

Responsive to the Office Action, Applicant respectfully requests reconsideration of the application identified above for the following reasons.

Refusal Under Section 2(d)

Registration has been refused under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), because it is alleged that Applicant’s mark is likely to be confused with the marks in the following U.S.

Registrations:

Reg. No.	Mark	Goods / Services	Owner
4728600	ARTIX	<p>Class 35: Advertising and business management consultancy; Arranging and conducting of fairs and exhibitions for business and advertising purposes; Business administration and management; Business consultation services; Comparison shopping services; Organizing exhibitions for commercial or advertising purposes; Organizing, promoting and conducting exhibitions, tradeshow and events for business purposes; Provision of information and advice to consumers regarding the selection of products and items to be purchased; Public relations; Restaurant franchising, namely, offering business management assistance in the establishment and/or operation of restaurants; Restaurant management for others; Retail convenience stores; Retail department stores; Supermarkets; Wholesale and retail store services featuring food, drinks, agricultural products, educational and entertaining products.</p>	FX Hotels Group Inc.
3988636	ARTEX	<p>Class 35: Business management consulting services, namely, assisting individual companies and organizations in the creation and oversight of alternative business risk management strategies featuring liaison between offshore managers for each insurance alternative risk management vehicle, feasibility analysis, domicile evaluation, business plan preparation, and license application; business services, namely, accounting.</p> <p>Class 41: Insurance brokerage, and administration of self-</p>	Arthur J. Gallagher & Co.

		insurance programs for others, namely, alternative financial risk transfer and captive management insurance and reinsurance, and property, casualty professional lines and workers' compensation insurance; insurance brokerage, namely, arrangements for fronting and reinsurance placement; assisting individual companies and organizations with insurance alternative risk management vehicles in the nature of insurance claims administration and services related to underwriting support, namely, actuarial services.	
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As an initial matter, Applicant notes that the cited Registrations are owned by two separate companies, FX Hotels Group, Inc. (4728600) and Arthur J. Gallagher & Co. (3988636). Further, ARTIX and ARTEX, which differ only by a single vowel. The cited marks are essentially identical to each other in sound and nearly identical in appearance. And they coexist for the same services, namely business management consulting.

Applicant has amended its identification of services to limit and specify the services as real estate services, namely "real estate management services; real estate acquisition services; leasing of real estate and commercial properties." As amended, Applicant's services, on their face, do not cover any of the services identified in the cited registrations. Applicant respectfully requests that the 2(d) refusal be withdrawn for the reasons set forth below:

Standard for 2(d) Refusal

In assessing the likelihood of confusion, "it is the duty of the examiner ... to find, upon consideration of all the evidence, whether or not confusion appears likely." *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563 (CCPA 1973). The multi-factor test outlined in *DuPont* provides the standard for assessing whether a likelihood of confusion exists. The weight given to any one factor may vary in light of the circumstances, but the crucial issue is always whether an appreciable number of ordinary prudent purchasers of the associated goods or services are likely to be

misled or confused as to the source of goods or services in question. See *Paula Payne Prods. Co. v. Johnson's Publ'g Co., Inc.*, 473 F.2d 901 , 902, 177 USPQ 76, 77 (CCPA 1973) ("[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source"); *Plus Prods. v. Plus Discount Foods, Inc.*, 722 F.2d 999, 222 USPQ 373 (2d Cir. 1983); *Lever Bros. Co. v. Am. Bakeries Co.*, 693 F.2d 251 , 253, 216 USPQ 177 (2d Cir. 1982) (AUTUMN for margarine not likely to be confused with AUTUMN GRAIN for bread). Further, not all of the *DuPont* factors may be relevant or of equal weight in a given case, and "any one of the factors may control a particular case." *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 U.S.P.Q.2d 1531, 1533 (Fed. Cir. 1997). The fundamental inquiry in the likelihood of confusion analysis is the cumulative effect of all the differences. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 928, 198 USPQ 151 (CCPA 1978).

No Likelihood Of Confusion Because The Amended Services Are Unrelated.

The 2(d) refusal rests on (a) alleged similarities of the marks and (b) an assertion that Applicant's broadly worded services for "marketing, business management, and real estate insurance services" cover all services of the type described, including the more specialized services identified in the cited registrations, namely "marketing business management, and insurance services."

The crucial question here is not merely whether Applicant's mark is similar to the cited marks, but whether the similarity is likely to cause confusion. And likelihood means probability. A mere possibility of confusion is not enough. *Bongrain Int'l (American) Cmp. v. De/ice de France, Inc.*, 811 F.2d 1479, 1 USPQ 2d 1775, 1779 (Fed. Cir. 1987). When only a possibility, rather than a probability, of confusion exists, registration of Applicant's mark should be allowed. 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:3 (4th ed. 2006).

In the current case, Applicant's services as amended, are entirely unrelated to those associated with the cited registrations. In particular, Applicant has amended and limited its services to "real estate

management services; real estate acquisition services; leasing of real estate and commercial properties.” These are unrelated to the services covered by each of the cited registrations, namely business consulting services (covered by both cited marks) and insurance brokerage and risk management services, including assistance with insurance alternative risk management vehicles. The respective services address different objectives for different purchasers under unique circumstances such that confusion as to source is unlikely.

Considering the overall differences between Applicant’s real estate services and the business consulting and insurance services covered by the cited registrations, Applicant submits that confusion between its mark and the marks in Registration Nos. 4728600 and 3988636 is highly unlikely. Likewise, Applicant respectfully requests that the 2(d) refusal as to that registration be withdrawn.