products. The proposed mark therefore is highly descriptive of a feature of Applicant's goods and "Applicant [has] the burden to show a concomitantly high level of secondary meaning." *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005).

In determining whether the applied-for mark has acquired distinctiveness, the following factors are generally considered: (1) length and exclusivity of use of the mark in the United States by an applicant; (2) the type, expense and amount of

advertising of the mark in the United States; and (3) an applicant's efforts in the United States to associate the mark with the source of the goods, such as unsolicited media coverage and consumer studies. *Id.*; Trademark Rule 2.41(a)(3), 37 C.F.R. § 2.41(a)(3).

Applicant has submitted (1) a statement of substantially exclusive and continuous use of the mark in commerce for the preceding five years; (2) an affidavit from Applicant's General Manager stating that "Applicant was the originator of the Mark NAG CHAMPA, and the initial user of that mark in the United States and worldwide;" (3) sales information of Applicant's incense in the United States under the mark of \$39,864,436.70 over the twenty year period from 1994 to March of 2013; and (4) excerpts from ebay.com, amazon.com, and google.com showing Applicant's products offered for sale.⁴⁸ Applicant asserts that this long use of the mark in the United States and the significant sales "establish[] that the Mark has acquired distinctiveness."⁴⁹

We do not find Applicant's evidence to be convincing. First, Applicant's use since 1990, while indicative of a degree of commercial success, is not conclusive or persuasive considering both the nature of the mark sought to be registered and the

⁴⁸ Applicant's claimed first use of the mark outside the United States since as early as 1973 is not relevant to our determination of acquired distinctiveness. Use of a mark in a foreign country does not give rise to rights in the United States if the goods are not sold in the United States. *See Linville v. Rivard*, 41 USPQ2d 1731 (TTAB 1996), *aff'd*, 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1998). Similarly, the fact that the applied-for mark has been registered in other countries is not relevant to our determination of acquired distinctiveness. Registration in a foreign country does not ensure eligibility for registration in the United States. *In re Rath*, 402 F.3d 1207, 74 USPQ2d 1174, 1179 (Fed. Cir. 2005).

⁴⁹ Applicant's Br. at 13; 7 TTABVUE 18.

widespread use of NAG CHAMPA by others. *See In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (evidence submitted by applicant held insufficient to establish acquired distinctiveness of PACKAGING SPECIALISTS, INC., for contract packaging services, notwithstanding, *inter alia*, continuous and substantially exclusive use for sixteen years, deemed “a substantial period but not necessarily conclusive or persuasive.”).

Moreover, Applicant’s use can hardly be called exclusive given the numerous other users of NAG CHAMPA for incense and other scented products. *See Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-941 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”). Even if Applicant was the initial user of NAG CHAMPA in the United States, the marketplace no longer reflects substantially exclusive use by Applicant. Nor has Applicant provided any explanation as to why it waited nearly fifteen years, from 1990 to 2005, before filing its application.

Second, while Applicant has submitted sales information, this evidence does not establish that consumers understand NAG CHAMPA to refer solely to Applicant’s goods. Moreover, the name “SATYA SAI BABA” prominently appears alongside the term NAG CHAMPA on Applicant’s own packaging, as well as on many of the web

pages offering Applicant's incense, which suggests that consumers may look to other indicia to distinguish Applicant's products from those of others.

In sum, the evidence submitted by Applicant suggests that it has enjoyed some commercial success in marketing its incense bearing the term NAG CHAMPA. But success in creating and selling a particular product does not mean the name given to that product serves as a source identifier. When all of the evidence of record is viewed as a whole, including the widespread use of the mark by third parties to describe the scent of incense made by others, Applicant's evidence falls short of demonstrating that the mark has acquired distinctiveness under Section 2(f).

Decision: The refusal to register Applicant's mark NAG CHAMPA under Section 2(e)(1) of the Trademark Act is affirmed. The refusal to register Applicant's mark on the ground that the Section 2(f) showing is insufficient is likewise affirmed.