



Paper No. 13

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**OFFICE OF PETITIONS**

In re Patent No. 5,439,202 :  
Issue Date: August 8, 1995 :  
Application No. 08/114,151 :  
Filed: September 1, 1993 :  
Attorney Docket No.: SRR 100-A :

ON PETITION

This is a decision on the "REQUEST FOR RECONSIDERATION [37 CFR 1.378(e)] PETITION TO ACCEPT AN UNAVOIDABLY DELAYED PAYMENT OF A MAINTENANCE FEE", filed March 17, 2008, in response to a prior decision mailed January 15, 2008, refusing to accept under 37 CFR 1.378(b) the delayed payment of a maintenance fee for the above-identified patent.

The petition under 37 CFR 1.378(e) is **DENIED**.<sup>1</sup>

BACKGROUND

The patent issued August 8, 1995. The second maintenance fee could have been paid from August 8, 2002 through February 10, 2003, or with a surcharge during the period from February 11, 2003 through August 8, 2003. Accordingly, the patent expired at midnight August 8, 2003, for failure to timely submit the second maintenance fee.

A petition filed September 25, 2006 under 37 CFR 1.378(c) was dismissed in a decision mailed February 20, 2007 because the grace period in 35 U.S.C. § 41(b) for paying the first maintenance fee expired on August 8, 2003. Since the petition was not filed within twenty-four (24) months after the expiration of the six-month grace period specified in 35 U.S.C. § 41(b), the Commissioner could not accept the delayed maintenance fee payment for the above-identified patent under 37 CFR 1.378(c).<sup>2</sup>

<sup>1</sup>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.

<sup>2</sup>35 U.S.C. § 41(c)(1) authorizes the Commissioner to accept a delayed maintenance fee payment within twenty-four (24) months after the expiration of the six-month grace period specified in 35 U.S.C. § 41(b) if the delay is shown to have been unintentional, and authorizes the Commissioner to accept a delayed maintenance fee payment at any time if the delay is shown to have been unavoidable. Thus, 35 U.S.C. § 41(c)(1) does not authorize

Subsequently, a petition under 37 CFR 1.378(b) was filed April 23, 2007 to accept the unavoidably delayed payment of the maintenance fee for the above identified patent. The petition was dismissed in a decision mailed January 15, 2008 because while petitioner stated that the delay in payment of the second maintenance fee was unavoidable due to financial and domestic difficulties at the time in question, no evidence was presented to substantiate the claim within the meaning of 37 CFR 1.378(b)(3).

The decision advised that petitioner must show that he 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 due to his financial situation until the petition was filed.

Petitioner was further advised that the issues of petitioner's financial problems 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.

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. See Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891). The showing of record does not adequately establish that petitioner's entire delay in paying the second maintenance fee from August 8, 2002, until the petition was filed on or about April 23, 2007, was unavoidable within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b).

A complete showing, with supporting documentation, was required of the financial condition of petitioner or the party responsible for payment of the maintenance fees. The decision of January 15, 2008 advised that such showing should include all income, expenses, assets, credit, and obligations, which made the delay in payment of the maintenance fee from August 8, 2002, until the filing of the petition on or about April 23, 2007, "unavoidable." A monthly breakdown was preferred. It was noted that petitioner must show that he 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 financially unable to make the payment until the petition was filed. The showing should include documentary proof of the maintenance fee tracking system, the entry of this patent in that system and an explanation of how the system worked.

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the Commissioner to accept a delayed maintenance fee payment later than twenty-four (24) months after the expiration of the six-month grace period specified in 35 U.S.C. § 41(b) unless the delay is shown to have been unavoidable.

Additionally, petitioner was required to show how he managed to conduct his daily personal and business affairs, including scheduling and settlement of short and long term debts and business obligations, bills, rent or mortgage payments, income taxes etc., during the time in question. Petitioner must demonstrate that his financial situation was such as to cause the payment of the maintenance fee to have been unavoidably delayed.

The instant petition under 37 CFR 1.378(e) purports to provide additional explanations as to why petitioners believe the payment of the second maintenance fee was delayed and why that delay was unavoidable.

### STATUTE AND REGULATION

35 USC 41(c)(1) states 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.

37 CFR 1.378(b)(3) states 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. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee.

### OPINION

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 USC 41(c)(1).

Acceptance of a late maintenance fee on the basis of unavoidable delay is considered under the same standard as that for reviving an abandoned application under 35 USC 133 because 35 USC 41(c)(1) uses the identical language, *i.e.*, "unavoidable" delay. 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)). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912)("The word '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 men in relation to their most important business"); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions

on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). 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. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

On reconsideration petitioner renews the argument that the delay in payment of the second maintenance fee was unavoidable due to financial and domestic difficulties at the time in question.

In support of the showing of unavoidable delay, the evidence includes the declaration of Petitioner Scriven and Federal Personal and Corporate Income Tax Returns for the years 2001 through 2006. Petitioner argues that he was financially unable to pay the maintenance fee due in part to business reversals and domestic obligations. Additionally, petitioner has included a "Poverty" report prepared by the U.S. Census Bureau which defines the poverty thresholds and purport to show that for the better of the years between 2001 and 2005, petitioner has been below or at the threshold of poverty in regards to income to pay for essential needs.

Petitioner's arguments and the evidence presented have been considered but are not persuasive.

In fact, the evidence provided shows that for tax years 2001 through 2005, the adjusted gross income totaled \$158,814. Since no evidence has been provided to show specifically what if any expenses, assets, credit, and other obligations existed and therefore how the income on hand was expended and/or allocated, petitioner has not shown that the maintenance fee in the amount of \$1,150 could not have been paid timely.

While petitioner notes that as a result of failed business ventures, he had various obligations regarding the failed businesses as well as Federal and State income taxes to pay, petitioner has not established a nexus between his businesses and his Patent. Rather, the matters regarding petitioner's failed business ventures and family obligations which may have been overwhelming and perhaps took precedence over all other matters, unfortunately such a delay is not "unavoidable" within the meaning of §1.137(a). However, this failure to treat the instant application as petitioner's most important business constitutes a showing of preoccupation with other matters that does not rise to the level of unavoidable delay and is therefore viewed as a lack of diligence on the part of petitioner.<sup>3</sup>

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<sup>3</sup>See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

Furthermore, the evidence presented regarding the Poverty level thresholds is irrelevant to the question of whether the petitioner treated the patent and the payment of the maintenance fees as his most important business.

Finally, the record fails to include a showing of the steps petitioner had in place to ensure the timely payment of the maintenance fee, as required under 37 CFR 1.378(b)(3). In this regard, while petitioner acknowledges that he "was aware of the need to pay the 7 ½ year maintenance fee, but when the fee became due, was unavoidably prevented from making the maintenance fee due to my financial conditions", the record fails to provide any mention of a reliable system in place to ensure the maintenance fee was paid when due.

### CONCLUSION

The prior decision which refused to accept under § 1.378(b) the delayed payment of a maintenance fee for the above-identified patent has been reconsidered. While it is unfortunate that petitioner's business operations were not profitable during the period in question, petitioner has not provided enough information to establish unavoidable delay due to financial hardship, thus petitioner has not carried the burden of proof to establish to the satisfaction of the Director that the delay was unavoidable and thus the delay in this case cannot be regarded as unavoidable within the meaning of 35 USC 41(c)(1) and 37 CFR 1.378(b). In view thereof, this patent will not be reinstated.

Since this patent will not be reinstated, the maintenance fee and surcharge submitted with the petition filed September 25, 2006 will be credited to deposit account no. 50-2815.

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

This file is being forwarded to Files Repository.

Telephone inquiries concerning this matter may be directed to Senior Petitions Attorney Patricia Faison-Ball at (571) 272-3212.



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Office of the Deputy Commissioner