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In re Application of	:	
Ong, et al.	:	
Application No. 11/754,832	:	ON PETITION
Filed: May 29, 2007	:	
Attorney Docket No. 30101.353	:	

This is a decision on the renewed petition under 37 CFR 1.137(a), filed December 16, 2008, requesting that the above-identified abandoned application be revived on the basis of unavoidable delay.

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 timely file pay the issue fee in response to the Notice of Allowance mailed June 23, 2008. This Notice set a statutory period for reply of three (3) months. No issue fee having been received, the application became abandoned on September 24, 2008. Applicants filed a petition to revive under 37 CFR 1.137(a) on October 15, 2008. However, the petition was dismissed in a decision mailed on November 12, 2008. Applicant filed a renewed petition on November 14, 2008. However, the petition was once again dismissed in a decision mailed on December 11, 2008.

Relevant Rules and Regulations:

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner 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 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). 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:

> 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 business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, **worthy and reliable employees**, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.[1]

Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."[2]

Analysis:

In essence, petitioner has presented the following arguments with the instant petition and the prior petitions: (1) a docketing error caused the delay, (2) neither applicant nor counsel had actual knowledge of the Notice of Allowance, and (3) petitioner

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

[2] Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

acted with the due care of a reasonably prudent person.

Petitioner explains that he received a "Private Pair Correspondence Notification" and a "Courtesy Reminder" postcard, both of which stated that new outgoing correspondence was available for the application. Neither of these documents "delivered" the Notice of Allowance to petitioner (either in text or as an attachment), "nor did either disclose or even hint that such a Notice had been issued." However, despite having knowledge that the Office had issued an action, Petitioner has stated that due to an error on his part, he inadvertently failed to print the Notice of Allowance, which in turn led to the Notice and the issue fee payment deadline not being docketed.

Actual knowledge of the Notice of Allowance is irrelevant. As part of the e-Office action Pilot Program, the Office informed petitioner that an action had been issued. That petitioner failed to print out the action to learn that it was a Notice of Allowance was not unavoidable.

Prior decisions on petition have acknowledged that it is true that a delay resulting from an error (e.g., a docketing error) on the part of an **employee** in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the due exercise of due care. See MPEP 711.03(c)(III)(C)(2).

However, when the actor is a registered member of the patent bar, he is held to a higher standard than one of these aforementioned employees. The Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and petitioner is bound by the consequences of those actions or inactions. Link v. Wabash, 370 U.S. 626, 633-34 (1962); Huston v. Ladner, 973 F.2d 1564, 1567, 23 USPQ2d 1910, 1913 (Fed. Cir. 1992); Smith v. Diamond, 209 USPQ 1091, 1093 (D.D.C. 1981). As such, the error of applicant's attorney in performing a clerical function can not be characterized as unavoidable within the meaning of 37 C.F.R. § 1.137(a).

Nevertheless, petitioner argues that he, as a patent attorney, was trained on the docketing software, and has been performing

docketing functions daily for several years. Accordingly, petitioner argues that he acted with the due care of a reasonably prudent person.

As set forth above, the unavoidable standard permits petitioners to rely upon worthy and reliable employees, and if through the unforeseen fault of one of these employees there occurs an error, it may properly be said to be unavoidable, all other conditions being present. MPEP 711.03(c)(III)(C)(2) sets forth these conditions with respect to docketing errors that occur on the part of an employee.

Lastly, the case of In re Katrapat, 6 USPQ2d 1863 (Comm'r Pat. 1988), cited by petitioner, has been considered, but is not persuasive. In Katrapat, the docketing error at issue occurred by one of counsel's reliable employees. Here, rather than relying upon a worthy and reliable employee in the performance of a clerical function, petitioner chose to undertake the clerical function himself. As a result, while an unfortunate error by counsel occurred, it can not be said to be unavoidable within the meaning of 37 CFR 1.137(a) and MPEP 711.03(c)(III)(C)(2).

Alternative Venue:

While the showing of record has not been sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is not precluded from obtaining relief by filing a petition pursuant to **37 CFR 1.137(b)** on the basis of **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); 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.

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

Charles Pearson
Director
Office of Petitions