

**This Opinion Is Not a
Precedent of the TTAB**

Mailed: February 22, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Luckenbach Texas, Inc.
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Serial Nos. 87800638 and 87983963¹
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Courtenay B. Allen of Pizarro Allen PC,
for Luckenbach Texas, Inc.

Michael W. Baird, Trademark Examining Attorney and
Managing Attorney, Law Office 118.
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Before Zervas, Lynch and Allard,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On February 16, 2018, Luckenbach Texas, Inc. (“Applicant”) filed an application (which was assigned application Serial No. 87800638) for registration on the Principal Register of the standard character mark LUCKENBACH for “alcoholic beverages, namely, whiskey, vodka, rum, and gin” in International Class 33 based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

¹ On September 16, 2021, the Board granted the Examining Attorney’s request for consolidation of these two applications for presentation to the Board.

The Examining Attorney issued a final refusal of registration of Applicant's mark on the ground that it is primarily merely a surname under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4).

Applicant filed a Notice of Appeal on July 6, 2020, along with a request for reconsideration of the final refusal. The Examining Attorney denied the request and Applicant then filed its brief. In its appeal brief, Applicant argued against the refusal and claimed acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), in the alternative. After the Board remanded the application to the Examining Attorney for consideration of Applicant's alternative claim of acquired distinctiveness, the Examining Attorney accepted Applicant's alternative claim but maintained the Section 2(e)(4) refusal.

The Board then resumed proceedings and allowed Applicant time to file a supplemental brief. Applicant filed a supplemental brief, but also filed a request to divide the application and an Amendment to Allege Use for "alcoholic beverages, namely, whiskey," identifying first use and first use in commerce of the mark on June 9, 2021. Application Serial No. 87983963 (the "child" application) was created for "alcoholic beverages, namely, whiskey," with application Serial No. 87800638 designated as the parent application for "alcoholic beverages, namely, vodka, rum, and gin." The Examining Attorney accepted Applicant's Allegation of Use in the child application, and the Board resumed proceedings and set the time for filing of the Examining Attorney's brief. The Board granted the Examining Attorney's subsequent

motion to consolidate the appeals of both the parent and child applications, and the Examining Attorney filed a brief which was followed by Applicant's reply brief.

We reverse the Section 2(e)(4) refusal to register in both applications.

Before discussing the merits of the refusal, we address an evidentiary issue. With his brief, the Examining Attorney submitted for the first time (i) a German language document (without an English translation), which the Examining Attorney maintains "governs the worldwide rules for German language and grammar and is the ultimate authority in this field," without citing to any authority for support;² and (ii) negative dictionary evidence for the terms "luckenbach" and "-enbach."³ The Examining Attorney requests that we take judicial notice of this evidence. Applicant objected to this evidence because it was submitted after the filing of the notice of appeal.

"The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal." Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.01 (2021).

² 18 TTABVUE 12.

References to the briefs on appeal refer to the Board's TTABVUE docket system for application Serial No. 87800638. Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system for the same application. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

³ We may consider "negative dictionary" evidence. *See In re Adlon Brand GmbH & Co. KG*, 120 USPQ2d 1717, 1719 (TTAB 2016) ("To show that ADLON has no other apparent meaning, she has submitted 'negative dictionary' evidence, that is, evidence showing that the term ADLON cannot be found in the dictionaries ... and the result of an electronic 'place name' search of THE COLUMBIA GAZETTEER OF THE WORLD, showing that ADLON does not appear therein.").

Applicant's objection to the German language document, submitted without an English translation, is sustained and we do not further consider the document. The Examining Attorney is reminded that Board proceedings are conducted in English and that translations of foreign language documents are to be submitted if intended for the Board to rely on them. TBMP § 104.⁴ (If we were to consider this German language document, we note that there is no evidentiary support for the Examining Attorney's claim that the document "is the ultimate authority in this field.")⁵

With regard to the negative dictionary evidence, "The Board may take judicial notice of dictionary definitions" TBMP § 1208.04. There already is, however, a negative dictionary search result for "luckenbach" in the record from the MERRIAM-WEBSTER DICTIONARY, and we have no need for additional negative dictionary evidence for the same term.⁶ The Examining Attorney's request for judicial notice of this negative dictionary evidence is denied as unnecessarily cumulative, and Applicant's objection thereto is sustained.

With regard to the negative dictionary evidence for the term "-enbach," we take judicial notice of this term to address one of the Examining Attorney's arguments regarding this term. The Board may take judicial notice of dictionary evidence, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB

⁴ TBMP § 104 advises, "If a party intends to rely upon any submissions that are in a language other than English, the party should also file a translation of the submissions. If a translation is not filed, the submissions may not be considered."

⁵ 18 TTABVUE 12.

⁶ See negative dictionary search results for "luckenbach" submitted with the January 14, 2020 Office Action, TSDR 12.

1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including from online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Applicant's objection to the proof of no dictionary entry for "-enbach" is overruled.

Turning now to the Section 2(e)(4) refusal, that statutory provision precludes registration on the Principal Register of a mark that is "primarily merely a surname" without a showing of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). "A mark is primarily merely a surname if the surname is the primary significance of the mark as a whole to the purchasing public." *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017) (citation and internal quotation marks omitted); *see also In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re United Distillers plc*, 56 USPQ2d 1220, 1221 (TTAB 2000).

When, as here, we are faced with a Section 2(e)(4) refusal of a term in standard character form with no other literal or design elements, we consider the impact the applied-for term has, or would have, on the purchasing public because "it is that impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance." *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm'r Pat. 1955)).

There is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname. This question

must be resolved on a case-by-case basis. *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985). We examine the entire record to determine the primary significance of a term. If we have any doubt on the issue based on the record before us, our practice in Section 2(e)(4) cases is generally “to resolve such doubts in favor of applicant.” *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995).

In *Darty*, the Federal Circuit considered several inquiries in determining whether the purchasing public would perceive a proposed mark as primarily merely a surname, including: (i) whether the applicant adopted a principal’s name and uses it in a way that reveals its surname significance; (ii) whether the term has a non-surname “ordinary language” meaning; and (iii) the extent to which the term is encountered as a surname. 225 USPQ at 653. The Board’s often cited “*Benthin* factors”⁷ are also examples of inquiries that may lead to evidence regarding the purchasing public’s perception of a term’s primary significance. These inquiries are not exclusive, and any of these circumstances – alone or in combination – and any other relevant circumstances may be considered when making this determination. *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277-78 (TTAB 2016). For example, “[w]e also consider if there is evidence to so indicate whether the public may perceive the

⁷ In *Benthin*, the Board stated that “factors” to be considered in determining whether a term is primarily merely a surname include (i) the degree of a surname’s rareness; (ii) whether anyone connected with applicant has that surname; (iii) whether the term has any recognized meaning other than that of a surname; (iv) whether the term has the “structure and pronunciation” of a surname; and (v) whether the stylization of lettering is distinctive enough to create a separate commercial impression. Where, as here, the mark is in standard characters, it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007).

mark to be primarily a meaningless, coined term.” *In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1719 (TTAB 2016).

As background, the record reflects that Applicant has an entertainment venue for concerts, events, and festivals known as “Luckenbach” located near the town of Fredericksburg, Texas.⁸ Applicant is the owner of several registrations including Registration No. 1188120 for the mark LUCKENBACH (registered on January 26, 1982, maintained) for “entertainment services namely, sponsoring promoting and conducting social events, festivals, dances, contests, conventions and the like” in International Class 41.⁹

A “City Profile” for Luckenbach, Texas states:

“Luckenbach is a scenic community in southeastern Gillespie County [Texas] with strong musical associations. The site was settled in the later 1840s and early 1850s by German farmers, among them the brothers Jacob Luckenbach and August Luckenbach. ... The pleasant setting is a mixture of caliche hills and bottomlands on Grape Creek, a tributary of the Pedernales River.

The first post office opened in 1854 under the name of south Grape Creek. Mrs. Albert Luckenbach, nee Minnie Engel, established a store and saloon. A dance hall, a cotton gin, and a blacksmith shop were in existence by the late 1800s.

...

Sometime in the later 1800s the post office closed. When it reopened in 1886, August Engel served as postmaster and renamed the town Luckenbach. William Engel became the next postmaster and opened the general store, which remains today in its original building. In 1896 the population was 150. It increased to a high of 492 in 1904 but declined dramatically in the first half of the twentieth

⁸ ¶¶ 3 and 4, June 6, 2019 Decl. of Kit Patterson, June 7, 2019 Req. for Recon., TSDR 30.

⁹ December 12, 2019 Response, TSDR 33-36; November 28, 2018 Response, TSDR 34-37.

century. From the 1920s to the 1950s Luckenbach had a population of twenty.

The dance hall was rebuilt by the early 1930s, and the new structure included a maple dance floor. ... When William died in 1935, his sons assumed control of the family businesses, including the saloon and dance hall. ... The town's population was sixty in 1960 but shrank during the following decades to twenty-five. ...

In 1971 Benno Engel sold Luckenbach to John Russell (Hondo) Crouch, from nearby Comfort. ... Crouch ... successfully turned the small community into a foil of the nearby "Texas White House" – Lyndon Johnson's place down the Pedernales at the LBJ Ranch. In 1973 singer-songwriter Jerry Jeff Walker recorded his best-selling album *Viva Terlingua* in Luckenbach. Frequent festivals—including an annual Mud Daubers' Day, an annual Hug-In, a women's chili cook-off, the Luckenbach Great World's Fair, and the Non-Buy Centennial Celebration (a take-off from the Republic of Texas Bicentennial in 1986), to which the Prince of Wales and Elizabeth Taylor were invited—brought tens of thousands of people to the pastoral setting.

Popularized in regional culture as the place where "Everybody is Somebody," Luckenbach achieved legendary proportions in 1977, the year after Hondo's death, when the Waylon Jennings hit song "Luckenbach, Texas (Back to the Basics of Love)" became a national favorite. The town attracted both professional and amateur musicians who enjoyed the laid-back, historic atmosphere. ... At the beginning of the new millennium the Texas Almanac gave the population of Luckenbach as twenty-five, even though the marker for tourists at the entrance to "old" Luckenbach gave the population as three. ...

Luckenbach was the site of Willie Nelsen's Fourth of July Picnic from 1995 through 1999. In 2002 Texas Monthly listed the town in the "Top 25 Unusual Treasures of Texas." The dance hall continued to be a popular gathering place for area and visiting musicians."

... The community was named for Mrs. Albert Luckenbach, who established a post office here.¹⁰

We now consider the factors relevant to this consolidated appeal.

1. The Extent to Which LUCKENBACH Is Encountered as a Surname

The Examining Attorney states that Luckenbach “appears to be a relatively rare surname.”¹¹ We agree. The Lexis/Nexus evidence demonstrates 674 entries,¹² and U.S. Census Bureau records demonstrate 489 entries in the 2010 census, for “Luckenbach” as a surname.¹³ *See, e.g., See In re Eximius Coffee*, 120 USPQ2d at 1280 (233 people with surname ALDECOA); *In re Adlon Brand*, 120 USPQ2d at 1720 (75 individuals with surname ADLON); *In re Giger*, 78 USPQ2d 1405, 1407 (TTAB 2006) (545 individuals with surname Giger). We find that LUCKENBACH is not commonly encountered as a surname.

In some instances, broad public exposure of a rare surname renders the surname no longer rare. In this case, there is no evidence from newspapers or publications that use LUCKENBACH as a surname to suggest public exposure to the term as a surname. *See In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004) (ROGAN primarily merely a surname based in part on broad exposure of public to politician, athletes, actor and author with this surname); *see also In re Garan Inc.*, 3 USPQ2d 1537, 1540 (TTAB 1987).

¹⁰ <http://www.hillcountryportal.com/luckenbach.html>, December 15, 2018 Office Action, TSDR 17-19.

¹¹ 18 TTABVUE 4.

¹² June 13, 2019 Office Action, TSDR 1.

¹³ December 12, 2019 Response, TSDR 28.

“While the fact that [LUCKENBACH] appears to be a relatively rare surname weighs in Applicant’s favor, it does not end the inquiry. Section 2(e)(4) makes no distinction between rare and commonplace surnames and even a rare surname is unregistrable if its primary significance to purchasers is a surname.” *In re Eximius Coffee*, 120 USPQ2d at 1281 (citations omitted).

2. Is LUCKENBACH the Surname of Anyone Connected with Applicant

The Examining Attorney states that “no one *currently* affiliated with Applicant’s business bears the surname LUCKENBACH.”¹⁴ (emphasis in original text.) He argues, however, that “Applicant’s website repeatedly informs readers that LUCKENBACH is a surname, ... that Applicant’s business bears that same surname,”¹⁵ and that the website “provides further information about Jacob Luckenbach and the Engel family descendants who later established a bar and dance hall at that same location.”¹⁶ The website includes an historical account of Luckenbach, Texas and explains, inter alia, “How Luckenbach Got Its Name”:

Luckenbach was established in 1849.

One of the first settlers in the area was Jacob Luckenbach (1817-1911). A group of German nobility, the Adelsverein, hoped for great riches by establishing a colony in the New World. ... Jacob[] ... moved [his family to a] site that was later known as Luckenbach.¹⁷

¹⁴ 18 TTABVUE 5.

¹⁵ 18 TTABVUE 6.

¹⁶ *Id.*

¹⁷ <https://www.luckenbachtexas.com/how-luckenbach-got-its-name>, June 13, 2019 Office Action, TSDR 16-17. Kit Patterson, Applicant’s President, adds in his December 10, 2019 declaration submitted with Applicant’s December 12, 2019 Response (TSDR 29):

The Examining Attorney cites to no business connection between Applicant on one hand and Jacob Luckenbach and the Engle family on the other. He “connects” Jacob Luckenbach and his son Carl Albert Luckenbach to Applicant in arguing that “[a] term appearing on an applicant’s own website in a manner that confirms the term’s surname significance is probative evidence on the issue of that term’s primary significance.” Applicant’s President, however, states that “[s]ince Applicant’s inception in 1973, no one named Luckenbach has been or is now associated or otherwise affiliated with the Applicant or its business.”¹⁸

We find that the Examining Attorney has not demonstrated that any member of the Luckenbach family has, or every had, any interest in Applicant. In addition, the Examining Attorney’s reliance on *In re Eximius Coffee*, 120 USPQ2d at 1279, and *In re Integrated Embedded*, 120 USPQ2d at 1507, is misplaced because those cases discuss individuals actually involved in the applicant’s business. In *Eximius Coffee*, the Board found that “Applicant’s website indicates that ALDECOA is not simply the name of the historical founder of Applicant’s business at some time in the past. Rather, ALDECOA identifies individuals who have been continuously involved in the business and presently are active participants in the daily operation and leadership

6. In the nineteenth century, I understand a Post Office at the property on which [Applicant’s] entertainment venue is now located was originally named after a person named Carl Albert Luckenbach, who was the fiance of the then property owner’s sister in the mid-1800s, and I understand that person passed away in 1939, long before the Applicant’s predecessors acquired the property in 1970.

¹⁸ ¶ 8, Kit Patterson December 10, 2019 Decl., December 12, 2019 Response, TSDR 29.

of the company.” *In re Eximius Coffee*, 120 USPQ2d at 1279. In *Integrated Embedded*, the Board found that the “Applicant’s specimens and the Examining Attorney’s evidence ... establish that Mr. Michael Barr is Applicant’s eponymous co-founder and its current Chief Technology Officer.” *Integrated Embedded*, 120 USPQ2d at 1506-07. *Cf. In re Adlon Brand*, 120 USPQ2d at 1724 (“[I]f a person named ADLON were associated with the business and that association were promoted to the public, it would enhance the public’s perception of the term as a surname.”) (citing *In re Integrated Embedded*, 120 at 1507).

Thus, the Examining Attorney has not established a “connection,” as contemplated in this *Benthin* factor, between Applicant and Jacob Luckenbach, or any member of his family, and we find that LUCKENBACH is not the surname of anyone connected with Applicant.

3. Does LUCKENBACH Have Any Recognized Meaning Other Than as a Surname

The Examining Attorney contends that “luckenbach” has no meaning in English and introduced “negative dictionary” evidence to support his contention that “luckenbach” is not an English language term.¹⁹ Applicant does not disagree that “luckenbach” has no meaning in English.

Applicant’s main argument as set forth in its Supplemental Brief is that the primary significance of “Luckenbach” is “in reference to Applicant’s business,

¹⁹ www.merriam-webster.com, January 14, 2020 Office Action, TSDR 8.

entertainment venue, and brand;²⁰ and “the fact of the matter is that, to the purchasing public in the United States, the primary meaning of Luckenbach is as an identifier of Applicant’s business, entertainment venue, and brand, not as a surname.”²¹ The declarations of individuals familiar with Applicant’s venue submitted by Applicant generally state that LUCKENBACH is associated with Applicant. *See*, for example:

- Andrea J. Brantley Declaration, stating:

11. To customers and other people who are familiar with the area in which the Luckenbach entertainment venue is located, the term “Luckenbach” is strictly associated with the Applicant’s entertainment venue, not the general geographical area in which it is located.

12. To customers and other people who are familiar with the Luckenbach entertainment venue, the primary meaning of the term “Luckenbach” is as the Applicant’s trademark or brand.²²

- Joseph W. Burkett IV Declaration, stating:

11. To customers and other people who are familiar with the Luckenbach entertainment venue, the primary significance of the term “Luckenbach” is as Applicant’s trademark, which since the early 1970s has indicated the source of Applicant’s products and services, rather than any significance as a surname.²³

These statements and similar statements made by other declarants are helpful in establishing acquired distinctiveness but have little bearing on whether

²⁰ 12 TTABVUE 4.

²¹ 12 TTABVUE 4-5.

²² June 7, 2019 Response, TSDR 11.

²³ December 12, 2019 Response, TSDR 10.

LUCKENBACH is primarily merely a surname. Any trademark, even a trademark which is asserted as being primarily merely a surname, has an association with a business, once distinctiveness has been shown. The Board in *Adlon Brand* disposed of an argument similar to the argument Applicant makes:

In an apparent effort to show that the primary significance of the mark is the contemporary Hotel Adlon Kempinski, Applicant has submitted an entry for the Hotel Adlon Kempinski from <tripadvisor.com>, indicating that it is “Ranked # 16 of 667 hotels in Berlin,” and setting forth excerpts from 11 reviews by travelers. While the travelers obviously understand ADLON to be part of the name or mark of the hotel, the reviews do not reveal their impressions as to whether ADLON is a surname, a word, or a coined term. Applicant has also submitted results of a search of the website of the United States Diplomatic Mission; the results are fragments of 10 entries that make reference to “Hotel Adlon,” “Hotel Adlon Berlin,” or “Hotel Adlon Kempinski Berlin.” These fragments appear to describe various events that took place at the hotel. ... Neither this evidence nor the evidence from <tripadvisor.com> shows that this foreign hotel is so prominent that its name has supplanted the surname significance of the term ADLON standing alone.

In arguing that the meaning of the mark ADLON is “a hotel” or “the source of [Applicant’s] goods/services,” it is not clear whether Applicant intended to argue that the public would perceive the mark as a coined term having no meaning other than as a trademark. If that is Applicant’s contention, we do not find the above evidence sufficient to prove it. The fact that a designation has been recognized as a trademark for particular goods or services (whether of the applicant or of a third party) does not imply that customers have ceased to perceive any other meaning in it. Trademark law (both statutory and common law) extensively contemplates that functioning trademarks may have descriptive or suggestive meanings, geographic meanings, surname meanings, or personal name meanings, all of which may be appreciated by customers even though they primarily understand the mark to be source-indicating. In order to show that the public would

perceive a proposed mark as a coinage, in the face of evidence establishing that the mark is a surname with no other recognized meaning, some objective countervailing evidence of such a perception is required.

In re Adlon Brand, 120 USPQ2d at 1723.

We find that the above reasoning applicable to the present case, and find Applicant's argument unpersuasive. Applicant's relevant evidence – which comprises a number of declarations – is not “objective countervailing evidence” of a perception that “the public would perceive a proposed mark as a coinage.” The declarations Applicant submitted are from Texans only, with most declarants saying that they live in or near Fredericksburg, Texas, very near Applicant's venue.

We now turn to other evidence in the record. First, as noted earlier in this opinion, in 1977, Waylon Jennings had a hit song titled “Luckenbach, Texas (Back to the Basics of Love)” which became a national favorite.²⁴ The song was “the #1 country and #25 Pop charting song.”²⁵ *See also*:

1. <https://www.visitfredericksburqtx.com/fattractions-activities/luckenbach-texas-inc/>

referencing “Luckenbach Texas, where ‘Everybody’s Somebody’”²⁶
2. <https://tshaonline.org/handbook/online/articles/hnl48>

Popularized in regional culture as the place where “Everybody is Somebody,” Luckenbach achieved legendary proportions in 1977, ... when Waylon

²⁴ <http://www.hillcountryportal.com/luckenbach.html>, December 15, 2018 Office Action, TSDR 18.

²⁵ https://en.wikipedia.org/wiki/Luckerbach,_Texas, June 6, 2018 Office Action, TSDR 3.

²⁶ June 6, 2018 Office Action, ?? TSDR 4.

Jennings hit song “Luckenbach, Texas (Back to the Basics of Love)” because a national favorite.²⁷

3. <https://hill-country-visitor.com/cities/luckenbach/>

And the world record song played was of course the famous song by Waylon Jennings and Willie Nelson “Luckenbach, Texas (Back to the Basics of Love) which perfectly captures the simplicity of living in this rustic place.”²⁸

Due to the prominence of the Waylon Jennings song with “Luckenbach” in its title, we find that the term has non-surname meaning.

Second, Applicant submitted evidence that “luckenbach” has a meaning in German. The Board has held that “whether a term is primarily merely a surname must take into consideration the meaning the term has in a foreign language.” *In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1569 (TTAB 2005).

Applicant relies on the declarations of seven individuals who state that they understand the term “luckenbach” to mean “gap creek.”²⁹ A Wikipedia entry for “Luckenbach Texas” introduced by the Examining Attorney states, “[t]he community, first named Grape Creek (or more likely a poor transliteration in the records of ‘Gap Creek’, as Luckenbach comes from German ‘lucken’ = gap & ‘bach’ = stream) ...”³⁰

Other evidence in the record indicates that “lücke” (with an umlaute on the letter “u”)

²⁷ December 15, 2018 Office Action, TSDR 22.

²⁸ *Id.*, TSDR 24.

²⁹ December 12, 2019 Response, TSDR 9-30.

³⁰ https://en.wikipedia.org/wiki/Luckenbach,_Texas, June 6, 2018 Office Action, TSDR 3.

may mean “gap,” “space,” “hole,” “loophole” or “break”; “lücken” is the plural form of “lücke”; and “bach” may mean “stream” or “brook.”³¹

The Examining Attorney argues that “gap” in German is “lücke,” with an umlaut over the letter “u”; that “ü” is a distinct letter, with a specific pronunciation; that it is not interchangeable with the letter “u”; and that the Board has recognized the distinctive characteristics of the German alphabet, and the effect such spelling differences have on German speakers, citing *In re Weiss Watch Co., Inc.*, 123 USPQ2d 1200, 1203-04 (TTAB 2017) (explaining that an eszett and a double “s” are different letters, and thus “Weiß” meaning “white,” would not be perceived the same as the surname “Weiss”).³² Because the Examining Attorney introduced a Wikipedia entry for “Luckenbach Texas” stating that “Luckenbach comes from German ‘lucken’ = gap & ‘bach’ = stream,”³³ and because Applicant’s evidence from deepl.com does not show an umlaut for “lucke,” but nonetheless provides a translation of that term as “hatch” and an alternative meaning of “gap,”³⁴ on this record we find unpersuasive the Examining Attorney’s argument regarding the significance of an umlaut.

In view of the foregoing, we find that the mark has one or more recognized meanings other than as a surname because it comprises a key word in the title of a famous Waylon Jennings song and German-speaking U.S. consumers would recognize it as “gap creek.”

³¹ www.collinsdictionary.com, January 14, 2020 Office Action, TSDR 7-8.

³² 18 TTABVUE 7.

³³ https://en.wikipedia.org/wiki/Luckenbach,_Texas, June 6, 2018 Office Action, TSDR 3.

³⁴ December 12, 2019 Response, TSDR 31-32.

4. Whether LUCKENBACH Has the Structure and Pronunciation of a Surname.

Whether a term has the structure and pronunciation of a surname is a “decidedly subjective” inquiry. *In re Eximius Coffee*, 120 USPQ2d at 1280 (quoting *In re Benthin Mgmt.*, 37 USPQ2d at 1333). As the Board noted in *In re Olin Corp.*, 124 USPQ2d 1327, 1332 (TTAB 2017), “applicants and examining attorneys may submit evidence that, due to a term’s structure or pronunciation, the public would or would not perceive it to have surname significance.”

The Examining Attorney relies on Wikipedia entries for “Dieffenbach,” “Katzenbach,” “Hollenbach” and “Bach” in arguing that LUCKENBACH has the structure and pronunciation of a surname.³⁵ The entries for “Katzenbach,” “Hollenbach” and “Bach” indicate that they are the names of geographic locations as well as surnames. The entry for “Dieffenbach” only identifies the defined term as a “surname.” The entries for “Hollenbach” and “Bach” are identified as “disambiguation[s].”

The Examining Attorney also relies on the results of a search in the Oxford English Dictionary for “-enbach,” stating that there is a “significant paucity of entries” in comparison to a “wide number of -ENBACH-formative surnames,” and concluding that “when presented with terms ending in -ENBACH, the average

³⁵ January 14, 2020 Office Action, TSDR 2-9.

American consumer would surmise that the term is a surname, even if previously unknown.”³⁶

We are not convinced by the Examining Attorney’s reasoning or evidence that LUCKENBACH has the structure and pronunciation of a surname. The evidence that certain people had the surnames Dieffenbach, Katzenbach, Hollenbach or Bach does not persuade us that any sizeable portion of the purchasing public in the United States are familiar with the surnames. In fact, none of the entries for “Dieffenbach” are for Americans. Further, the negative dictionary evidence regarding “-enbach” only tells us that “-enbach” is not in the Oxford English Dictionary; it does not tell us that the term has surname significance.

Based on the paucity of evidence, combined with the subjective nature of this factor, we are unable to make a definitive determination whether Applicant’s mark has the structure and pronunciation of a surname.

Conclusion

In balancing the factors, we find that consumers do not commonly encounter LUCKENBACH as a surname, it has alternative meanings, and the Examining Attorney has not established that it has the structure and pronunciation of a surname. We resolve any doubts we have regarding the Section 2(e)(4) refusal in favor of Applicant. *See In re Benthin Mgmt.*, 37 USPQ2d at 1334. In view of the foregoing, we conclude that LUCKENBACH is not primarily merely a surname.

³⁶ 18 TTABVUE 7.

Decision: The refusal to register Applicant's mark LUCKENBACH under Section 2(e)(4) is reversed in both applications. Both applications may proceed in due course without a claim of acquired distinctiveness under Section 2(f).