



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

Mark B. Wilson
FULBRIGHT & JAWORSKI L.L.P.
Suite 2400
600 Congress Avenue
Austin TX 78701

MAILED
MAR 28 2011
OFFICE OF PETITIONS

In re Patent No. 7,452,630 :
Thackery, et al. : DECISION ON REQUEST FOR
Issue Date: November 18, 2008 : PATENT TERM ADJUSTMENT
Application No. 10/228,734 :
Filed: August 27, 2002 :
Atty Docket No. ADAA:105USC1 :

This is a decision on the "PETITION UNDER 37 C.F.R. § 1.182" filed November 9, 2010, requesting that the patent term adjustment determination for the above-identified patent be changed from nine hundred and thirty-six (936) days to one thousand, three hundred and sixty-three (1,363) days. Patentees request this correction on the basis that the Office took in excess of three years to issue this patent and in light of the Court of Appeals for the Federal Circuit' decision in *Wyeth v. Kappos*, 2009-1120 (Fed. Cir. 1-7-2010).

The petition is hereby **DENIED**. This decision is a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See, MPEP 1002.02.

Your petition for recalculation/reconsideration of the USPTO's PTA determination for U.S. Patent No. 7,452,630 is dismissed as untimely. On February 1, 2010, the USPTO published a Federal Register notice that, *inter alia*, announced a limited waiver of the two-month deadline for filing a petition for reconsideration of a PTA determination under 37 CFR § 1.705(d). See Interim Procedure for Patentees to Request a Recalculation of the Patent Term Adjustment to Comply with the Federal Circuit Decision in *Wyeth v. Kappos* Regarding Overlapping Delay Provisions of 35 U.S.C. § 154(b)(2)(A), 75 Fed. Reg. 5043 (Feb. 1, 2010) (notice).

Specifically, patent owners were permitted to request recalculation of a patent's PTA in view of the Federal Circuit

decision *Wyeth v. Kappos*, 591 F.3d 1364 (Fed. Cir. 2010) up to 180 days after the grant of the patent. The USPTO determined not to accept any requests for PTA recalculation initially filed more than 180 days after patent grant, however, in view of the statutory judicial review provisions of 35 U.S.C. § 154(b)(4), which require that any civil action to challenge the USPTO's PTA determination be brought within 180 days of patent grant. The USPTO believes that statutory 180-day period for seeking court review of the USPTO's PTA determinations, particularly in view of the six-year statute of limitations that otherwise is applicable for actions under the Administrative Procedure Act, indicates a congressional intent that PTA issues be resolved shortly after a patent issues. The USPTO does not consider it likely that Congress created a scheme under which the time period to seek initial USPTO review of a PTA determination extends beyond the time period provided for a dissatisfied patentee to seek judicial review of the USPTO's PTA determination. This, the USPTO believes that the 180-day period in 35 U.S.C. § 154(b)(4) represents the outer limit on the USPTO's ability to conclude its PTA determination.

The present renewed petition under 37 CFR 1.182 is granted to the extent that the decision of September 10, 2010, has been reconsidered; however, the renewed petition requesting reconsideration of the PTA determination more than 180 days after the patent grant is **DENIED**.

Telephone inquiries specific to this matter should be directed to Kenya A. McLaughlin, Petitions Attorney, (571) 272-3222.



Anthony Knight
Director
Office of Petitions