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SEP 25 2008

OFFICE OF PETITIONS

In re Application of	:	
Christian C. Ibeagwa	:	
Application No. 08/554,270	:	DECISION ON THIRD RENEWED
Patent No. 6,000,565	:	PETITION PURSUANT TO
Filed: November 6, 1995	:	37 C.F.R. § 1.378(E)
Issue Date: December 14, 1999	:	
Title: WEANING BINDER FOR	:	
NURSING (FEEDING) BOTTLES	:	

This is a decision on the "PETITION FOR EXTENSION OF TIME UNDER 37 C.F.R. 1.136(b), filed on July 1, 2008. This submission is begin treated as a third renewed petition pursuant to 37 C.F.R. § 1.378(e), requesting reconsideration of a prior decision pursuant to 37 C.F.R. § 1.378(b), which refused to accept the delayed payment of maintenance fees for the above-referenced patent.

This third renewed petition pursuant to 37 C.F.R. § 1.378(e) is DENIED.¹

THERE WILL BE NO FURTHER RECONSIDERATION OF THIS MATTER BY THIS OFFICE.

¹ This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for the purposes of seeking judicial review. See MPEP § 1002.02.

Any petition to accept an unavoidably delayed payment of a maintenance fee filed under 37 C.F.R. § 1.378(b) must include:

- (1) The required maintenance fee set forth in 37 C.F.R. § 1.20 (e) through (g);
- (2) The surcharge set forth in 37 C.F.R. § 1.20(i)(1), and;
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

BACKGROUND AND PROCEDURAL HISTORY

The patent issued on December 14, 1999. The grace period for paying the 3½-year maintenance fee provided in 37 C.F.R. § 1.362(e) expired at midnight on December 14, 2003, with no payment received. Accordingly, the patent expired on December 14, 2003.

The period for paying the 3½-year maintenance fee without the surcharge extended from December 14, 2002 to June 15, 2003 and for paying with the surcharge from June 16, 2003 to December 14, 2003. Thus, the delay in paying the 3½-year maintenance fee extended from December 14, 2003 at midnight to the filing of this third renewed petition pursuant to 37 C.F.R. § 1.378(b) on July 1, 2008.

On August 22, 2007, Petitioner filed an original petition pursuant to 37 C.F.R. § 1.378(b), which was dismissed via the mailing of a decision on January 7, 2008, for failure to include either the 3½-year maintenance fee or the surcharge that is associated with the filing of a petition pursuant to Rule 1.378(b). The decision indicated that a petition fee of \$400 would be required should reconsideration of the decision be desired.

A renewed petition was submitted on January 4, 2008,² along with the 3½-year maintenance fee and a portion of the surcharge. A letter was mailed on January 28, 2008, which indicated that Petitioner had failed to submit the surcharge in full (\$685 was received when \$700 was due), the 7½-year maintenance fee of \$1,180, and the petition fee of \$400.

A second renewed petition was filed on April 1, 2008,³ and was dismissed via the mailing of a decision on May 27, 2008. With the second renewed petition, Petitioner submitted a check in the amount of \$1,260.⁴ The decision indicated:

However, this money was not received by the Office, for it appears that Petitioner's bank account contained insufficient funds. Moreover, it does not appear that Petitioner attempted to include the \$400 petition fee in this payment.

Decision on second renewed petition, page 2.

The decision further indicated, *in pertinent part*:

Petitioner has failed to submit the 7½-year maintenance fee (\$1,180), the surcharge that is associated with the present petition in full (\$685 has been received when \$700 is due), or the \$400 petition fee that is associated with a request for reconsideration of a decision on a petition pursuant to Rule 1.378(b).

The payment of both the complete surcharge and the petition fee are prerequisites to the filing of a renewed petition to accept an unavoidably delayed payment of a maintenance fee in an expired patent. Therefore, consideration of the merits of the petition before receipt of these fees would be premature.

...

It appears that Petitioner may be intentionally delaying the submission of these fees. Petitioner is reminded that intentional delay is an absolute bar to the acceptance of these fees.

² As noted on the second page of the decision of January 28, 2008, it appears that the submission of January 4, 2008 and the decision on the original petition crossed in the mail.

³ It is noted that this communication contains a certificate of mailing dated March 28, 2008.

⁴ Petitioner attempted to submit the deficient \$15 for the surcharge, the 7½-year maintenance fee, and a \$65 surcharge that was not required.

Petitioner has a period of ONE MONTH to respond to this communication, and extensions of time will not be available.

...

Thereafter, there will be no further reconsideration of this matter...

Decision on second renewed petition, pages 2-4.

ANALYSIS

This third renewed petition must be denied for the following three reasons.

First, this third renewed petition must be denied due to the fact that it was not timely filed.

The decision on second renewed petition was mailed on May 27, 2008, and set a one-month non-extendable period for response. As such, a response was due no later than June 27, 2008. Due to the fact that this third renewed petition was not filed until July 1, 2008, it must be denied as untimely.

Regarding Petitioner's request that the Office extend the period for responding to the decision on second renewed petition "from June 28 to December 28 of 2008 or as may be deemed proper,"⁵ Petitioner will note that on the third page of the decision on second renewed petition, it was indicated that Petitioner had one month period to provide a response to the communication, and that extensions of time would not be made available. Therefore, the request for an extension of time must be denied.

Second, this third renewed petition must be denied due to the fact that Petitioner has not submitted the required funds.

The decision on the second renewed petition indicated that Petitioner would need to submit the 7½-year maintenance fee (\$1,180), the surcharge that is associated with the present petition in full (\$685 had been received when \$700 is due), and the \$400 petition fee that is associated with a request for reconsideration of a decision on a petition pursuant to Rule 1.378(b).

⁵ Third renewed petition, page 1.

With this third renewed petition, Petitioner has submitted \$200 towards the \$400 petition fee. As of the date of this mailing, neither the maintenance fee nor the balance of the surcharge has been submitted to the Office.

Petitioner, after receiving notice that no further reconsideration would be accorded to him, failed to submit the petition fee, the maintenance fee, or the balance of the surcharge, and requested another opportunity to provide the funds that he knew were required. Title 35 of the United States Code, section 41(b) states that: "The Director shall (emphasis added) charge the following fees for maintaining in force all patents based on applications filed on or after December 12, 1980..." Thus, in accordance with the law, the maintenance fee must be collected and cannot be waived. Without the maintenance fee, no further action can be taken in respect to this matter.

Petitioner has asserted that he had but one month in which to file the requisite fee. The United States Patent and Trademark Office (USPTO) is not unmindful of the fact that pro se applicants file and prosecute applications and maintain patents in force. However, Petitioner has been given three opportunities in which to submit the required fees. Therefore, it is considered that there is no merit to the suggestion that Petitioner was given only one month in which to submit the fees.

Third, this third renewed petition must be denied due to the fact that Petitioner has conceded that at least a portion of the delay was intentional.

The decision on the second renewed petition indicated that a check in the amount of \$1,260 had been included with the petition, however the money was not received by the Office.

With this third renewed petition, Petitioner has indicated that the money was not received by the Office due to the fact that he *intentionally issued a stop payment order on the check* as a protest, due to his belief that the surcharge that is associated with the filing of a petition pursuant to 37 C.F.R. § 1.378(b) is \$65, and not \$700:

...Petitioner contends that a stop payment was requested by Petitioner for protesting surcharge of \$700 rather than a \$65 surcharge that was not required.

Third renewed petition, page 2.

As such, Petitioner has indicated that he has intentionally delayed the revival of this patent, and it is clear that he will not be able to establish that the entire period of delay was unavoidable, pursuant to 37 C.F.R. §1.378(b)(3). Petitioner will note that a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable,"⁶ and a concession of intentional delay is the antithesis of unavoidable delay.

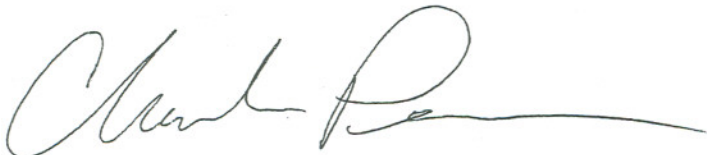
CONCLUSION

The prior decision which refused to accept, under 37 C.F.R. §1.378(b), the delayed payment of a maintenance fee for the above-identified patent, has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. §41(c)(1) and 37 C.F.R. §1.378(b).

Since this patent will not be reinstated, Petitioner is entitled to a refund of both the \$465 that was submitted on January 4, 2008 for the 3½ maintenance fee and the \$685 that was that was submitted on January 4, 2008 towards the \$700 surcharge, but not the \$200 that was submitted with this petition as a portion of the \$400 fee associated with the filing of a renewed petition pursuant to 37 C.F.R. §1.378(e). A treasury check will be issued in due course.

Telephone inquiries should be directed to Senior Attorney Paul Shanowski at (571) 272-3225.

The application will be forwarded to Files Repository.



Charles Pearson
Director
Office of Petitions

⁶ Haines v. Quigg, 673 F. Supp. 314, 316-17; 5 USPQ2d (BNA) 1130, at 1131-32.