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**FEB 03 2010**

In re Application of :  
Ellen Baer :  
Application No. 10/905,834 : ON PETITION  
Filed: January 22, 2005 :  
Title: Pet Bedding Kit :

This is in response to the letter filed June 5, 2009, which is being treated as a renewed petition to revive under 37 CFR 1.137(a).

The petition under 37 CFR 1.137(a) is DENIED. 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.

Procedural History:

The above-identified application became abandoned for failure to file a reply to the non-final Office action mailed September 25, 2006. This Office action set a shortened statutory period for reply of three (3) months. No reply having been received, the application became abandoned on December 26, 2006. A Notice of Abandonment was mailed on April 27, 2007. Applicant

filed a petition to revive due to unavoidable delay under 37 CFR 1.137(a) on June 5, 2007. Applicant argued that a response was timely filed by Express Mail mailing label no. EQ953092096US on December 23, 2006. In support thereof, applicant included a copy of the Express Mail mailing label. In addition, applicant included a copy of the response alleged to have been filed on that date. However, the Express Mail mailing label number was not affixed to the response.

The petition was dismissed in a decision mailed on June 21, 2007. First, the petition was not accompanied by the required petition fee. Secondly, the decision explained that if applicant was contending that the application was in fact not abandoned, then applicant should have filed a petition under 37 CFR 1.181 to withdraw the holding of abandonment (no fee required). However, if there was no dispute as to whether the application was abandoned (e.g., applicant's contentions merely involved the cause of the abandonment), then applicant should have filed a petition to revive under 37 CFR 1.137(a) (unavoidable delay) or 37 CFR 1.137(b) (unintentional delay).

In response, Applicant filed a letter on August 7, 2007, in which Applicant stated "the application was never abandoned". Applicant further explained that the Express Mail mailing label number was not included on the copy of the response allegedly filed on December 23, 2006 because it was not "visible on the top sheet of any page submitted". This time, Applicant included a copy of the response allegedly filed on December 23, 2006, bearing the Express Mail mailing label number on the top of each page.

Applicant's letter was treated as a petition under 37 CFR 1.181 to withdraw the holding of abandonment, and dismissed in a decision mailed on September 2, 2008. The decision cited 37 CFR 1.10(e):

37 CFR 1.10(e) states:

Any person mailing correspondence addressed as set out in § 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS but not received by the Office, may petition the Director to consider such correspondence filed in the Office on the USPS deposit date, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;

(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";

(3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and

(4) The petition includes a statement which establishes, to the satisfaction of the Director, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

The decision went on to explain that from comparing the copy of the allegedly filed December 23, 2006 response submitted on June 5, 2007 to the response submitted on August 7, 2007, it was obvious that the Express Mail mailing number was not placed on the correspondence prior to the original mailing by "Express Mail". Rather, the number appeared to have been inserted after the fact. For example, the top and bottom margins on the June 5, 2007 copy and the August 7, 2007 copy are different. Therefore, the August 7, 2007 copy was not a "true copy" of the response petitioner alleges she filed. As such, petitioner did not establish that Rule 1.10(e)(2) was complied with, and therefore the holding of abandonment could not be withdrawn.

Applicant next filed a petition to revive an unavoidably abandoned application under 37 CFR 1.137(a) on February 5, 2009. However, this petition was dismissed in a decision mailed on March 2, 2009. The decision explained that Applicant had not shown that the entire delay was unavoidable, in that Applicant

had not demonstrated why she was unavoidably prevented from complying with the Express Mail provisions of 37 CFR 1.10(e). In particular, Applicant had not demonstrated why it was unavoidable that she failed to include the Express Mail mailing label number on the correspondence prior to the original mailing by Express Mail.

Renewed Petition filed June 5, 2009:

On renewed petition, petitioner makes the following arguments: (1) that she did supply the Office with a original copy of the application papers, bearing the Express Mail mailing label number affixed thereon; (2) that the Code of Federal Regulations does not require that the application number be listed on an USPS receipts or other official USPS documents. Rather, it is Office practice to accept applications and correspondence without an Express Mail mailing label number typed onto each page or affixed to any document within the Express Mail envelope; (3) that petitioner has included a copy of correspondence bearing the Express Mail mailing label number - specifically a copy of the first page of the Examiner's September 25, 2006 Office action (form PTO-90C). Lastly, petitioner draws attention to the fact that the Office has not conducted a search for her correspondence. This decision shall address petitioner's arguments in turn.

With respect to petitioner's first argument, a review of the record, as well as petitioner's admission in the instant renewed petition, confirms that petitioner has not supplied the Office with an original, true copy of the correspondence bearing an Express Mail mailing label number affixed thereon. In the instant renewed petition, petitioner confirms that she typed the Express Mail mailing label number at the top of each page of the correspondence, after being advised to do so in a telephone conversation sometime in August of 2008.<sup>1</sup> However, in doing so, petitioner has not supplied an original, true copy.

With respect to petitioner's second argument, petitioner is correct in that the Office does not require applicants to include application numbers on USPS documents, receipts, etc. Petitioner is also correct in that the Office will accept correspondence without the Express Mail mailing label number affixed onto each page that constitutes the correspondence. However, an applicant who doesn't include the Express Mail mailing label number on her correspondence does so at her peril, in the event the Office does

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<sup>1</sup> That the Office advised petitioner to alter a true copy is disputed by the Office.

not receive the correspondence. As the Office has previously stated:

Correspondence actually received by the Office will not be denied a filing date as of the date of deposit with the USPS because the Express Mailing label number was not placed thereon prior to the original mailing. **However, the absence of the number of the Express Mail mailing label will preclude a party from obtaining relief on petition, under sections 1.10(c) through (e).**<sup>2</sup>

With respect to petitioner's third argument, petitioner has supplied a true copy of form PTO-90C, bearing Express Mail mailing label no. EQ953092096US. Petitioner previously included a copy of the Express Mail mailing label, bearing a "date-in" of December 23, 2006. It is stated by petitioner that the copy of form PTO-90c having the Express Mail label affixed thereto was not sent to the USPTO, but was kept by petitioner:

In addition, I kept a copy of the original express mail label, as well as a sticker from the same label (see attached), which I affixed to the received PTO-90C received from Andrea Valenti...." (Letter of petitioner dated June 5, 2009).

As required by 37 CFR 1.10, petitioner did not submit a true copy of the correspondence filed with the USPTO, containing the Express Mail mailing label number. Petitioner kept the mailing label number sticker and affixed it to her copy of the PTO-90C, which she kept. See O'Shannessy v. Doll, 566 F.Supp 2d 486 (E.D. Va. 2008)., in which the Court ruled against an applicant trying to obtain a filing date, where he did not include the Express Mail mailing label number on his correspondence.

Lastly, as set forth above, where the Office does not receive correspondence that petitioner alleges to have filed, it is incumbent on petitioner to establish that she complied with the provisions of 37 CFR 1.10(e). Petitioner, rather than the Office, has the burden of establishing that a certain piece of correspondence was filed on a certain date.

#### Conclusion and Alternative Remedy:

For the reasons set forth above, the instant renewed petition is

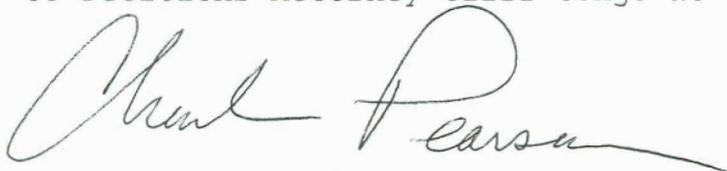
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<sup>2</sup> Communications with the Patent & Trademark Office, 61 Fed. Reg. 56439, 56441 (Nov. 1, 1996) (emphasis added).

denied. No further opportunity is given to petitioner to establish that the delay was unavoidable.

If petitioner desires to revive the abandoned application, petitioner may do so by filing a petition to revive under 37 CFR 1.137(b) - unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m) (currently \$810); and (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. A blank petition form is enclosed.

Telephone inquiries related to this decision should be directed to Petitions Attorney Cliff Congo at (571)272-3207.

A handwritten signature in cursive script that reads "Charles Pearson". The signature is written in dark ink and is positioned above the typed name and title.

Charles Pearson  
Director  
Office of Petitions

Enc: PTO/SB/64 (2 pages)  
Privacy Act Statement (1 page)