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OFFICE OF PETITIONS

In re Application of	:	
Michael La Veau and Janet	:	
Tlapek	:	
Application No. 08/794,562	:	
Patent No. 5,857,959	:	DECISION ON RENEWED PETITION
Filed: February 3, 1997	:	UNDER 37 C.F.R. §1.378(E)
Issue Date: January 12, 1999	:	
Attorney Docket Number: 2089-	:	
000004	:	
Title: CONCEPTION KIT	:	

This is a decision on the renewed petition filed April 6, 2006¹, pursuant to 37 C.F.R. §1.378(b)², to reinstate the above-identified patent.

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- 1 The petition contains a certificate of mailing dated March 31, 2006.
2 Any petition to accept an unavoidably delayed payment of a maintenance fee filed under 37 C.F.R. §1.378(b) must include:
- (1) The required maintenance fee set forth in 37 C.F.R. §1.20 (e) through (g);
 - (2) The surcharge set forth in 37 C.F.R. §1.20(i)(1), and;
 - (3) A showing 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.

The request to accept the delayed payment of the maintenance fee is DENIED³.

The patent issued on January 12, 1999. The grace period for paying the 3½-year maintenance fee provided in 37 CFR §1.362(e) expired at midnight on January 12, 2003, with no payment received. Accordingly, the patent expired on January 12, 2003 at midnight.

On December 19, 2005, Petitioner filed a petition under 37 C.F.R. §1.378(b), which was dismissed via the mailing of a decision on February 3, 2006.

With the original petition, Petitioner submitted the surcharge associated with a petition to accept late payment of a maintenance fee as unavoidable, the 3½-year maintenance fee, and a statement of facts, meeting the first and second requirements set forth in 37 C.F.R. §1.378(b).

With the present petition pursuant to 37 C.F.R. §1.378(e), Petitioner has again failed to meet the showing requirement under 37 C.F.R. §1.378(b)(3). A discussion follows.

The standard

35 U.S.C. §41(c)(1) states:

The Director may accept the payment of any maintenance fee... after the six-month grace period if the delay⁴ is shown to the satisfaction of the Director to have been unavoidable.

37 C.F.R. §1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 37 C.F.R. §1.137(a). This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

³ 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.

⁴ This delay includes the entire period between the due date for the fee and the filing of a grantable petition pursuant to 37 C.F.R. §1.378(b).

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 business⁵.

In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable⁶."

An adequate showing that the delay in payment of the maintenance fee at issue was unavoidable within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. Where the record fails to disclose that the patentee took reasonable steps, or discloses that the patentee took no steps, to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 C.F.R. §1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).

The burden of showing the cause of the delay is on the person seeking to revive the application⁷.

A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice, or the MPEP is not rendered "unavoidable" due to either the applicant's reliance upon oral advice from USPTO employees or the USPTO's failure to advise the applicant to take corrective action⁸.

The Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and the applicant is bound by the consequences of those actions or inactions⁹. Specifically, petitioner's delay caused by the mistakes or negligence of his

5 In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

6 Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

7 Id.

8 See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985).

9 Link v. Wabash, 370 U.S. 626, 633-634 (1962).

voluntarily chosen representative does not constitute unavoidable delay within the meaning of 35 USC 133¹⁰.

The actions of the attorney are imputed to the client, for when a petitioner voluntarily chooses an attorney to represent him, the petitioner cannot later avoid the repercussions of the actions or inactions of this selected representative, for clients are bound by the acts of their lawyers/agents, and constructively possess "notice of all facts, notice of which can be charged upon the attorney"¹¹."

Courts hesitate to punish a client for its lawyer's gross negligence, especially when the lawyer affirmatively misled the client," but "if the client freely chooses counsel, it should be bound to counsel's actions"¹²."

Presuming for the purposes of discussion that it was an act/omission of Counsel that contributed to any of the delay herein, the act(s) or omissions of the attorney/agent are imputed wholly to the applicant/client¹³ in the absence of evidence that the attorney/agent has acted to deceive the client.¹⁴

**Portions of the Code of Federal Regulations and the MPEP
relevant to the abandonment of this application**

37 C.F.R. § 1.362 Time for payment of maintenance fees.

10 Haines, 673 F.Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32; Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 103, 131 (Comm'r Pat. 1891).

11 Link at 633-634.

12 Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1233 (7th Cir. 1983). See also, Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); LeBlanc v. I.N.S., 715 F.2d 685, 694 (1st Cir. 1983).

13 The actions or inactions of the attorney/agent must be imputed to the petitioners, who hired the attorney/agent to represent them. Link v. Wabash Railroad Co., 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390-91 (1962). The failure of a party's attorney to take a required action or to notify the party of its rights does not create an extraordinary situation. Moreover, the neglect of a party's attorney is imputed to that party and the party is bound by the consequences. See Huston v. Ladner, 973 F.2d 1564, 23 USPQ2d 1910 (Fed Cir. 1992); Herman Rosenberg and Parker Kalon Corp. v. Carr Fastener Co., 10 USPQ 106 (2d Cir. 1931).

14 When an attorney intentionally conceals a mistake he has made, thus depriving the client of a viable opportunity to cure the consequences of the attorney's error, the situation is not governed by the stated rule in Link for charging the attorney's mistake to his client. In re Lonardo, 17 USPQ2d 1455 (Comm'r. Pat. 1990).

(a) Maintenance fees as set forth in §§ 1.20(e) through (g) are required to be paid in all patents based on applications filed on or after December 12, 1980, except as noted in paragraph (b) of this section, to maintain a patent in force beyond 4, 8 and 12 years after the date of grant.

(b) Maintenance fees are not required for any plant patents or for any design patents. Maintenance fees are not required for a reissue patent if the patent being reissued did not require maintenance fees.

(c) The application filing dates for purposes of payment of maintenance fees are as follows:

(1) For an application not claiming benefit of an earlier application, the actual United States filing date of the application.

(2) For an application claiming benefit of an earlier foreign application under 35 U.S.C. 119, the United States filing date of the application.

(3) For a continuing (continuation, division, continuation-in-part) application claiming the benefit of a prior patent application under 35 U.S.C. 120, the actual United States filing date of the continuing application.

(4) For a reissue application, including a continuing reissue application claiming the benefit of a reissue application under 35 U.S.C. 120, the United States filing date of the original non-reissue application on which the patent reissued is based.

(5) For an international application which has entered the United States as a Designated Office under 35 U.S.C. 371, the international filing date granted under Article 11(1) of the Patent Cooperation Treaty which is considered to be the United States filing date under 35 U.S.C. 363.

(d) Maintenance fees may be paid in patents without surcharge during the periods extending respectively from:

(1) 3 years through 3 years and 6 months after grant for the first maintenance fee,

(2) 7 years through 7 years and 6 months after grant for the second maintenance fee, and

(3) 11 years through 11 years and 6 months after grant for the third maintenance fee.

(e) Maintenance fees may be paid with the surcharge set forth in § 1.20(h) during the respective grace periods after:

(1) 3 years and 6 months and through the day of the 4th anniversary of the grant for the first maintenance fee.

(2) 7 years and 6 months and through the day of the 8th anniversary of the grant for the second maintenance fee, and

(3) 11 years and 6 months and through the day of the 12th anniversary of the grant for the third maintenance fee.

(f) If the last day for paying a maintenance fee without surcharge set forth in paragraph (d) of this section, or the last day for paying a maintenance fee with surcharge set forth in paragraph (e) of this section, falls on a Saturday, Sunday, or a federal holiday within the District of Columbia, the maintenance fee and any necessary surcharge may be paid under paragraph (d) or paragraph (e) respectively on the next succeeding day which is not a Saturday, Sunday, or Federal holiday.

(g) Unless the maintenance fee and any applicable surcharge is paid within the time periods set forth in paragraphs (d), (e) or (f) of this section, the patent will expire as of the end of the grace period set forth in paragraph (e) of this section. A patent which expires for the failure to pay the maintenance fee will expire at the end of the same date (anniversary date) the patent was granted in the 4th, 8th, or 12th year after grant.

(h) The periods specified in §§1.362 (d) and (e) with respect to a reissue application, including a continuing reissue application thereof, are counted from the date of grant of the original non-reissue application on which the reissued patent is based.

[49 FR 34724, Aug. 31, 1984, added effective Nov. 1, 1984; paras. (a) and (e), 56 FR 65142, Dec. 13, 1991, effective Dec. 16, 1991; paras. (c)(4) and (e) revised and para. (h) added, 58 FR 54504, Oct. 22, 1993, effective Jan. 3, 1994]

2542 Change of Correspondence Address

Unless a fee address has been designated, all notices, receipts, refunds, and other communications relating to the patent will be directed to the correspondence address (37 CFR 1.33) used during the prosecution of the application. Practitioners of record when the patent issues who do not wish to receive correspondence relating to maintenance fees must change the correspondence address in the patented file or provide a fee address to which such correspondence should be sent. It is not required that a practitioner file a request for permission to withdraw pursuant to 37 CFR 1.36 solely for the purpose of changing the correspondence address in a patented file. The correspondence address should be updated or changed as necessary to ensure that all communications are received in a timely manner. A change of correspondence address may be made as provided in 37 CFR 1.33(a). The correspondence address may be changed as provided in 37 CFR 1.33(a)(1) prior to the filing of an oath or declaration. After an oath or declaration has been executed and filed by at least one inventor, the correspondence address may be changed as provided in 37 CFR 1.33(a)(2). Requests for a change of the correspondence address may be sent to the Office of Public Records, Document Services Division, Special Handling Branch during the enforceable life of the patent. To ensure accuracy and to expedite requests for change to the correspondence address, it is suggested that the request include both the patent number and the application number. Form PTO/SB/122 may be used to request a change of correspondence address in a patent application. Form PTO/SB/123 may be used to request a change of correspondence address for an issued patent.

2575 Notices

Under the statutes and the regulations, the Office has no duty to notify patentees when their maintenance fees are due. It is the responsibility of the patentee to ensure that the maintenance fees are paid to prevent expiration of the patent. The Office will, however, provide some notices as reminders that maintenance fees are due, but the notices, errors in the notices or in their delivery, or the lack or tardiness of notices will in no way relieve a patentee from the responsibility to make timely payment of each maintenance fee to prevent the patent from expiring by operation of law. The notices provided by the Office are courtesies in nature and intended to aid patentees. The Office's provision of notices in no way shifts the burden of monitoring the time for paying maintenance fees on patents from the patentee to the Office.

**Application of the standard to the current facts and
circumstances**

Petitioner's representative has submitted a statement of facts that has been executed by the attorney who submitted this petition on behalf of one of the joint inventors. No statement of facts has been presented by any person who might have firsthand knowledge of the facts and allegations contained therein.

Petitioner's representative's explanation of the delay has been considered, and it has been determined that it fails to meet the standard for acceptance of a late payment of the maintenance fee and surcharge, as set by 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3). The period for paying the 3½-year maintenance fee without the surcharge extended from January 12, 2002 to July 12, 2002 and for paying with the surcharge from July 13, 2002 to January 12, 2003. Thus, the delay in paying the 3½-year maintenance fee extended from January 12, 2003 at midnight to the filing of the present petition on December 19, 2005.

The underlying facts are summarized as such:

- On March 21, 1997, the present patent was assigned by the two joint inventors to Veos Limited, which is a French company¹⁵.
- On October 3, 1997, Veos Limited was purchased by a British company which operates under an identical name¹⁶.
- On January 29, 1998, the British version of Veos Limited assigned the application to Veos France Eurl¹⁷.
- On January 12, 1999, Veos France Eurl assigned the application to Veos BV¹⁸.
- Each of these companies are entities of Veos PLC¹⁹.
- "Sometime prior to February 12, 2005," both the British and French Veos Limiteds, as well as Veos PLC went into receivership. Notices of Appointment of Administrators for the receivership were issued on February 9, 2005²⁰.

15 Original petition, paragraph 2.

16 Id. at 3.

17 Id. at 4.

18 Id. at 6.

19 Id. at 7.

20 Id. at 8.

- On June 7, 2005, the assets of these companies were advertised in the Financial Times²¹.
- One of the inventors, Michael La Vean, is a creditor of Veos PLC. He bought the "title and rights" to the present patent "as a result of the sale in receivership on July 20, 2005²²."

Petitioner's Representative has Failed to Identify the Error

With this renewed petition, Petitioner's representative has asserted that the attorney of record for the present patent, Mr. Hofer, is responsible for Veos' failure to submit the maintenance fee in a timely manner. It is set forth that prior to the expiration of this patent, Attorney Hofer sent a letter to the Chief Executive Officer/Chairman of Veos PLC, listing maintenance fees which were due on the company's patents. The present patent was not on the list, and as such, the company was not informed by its chosen counsel that a maintenance fee was due²³.

Petitioner's representative has not identified the cause of the error. It has been hypothesized that perhaps the "repeated transferring of docketing data" as Mr. Hofer moved from law firm to law firm resulted in the error²⁴, or perhaps the patent number was erroneously left off the list when the letter was prepared. This amounts to mere supposition and conjecture on the part of Petitioner's representative, and it does not appear that he has been able to determine the actual cause of the error. Furthermore, no statement from anyone having firsthand knowledge of these allegations has been provided to the Office.

Petitioner's Representative Has Failed To Enumerate The Steps Taken To Ensure The Timely Payment Of The Maintenance Fee

37 C.F.R. §1.378(b)(3) sets forth that a petition submitted under this portion of the C.F.R. must include a showing which is described as follows:

A showing 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

21 Id. at 9.

22 Id. at 10.

23 Petition, page 4.

24 Id.

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.

Petitioner's representative has not shown that any of the involved parties had any steps in place for ensuring that the maintenance fee would be submitted in a timely manner. As such, acceptance of the maintenance fee is precluded by 35 U.S.C. 41(c) and 37 C.F.R. §1.378(b)(3).

On the tenth page of the decision on the original petition, the need for a showing of the steps that Hofer had in place at his various law firms was discussed:

...the attorney who prosecuted this application [Mr. Hofer] has since left his firm and has transferred to other firms in the interim...Furthermore, it has not been shown that any of the law firms for which this individual has worked had any steps in place for ensuring that the maintenance fee was submitted in a timely manner.

With this renewed petition, it does not appear that Petitioner's representative has revealed the steps taken to ensure timely payment of the maintenance fee. Petitioner's representative has alleged that "Mr. Hofer took reasonable and prudent steps to ensure that maintenance fee reminders were prepared and sent to" Veos²⁵. It does not appear that Petitioner's representative has described the systems which were purportedly in place. As such, it cannot be discerned if Mr. Hofer had any steps in place to ensure the timely payment of the maintenance fees - especially since Petitioner's representative has made this assertion in the absence of any firsthand knowledge of the steps that Mr. Hofer is purported to have had in place.

On the third page of the renewed petition, Petitioner's representative sets forth that subsequent to the issuance of this patent, Mr. Hofer transferred from firm to firm, and "Mr. Hofer explained [to Petitioner's representative] that each time he [Mr. Hofer] changed law firms, all of the docketing data related to U.S. Patent No. 5,857,959 was believed to have been transferred." Petitioner's representative has not described the docketing system employed at any of these firms. It follows that the Office has not been provided with the opportunity to discern if it

²⁵ Renewed petition, page 4.

was reasonable for Mr. Hofer to have relied on these docketing systems which are alleged to have been in place.

As set forth on the tenth page of the decision on the original petition, "it has not been shown that any of the law firms for which this individual has worked had any steps in place for ensuring that the maintenance fee was submitted in a timely manner." With this renewed petition, the showing has not been provided.

A Docketing Error cannot be Considered to have been Unavoidable when the Error was made by an Attorney

Petitioner's representative has alleged that Veos was not "reminded to pay the maintenance fee," and this "resulted in the unavoidable expiration of" this patent²⁶. In essence, Petitioner's representative has blamed the expiration on a docketing error committed by Mr. Hofer. A method where a similar mistake can be characterized as unavoidable is set forth in MPEP 711.03(c)(II)(C)(2), but this method is applicable only when the actor was an employee such as a docket clerk or a paralegal. When the actor is a registered member of the patent bar, he is held to a higher standard than one of these aforementioned employees. As such, Mr. Hofer's alleged failure to keep his docketing system up to date, or the alleged failure to include the present patent in the list of Veos patents cannot be characterized as "unavoidable." It follows that the granting of this renewed petition is precluded.

It is not clear if the Omission led to the Expiration of this Patent

No statement has been provided from the Chief Executive Officer/Chairman of Veos. As such, even if Hofer had informed this individual of the need to pay the maintenance fee for this patent, the Office has no way of determining if this individual would have been of the inclination to make the payment. It is equally possible that he would have instructed Mr. Hofer to forgo the payment, and let the patent lapse, especially since the company was having financial difficulties. As set forth on the ninth page of the decision on the original petition,

It is equally possible that prior to being placed under receivership, if these business concerns were facing financial

²⁶ Renewed petition, page 4.

difficulties, a conscious decision was made to forsake the present patent, so that scarce financial resources could be allocated to other uses.

The Lack of Firsthand Knowledge

The decision on the original petition made it clear that statements from those having firsthand knowledge of the facts set forth in the original petition would be required.

Petitioner's representative has blamed the expiration of this patent on the inaction of Mr. Hofer, but no statement has been provided by the same. Instead, Petitioner's representative has offered to provide a statement from Mr. Hofer at some point in the future, "should it be necessary²⁷."

The decision on the original petition made it clear that a statement from Mr. Hofer was a mandatory component of a grantable renewed petition. Regarding this offer to file an affidavit from Mr. Hofer at some point in the future, Petitioner will note the text which appears on pages eleven and twelve of the decision on the original petition:

After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner (emphasis included). Accordingly, on request for reconsideration, it is extremely important that petitioner supply any and all (emphasis included) relevant information and documentation in order to meet his burden of showing unavoidable delay. This includes statements by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them (emphasis added).

Petitioner's representative, after receiving notice that no further reconsideration would be accorded to him, failed to submit the required statement from Mr. Hofer. Instead, Petitioner's Representative offered to provide the document, which he was informed would be required, at a later time, when he was informed that another opportunity would not be afforded to him. By consciously omitting this necessary component of a grantable petition, it is clear that Petitioner's Representative has failed to establish that the entire period of delay was unavoidable, pursuant to 37 C.F.R. §1.378(b)(3).

²⁷ Renewed petition, page 6.

The Period of Delay and the Failure to Treat this Matter as his Most Important Business

The delay in paying the 3½-year maintenance fee extended from January 12, 2003 at midnight to the filing of the original petition on December 19, 2005.

As set forth in 37 C.F.R. §1.378(b)(3), the petition must be filed promptly after the patentee became aware of the expiration of the patent.

On the fourth page of this renewed petition, Petitioner's representative explains that the expiration of this patent was discovered "sometime in August of 2005." The decision on the original petition inquired as to why it took an additional four months to file the original petition. Researching the underlying cause took "several weeks," and Petitioner's representative underwent surgery on October 10, 2005 and was "on disability leave until November, 2006, and then only returned to work part time while undergoing physical therapy through December, 2006²⁸." It is noted that the address that appears at the bottom of this renewed petition is the law firm of "Butzel and Long." As such, it does not appear that Petitioner's representative is a solo practitioner. It is not clear what prevented the other members of this firm from handling the responsibilities of Petitioner's representative during his period of incapacitation. It appears that nobody handled the professional affairs of Petitioner's representative while he was incapacitated, and this matter was merely placed on hold until his return. This does not appear to be consistent with the actions of one who acted in relation to his most important business.

As such, Petitioner's representative still has not provided the necessary showing to establish that the delay was unavoidable within the meaning of 35 USC 41(c) and 37 C.F.R. §1.378(b). A patent holder's reliance upon an attorney does not provide him with an absolute defense, but rather shifts the focus to whether the attorney acted reasonably and prudently²⁹. It is well established that a patent holder is bound by any errors that may have been committed by his attorney³⁰. Petitioner's representative has shown that this matter was not handled as one

28 Renewed petition, page 5.

29 California Medical Products v. Technol Med. Prod., 921 F. Supp. 1219, 1259 (D. Del. 1995).

30 Smith v. Diamond, 209 U.S.P.Q. 1091, 1093 (D.D.C. 1981) (citing Link v. Wabash Railroad Co., 370 U.S. 626, 8 L. Ed. 2d 734 (1962)).

would have handled one's most important business, and this precludes the finding that the entire period of delay was unavoidable.

Conclusion

Petitioner has not fully addressed each of the issues raised in the decision on the original petition. Furthermore, Petitioner has not met the requirements of 37 C.F.R. §1.378(b)(3), as discussed at length above. For the reasons enumerated in this decision, Petitioner has not established that the entire period of delay has been unavoidable.

The prior decision which refused to accept, under 37 C.F.R. §1.378(b), the delayed payment of a maintenance fee for the above-identified patent, has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. §41(c)(1) and 37 C.F.R. §1.378(b).

Since this patent will not be reinstated, the petitioner is entitled to a refund of the surcharge and the 3½-year maintenance fee, but not the \$400 fee associated with the filing of the present renewed petition under 37 C.F.R. §1.378(e). The money will be refunded to Petitioner's Deposit Account in due course.

The general phone number for the Office of Petitions which should be used for status requests is (571) 272-3282. Telephone inquiries regarding this decision should be directed to Senior Attorney Paul Shanowski at (571) 272-3225.



Charles Pearson
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United States Patent and Trademark Office