



Paper No. 6

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OFFICE OF PETITIONS

In re Application of	:	
Baerlocher et al.	:	
Application No. 10/290,800	:	DECISION DENYING PETITION
Filed: 6 November, 2002	:	
Attorney Docket No. 0112300-1164	:	

This is a decision on the request for reconsideration filed on 4 August, 2003, requesting that the above-identified application be accorded a filing date of 8 November, 2002, instead of the presently accorded filing date of 6 November, 2002.

The petition is denied.¹

BACKGROUND

Applicants filed a petition on 19 February, 2003, alleging that applicants deposited the original application papers in USPS Post Office to Addressee Express Mail service on 8 November, 2002, and that the application was entitled to a filing date of 8 November, 2002, rather than the presently-accorded filing date of 6 November, 2002.

In support of the petition, petitioners provided a copy of Express Mail label No. EL811965728US (the same Express Mail number found on the itemized transmittal letter accompanying the application papers). The Express Mail label shows a "date-in" of 11/06/02. Petitioners argued, however, that the application was entitled to the later filing date because it was actually deposited with the USPS on 8 November, 2002, and that the USPS entered the "date-in" of 11/06/02 in error. Petitioners also pointed to their "Certificate of Express Mailing" dated 8 November, 2002.

¹This is a final agency action. See MPEP 1002.02.

The petition was dismissed on 18 March, 2003, because petitioners had failed to provide sufficient evidence that the application had in fact been deposited in Express Mail service on 8 November, 2002, rather than 6 November, 2002. Petitioners were advised to provide either a letter from the USPS stating that the correct date of deposit was 8 November, 2002, and explaining why the error occurred. Petitioners were also informed that, alternatively, they could provide evidence that came into being after deposit and within one business day of deposit showing that the application was in fact deposited in Express Mail service on 8 November, 2002, and were reminded that there is no provision in the rules for use of a Certificate of Mailing to establish the filing date when Express Mail service is used.

In the present request for reconsideration, petitioners again assert that the "date-in" of 6 November, 2002, was incorrectly entered by the USPS. Petitioners have not provided an explanation from the USPS or any other evidence to establish the date of deposit as 8 November, 2002, but instead appear to rely on the fact that they are requesting a later, rather than earlier, filing date as justification for granting the petition.

STATUTES AND REGULATIONS

35 U.S.C. 21(a) states:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered to be filed in the Office on the date on which it was deposited with the United States Postal Service but for postal interruptions or emergencies designated by the Commissioner.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be

accorded the Office receipt date as the filing date.²
(emphasis added)

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

OPINION

Petitioners have provided no evidence in support of their contention that the application was deposited in Express Mail service on 8 November, 2002, rather than 6 November, 2002, as indicated on the Express Mail mailing label.

² See 37 CFR 1.6(a).

The PTO considers the date the paper or fee is shown to have been deposited as "Express Mail" to be the "Date In" on the Express Mail label. Placing the "Date In" on the Express Mail label and receipt by the postal clerk establishes that the package was actually received by the USPS. That is the date that verifies that the package was actually mailed. While it is unclear whether petitioners deposited in the application in an Express Mail "drop box" or deposited the application with the USPS by handing it directly to a postal employee at a Post Office, deposit of the application in an Express Mail drop box on a given date, per se, does not entitle applicants to the date of deposit as the filing date. Likewise, if the application was handed to a Postal Service employee, it is petitioners' responsibility to ensure, at the time of deposit, that petitioners receive a properly completed copy of the Express Mail label, bearing the correct "date-in", from the Postal Service employee to whom the application was given for mailing.

While the Office does not dispute that petitioners intended to file the application on 8 November, 2002, without the requisite showing of proof, the Office is, unfortunately, unable to grant the relief requested.

Additionally, as previously stated, there is no requirement of 37 CFR 1.10(d) for a certificate of mailing by "Express Mail".³ In accordance with 37 CFR 1.10(d)(3), the Express Mail certificate of mailing may not serve as evidence of timely mailing because it was created prior to the deposit of the application in Express Mail.

CONCLUSION

The evidence and arguments presented have been carefully considered, but are not persuasive of applicants' entitlement to a filing date of 8 November, 2002. Applicants must establish to the satisfaction of the Commissioner that the original application papers were properly deposited in Express Mail service on 8 November, 2002. In this case, applicants have not provided sufficient evidence to support their entitlement to a filing date of 8 November, 2002. Accordingly, applicants have failed to meet their burden.

³See 1174 O.G. Pat. Of. 92 (May 16, 1995).

The previous decision has been reconsidered as requested.
However, the petition is denied.

This application file is being forwarded to Technology Center
3700 for examination in due course.

Telephone inquiries concerning this matter may be directed to
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