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In re Patent of Haber et al. Patent No. 4,846,808 Application No.07 /156,531 Filed: Feb:ruary 16, 1988
Issued: July 11, 1989
Attorney Docket No. HMTC-36

JUN 1 9 **2001**

OFFICE OF **PETITIONS** NC **PATENTS**
ON PETITION

This is a **decision on the renewed petition under** 37 **CFR** § **1.3 78(b), filed November 27, 2000, to reinstate the above-identified patent.**

The petition is **DENIED.1**

Background

The patent issued July 11, 1989. The 7.5 year maintenance fee could have been paid from July 11 , 1996, througb J anuary 11, 1997 t or with a surcharge during the period from J anuary 12t 1997 t to July 11 t 1991.2 Petitioner did not do so. Accordingly t the patent expired July 12, 1997.
A petition under 35 USC 4l(c)(I) and 37 CFR 1.378(b) was filed Au,gust 4t 2000 (Certificate of Mailing Date of December 30, 1999)t and was dismissed in the decision of October 2t 2000.

Statute and Regulation

35 U.S.C. § **41(b) states in pertinent part that:**

"The Commissioner shall charge the following fees for maintaining in force all patents based on applications filed on or after December 13' 1980:
(1) 3 years and 6 months after grant, $830.
(2) 7 years and 6 months after grant, $1,900.
(3) 11 years and 6 months after grant, $2,910.
Unless payment of the applicable maintenance fee is received in the Patent and Trademark Office on or before the date the fee is due or within a grace period of six months thereafter, the patent shall expire as of the end of such grace period."

I This decision may be viewed as a final agency action within the meaning of 5 USC § 704 for purposes of seeking judicial review. See MPEP 1002.02. The terms of37 CFR 1.378(e) *do not apply* to this decision.

2 The small entity fee at the time the patent expired was $1,025 for the 7.5 year fee. The surcharge during for a payment made during this period would have been $65. Therefore, petitioner would have needed to pay $1,090 to prevent expiration of the patent.

3 Maintenance fees in effect as of the date the first petition was filed on December 30, 1999. The fees may be subject to an annual adjustment on October I of each year, see 35 USC 41(1), and are reduced by 50% for small entities, see 35 USC 41(h)(I).

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35 U.S.C. § **41(c)(I) states that:**

"The Commissioner 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 Commissioner to have been unavoidable."** (emphasis added)

37 CFR 1.378(b)(3) states that any petition to accept delayed payment ofa maintenance fee must include:

" A showins 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."

Oninion

The Commissioner is responsible for determining the standard for unavoidable delay and for applying that standard

35 U.S.C. 41(c)(I) states, "The Commissioner may acce-pt the payment of any maintenance fee at any time ...if the delay is shown *to the satisfaction of the Commissioner* to have been unavoidable." (emphasis added).

"In the specialized field of patent law, ...the Commissioner of Patent and Trademarks is primarily responsible for the application and enforcement of the various narrow and technical statutory and regulatory 1lrovisions. His interpretation of those provisions is entitled to considerable deference.'

Patentee must establish that he or she acted the same as a reasonable and prudent person would have acted in regard to their most important business

"The critical phrase 'unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable' has remained unchanged since first enacted in 1861."5 *"Clearly the question ofwhether an applicant's delay in prosecuting an application was unavoidable must be decided on a case-by-case basis, taking all of the facts and circumstances into account.* ,,6 The general standard presently applied by the office is, "did petitioner act as a reasonable and prudent person in relation to his or her most important business1"

4 Rvdeen v. Oui22. 748 F.Supp. 900,904, 16 U.S.P.Q.2d (BNA)1876 (D.D.C. 1990), aff'd without oninion (Rule 36). 937 F.2d 623 (Fed. Cir. 1991) ~Morcanroth v. Oui22. 885 F.2d 843,848,12 U.S.P.Q.2d (BNA) 1125 (Fed. Cir. 1989); Ethicon. Inc. v. Oui22. 849 F .2d 1422, 1425, 7 U.S.P .Q.2d (BNA) 1152 (Fed. Cir. 1988) ("an agency' interpretation of a statute it administers is entitled to deference"); ~ Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc.. 467 U.S. 837, 844,81 L. Ed. 694, 104 S. Ct. 2778 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."»

5 **Smith** v. Mossine:hoff. **671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982).**

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In 1992, Congress enacted legislation concerning the reinstatement of patents for failure to timely pay the maintenance fee

Before 1992, in order to reinstate a t'atent, one had to demonstrate that the entire delay in making the payment and filing the petition to reInstate was unavoidable. Congress recognized how difficult the standard was to meet.

The unavoidable standard was described by Congressional representatives as "inflexible", "extremely hard to meet", and "too stringent."7 In addition, the result of the application of the unavoidable standard can be "harsh" and result in "traged';1."s Congress could have passed legislation making the unavoidable standard easier to meet. Thev did not. Instead, Congress created the "unintentional" standard whereby one only has to establish that one intended to make a payment, but did not.9 However, Congress made the determination that one would only be able to file an "unintentional" petition within 24 months of the last day of the six month grace period.1o If one is past this time period, one must satisfy the "extremely hard to meet" "unavoidable" standard.

Application of the unavoidable standard to the present facts

As stated before, the question of unavoidable delay will be decided on a case-by-case basis, taking all of the facts and circumstances into account. The statute requires a "showing" by petitioner. Therefore, petitioner has the burden of proof.

Petitioner must demonstrate that he acted as a reasonable and prudent person in relation to his most imyortant business. The decision will be based solely on the administrative record in existence. Petitioner should remember that it is not enough that the delay was unavoidable; petitioner must ~ that the delay was unavoidable. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable.

J "(The unavoidable] standard has been found to be extremely hard to meet. Some patent owners have lost their patent rights due to this inflexible standard." 138 CONG. REC. S16613, 16614 (September 30, 1992) (statement of Rep. DeConcini). "Mr. Brooks from the Committee of the Judiciary, submitted the following[:] ...The 'unavoidable' standard has proved to be too stringent in many cases. Many patentees have been deprived of their patent rights for failure to pay the maintenance fees for reasons that may have been unintentional yet not unavoidable." H.R. REP. NO.993, 102d Cong., 2nd Sess., 2 (1992), reprinted in 1992 U.S.C.C.A.N. 1623, 1623-1624. "The unavoidable standard has proved to be too stringent in many cases." 138 CONG. REC. H1115 (October 3, 1992) (statement of Rep. Hughes).

8 "[An employee ofa law firm said to me] 'Mr. McCollum, are you aware of all the problems that small patent holders have with regard to these maintenance fees? ...They don't get the notices, either move or whatever, and really didn't intend to not make those fees, but the standards are so high they cannot overcome it when they come in here.' It is an unavoidable standard; of course they could have technically avoided it and therefore they have lost their patent. I think that is a tragedy. I looked into this and consequently that is the origin ofwhere this bill came from. ...I do agree with the comments made by [Rep. Hughes] that the standard of 'unavoidable' was just too high, 'unintentional' is much better." 138 CONG. REC. HIllS (October 3, 1992) (statement of Rep. McCollum). The unavoidable standard is "too stringent. Some patent owners have lost their patent rights due to circumstances that do not warrant this harsh result, but that could not be considered 'unavoidable' under current law." 138 CONG. REC. El688 (June 4, 1992) (extension of remarks of Rep. McCollum).

9 A petition to accept an unintentionally delayed payment must be accompanied by the maintenance fee, the required surcharge, and "a statement that the delay in payment of the maintenance fee was unintentional." 37 CFR 1.378(c).

10 An "unintentional" petition must be filed within 24 months of the last day of the six month grace period. If the 3.5 year fee is missed, then the unintentional petition must be filed within six years of the date of issue. If the 7.5 year fee is missed, an unintentional petition must be filed within 10 years of the date of issue. If the 11.5 year fee is missed, then the petition must be filed within **14** years of the date of issue.

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Facts:

The patent issued July 11, 1989.
Habley Medical ("Petitioner") has existed since 1976. Petitioner derives substantially all its income from patents. By the end of 1996, petitioner owned over 100 **patents.**

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During 1996, petitioner consisted of primarily 5 employees- a receptionist secretary, a technical drafts.person, an engineer inventor, and two officers. Petitioner has stated, "By 1996, the income [petitIoner] derived from licensing its patents had declined substantially. Largely because of this reduced income, rpetitioner] operated In the red, and its 1996 Federal Corporate Income Tax Statement showeQ a net loss of$142,214."11 Specifically, the 1996 Income tax return shows that the two officers of the company were paid $730,104, and the employees were paid $52,477. These expenses together WIth depreciation of$39,104 were the primary cause of the net loss even thou~ the company had an income of $920,019. At the end of the year, per the tax return, petitIoner had "Buildings and other depreciable assets" worth $1,135,807, $11,000 cash, and $196,545 in accounts receivable. It should be noted that the complete 1996 tax return has not been provided. For example, portions of the return such as Schedule A, Schedule E, and Statement 1 have not been submitted.

During 1996, even though petitioner had $920,019 in income, petitioner did not pay a single maintenan~e fee fo~ any of its patents. The instant ~titio~ states, "rPetitioner] could not an~,Wd nQ1 pay a smgle maIntenance fee throughout the entire penod from June, 1995 to July, 1999.
The patent issued July 11,1989. The 7.5 year maintenance fee could have been paid from July 11, 1996, through January 11, 1997, or with a surcharge during the period from January 12, 1997, to July 11, 1991.13 Petitioner did not do so. Accordingly, the patent expired July 12, 1997.

1997.1998:

After the 1996 year, petitioner had $11,000 in cash and $196,545 in accounts receivable. record fails to discuss these funds.

During 1997, petitioner did not file a **federal** tax **return. During 1998, petitioner did not file** a **federal** tax **return.**

In February of 1998, two of the employees left and brought legal action against petitioner for unpaid wages during 1997 and 1998. One of the employees was the vice-president of the company.

In **September of 1998, the president of the company resigned.** In **that same month, petitioner took action to sell its offices and facilities in Lake Forest, California. Prior to the close of escrow,** a **creditor executed** a **Deed** of Trust **with Assignment** of Rents. **The result** of the

II Original Petition filed on January 3, 2000, page

12 Page 2 **(emphasis added).**

13 The small entity fee at the time the patent expired was $1,025 for the 7.5 year fee. The surcharge during for a payment made during this period would have been $65. Therefore, petitioner would have needed to pay $1,090 to prevent expiration of the patent.

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creditor's action was that petitioner received none of the proceeds of the sale.

The business records and personal property of petitioner were placed in storage rented from Stor-It Self-Storage Units.

After the vice-president left the coml'any, he sold all his shares to Matthew Kashani. On December 8,1998, Matthew Kashant was elected president of petitioner. He moved petitioner's offices to San Diego, California. From December of 1998 to November of 2000, petitioner received approximately $30,000 in licensing income. The instant petition states, ".wl of this income went to payoff legal actions taken by former employees to collect back wages. As far as is known, all other licensing income derived during prior years went exclusively for office building mortgage payments [and] to Ray salaries ofnone-equity (sic) employees, and to reimburse, in part, equity employees.' 4

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In February of 1999, the storage unit for the business records was sold due to petitioner's failure to pay rent. Stor-It Self-Storage Units attempted to contact petitioner, but petitioner had failed to provide a current address or phone number to the storage company. The storage unit was sold. The current location of the business records which had been retained in storage is unknown.

During an **unspecified time in 1999, the employee action for past wages was settled for** an **unspecified amount.**

Per the instant petition, "Mr .Kashani learned the status of r **petitioner'** s] **patent portfolio and decided on** a **course of action only after communicating wiffi his patent attorney, Morland Fischer, throughout the second half of *1999."1S***

Petitioner has failed to provide any financial statements concerning the year 1999 including a 1999 income tax return. Petitioner does not allege that an income tax return was not filed for the 1999 year. Petitioner does state that no maintenance fee payments were made by petitioner from June, 1995 to July, 1999. The record is unclear as to whether or not any maintenance payments were made during 1999 after the month of July of 1999.

Anal1:sis:

As stated before, the question of unavoidable delay will be decided on a case-by-case basis, taking all of the facts and circumstances into account. The statute requires a "showing" by petitioner. Therefore, petitioner has the burden of proof. Petitioner must demonstrate that he acted as a reasonable and prudent person in relation to his most important business. The decision will be based solely on the administrative record in existence. *Petitioner should remember that it is not enough that the delay was unavoidable; petitioner must ~ that the delay was unavoidable.* A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable.

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would have been timely 12aid.

Petitioner bases his showing on financial allegations. For the petition to be granted, petitioner must prove that, but for the

financial difficultIes, the maintenance fee would have been timely paid. Petitioner has failed to supply such evidence. What steps were in place to make sure the due date for the fee was not forgotten? Who was responsible for pa~ent of the fee? Petitioner alleges that p:titioner did not have financial funds but fails to prove that the fee would have been timely paid If such funds had existed. Petitioner has failed to establish that any steps existed to ensure the fee was timely paid.

A reasonable and prudent person, in relation to his most important business, would not rely on memory to remind him when payments would fall due several years in the future. Instead, such an individual would implement a reliable and trustworthy tracking system to keep track of the relevant dates. The indIvidual would also take steps to ensure that the patent infonnation was correctly entered into the tracking system.

37 CFR 1.3 78(b)(3) precludes acceptance of a late maintenance fee for a patent unless a petitioner can demonstrate that steps were in place to monitor the maintenance fee. The Federal Circuit has s~cifically upheld the validity of this properly promulgated regulation.16 In ~ Lehman, petItioner claimed that he had not known of the existence of maintenance fees and therefo~e had no.s~eps in place to pay such fees. The petitioner therefore argued that the PTO's regulatIons reqwnng such steps created to heavy a burden. The court stated, "Ray also takes issue with the PTO ' s regulation, 37 C.F .R. § 1.3 78(b)(3), supra, ar~ing that it' creates a burden that goes well beyond what is reasonably prudent.' We disagree. The PTO's regulation merely sets forth how one is to prove that he was reasonably prudent, i.e., by showing what steps he took to ensure that the maintenance fee would be timely paid, and the steps taken in seeking to reinstate the patent. We do not see these as requirements additional to proving unavoidable delay, but as the very elements of unavoidable delay."17

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Petitioner must prove that the entire delay was unavoidable, and was caused by financial difficulties and NOT lack of knowledge of the need to pay the maintenance fee. Petitioner is responsible for possessing knowledge of the need to pay the maintenance fee.

Under the statutes and regulations, the Office has no duty to notify patentee of the requirement to pay maintenance fees or to notify patentee when the maintenance fee is due.ls It is solely the responsibility of the patentee to assure that the maintenance fee is paid timely to prevent

16 Ra~ v. Lehman. 55 F.3d 606,609; 34 U.S.P.Q.2d (BNA) 1786 (Fed. Cir. 1995).

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18 "Congress expressly conditioned §§ 133 and 151 on a specific type of notice, while no such notice requirements are written into § 41(c) ...[T]he Commissioner's interpretation of 'unavoidable' and of the PTO's duty to provide reminder notices then, do not plainly contradict the statute. For this reason, we must accord deference to the Commissioner's no-timely-notice interpretation." Rav v. Comer. 1994 U.S. Dist. LEXIS 21478,8-9 (1994), *aff'd on other grounds* Rav v. Lehman. 55 F.3d 606,
34 USPQ2d 1786 (Fed. Cir. 1995) (£ilingRvdeen v. Oui2g. 748 F. Supp. 900,905 (1990), Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc.. 467 U.S. 837,81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984». "The Court concludes as it did in Rydeen, that as a constitutional matter, 'plaintiffwas not entitled to any notice beyond publication of the statute.'" lQ. at 3 (£i!i!lg Rvdeen v. OUi22. 748 F. Supp. at 906, Texaco v. Short. 454 U.S. 516,536,70 L. Ed. 2d 738,102 S. Ct. 781 (1982».

expiration of the patent. The Patent Office, as a courtesy, tries to send maintenance fee
reminders and notices of patent expiration to the address ofrecord. However, the failure to receive the reminder notice, and the lack of knowledge of the requirement to pay the maintenance fee, will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office.19 In addition, delay resulting from petitioner's failure to keep the PTO apprised of a current correspondence address for receiving communications regarding maintenance fee payments IS not unavoidable delay }0

Even if the Office were required to provide notice to applicant of the existence of maintenance fee requirements, such notIce is provided by the patent Itself!1 The Letters Patent contains a Maintenance Fee Notice that warns that the patent may be subject to maintenance fees if the application was filed on or after December 12,1980. While it is unclear as to who was and is in actual possession of the patent, Petitioner's failure to read the Notice does not vitiate the Notice, nor does the delay resultIng from such failure to read the Notice establish unavoidable delay.

The Court in ~~~~*!-~i2~~* held that counsel's nonawareness ofPTO rules did not constitute "unavoidable" delay.

Nonawareness of PTO statutes or rules, which state maintenance fee amounts and the dates they are due, does not constitute unavoidable delay.

Petitioner must act as a reasonable and prudent person in relation to his most im~ortant business. Mr. Kashani became president of petitioner in December of 1998. However, per the instant petition, "Mr .Kashani learned the status of [petitioner's] patent portfolio and decided on a course of action only after communicating with his patent attorney, Morland Fischer, throu~out the second half of 1999."23 Petitioner has failed to prove that the fee would have been paid earlier, but for the financial difficulties. If Kashani was unaware of the need to reinstate the patent, then it is irrelevant that he could not have fmancially afforded to take such a step. Petitioner has
failed to t>rove that he knew of the need to reinstate the patent, that he treated the reinstatement as his most lInportant business, and that he was unavoidably prevented from paying the
maintenance fee and fee for reinstatement earlier than December 30,1999, due to petitioner's financial situation.

19 **~MPEP2575.**

20 **The mere inclusion, in** a **paper filed in** an **application or patent, of** an **address differing from the previously provided correspondence address, will not change the address of record. To change the correspondence address,** a **clear and unambiguous request must be made by** a **party authorized to change the address.**

21 ~ Rav v. Lehman. 55 F.3d 606, 610; 34 USPQ2d 1786, 1789 (Fed. Cir. 1995).

22 Smith v. Mossinlthoff. 671 F.2d 533,538,213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982) (£iti!lg Potter v. Oann. 201 U.S.P.Q. (BNA) 574 (0. O.C. 1978».

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to the filing of the originall2etition to reinstate on Januarv 3.2000.
Petitioner has not proven that the entire delay in the submission of the maintenance fee was unavoidable.

The prior decision on petition requested the following information:
(1) a full and complete tax return for 1996,
(2) a full and complete tax return for 1997,
(3) a full and complete tax return for 1998,
(4) a full and complete tax return for 1999,
(5) a list of income, expenses, assets, credit and obligations for the year 1996,
(6) a list of income, expenses, assets, credit and obligations for the year 1997,
(7) a list of income, expenses, assets, credit and obligations for the year 1998,
(8) a list of income, expenses, assets, credit and obligations for the year 1999, and (9) documentation which supports (5), (6), (7), and (8).

Petitioner has failed to supply (I), (2), (3), (4), (5), (6), (7), (8), and (9).

Petitioner states that the 1997 and 1998 returns were not submitted because petitioner did not file returns for those years. Petitioner fails to explain petitioner's failure to supply full and complete tax returns for 1996 or 1999. A part of the reason for the failure to supply more business records for 1996, 1997, and 1998 may be the loss of business records due to petitioner's failure to pay
rent for storage or to retrieve the business records in storage prior to the unit being auctioned off. *However, regardless of the reason for the loss of the business records, such loss will not shift the burden ofprooffrom petitioner to the Office. Petitioner must prove that the entire delay was unavoidable. If petitioner is unable to prove that the entire delay was unavoidable, regardless of the reason for the inability, then the petition cannot be granted.*
The evidence consists of the following:
1) statements by Morland Fischer, the attorney who is filing the petitions on behalf of petitioner, 2) a copy of a portion of a 1996 tax return,
3) a copy of a claim for worker's compensation benefits filed by a former employee of petitioner, 4) a copy of the Deed of Trust with Assi~ent of Rents which resulted in petitioner receiving none of the proceeds of the sale of its buIlding in September of 1998, and
5) a letter ftom Stor-It Self-Storage Units..

The evidence submitted fails to prove that the entire delay was unavoidable.

The patent issued July 11, 1989. The 7.5 **year maintenance fee could have been paid from July 11, 1996, througl)** J **anuary 11, 1997, or with** a **surcharge during the period from** J **anuary 12, 1997,** to July **11,1997!4** Petitioner did not do so. Accordingly, the patent expired July **12,1997.**

The record fails to prove that the maintenance fee could not have been paid during the period of July of 1996 to July of 1997. During 1996, petitioner had an income of over $900,000, yet petitioner contends that petitioner did not have the finances available to pay a single maIntenance fee for any of its patents for that year .Petitioner has not demonstrated that its financial troubles were immediate and unexpected. Why did J?etitioner not take action while it had the money to pay the maintenance fee if it foresaw financial difficulty in the future? An applicant may delay

24 The small entity fee at the time the patent expired was $1,025 for the 7.5 year fee. The surcharge during for a payment made during this period would have been $65. Therefore, petitioner would have needed to pay $1,090 to prevent exDiration of the Datent.

action until the end of the time period for reply. In doing so, however, the applicant must assume the risk attendant to such delay. After the 1996 year, petitioner had $11,000 m cash and
$196,545 in accounts receivable. The record fails to discuss these funds. Were these funds still available in July of 1997? Petitioner fails to fully discuss petitioner's assets.

Petitioner states, " As far as is known, all other licensin~ income derived during prior years went exclusively for office building mortgage {>ayments [an~~ to pay salaries ofnone-equity (sic) employees, and to reimburse, in part, eqwty employees. ,25 The language " As far as is known" is insUffi~i.ent to conclusively prove ~o~ 1'!1oney was sp.ent d~g prior ye~. The attorney filing the petitIon has not proven that he IS mtlmately familIar WIth all the busmess expenses of the company during 1997 and 1998. Declarations have not been submitted from any individuals who were employees or shareholders during this time. In fact, declarations supporting the contentions in the petition have not been filed by any individual. Petitioner could prove the contention for
the year 1996 by submitting a full and complete tax return. Petitioner has not done so. The 1996 tax return lists "Other deductions" in the amount of $174,032. Since a copy of Statement 1 has not been provided, the Office cannot determine the expenses which constItuted "Other deductions." In addition, the " As far as is known" statement by the attorney concerns only licensing income and does not include income on accounts receivable or discuss the $11,000.
The Office has not been provided with a detailed list of income, assets, credit, and expenses for 1996,1997 or 1998. PetItioner has stated that in February of 1998, two of the employees left and brought legal action against ~titioner for unpaid wages during 1997 and 1998. One of the employees was the vice-presldent of the company. Petitioner fails to address how much the employees were owed and for what time periods. The resignation of the employees alone fails to prove that monetary funds did not exist to pay the necessary fees for the patent from July of 1996 to July of 1997 or afterwards. In September of 1998, the president of the company resigned due to psychological difficulties. If the president of the company was owed any back wages, the record fails to disclose such a fact. During September of 1998, petitioner took action to sell its offices and facilities in Lake Forest, California. Prior to the close of escrow, a creditor executed a Deed of Trust with Assignment of Rents. The result of the creditor's action was that petitioner received none of the proceeds of the sale. In addition, petitioner failed to pay rent for storage or to provide the storage company with a current telephone number or address. The record fails to disclose whether such failure to pay rent was due to neglect or financial inability .In essence, in 1998, petitioner has proven that two employees were owed wages as of February of 1998, that a building was sold for no profit, and that fees were not paid for storage.
It should be noted that the loss of employees and a building do not automatically constitute unavoidable delay. Petitioner was responsible for treating the payment of fees necessary for the patent as its most important business. Petitioner simply needed to implement a reliable system to ensure the due dates were not forgotten and to pay the fee when it became due. The prior conduct can easily be handled b}:one person (such as a single shareholder) without the need for a multitude of employees or an office building. Petitioner has failed to prove that steps were taken to ensure that the fee was timely paid and that petitioner could not afford to pay the fee when it became due.

On December 8,1998, Matthew Kashani was elected president of petitioner. He moved petitioner's offices to San Diego, California. From December of 1998 to November of 2000, petitioner received approximately $30,000 in licensing income. The instant petition states, "~ of this income went to pay off legal actions taken by former employees to collect back wages." 6

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The petition fails to address any income from sources other than licensing income. Did petitIoner receive any other income? Petitioner has failed to supply the information requested in the prior decision consisting of a full and complete 1999 tax return and a list of income, expenses, assets, credit and obligations for the year 1999. Petitioner has failed to submit any documentation which supports the allegation that all $30,000 was spent paying off legal actIons. How did petitioner afford to set up offices in San Diego, CA, unless some money was spent on such a relocation? Of particular interest would be whether any maintenance fees were paid for other patents after July of 1999. Petitioner does state that no maintenance fee payments were made by petitioner from June, 1995 to July, 1999. Since petitioner has failed to provide the information requested in the previous decision on petition, the record is unclear as to whether or not any maintenance payments were made during 1999 after the month of July of 1999. If payments were made on other patents, why could petitioner not afford to reinstate the instant patent? Petitioner has simply failed to .provide sufficient evidence to prove that a petition to reinstate could not have been filed earlier. In other words, petitioner has failed to prove that it knew of the need to reinstate the patent, that it treated the reinstatement as its most im{>ortant business, but that it was unavoidably prevented, due to financial reasons, from reinstatIng the patent earlier .
This decision is based solely on the administrative record in existence. The issue which must be decided is NOT whether the entire delay in submission of the maintenance fee was unavoidable. Instead, the issue that must be decided is whether petitioner has groven that the entire delay was unavoidable. Petitioner has not proven that the entire delay was unavoidable.

Decision

The prior decision which refused to accept under 37 **CFR** § **1.3 78(b**) **the delayed payment of** a **maintenance fee for the above-identified patent has been reconsidered. For the reasons herein and stated** in **the I?revious decision, the entire delay in this case cannot be ref,arded** as **unavoidable within the meaning of35 USC** § **41(c)(I) and 37 CFR** § **1.378(b). Therefore, the petition is denied.**

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

Since this patent will not be reinstated, maintenance fees and surcharges submitted by petitioner will be credited to petitioner's deposit account. The $130 fee for requesting reconsideration is not refundable.

The patent file is being forwarded to Files Repository .

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683

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Manuel A. **Antonakas, Director**
Office of Petitions
Office of the Deputy Commissioner
for Patent ExamInation Policy