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OFFICE OF PETITIONS

In re Application of	:	
George Guang Yang	:	
Application No. 09/669,811	:	ON PETITION
Filed: 09/26/2000	:	
For: SYSTEM AND METHODS FOR AUTOMATIC REAL-TIME DATABASE DATA EXCHANGE THROUGH INTERNET AMONG COMPUTER PLATFORMS AND DATABASE	:	

This is a decision in reference to the communication entitled "PETITION FOR RECONSIDERATION TO REVIVE MY APPLICATION" filed on February 4, 2008, which is treated as a renewed petition to withdraw the holding of abandonment.

The petition is **DENIED**. This decision may be viewed as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02.

BACKGROUND

This application became abandoned on July 17, 2004, for failure to submit a timely and proper response to the final Office action mailed on April 16, 2004, which set a three (3) month shortened statutory period for reply. On May 4, 2004, a proposed reply was filed. On October 6, 2004, an Advisory Action was mailed, stating that the reply filed on May 4, 2004, fails to place the application in condition for allowance. On October 25, 2004, applicant attempted to file a Notice of Appeal, accompanied by $160.00 in fee. On January 23, 2007, an Office communication was mailed stating that the appeal is dismissed because the statutory fee for filing the brief was not timely submitted, and the Appeal Brief was not timely submitted, and the period for obtain an extension of time to file the brief has expired. On January 29, 2007, a Notice of Abandonment was mailed, stating the reply filed on October 25, 2004, was not a proper reply.

The petition to withdraw the holding of abandonment filed on February 6, 2007, was dismissed on May 7, 2007. The renewed petition filed on May 29, 2007, was dismissed on July 25, 2007.

On August 10, 2007, a second renewed petition was filed, which was dismissed on September 27, 2007. A third renewed petition was filed on October 10, 2007, and was dismissed on December 17, 2007.

The subject renewed petition was filed on February 4, 2008.

Petitioner asserts, in pertinent part:

> The dismissal of my petition by your office "On Petition" mailed to me on December 17, 2007 **erred** in the following facts and legal bases and should be reversed:
>
> 1. **Your office did not abandon my application, nor send me any notice or letter to abandon my application on July 17, 2004** as your "On Petition" stated. Your decision to dismiss my petition erred on this fact.
>
> 2. The only "Notice of Abandonment" was mailed to me by your office on January 29, 2007. I have timely and properly responded by sending my "RE: Notice of Abandonment" to your office on February 3, 2007, which argued that it was your office's mistake to abandon my application and I have not done anything wrong.
>
> 3. I have amended my appeal brief pursuant to 37 CFR 41.37 and sent my "Amended Appeal Brief" with $250.00 filing fee under 37 CFR 41.20(b)(2) to your office on February 1, 2007 to timely respond your "Communication Re: Appeal" on January 23, 2007 which was two years and three months later after I mailed my "Notice and Brief of Appeal" to you office on October 18, 2004.
>
> 4. I timely and properly sent my "Response to Your Office Action" on April 26, 2004 to respond your "Office Action Summary" mailed to me on April 16, 2004, which did not suggest me any option to file an appeal. My response was timely filed by your office without any dispute.
>
> 5. Your office mailed me the "Advisory Action" on October 6, 2004 (5 months later) to **require me** either (1) timely file an amendment which places the application in condition for allowance; **(2) timely file a Notice of Appeal (with appeal fee)**; or (3) timely file Request for Continued Examination. I timely and

prompt mailed my "Notice and Brief of Appeal" with sufficient fee $160.00 under 37 CFR 1.17(b) to your office on October 18, 2004. I combined the notice of appeal and brief of appeal together to save time, and my "Notice and Brief of Appeal" was timely and correctly filed and my check was cashed by your office without any dispute.

6. It is not correct that your office found my appeal was late and without sufficient fee as you stated on the "On Petition". Your "On Petition" **erred** on this fact that the fee for filing a Notice of Appeal for a small entity, as of October 25, 2004, **was not $170.00** under 37 CFR 1.17(b). The Revision of Patent Fees for Fiscal Year 2005, 69 Fed. Reg. 52604 was not posted on your official website on October 25, 2004, and I did not have a chance to know it. It was your office duty, in good faith, to let the applicants know when your office increased fees. Actually, I paid additional $250.00 appeal fee on February 1, 2007 and your office cashed my check without any dispute.

7. My "Notice and Brief of Appeal" combined the notice of appeal and the brief of appeal together to save time and was submitted timely to your office without any delay on October 18, 2004. I expected your office would give me further instructions or guides for my appeal as the general practice of your office in good faith, but I did not receive any response from your office until the "Communication Re: Appeal" mailed to me on January 23, 2007, and I properly and timely responded it on February 1, 2007.

(emphasis in original)

LAW AND REGULATION

35 U.S.C. 133 states:

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable.

35 U.S.C. 134(a) states, in pertinent part:

> An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.

37 CFR 1.22(a) states:

> Patent fees and charges payable to the United States Patent and Trademark Office are required to be paid in advance; that is, at the time of requesting any action by the Office for which a fee or charge is payable with the exception that under § 1.53 applications for patent may be assigned a filing date without payment of the basic filing fee.

37 CFR 1.135(b) states:

> 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.

OPINION

Petitioner argues that the decision mailed on December 17, 2007, "erred in the following facts and legal bases". Essentially, petitioner argues that the Notice of Appeal filed on October 24, 2004, was a proper and timely reply to the final Office action mailed on April 16, 2004.

Petitioner's argument has been considered, but is not persuasive.

As stated previously, the small entity fee for filing a Notice of Appeal, as of October 25, 2004, was $170.00, not $160.00. Patent fees and charges payable to the United States Patent and Trademark Office are required to by paid in advance; that is, at the time of requesting any actions by the Office for which a fee or charge is payable. See 37 CFR 1.22. As applicant did not pay

the proper amount at the time of filing the papers filed on October 25, 2004, a proper filing of a Notice of Appeal was not made.

To this end, although the USPTO attempts to notify parties as to defective papers in order to permit timely refiling, it has no obligation to do so. See In Re Columbo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994). Rather it is the applicants who are ultimately responsible for filing proper documents. Id. As such, it is the fault of the applicant, not the USPTO, that the proper Notice of Appeal fee was not filed.

Further, petitioner's argument that the "Revision of Patent Fees For Fiscal Year 2005, 69 Fed. Reg. 52604 was not posted on your official website on October 25, 2004, and I did not have a chance to know it," lacks merit. In providing the *Federal Register* citation, petitioner concedes that the fee schedule revision was published therein, and petitioner therefore is considered to have constructive notice thereof, whether or not it was posted on the USPTO's website. See 44 U.S.C. 1507. In this case, the fee schedule revision was published in the *Federal Register* on August 27, 2004. While it is unfortunate that petitioner was not aware that the fee had changed, the failure of petitioner to file the fee in the proper amount was an avoidable mistake, and one which does not merit withdrawal of the holding of abandonment. As stated above, it is the responsibility of the applicant, not the USPTO, to ensure that the proper fee is paid when filing papers requiring a fee in the USPTO.

Furthermore, assuming, *arguendo*, petitioner's Notice of Appeal had included the proper fee, it was, in any event, an untimely reply to the final Office action mailed on April 16, 2004. As the final Office action set a three (3) month shortened statutory period for reply, only up to three (3) months of extensions of time could be obtained. The Notice of Appeal would, therefore, have to have been filed not later than October 16, 2004, with the appropriate extensions of time to be a timely reply. In no event, however, could a timely Notice of Appeal be filed on October 25, 2004, because said date was more than six (6) months after the date of mailing of the final Office action mailed on April 16, 2004.

While the Office is mindful that applicant is a *pro se* inventor, such does not excuse petitioner from compliance with Office laws and regulations. Petitioner was not forced, but rather made a conscious decision to prosecute the application *pro se*, and therefore must be held accountable for his actions, or lack

thereof, before the Office. There are numerous resources available to petitioner, as to the others who have chosen this path of prosecution, to obtain the necessary information to prosecute the application before the Office.

In summary, the showing of record is that petitioner did not file a proper and timely reply to the final Office action mailed on April 16, 2004. As such, the application is properly held **abandoned**.

As petitioner has failed, despite repeated attempts, to provide any persuasive arguments meriting withdrawal of the holding of abandonment, the petition must be **denied**.

CONCLUSION

The prior decision, which refused to withdraw the holding of abandonment, has been reconsidered, and is affirmed.

Petitioner is not precluded from filing a petition to revive pursuant to 37 CFR 1.137. However, continued delay in filing such a petition, after this final agency action, may be determined to be intentional delay and may preclude revival of the application.

Telephone inquiries concerning this matter may be directed to Senior Petitions Attorney Douglas I. Wood at (571) 272-3231.

Charles Pearson
Director
Office of Petitions