

scientific and technical training necessary to enable him or her to render applicants for patents valuable service. 1995 Bulletin at 1.

The bulletin discusses three categories for demonstrating the required scientific and technical training: Category A (a bachelor's degree in one of thirty recognized technical subjects); Category B (a bachelor's degree in another subject and completion of a sufficient number of technical courses); Category C (a passing score on a state Fundamentals of Engineering test). 1995 Bulletin at 2-4. Category B includes the following 4 options:

- (1) 24 semester hours in physics;
- (2) 24 semester hours in biological sciences and 8 semester hours in chemistry or physics;
- (3) 30 semester hours in chemistry; or
- (4) 40 semester hours of chemistry, physics, the biological sciences or engineering including 8 semester hours in chemistry or physics.

1995 Bulletin at 2-3.

Petitioner filed an application for admission to the May 3, 1995, examination. Because she did not qualify for admission under Category A, the Director reviewed the courses she took and accepted 36 semester hours under Category B, Option 4, including 4 semester hours for Chemistry 101. In a letter dated April 13, 1994, Petitioner acknowledged that she was "in the process of completing the[] final four credits by taking Chemistry 102." On January 20, 1995, Petitioner was advised that she could be provisionally qualified to take the May 3, 1995, examination, if she provided satisfactory evidence of course enrollment for Chemistry 102 (with a registration receipt bearing a date on or before January 31, 1995) by February 15, 1995. The letter further noted that

provisional qualification carries with it the caveat that your examination scores will be withheld unless and until we are in receipt of an official transcript showing that

you received a grade of “C” or higher in Chemistry 102.

Petitioner provided the Director with evidence of registration and she sat for the May 3, 1995, examination.

Due to a personal crisis, Petitioner was unable to complete the Chemistry 102 course. She asked for and was granted several extensions of time. Her last request for an extension of time was granted and expired in December 1996.

On February 4, 1997, Petitioner filed a petition informing the Director that she had not completed the Chemistry 102 course. In the petition, Petitioner sought a permanent waiver of the Chemistry 102 requirement, release of her scores from the May 3, 1995, examination, and (if necessary) permission to sit for the August 27, 1997, examination. On January 13, 1998, the Director denied Petitioner’s request for a permanent waiver. Petitioner now seeks review of the Director’s decision.

Opinion

The Commissioner has the authority to waive any of the PTO regulations pursuant to 37 C.F.R. § 10.170, which provides in pertinent part:

(a) In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended or waived by the Commissioner

An “extraordinary situation” for purposes of the waiver regulation is one which could not have been prevented by the exercise of ordinary care or diligence. See Nitto Chemical Indus. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (finding that “oversight that could have been prevented by the exercise of ordinary care or diligence” is not an extraordinary situation).

Petitioner has the burden to show that her circumstances rise to the level of an extraordinary

situation which, in the interest of justice, requires a waiver.

Pursuant to 35 U.S.C. § 31, the Commissioner of Patents and Trademarks

may require [agents and attorneys], before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

35 U.S.C. § 31 (emphasis added). Under his statutory authority, the Commissioner promulgated 37 C.F.R. § 10.7 which reads in pertinent part:

(a) No individual will be registered to practice before the Office unless he or she shall:

.....

(2) Establish to the satisfaction of the Director that he or she is:

.....

(ii) Possessed of the legal, scientific, and technical qualifications necessary to enable him or her to render applicants for patents valuable service.

37 C.F.R. §10.7 (emphasis added).

To show applicants “the kinds of credentials that typically demonstrate the scientific and technical qualifications required by 37 C.F.R. § 10.7(a)(2)(ii),” the PTO issues bulletins, similar to the 1995 and 1997 Bulletins, prior to each examination. Premysler v. Commissioner of Patents and Trademarks, 71 F.3d 387, 390, 37 USPQ2d 1057, 1059-60 (Fed. Cir. 1995). The Chemistry 102 “requirement” under Category B, Option 4 appears in both the 1995 and 1997 Bulletins. The bulletins, however, “are not dispositive in determining whether an applicant may sit for the PTO examination.” *Id.* at 390, 37 USPQ2d at 1060. Rather, the Director must be satisfied that an applicant for the examination possesses the necessary scientific and technical qualifications, pursuant to 37 C.F.R. § 10.7(a)(2)(ii).

Because the Chemistry 102 requirement is not a regulation, Petitioner's request for a waiver of the rules is somewhat misplaced. In general, a waiver is pertinent when strict enforcement of an administrative regulation would operate to impose an injustice. More importantly, a waiver is not intended to subvert a broad policy objective, such as requiring practitioners to be technically qualified to represent persons conducting business before the PTO in patent matters. However, for purposes of deciding the petition and because Petitioner does argue the correct standard for determining a waiver--extraordinary circumstances which in the interest of justice requires a waiver, this decision will address the issue of whether Petitioner has met her burden of showing that her personal circumstances rise to the level of extraordinary circumstances, and whether Petitioner is technically qualified to represent persons conducting business before the PTO in patent matters.

Petitioner argues, inter alia, that the _____, her relocation in _____ to start a new job teaching at _____ the demands of starting a new job, and the continuing demands of her current job rise to the level of extraordinary circumstances. These events and circumstances, except for the _____ resulted from her choice to pursue her college teaching career. They were made with full knowledge that she needed to meet the Chemistry 102 requirement. In addition, Petitioner's argument that "she was unable to find or register for any Chemistry 102 classes" because she "was new to the _____ area and was simply unfamiliar with any of the schools" is somewhat dubious considering that Petitioner was teaching at one of those schools-- _____ Petitioner cannot now argue that the events and circumstances that resulted from her choice to pursue her college teaching career could not have been prevented

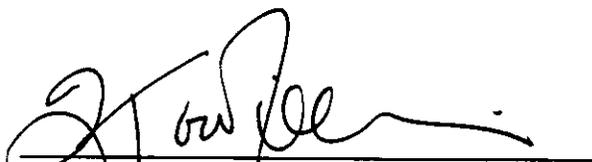
through the exercise of ordinary care or diligence. Accordingly, Petitioner has not met her burden of showing that her personal circumstances rise to the level of extraordinary circumstances.

The remainder of Petitioner's argument deals with her credentials as a computer programmer and professor. Petitioner's credentials, however, address the issue of whether she possesses sufficient technical and scientific expertise, not whether her personal circumstances rise to the level of extraordinary circumstances which in the interest of justice require the waiver of a regulation. Petitioner has not shown, however, that she possesses sufficient technical and scientific expertise without having met the Chemistry 102 requirement. For example, Petitioner presents no evidence to support her argument that her bachelor's degree in computer science is equivalent to "one of the automatically qualifying degrees." Petition, p.4. She also does not explain how teaching legal courses demonstrates technical and scientific expertise. Rather, she argues that [n]o Chemistry 102 class will allow her to better understand patents or prosecution." Id. Petitioner's argument misses the point. A Chemistry 102 class furthers her understanding of basic science and technology, a skill needed in preparing patent applications since a vast majority of them relate to chemistry, physics and engineering. As a registered patent attorney, Petitioner would not be limited to prosecuting only patent applications related to computer science.

Conclusion

Petitioner's request for a permanent waiver of the Chemistry 102 requirement under Category B, Option 4 is DENIED. Furthermore, because a review of the record shows that Petitioner does not otherwise possess the necessary technical and scientific expertise, her request for release of her scores from the May 3, 1995, examination or, if necessary, permission to sit for a subsequent examination without having met the Chemistry 102 requirement is also DENIED.

AUG 31 1998



Q. TODD DICKINSON

Deputy Assistant Secretary of Commerce
and Deputy Commissioner of Patents and Trademarks