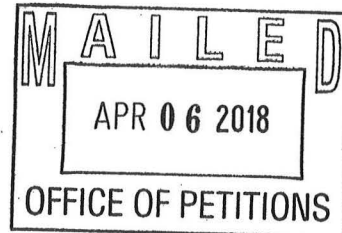




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Asha Nutrition Sciences, Inc.
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In re Application of
Urvashi Bhagat
Application No.: 13/332,251
Filed: December 20, 2011
For: LIPID-CONTAINING
COMPOSITIONS AND METHODS OF
USE THEREOF

DECISION ON PETITION

This is a decision on the petition filed on March 6, 2018 under 37 CFR 1.181, requesting that the Director exercise supervisory authority and overturn the decision of March 6, 2018 by the Director of Technology Center 1600 (Technology Center Director), which Technology Center Director decision refused to grant petitioner's request to assign the application to another examiner or United States Patent and Trademark Office (USPTO) official.

The petition to overturn the Technology Center Director's decision of March 6, 2018 and assign the application to another examiner or USPTO official is **DENIED**.

RELEVANT BACKGROUND

The above-identified application was filed on December 20, 2011, and claims benefit as a divisional application of prior-filed application No. 12/426,034.

Prosecution of the above-identified application resulted in a non-final Office action being mailed on April 14, 2015. The Office action of April 14, 2015 included, *inter alia*, a rejection of claims 94 and 101 under 35 U.S.C. § 102(b)¹ as being anticipated by U.S. Patent No. 5,549,905 to Mark

¹ Section 4 of the Leahy-Smith America Invents Act (AIA) designated 35 U.S.C. § 112, ¶¶ 1 through 6, as 35 U.S.C. §§ 112(a) through (f), effective as to applications filed on or after September 16, 2012. See Pub. L. No. 112-29, § 4, 125 Stat. 284, 293-97 (2011). Section 3 of the AIA revised 35 U.S.C. §§ 102 and 103, effective as to applications having any claim with an effective filing date on or after March 16, 2013. See Pub. L. No. 112-29, § 3, 125 Stat. at 285-293. Since the above-identified application was filed prior to September 16, 2012, and contains only claims

et al. The Office action of April 14, 2015 also stated that, claims 1 through 93 were previously cancelled, and claims 95, 102 through 104, 107, 108, 112 through 114, 116, 118, 119, 121 through 125, 128 through 137, 139, 140, and 142 through 176 were previously withdrawn from consideration.

A response to the non-final Office action of April 14, 2015 was filed on May 2, 2015, and a supplemental response was filed on June 13, 2015.

A Notice of Non-Responsive amendment was mailed on September 30, 2015. A response to the Notice of Non-Responsive amendment of September 30, 2015 was filed on September 30, 2015.

A non-final Office action was mailed on March 4, 2016. The Office action of March 4, 2016 included, *inter alia*: (1) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139, 140, 145 through 150, 153 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 101 as not directed to patent eligible subject matter; (2) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139, 140, 145 through 150, 153 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 112, ¶ 2, for failing to comply with its definiteness requirement; (3) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139, 140, 145, 147, 148, 153 through 157, 159 through 161, 164 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 102(b) as being anticipated by “Olives” (published March 14, 2006), as evidenced by “Olives Nutrient Analysis” (published March 14, 2006); and (4) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, , 139, 140, 145, 147 through 149, 153 through 157, 159 through 162, 164 through 166, 171, 177, and 178 under 35 U.S.C. § 102(b) as being anticipated by “Walnuts” (published November 9, 2006), as evidenced by “Walnuts Nutrient Analysis” (published November 9, 2006). The Office action of March 4, 2016 also acknowledged receipt of declarations under 37 CFR § 1.132 by Drs. Das, Rucker, and Rustagi filed May 2, 2015, and Dr. Erickson, filed June 13, 2015.

A response to the non-final Office action of March 4, 2016 was filed on July 24, 2016 amending claims 94 and 101.

A final Office action was mailed on December 21, 2016. The final Office Action of December 21, 2016 included, *inter alia*: (1) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139, 140, 145, 147 through 149, 153 through 157, 159 through 162, 164 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 101 as not directed to patent eligible subject matter; (2) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139, 140, 145 through 150, 153 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 112, ¶ 2, for failing to comply with its definiteness requirement; and (3) a rejection of claims 94, 95, 101, 108, 116, 119, 122 through 125, 128 through 132, 134, 137, 139,

with an effective filing date prior to March 16, 2013, this decision refers to the pre-AIA versions of 35 U.S.C. §§ 102, 103, and 112.

140, 145, 147 through 149, 153 through 157, 159 through 162, 164 through 166, 168, 171, 177, and 178 under 35 U.S.C. § 102(b) as being anticipated by “Olive Oil” (published July 14, 2007), as evidenced by Olive Oil Nutritional Profile (published July 14, 2007).

A reply under 37 CFR 1.116 to the final Office action of December 21, 2016 was filed on February 21, 2017. The reply under 37 CFR 1.116 of February 21, 2017 proposed to amend claims 94 and 101.

An advisory action was mailed on March 17, 2017. The advisory action of March 17, 2017 indicated that the amendment of February 21, 2107 would be entered for purposes of appeal.

A petition under 37 CFR 1.181 was filed on May 9, 2017, and supplemented on May 21, 2017, requesting that the finality of the Office action of December 21, 2016 be withdrawn.

A decision by Technology Center Director was mailed on May 31, 2017. The decision of May 31, 2017 denied the petition of May 9, 2016.

A petition under 37 CFR 1.181 was filed on June 5, 2017, and replaced by the petition under 37 CFR 1.181 filed on June 6, 2017. The June 6, 2017 petition under 37 CFR 1.181 requests that the Director exercise his supervisory authority over the Technology Center Director, and specifically requests that the examiner be directed to withdraw the finality of the Office action of December 21, 2016, consider the declarations under 37 CFR § 1.132 filed on May 2, 2015, and respond to each of petitioner’s arguments.

The petition of June 5, 2017, was denied by the Deputy Commissioner for Patent Examination Policy in a decision of June 21, 2017.

A Notice of Abandonment was mailed on August 11, 2017, stating that the above-referenced application is abandoned due to insufficient payment of the fee for the request for continued examination filed May 22, 2013.

A petition under 37 CFR 1.181 was filed on August 17, 2017 requesting that the holding of abandonment be withdrawn.

The petition of August 17, 2017 was granted in a decision of October 6, 2017. A supplemental decision was issued on October 12, 2017, resetting the time period for filing an appeal brief from the mailing date of the petition decision of October 6, 2017.

A reply under 37 CFR 1.116 to the final Office action of December 21, 2016 was filed on December 5, 2017. The reply under 37 CFR 1.116 of December 5, 2017 proposed to amend claims 94, 101, 119, 140, and 171.

An advisory action was mailed on January 18, 2018. The advisory action of January 18, 2018, indicated that the amendments filed on December 5, 2017 would not be entered for purposes of appeal.

A petition under 37 CFR 1.181 was filed on February 7, 2018, requesting a change of examiner.

The petition of February 7, 2018 was denied by the Technology Center Director in a decision of March 6, 2018.

A petition under 37 CFR 1.181 was filed on March 6, 2018, requesting review of the March 6, 2018 decision by the Technology Center Director and reassignment of the above-identified application to the *Pro Se* Examining Art Unit, or in the alternative, to the Commissioner for Patents for examination.

STATUTE AND REGULATION

35 U.S.C. § 131 provides that:

The Director shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefor.

35 U.S.C. § 132 provides that:

(a) Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

(b) The Director shall prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant. The Director may establish appropriate fees for such continued examination and shall provide a 50 percent reduction in such fees for small entities that qualify for reduced fees under section 41(h)(1).

37 CFR 1.181(f) provides that:

The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

OPINION

Petitioner requests that the application be reassigned to the *Pro Se* Examining Art Unit or alternatively, assigned to the Commissioner for Patents. Petitioner alleges that the actions and conduct of the examiners and supervisors involved with the prosecution of the instant application were improper and biased against the petitioner.

A petitioner is not entitled to choose his or her examiner, Supervisory Patent Examiner, or other deciding official. *See In re Arnott*, 19 USPQ2d 1049, 1052 (Comm'r Pat. 1991). A Technology Center Director and Supervisory Patent Examiner have considerable latitude as part of their day-to-day management of a Technology Center or Group Art Unit (respectively) in deciding the assignment of applications to examiners and the transfer of applications between examiners. A petitioner seeking to invoke the Director's supervisory authority to overrule the Technology Center Director and direct the Technology Center Director to assign an application to a new examiner must demonstrate improper conduct amounting to bias or the appearance of bias on the part of the examiner. *See In re Ovshinsky*, 24 USPQ2d 1241, 1251-1252 (Comm'r Pats. 1992). The record of the instant application, including the exhibits provided by the petitioner, does not indicate improper conduct amounting to bias or the appearance of bias on the part of the examiner or supervisor so as to warrant directing the Technology Center Director to transfer the above-identified application to a new examiner or the *Pro Se* Examining Art Unit.

Petitioner's complaint specifically alleges the examiners and supervisors involved in the instant application acted improperly and with bias against the petitioner based on perceived delays in issuing certain Office actions and certain statements allegedly made by the examiners and supervisors. Petitioner also contends the examiner attempted improper restrictions and maintained improper rejections, thus, further evidencing bias against petitioner. The examination of the instant application has been carefully reviewed, and there is no evidence of bias or improper conduct therein on the part of the examiner that would warrant replacing him with another, or transferring the application to the *Pro Se* Examining Art Unit for examination. The alleged improprieties cited by petitioner do not evidence bias or prejudice on the part of the examiners or supervisors. For example, the timeliness of Office actions issued in the instant application do not appear to be extraordinary. Also, the allegations of certain statements made by the examiners and supervisors lack context, substantiation, and/or sufficient supporting

evidence to demonstrate bias or prejudice against petitioner. Lastly, reasonable people can disagree as to whether a given claim is patentable and on what basis. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969). A mere difference of opinion between the examiner and the petitioner as to the patentability of one or more claims or the propriety of restrictions of the claims does not evidence bias or improper conduct on the part of the examiner, much less warrant his replacement.²

In view of the above, the petitioner has not demonstrated improper actions amounting to bias or the appearance of bias on the part of the examiners or supervisors involved with the prosecution of the instant application.

DECISION

The petition to direct the Technology Center Director to transfer the above-identified application to the *Pro Se* Examining Art Unit or other USPTO official is **DENIED**.

This constitutes a final decision on this petition. No further requests for reconsideration will be entertained. Judicial review of this petition decision may be available upon entry of a final agency action adverse to the petitioner in the instant application (e.g., a final decision by the Patent Trial and Appeal Board). *See* MPEP § 1002.02.

While the circumstances of the above-identified application do not warrant directing the Technology Center Director to reassign the above-identified application to another examiner or other USPTO official, in the event that petitioner timely files an appeal brief or request for continued examination in the above-identified application, the USPTO will assess whether the preferable course of action is to transfer the above-identified application to the *Pro Se* Examining Art Unit.

The time period for filing an appeal brief continues to run from the mailing date of the petition decision of October 6, 2017. Alternatively, petitioner may file a request for continued examination within the time period for filing an appeal brief. Failure to file a timely an appeal

² Petitioner also has submitted a number of electronic mail messages to the USPTO including comments, and articles by members of the public, concerning the decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in application no. 12/426,034. These electronic mail messages are being made of record in the above-identified application. That petitioner and members of the public disagree with the decision by the Federal Circuit in application no. 12/426,034 does not demonstrate improper conduct, or bias or the appearance of bias, on the part of the examiner in the above-identified application.

brief (or request for continued examination) will result in dismissal of the appeal (37 CFR 41.37(b)) and abandonment of the above-identified application (MPEP § 1215.01).

A handwritten signature in black ink, appearing to read 'R. W. Bahr', is positioned above the printed name.

Robert W. Bahr
Deputy Commissioner for
Patent Examination Policy