

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

PRL USA HOLDINGS, INC.,

Opposer

v.

BRASILIO MACHADO,

Applicant

Decision on Request for Extension of  
Time to Appeal under 37 C.F.R.  
§ 2.145(e)

Opp. No. 91/230,510

MEMORANDUM AND ORDER

On March 13, 2020, Applicant Brasilio Machado (Applicant) filed with the Trademark Trial and Appeal Board a motion pursuant to 37 CFR § 2.145(e)(1)(ii) seeking, *nunc pro tunc*, a fourteen (14) day extension of time to file a notice of appeal to the United States Court of Appeals for the Federal Circuit. The appeal seeks review of the Trademark Trial and Appeal Board's January 7, 2020, decision sustaining the opposition, filed by Opposer PRL USA Holdings, Inc. (Opposer), to Respondent's Trademark Application Ser. No. 87/019,978. *See* TTABVue Dkt. No. 46. The request for extension of time is GRANTED for the reasons set forth below.

Background

Under 37 C.F.R. § 2.145(d), the period for filing a notice of appeal or a civil action expires sixty-three (63) days from the date of the final decision of the Board. Under 37 C.F.R. § 2.145(e), the Director may extend the time for seeking judicial review of a final Board decision in an opposition proceeding. If the request is filed before the specified time of sixty-three days has expired, the Director assesses the

request under a good cause standard. *See* 37 C.F.R. § 2.145(e)(1)(i). But if the request is filed after the specified time has expired, then the request must satisfy a stricter standard: excusable neglect. *See* 37 C.F.R. § 2.145(e)(1)(ii).

The Board's decision granting the petition to cancel Respondent's registration was mailed on January 7, 2020. TTABVue Docket No. 46. Thus, to be timely, any request for an extension of time to seek judicial review was due on or before March 10, 2020—63 days from January 7, 2020. Respondent, however, filed its request on March 13, 2017, three days late. Therefore, the Director will review this request under the excusable neglect standard of 37 C.F.R. § 2.145(e)(1)(ii).

The request contains an affidavit from Applicant's lawyer, Virginia Wolf Gilliam, Esq. The following recitation of facts is drawn from that affidavit. Attorney Gilliam met with and was retained by Applicant for appeal purposes on January 31, 2020. On February 3, 2020, Attorney Gilliam instructed her legal secretary to calendar the 63-day deadline for the filing of the notice of appeal. Unbeknownst to Attorney Gilliam, her secretary did not do so. Several days later, Attorney Gilliam's secretary was fired for poor work performance. As the due date approached, Attorney Gilliam became ill with a respiratory infection, and was also simultaneously caring for her sick child at home for several days. When she finally returned to work on March 11, 2020, she discovered that the deadline for appeal was not calendared and the notice of appeal was now one day late. She drafted this request and supporting affidavit and filed them with the Board on March 13.

## Discussion

The USPTO determines whether excusable neglect has been shown by applying the analysis set forth in the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). The *Pioneer* Court identified four nonexclusive factors that could bear on whether a neglectful act or omission is excusable: “[1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Id.* at 395 (brackets added).

Applying the factors in order, the Director first finds there is nothing to indicate that Opposer is likely to be prejudiced by extending the time to seek judicial review. The Director notes that Attorney Gilliam states that she emailed Opposer's counsel about this request but as of the filing date of her motion had not heard back.

Second, the request was filed only three days after the closing of the 63-day window within which to seek judicial review, which indicates that the potential impact on judicial proceedings would be minimal.

Third, the asserted reasons for the delay, including whether the delay was within the reasonable control of the movant, also do not weigh against a finding of excusable neglect. The Federal Circuit has noted that the USPTO's decisions under this standard typically deem the reason for the delay, and whether it was within the control of the party requesting that the delay be excused, to be highly significant. *See FirstHealth of Carolinas, Inc. v. CareFirst of Md., Inc.*, 479 F.3d 825, 829 (Fed. Cir. 2007)

(citing *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701 (TTAB 2002)) (further citation omitted). Here, Respondent instructed her legal secretary to calendar the date for appeal, but the secretary did not do so. Applicant's attorney thus took a reasonable step to calendar the appeal notice due date and thus adhere to the filing deadline. Those efforts, however, failed because the employee charged with calendaring the due date failed to carry out that task. That docketing/clerical error, while chargeable to Applicant and his attorney and certainly negligent, should be considered in conjunction with other pertinent conduct relating to the delay. Specifically, as the deadline approached, Attorney Gilliam and her child took ill, and Attorney Gilliam did not return to work until March 11, one day after the notice of appeal was due—circumstances outside of Attorney Gilliam's control. She then acted promptly to get this motion on file within 2 days after returning to work and realizing that the notice was overdue. The Director finds that Applicant's counsel acted diligently to remedy the missed deadline caused by the docketing error of counsel's employee. *Cf. Walter v. Blue Cross & Blue Shield United of Wisc.*, 181 F.3d 1198, 1202 (11th Cir. 1999) (failure of a legal secretary to record the applicable deadline is the type of "innocent oversight" that is potentially excusable depending on the circumstances); *Prentice v. Info. Res., Inc.*, 139 F.3d 902 (table), 1998 WL 67702, at \*1 (7th Cir. 1998) (court found excusable neglect notwithstanding docketing error where counsel acted promptly and diligently upon discovery of the error); *Consol. Freightways Corp. v. Larson*, 827 F.2d 916, 921 (3d Cir. 1987) (clerical errors, while constituting

neglect, can, depending on the circumstances, be excusable). Thus, overall, this factor is neutral in the overall calculus, or slightly favors granting the requested relief.

Fourth, the facts set forth in the Gilliam affidavit lead the Director to find that Applicant has acted in good faith, such that the fourth *Pioneer* factor also does not weigh against finding excusable neglect.

Having considered the relevant factors in light of the facts and circumstances set forth in Attorney Gilliam's affidavit, the Director finds that the minimal delay here was the result of excusable neglect. The Director notes that parties appearing before the Agency must take reasonable measures to assure timely compliance with USPTO timelines and requirements. However, the "excusable neglect" standard dictates balancing all the facts where no one factor is determinative and, on balance here, the facts ultimately weigh in favor of granting the requested additional time to appeal the Board's decision.

#### Decision

The Director GRANTS Applicant's request. Although TTABVue does not reflect the filing of a notice of appeal, Applicant attached one to its motion for extension of time. By this order, the Director deems the notice of appeal therefore to have been filed with the Board as of March 13, 2020, and the Board is directed to revise its TTABVue entry to so reflect. Applicant should be sure to comply with all the other requirements for filing the appeal with the Federal Circuit. *See* 37 CFR § 2.145(a).

ANDREI IANCU

*Under Secretary of Commerce for Intellectual  
Property and Director of the United States  
Patent and Trademark Office*

Date: March 23, 2020

By:       /s/ Thomas W. Krause  
THOMAS W. KRAUSE  
Solicitor

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