


UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/022292

APPLICANT: Aladdin's Eatery, Inc.

CORRESPONDENT ADDRESS:
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**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**
2/13/06

MARK: ALADDIN'S EATERY

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

EXAMINING ATTORNEY'S APPEAL BRIEF

STATEMENT OF THE CASE

Applicant has appealed the Trademark Examining Attorney's final refusal to register the special form trademark ALADDIN'S EATERY with design for "Restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith," in International Class 043 on the ground of likelihood of confusion, mistake or deception under Trademark Act §2(d), 15 U.S.C. § 1052(d), with the following marks: (1) the special form mark ALADDIN with a lamp design for "[r]esort, hotel, restaurant, bar, lounge services; beauty salon and health spa services;" U.S. Reg. No. 2632473; (2) the typed mark ALADDIN for "hotel and restaurant services." U.S. Reg. No. 1779369; and (3) the stylized mark ALADDIN for "Resort, hotel, restaurant, bar, lounge services; beauty salon and health spa services," U.S. Reg. No. 2628932. ^[1]

FACTS

Applicant filed this application on April 10, 2000, applying to register on the Principal Register the

special form mark ALADDIN'S EATERY with design for "[r]estaurants."^[2] On October 13, 2000, the application was suspended and applicant was advised of the potential refusal under §2(d) with regard to U.S. Application Nos. 75936968 and 75936969. Letters of suspension regarding the aforementioned U.S. Application Nos. were subsequently sent on August 10, 2001, December 3, 2001, and July 16, 2002.

On December 16, 2002, an Office action was sent that advised applicant that U.S. Application No. 75936969 had matured into U.S. Reg. No. 2632473; therefore, registration was refused under §2(d) of the Trademark Act based upon a likelihood of confusion with the registered mark. The Office action also maintained and continued the citation of the earlier-filed U.S. Application No. 75936968. A second Office action, dated July 7, 2003, refused registration under §2(d) of the Trademark Act based upon a likelihood of confusion with the marks in U.S. Reg. Nos. 1779369, 1789789, 2628932, and 2632473. The Office action also required a disclaimer of the word "EATERY," and withdrew the citation of U.S. Application No. 75936968 because it had abandoned. In the third Office action, dated September 24, 2003, the §2(d) refusals to register were made final as to U.S. Reg. Nos. 1779369, 1789789, 2628932, and 2632473. The fourth Office action, dated November 26, 2003, refused a proposed amendment to the identification and continued the §2(d) refusal to register as to U.S. Reg. Nos. 1779369, 1789789, 2628932, and 2632473. The fifth Office action, sent on July 1, 2004, accepted an amendment to the identification and made final the §2(d) refusals to register as to U.S. Reg. Nos. 1779369, 1789789, 2628932, and 2632473. On January 12, 2005, applicant filed a notice of appeal with the Board. On January 12, 2005, this appeal was acknowledged by the Board and the case was remanded to the Examining Attorney.

On June 8, 2005, the mark was erroneously approved for publication.^[3] On July 28, 2005, the mark was withdrawn from publication. On June 29, 2005, the Examining Attorney sent a memorandum to the Director requesting restoration of jurisdiction pursuant to TMEP §1504.04. The Director restored jurisdiction to the Examining Attorney on August 22, 2005. In the sixth Office Action, dated September 2, 2005, applicant's request for reconsideration was denied and the §2(d) refusals as to U.S. Reg. Nos.

1779369, 2628932, and 2632473 were maintained and continued. The Office action also withdrew the citation of U.S. Reg. No. 1789789 because the registration had been cancelled. On September 7, 2005 the Office mailed applicant a notice that the appeal was resumed. Applicant filed the appeal brief on November 1, 2005.

ISSUES RAISED BY APPLICANT'S BRIEF

Applicant's appeal brief, filed on November 1, 2005, states that applicant would be pleased to adopt as its recitation of services "restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith." Applicant's Brief p. 2. Yet, applicant already amended the identification to this on May 28, 2004. The Examining Attorney accepted the amendment to the identification on July 1, 2004.

ISSUE ON APPEAL

The sole issue on appeal is whether the mark, when used in connection with the identified services, is likely to cause confusion under §2(d) of the Trademark Act with the marks in U.S. Registration Nos. 1779369, 2632473, and 2628932.

OBJECTIONS

The Examining Attorney objects to the introduction into evidence of applicant's September 27, 2005 correspondence, as it was filed after the time period allotted for a response. A proper response must be received by the Office within six months from the mailing date of the Office action in order to avoid abandonment of the application. 15 U.S.C. §1062(b); 37 C.F.R. §2.62. The Office action mailing date was July 1, 2004, and a response was due on or before January 1, 2005. However, the response was filed on September 27, 2005.

The Examining Attorney objects to applicant's introduction of new evidence in his brief, including the introduction of a trademark search, a Google® search, and a Hoover® search as evidence.^[4] TBMP

§§1207 *et seq.* See *Rexall Drug Co. v. Manhattan Drug Co.*, 284 F.2d 391, 128 USPQ 114 (C.C.P.A. 1960); *In re Psygnosis Ltd.*, 51 USPQ2d 1594 (TTAB 1999); TMEP §710.01(c).

ARGUMENT

A. INTRODUCTION

Applicant applied for registration of the special form mark ALADDIN'S EATERY with design^[5] for "[r]estaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith." Registration was refused under §2(d) of the Trademark Act based upon a likelihood of confusion with three marks owned by the same registrant: (1) the special form mark ALADDIN with a lamp design for "[r]esort, hotel, restaurant, bar, lounge services; beauty salon and health spa services;" U.S. Reg. No. 2632473;^[6] (2) the typed mark ALADDIN for "hotel and restaurant services;" U.S. Reg. No. 1779369; and (3) the stylized mark ALADDIN for "Resort, hotel, restaurant, bar, lounge services; beauty salon and health spa services;" U.S. Reg. No. 2628932.^[7]

Taking into account the relevant *Du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

B. APPLICANT'S MARK, ALADDIN'S EATERY, IS VERY SIMILAR TO REGISTRANT'S MARKS, ALADDIN.

1. APPLICANT'S AND REGISTRANT'S MARKS ARE SIMILAR IN SOUND AND APPEARANCE.

The word "ALADDIN" is spelled the same way and pronounced the same way in all of the marks and it is the dominant feature of applicant's and registrant's marks. The marks are compared in their entireties under a §2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976). *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); TMEP §1207.01(b)(viii).

The word "ALADDIN" is the dominant feature of the marks because it is arbitrary as assigned to all of applicant's and registrant's named services, it is the literal portion of the marks, and because the other wording in applicant's mark has been disclaimed. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii). The word "ALADDIN" is also dominant because applicant has disclaimed the descriptive word "EATERY," as the word "eatery" means "a restaurant."^[8] Disclaimed matter is typically less significant or less dominant when comparing marks. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re*

Equitable Bancorporation, 229 USPQ 709 (TTAB 1986). Because the word “ALADDIN” is the dominant feature of applicant’s and registrant’s marks, the marks are similar in sound and appearance.

2. APPLICANT’S AND REGISTRANT’S MARKS CREATE THE SAME COMMERCIAL IMPRESSION.

Applicant’s mark, ALADDIN’S EATERY, and registrant’s marks, ALADDIN, create the same overall commercial impression. The differences in the marks, namely (i) applicant’s addition of a possessive ‘S to “ALADDIN,” (ii) applicant’s addition of the descriptive term “EATERY,” and (iii) the differences in the designs, do not obviate this commercial impression. All of the restaurant services will be referred to as ALADDIN.

Applicant’s mere addition of the possessive ‘S does nothing to distinguish applicant’s mark from registrant’s marks. The Federal Circuit encountered a similar case in *In re Chatam International Inc.*, where the Court compared two marks, JOSE GASPARGOLD and GASPARGOLD’S ALE, that had the dominant word GASPARGOLD. *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004). The court declared that “[v]iewed in their entireties with the non-dominant features appropriately discounted, the marks have become nearly identical. That is, the dominant feature of [the applicant’s] mark, GASPARGOLD, is also the dominant feature of the registered mark, GASPARGOLD’S, albeit in possessive form.” *Id.*, 380 F.3d at 1343, 71 USPQ2d at 1946. The court held that the Trademark Trial and Appeal Board “correctly perceived that GASPARGOLD and GASPARGOLD’S convey a similar appearance, sound, connotation, and commercial impression.” *Id.* That case is similar to the case at hand because both cases deal with marks that share a dominant word, with applicant’s mark being possessive and registrant’s marks being singular. Therefore, applicant’s addition of a possessive ‘S does not obviate the similarities of the marks.

Because the word “EATERY” is descriptive, as noted above, it is much less significant in creating a commercial impression. All of applicant’s and registrant’s marks will be referred to as “ALADDIN.”

Applicant's own specimens of record support this, as many of them use the word "ALADDIN'S" without adding the word "EATERY." Applicant's specimens of record contain the following statements or phrases: "At Aladdin's, eat good, eat healthy;" "Our intention at Aladdin's is to provide our customers unique, natural foods...;" "Aladdin's Lamb Rolled;" "Aladdin's Falaffel Rolled;" "Aladdin's Salad;" "Aladdin's Kabob Rolled;" et cetera. Therefore, the word "ALADDIN" in applicant's mark plays the most significant role in creating a commercial impression.

The fact that the design elements in the application and in U.S. Registration Nos. 2632473 and 2628932 differ does not obviate the similarities of the marks. As noted above, when a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii). Despite their differences, the commercial impression of applicant's and registrant's marks are the same.

Therefore, viewed in their entireties, with the non-dominant features appropriately discounted, applicant's mark is nearly identical to registrant's marks in appearance, sound, and meaning and therefore the marks have a similar commercial impression. Both applicant's and registrant's restaurant services will be referred to as "ALADDIN."

3. APPLICANT'S AND REGISTRANT'S MARKS HAVE THE SAME MEANING.

The word "ALADDIN" has the same meaning in both applicant's and registrant's marks. The word "Aladdin" brings to mind the "boy [from *Arabian Nights*] who acquires a magic lamp and a magic ring with which he can summon two jinn to fulfill any desire."^[9] Nevertheless, applicant argues that ALADDIN'S EATERY has a different meaning than ALADDIN alone does. In his brief, applicant argues that "ALADDIN'S EATERY suggests some type of small,

informal restaurant,” while “[t]he cited marks connote and give a commercial impression of a fictitious character and do not bring to mind anything relating to food.”^[10] Applicant has not provided any evidence to substantiate this statement. Although the designs in applicant’s mark and the cited marks differ, the designs do not alter the meaning of the marks. As noted above, the word “ALADDIN” is dominant over the additional wording and design elements in the marks. The design in one of the cited marks is a lamp design, which acts only to reinforce that the word “Aladdin” in the mark refers to the boy from *Arabian Nights*. The other cited special form mark is the stylized word ALADDIN. Such stylization does not alter the meaning of the word “ALADDIN.” The design in applicant’s mark is comprised of various decorative features including leaves, a menu, and a bowl that is emanating steam. The design does not alter the meaning of the word “ALADDIN.” Applicant has not presented evidence that proves otherwise. Therefore, applicant’s and registrant’s marks have the same or similar meanings.

Because applicant’s and registrant’s marks have such a similar appearance, commercial impression, and meaning, when applicant’s mark is compared to the registered marks, “the points of similarity are of greater importance than the points of difference.” *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 40, 108 USPQ 161 (D.C. Cir. 1956) (internal citation omitted).

C. APPLICANT’S AND REGISTRANT’S SERVICES ARE SIMILAR.

1. REGISTRANT’S IDENTIFICATION ENCOMPASSES APPLICANT’S IDENTIFICATION.

If the services of the respective parties are closely related, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply with diverse services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied* 506 U.S. 1034 (1992); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ

443 (TTAB 1980); TMEP §1207.01(b).

Here, registrant's identified services include "hotel and restaurant services"^[11] and "[r]esort, hotel, restaurant, bar, lounge services; beauty salon and health spa services."^[12] Applicant's identified services, as amended are, "for "[r]estaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith." Registrant's recitation of services is broader than applicant's and therefore encompasses applicant's services.

A determination of whether there is a likelihood of confusion is made solely on the basis of the services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999). If the cited registration describes the services broadly and there are no limitations as to their nature, type, channels of trade, or classes of purchasers, then it is presumed that the registration encompasses all services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); TMEP §1207.01(a)(iii).

The registrant's services as identified are "restaurant services" and contain no limitations as to the type of restaurant services. Therefore, the Examining Attorney must presume that it encompasses all services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. That is, the Examining Attorney must presume that the registrant's restaurant services include restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); TMEP §1207.01(a)(iii). Therefore, for the purpose of the §2(d) analysis, applicant's and registrant's services are presumed to be identical.

Registrant's registrations apply to all restaurant services because of the broad wording of services. Applicant argues that the services differ because registrant's restaurant services are linked to hotel

services and that “[i]ntegrated hotel and restaurant services are something different from restaurant services.”^[13] The fact that registrant’s recitation of services for U.S. Registration Nos. 1779369 states his services in such a way that “services” modifies both “hotel” and “restaurant” does not mean that the registration only applies to restaurant services that are linked with hotel services or hotel services that are linked with restaurant services. Similarly, U.S. Registration Nos. 2632473 and 2628932 list the registrants services as “[r]esort, hotel, restaurant, bar, lounge services; beauty salon and health spa services,” but this does not mean that only restaurant services linked with resort, hotel, bar, and lounge services are protected by the registration. Nevertheless, applicant argues that “[c]onsumers are aware that hotel restaurants... are distinct and unique. No one would expect to get a similar dining experience at a hotel restaurant and an ethnic neighborhood eating establishment.”^[14] Again, because the registrations do not contain any limiting words, the Examining Attorney must presume that registrant’s services include all restaurant services, including those named as applicant’s services. Applicant argues that the actual services of the registrant are in fact “intimately linked with the dominant hotel and casino aspect of the cited marks.”^[15] Yet, an applicant may not restrict the scope of the services covered in the registration by extrinsic argument or evidence. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986); TMEP §1207.01(a)(iii). Therefore for the purpose of the §2(d) analysis, applicant’s services are identical to the registrant’s.

2. THE ADDITIONAL DU PONT FACTORS SUPPORT A FINDING OF LIKELIHOOF OF CONFUSION.

Additional *DuPont* factors support a finding of likelihood of confusion despite applicant’s arguments to the contrary. Throughout his brief, applicant makes many statements of fact without supporting evidence, arguing that the *Du Pont* factors favor applicant. Because applicant provides no evidentiary support for such statements, these statements are not relevant and in one case, one of applicant’s statements regarding the fame of registrant’s marks is in favor of the Examining Attorney’s argument.

Applicant states that “[m]any are using the name [ALADDIN] for food.”^[16] As noted above, the Examining Attorney objects to the introduction of new evidence. TBMP §§1207 *et seq.* See *Rexall Drug Co. v. Manhattan Drug Co.*, 284 F.2d 391, 128 USPQ 114 (C.C.P.A. 1960); *In re Psygnosis Ltd.*, 51 USPQ2d 1594 (TTAB 1999); TMEP §710.01(c). Nevertheless, it should be noted, that the registrant is the only owner of registrations for the mark ALADDIN for any type of restaurant service.

Applicant also states that the relevant consumers of applicant’s and registrant’s services differ and that applicant’s consumers are “neighborhood families looking for a place that services Middle Eastern food,” while registrant’s consumers are “people traveling to Las Vegas and choosing among casinos on the strip.”^[17] Applicant cannot limit registrant’s consumers, channels of trade, or identified services as stated in the above argument. Applicant argues that its activities are geographically separate from those of registrant.^[18] This argument is not persuasive because applicant seeks a geographically unrestricted registration, and the registrations at issue enjoy a presumption of registrant’s exclusive right to nationwide use of the registered marks under Section 7(b) of the Trademark Act regardless of its actual extent of use. Trademark Act Section 7(b), 15 U.S.C. §1057(b). See *e.g. Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983); *Amcor, Inc. v. Amcor Indus., Inc.*, 210 USPQ 70, 77 (TTAB 1981). Therefore, the geographical extent of applicant’s and registrant’s activities is not a proper factor for consideration here. *In re Shell Oil Co.*, 26 USPQ2d 1687, 1689-90 (Fed. Cir. 1993); *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 n.4 (TTAB 1987). There is no reason to think that a Las Vegas “neighborhood family” would not choose a Middle Eastern restaurant. Because registrations are national in scope, if applicant’s registration was allowed, there would be no restriction preventing the applicant from opening a restaurant in a Las Vegas neighborhood.

Applicant also states that such consumers are sophisticated and that they will recognize the differences between the respective marks.^[19] There is no evidence provided that proves that restaurant consumers are sophisticated. Nevertheless, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983); TMEP §1207.01(d)(vii).

Applicant claims that there has been no actual confusion in the years that both applicant and registrant have used their marks.^[20] Applicant also points out that “no oppositions were filed during the opposition period [when applicant’s mark was erroneously approved for publication, and that this] is strong evidence that there is no likelihood of confusion.”^[21] Yet, it is not necessary to show actual confusion in establishing a likelihood of confusion under §2(d) of the Trademark Act. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein; TMEP §1207.01(d)(ii). The fact that no oppositions were filed during the opposition time period does not prove that consumers will not actually be confused when encountering applicant’s and registrant’s marks. The lack of evidence of actual confusion carries little weight. *In re Majestic Distilling Co.*, 65 USPQ2d 1201, 1205 (Fed. Cir. 2005) (citing *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 964, 144 USPQ 435, 488 (CCPA 1965)).

Applicant further claims that “the cited application[s] are known for casino services.”^[22] Here, the applicant admits that registrant’s mark is in fact a famous mark and therefore, this factor is in favor of the likelihood of confusion.

Applicant claims that the owner of the cited registrations is “not [known] for restaurant services [because n]one of the food establishments in the casino operate under the ALADDIN name.”^[23] The applicant may not introduce extrinsic evidence into the record after the appeal has been instituted. TBMP §§1207 *et seq.* See *Rexall Drug Co. v. Manhattan Drug Co.*, 284 F.2d 391, 128 USPQ 114 (C.C.P.A. 1960); *In re Psygnosis Ltd.*, 51 USPQ2d 1594 (TTAB 1999); TMEP 710.01(c). The current filing basis for both cited marks is §1(a), or use based, such that the registrant had to submit a sworn declaration or affidavit that stated that he is using the mark in commerce in conjunction with the named services. As a matter of policy, the Office is not in a position to question statements submitted with a sworn declaration or affidavit, unless presented with substantial evidence that contradicts such statement.^[24]

CONCLUSION

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

The applicant's special form mark ALADDIN'S EATERY with design is likely to be confused with the registrant's marks ALADDIN in typed form, ALADDIN in special form in stylized font, and ALADDIN in special form with lamp design, where the applicant's mark creates the same or similar commercial impression as the registrant's mark and where they are used on identical services.

For the foregoing reasons, it is respectfully submitted that the refusal of registration under §2(d) of the Trademark Act, 15 U.S.C. §1052(d), be affirmed.

USPTO
Trademark

[1] The present application has a companion application, Serial No. 76020517, for the typed mark, ALADDIN'S EATERY. The appeal of the refusal to register the companion mark was recently decided by the Trademark Trial and Appeal Board on February 7, 2006, and the refusal to register was affirmed.

[2] Although the first identification was "[r]estaurants." Applicant amended the identification on May 28, 2004 to "Restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith."

[3] Applicant states that "[t]he Office Action sent on September 2, 2005, falsely and without support indicated that [the] publication was accidental, and indicated falsely, incorrectly and without support that the Applicant's mark was withdrawn [from publication] on July 28, 2005." Applicant's Brief p. 2. Yet, the September 2, 2005 Office action merely stated the facts.

[4] See Applicant's Brief p. 9. Although this evidence is mentioned in applicant's July 24, 2003 response at p.5, and applicant's May 28, 2004 response at p. 11, the evidence is not of record. Applicant's September 27, 2002 mentions a book of evidence that was presented to a former Examining Attorney, but this book of evidence is also not of record. The current Examining Attorney has requested this evidence via telephone from the applicant's attorney but the applicant's attorney was unable to provide copies.

[5] See first attachment labeled Design Mark to view.

[6] See second attachment labeled 263273 to view.

[7] See third attachment labeled 2628932 to view.

[8] See the Internet dictionary evidence attached to the July 7, 2003 Office action.

[9] *American Heritage Dictionary of the English Language: Fourth Edition*, (2000), at <http://www.bartleby.com/61/30/A0173000.html> (last visited January 23, 2006).

[10] Applicant's Brief p. 5-6.

[11] U.S. Registration No. 1779369.

[12] U.S. Registration Nos. 2632473 and 2628932.

[13] Applicant's Brief p. 7.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 9.

[17] *Id.* at 4.

[18] *Id.* at 6-9.

[19] *Id.* at 8-9.

[20] *Id.* at 9.

[21] *Id.* at 2.

[22] *Id.* at 8.

[23] *Id.* at 9.

[24] If applicant believes that the registrant is not using his mark in conjunction with the named services, he may wish to pursue cancellation proceedings. A petition to cancel a registration owned by another party may be filed with the Trademark Trial and Appeal Board under §14 of the Trademark Act, 15 U.S.C. §1064. TMEP §1607.



ALADDIN



ALADDIN