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OFFICE OF PETITIONS

Constantine N. Colyvas
59 Valorie Rd.
Southampton NY 11968

In re Application of :
Constantine N. Colyvas :
Application No. 11/789,071 : DECISION ON THIRD RENEWED
Filed: April 24, 2007 : PETITION PURSUANT TO
Title: EASY IN SAND-BRELLA : 37 C.F.R. § 1.181(A)

This is a decision on the third renewed petition pursuant to 37 C.F.R. § 1.181(a) to withdraw the holding of abandonment, filed on January 21, 2010.

The third renewed petition pursuant to 37 C.F.R. § 1.181 is DENIED.

THERE WILL BE NO FURTHER RECONSIDERATION OF THIS MATTER BY THIS OFFICE.¹

BACKGROUND

The above-identified application became abandoned for failure to reply within the meaning of 37 C.F.R § 1.113 in a timely manner to the final Office action mailed January 26, 2009, which set a shortened statutory period for reply of three months. An after-final response was received on February 11, 2009, and an advisory action was mailed on March 24, 2009. No extensions of time under the provisions of 37 C.F.R § 1.136(a) were obtained, and no further response that constituted a proper response was received. Accordingly, the above-identified application became abandoned on April 27, 2009. A notice of abandonment was mailed on August 31, 2009.

¹ This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for the purposes of seeking judicial review. See MPEP § 1002.02.

RELEVANT PORTIONS OF THE C.F.R.

37 C.F.R. § 1.134 sets forth, in toto:

An Office action will notify the applicant of any non-statutory or shortened statutory time period set for reply to an Office action. Unless the applicant is notified in writing that a reply is required in less than six months, a maximum period of six months is allowed.

37 C.F.R. § 1.135 sets forth, in toto:

(a) If an applicant of a patent application fails to reply within the time period provided under § 1.134 and § 1.136, the application will become abandoned unless an Office action indicates otherwise.

(b) Prosecution of an application to save it from abandonment pursuant to paragraph (a) of this section must include such complete and proper reply as the condition of the application may require. The admission of, or refusal to admit, any amendment after final rejection or any amendment not responsive to the last action, or any related proceedings, will not operate to save the application from abandonment.

(c) When reply by the applicant is a bona fide attempt to advance the application to final action, and is substantially a complete reply to the non-final Office action, but consideration of some matter or compliance with some requirement has been inadvertently omitted, applicant may be given a new time period for reply under § 1.134 to supply the omission.

PROCEDURAL HISTORY AND ANALYSIS

An original petition pursuant to 37 C.F.R. § 1.181(a) was filed on August 20, 2009, and was dismissed via the mailing of a decision on September 30, 2009, which set forth, in pertinent part:

With this petition, Petitioner has indicated that he does not agree with the propriety of the final Office action of January 26, 2009.

...

If Applicant believed that the objections and rejections contained in the final Office action of January 26, 2009 had been made in error, the proper course of action would have been to submit either a notice of appeal (and fee required by law), a Request for Continued Examination coupled with a submission and the requisite fee, or a continuation application coupled with the requisite fee. Alternatively, Petitioner could have submitted a claim which placed this application in condition for allowance (it is noted that the Examiner included suggested claim language in the advisory action of March 24, 2009).

However, Petitioner failed to properly respond to the final Office action of January 26, 2009, and instead submitted a

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plurality of communications to the Office challenging the propriety of the examination which he has received.

Decision on original petition, pages 3-4.

A renewed petition pursuant to 37 C.F.R. § 1.181(a) was filed on October 9, 2009, and was dismissed via the mailing of a decision on November 23, 2009.

A second renewed petition pursuant to 37 C.F.R. § 1.181(a) was filed on December 18, 2009, where Petitioner indicated that he disagrees with both the non-final Office action of January 18 2008 (sic)² and the abandonment of this application for failure to respond to the final Office action of January 26, 2009. The second renewed petition was dismissed via the mailing of a decision on January 11, 2010.

With this third renewed petition, Petitioner has asserted that this application did not go abandoned for a failure to reply within the meaning of 37 C.F.R. § 1.113 in a timely manner to the final Office action mailed January 26, 2009, and has included:

- a letter dated March 6, 2009 (the original submission has been received in the located in the electronic file and received on March 10, 2009), and;
- a letter dated February 22, 2009 and addressed to "Commissioner Godici" at a facsimile number that differs from the central facsimile number, in contravention to the requirements of MPEP § 502.01(I)(A).³ A copy of which has not been located in the electronic file, however, this letter bears neither a certificate of mailing⁴ nor an express mail label number,⁵ and as such, it does not appear that Petitioner is in a position to establish the prior submission of the same.

A proper response to the final Office action of January 26, 2009 was not received, and as such, the record does not support a finding that the holding of abandonment should be withdrawn.

² Petitioner appears to be referring to the non-final Office action which was mailed on January 22, 2008.

³ "Effective December 1, 2003, all patent application related correspondence transmitted by facsimile must be directed to the central facsimile number, with a few exceptions below. The central facsimile number is (571) 273-8300."

⁴ See 37 C.F.R. §§ 1.8(a)(1)(ii) and 1.8(b)(2).

⁵ See 37 C.F.R. § 1.10(e)(2).

CONCLUSION

The prior decisions which refused to withdraw the holding of abandonment in this application pursuant to 37 C.F.R. § 1.181(a), have been reconsidered. For the above stated reasons, the holding of abandonment will not be withdrawn.

Moreover, the decision on the second renewed petition of January 11, 2010 indicated, *in pertinent part*:

It does not appear that Petitioner will be able to establish that the holding of abandonment should be withdrawn, and nothing in the record suggests that the entire period of delay was unavoidable. Therefore, **Petitioner's only relief is a petition under 37 C.F.R. § 1.137(b),⁶ and - having been made aware of this reality - any delay in promptly seeking relief under 37 C.F.R. § 1.137(b) may be considered evidence of intentional delay and an absolute bar to revival.**

...

The petition pursuant to 37 C.F.R. § 1.137(b) should be submitted along with the petition fee and either an amendment which places the application in condition for allowance, a Notice of Appeal, a Request for a Continuation Application pursuant to 37 C.F.R. § 1.53(b), if applicable, or a Request for Continued Examination pursuant to 37 C.F.R. § 1.114.

Decision on second renewed petition, page 4. Emphasis included.

It is suggested that Petitioner file a petition under 37 C.F.R. 1.137. Delay in filing such a petition may be interpreted as intentional delay which would preclude this application from being revived. This means that Petitioner's continued filing of letters requesting that the holding of abandonment be withdrawn will be treated as an act of intentional delay since a final agency action has been issued.

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by: (A) the required reply; (B) the petition fee as set forth in 37 C.F.R. § 1.17(l), and; (C) a showing to the satisfaction of the Director 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 unavoidable. Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 C.F.R. § 1.137 was unavoidable, the Commissioner may require additional information. Currently, the petition fee as set forth in 37

⁶ The fee that is associated with the filing of this petition is presently set at \$810 for a small entity. Petitioner may download the associated form here: <http://www.uspto.gov/web/forms/sb0064.pdf>.

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C.F.R. § 1.17(l) is \$270.00 for a Small Entity. Petition form PTO/SB/61 for revival of an application under 37 C.F.R. § 1.137(a) is attached.

A grantable petition under 37 C.F.R § 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 § 1.17(m), 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. The Director may require additional information where there is a question whether the delay was unintentional. Currently, the petition fee as set forth in 37 C.F.R. § 1.17(m) is \$810.00 for a Small Entity. Petition form PTO/SB/64 for revival of an application under 37 C.F.R. § 1.137(b) is attached.

The required reply is the same for each petition. It is the filing of an amendment which places the application in condition for allowance, a Notice of Appeal, or a Request for Continued Examination pursuant to 37 C.F.R. § 1.114. The two petitions are similar but have very different standards. The difference between the two petitions is that petitions under the unavoidable standard are less expensive; however the showing that must be made is more rigorous. You should further note that where there has been an extended period of delay, the Commissioner may inquire as to the circumstances of that delay.

Telephone inquiries regarding this decision should be directed to Senior Attorney Paul Shanoski at (571) 272-3225.⁷



Anthony Knight
Director
Office of Petitions
United States Patent and Trademark Office

Encl. PTO/SB/61
 PTO/SB/64

⁷ Petitioner will note that all practice before the Office should be in writing, and the action of the Office will be based exclusively on the written record in the Office. See 37 C.F.R. § 1.2. As such, Petitioner is reminded that no telephone discussion may be controlling or considered authority for any further action(s) of Petitioner.