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**MAILED**  
**FEB 07 2012**  
**OFFICE OF PETITIONS**

In re Application of  
Xiaolu Wang  
Application No. 09/711,695  
Filed: November 13, 2000  
Attorney Docket No.

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ON PETITION

This is a decision on the petition under 37 CFR 1.181, filed December 2, 2011, which is being treated as a petition under 37 CFR 1.181 requesting the Director exercise his supervisory authority and overturn the decision of the Petitions Examiner, dated June 3, 2011, which refused to withdrawal of the holding of abandonment of the above-identified application.

The petition to withdrawal the holding of abandonment is **DENIED**.

**BACKGROUND**

The instant application was filed November 13, 2000, and prosecution advanced up to the issuance of a final rejection on May 12, 2009. An amendment after final rejection was filed on August 11, 2009 and an advisory action was mailed December 2, 2009 in response to the amendment after final rejection. Subsequent to the advisory action, petitioner has filed various requests for the withdrawal of the holding of abandonment. All of petitioner's requests have been dismissed. A petition for supervisory review of the decisions dismissing those requests was filed by petitioner and is addressed below.

**STATUTE, REGULATION, AND EXAMINING PROCEDURE**

35 U.S.C. 133 states:

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable.

37 CFR 1.116(c) states:

The admission of, or refusal to admit, any amendment after a final rejection, a final action, an action closing prosecution, or any related proceedings will not operate to relieve the application or reexamination proceeding from its condition as subject to appeal or to save the application from abandonment under § 1.135, or the reexamination prosecution from termination under § 1.550(d) or § 1.957(b) or limitation of further prosecution under § 1.957(c).

37 CFR 1.135 states:

(a) If an applicant of a patent application fails to reply within the time period provided under § 1.134 and § 1.136, the application will become abandoned unless an Office action indicates otherwise.

(b) Prosecution of an application to save it from abandonment pursuant to paragraph (a) of this section must include such complete and proper reply as the condition of the application may require. The admission of, or refusal to admit, any amendment after final rejection or any amendment not responsive to the last action, or any related proceedings, will not operate to save the application from abandonment.

37 CFR 1.181(f) states:

The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

#### OPINION

The file wrapper for the above-referenced application has been reviewed and in particular, the decision on the request for withdrawal of the holding of abandonment mailed June 3, 2010. Petitioner contends that the decision is incorrect since "The Office reached the erroneous decision again without consideration of the merits of the petition but relied solely on the erroneous conclusion of the advisory action of December 2, 2009." Petitioner should note that amendments filed under 37 CFR 1.116 (amendments filed after final rejection) are not entered as a matter of right. Furthermore, as set forth in 37 CFR 1.116(c):

The admission of, or refusal to admit, any amendment after a final rejection, a final action, an action closing prosecution, or any related proceedings will not operate to relieve the application or reexamination proceeding from its condition

as subject to appeal or save the application from abandonment... (Underlining added for emphasis.)

Therefore, whether the advisory action contained a defect or not is immaterial to the fact that this application is abandoned. Abandonment occurs as a matter of law because of inaction on the part of the applicant, see 35 USC 133, as codified in 37 CFR 1.135. Abandonment does not occur because of any action on the part of the USPTO. Thus a Notice of Abandonment is not controlling for any purpose. Notices of Abandonment are merely sent as a courtesy to applicant.

Any arguments as to the sufficiency of the rejections made by the examiner are issues that are not for consideration by way of petition. Petitions are for review of procedural issues. Substantive issues, such as the sufficiency of the rejection, are reviewed by way of appeal.

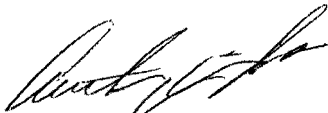
Finally, 37 CFR 1.181(f) states: "The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings." Since the amendment filed August 11, 2009 did not *prima facie* place the application in condition for allowance, the application has been properly held abandoned.

#### **DECISION**

The petition is granted to the extent that the decision of June 3, 2011 has been reviewed, but is denied in all other respects.

Petitioner may consider filing a petition under 37 CFR 1.137(a) or (b) to revive the application.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3687.



Anthony Knight  
Director  
Office of Petitions

Enclosures: Form PTO/SB 64  
Form PTO/SB 61