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J.C. PATENTS INC.
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In re Patent No. 6,094,367 :
Issue Date: 25 July, 2000 :
Application Number: 09/343,042 :
Filing Date: 29 June, 1999 : OFFICE OF PETITIONS
Attorney Docket No.: JCLA4030 : ON PETITION

This is a decision on the petition filed on 20 November, 2008, pursuant to 37 C.F.R. §1.378(b) to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent, which is treated as a petition under 37 C.F.R. §1.378(e) requesting reconsideration of a petition for acceptance of payment of a maintenance fee for the above-referenced patent as having been delayed due to unavoidable delay. (See: 37 C.F.R. §1.378(e).¹)

Petitioner has authorized the petition fee herein to be charged to Deposit Account 50-0710, Order No. JCLA4030, and that fee (\$400.00) is now charged.

The request to accept the delayed payment of the maintenance fee is **DENIED**.²

BACKGROUND

Patent No. 6,094,367 (the '367 patent) issued on 25 July, 2000. The first maintenance fee could have been paid during the period from 25 July, 2003, through 25 January, 2004, or, with a surcharge, during the period from 26 January through (Monday) 26 July, 2004. Accordingly, the patent expired after midnight 25 July, 2004, for failure to pay timely the first maintenance fee.

¹ A grantable petition to accept a delayed maintenance fee payment under 37 C.F.R. §1.378(b) must include:

- (1) the required maintenance fee set forth in §1.20(e) through (g);
- (2) the surcharge set forth in §1.20(f)(1); and
- (3) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

² This decision may be regarded as a final agency action within the meaning of 5 U.S.C. §704 for purposes of seeking judicial review. See MPEP §1002.02.

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The original petition under 37 C.F.R. §1.378(b) was filed (with fee) on 22 August, 2007, and dismissed on 22 September, 2008. The instant petition was filed (with fee authorization) on 20 November, 2008.

A petition to accept the delayed payment of a maintenance fee under 35 USC §41(c) and 37 C.F.R. §1.378(b) must be accompanied by:

- (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely;
- (2) payment of the appropriate maintenance fee, unless previously submitted; and
- (3) payment of the surcharge set forth in 37 C.F.R. §1.20(i)(1).

The instant petition fails to satisfy the showing requirement (1) described above.

As with the original petition, this petition lacks: an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, as set forth above.

STATUTE AND REGULATION

The grant of authority at 35 U.S.C. §41(c)(1) provides that:

The Director may accept the payment of any maintenance fee required by subsection (b) of this section...after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable.

The regulations 37 C.F.R. §1.378(b)(3) thus set forth that any petition to accept delayed payment of a maintenance fee must include:

A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date, and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. (Emphasis supplied.)

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OPINION

The Director may accept late payment of the maintenance fee under 35 U.S.C. §41(c) and 37 C.F.R. §1.378(b) if the delay is shown to the satisfaction of the Director to have been “unavoidable.”³

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. §133 because 35 U.S.C. §41(c)(1) uses the identical language, i.e., “unavoidable” delay.⁴ Decisions reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable.⁵ In addition, decisions on revival are made on a “case-by-case basis, taking all the facts and circumstances into account.”⁶ Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a Petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay.⁷

In essence, Petitioner must show that he/she was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fee came due, was “unavoidably” prevented from making the maintenance fee payment until the petition was filed.

In determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person.⁸

It is incumbent upon the patent owner to implement steps to schedule and pay the fee, or obligate another to do so.⁹

The regulations at 37 C.F.R. §1.378(b)(3) require a showing of the steps in place to pay the maintenance fee, and the record currently lacks a showing that any steps were employed by Petitioner or anyone else.

³ 35 U.S.C. § 41(c)(1).

⁴ *Ray v. Lehman*, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting *In re Patent No. 4,409,763*, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)).

⁵ *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term “unavoidable” is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful man in relation to their most important business”); *In re Mattullath*, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

⁶ *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

⁷ *Haines v. Quigg*, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

⁸ *Ray*, 55 F3d at 608-609, 34 USPQ2D at 1787.

⁹ See: *California Medical Products v. Technol. Med. Prod.*, 921 F.Supp 1219, 1259 (D. Del. 1995).

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In the absence of a showing that a Petitioner or anyone else was engaged in tracking the maintenance fee due dates, and that party had in fact been tracking the due dates with a reliable tracking system, such as would be used by prudent and careful persons in relation to their most important business, a Petitioner cannot reasonably show that the delay was unavoidable delay.¹⁰ Put otherwise, other issues (e.g., whether patentee/assignee/licensee's financial problems or other matters of the day) are immaterial in the absence of a showing that these, and not the lack of any steps in place to pay the fee, caused or contributed to the delay.¹¹

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 C.F.R. §1.378(b)(3).

The Office has made clear to patent holders that they, not the Office, are responsible for ensuring timely payment of maintenance fees due, and that the Office has no responsibility for notifying patent holders of maintenance fee payment due dates.

The Commentary at MPEP §2590 provides in pertinent part:

In view of the requirement to enumerate the steps taken to ensure timely payment of the maintenance fee, the patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay. See *Patent No. 4,409,763, supra*. See also Final Rule entitled "Final Rules for Patent Maintenance Fees," published in the *Federal Register* at 49 *Fed. Reg.* 34716, 34722-23 (August 31, 1984), and republished in the *Official Gazette* at 1046 *Off. Gaz. Pat. Office* 28, 34 (September 25, 1984). Under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent. The lack of knowledge of the requirement to pay a maintenance fee and the failure to receive the Maintenance Fee Reminder will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office. (Emphasis supplied.)

Submitted on Original Petition

It is noted from the outset that the original petition provided no documentation in support, save for what is identified as the documentation of the termination of the Assignee's employee (whom

¹⁰ *In re Katrapat*, 6 USPQ2d 1863, 1867-1868 (Comm'r Pat. 1988); *California, supra*.

¹¹ See: *Ex parte Murray*, 1891 Dec. Comm'r Pat. 130, 131 (1891). And in such case, a showing of unavoidable delay based upon financial condition must establish that the financial condition of the Petitioner during the entire period of the delay was such as to excuse the delay.

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the petition suggested oversight patent matters for the Assignee)—and this transaction was dated 17 May, 2002—more than two (2) years before the expiration of the instant patent.

In the original petition:

- Petitioner stated that:

—Chun-Ming Shih (Mr. Shih) was in charge of all patent-related matters for Assignee (mis-identified as Patentee) (Petitioner statement, page 1);

—Sometime before 1 February, 2001, Mr. Shih notified Sherry Liao (Ms. Liao) the local representative of Petitioner, that Petitioner was no longer to be responsible for maintenance of the instant patent (Petitioner statement, page 1) as the Assignee sought to control costs;

—Ms. Liao confirmed this change with Mr. Shih (Petitioner statement, page 1);

—Assignee had been reasonable and prudent in its monitoring of docketing and deadline matters as to patents, however, it was not until August 2007 that Yu-Yin Chen (Ms. Chen) learned that, consistent with the instructions of Mr. Shih, Petitioner no longer was overseeing the maintenance of the instant patent (Petitioner statement, page 1).

- Ms. Chen stated that:

—She undertook oversight of Assignee's patent portfolio on 8 June, 2006 (Ms. Chen statement, page 1);

—She was preceded in this position by Hsin-I Ku (Ms. Ku), and Ms. Ku was preceded in the position by Jiang-Wen Yu (Mr. Yu), who ended his employment on 26 May, 2004. No other information is provided about these persons or when she began and ended her duties in this regard. (Ms. Chen statement, pages 1-2);

—The expiration of the instant patent was not discovered until the Assignee finally undertook an audit of patent matters in August 2007 (Ms. Chen statement, page 1);

—This August 2007 discovery was the first that Ms. Chen or the Assignee knew of the expiration of the instant patent (Ms. Chen statement, page 1).

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- Ms. Liao stated that:

—She oversees operation of patent maintenance fee work for Petitioner's firm, J.C. Patents (Ms. Liao statement, page 1);

—She received notice from Mr. Shih at sometime prior to 1 February, 2001 that the Assignee would monitor the maintenance fee matters for the instant patent (Ms. Liao statement, page 1);

—On 1 February, 2001, she confirmed this with Mr. Shih (Ms. Liao statement, page 1); and

—Thereafter she deleted/removed the maintenance fee data for the instant patent from the statement, page 1).

Moreover, there was no documentation accompanying the original petition to evidence:

- Notice from Mr. Shih/Assignee to Petitioner to terminate its maintenance fee efforts with regard to the instant patent;
- Notice from Petitioner to Mr. Shih/Assignee of the due dates for maintenance fees in this matter;
- Acknowledgement by Mr. Shih/Assignee of the due dates for maintenance fees in this matter;
- The calendaring by Mr. Shih/Assignee of the due dates for maintenance fees in this matter;
- Any effort by Assignee to audit its patent matters between the data of Mr. Shih's termination of his employment with the Assignee (17 May, 2002) and August 2007— notwithstanding the fact that there were four different people—to wit: Mr. Shih, Mr. Yu, Ms. Ku and Ms. Chen—with oversight duties in this area in the period from May 2002 through August 2007
- Assignee's patent maintenance system.

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Submitted on Request for Reconsideration

The sum total of Petitioner's submission on request for reconsideration was as follows:

- three (3) pages of what the petition describes as “bibliography data of [the instant] patent/patent application, legal status thereof, and monitoring/control thereof”¹² (notably there is no explanation of the meaning of “legal status thereof, and monitoring/control thereof”); and
- a seven- (7-) paragraph statement by Huang Chin Yi (Mr Chin Yi), now averred to be the Deputy Manager of IP administration, ASUSTek Computer, Inc., the averred assignee.

Mr. Chin Yi stated that:

- the assignee introduced an internal patent management and docketing system “in the beginning of 2002” for the purpose of monitoring and controlling each case owned by the assignee;
- the “regular flow of managing annuity (sic) for a patent owned by the assignee includes periodically generating a deadline list on which annuities or maintenance fees to be paid are enumerated, actually making the payment for said to-be-paid annuities or maintenance fees, and manually inputting the date of payment. The system was designed to automatically overwrite the outdated deadlines of paying the previous maintenance fees once the same have been paid and such payments are recorded in the system”;
- “on account of personnel shift, an audit of patent matters had been undertaken through the PAIR system under the instruction of the assignee, and the non-payment of the 3.5th – 7.5th (sic) year maintenance fee for the subject patent was then found. Nonetheless, the record showing in the system indicated the next fee due is the 7.5th – 11.5th year maintenance fee. There appeared to be an error occurring in the system and resulting in absence of the correct deadline with regards to the payment of the 3.5th – 7.5th (sic) year maintenance fee for the subject patent in the year of 2002. Namely the due date for paying the 3.5th – 7.5th (sic) year maintenance fee for the above-reference patent has never been showing in the system” (emphasis added);
- “I have been exercising great care and diligence in scrutinizing the system but fail to locate the system bug which appears to arise out of unknown reasons. Such an unforeseen fault occurred without deceptive intent.”

¹² Petition, at page 2-3.

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The indication—though certainly not expressed anywhere in statements or petitions—is that the assignee’s internal “Disclosure No.,” or docket/reference number for the instant ’367 patent is “0870015-US.” (See: “Attachment A—Bibliographic Data Sheet”)

The record is silent as to any system in place between the date of issue and “the beginning of 2002”—at which time assignee finally “introduced an internal patent management and docketing system.”

With regard to the period after “the beginning of 2002” when assignee “introduced an internal patent management and docketing system” (the system), the record appears to contain no indication (as to statement and documentary support) that:

- proper data was entered into the system as to the appropriate and statutory timetable for payment of the maintenance fees due for the instant ’367 patent with regard to the first, second and third maintenance fees; or
- the system ever contained the correct data for the first and second maintenance fees— notably, the only evidence of record is that the “Attachment B—Legal Status.”

(Neither the “Disclosure No. 0870015-US” nor any other apparent reference to the ’367 patent is evidence on the “Attachment C—Monitoring and Control Page” submitted by Petitioner as the attachment to Mr. Chen Yi’s statement.)

Thus, there is no statement and documentary support of record that there was in place as to the instant ’367 patent a system for/scheduling of payment of the first maintenance fee as of:

- the opening and closing of the first window for payment or the second window for payment or the third window for payment of that maintenance fee.

Even if it had been an error of Counsel that caused the delay herein—and the record is silent as to such a suggestion—the general rule is that errors of a party’s Counsel are imputed to and bind the party by the consequences, for it is the party who made the selection of Counsel.¹³

Thus, the showing of record as of this writing is insufficient to establish adequately that Petitioner’s entire delay in paying the first maintenance fee from after midnight 25 July, 2004 until the petition was filed on or about 22 August, 2007 (and subsequently renewed on 20

¹³ *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390-91 (1962).

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November, 2008), were due to unavoidable delay within the meaning of 35 U.S.C. §41(c) and 37 C.F.R. §1.378(b).

Petitioner has not addressed the explicit requirements set forth in the 22 September, 2008, decision as to Petitioner's burden on renewed petition:

The regulations at 37 C.F.R. §1.378(b)(3) state that any petition to accept delayed payment of a maintenance fee must include:

A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date, and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

In any future filing, this showing should include, but is not limited to, docket records, tickler reports, and file jacket entries for this application, and documents regarding the alleged cause of the delay and copies of any documents referred to in Petitioner's statement as to the cause of the unavoidable delay are required. All the causes which contributed to the failure to timely pay the maintenance fee must be presented and supported with appropriate evidence.¹⁴ (In general, a Petitioner should identify the party(ies) responsible for making the payment: A showing must be made (with supporting documents) outlining the efforts made to ensure timely payment of the maintenance fee—including scheduling and calendaring information, appointment of an individual with the authority and responsibility to pay the fee, and detailing of the causes for a failure in that process.)

Instead Petitioner submitted but generalities, with little substance and no documentation supporting the averments—particularly the averments of what was not done and why.

This petition does not satisfy the requirement of 37 C.F.R. §1.378(b)(3). As discussed below, the statements and documents presented in the petition fail to satisfy the showing required to establish unavoidable delay within the meaning of 37 C.F.R. §1.378(b).

¹⁴ The showing must also enumerate the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. Statements from all persons who contributed to the delay are also required.

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The statute, 35 U.S.C. §41(c)(1), does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the Petitioner has failed to carry his or her burden to establish that the delay was unavoidable.¹⁵ The statute, 35 U.S.C. §133, does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing. Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Director that the delay in payment of a maintenance fee is unavoidable.¹⁶

Because 35 U.S.C. § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. §133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.¹⁷ That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. §41(c) and 37 C.F.R. §1.378(b)(3) requires a showing of the steps taken by the responsible party to ensure the timely payment of the second maintenance fee for this patent.¹⁸

There are three periods to be considered during the evaluation of a petition under 37 C.F.R. §1.378(b):

- (1) The delay in reply that originally resulted in expiration;
- (2) The delay in filing an initial petition pursuant to §1.378(b) to reinstate the patent; and
- (3) The delay in filing a grantable petition pursuant to §1.378(b) to reinstate the patent.¹⁹

At the outset and as discussed thoroughly above, the showing is not persuasive with regards to items (1) and (2).

Petitioner has provided no clear explanation supported by documentary evidence as to the mechanism by which the delay occurred with the resulting expiration of the instant patent or as to a timely filing of a petition to reinstate.

¹⁵ See *Commissariat A. L'Energie Atomique v. Watson*, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960).

¹⁶ See *Rydeen v. Quigg*, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), *aff'd* 937 F.2d 623 (Fed. Cir. 1991)(table), *cert. denied*, 502 U.S. 1075 (1992); *Ray v. Lehman*, *supra*.

¹⁷ *Ray*, 55 F.3d at 609, 34 USPQ2d at 1788.

¹⁸ *Id.*

¹⁹ See *Changes to Patent Practice and Procedure: Final Rule Notice*, 62 Fed. Reg. 53131 at 53158 (October 10, 1997).

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In the response filed on 20 November, 2008, Petitioner and the assignee failed to address the instant matter in/with the step-by-step showing supported by statements of the interested parties/parties responsible for payment of the maintenance fee(s)—combined with documentary support for those showings/statements—as discussed in detail in the guidance in the Commentary at MPEP §2590.

Thus, the petition does not satisfy the requirements of 37 C.F.R. §1.378(b)(3).

The statements presented in the petition fail to satisfy the showing required to establish unavoidable delay within the meaning of 37 C.F.R. §1.378(b). (Petitioner's attention is drawn to the guidance in the Commentary at MPEP §2590.)

The provisions of 35 U.S.C. §41(c)(1) do not require an affirmative finding that the delay was avoidable, but only an explanation as to why the Petitioner has failed to carry his or her burden to establish that the delay was unavoidable.²⁰ The provisions of 35 U.S.C. §133 do not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing.

Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Director that the delay in payment of a maintenance fee is unavoidable.²¹

Because 35 USC § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 USC § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.²² That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 C.F.R. §1.378(b)(3) requires a showing of the steps taken by the responsible party to ensure the timely payment of the maintenance fee for this patent.²³

Petitioner has made no showing in support of the averment—in that Petitioner has provided almost no appropriate documentation.

Simply stated, neither Petitioner nor the assignee has made a showing that—at the time(s) the maintenance fee and/or maintenance fee and surcharge were due for the instant patent—a system

²⁰ See *Commissariat A. L'Energie Atomique v. Watson*, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960).

²¹ See *Rydeen v. Quigg*, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), *aff'd* 937 F.2d 623 (Fed. Cir. 1991)(table), *cert. denied*, 502 U.S. 1075 (1992); *Ray v. Lehman*, *supra*.

²² *Ray*, 55 F.3d at 609, 34 USPQ2d at 1788.

²³ *Id.*

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was in place for the payment of the fee(s). The showing of record is that, rather than unavoidable delay—i.e., the failure of a system—there was no maintenance fee system operated by Assignee with regard to the instant patent when the first maintenance fee came due. Thus, given the absence of a system to maintain the instant patent, there can be no failure of the system. The assignee's failure to demonstrate such a system does not evidence or otherwise constitute unavoidable delay.²⁴

There is only a suggestion that Assignee changed its maintenance efforts in regard to the instant matter for whatever reason that change was made.

A showing of diligence in matters before the Office is essential to support a finding of unavoidable delay herein.²⁵ There is no "sliding scale" based upon the priority given to this maintaining this patent in force, or more diligently seeking reinstatement, vis-a-vis other matters by Petitioner. The issue is solely whether the maintenance, or reinstatement, of the patent at issue was actually conducted with the care or diligence that is generally used and observed by prudent and careful persons in relation to their most important business.

The delay was not unavoidable. The record fails to adequately evidence that they have exercised the due care and diligence observed by prudent and careful persons, in relation to their most important business, which is necessary to establish unavoidable delay²⁶ as to payment of the first maintenance fee for this specific patent.

The record fails to disclose that Assignee took reasonable steps to ensure timely payment of the maintenance fee.

In fact, the record indicates no clear steps were taken by Assignee to ensure timely payment of the maintenance fee.

Since no clear steps were taken by Assignee, the provisions of 37 CFR 1.378(b) precludes acceptance of the delayed payment of the maintenance fee due to unavoidable delay.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

²⁴ See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

²⁵ See Futures Technology, Ltd. v. Quigg, 684 F. Supp. 430, 431, 7 USPQ2d 1588 (E.D. Va. 1988)(applicant's diligent inquiry into the status of the application is required to show unavoidable delay); Douglas v. Manbeck, 21 USPQ2d 1697, 1699-1700 (E.D. Pa. 1991), *aff'd*, 975 F.2d 869, 24 USPQ2d 1318 (Fed. Cir. 1992) (even representation by counsel does not relieve the applicant from his obligation to exercise diligence before the USPTO; applicant's lack of diligence extending two and one half years overcame and superseded any omissions by his counsel).

²⁶ Pratt, supra.

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The Office is unable to grant the requested relief because Petitioner has not provided a showing that the delay was unavoidable.

CONCLUSION

The prior decision which refused to accept under 37 C.F.R. §1.378(b) the delayed payment of a maintenance fee for the above-identified patent has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. §41(c)(1) and 37 C.F.R. §1.378(b).

In summary, the showing of record has been considered, but does not rise to the level of unavoidable delay.

The petition under 37 C.F.R. §1.378(e) is **denied**.

As stated in 37 C.F.R. §1.378(e), no further reconsideration or review of the decision refusing to accept the delayed payment of the maintenance fee under 37 C.F.R. §1.378(e) will be undertaken.

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.)

Since this patent will not be reinstated, a refund check covering, the maintenance fee and surcharge fee, less the \$400.00 fee for the present request for reconsideration, has been scheduled.

As stated in 37 C.F.R. §1.378(e), no further reconsideration or review of this matter will be undertaken.

Telephone inquiries regarding this decision should be directed to John J. Gillon, Jr., attorney, at 571-272-3214.



Charles A. Pearson
Director, Office of Petitions