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OFFICE OF PETITIONS

In re Application of :
Gideon Samid :
Application No. 11/902,054 : DECISION ON PETITION
Filed: September 18, 2007 :
Title: Pinpen: A One-Way Graphic Generator :

This is a decision on the renewed petition filed May 4, 2009, which is being treated as a petition under 37 CFR 1.181 requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **DENIED**. No further consideration of this matter will be undertaken by the Office. Petitioner is not precluded from seeking revival of the present application under 37 CFR 1.137 as explained in the conclusion to this decision.

BACKGROUND

This application was held abandoned for failure to timely respond to the Notice to File Corrected Application Papers (Notice) of October 4, 2007, which set a two (2) month shortened statutory period for reply. No extensions of time under the provisions of 37 CFR §1.136(a) were obtained. A response to the Notice was not received. Accordingly, the above-identified application was held abandoned on December 5, 2007. A Notice of Abandonment was mailed on June 9, 2008.

A petition under 37 C.F.R. § 1.181 to withdraw the holding of abandonment filed June 27, 2008 was dismissed on August 29, 2008. A second petition filed under 37 CFR 1.181 was dismissed on August 8, 2008. A third petition filed under 37 CFR 1.181 was filed on January 23, 2009 and dismissed on March 2, 2009.

Petitioner contends that a response to the Notice to File Corrected Application Papers was submitted on or about November 26, 2007 via first class mail with sufficient postage and duly marked return address. Petitioner insists that the abandonment should be withdrawn because a response was filed and because the Office waited six months to notify petitioner that a response to the Notice was not received. Petitioner further speculates that the response to the Notice was misplaced by the USPTO or lost by the US Postal Service. Petitioner further argues since is no evidence that petitioner has lied to the Office a reasonable person would accept a copy of the reply submitted on June 27, 2008.

APPLICABLE RULES AND REGULATIONS

37 CFR § 1.8 Certificate of mailing or transmission sets forth in pertinent part:

(b) In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the U.S. Patent and Trademark Office after a reasonable amount of time has elapsed from the time of mailing or transmitting of the correspondence, or after the application is held to be abandoned, or after the proceeding is dismissed or decided with prejudice; or the prosecution of a reexamination proceeding is terminated pursuant to § 1.550(d) or § 1.957(b) or limited pursuant to § 1.957(c), or a requester paper is refused consideration pursuant to § 1.957(a), the correspondence will be considered timely if the party who forwarded such correspondence:

- (1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;
- (2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and
- (3) Includes a statement that attests on a personal knowledge basis or to the satisfaction of the Director to the previous timely mailing, transmission or submission. If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement. If the correspondence was transmitted via the Office electronic filing system, a copy of an acknowledgment receipt generated by the Office electronic filing system confirming submission may be used to support this statement.

ANALYSIS

On renewed petition, petitioner continues to argue that a response to the Notice to File Corrected Application Papers was submitted on November 26, 2007. A copy of the reply purportedly submitted on November 26, 2007 was provided on June 27, 2008. A review of the record confirms that the Office was not in receipt of the November 26, 2007 response. An applicant alleging that a paper was filed in the USPTO and later misplaced has the burden of proving by a preponderance of evidence. Neither petitioner's assertion of willingness to provide an affidavit or statement of fact attesting to the fact that a response was filed on November 26, 2007, nor petitioner's contention that he is not a liar is more persuasive than the Official file. Simply put, this is a matter of evidence that is of record that would support the contention that the response was received by the USPTO. No personal attacks are meant by this decision; it is merely a question of evidence that would support the decision

The copy of the reply shows that the response did not include a certificate of mailing pursuant to 37 CFR §1.8. Further, petitioner does not contend that a postcard receipt was submitted or that the response was submitted pursuant to the procedures set forth in 37 CFR §1.10. As such petitioner has failed to provide any evidence to support a reply to the

Notice to File Corrected Application Papers was ever timely submitted. Assuming arguendo the response was lost after receipt by the USPTO or by the USPS, if petitioner made use of the procedures under 37 CFR 1.8, 37 CFR §1.10 or MPEP 503 a copy of the response could have been used to establish a timely response was submitted. The fact that petitioner contends that the response was mailed at night and thus was unable to obtain certified mail status is not germane. Further, petitioner's manual recording in a 2007 organizer, would not rise to the level required to establish a response was timely submitted. The failure to make use of the procedures provided in the rules, regulations and the manual of patent examination procedure does not warrant a finding that the holding of abandonment should be withdrawn.

Petitioner's argument that there was Office delay in informing applicant that a response was not received is not persuasive to establish the petition should be withdrawn. The Notice to File Corrected Application Papers provided applicant with a two month extendable period to respond. As such the maximum period of reply with a request for extension of time and the appropriate fee expired on May 4, 2008. The mailing on the Notice of Abandonment on June 9, 2008 did not involve undue delay.

CONCLUSION

As such, the holding of abandonment will not be withdrawn.

Petitioner may wish to consider filing a petition stating that the delay was unintentional. 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 prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$810.00 petition fee.

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 cannot make a statement that the delay was unintentional unless the entire delay, including 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 revival under 37 CFR 1.137(b).

Telephone inquiries concerning this decision should be directed to Petitions Attorney, Charlema Grant at (571) 272-3215.


Anthony Knight
Director
Office of Petitions