Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

IN RE APPLICATION OF S
June 7, 1988

James E. Denny

Deputy Assistant Commissioner for Patents

ON PETITION

***1** This is a decision on petition, filed March 14, 1988, in the above- identified application, requesting waiver of the requirements of 37 CFR 1.136(a) so that a request for extension of time filed after the period for response had expired could be granted.

The petition is denied.

This application became abandoned for failure to respond in a timely manner to the Office action of September 16, 1986 which set a three (3) month shortened statutory period for response.

On January 13, 1988, petitioner filed a 37 CFR 1.137(b) petition and a proposed response. The date of abandonment of this application was determined to be December 17, 1986; MPEP 711.04(a). Since the § 1.137(b) petition was filed more than one (1) year after this date of abandonment, the petition was held to be barred and therefore was dismissed in a decision mailed January 26, 1988.

In this petition, it is argued that law and regulation allow the Commisisoner to grant the above noted request for an extension of time whereby the date of abandonment of this application will become March 17, 1987, thus rendering the § 1.137(b) petition timely and grantable.

A § 1.136(a) extension of time is authorized under 35 USC 41(a)8 which was enacted pursuant to H.R. 6260. The legislative history of H.R. 6260 is set forth in House Report No. 97-542 (Committee on the Judiciary), Congressional Record, Vol. 128 (1982), a reprint of which appears at 1086 TMOG 88. This report contains the following statement (see 1086 TMOG 91):

"The Commissioner may issue regulations providing when, within any maximum period permitted by statute, petitions for extensions of time, and the required fee therefor, may be filed". (Emphasis added).

This statement clearly establishes that Congress, in promulgating 35 USC 41(a)8, did not intend to permit the grant of an extension of time request filed after the expiration of a statutory period.

Even absent this expression of Congressional intent, it would be improper to grant an extension of time request filed after the expiration of a statutory period. This is because the Commissioner, in accordance with his authority under 35 USC 6, has implemented 35 USC 41(a)8 via regulations (i.e., 37 CFR 1.17 and 1.136(a)) which plainly do not permit the grant of such a request. In this regard, note for

example, the following statement contained in the Final Rule publication, dated July 14, 1982, at 1021 OG 19:

***2** "The extension fee can be paid during the period for which an extension of time to respond is desired, or after the original period for response has expired, provided that any maximum statutory period which may apply has not expired." (Emphasis added).

37 CFR 1.183 permits waiver of any requirement of the rules which is not a requirement of statute in an extraordinary situation, when justice requires. Petitioner has neither alleged, nor proven, that an extraordinary situation exists. Similarly, petitioner has not shown that the interests of justice require waiver of the rules in the situation described above. Further, since there is an alternative remedy available to applicant, namely a petition to revive under 37 CFR 1.137, resort to waiver of the rules is unnecessary. Accordingly, the petition to waive the rules is denied.

It follows that the petition under 37 CFR 1.137(b) remains barred as untimely.

8 U.S.P.Q.2d 1630

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