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MAILED

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OFFICE OF PETITIONS

In re Application of :
Aguilera : DECISION ON PETITION
Application No. 12/384,562 :
Filed: April 7, 2009 :
For: DOUBLE OR NOTHING :

This decision is in response to the renewed petition under 37 CFR 1.181 filed February 6, 2012.

The petition under 37 CFR 1.181 to withdraw the holding of abandonment is hereby **DENIED**.

RELEVANT BACKGROUND

The application became abandoned March 31, 2011 for failure to timely submit a proper reply in response to the final Office action mailed December 30, 2010. The final Office action set a three month shortened statutory period of time for reply. A reply was filed January 10, 2011. The reply, however, failed to place the application in condition for allowance, as indicated in the Advisory Action mailed October 19, 2011. An untimely reply was filed October 31, 2011. Notice of Abandonment was mailed November 8, 2011. A petition under 37 CFR 1.181 was filed November 16, 2011 and dismissed December 8, 2011. A renewed petition was filed December 19, 2011 and dismissed January 30, 2012.

Petitioner herein requests withdrawal of the holding of abandonment of the above-identified application and seeks “a break with a reasonable review of my application.” Petitioner further argues that “[t]he concept of ‘abandonment’ is an interpretation of your Examiner.” Petitioner further states that he has not “been informed what makes my application non-compliant.” Petitioner further asserts that he seeks the Office’s “help” and “good advice.” Petitioner further asserts that he cannot afford a patent attorney.

RELEVANT STATUTE AND REGULATION

35 USC 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 1.134 states:

An Office action will notify the applicant of any non-statutory or shortened statutory time period set for reply to an Office action. Unless the applicant is notified in writing that a reply is required in less than six months, a maximum period of six months is allowed.

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 1.136 states:

- (a)(1) If an applicant is required to reply within a nonstatutory or shortened statutory time period, applicant may extend the time period for reply up to the earlier of the expiration of any maximum period set by statute or five months after the time period set for reply, if a petition for an extension of time and the fee set in § 1.17(a) are filed, unless:
 - (i) Applicant is notified otherwise in an Office action;
 - (ii) The reply is a reply brief submitted pursuant to § 41.41 of this title;
 - (iii) The reply is a request for an oral hearing submitted pursuant to § 41.47(a) of this title;
 - (iv) The reply is to a decision by the Board of Patent Appeals and Interferences pursuant to § 1.304 or to § 41.50 or § 41.52 of this title; or
 - (v) The application is involved in a contested case (§ 41.101(a) of this title).
- (2) The date on which the petition and the fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The expiration of the time period is determined by the amount of the fee paid. A reply must be filed prior to the expiration of the period of extension to avoid abandonment of the application (§ 1.135), but in no situation may an applicant reply later than the maximum time period set by statute, or be granted an extension of time under paragraph (b) of this section when the provisions of this paragraph are available. See § 1.304 for extensions of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extensions of time in ex parte reexamination proceedings, § 1.956 for extensions of time in inter partes reexamination proceedings; and §§ 41.4(a) and

41.121(a)(3) of this title for extensions of time in contested cases before the Board of Patent Appeals and Interferences.

(3) A written request may be submitted in an application that is an authorization to treat any concurrent or future reply, requiring a petition for an extension of time under this paragraph for its timely submission, as incorporating a petition for extension of time for the appropriate length of time. An authorization to charge all required fees, fees under § 1.17, or all required extension of time fees will be treated as a constructive petition for an extension of time in any concurrent or future reply requiring a petition for an extension of time under this paragraph for its timely submission. Submission of the fee set forth in § 1.17(a) will also be treated as a constructive petition for an extension of time in any concurrent reply requiring a petition for an extension of time under this paragraph for its timely submission.

(b) When a reply cannot be filed within the time period set for such reply and the provisions of paragraph (a) of this section are not available, the period for reply will be extended only for sufficient cause and for a reasonable time specified. Any request for an extension of time under this paragraph must be filed on or before the day on which such reply is due, but the mere filing of such a request will not affect any extension under this paragraph. In no situation can any extension carry the date on which reply is due beyond the maximum time period set by statute. See § 1.304 for extensions of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extensions of time in ex parte reexamination proceedings; § 1.956 for extensions of time in inter partes reexamination proceedings; and §§ 41.4(a) and 41.121(a)(3) of this title for extensions of time in contested cases before the Board of Patent Appeals and Interferences. Any request under this section must be accompanied by the petition fee set forth in § 1.17(g).

(c) If an applicant is notified in a "Notice of Allowability" that an application is otherwise in condition for allowance, the following time periods are not extendable if set in the "Notice of Allowability" or in an Office action having a mail date on or after the mail date of the "Notice of Allowability":

- (1) The period for submitting an oath or declaration in compliance with § 1.63;
- (2) The period for submitting formal drawings set under § 1.85(c); and
- (3) The period for making a deposit set under § 1.809(c).

The record fails to establish that a proper reply to the final Office action mailed December 30, 2010 was timely received on or before the maximum extendible period of time for reply. A proper reply was required to consist of an amendment *prima facie* placing the application in condition for allowance, a request for continued examination (including fee and submission), a notice of appeal (including fee), or a continuation application (including fee), and, if applicable, a petition for extension of time (including fee).

Contrary to petitioner's arguments, abandonment is not a "concept" subject to the interpretation of the examiner. Abandonment occurs as a matter of law, not at the discretion of the examiner, upon failure by applicant of a patent application to reply within the time period provided under § 1.134 and § 1.136. See, 37 CFR 1.135(a). As the record fails to establish that a proper reply to the final Office action mailed December 30, 2010 was timely filed within the time period for reply set forth therein, the holding of abandonment will not be withdrawn.

With respect to the reasons that the reply filed January 11, 2011 was deemed insufficient, petitioner is directed to the Office communications mailed October 19, 2011. Petitioner is advised that the amendments filed subsequent to the abandonment of the application will not be examined because the application is abandoned and, thus, not subject to further prosecution.

With respect to petitioner's solicitation of the "help" and "good advice" of the Office, petitioner is advised that it is outside of the jurisdiction of the Office to provide the services sought by petitioner. An examination of this petition reveals that applicant is unfamiliar with the rules and procedures governing patent petitions. While an inventor may prosecute the application, lack of skill in this field usually acts as a liability in affording the maximum protection for the invention disclosed. Applicant is advised to secure the services of a registered patent attorney or agent to prosecute the application, since the value of a patent is largely dependent upon skilled preparation and prosecution. The Office cannot aid in selecting an attorney or agent.

A listing of registered patent attorneys and agents is available on the USPTO Internet web site <http://www.uspto.gov> in the Site Index under "Attorney and Agent Roster". Applicants may also obtain a list of registered patent attorneys and agents located in their area by writing to the Mail Stop OED, Director of the U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

With respect to petitioner's request for withdrawal of the final Office action mailed December 30, 2010, petitioner's arguments do not provide any legal authority for setting aside or otherwise disturbing the holding of abandonment set forth in the Notice of Abandonment mailed November 8, 2011.

ALTERNATE VENUE

As previously suggested, petitioner may wish to consider filing a petition stating that the delay was unintentional. See, enclosed. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not

appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

DECISION

The relief sought by petitioner and discussed herein is without statutory, legislative, or procedural support. In view thereof, petitioner's request for relief, including the withdrawal of the holding of abandonment, is hereby denied.

As previously advised, petitioner may wish to consider filing a petition under 37 CFR 1.137 (b) to revive the application.

Telephone inquiries concerning this matter may be directed to Attorney Advisor at (571) 272-3205.



Anthony Knight
Director
Office of Petitions

Enclosure