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In re Application of :
Jeffrey Matos :
Application No. 12/657,155 : DECISION ON PETITION
Filed: January 14, 2010 :
Atty Docket No. 300682-00035 :
(MATOS 219) :

OFFICE OF PETITIONS

This is in response to the RENEWED REQUEST FOR RECONSIDERATION ON PETITION TO DESIGNATE AN EARLIER FILING DATE filed May 27, 2011, renewing a request that the filing date of the above-identified application be corrected from January 14, 2010 to January 13, 2010.

The renewed petition is **DENIED**.

This decision may be viewed as a final agency action within the meaning of 5 U.S.C 704 for purposes of seeking judicial review. See MPEP § 1002.02(b). The provisions of 37 CFR 1.181(f) do not apply to this decision.

BACKGROUND

Application papers in the above-identified application were considered received by the Office after having been *deposited* in the Express Mail service of the United States Postal service (USPS) on January 14, 2010. Accordingly, pursuant to 35 U.S.C. 21(a) and 37 CFR 1.10, the application was accorded a filing date of January 14, 2010.

By request for corrected filing receipt filed February 9, 2010 and initial petition filed May 18, 2010, petitioner requested that the Office accord the application a filing date of January 13, 2010 on the basis that the application was deposited with the USPS on January 13, 2010.

By decision mailed September 14, 2010, the Office dismissed the initial request to correct the filing date to January 13, 2010. By decision mailed March 29, 2011, the Office dismissed the renewed request to correct the filing date to January 13, 2010. Considering all the evidence presented, in sum, the decisions concluded that petitioner had not complied with the requirements of 37 CFR 1.10 for benefit of a filing date of January 13, 2010, as follows:

- Petitioner had not satisfied the requirement of 37 CFR 1.10(d)(2) that the "Express Mail" mailing label be placed on the papers that constitute the correspondence prior to the original mailing by "Express Mail." The "Express Mail" Label No. "EH 782 827 041 US" placed on the correspondence by the law firm that prepared the application was not the "Express Mail" number used to mail the correspondence. Applicant upon arrival at the USPS mailed the correspondence under a new "Express Mail" number and no change was made to the number placed on the correspondence. The actual "Express Mail" number of the label used is not on the correspondence. As such, petitioner could never establish that the "Express Mail" label number was placed on the correspondence prior to the original mailing as it simply was not.
- Petitioner was reminded that the Office does not grant requests to waive the requirement to place the number of the "Express Mail" mailing label on the papers that constitute the correspondence prior to the original mailing as this is an oversight that can be avoided by the exercise of reasonable care.
- Assuming *arguendo* that the correct "Express Mail" label number were on the application papers, petitioner had not provided persuasive evidence that the requested date of deposit, January 13, 2010, was the date of deposit with the USPS as shown by the "date-in" on the "Express Mail" label or other Official USPS notation. See 37 CFR 1.10(a)(2). The date-in space on the "Express Mail" label was blank and no USPS date-stamp was on the label. The only Official documentation uncovered with respect to the "Express Mail" mailing label used, the record from the USPS Track & Confirm system, supported the accorded filing date of January 14, 2010, as it showed that the correspondence was

considered by the USPS to have been accepted at 4:06 pm on January 14, 2010.

- The proffered receipt showing that \$18.30 worth of postage was purchased at 10:45:17 pm on January 13, 2010 was not considered an Official notation by the USPS of the date of deposit. Nor was the receipt persuasive that the requirements of 37 CFR 1.10 were met. It was concluded that the making of such a purchase does not establish that the application papers were deposited in USPS service *prior to the last scheduled pickup of the day.*

The instant renewed petition was filed on May 27, 2011. Petitioner submitted an additional declaration of applicant attesting to placing the application in a USPS drop box at the U.S. Postal Service Building on Eighth Avenue and 32nd Street on January 13, 2010 at about 10:45 pm. Specifically, applicant purchased postage, applied an "Express Mail" mailing label to the envelope and dropped the envelope in the "Express Mail" box within the lobby. In support of a conclusion that the correspondence was deposited on January 13, 2010, petitioner again supplies a copy of their \$18.30 postage receipt along with a copy of their EZ-Pass statement indicating that they entered the island of Manhattan on January 13, 2010, and exited on the same day at 11:17 pm.

Despite arguing entitlement to a filing date of January 13, 2010, petitioner acknowledges that on January 13, 2010 the service window was closed, prior to 10:00 pm. Thus, the service window was closed before the deposit of the application¹. Further, counsel attests to the fact that, when mail is deposited in the lobby of the USPS Building on Eighth Avenue and 32nd Street in New York City, after 5:00 pm, it is assigned a mailing date of the next day. Counsel states the preceding fact was confirmed by an official of the USPS and is expressly stated on the Postal Deposit Boxes in the lobby of the USPS Building.

STATUTE AND REGULATION

35 U.S.C. 21(a)

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office

¹ Petitioner states that prior to January 2010, it had remained open until at least midnight.

will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

37 CFR § 1.10(a)

- (1) 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 with the USPTO on the date of deposit with the USPS.
- (2) 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).

37 CFR 1.10(b) 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. Persons dealing indirectly with the employees of the USPS (such as by deposit 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. The paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon. See paragraphs (c), (d) and (e) of this section.

37 CFR 1.10(d) provides 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 the "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

The prior decisions dismissing the request to correct the filing date to January 13, 2010, and maintaining a filing date of January 14, 2010, are affirmed. Within the meaning of 35 U.S.C. §21(a) and 37 CFR 1.10, the application papers in the above-identified application are properly considered deposited with the USPS on January 14, 2010, and thus, considered filed with the Office on January 14, 2010. The application is not entitled to an earlier filing date of January 13, 2010.

The renewed petition did not overcome the prior conclusions that the "Express Mailing" label number used was not placed on the correspondence prior to the original mailing, and that there is no Official date-in or notation showing that the correct date of deposit is January 13, 2010.

Thus, the absence of the "Express Mail" mailing number on the correspondence is dispositive². As stated in MPEP 513, if the number of the mailing label did not appear on the correspondence as originally filed, relief will not be granted on petition under 37 CFR 1.10(c), (d), (e), (g) or (h), even if the party who filed the correspondence satisfies the other requirements of 37 CFR 1.10(c), 1.10(d), 1.10(e), 1.10(g), or 1.10(h).

Further, the renewed petition makes clear that the application papers were not entrusted directly to a USPS employee on January 13, 2010. Rather, the showing is that the correspondence was placed in a drop box *after* the last scheduled pickup for the day. The window to present the "Express Mail" mailing directly to a USPS employee had closed when applicant arrived at the USPS. The showing reveals that applicant expected the window to be open until midnight and did not realize that the last scheduled pickup for the drop box was 5 pm. The evidence in the form of statements from practitioner about what the USPS says the practice is with respect to the USPS branch used and the drop box corroborates the conclusion of the Office that the correspondence was deposited on January 14, 2010. The placement of the correspondence in the drop box on January 13, 2010 did not constitute a deposit with the USPS on January 13, 2010 as that USPS was no longer accepting deposits for January 13, 2010 via the drop box after 5 pm on January 13, 2010. The postage receipt and the EZ pass support a conclusion that applicant intended to deposit the papers in "Express Mail" on January 13, 2010, prior to the last scheduled pickup. However, applicant was not successful.

Petitioner has not met his burden of proof to establish a date of deposit with the USPS of January 13, 2010 in compliance with 35 USC 21(a) and 37 CFR 1.10.

² However, the correspondence as received remains entitled to a filing date of January 14, 2010. As further stated in MPEP 513, correspondence deposited with the USPS on or after December 2, 1996, and which is actually received by the Office will not be denied a filing date as of the "date-in" appearing on the "Express Mail" mailing label because the number of the "Express Mail" mailing label was not placed on the correspondence prior to the original mailing.

CONCLUSION

In view thereof, the petition is denied. It is concluded that, pursuant to 35 USC 21(a) and 37 CFR 1.10, the application papers are properly considered filed on January 14, 2010, the date of deposit with the USPS.

The application with a filing date of January 14, 2010 is being forwarded to the Technology Center for examination in due course.

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



Anthony Knight
Director
Office of Petitions