

On May 18, 2000, OED disapproved Petitioner's application to take the October 2000 exam. The decision stated that Petitioner had not submitted a transcript showing that he had earned a bachelor's degree and that the transcript that he submitted showed satisfactory completion of only a portion of the scientific credit hours required.

On May 26, 2000, Petitioner petitioned the Director of OED for reconsideration of the disapproval decision. Petitioner also supplemented his initial application with an updated transcript, showing satisfactory completion of an additional 4 semester hours of chemistry and 8 semester hours of biology, for a total of 8 semester hours of chemistry and 12 semester hours of biology. The Director of OED denied the petition on June 13, 2000.

On July 6, 2000, Petitioner supplemented his application with another transcript, showing satisfactory completion of an additional 5 semester hours of biology, for a total of 8 semester hours of chemistry and 17 semester hours of biology. The record does not show whether OED has accepted the additional credits shown on the updated transcript as counting toward the required 24 biology credits.¹ On August 7, 2000, after filing the present petition, Petitioner submitted another transcript showing completion of additional course work. This matter has not been remanded to the Director of OED for consideration of the new evidence since the new evidence was submitted after the filing deadline. Moreover, Petitioner's application was also incomplete because he failed to submit a transcript showing that he earned a bachelor's degree.

On July 11, 2000, Petitioner filed the present petition, which is being construed as a petition under 37 CFR § 10.2(c), on the basis that it seeks review of a "final decision of the Director [of OED] refusing to register an individual under § 10.6."

¹ The letter includes a certificate of mailing stating that the transcript was mailed on July 6, 2000. It was not received in OED until July 12, 2000.

OPINION

Prospective patent attorneys and patent agents are required to establish that they are “possessed of the legal, scientific, and technical qualifications necessary to enable [them] to render applicants for patents valuable service.” 37 CFR § 10.7(a)(2)(ii). The General Requirements Bulletin for the October 2000 exam sets out several options by which applicants may demonstrate their scientific and technical qualifications. See the General Requirements Bulletin, pages 3-4. The General Requirements Bulletin also makes clear that applicants must show that they have the required scientific and technical qualifications as of the filing deadline for the exam. The General Requirements Bulletin states that:

[t]he deadline for filing **all** application documents, **all** appropriate fees, [and] **all** necessary supporting documents . . . is July 7, 2000. That means that the PTO must receive the complete application, including official transcripts from colleges or universities on or before the deadline date. . . . To be admitted to the examination, . . . a satisfactory showing of the applicant’s qualifications, including official transcripts and course descriptions (if needed), must be filed in the Patent and Trademark Office on or before July 7, 2000. . . . There will be no opportunity to file supplemental documents after July 7, 2000, to obtain admission to the October 2000 examination.

General Requirements Bulletin, pages 9-10 (emphases in original).

Petitioner does not dispute that, as of the filing deadline for the October 2000 exam, he had not completed the courses required under any of the options in the General Requirements Bulletin. Nor does Petitioner contend that he had the necessary qualifications as of the filing deadline for the October 2000 exam, even though he did not meet the requirements set out in the General Requirements Bulletin, i.e., Petitioner is not arguing that he had adequate technical skills as of the filing date deadline. Cf. Premysler v. Lehman, 71 F.3d 387 (Fed. Cir. 1995) (General Requirements Bulletin is not dispositive of whether applicant can sit for PTO exam; Director has

discretion to determine possession of adequate technical skills.). Rather, Petitioner requests a waiver of the filing deadline to allow him to submit evidence that he has completed additional course work, the completion of which will provide him with the necessary technical qualifications under the option he selected. Petitioner therefore seeks an extension of the filing deadline to August 16, 2000, arguing that his “situation does present an extraordinary circumstance justifying relief under Section 10.170.”

In his most recent petition, Petitioner explains that an official transcript showing completion of the final required 7 semester hours in biology “will first be available from in approximately the second week in August.” Petitioner asserts that this case presents an extraordinary situation in which justice requires waiving the filing deadline because he submitted all available documents well in advance of the filing deadline, but the transcript showing satisfactory completion of the final 7 required biology credits could not be timely submitted because “the grades that are to be sent on or before August 16 are not yet in existence.” Petitioner also argues that this is not an instance in which the waiver is necessary because of an “oversight” on the part of the applicant, because there is nothing he can do to speed the issuance of the required transcript, and therefore waiver of the application deadline is in order.

An “extraordinary situation” that merits relief under 37 CFR § 10.170 is one that is not an “oversight that could have been prevented by the exercise of ordinary care and diligence,” Nitto Chemical Ind. Co., Ltd. v. Comer, 39 USPQ2d 1778, 1780 (D.D.C. 1994), or one in which “no meaningful alternatives are available,” Margolis v. Banner, 599 F.2d 435, 443 (CCPA 1979). Petitioner’s situation is not an extraordinary one that requires waiving the filing deadline. Simply put, Petitioner submitted his application prematurely and now seeks special treatment in order to

be admitted to the October 2000 exam. The circumstances presented by this case do not show that Petitioner's situation is an extraordinary one which requires waiving the filing deadline.

OED receives approximately 2000 applications for each registration exam. Each of these applications must be individually evaluated to determine that they are complete, that the required fees have been submitted, that the applicant has the required scientific and technical qualifications, and that no issues of moral character preclude registration. In addition, the evaluation of all of the applications must be completed well in advance of the exam date so that the Office of Personnel Management can arrange for test facilities in each exam location on the exam date. Because of these factors, OED must require that applicants submit all required documents by the filing deadline.

The General Requirements Bulletin for the October 2000 exam made clear that all materials had to be received by the filing deadline. The Bulletin stated that:

the PTO must receive the complete application, including official transcripts from colleges or universities on or before the deadline date. . . . To be admitted to the examination, . . . a satisfactory showing of the applicant's qualifications, including official transcripts and course descriptions (if needed), must be filed in the Patent and Trademark Office on or before July 7, 2000. . . . There will be no opportunity to file supplemental documents after July 7, 2000, to obtain admission to the October 2000 examination.

General Requirements Bulletin, pages 9-10 (emphasis added).

Despite the clarity of the General Requirements Bulletin and despite Petitioner's presumptive understanding of the filing requirements, he chose to apply for the October 2000 exam even though he knew that he would be unable to file the required transcript documents by the filing deadline.

Petitioner's choice to apply for the October 2000 exam, knowing in advance that he could not meet the filing deadline requirements, shows that this case does not present an "extraordinary situation" which requires waiving the filing deadline.² This fact distinguishes the present case from other cases in which the Commissioner or the courts have found an "extraordinary situation" justifying waiver of the rules under 37 CFR § 10.170. For example, where a patent application was properly deposited in the mail but was apparently stolen from the United States Postal Service, waiver of the rules was required because "justifiably unexpected theft or loss of the original documents from the mails should not be permitted to prejudice the rights of a plaintiff not himself culpable." Sturzinger v. Commissioner of Patents, 181 USPQ 436, 437 (D.D.C. 1974). Likewise, the rules have been waived where papers intended to be filed at the PTO were never received but where the responsible courier testified that he always "strictly adhered" to the prescribed procedure and where counsel took "detailed steps to ensure that the timely filing took place." In re Bachler, 229 USPQ 553, 554 (Comm'r 1986). Notably, in both of these cases, the petitioner took all steps necessary for filing of the relevant paper at the PTO. In both cases, the necessity for waiver of the rules derived from no fault of the petitioner.

Here, by contrast, the present situation arose because Petitioner chose to disregard the clear notice in the General Requirements Bulletin that all necessary documents had to be filed by the filing deadline. Petitioner chose to apply for the October 2000 exam even though he knew he would not finish the required classes until after the filing deadline. The present situation is a result

² It is noted that the filing deadline is not a "requirement of the regulations," subject to waiver under 37 CFR 10.170. However, Petitioner has argued his case based on the standard of § 10.170 ("an extraordinary situation, when justice requires" waiver of the rules) and the issue has been considered based on the terms in which it was presented.

of Petitioner's own disregard of clearly stated requirements. This is not an extraordinary situation, requiring waiver of a deadline that Petitioner chose to ignore.

Petitioner also argues that he cannot simply wait until the next administration of the exam in April 2001 and therefore "no meaningful alternatives are available" to him. See Margolis v. Banner, 599 F.2d 435, 443 (CCPA 1979) (Writs of mandamus and prohibition "are to be issued only in extraordinary circumstances when no meaningful alternatives are available."). Petitioner presents two arguments as to why the April 2001 exam is not a meaningful alternative.

First, Petitioner argues that the opportunity to take a later registration exam should not be considered a "meaningful alternative," because it is an alternative that is always available to exam applicants. To consider a later exam to be a "meaningful alternative," Petitioner argues, would vitiate § 10.170 in the context of the registration exam. This argument is not persuasive. The text of § 10.170 states that the requirements of the regulations may be waived "[i]n an extraordinary situation" (emphasis added). It may well be true that the opportunity to take a later exam is a meaningful alternative that will preclude relief under § 10.170 for nearly all exam applicants. This result comports with the text of § 10.170, which limits relief under that section to "extraordinary" situations. Relief under § 10.170 is simply not intended to address the rather ordinary situation of an applicant who does not meet a filing deadline, if that applicant can simply take the exam when it is next administered. See also Lucero v. Ogden, 718 F.2d 355 (10th Cir. 1983) (due process satisfied where state bar applicant denied admission to bar for failure to pass bar examination, where applicant had unqualified right to retake the examination).

Second, Petitioner argues that the April 2001 exam is not a meaningful alternative because he is "moving to _____ to establish a satellite branch for [his] employer," and waiting to take the April 2001 exam will force a delay in these plans. This argument is also not persuasive.

Petitioner's employer's decision to send him to _____ without the needed certification does not create an extraordinary situation. Petitioner can _____ in April 2001 in order to take the exam or Petitioner could delay his move _____ This is not a situation where the exam is only given once and Petitioner would never have the opportunity to sit for the exam.

The facts of this case distinguish it from Margolis v. Banner. In that case, the Office required the patent applicant to make certain changes to an application. The applicant failed to respond and the application became abandoned. However, no claims were actually rejected and therefore no appeal to the Board of Appeals was possible. The CCPA held that a writ of mandamus was appropriate in such circumstances because without such a writ, "no other adequate means is available that would permit petitioners to obtain review by the Board of Appeals and to secure this court's eventual appellate jurisdiction." Margolis, 599 F.2d at 443. Thus, the lack of any other avenue of appeal justified a finding of "extraordinary circumstances." In addition, Margolis was subsequently limited in In re Makari, 708 F.2d 709, 218 USPQ 193 (Fed. Cir. 1983). The Makari court emphasized that the Margolis court issued a writ in order to preserve its prospective appellate jurisdiction. See id. at 711, 218 USPQ at 194.

This case presents no exigency analogous to the court's need to preserve its prospective jurisdiction. As discussed above, the exam is given again in six months. Petitioner can _____ take the April 2001 registration examination. Thus, Margolis does not justify granting a waiver in this case where an applicant who did not qualify to be admitted to the patent exam as of the filing deadline requests waiver of the deadline while he completes the necessary coursework.

Finally, nothing in the present petition addresses Petitioner's failure to file an official transcript showing that he has earned a bachelor's degree. A bachelor's degree is a requirement of the Category B, option 2, route. General Requirements Bulletin, page 3. Submission of an official, original transcript is required to show that a bachelor's degree was awarded. General Requirements Bulletin, page 4 ("Official original transcripts are required to establish . . . the award of a Bachelor's degree.")

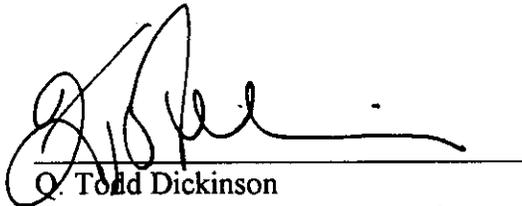
Petitioner has not provided the USPTO with an official transcript showing that he has earned a bachelor's degree. This deficiency was pointed out in OED's May 18, 2000, decision disapproving Petitioner's application ("No transcript for any undergraduate degree has been presented."). Petitioner has provided no explanation of his failure to remedy this deficiency. Therefore, he has not shown any basis for waiver of the filing deadline to allow him to provide an official original transcript showing that he has earned a bachelor's degree. Thus, even if the filing deadline were to be waived to allow Petitioner to file evidence of additional scientific and technical credits, no waiver to file an undergraduate transcript is merited, and Petitioner's application for the October 2000 exam would still be denied for failure to show that he has the required qualifications.

ORDER

For the reasons given above, the requested waiver of the filing deadline for the October 18, 2000, exam is denied.

Petitioner's examination fee for the October 18, 2000, exam will be refunded in due course.

This is a final agency action.

A handwritten signature in black ink, appearing to read "Q. Todd Dickinson", is written over a horizontal line.

Q. Todd Dickinson
Under Secretary of Commerce for Intellectual
Property and Director of the United States Patent
and Trademark Office

Harry I. Moatz, Director
Office of Enrollment and Discipline