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JUN 13 2006

In re Application of  
Kamila Kiecker  
Application No. 09/902,814  
Filed: July 12, 2001  
Title of Invention:  
REUSABLE DIAPER WITH LINER

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: **OFFICE OF PETITIONS**  
:  
: ON PETITION  
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This is a decision on the Letter filed December 23, 2005, in response to a Decision dismissing a Petition to Withdraw the Holding of Abandonment. The Letter is properly treated as a Request for Reconsideration of Petition to Withdraw the Holding of Abandonment under 37 CFR 1.181(a). The delay in treating this petition is regretted.

The petition is denied.

Background

The above-identified application became abandoned for failure to reply in a timely manner to the Office communication mailed August 22, 2003. The Office communication set a shortened statutory reply period of one (1) month, and provided for extensions of time under 37 CFR 1.136(a). No reply having been received, the application became abandoned September 23, 2003. A Notice of Abandonment was mailed March 5, 2004.

The April 5, 2004 Petition

Applicant filed a petition to withdraw the abandonment of the application on April 5, 2005, wherein Applicant stated that a timely response was filed; however, Applicant provided no proof that a reply was filed, and a review of Office records revealed that no response had been filed. Applicant was so notified in a Decision dismissing the petition, mailed October 19, 2005. Applicant was advised that she may file a renewed petition addressing the reasons for dismissal.

The December 23, 2005 petition

Applicant filed a petition for reconsideration on December 23, 2005, along with "[p]roof of payment and distribution of \$215.00 on 6/14/2004 is enclosed."

The Decision was dismissed in a Decision mailed March 16, 2006, for failing to meet the requirements of a grantable petition. In the Decision dismissing the December 23, 2005 Petition, Applicant was advised that the application became abandoned for failure to reply to the Office communication mailed August 22, 2003. The Office communication set a shortened statutory reply period of one (1) month, and provided for extensions of time under 37 CFR 1.136(a). No reply having been received, the application became abandoned September 23, 2003. As such, and assuming, arguendo, that payment had been received in this Office on or about June 14, 2004, at that time the application had been abandoned for over eight (8) months. As such, the reply putatively filed would not have been timely.

Applicant was also advised that Office records do not reveal that a reply to the August 22, 2003 Office communication was filed. Applicant was informed that the USPTO file is the official record of the papers filed in this application. A review of the official file revealed that no reply to the August 23, 2003 Office communication was filed, since no such reply is present in the file. An applicant alleging that a paper was filed in the USPTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The assertion by Applicant contains the Applicants' recall of events, which are not more persuasive than the record of what was filed as shown by the official file.

The Decision noted that the best evidence of what was filed in this Office is an applicant's postcard receipt. "If a receipt of any item (e.g., paper or fee) filed in the USPTO is desired, it may be obtained by enclosing with the paper a self-addressed postcard specifically identifying the item. The USPTO will stamp the receipt date on the postcard and place it in the outgoing mail. A postcard receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all items listed thereon on the date stamped thereon by the USPTO.." MPEP § 503.

Applicant was also informed of the second method wherein an Applicant may demonstrate timely filing of papers with this



Office is under 37 CFR § 1.8, Certificate of mailing or transmission, which provides:

(a) Except in the situations enumerated in paragraph (a)(2) of this section or as otherwise expressly excluded in this chapter, correspondence required to be filed in the U.S. Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or (B) Transmitted by facsimile to the Patent and Trademark Office in accordance with § 1.6(d); and

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

37 CFR 1.8

The Decision concluded by informing applicant that Applicant had again failed to demonstrate that a timely and proper reply to the August 23, 2003 Office communication was filed in this Office. Accordingly, the petition to withdraw the abandonment of the application was dismissed. Applicant was advised that

After a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner. Therefore, it is extremely important that petitioner supply any and all relevant information and documentation with his request for reconsideration. The Commissioner's decision will be based solely on the administrative record in existence.

Decision dismissing December 23, 2005 Petition at p.3.

Applicant was strongly urged to file a petition stating that the delay was unintentional. Further to this, Applicant was informed that Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in was "unavoidable." An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required fee, currently \$750.00.

The Decision noted that 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 can not 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 revive under 37 CFR 1.137(b).

The instant Renewed Petition

Applicant files the instant renewed petition and provides that the delay was unintentional; however, no petition fee for a petition to revive based upon an unintentionally delayed reply to the Office communication has been filed. In fact, Applicant states in the last paragraph of the instant petition that "[t]he only way [she] will pay that amount is that [she] will need to have the utility patent in [her] hands within one month of receipt of the payment. Before [she] sends payment [she] will need a written statement to that agreement."

Applicant also reiterates that she paid using a credit card and form; however, she admits that she does not have copies of the putatively-filed forms, and as stated in previous decisions, the Office has no record of having received payment by credit card<sup>1</sup>.

Finally, Applicant files two United States Post Office ("USPS") receipts indicating that correspondence was sent to this Office on April 19, 2003; however, the Office communication in question

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<sup>1</sup> Applicant has confirmed via telephone conversation with this Attorney on April 11, 2006, that her credit card was never charged the amount putatively submitted.



was mailed on August 22, 2003. As such, the receipts from the USPS have no bearing on this case.

#### Analysis

A review of Office records reveals that Applicant did submit payment of \$215.00 to this Office in a check dated June 16, 2004. However, as stated in the Decision dismissing the December 23, 2005 petition, "assuming, arguendo, that payment had been received in this Office on or about June 14, 2004, at that time the application had been abandoned for over eight (8) months. As such, the reply putatively filed would not have been timely." Id. At p.2. The August 22, 2003 Office communication set a shortened statutory reply period of one (1) month, and provided for extensions of time under 37 CFR 1.136(a). Applicant states that she filed a reply; however, neither this Office nor Applicant has any record of having filed a reply prior to June 14, 2004. Because no reply was received, the application became abandoned September 23, 2003. Moreover, Applicant admits that she has no record that her credit card was charged the \$215.00. As such, Applicant was on notice that there may have been a problem with the fee submission. Applicant has failed to demonstrate that a timely reply to the August 22, 2003 Office communication was filed.

#### Conclusion

For the above stated reasons, the petition is denied.

Telephone inquiries concerning this matter should be directed to Petitions Attorney Derek L. Woods at (571) 272-3232.



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Director  
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