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In re Application of	:	
Akihiko Itami, et al	:	OFFICE OF PETITIONS
Application No. 11/229,130	:	DECISION DENYING
Filed: September 17, 2005	:	PETITION
Attorney Docket No. KON-2030	:	

This is a decision on the renewed petition filed July 11, 2007, requesting that the above-identified application be accorded a filing date of September 15, 2005, rather than the presently accorded date of September 17, 2005. The petition is being considered under 37 CFR 1.10(d).

The renewed petition is granted to the extent that the decision has been reconsidered; however, the petition is **DENIED**. This decision may be viewed as a final agency action with in the meaning of 5 U.S.C. 704 and for purposes of seeking judicial review. See MPEP §1002.02(b).

BACKGROUND

Petitioners argue that the application was deposited in Express Mail service with the U. S. Postal Service (USPS) on September 15, 2005. However, the USPS incorrectly entered the "date-in" on the express mailing label as September 17, 2005. Accordingly, petitioners request that the application be accorded a filing date as of the actual date of deposit with the USPS.

RELEVANT STATUTE AND REGULATIONS

35 U.S.C. 111(a) provides that:

The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

Paragraph (a) of 37 C.F.R. §1.10 states that:

Any correspondence received by the U.S. Patent and Trademark Office (USPTO) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the USPTO on the date of deposit with the USPS. The date of deposit with USPS is shown by the "date-in" on the "Express Mail" label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. See § 1.6(a).

(Emphasis supplied).

Paragraph (b) of 37 C.F.R. § 1.10(b) further provides that:

Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked, and that persons dealing indirectly with the employees of the USPS (such as by depositing correspondence in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked.

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Director to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to

the satisfaction of the Director, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

OPINION

Petitioners have shown that the instant petition was filed promptly within the meaning of § 1.10(d)(1). There is no dispute that the number of the "Express Mail" mailing label, EV 733807227 US, was placed on the papers that constitute the correspondence prior to the original mailing by "Express Mail," in compliance with § 1.10(d)(2). The papers presently accorded a filing date of September 17, 2005 bear that "Express Mail" number.

Petitioners' application was accorded a filing date of September 17, 2005, and the evidence supports a conclusion that this is the date of deposit of the correspondence with the USPS. The USPS Track & Confirm restoration record shows that the correspondence mailed under "Express Mail" number EV 733807227 was accepted by the USPS on September 17, 2005 at 4:02 am, and actually delivered to the USPTO on September 19, 2005 at 5:53 am.

Petitioners' arguments and evidence have been reconsidered, but not found persuasive that the "date-in" on the "Express Mail" mailing label entered by the USPS (and as set forth in the Express Mail database) was incorrectly entered. Petitioners have not provided a statement from the USPS supporting a conclusion that the USPS erred in entering the date of acceptance of the "Express Mail" package. However, the evidence provided for this purpose includes:

(1) an Affidavit from Donald C. Lucas, attesting to signing the application on September 15, 2005 and giving the USPS Express Mail envelope with the signed documents therein to Ms. Erin C. Henderson for hand-delivery to the Grand Central Terminal US Post Office. Attorney Lucas indicates that, while the Grand Central Terminal US Post Office has a drop box for Express Mail that remains open until 7:00p.m., the Post Office itself remains open until 9:00p.m. on weekdays. Attorney Lucas notes that Mr. Timothy D. Meade accompanied Ms. Henderson to the local USPS office on September 15, 2005.

(2) an Affidavit from Erin C. Henderson, attesting to having hand-delivered the correspondence mailed under Express Mail label No. EV 733807227 US to an USPS employee on September 15, 2005 at about 7:00p.m. Ms. Henderson states that the USPS employee did not return the Express Mail mailing label at that time.

(3) an Affidavit from Timothy D. Meede, attesting to accompanying Ms. Erin C. Henderson to the USPS and witnessing Ms. Henderson hand-deliver the correspondence to an USPS employee behind the counter on September 15, 2005.

The present petition also fails to include any evidence that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. For this purpose, petitioners refer to:

(1) a copy of a fax sent on September 15, 2005, with a time of 11:53(a.m.) which was sent to their client.

(2) a copy of the reporting letter dated September 15, 2005 sent to the their client.

(3) a declaration by Margaret Rogers stating that normal business practice in the firm is to transmit reporting letters to clients the same day that new applications are filed.

Petitioners argue that the declaration should be given the same weight as a log book because both evidence the normal business practice of the firm. However, while a log book may be accepted as evidence that came into being after deposit and within one business day thereof, the components required for the acceptable log book evidence must contain information such as the Express Mail number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log. In this case, the first paragraph of the reporting letter simply states:

"In accordance with your instructions of September 9, 2005, we have forwarded the above-reference application to the U.S. Patent and Trademark Office for filing."

No where does this reporting letter indicate that this application was mailed via "Express Mail Post Office to Addressee" on a specified day. Further, Ms. Rogers suggest that new applications are filed on the same day as the reporting letter are transmitted to

the client. This evidence may support a conclusion that this is your general practice; however, there is no showing in this particular instance that this practice was followed. Petitioners' evidence is not persuasive that the reporting letter should be given the weight of a log book. The reporting letter doesn't contain the necessary information found in a log book.

Further, by petitioner's own admission, the fax of the reporting letter to the client was sent at 11:53 a.m. on September 15, 2005, but the Express Mail package containing the application was purportedly hand-carried to the USPS and handed to an USPS employee at about 7:00 p.m. on September 15, 2005, as declared in the affidvits of Ms. Henderson and Mr. Meede. Clearly a communication sent prior to the actual filing hour cannot be considered as evidence which came into being **after** deposit and within one business day thereof.

CONCLUSION

The petition is DENIED. This decision may be viewed as a final agency action with in the meaning of 5 U.S.C. 704 and for purposes of seeking judicial review. See MPEP §1002.02(b).

Any questions concerning this matter may be directed to Sherry D. Brinkley at (571) 272-3204.



Charles A. Pearson
Director
Office of Petitions