

April 22, 1999, OED denied this request citing the General Requirements Bulletin for the April 1999 examination which provided that a request for refund or deferral must be received by February 1, 1999. The April 22, 1999, response from OED indicated that if Petitioner believed her situation to be extraordinary, she could submit a request for a review of the situation.

On May 5, 1999, Petitioner requested a review of OED's refusal to refund or defer the examination fee. Petitioner submitted as evidence of extraordinary circumstances a death certificate indicating that _____ passed away on _____ On August 6, 1999, the Director issued a final decision denying Petitioner's request for a refund or deferral of the April examination fee. The Director based this decision, in part, on Petitioner's failure to sufficiently articulate extraordinary circumstances which would justify the waiving or suspending of 37 C.F.R. § 1.21(a)(1). In particular, the Director notes that Petitioner submitted her registration application (December 28, 1998) _____ after _____ death _____ and _____ had until February 1, 1999, in which to request a refund or deferral. The Director suggests that Petitioner, employing ordinary care and diligence, could have either (i) not submitted her application at all, or (ii) requested a refund or deferral prior to the February 1, 1999, deadline.

On September 3, 1999, Petitioner filed the present request pursuant to 37 C.F.R § 10.2(c) seeking review of the Director's decision.

OPINION

The Commissioner may refund any fee paid by mistake or any amount paid in excess of that required. 35 U.S.C. § 42(d). Admission to the examination for registration to practice requires (i) a non-refundable \$40 application fee, and (ii) a \$310 registration examination fee. 37 C.F.R. § 1.21 (a)(1). The General Requirements brochure which included the registration

application to the April 1999 examination provided that the “\$310 examination will not be refunded or deferred to another examination unless your notification is filed with OED prior to February 1, 1999.” (Emphasis added). Title 37 C.F.R. § 10.170 provides, in part, that the Commissioner or his designee (the Director) may, in an extraordinary situation, suspend or waive any requirement of the regulations. The Director determined that Petitioner failed to show that the examination fee was either paid by mistake or was in excess of that required. The Director further determined that Petitioner failed to establish an extraordinary situation warranting a suspension or waiver of the regulations. For the following reasons, I concur with the Director’s decision and deny Petitioner’s request.

Title 37 C.F.R. § 10.2(c) provides that the “petition will be decided on the basis of the record made before the Director and no new evidence will be considered by the Commissioner in deciding the petition.” In her petition, Petitioner states “[w]hat could possibly be a more extraordinary circumstance than the death of _____ and _____ at the same time.”¹ The death of _____ and a _____ are certainly tragic and unfortunate events. These unfortunate events occurred between _____ and _____. With this in mind, however, Petitioner voluntarily submitted the application for registration on December 28, 1998, and did not notify OED in writing until March 6, 1999, of her plans to withdraw from the April Examination—well after the date the \$310 fee had been obligated for the

¹ The record before the Director is devoid of evidence of _____ and will be afforded little weight in determining whether the Director erred in her decision. It is noted, however, that the evidence of _____ submitted to the Director on August 6, 1999, indicates that _____ before Petitioner submitted her application, and _____ before the February 1, 1999, notification deadline.

examination.²

In order to practice before the PTO in patent cases, an applicant must take and pass the registration examination. Since these examinations are only given twice a year, the PTO processes a large number of applications for each exam. For each examination, the PTO must arrange with the Office of Personnel Management (OPM) to administer the examination simultaneously at multiple sites across the country. The PTO must provide OPM with the number of test-takers for each site and how many at each site require special accommodations. Once OPM is apprised of the PTO's requirements, OPM personnel must then arrange for rental of space appropriate for administering the exam. To allow sufficient time for space rental, proctors, and administration, the PTO must provide OPM with final numbers and special accommodations at least six weeks prior to the examination. Therefore, funds and resources are committed well in advance of the actual examination date. The application and refund/deferral deadlines are not set arbitrarily, but are calculated to ensure that numbers are fixed at the point of resource allocation. Toward this end, by the February 1, 1999, deadline, Petitioner's \$310 fee had been committed and Petitioner's space had been reserved.

The cases³ cited by the Director are not misplaced as suggested by the Petitioner. These cases represent the Commissioner's understanding of "extraordinary situation" to refer to

² In Petitioner's March 2, 1999, letter she states that "I have tried to contact your office [OED] for the past 2 weeks" Even at this earlier date, Petitioner would have missed the February 1, 1999, deadline by two weeks.

³ Nitto Chemical Industry Co. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (extraordinary situation is not an "oversight which could have been prevented by the exercise of ordinary care or diligence"); Margolis v. Banner, 599 F.2d 435, 443; 202 USPQ 365, 371 (CCPA 1979) (extraordinary circumstance can be defined as a situation where "no meaningful alternatives are available").

situations which could not have been prevented by ordinary care and diligence and where alternatives are not available. Petitioner's _____ passed away prior to the application deadline. At that point, Petitioner had the option to not file the registration application, or, once filed, to request a refund or deferral prior to February 1, 1999. Petitioner did not exercise ordinary care and diligence because she failed to submit this timely request for a refund or deferral. Therefore, Petitioner has failed to articulate an extraordinary situation warranting a waiver or suspension of the regulations. Petitioner has also failed to argue that the \$310 application fee was paid by mistake or was in excess of that required.

ORDER

Upon consideration of the petition to the Commissioner for a deferral of Petitioner's April 1999 \$310 examination fee, it is ORDERED that the petition is denied.

This is a final agency action.

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Todd Dickinson
Acting Assistant Secretary of Commerce
and Acting Commissioner of Patents and Trademarks