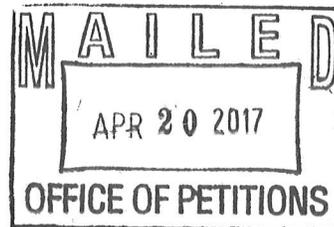




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In re Patent No. 9,414,812 :
Arcadi Elbert : DECISION
Issue Date: 08/16/2016 : ON REQUEST FOR
Application No. 13/894,045 : RECONSIDERATION OF
Filing or 371(c) Date: 05/14/2013 : PATENT TERM ADJUSTMENT
Docket No.: 58534.320.1 :

This is a decision on the patent term adjustment in response to the “PETITION REQUESTING RECONSIDERATION OF THE PATENT TERM ADJUSTMENT AFTER ISSUANCE OF THE PATENT” filed October 13, 2016, requesting that the patent term adjustment determination for the above-identified patent be changed from 224 days to 273 days.

The request is **DENIED**.

This decision is the Director's decision on the applicant's request for reconsideration for purposes of seeking judicial review under 35 U.S.C. §154(b)(4).

On August 16, 2016, the above-identified application matured into U.S. Patent No. 9,414,812. The patent issued with a PTA of 224 days. The present request for redetermination of the patent term adjustment was timely filed within two months of the issue date.

The present petition

Patentee argues that the Office improperly calculated “B” delay as 45 days. According to Patentee, “B” delay should be 94 days. The number of days of “A” delay and Applicant delay are not in dispute.

Discussion

Patentee’s argument has been carefully considered. Upon review, the USPTO finds that Patentee is entitled to **224** days of PTA. The Office has revisited the amount of “B” delay under 35 U.S.C. § 154(b)(1)(B) and the amount of overlapping days under 35 U.S.C. § 154(b)(2)(A) pursuant to the Federal Circuit’s decision in *Novartis AG v. Lee*, 740 F.3d 593 (Fed. Cir. 2014).

As for the amount of “B” delay, the Federal Circuit reviewed the statutory interpretation of 35 U.S.C. § 154(b)(1)(B)(i) and issued a decision regarding the effects of a Request for Continued Examination (“RCE”) on “B” delay in *Novartis AG v. Lee*, 740 F.3d 593 (Fed. Cir. 2014). In *Novartis*, the Federal Circuit agreed with the Office that “no [“B” delay] adjustment time is available for any time in continued examination, even if the continued examination was

initiated more than three calendar years after the application's filing." *Novartis*, 740 F.3d at 601. However, the *Novartis* court found that if the Office issues a notice of allowance after an RCE is filed, the period after the notice of allowance should not be excluded from the "B" delay period but should be counted as "B" delay. *Id.* at 602. The Federal Circuit issued its mandate in the *Novartis* appeal on March 10, 2014.

Pursuant to the *Novartis* decision, the USPTO has determined that the patentee is entitled to 45 days of "B" delay. In this case, the application was filed on May 14, 2013, and the patent issued on August 16, 2016; thus, the application was pending for 1191 days. During this time, Applicants filed an RCE on February 24, 2016, and the Office mailed a Notice of Allowance on April 12, 2016. Under 35 U.S.C. § 154(b)(1)(B)(i), there was one time period consumed by continued examination ("RCE period") – from February 24, 2016 until the Notice of Allowance was issued on April 12, 2016 – *i.e.* 49 days. Subtracting the RCE period from the total number of days the application was pending results in $1191 - 49 = 1142$ days. Thus, for purposes of "B" delay, the application was pending for $1142 - 1097$ [*i.e.*, the 3 year delay period] = 45 days beyond the 3-year anniversary of the filing date.

Overall PTA Calculation

Formula:

"A" delay + "B" delay + "C" delay - Overlap - applicant delay = X

USPTO's Calculation:

$246 + 45 + 0 - 0 - 67 = 224$

Patentee's Calculation:

$246 + 94 + 0 - 0 - 67 = 273$

Conclusion

Patentee is entitled to PTA of two hundred twenty-four (224) days. Using the formula "A" delay + "B" delay + "C" delay - overlap - applicant delay = X, the amount of PTA is calculated as following: $246 + 45 + 0 - 0 - 67 = 224$ days.

Telephone inquiries specific to this matter should be directed to Attorney Advisor Cliff Congo at (571) 272-3207.

/ROBERT CLARKE/
Robert A. Clarke
Patent Attorney
Office of the Deputy Commissioner
for Patent Examination Policy