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OFFICE OF PETITIONS

In re Patent No. 7,189,819 :
Basi et al. : DECISION DENYING
Application No. 10/010,942 : REQUEST FOR
Issue Date: March 13, 2007 : RECONSIDERATION OF
Filed: December 6, 2001 : PATENT TERM ADJUSTMENT
Attorney Docket No. ELN-002 : UNDER 37 CFR 1.705(d)

This is a decision on the "REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 CFR §1.705(d)," filed May 14, 2007, requesting that the patent term adjustment determination for the above-identified patent be changed from four hundred ninety-two (492) days to at minimum seven hundred twenty-two (722) days.

The request for reconsideration is granted to the extent that the determination has been reconsidered; however, the request for reconsideration of patent term adjustment is **DENIED** with respect to making any change in the patent adjustment determination under 35 U.S.C. § 154(b) of 492 days. This decision may be viewed as a final agency action within the meaning of 5 U.S.C 704 and for purposes of seeking judicial review. See MPEP § 1002.02(b).

BACKGROUND

On May 11, 2006, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above-identified application. The Notice stated that the patent term adjustment (PTA) to date is 0 days.

On August 10, 2006¹, patentees timely filed a request for reconsideration of patent term adjustment pursuant to 37 CFR § 1.705(b), requesting that the initial determination of patent term adjustment be corrected from zero days to at least five hundred eight (508) days. By decision mailed December 26, 2006, the request was granted only to the extent that the patent term adjustment determination at the time of the mailing of the notice of allowance was changed to zero days, including an additional period of reduction of twelve (12) days for applicant delay² and an additional period of reduction of sixty-nine (69) days for applicant delay pursuant to 37 CFR 1.704(c)(7). It is noted that the issue of entry of a period of adjustment for the Office taking in excess of three years to issue the patent was not addressed³.

On February 26, 2007, patentees filed a request for reconsideration of the decision mailed December 26, 2006.

Prior to a decision being rendered, on March 13, 2007, the application matured into U.S. patent No. 7,189,819, with a revised patent term adjustment of four hundred twenty-three (423) days. This revised determination included entry of an additional period of adjustment of four hundred ninety-one (491) days for the Office taking in excess of three years to issue the patent.

By decision mailed April 2, 2007, the request for reconsideration was granted only to the extent that the disputed period of reduction of 69 days previously entered pursuant to 37 C.F.R. §1.704(c)(7) was removed. The revised patent term adjustment was corrected to four hundred ninety-two (492) days (423 + 69) by way of issuance of a Certificate of Correction on May 1, 2007.

¹ A copy of this request was resubmitted on October 26, 2006.

² Patentees had disclosed that an additional period of reduction of 12 days should have been entered pursuant to 37 CFR 1.704(c)(8) and the Office agreed.

³ It appears that this issue was overlooked on review of the application for patent term adjustment filed August 10, 2006. This was of no consequence to the decision rendered. As knowledge of the actual date of issuance of the patent is necessary to determine this period, it is Office practice to hold the decision on this issue in abeyance until after the actual patent date. Had this issue not been overlooked, the decision mailed December 26, 2006 would have additionally stated that as to this issue a "decision is being held in abeyance until after the actual patent date" and set a two-month period from the date of issuance of the patent for patentees to request that the Office address this issue.

As the patent had not issued when the request was filed, patentees' request for reconsideration filed February 26, 2007 only addressed the initial determination of patent term adjustment and not the additional period of adjustment of four hundred ninety-one (491) days. In turn, the decision did not directly address patentees' original contention with respect to the period of adjustment for the Office taking in excess of three years to issue the patent. Nonetheless, the revised patent term adjustment determination was reviewed in toto and the additional period of adjustment of four hundred ninety-one (491) days found to be correct.

On May 14, 2007, this request for reconsideration of the revised patent term adjustment indicated in the patent was timely filed.

Prior to this decision being rendered, a civil action was filed.

STATUTE AND REGULATION

35 U.S.C. § 154(b) as amended by § 4402 of the American Inventors Protection Act of 1999⁴ (AIPA) provides that:

ADJUSTMENT OF PATENT TERM. -

(1) PATENT TERM GUARANTEES. -

(A) GUARANTEE OF PROMPT PATENT AND TRADEMARK OFFICE RESPONSES. - Subject to the limitations under paragraph (2), if the issue of an original patent is delayed due to the failure of the Patent and Trademark Office to -

(i) provide at least one of the notifications under section 132 of this title or a notice of allowance under section 151 of this title not later than 14 months after -

(I) the date on which an application was filed under section 111(a) of this title; or

(II) the date on which an international application fulfilled the requirements of section 371 of this title;

(ii) respond to a reply under section 132, or to an appeal taken under section 134, within 4 months after the date on which the reply was filed or the appeal was taken;

⁴ Public Law 106-113, 113 Stat. 1501, 1501A-557 through 1501A-560 (1999).

(iii) act on an application within 4 months after the date of a decision by the Board of Patent Appeals and Interferences under section 134 or 135 or a decision by a Federal court under section 141, 145, or 146 in a case in which allowable claims remain in the application; or

(iv) issue a patent within 4 months after the date on which the issue fee was paid under section 151 and all outstanding requirements were satisfied, the term of the patent shall be extended 1 day for each day after the end of the period specified in clause (i), (ii), (iii), or (iv), as the case may be, until the action described in such clause is taken.

(B) GUARANTEE OF NO MORE THAN 3-YEAR APPLICATION PENDENCY. — Subject to the limitations under paragraph (2), if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years after the actual filing date of the application in the United States, not including —

(i) any time consumed by continued examination of the application requested by the applicant under section 132(b);

(ii) any time consumed by a proceeding under section 135(a), any time consumed by the imposition of an order under section 181, or any time consumed by appellate review by the Board of Patent Appeals and Interferences or by a Federal court; or

(iii) any delay in the processing of the application by the United States Patent and Trademark Office requested by the applicant except as permitted by paragraph (3)(C), the term of the patent shall be extended 1 day for each day after the end of that 3-year period until the patent is issued.

(C) GUARANTEE OR ADJUSTMENTS FOR DELAYS DUE TO INTERFERENCES, SECRECY ORDERS, AND APPEALS. — Subject to the limitations under paragraph (2), if the issue of an original patent is delayed due to —

(i) a proceeding under section 135(a);

(ii) the imposition of an order under section 181;

or

(iii) appellate review by the Board of Patent Appeals and Interferences or by a Federal court in a case in which the patent was issued under a decision in the review reversing an adverse determination of patentability, the

term of the patent shall be extended 1 day for each day of the pendency of the proceeding, order, or review, as the case may be.

(2) LIMITATIONS. -

(A) IN GENERAL. - To the extent that periods of delay attributable to grounds specified in paragraph (1) overlap, the period of any adjustment granted under this subsection shall not exceed the actual number of days the issuance of the patent was delayed.

The implementing regulation, 37 CFR § 1.702, provides grounds for adjustment of patent term due to examination delay under the Patent Term Guarantee Act of 1999 (original applications, other than designs, filed on or after May 29, 2000).

(a) Failure to take certain actions within specified time frames. Subject to the provisions of 35 U.S.C. 154(b) and this subpart, the term of an original patent shall be adjusted if the issuance of the patent was delayed due to the failure of the Office to:

(1) Mail at least one of a notification under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151 not later than fourteen months after the date on which the application was filed under 35 U.S.C. 111(a) or fulfilled the requirements of 35 U.S.C. 371 in an international application;

(2) Respond to a reply under 35 U.S.C. 132 or to an appeal taken under 35 U.S.C. 134 not later than four months after the date on which the reply was filed or the appeal was taken;

(3) Act on an application not later than four months after the date of a decision by the Board of Patent Appeals and Interferences under 35 U.S.C. 134 or 135 or a decision by a Federal court under 35 U.S.C. 141, 145, or 146 where at least one allowable claim remains in the application; or

(4) Issue a patent not later than four months after the date on which the issue fee was paid under 35 U.S.C. 151 and all outstanding requirements were satisfied.

(b) Failure to issue a patent within three years of the actual filing date of the application. Subject to the provisions of 35 U.S.C. 154(b) and this subpart, the term of an original patent shall be adjusted if the issuance of

the patent was delayed due to the failure of the Office to issue a patent within three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an international application, but not including⁵:

In pertinent part, 37 CFR § 1.703 provides for calculation of the periods, as follows:

Period of adjustment of patent term due to examination delay.

(a) The period of adjustment under § 1.702(a) is the sum of the following periods:

(1) The number of days, if any, in the period beginning on the day after the date that is fourteen months after the date on which the application was filed under 35 U.S.C. 111(a) or fulfilled the requirements of 35 U.S.C. 371 and ending on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first;

(2) The number of days, if any, in the period beginning on the day after the date that is four months after the date a reply under § 1.111 was filed and ending on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first;

(3) The number of days, if any, in the period beginning on the day after the date that is four months after the date a reply in compliance with § 1.113(c) was filed and ending on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first;

(4) The number of days, if any, in the period beginning on the day after the date that is four months after the date an appeal brief in compliance with § 41.37 of this title was filed and ending on the date of mailing of any of an examiner's answer under § 41.39 of this title, an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first;

⁵

(1) Any time consumed by continued examination of the application under 35 U.S.C. 132(b);

(2) Any time consumed by an interference proceeding under 35 U.S.C. 135(a);

(3) Any time consumed by the imposition of a secrecy order under 35 U.S.C. 181;

(4) Any time consumed by review by the Board of Patent Appeals and Interferences or a Federal court; or

(5) Any delay in the processing of the application by the Office that was requested by the applicant.

(5) The number of days, if any, in the period beginning on the day after the date that is four months after the date of a final decision by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145 or 146 where at least one allowable claim remains in the application and ending on the date of mailing of either an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151, whichever occurs first; and

(6) The number of days, if any, in the period beginning on the day after the date that is four months after the date the issue fee was paid and all outstanding requirements were satisfied and ending on the date a patent was issued.

(b) The period of adjustment under § 1.702(b) is the number of days, if any, in the period beginning on the day after the date that is three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an international application and ending on the date a patent was issued, but not including the sum of the following periods⁶:

⁶ (1) The number of days, if any, in the period beginning on the date on which a request for continued examination of the application under 35 U.S.C. 132(b) was filed and ending on the date the patent was issued;

(2) (i) The number of days, if any, in the period beginning on the date an interference was declared or redeclared to involve the application in the interference and ending on the date that the interference was terminated with respect to the application; and (ii) The number of days, if any, in the period beginning on the date prosecution in the application was suspended by the Office due to interference proceedings under 35 U.S.C. 135(a) not involving the application and ending on the date of the termination of the suspension;

(3) (i) The number of days, if any, the application was maintained in a sealed condition under 35 U.S.C. 181; (ii) The number of days, if any, in the period beginning on the date of mailing of an examiner's answer under § 41.39 of this title in the application under secrecy order and ending on the date the secrecy order was removed; (iii) The number of days, if any, in the period beginning on the date applicant was notified that an interference would be declared but for the secrecy order and ending on the date the secrecy order was removed; and (iv) The number of days, if any, in the period beginning on the date of notification under § 5.3(c) of this chapter and ending on the date of mailing of the notice of allowance under 35 U.S.C. 151; and,

(4) The number of days, if any, in the period beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date of the last decision by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145, or on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first, if the appeal did not result in a decision by the Board of Patent Appeals and Interferences.

37 CFR 1.703(f) provides that:

The adjustment will run from the expiration date of the patent as set forth in 35 U.S.C. 154(a)(2). To the extent that periods of delay attributable to the grounds specified in §1.702 overlap, the period of adjustment granted under this section shall not exceed the actual number of days the issuance of the patent was delayed. The term of a patent entitled to adjustment under § 1.702 and this section shall be adjusted for the sum of the periods calculated under paragraphs (a) through (e) of this section, to the extent that such periods are not overlapping, less the sum of the periods calculated under § 1.704. The date indicated on any certificate of mailing or transmission under § 1.8 shall not be taken into account in this calculation.

OPINION

On March 13, 2007, this patent issued with a revised patent term adjustment of four hundred twenty-three (423) days. Pursuant to the decision mailed April 2, 2007, on May 1, 2007, the Office issued a Certificate of Correction correcting the patent term adjustment in this patent from 423 to 492 days. Patentees argue that the determination of 492 days remains in error in that pursuant to 35 U.S.C. § 154(b) the Office failed to issue a patent within three years of the actual filing date of the above-referenced application in accordance with 37 CFR § 1.702(b) and failed to take certain action within the time frames specified in 37 CFR § 1.702(a).

Specifically, patentees argue that the period of adjustment due to the Three Year Delay by the Office, pursuant to 37 CFR § 1.703(b), is 827 days. This 827 day period is calculated based on the application having been filed under 35 U.S.C. 111(a) on December 6, 2001, and the patent having not issued until March 13, 2007, three years and 827 days later. Patentees maintain that in addition to this 827 day period, they are entitled to a period of adjustment due to examination delay, pursuant to 37 CFR §1.702(a), totalling 336 days. This 336 day period is the sum of:

- a period of delay of 230 days for the failure by the Office to mail at least one of a notification under 35 U.S.C. 132 not later than fourteen months after the

date on which the application was filed under 35 U.S.C. 111(a), pursuant to § 1.702(a)(1);

- a period of delay of 14 days for the failure by the Office to respond to a reply under 35 U.S.C. 132 not later than four months after the date on which the reply was filed, pursuant to § 1.702(a)(2);
- a period of delay of 92 days for the Office's failure to issue a patent not later than four months after the date on which the issue fee was paid under 35 U.S.C. 151 and all outstanding requirements were satisfied, pursuant to § 1.702(a)(4).

Patentees further state, citing 37 CFR § 1.703(f), that they are entitled to a period of patent term adjustment equal to the period of delays based on the grounds set forth in 37 CFR §1.702 reduced by the period of time equal to the period of time during which patentees failed to engage in reasonable efforts to conclude prosecution pursuant to 37 CFR §1.704. In other words, the period of Office delay reduced by the period of applicant delay. The period of reduction of 335 days for applicant delay is not in dispute⁷. Patentees maintain that the total period of Office delay is the sum of the period of Three Years Delay (827 days) and the period of Examination Delay (336 days) to the extent that these periods of delay are not overlapping. Patentees contend that:

As the period of 14 month delay ended on September 24, 2003, prior to the first day of the period of Three Years Delay, i.e., December 7, 2004, Patentees submit that these periods are not overlapping. Patentees note, however, that both the 14 day period of 4 month examination delay (September 20, 2005 to October 3, 2005) and the 92 day period of 4 month issue delay (December 12, 2006 to March 13, 2007) overlap with portions of the Three Year Delay period (December 7, 2004 to March 13, 2007). Accordingly, patentees submit that the total period of Office Delay is 1057 days, which is the sum of the period of Three Year Delay (827 days) and the period of Examination Delay (336 days), reduced by the period of overlap (14 days + 92 days = 106 days). See pp. 3-4 of petition filed May 14, 2007.

⁷ The periods of reduction include pursuant to 37 CFR 1.704(b), 79 days for response filed March 12, 2004, 92 days for response filed November 26, 2004, 30 days for response filed May 19, 2005, 59 days for response filed March 3, 2006, and as corrected by decision of December 26, 2006, 38 days (not 107 days) for the response filed July 9, 2002; and pursuant to 37 CFR 1.704(c)(8), 20, 5, and 12 days for supplemental papers filed December 16, 2004, May 24, 2005, and March 12, 2006 (The 12 days was also corrected by decision of December 26, 2006).

As such, patentees assert entitlement to a patent term adjustment of 722 days (827 + 336 - 106 reduced by 335).

The Office agrees that the patent issued 3 years and 827 days after its filing date. The Office agrees that the actions detailed above were not taken within the specified timeframes, and thus, the entries of periods of adjustment of 230, 14 and 92 days respectively are correct. At issue is whether patentees should accrue 827 days of patent term adjustment for the Office taking in excess of three years to issue the patent, as well as, 336 days for Office failure to take certain actions within specified time frames (or examination delay) with only a period of 106 days considered to overlap.

The Office does not agree and contends that the entire period of 336 days overlap. Patentees' interpretation of the period of overlap has been considered and found to be incorrect. Patentees' calculation of the period of overlap is inconsistent with the Office's interpretation of this provision. 35 U.S.C. 154(b)(2)(A) limits the adjustment of patent term, as follows:

to the extent that the periods of delay attributable to grounds specified in paragraph (1) overlap, the period of any adjustment granted under this subsection shall not exceed the actual number of days the issuance of the patent was delayed.

Likewise, 37 CFR 1.703(f) provides that:

To the extent that periods of delay attributable to the grounds specified in §1.702 overlap, the period of adjustment granted under this section shall not exceed the actual number of days the issuance of the patent was delayed.

As explained in *Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. 154(b)(2)(A)*, 69 Fed. Reg. 34283 (June 21, 2004), the Office interprets 35 U.S.C. 154(b)(2)(A) as permitting either patent term adjustment under 35 U.S.C. 154(b)(1)(A)(i)-(iv), or patent term adjustment under 35 U.S.C. 154(b)(1)(B), but not as permitting patent term adjustment under both 35 U.S.C. 154(b)(1)(A)(i)-(iv) and 154(b)(1)(B). Accordingly, the Office implements the overlap provision as follows:

If an application is entitled to an adjustment under 35 U.S.C. 154(b)(1)(B), the entire period during which the application was pending (except for periods excluded under 35 U.S.C. 154(b)(1)(B)(i)-(iii)), and not just the period beginning three years after the actual filing date of the application, is the period of delay under 35 U.S.C. 154(b)(1)(B) in determining whether periods of delay overlap under 35 U.S.C. 154(b)(2)(A). Thus, any days of delay for Office issuance of the patent more than 3 years after the filing date of the application, which overlap with the days of patent term adjustment accorded prior to the issuance of the patent will not result in any additional patent term adjustment. See 35 U.S.C. 154(b)(1)(B), 35 U.S.C. 154(b)(2)(A), and 37 CFR § 1.703(f). See *Changes to Implement Patent Term Adjustment Under Twenty Year Term; Final Rule*, 65 Fed. Reg. 54366 (Sept. 18, 2000). See also *Revision of Patent Term Extension and Patent Term Adjustment Provisions; Final Rule*, 69 Fed. Reg. 21704 (April 22, 2004), 1282 Off. Gaz. Pat. Office 100 (May 18, 2004). See also *Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. 154(b)(2)(A)*, 69 Fed. Reg. 34283 (June 21, 2004).

The current wording of § 1.703(f) was revised in response to the misinterpretation of this provision by a number of applicants. The rule was slightly revised to more closely track the corresponding language of 35 U.S.C. 154(b)(2)(A). The relevant portion differs only to the extent that the statute refers back to provisions of the statute whereas the rule refers back to sections of the rule. This was not a substantive change to the rule nor did it reflect a change of the Office's interpretation of 35 U.S.C. 154(b)(2)(A). As stated in the *Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. 154(b)(2)(A)*, the Office has consistently taken the position that if an application is entitled to an adjustment under the three-year pendency provision of 35 U.S.C. 154(b)(1)(B), the entire period during which the application was pending before the Office (except for periods excluded under 35 U.S.C. 154(b)(1)(B)(i)-(iii)), and not just the period beginning three years after the actual filing date of the application, is the relevant period under 35 U.S.C. 154(b)(1)(B) in determining whether periods of delay "overlap" under 35 U.S.C. 154(b)(2)(A).

This interpretation is consistent with the statute. Taken together the statute and rule provide that to the extent that periods of delay attributable to grounds specified in 35 U.S.C. 154(b)(1) and in corresponding §1.702 overlap, the period of adjustment granted shall not exceed the actual number of days the issuance of the patent was delayed. The grounds specified in these sections cover the A) guarantee of prompt Patent and Trademark Office responses, B) guarantee of no more than 3 year application pendency, and C) guarantee or adjustments for delays due to interference, secrecy orders and appeals. A section by section analysis of 35 U.S.C. 154(b)(2)(A) specifically provides that:

Section 4402 imposes limitations on restoration of term. In general, pursuant to [35 U.S.C.] 154(b)(2)(A)-(C), total adjustments granted for restorations under [35 U.S.C. 154](b)(1) are reduced as follows: (1) To the extent that there are multiple grounds for extending the term of a patent that may exist simultaneously (e.g., delay due to a secrecy order under [35 U.S.C.] 181 and administrative delay under [35 U.S.C.] 154(b)(1)(A)), the term should not be extended for each ground of delay but only for the actual number of days that the issuance of a patent was delayed; See 145 Cong. Rec. S14,718⁸

As such, the period for over 3 year pendency does not as argued by patentees overlap only to the extent that the actual dates in the period beginning three years after the date on which the application was filed overlap with the actual dates in the periods for failure of the Office to take action within specified time frames. In other words, consideration of the overlap does not begin three years after the filing date of the application. Patentees are incorrect in treating the relevant period as starting on December 7, 2004, the date that is 3 years after the actual filing date of the application.

In this instance, the relevant period under 35 U.S.C. 154(b)(1)(B) in determining whether periods of delay "overlap" under 35 U.S.C. 154(b)(2)(A) is the entire period during which

⁸ The AIPA is title IV of the Intellectual Property and Communications Omnibus Reform Act of 1999 (S. 1948), which was incorporated and enacted as law as part of Pub. L. 106-113. The Conference Report for H.R. 3194, 106th Cong. 1st Sess. (1999), which resulted in Pub. L. 106-113, does not contain any discussion (other than the incorporated language) of S. 1948. A section-by-section analysis of S. 1948, however, was printed in the Congressional Record at the request of Senator Lott, See 145 Cong. Rec. S14,708-26 (1999) (daily ed. Nov. 17, 1999).

the application was pending before the Office, December 6, 2001 to April 2, 2007. (There were no periods excluded under 35 U.S.C. 154(b)(1)(B)(i)-(iii)). 336 days of patent term adjustment were accorded prior to the issuance of the patent for the Office failing to respond within specified time frames during the pendency of the application. All of these 336 days overlap with the 827 days for Office delay in issuing the patent. Accordingly, at issuance, the Office properly entered 491 days (827 - 336 days) additional days of patent term adjustment for the Office taking in excess of 3 years to issue the patent.

In view thereof, the Office maintains that the correct revised determination of patent term adjustment at the time of the issuance of the patent is 492 days. The Certificate of Correction was properly issued and no further action is required.

CONCLUSION

The request for reconsideration of the revised patent term adjustment is denied. This decision may be viewed as a final agency action. See MPEP § 1002.02(b).

The Office acknowledges that patentees previously submitted the \$200 fee set forth in §1.18(e) on application for patent term adjustment filed August 10, 2006. As this request pertains only to the over 3-year delay issue raised in the application for patent term adjustment, no additional fees are required.

Telephone inquiries specific to this matter should be directed to Nancy Johnson, Senior Petitions Attorney, at (571) 272-3219.



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