

Request for Reconsideration after Final Action

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Input Field	Entered
SERIAL NUMBER	85969508
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION (no change)	
ARGUMENT(S)	
Please see the actual argument text attached within the Evidence section.	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Request for Reconsideration; printouts of the TESS summaries of 2 registrations owned Applicant; a copy of a Letter of Consent with owner of Reg No 3191490; copy of an Office Action issued to owner of Reg No 3792358; copy of a Response to Office Action filed by owner of Reg No 3792358; excerpt from website for Cited Mark; Wikipedia entry for pidgin; and recent TTAB decision

ADDITIONAL STATEMENTS SECTION

SECTION 2(f) Claim of Acquired Distinctiveness, IN PART, based on Prior Registration(s)	THE KITCHEN has become distinctive of the goods/services as evidenced by the ownership on the Principal Register for the same mark for related goods or services of U Registration No(s). 4165447 and 4679061.
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SIGNATURE SECTION

RESPONSE SIGNATURE	/Andrew Roppel/
SIGNATORY'S NAME	Andrew Roppel
SIGNATORY'S POSITION	Attorney for Applicant, Colorado bar member
SIGNATORY'S PHONE NUMBER	303-473-2709
DATE SIGNED	04/21/2015
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES

FILING INFORMATION SECTION

SUBMIT DATE	Tue Apr 21 19:59:59 EDT 2015
TEAS STAMP	USPTO/RFR-63.236.112.69-2 0150421195959891305-85969 508-5309cf5f0e6feb48c3ea2 cf3c6895141e410e5e1cb7dcb 1321e0c2b6b6bc73ccfd-N/A- N/A-20150421194808506208

**Request for Reconsideration after Final Action
To the Commissioner for Trademarks:**

Application serial no. **85969508** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

Please see the actual argument text attached within the Evidence section.

EVIDENCE

Evidence in the nature of Request for Reconsideration; printouts of the TESS summaries of 2 registrations owned by Applicant; a copy of a Letter of Consent with owner of Reg No 3191490; copy of an Office Action issued to owner of Reg No 3792358; copy of a Response to Office Action filed by owner of Reg No 3792358; excerpt from website for Cited Mark; Wikipedia entry for pidgin; and recent TTAB decision has been attached.

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[Evidence-1](#)

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[Evidence-10](#)

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Converted PDF file(s) (3 pages)

[Evidence-1](#)

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ADDITIONAL STATEMENTS

Section 2(f) Claim of Acquired Distinctiveness, in part, Prior Registration(s)

THE KITCHEN has become distinctive of the goods/services as evidenced by the ownership on the Principal Register for the same mark for related goods or services of U.S. Registration No(s). 4165447 and 4679061.

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Andrew Roppel/ Date: 04/21/2015

Signatory's Name: Andrew Roppel

Signatory's Position: Attorney for Applicant, Colorado bar member

Signatory's Phone Number: 303-473-2709

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85969508

Internet Transmission Date: Tue Apr 21 19:59:59 EDT 2015

TEAS Stamp: USPTO/RFR-63.236.112.69-2015042119595989

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Descriptiveness Refusal Under Section 2(e)(1)

With respect to the descriptiveness refusal under Section 2(e)(1) and the rejection of Applicant's claim of acquired distinctiveness under Section 2(f) based on Applicant's more than eleven (11) years' use of the mark, Applicant hereby adopts the Examiner's suggestion of submitting a 2(f) claim based on Applicant's ownership of two (2) registrations on the Principal Register for the same mark for the same services, namely, U.S. Reg. Nos. 4165447 and 4679061 (the final Office Action suggested basing the claim only on Reg. No. 4165447, but, inasmuch as Reg. No. 4679061 issued after the final Office Action was issued and because it follows a structure similar to the one in Reg. No. 4165447, Applicant believes its claim of acquired distinctiveness under Section 2(f) is bolstered by this additional registration).

Applicant submits that this new 2(f) claim is sufficient to overcome the descriptiveness refusal and to obviate the rejection of Applicant's prior 2(f) claim.

Likelihood of Confusion Refusal – Reg. No. 3191490

With respect to the Office Action's Section 2(d) refusal based on a perceived likelihood of confusion with the mark shown in Registration No. 3191490, namely KITCHEN & Design covering "restaurant services, take out restaurant services and food catering services" in Class 43, Applicant attaches a copy of a Letter of Consent from Registrant and submits that this letter is sufficient to overcome the refusal. See In re E. I. du Pont de Nemours & Co. in which the Court of Customs and Patent Appeals stated as follows:

[W]hen those most familiar with use in the marketplace and most interested in precluding confusion enter agreements designed to avoid it, the scales of evidence are clearly tilted. It is at least difficult to maintain a subjective view that confusion will occur when those directly concerned say it won't. A mere assumption that confusion is likely will rarely prevail against uncontroverted evidence from those on the firing line that it is not.

476 F.2d at 1363, 177 USPQ at 568.

Likelihood of Confusion Refusal – Reg. No. 3792358

With respect to the Office Action's Section 2(d) refusal based on a perceived likelihood of confusion with the mark shown in Registration No. 3792358, namely DA KITCHEN covering "restaurant services; carry out restaurant services; catering services" in Class 43 and "clothing, namely, shorts, t-shirts, tank tops, and hats" in Class 25 (the "Cited Mark" or the "Cited Registration"), Applicant respectfully traverses the refusal based on the following arguments, evidence, and authority.

There is no likelihood of confusion between Applicant's mark and the Cited Mark because:

1. The only common element between the marks – the term "kitchen" - is the subject of a disclaimer in the Cited Registration, meaning that the Registrant does not own exclusive rights to that term and, in contrast, is the subject of a claim of acquired distinctiveness in the current application and in Applicant's U.S. Reg. Nos. 4165447 and 4679061, meaning that the Applicant does own exclusive rights in that term;
 2. The Cited Mark is Weak and Deserving of Narrow Protection;
 3. The Cited Mark "Da Kitchen" is a Hawaiian slang/pidgin phrase that creates a different commercial impression than the English phrase "The Kitchen;" and
 4. Based on arguments submitted by the Registrant to the USPTO in arguing around a Section 2(d) likelihood of confusion refusal, the Registrant itself believes that its mark DA KITCHEN is distinguishable from "THE KITCHEN."
1. The Registrant Does Not Own Exclusive Rights in the term "KITCHEN," While Applicant Does Owns Exclusive Rights in the Term "KITCHEN" and in the Wording "THE KITCHEN"

The Cited Registration includes a disclaimer of the term "kitchen," which means that the Registrant makes no claim to the exclusive right to use the use "kitchen" apart from its mark as a whole.

In contrast, Applicant's owns rights in the term "KITCHEN," as evidenced by Applicant's ownership of U.S. Reg. No. 4165447 on the Principal Register for the mark THE KITCHEN NEXT DOOR covering "restaurant and café services," which registration includes a 2(f) claim, in part, as to "KITCHEN." And, Applicant's owns rights in the wording "THE KITCHEN," as evidenced by Applicant's ownership of U.S. Reg. No. 4679061 on the Principal Register for the mark THE KITCHEN UPSTAIRS covering "restaurant and cafe services; bar and lounge services," which registration includes a 2(f) claim, in part, as to "THE KITCHEN." See the attached print-outs from the USPTO's TESS database for these two registrations.

So, the only term common to the mark – the term "KITCHEN" – is one for which the Registrant does not own exclusive rights and one for which Applicant does own exclusive rights.

Applicant submits that the refusal should be withdrawn on this basis alone.

In addition, the case law is well developed that inclusion of a common term in two marks is itself insufficient to render marks confusingly similar. Lever Bros. Co. v. American Bakeries Co., 693 F.2d 251, 257, 216 U.S.P.Q. 177, 182 (26 Cir. 1982) (AUTUMN GRAIN for bread not confusingly similar to AUTUMN for margarine). As the Eighth Circuit explained:

The use of identical, even dominant, words in common does not automatically mean that two marks are similar. Rather, in analyzing the similarities of sight, sound, and meaning between two marks, a court must look to the overall impression created by the marks and not merely to compare individual features.

General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987) (OATMEAL RAISIN CRISP and APPLE RAISIN CRISP for breakfast cereals not likely to be confused).

Such differences have been held to be sufficient to avoid consumer confusion in marks that share a common element for related and even identical goods. Some examples are set forth below:

- **ALL** (detergent) and **ALL CLEAR** (household cleaning product): Lever Bros. Co. v. Barcolene Co., 174 U.S.P.Q. 392 (CCPA 1972).
- **ROMANBURGER** (sandwiches) and **ROMAN** (bread): Mr. Hero Sandwich Systems, Inc. v. Roman Meal Co., 781 F.2d 884, 228 U.S.P.Q. 364 (Fed. Cir. 1986).
- **SILK' N SATIN** (face lotion) and **SILK** (face cream): Pacquin-Lester Co. v. Charmaceuticals, Inc., 484 F.2d 1384, 179 U.S.P.Q. 45 (C.C.P.A. 1973).
- **CORN-ROYAL** (butter) and **ROYAL** (liquid frying shortening): Standard Brands, Inc. v. Peters, 191 U.S.P.Q. 168, 172 (T.T.A.B. 1975).
- **OOZ BALL** and **OOZE** (both for novelty toy compound): Monarch Licensing, Ltd. v. Ritam Int'l Ltd., 24 U.S.P.Q.2d 1456, 1461 (S.D.N.Y. 1992).
- **FINAL** and **FINAL FLIP** (both for rodenticide): Bell Lab. Inc. v. Colonial Prods. Inc., 644 F.Supp. 542, 231 U.S.P.Q. 569 (S.D. Fla. 1986).
- **MAGIC** (dehydrated onions, garlic, potatoes) and **SOUR MAGIC** (sour cream): Basic Vegetable Prods. Inc. v. General Foods Corp., 165 U.S.P.Q. 781, 784 (T.T.A.B. 1970).
- **CONDITION** and **CURL & CONDITION** (both for hair care products): Redken Labs Inc. v. Clairol Inc., 501 F.2d 1403, 183 U.S.P.Q. 84 (9th Cir. 1974).
- **EASY** and **EASYTINT** (both for paint products): Murray Corp. of America v. Red Spot Paint and Varnish Co., 280 F.2d 158, 126 U.S.P.Q. 390 (C.C.P.A. 1960).
- **SILK** and **SILKSTICK** (both for cosmetic products): Melaro v. Pifzer, Inc., 214 U.S.P.Q. 645, 648 (T.T.A.B. 1975).

These cases demonstrate that the mere presence of an identical element in two marks does not compel a conclusion that the marks are confusingly similar.

2. The Cited Mark is Weak and Deserving of Narrow Protection

A threshold question in every case is the degree of protection afforded a registered mark. See, e.g., King Candy Co. v. Eunice King's Kitchen, Inc., 178 U.S.P.Q. 121, 124 (T.T.A.B. 1973) (MISS KING'S for cake not confusingly similar to KING'S for candy), *aff'd*, 496 F.2d 1400, 182 U.S.P.Q. 108 (C.C.P.A. 1974). "[T]he strength and distinctiveness of [a] mark is a vital consideration in determining the scope of protection it should be accorded." Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 259, 205 U.S.P.Q. 969, 975 (5th Cir. 1980) (DOMINO'S PIZZA not confusingly similar to DOMINO sugar). As expressed by the Court of Customs and Patent Appeals:

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Sure-Fit Prods. Co. v. Saltzson Drapery Co., 254 F.2d 158, 160, 117 U.S.P.Q. 295, 297 (C.C.P.A. 1958) (SURE-FIT and RITE-FIT not confusingly similar); accord Home Decorators, Inc. v. Ekco Prods., Inc., 292 F.2d 296, 298, 130 U.S.P.Q. 153, 155 (C.C.P.A. 1961) (PRESTIGE for bathroom and kitchen accessories not confusingly similar to PRESTIGE for silver plated flatware); In re Central Soya Co., 220 U.S.P.Q. 914, 917 (T.T.A.B. 1984) (POSADA for frozen food not confusingly similar to LA POSADA for lodging and restaurant services).

As evidenced by the numerous third party registrations and applications attached to the Office Action dated October 3, 2013 for marks incorporating the term "KITCHEN" in the context of restaurant services, the Cited Mark is weak and deserving of narrow protection. 2 J. McCarthy, Trademarks and Unfair Competition, § 11:88, at 11-150.7 (4th ed. 2000).

Registrant itself appears to understand the limited protection its mark should be afforded. During the prosecution of its mark, and specifically in connection with arguments it made to distinguish its mark DA KITCHEN from the a mark cited against it, specifically the mark THE KITCHEN & Design, Registrant stated as follows:

- *“Although the word ‘KITCHEN’ is present in each mark, this fact alone cannot be dispositive of the likelihood of confusion because the use of the word ‘KITCHEN’ is frequently found in registered marks. There are 545 marks containing the word ‘KITCHEN’.”*

See the attached copy of the Registrant’s Response to Office Action dated December 22, 2009.

Further, in view of the very narrow scope of protection given to "weak" marks, "the addition of other matter to a highly suggestive or descriptive designation, whether such matter be equally suggestive or even descriptive, **or possibly nothing more than a variant of the term**, may be sufficient to distinguish them so as to avoid confusion in trade." In re Hunke & Jochheim, 185 U.S.P.Q. 188, 189 (T.T.A.B. 1975) (HIG DURABLE for stationery articles, including folders, binders and paper, not confusingly similar to DURABUL for record books) (emphasis added).

3. The Cited Mark “Da Kitchen” is a Hawaiian Slang/Pidgin Phrase That Creates a Different Commercial Impression Than The English Phrase “The Kitchen”

The Cited Mark is a Hawaiian slang/pidgin phrase. See the attached excerpt from the Registrant’s website located at www.da-kitchen.com.

So, while the Office Action argues that “*the respective marks clearly have the same meaning and connotation*” because “*the slang word ‘da’ is defined as ‘the,’*” the Doctrine of Foreign Equivalentents does not apply to the Hawaiian language, which means that consumers will not stop and translate the marks. In support of this assertion, Applicant

references the TTAB's recent decision in In re Christopher A. Fahey, DBA Gravity Guitar Picks, in which the court stated:

Nonetheless, the doctrine of foreign equivalents will not be invoked where, as here, the non-English language at issue is obscure or unusual, that is, not spoken by an appreciable number of individuals sufficient to sustain a finding of a likelihood of confusion. Applicant has raised the question whether, under the facts of this case, the Hawaiian language is such a language. The record herein shows that approximately eighteen thousand Hawaiian language speakers live in the state of Hawaii and seven thousand more Hawaiian speakers live elsewhere in the United States. Moreover, there is substantially no population of Hawaiian speakers elsewhere around the globe. Given this set of facts, we agree with Applicant that the Hawaiian language cannot be characterized as a modern, common language, and hence, the doctrine of foreign equivalents does not apply.

See In re Christopher A. Fahey, DBA Gravity Guitar Picks, ex parte appeal involving Serial No. 86250337 (TTAB April 13, 2015) <http://ttabvue.uspto.gov/ttabvue/ttabvue-86250337-EXA-10.pdf> (SUNRISE not confusingly similar to "PUKANA LA," which means "sunshine, sunrise" in Hawaiian). A copy of the decision is attached hereto.

Applicant submits that if the Doctrine of Foreign Equivalents does not apply to the Hawaiian language itself, it certainly should not apply to Hawaiian slang/pidgin. In this regard, the term "pidgin" refers to a means of communication between two or more groups that do not have a language in common; it is not the native language of any speech community. See the attached Wikipedia entry for "pidgin."

Accordingly, because Applicant's mark and the Cited Mark are in different languages for which the Doctrine of Foreign Equivalents does not apply, Applicant submits that the marks create different and distinct commercial impressions. The Cited Mark creates the impression of a kind of patois, while the Applicant's mark does not. This difference, along with the limited protection that should be afforded the Cited Mark, and together

with the fact that the term “kitchen” has been disclaimed in the Cited Registration, but is the subject of 2(f) claims, in part, in two registrations owned by Applicant and is the subject of a 2(f) claim in this application, demonstrate that confusion between the marks is not likely.

4. Registrant Itself Believes That “DA KITCHEN” is Distinguishable From “THE KITCHEN”

The Cited Mark DA KITCHEN itself faced a potential refusal from the USPTO under Section 2(d) based on a perceived likelihood of confusion with the mark shown in Application Serial No. 77485693, namely THE KITCHEN & Design covering “restaurant and cafe services; restaurant and catering services; restaurant services, including sit-down service of food and take-out restaurant services; self service restaurants” in Class 43. See the attached copy of the Office Action dated September 17, 2009 issued to the Cited Registration.

The Registrant submitted the following statement in its arguments to overcome that potential refusal:

- *“The mark that is the subject of the instant application, DA KITCHEN, and the mark of Serial No. 77485693, THE KITCHEN, are dissimilar in their appearance, sound, connotation and commercial impression.”*

See the attached copy of the Registrant’s Response to Office Action dated December 22, 2009.

Based on this statement, it seems clear that the Registrant itself believes that its mark DA KITCHEN is not likely to cause confusion with THE KITCHEN.

Applicant agrees and respectfully requests reconsideration of the refusal based on the foregoing arguments, evidence, and case law.

CONCLUSION

"A showing of mere possibility of confusion is not enough; a substantial likelihood that the public will be confused must be shown." Omaha Nat'l Bank v. Citibank (S.D.), N.A., 633 F. Supp. at 234, 229 U.S.P.Q. at 52.

Based on the different languages used in the respective marks, the fact that the Doctrine of Foreign Equivalents does not apply in this case, the limited protection that should be afforded the Cited Mark, and based on the differences in the marks when considered in their entireties, Applicant respectfully requests the Examining Attorney to withdraw the refusal to register and to pass this application to publication.

7741613_1



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THE KITCHEN NEXT DOOR

Word Mark	THE KITCHEN NEXT DOOR
Goods and Services	IC 043. US 100 101. G & S: Restaurant and cafe services. FIRST USE: 20110613. FIRST USE IN COMMERCE: 20110613
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85246758
Filing Date	February 18, 2011
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	January 17, 2012
Registration Number	4165447
Registration Date	June 26, 2012
Owner	(REGISTRANT) The Kitchen Cafe, LLC LIMITED LIABILITY COMPANY COLORADO 1039 Pearl Street Boulder COLORADO 80302
Attorney of Record	Scott S. Havlick
Type of Mark	SERVICE MARK
Register	PRINCIPAL-2(F)-IN PART
Live/Dead Indicator	LIVE
Distinctiveness Limitation Statement	as to "KITCHEN"

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THE KITCHEN UPSTAIRS

Word Mark	THE KITCHEN UPSTAIRS
Goods and Services	IC 043. US 100 101. G & S: Restaurant and cafe services; bar and lounge services. FIRST USE: 20051100. FIRST USE IN COMMERCE: 20051100
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86325955
Filing Date	July 1, 2014
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 11, 2014
Registration Number	4679061
Registration Date	January 27, 2015
Owner	(REGISTRANT) The Kitchen Cafe, LLC LIMITED LIABILITY COMPANY COLORADO 1039 Pearl Street Boulder COLORADO 80302
Attorney of Record	Scott S. Havlick
Prior Registrations	4165447;4511498
Type of Mark	SERVICE MARK
Register	PRINCIPAL-2(F)-IN PART
Live/Dead Indicator	LIVE
Distinctiveness Limitation	

Statement

AS TO "THE KITCHEN"

-
- | | | | | | | | | | |
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CONSENT AGREEMENT

This Consent Agreement (“Agreement”) is made by and between The Kitchen Café, LLC, located at 1039 Pearl Street, Boulder, Colorado 80302 (“The Kitchen”) and the EMJS, Inc. d/b/a Nicola’s Kitchen, located at 20969 Ventura Boulevard, Woodland Hills, California 91364 (“Nicola’s”), to be effective as of March 31, 2015 (“Effective Date”).

RECITALS

A. The Kitchen has used the trademark “THE KITCHEN” as a restaurant name since opening its first location in Boulder, Colorado in February 2004; and since then, has opened additional THE KITCHEN restaurants in Denver and Fort Collins, Colorado, and Chicago, Illinois.

B. The Kitchen has sought to register THE KITCHEN with the United States Patent and Trademark Office for “restaurant and café services” (Ser. No. 85969508) (referred to in this Agreement as “THE KITCHEN Application”), and that application remains pending and subject to an Office Action wherein Nicola’s registration for the mark KITCHEN, U.S. Registration No. 3191490, has been cited as an obstacle to registration under Section 2(d):



Hereinafter referred to as “KITCHEN & Design” mark.

C. The Kitchen and Nicola’s do not believe their respective marks are likely to create confusion with one another. They have co-existed without confusion for over a decade. Their restaurant concepts are dissimilar as are the cuisine’s they offer. Therefore the parties have entered into this Agreement to memorialize their understanding and to assure that no risk of consumer confusion occurs between them in the future as a result of their simultaneous use of THE KITCHEN and KITCHEN & Design for restaurant services.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals which are hereby incorporated into this Agreement, and for other full and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. No Likelihood of Confusion. The parties acknowledge that based upon the differences between the Nicola’s KITCHEN & Design mark and The Kitchen’s mark THE KITCHEN, the Parties have clearly thought out their commercial

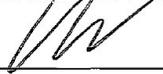
mark THE KITCHEN, the Parties have clearly thought out their commercial interests and recognize that it is unlikely that the sources of their respective products and services would be confused by purchasers.

2. No Actual Confusion During 10 Years of Simultaneous Use. There has been no known actual confusion among customers or the public arising over the past decade during the simultaneous use of the KITCHEN & Design mark and THE KITCHEN mark.
3. Mitigation. In the unlikely event of confusion, the Parties agree to make reasonable efforts to prevent, eliminate, and minimize any instances of actual confusion or a likelihood of confusion arising out of the use of their respective marks commensurate with the facts and circumstances of any such instances.
4. Consent to Registration. Nicola's hereby consents to the registration of THE KITCHEN Application in the United States in connection with prepared food or restaurant or café services.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

THE KITCHEN CAFÉ, LLC
A Colorado Limited Liability Company

EMJS, INC. D/B/A NICOLA'S KITCHEN,
A California Corporation

By: 

By: _____

Printed Name: Merle Waterman

Printed Name: _____

Title: CFO

Title: _____

Date: 3/31/15

Date: _____

interests and recognize that it is unlikely that the sources of their respective products and services would be confused by purchasers.

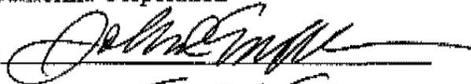
- 2. No Actual Confusion During 10 Years of Simultaneous Use. There has been no known actual confusion among customers or the public arising over the past decade during the simultaneous use of the KITCHEN & Design mark and THE KITCHEN mark.
- 3. Mitigation. In the unlikely event of confusion, the Parties agree to make reasonable efforts to prevent, eliminate, and minimize any instances of actual confusion or a likelihood of confusion arising out of the use of their respective marks commensurate with the facts and circumstances of any such instances.
- 4. Consent to Registration. Nicola's hereby consents to the registration of THE KITCHEN Application in the United States in connection with prepared food or restaurant or café services.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

THE KITCHEN CAFÉ, LLC
A Colorado Limited Liability Company

EMJS, INC. D/B/A NICOLA'S KITCHEN,
A California Corporation

By: _____

By: 

Printed Name: _____

Printed Name: JOHN SAFFELL

Title: _____

Title: PRESIDENT

Date: _____

Date: 3/31/15



Authentic Hawaiian Cuisine.

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About



Welcome to Da Kitchen restaurant. We are a Local & Hawaiian Food establishment with growing roots on the Island of Maui and expanding in 2010 to the outer Island of Oahu. Our restaurants were opened with the intention to serve not only mouth watering food, but also Big portions at the best price we can! Our customer base is purely through word of mouth and we have an obligation to meet the expectations of those who recommend us.

Da Kitchen has been honored with an invitation to cook at the Inaugural Luau in Washington D.C. during the Election of President Obama; we were featured on the The Bizarre Food Show on the Travel Channel; and have made many publications and tv shows which have given us the opportunity to grow on the Island of Maui! It is a privilege to be where we are today and to employ such a wonderful and hard working staff that strides every day to serve our good food with aloha and Big Smiles.

Da Kitchen was established in 1998 with our first location in Kihei on the Island of Maui. In 2000 we ventured into opening our Kahului location, where we took the typical plate lunch in a take out container to the next level and opened our first full service restaurant. The name Da Kitchen translates from Hawaiian slang/pidgin to "The Kitchen". Our cuisine puts its emphasis on traditional Local Hawaiian food, but yet with a creative, yet diverse cuisine.

The menu incorporates both traditional classic Local and Hawaiian favorites, which is inspired by the different ethnic groups established in the islands of Hawaii. Acclaimed favorites include Hawaiian Plate, Mahi Mahi Fish Tempura, Pulehu Grilled Steaks, fresh Fish & Seafood, and a different variety of other local plate lunch favorites like Teriyaki Chicken, Chicken Katsu and Loco Moco. We can fill the palletes of many with our diverse and amazing menu selections.

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Pidgin

From Wikipedia, the free encyclopedia

Not to be confused with the Pigeon bird. For the instant messaging client, see Pidgin (software).

A **pidgin** /ˈpɪdʒɪn/, or **pidgin language**, is a simplified version of a language that develops as a means of communication between two or more groups that do not have a language in common. It is most commonly employed in situations such as trade, or where both groups speak languages different from the language of the country in which they reside (but where there is no common language between the groups). Fundamentally, a pidgin is a simplified means of linguistic communication, as it is constructed impromptu, or by convention, between individuals or groups of people. A pidgin is not the native language of any speech community, but is instead learned as a second language.^{[1][2]} A pidgin may be built from words, sounds, or body language from multiple other languages and cultures. They allow people who have no common language to communicate with each other. Pidgins usually have low prestige with respect to other languages.^[3]

Not all simplified or "broken" forms of a language are pidgins. Each pidgin has its own norms of usage which must be learned for proficiency in the pidgin.^[4]

Contents

- 1 Etymology
- 2 Terminology
- 3 Common traits among pidgin languages
- 4 Pidgin development
- 5 See also
- 6 Notes
- 7 References
- 8 Further reading
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Etymology

The origin of the word is uncertain. *Pidgin* first appeared in print in 1850. The most widely accepted etymology is from the Chinese pronunciation of the English word *business*.^[5]

Another etymology that has been proposed is English *pigeon*, a bird sometimes used for carrying brief written messages, especially in times prior to modern telecommunications.^[6]

Terminology

The word *pidgin*, formerly also spelled *pigion*,^[5] used to refer originally to Chinese Pidgin English, but was later generalized to refer to any pidgin.^[7] *Pidgin* may also be used as the specific name for local pidgins or creoles, in places where they are spoken. For example, the name of the creole language Tok Pisin derives from the English words *talk pidgin*. Its speakers usually refer to it simply as "pidgin" when speaking English.^{[8][9]} Likewise, Hawaiian Creole English is commonly referred to by its speakers as "Pidgin".

The term *jargon* has also been used to refer to pidgins, and is found in the names of some pidgins, such as Chinook Jargon. In this context, linguists today use *jargon* to denote a particularly rudimentary type of pidgin;^[10] however, this usage is rather rare, and the term *jargon* most often refers to the words particular to a given profession.

Pidgins may start out as or become trade languages, such as Tok Pisin. Trade languages are often fully developed languages in their own right such as Swahili. Trade languages tend to be "vehicular languages", while pidgins can evolve into the vernacular.

Common traits among pidgin languages

Since a pidgin language is a fundamentally simpler form of communication, the grammar and phonology are usually as simple as possible, and usually consist of:

- Uncomplicated clausal structure (e.g., no embedded clauses, etc.)
- Reduction or elimination of syllable codas
- Reduction of consonant clusters or breaking them with epenthesis
- Basic vowels, such as [a, e, i, o, u]
- No tones, such as those found in West African and Asian languages
- Use of separate words to indicate tense, usually preceding the verb
- Use of reduplication to represent plurals, superlatives, and other parts of speech that represent the concept being increased
- A lack of morphophonemic variation

Pidgin development

The initial development of a pidgin usually requires:

- prolonged, regular contact between the different language communities
- a need to communicate between them
- an absence of (or absence of widespread proficiency in) a widespread, accessible interlanguage

Keith Whinnom (in Hymes (1971)) suggests that pidgins need three languages to form, with one (the superstrate) being clearly dominant over the others.

Linguists sometimes posit that pidgins can become creole languages when a generation of children learn a pidgin as their first language,^[11] a process that regularizes speaker-dependent variation in grammar. Creoles can then replace the existing mix of languages to become the native language of a community (such as the Chavacano language in the Philippines, Krio in Sierra Leone, and Tok Pisin in Papua New Guinea). However, not all pidgins become creole languages; a pidgin may die out before this phase would occur (e.g. the Mediterranean Lingua Franca).

Other scholars, such as Salikoko Mufwene, argue that pidgins and creoles arise independently under different circumstances, and that a pidgin need not always precede a creole nor a creole evolve from a pidgin. Pidgins, according to Mufwene, emerged among trade colonies among "users who preserved their native vernaculars for their day-to-day interactions". Creoles, meanwhile, developed in settlement colonies in which speakers of a European language, often indentured servants whose language would be far from the standard in the first place, interacted extensively with non-European slaves, absorbing certain words and features from the slaves' non-European native languages, resulting in a heavily basilectalized version of the original language. These servants and slaves would come to use the creole as an everyday vernacular, rather than merely in situations in which contact with a speaker of the superstrate was necessary.^[12]

See also

- Basque–Icelandic pidgin
- Béarlachas
- Chavacano in the Philippines
- Creole language
- Chinese Pidgin English
- Chinook Jargon
- Decreolization
- Languages derived from Delaware languages
- Dutch-based creole languages
- Engrish or Chinglish
- Fanagalo in South Africa
- French-based creole languages
- Pidgin Hawaiian
- International Sign
- Jamaican Creole
- Lingua franca
- List of English-based pidgins
- Manglish
- Mediterranean Lingua Franca or Sabir
- Mixed language
- Nigerian Pidgin
- Pequeno Português
- Portuguese-based creole languages
- Portuguêsol
- Russenorsk
- Spanish-based creole languages
- Spanglish
- Singlish
- Trading zones
- Pidgin Wolof

Notes

1. See Todd (1990:3)
2. See Thomason & Kaufman (1988:169)
3. Bakker (1994:27)
4. Bakker (1994:26)
5. *Online Etymology Dictionary* (<http://www.etymonline.com/index.php?term=pidgin>)
6. Crystal, David (1997), "Pidgin", *The Cambridge Encyclopedia of Language* (2nd ed.), Cambridge University Press
7. Bakker (1994:25)
8. Smith, Geoff P. *Growing Up with Tok Pisin: Contact, creolization, and change in Papua New Guinea's national language*. London: Battlebridge. 2002. p. 4.
9. Thus the published court reports of Papua New Guinea refer to Tok Pisin as "Pidgin": see for example *Schubert v The State* [1979] PNGLR 66.
10. Bakker & 1994 (pp25–26)
11. For example: Campbell, John Howland; Schopf, J. William, eds. (1994). *Creative Evolution* (<http://books.google.com/books?id=ve38UmPnf00C>). Life Science Series. Contributor: University of California, Los Angeles. IGPP Center for the Study of Evolution and the Origin of Life. Jones & Bartlett Learning. p. 81. ISBN 9780867209617. Retrieved 2014-04-20. "[...] the children of pidgin-speaking parents face a big problem, because pidgins are so rudimentary and inexpressive, poorly capable of expressing the nuances of a full range of human emotions and life situations. The first generation of such children spontaneously develops a pidgin into a more complex language termed a creole. [...] [T]he evolution of a pidgin into a creole is unconscious and spontaneous."
12. "Salikoko Mufwene: "Pidgin and Creole Languages" " (<http://humanities.uchicago.edu/faculty/mufwene/pidginCreoleLanguage.html>). Humanities.uchicago.edu. Retrieved 2010-04-24.

References

- Bakker, Peter (1994), "Pidgins", in Jacques Arends; Pieter Muysken; Norval Smithh, *Pidgins and Creoles: An Introduction*, John Benjamins, pp. 26–39
- Hymes, Dell (1971), *Pidginization and Creolization of Languages*, Cambridge University Press, ISBN 0-521-07833-4
- McWhorter, John (2002), *The Power of Babel: The Natural History of Language*, Random House Group, ISBN 0-06-052085-X
- Sebba, Mark (1997), *Contact Languages: Pidgins and Creoles*, MacMillan, ISBN 0-333-63024-6

- Thomason, Sarah G.; Kaufman, Terrence (1988), *Language contact, creolization, and genetic linguistics*, Berkeley: University of California Press, ISBN 0-520-07893-4
- Todd, Loreto (1990), *Pidgins and Creoles*, Routledge, ISBN 0-415-05311-0

Further reading

- Holm, John (2000), *An Introduction to Pidgins and Creoles*, Cambridge Univ. Press.

External links

- Language Varieties Web Site (<http://www.une.edu.au/langnet/index.html>)

Retrieved from "<http://en.wikipedia.org/w/index.php?title=Pidgin&oldid=657040573>"

Categories: Interlinguistics | Pidgins and creoles

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To: Restaurant Destinations, Inc. (simlay@pjpn.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77763583 - DA KITCHEN - N/A
Sent: 9/17/2009 12:10:56 PM
Sent As: ECOM108@USPTO.GOV
Attachments: [Attachment - 1](#)
[Attachment - 2](#)
[Attachment - 3](#)
[Attachment - 4](#)

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77763583

MARK: DA KITCHEN

77763583

CORRESPONDENT ADDRESS:

SHANNON S. IMLAY
PAUL JOHNSON PARK & NILES
2145 KAOHU ST STE 203
WAILUKU, HI 96793-2257

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

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

APPLICANT: Restaurant Destinations, Inc.

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

N/A

CORRESPONDENT E-MAIL ADDRESS:

simlay@pjpn.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 9/17/2009

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62(a), 2.65(a); TMEP §§711, 718.03.

Potential Likelihood of Confusion Section 2(d) Refusal

The trademark examining attorney has searched the Office's database of registered and pending marks and has found no similar registered mark that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d). However, a mark in a prior-filed pending application may present a bar to registration of applicant's mark.

The filing date of pending Application Serial No. 77485693 precedes applicant's filing date. See attached referenced application. If the mark in the referenced application registers, applicant's mark may be refused registration under Trademark Act Section 2(d) because of a likelihood of confusion between the two marks. *See* 15 U.S.C. §1052(d); 37 C.F.R. §2.83; TMEP §§1208 *et seq.* Therefore, upon receipt of applicant's response to this Office action, action on this application may be suspended pending final disposition of the earlier-filed referenced application.

In response to this Office action, applicant may present arguments in support of registration by addressing the issue of the potential conflict between applicant's mark and the mark in the referenced application. Applicant's election not to submit arguments at this time in no way limits applicant's right to address this issue later if a refusal under Section 2(d) issues.

Although applicant's mark has been refused registration, applicant may respond to the refusal(s) by submitting evidence and arguments in support of registration.

Applicant must respond to the requirement(s) set forth below.

Classification of Goods and Services

The application identifies goods and/or services that are classified in at least 2 classes; however, the fees submitted are sufficient for only 1 class. In a multiple-class application, a fee for each class is required. 37 C.F.R. §2.86(a)(2); TMEP §§810.01, 1403.01.

Therefore, applicant must either (1) restrict the application to the number of classes covered by the fee(s) already paid, or (2) submit the fees for the additional class(es).

Applicant may adopt the following, if accurate:

Class 25: Clothing, namely, shirts, t-shirts, tank tops, and hats

Class 43: Restaurant services; carry out restaurant services; catering services.

Identifications of goods and/or services can be amended only to clarify or limit the goods and/or services; adding to or broadening the scope of the goods and/or services is not permitted. 37 C.F.R. §2.71(a); *see* TMEP §§1402.06 *et seq.*, 1402.07. Therefore, applicant may not amend the identification to include goods and/or services that are not within the scope of the goods and/or services set forth in the present identification.

For assistance with identifying and classifying goods and/or services in trademark applications, please see the online searchable *Manual of Acceptable Identifications of Goods and Services* at <http://tess2.uspto.gov/netahhtml/tidm.html>. *See* TMEP §1402.04.

Additional Fee Required for Multi-Class Application

If applicant prosecutes this application as a combined, or multiple-class application, then applicant must comply with each of the requirements below for those goods and/or services based on actual use in commerce under Trademark Act Section 1(a):

- (1) Applicant must list the goods/services by international class;
- (2) Applicant must submit a filing fee for each international class of goods and/or services not covered by the fee already paid (current fee information should be confirmed at <http://www.uspto.gov>); and
- (3) For each additional international class of goods and/or services, applicant must submit:
 - (a) Dates of first use of the mark anywhere and dates of first use of the mark in commerce, or a statement that the dates of use in the initial application apply to that class. The dates of use, both anywhere and in commerce, must be at least as early as the filing date of the application.;
 - (b) One specimen showing the mark in use in commerce for each class of goods and/or services. The specimen must have been in use in commerce at least as early as the filing date of the application. If a single specimen supports multiple classes, applicant should indicate which classes the specimen supports rather than providing multiple copies of the same specimen. Examples of specimens for goods are tags, labels, instruction manuals, containers, photographs that show the mark on the goods or packaging, or displays associated with the goods at their point of sale. TMEP §§904.03 *et seq.* Examples of specimens for services are signs, photographs, brochures, website printouts or advertisements that show the mark used in the sale or advertising of the services. TMEP §§1301.04 *et seq.*;
 - (c) The following statement: “**The specimen was in use in commerce on or in connection with the goods and/or services listed in the application at least as early as the filing date of the application.**”; and
 - (d) Verification of the statements in 3(a) and 3(c) (above) in an affidavit or a signed declaration under 37 C.F.R. §§2.20, 2.33. Verification is not required where (1) the dates of use for the added class are stated to be the same as the dates of use specified in the initial application, and (2) the original specimens are acceptable for the added class(es).

See 15 U.S.C. §§1051(a), 1112, 1127; 37 C.F.R. §§2.32(a)(5), 2.34(a)(1), 2.56(a), 2.71(c), 2.86(a); TMEP §§1403.01, 1403.02(c).

With respect to the requirement in 3(b) above for a specimen for each class of goods and/or services, please note that the specimen(s) of record is acceptable for International Class(es) 25 and 43.

The filing fee for adding classes to an application is as follows:

- (1) \$325 per class, when the fees are submitted with a response filed online via the Trademark Electronic Application System (TEAS) at <http://www.uspto.gov/teas/index.html>; or
- (2) \$375 per class, when the fees are submitted with a paper response.

37 C.F.R. §2.6(a)(1)(i)-(a)(1)(ii); TMEP §810.

Required Disclaimer – Class 43

THIS REQUIREMENT IS LIMITED TO CLASS 43.

Applicant must insert a disclaimer of KITCHEN for International Class 43 in the application because it merely describes applicant's services. As shown by the attached dictionary definition, kitchen means "a place (as a room) with cooking facilities." Applicant's services are "restaurant services; carry out restaurant services; catering services;" these services will be performed in a kitchen and then provided to the consumer. Therefore, kitchen is merely descriptive of applicant's services and must be disclaimed. See 15 U.S.C. §1056(a); TMEP §§1213, 1213.03(a).

The following is the accepted standard format for a disclaimer:

No claim is made to the exclusive right to use "KITCHEN" for International Class 43 apart from the mark as shown.

TMEP §1213.08(a)(i).

Response

If applicant has questions about its application or this Office action, please contact the assigned trademark examining attorney at the telephone number below.

/Kourtnee C. Hodges/
Law Office 108
Examining Attorney
Office: 571-272-2816
Fax: 571-273-9108

RESPOND TO THIS ACTION: Applicant should file a response to this Office action online using the form at <http://www.uspto.gov/teas/eTEASpageD.htm>, waiting 48-72 hours if applicant received notification of the Office action via e-mail. For *technical* assistance with the form, please e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned examining attorney. **Do not respond to this Office action by e-mail; the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the

complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

Print: Sep 17, 2009

77485693

DESIGN MARK

Serial Number

77485693

Status

NOTICE OF ALLOWANCE - ISSUED

Word Mark

THE KITCHEN

Standard Character Mark

No

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Hamaydeh, Azmi INDIVIDUAL JORDAN TAWAM HOSPITAL AL AIN UNITED ARAB
EMIR. 15258

Goods/Services

Class Status -- ACTIVE. IC 043. US 100 101. G & S: Restaurant and
cafe services; Restaurant and catering services; Restaurant services,
including sit-down service of food and take-out restaurant services;
Self service restaurants.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "THE KITCHEN" APART
FROM THE MARK AS SHOWN.

Description of Mark

The mark consists of a barn image on the left, on the right first line
is "THE", and the second line on the right is "KITCHEN", the image and
the letters are of burgundy color on a white background.

Colors Claimed

The color(s) white and burgundy is/are claimed as a feature of the
mark.

Filing Date

2008/05/29

Examining Attorney

MARTIN, EUGENIA



THE
KITCHEN



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kitchen

8 entries found.

- kitchen (noun)
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Main Entry: **kitch-en**

Pronunciation: \ˈki-çən\

Function: *noun*

Etymology: Middle English *kichene*, from Old English *cyçene*, from Late Latin *coquina*, from Latin *coquere* to cook — more at **COOK**

Date: before 12th century

1 : a place (as a room) with [cooking](#) facilities

2 : the personnel that prepares, cooks, and serves food

3 : **CUISINE**

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"kitchen." [Merriam-Webster Online Dictionary](#). 2009.
Merriam-Webster Online. 17 September 2009.
<<http://www.merriam-webster.com/dictionary/kitchen>>

APA Style

kitchen. (2009). In *Merriam-Webster Online Dictionary*.
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To: Restaurant Destinations, Inc. (simlay@pjpn.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77763583 - DA KITCHEN - N/A
Sent: 9/17/2009 12:10:58 PM
Sent As: ECOM108@USPTO.GOV
Attachments:

IMPORTANT NOTICE REGARDING YOUR TRADEMARK APPLICATION

Your trademark application (Serial No. 77763583) has been reviewed. The examining attorney assigned by the United States Patent and Trademark Office (“USPTO”) has written a letter (an “Office action”) on **9/17/2009** to which you must respond (*unless the Office letter specifically states that no response is required*). Please follow these steps:

1. **Read** the Office letter by clicking on this **link** http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77763583&doc_type=OOA& OR go to <http://tportal.uspto.gov/external/portal/tow> and enter your serial number to access the Office letter. If you have difficulty accessing the Office letter, contact TDR@uspto.gov.

PLEASE NOTE: The Office letter may not be immediately available but will be viewable within 24 hours of this e-mail notification.

2. **Contact** the examining attorney who reviewed your application if you have any questions about the content of the Office letter (contact information appears at the end thereof).

3. **Respond** within 6 months, calculated from **9/17/2009** (*or sooner if specified in the Office letter*), using the Trademark Electronic Application System (TEAS) **Response to Office Action form**. If you have difficulty using TEAS, contact TEAS@uspto.gov.

ALERT:

Failure to file any required response by the applicable deadline will result in the **ABANDONMENT** (loss) of your application.

Do NOT hit “Reply” to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses.

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77763583
LAW OFFICE ASSIGNED	LAW OFFICE 108
MARK SECTION (no change)	
ARGUMENT(S)	
<p>This is in response to the Office Action of September 17, 2009.</p> <p>The Examining Attorney has refused registration of the subject mark under Trademark Act § 2(d), on the grounds that Applicant's "DA KITCHEN" mark, when used in connection with Applicant's services in International Class 43, so resembles the mark which is the subject of then-pending U.S. Application Serial No. 77485693 as to be likely to cause confusion.</p> <p>Applicant respectfully traverses and requests the Examining Attorney's further consideration on this matter.</p> <p>U.S. Application Serial No. 77485693 was abandoned on September 21, 2009. Enclosed herein with this response is "Exhibit A", which is a true and correct copy of the Notice of Abandonment.</p> <p>Additionally, Applicant submits that a consideration of certain <i>Du Pont</i> factors leads to the conclusion that there is no likelihood that the Applicant's mark will cause confusion. <i>See In re E.I. du Pont de Nemours & Co.</i>, 476 F2d 1357, 177 USPQ 563 (CCPA 1973).</p> <p>The mark that is the subject of the instant application, DA KITCHEN, and the mark of Serial No. 77485693, THE KITCHEN, are dissimilar in their appearance, sound, connotation and commercial impression. Visually, the marks are different since THE KITCHEN is a design mark containing a house design aside the mark, and the house design is the dominant portion of the mark.</p> <p>Although the word "KITCHEN" is present in each mark, this fact alone cannot be dispositive of the likelihood of confusion because the use of the word "KITCHEN" is frequently found in registered marks. There are 545 marks containing the word "KITCHEN".</p> <p>Moreover, the mark THE KITCHEN was an intent to use application, and thus, there is not possibly any actual confusion among consumers between the two marks.</p>	
EVIDENCE SECTION	

EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_72253144134-182000840 . Exhibit Notice of Abandonment.pdf
CONVERTED PDF FILE(S) (2 pages)	\\TICRS\EXPORT9\IMAGEOUT9\777\635\77763583\xml1\ROA0002.JPG
	\\TICRS\EXPORT9\IMAGEOUT9\777\635\77763583\xml1\ROA0003.JPG
DESCRIPTION OF EVIDENCE FILE	Notice of Abandonment of U.S. Application Serial No. 77485693
GOODS AND/OR SERVICES SECTION (043)(current)	
INTERNATIONAL CLASS	043
DESCRIPTION	
Restaurant services; carry out restaurant services; catering services; clothing, namely, shirts, t-shirts, tank tops, hats	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/01/1998
FIRST USE IN COMMERCE DATE	At least as early as 05/01/1998
GOODS AND/OR SERVICES SECTION (043)(proposed)	
INTERNATIONAL CLASS	043
TRACKED TEXT DESCRIPTION	
Restaurant services; carry out restaurant services; catering services; clothing, namely, shirts, t-shirts, tank tops, hats	
FINAL DESCRIPTION	
Restaurant services; carry out restaurant services; catering services	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/01/1998
FIRST USE IN COMMERCE DATE	At least as early as 05/01/1998
STATEMENT TYPE	"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce at least as early as the filing date of the application" <i>[[for an application based on Section 1(a), Use in Commerce]</i> OR "The substitute (or new, if appropriate) specimen(s) was/were in use in commerce prior either to the filing of the Amendment to Allege Use or expiration of the filing deadline for filing a Statement of Use" <i>[[for an application based on Section 1(b) Intent-to-Use]</i> .
SPECIMEN	\\TICRS\EXPORT9\IMAGEOUT9\777\635\77763583\xml1\RO

FILE NAME(S)	A0004.JPG
SPECIMEN DESCRIPTION	Photograph of restaurant
GOODS AND/OR SERVICES SECTION (025)(class added)	
INTERNATIONAL CLASS	025
DESCRIPTION	Clothing, namely, shirts, t-shirts, tank tops, and hats
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/01/2000
FIRST USE IN COMMERCE DATE	At least as early as 01/01/2000
STATEMENT TYPE	"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce at least as early as the filing date of the application" <i>[for an application based on Section 1(a), Use in Commerce]</i> OR "The substitute (or new, if appropriate) specimen(s) was/were in use in commerce prior either to the filing of the Amendment to Allege Use or expiration of the filing deadline for filing a Statement of Use" <i>[for an application based on Section 1(b) Intent-to-Use]</i> .
SPECIMEN FILE NAME(S)	
ORIGINAL PDF FILE	SPN0-72253144134-182000840 . Specimen 2 webpage tshirt.pdf
CONVERTED PDF FILE(S) (2 pages)	\\TICRS\EXPORT9\IMAGEOUT9\777\635\77763583\xml1\ROA0005.JPG
	\\TICRS\EXPORT9\IMAGEOUT9\777\635\77763583\xml1\ROA0006.JPG
SPECIMEN DESCRIPTION	Digitally scanned webpage of shirts
ADDITIONAL STATEMENTS SECTION	
DISCLAIMER	No claim is made to the exclusive right to use KITCHEN apart from the mark as shown.
PAYMENT SECTION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
TOTAL FEES DUE	325
SIGNATURE SECTION	
DECLARATION SIGNATURE	/Shannon S. Imlay/
SIGNATORY'S NAME	Shannon S. Imlay

SIGNATORY'S POSITION	attorney of record
DATE SIGNED	12/22/2009
RESPONSE SIGNATURE	/Shannon S. Imlay/
SIGNATORY'S NAME	Shannon S. Imlay
SIGNATORY'S POSITION	attorney of record
DATE SIGNED	12/22/2009
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Dec 22 18:52:10 EST 2009
TEAS STAMP	USPTO/ROA-72.253.144.134- 20091222185210985810-7776 3583-4604ea135e22d19e1b84 886fecc72993-CC-6196-2009 1222182000840313

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/30/2011)

**Response to Office Action
To the Commissioner for Trademarks:**

Application serial no. **77763583** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

This is in response to the Office Action of September 17, 2009.

The Examining Attorney has refused registration of the subject mark under Trademark Act § 2(d), on the grounds that Applicant's "DA KITCHEN" mark, when used in connection with Applicant's services in International Class 43, so resembles the mark which is the subject of then-pending U.S. Application Serial No. 77485693 as to be likely to cause confusion.

Applicant respectfully traverses and requests the Examining Attorney's further consideration on this matter.

U.S. Application Serial No. 77485693 was abandoned on September 21, 2009. Enclosed herein with this response is "Exhibit A", which is a true and correct copy of the Notice of Abandonment.

Additionally, Applicant submits that a consideration of certain *Du Pont* factors leads to the conclusion that there is no likelihood that the Applicant's mark will cause confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F2d 1357, 177 USPQ 563 (CCPA 1973).

The mark that is the subject of the instant application, DA KITCHEN, and the mark of Serial No. 77485693, THE KITCHEN, are dissimilar in their appearance, sound, connotation and commercial impression. Visually, the marks are different since THE KITCHEN is a design mark containing a house design aside the mark, and the house design is the dominant portion of the mark.

Although the word "KITCHEN" is present in each mark, this fact alone cannot be dispositive of the likelihood of confusion because the use of the word "KITCHEN" is frequently found in registered marks. There are 545 marks containing the word "KITCHEN".

Moreover, the mark THE KITCHEN was an intent to use application, and thus, there is not possibly any actual confusion among consumers between the two marks.

EVIDENCE

Evidence in the nature of Notice of Abandonment of U.S. Application Serial No. 77485693 has been attached.

Original PDF file:

[evi_72253144134-182000840 . Exhibit Notice of Abandonment.pdf](#)

Converted PDF file(s) (2 pages)

[Evidence-1](#)

[Evidence-2](#)

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 043 for Restaurant services; carry out restaurant services; catering services; clothing, namely, shirts, t-shirts, tank tops, hats

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/01/1998 and first used in commerce at least as early as 05/01/1998, and is now in use in such commerce.

Proposed:

Tracked Text Description: Restaurant services; carry out restaurant services; catering services; ~~clothing, namely, shirts, t-shirts, tank tops, hats~~

Class 043 for Restaurant services; carry out restaurant services; catering services

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/01/1998 and first used in commerce at least as early as 05/01/1998, and is now in use in such commerce.

Applicant hereby submits a new specimen for Class 043. The specimen(s) submitted consists of

Photograph of restaurant.

"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce at least as early as the filing date of the application" *[[for an application based on Section 1(a), Use in Commerce]* OR **"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce prior either to the filing of the Amendment to Allege Use or expiration of the filing deadline for filing a Statement of Use"** *[[for an application based on Section 1(b) Intent-to-Use]*.

[Specimen File1](#)

Applicant hereby adds the following class of goods/services to the application:

New: Class 025 for Clothing, namely, shirts, t-shirts, tank tops, and hats

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 01/01/2000 and first used in commerce at least as early as 01/01/2000, and is now in use in such commerce.

Applicant hereby submits a specimen for Class 025. The specimen(s) submitted consists of Digitally scanned webpage of shirts.

"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce at least as early as the filing date of the application" *[[for an application based on Section 1(a), Use in Commerce]* OR **"The substitute (or new, if appropriate) specimen(s) was/were in use in commerce prior either to the filing of the Amendment to Allege Use or expiration of the filing deadline for filing a Statement of Use"** *[[for an application based on Section 1(b) Intent-to-Use]*.

Original PDF file:

[SPN0-72253144134-182000840 . Specimen 2 webpage tshirt.pdf](#)

Converted PDF file(s) (2 pages)

[Specimen File1](#)

[Specimen File2](#)

ADDITIONAL STATEMENTS

Disclaimer

No claim is made to the exclusive right to use KITCHEN apart from the mark as shown.

FEE(S)

Fee(s) in the amount of \$325 is being submitted.

SIGNATURE(S)

Declaration Signature

If the applicant is seeking registration under Section 1(b) and/or Section 44 of the Trademark Act, the applicant has had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. 37 C.F.R. Secs. 2.34(a)(2)(i); 2.34 (a)(3)(i); and 2.34(a)(4)(ii); and/or the applicant has had a bona fide intention to exercise legitimate control over the use of the mark in commerce by its members. 37 C.F. R. Sec. 2.44. If the applicant is seeking registration under Section 1(a) of the Trademark Act, the mark was in use in commerce on or in connection with the goods and/or services listed in the application as of the application filing date or as of the date of any submitted allegation of use. 37 C.F.R. Secs. 2.34(a)(1)(i); and/or the applicant has exercised legitimate control over the use of the mark in commerce by its members. 37 C.F.R. Sec. 244. The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any

resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; that if the original application was submitted unsigned, that all statements in the original application and this submission made of the declaration signer's knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.

Signature: /Shannon S. Imlay/ Date: 12/22/2009

Signatory's Name: Shannon S. Imlay

Signatory's Position: attorney of record

Response Signature

Signature: /Shannon S. Imlay/ Date: 12/22/2009

Signatory's Name: Shannon S. Imlay

Signatory's Position: attorney of record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

RAM Sale Number: 6196

RAM Accounting Date: 12/23/2009

Serial Number: 77763583

Internet Transmission Date: Tue Dec 22 18:52:10 EST 2009

TEAS Stamp: USPTO/ROA-72.253.144.134-200912221852109

85810-77763583-4604ea135e22d19e1b84886fe

cc72993-CC-6196-20091222182000840313

Sep 21, 2009

NOTICE OF ABANDONMENT

HAMAYDEH, AZMI
TAWAM HOSPITAL
AL AIN
15258
UNITED ARAB EMIR.

SERIAL NUMBER: 77/485693
MARK: THE KITCHEN
APPLICANT: Hamaydeh, Azmi

THE ABOVE IDENTIFIED TRADEMARK APPLICATION WAS ABANDONED ON 09/21/2009 FOR THE FOLLOWING REASON:

APPLICANT FAILED TO FILE A STATEMENT OF USE (SOU) OR REQUEST FOR AN EXTENSION OF TIME TO FILE A STATEMENT OF USE (EXTENSION REQUEST). TRADEMARK ACT 1(d)(4), 15 U.S.C. 1051 (d)(4); 37 C.F.R. 2.65(c).
YOU CAN REQUEST REINSTATEMENT OF THE APPLICATION FOR NO FEE IF:

- * YOU HAVE PROOF THAT THE STATEMENT OF USE OR EXTENSION REQUEST WAS RECEIVED IN THE USPTO ON OR BEFORE THE DUE DATE - SUCH AS A POSTCARD WITH A USPTO MAILROOM DATE STAMP; OR,
- * YOU MAILED OR FAXED THE STATEMENT OF USE OR EXTENSION REQUEST ON OR BEFORE THE DUE DATE WITH A CERTIFICATE OF MAILING OR FACSIMILE TRANSMISSION, IN ACCORDANCE WITH USPTO RULE 2.197, 37 CFR SEC. 2.197.

YOU MUST SUBMIT A COPY OF THE PREVIOUSLY SUBMITTED TIMELY STATEMENT OF USE OR EXTENSION REQUEST WITHIN 2 MONTHS OF THE DATE PRINTED AT THE TOP OF THIS NOTICE ALONG WITH ONE OF THE TYPES OF PROOF SET OUT ABOVE. YOU MAY FAX THIS INFORMATION TO THE INTENT TO USE UNIT AT 571-273-9550.

IF YOU DO NOT HAVE THE PROOF NECESSARY FOR REINSTATEMENT, YOU CAN FILE A PETITION TO REVIVE THROUGH THE TRADEMARK ELECTRONIC APPLICATION SYSTEM (TEAS) AVAILABLE AT <http://www.uspto.gov/teas/index.html>. USPTO RULE 2.66, 37 CFR SEC. 2.66, REQUIRES:

- * A "PETITION TO REVIVE" **TO BE FILED WITHIN 2 MONTHS** OF THE DATE PRINTED AT THE TOP OF THIS NOTICE;
- * A SIGNED STATEMENT BY SOMEONE WITH FIRST HAND KNOWLEDGE OF THE FACTS THAT THE DELAY IN RESPONDING BY THE DUE DATE WAS "UNINTENTIONAL";
- * A PETITION FEE OF \$100, MADE PAYABLE TO THE COMMISSIONER OF TRADEMARKS; AND
- * IF YOU RECEIVED THE NOTICE OF ALLOWANCE, YOU MUST ALSO INCLUDE A STATEMENT OF USE OR EXTENSION REQUEST AND THE REQUIRED FEES, INCLUDING ANY FEES FOR EXTENSION REQUESTS THAT SHOULD HAVE BEEN FILED IF THE APPLICATION HAD NEVER BEEN ABANDONED. IF YOU DID NOT RECEIVE THE NOTICE OF ALLOWANCE, INCLUDE A STATEMENT THAT YOU DID NOT RECEIVE THE NOTICE OF ALLOWANCE.

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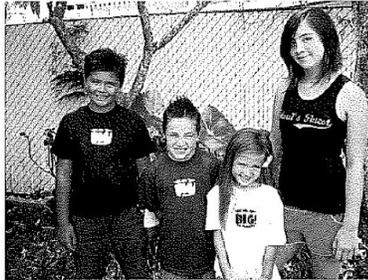
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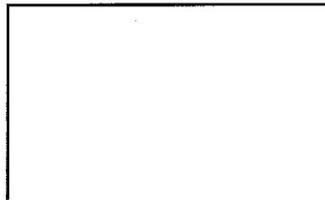


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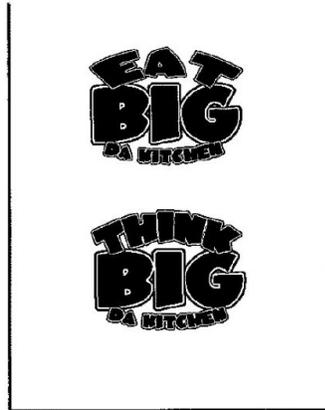
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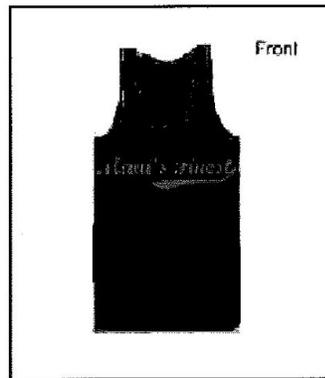
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RAM SALE NUMBER: 6196
RAM ACCOUNTING DATE: 20091223

INTERNET TRANSMISSION DATE:
2009/12/22

SERIAL NUMBER:
77/763583

Description	Fee Code	Transaction Date	Fee	Number Of Classes	Total Fees Paid
New App	7001	2009/12/22	325	1	325

This Opinion is not a
Precedent of the TTAB

Mailed: April 13, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Christopher A. Fahey, DBA Gravity Guitar Picks

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Serial No. 86250337
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Paul W. Reidl of the Law Office of Paul W. Reidl,
for Christopher A. Fahey.

Zhaleh Delaney, Trademark Examining Attorney, Law Office 116,
Michael W. Baird, Managing Attorney.

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Before Bucher, Mermelstein and Wolfson,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Christopher A. Fahey (“Applicant”), a resident of California, seeks registration on the Principal Register of the mark **SUNRISE** (*in standard character format*) for “guitar picks” in Int. Class 15.¹ Registration has been finally refused on the ground that Applicant’s mark is likely to cause confusion in view of the mark shown at right registered for “guitars.” Trademark Act Section 2(d), 15 U.S.C. § 1052(d). The English translation



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¹ Application Serial No. 86250337 was filed on April 11, 2014, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as January 22, 2014.

² Registration No. 4285269 issued on February 5, 2013.

provided in the registration of “Pukana La” is “sunshine, sunrise.” The gravamen of the Examining Attorney’s argument is her contention that inasmuch as “Pukana La” means “Sunrise,” the marks share identical connotations under “the doctrine of foreign equivalents.” The Office and Applicant have both argued that the similarity/dissimilarity of the marks is the dispositive factor herein.

Under the first *du Pont*³ factor, we focus on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. Yet, when focusing on the perceptions of ordinary American consumers who are multilingual, we are tasked with calibrating a bewildering balance – namely weighing (1) the closeness with which the non-English-language term denotes the putative equivalent term in the English-language, against (2) the quite obvious and inevitable differences of sight and sound involved in comparisons of the English language expression with the untranslated non-English language term.

In applying the ideas drawn from cases such as *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005) and its progeny, Applicant poses the question as to whether the Office has established that Hawaiian is a “common, modern language.”

To the extent modern means something different from common, we find that Hawaiian is clearly a modern language. Despite concerted colonial attempts between 1896 and the 1960s to eradicate the language, this record speaks to the continued viability of the language and its contemporary significance to the Hawaiian people. The language has seen something of a revival over the past

³ See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

several decades, and on this record we find that it qualifies as a living, modern language. Hawaiian cannot, for example, be placed into the same category as Ancient Greek – the prototype of a dead language.

Nonetheless, the doctrine of foreign equivalents will not be invoked where, as here, the non-English language at issue is obscure or unusual, that is, not spoken by an appreciable number of individuals sufficient to sustain a finding of a likelihood of confusion. Applicant has raised the question whether, under the facts of this case, the Hawaiian language is such a language. The record herein shows that approximately eighteen thousand Hawaiian language speakers live in the state of Hawaii and seven thousand more Hawaiian speakers live elsewhere in the United States. Moreover, there is substantially no population of Hawaiian speakers elsewhere around the globe. Given this set of facts, we agree with Applicant that the Hawaiian language cannot be characterized as a modern, common language, and hence, the doctrine of foreign equivalents does not apply. In the event that this doctrine is unavailable, the involved marks are totally dissimilar, and there is no basis for concluding that confusion is likely. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991).

Decision: The refusal to register Applicant's mark **SUNRISE** under Section 2(d) of the Lanham Act is hereby reversed.