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INNOVATION DIVISION
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NEW YORK NY 10022

In re Application of :
Andrew C. Gilbert et al. :
Application No. 10/113,841 : ON PETITION
Filed: March 29, 2002 :
Attorney Docket No. 01-1050 :

This is a response to the PETITION TO INVOKE SUPERVISORY AUTHORITY OF THE DIRECTOR AND PETITION FOR RULE MAKING, filed October 13, 2010, which is being treated as a petition under 37 CFR 1.181(a)(3), requesting that the Director exercise his supervisory authority to review and overturn the decision of the Director, Technology Center 3600 (Technology Center Director), dated August 13, 2010, which dismissed the petition filed October 14, 2009.

This is also a decision on the petition for extension of time under 27 CFR 1.136(b) filed March 19, 2010.

The petition under 37 CFR 1.181(a)(3), to overturn the decision of the Technology Center Director dated August 13, 2010, is **DENIED**. Accordingly, the Technology Center will **not** be directed to withdraw the finality of the final Office action mailed on February 19, 2009 or to enter the after final amendments filed on July 28, 2009 and August 19, 2009.

The petition under 37 CFR 1.136(b), requesting an extension of time for filing of an appeal brief, is **granted** to the extent petitioners are given a time period of **TWO (2) MONTHS** from the mail date of this decision to file an appeal brief in compliance with 37 CFR 41.37. An appeal brief in compliance with 37 CFR 41.37 must be filed within **two months** from the mailing date of this decision to avoid dismissal of the appeal by operation of 37 CFR 41.37. This time period is **not** extendable under 37 CFR 1.136 or any other provision, and petitioners should expect **no** further extension of the time period for filing an appeal brief in this application.

BACKGROUND

A non-final Office action was mailed January 23, 2008.

An amendment to the Office action was filed February 25, 2008 and supplemented on April 23, 2008.

A final Office action was mailed February 19, 2009.

A petition to the Technology Center Director was filed October 14, 2009.

A petition decision by the Technology Center Director, dismissing the October 14, 2009 petition was mailed August 13, 2010.

The instant petition to the Director was filed October 13, 2010.

STATUTE, REGULATION, AND EXAMINING PROCEDURE

35 U.S.C. § 132(a) states:

(a) Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

37 CFR 1.4(c) states:

(c) Since different matters may be considered by different branches or sections of the United States Patent and Trademark Office, each distinct subject, inquiry or order must be contained in a separate paper to avoid confusion and delay in answering papers dealing with different subjects.

37 CFR 1.181 states:

- (a) Petition may be taken to the Director:
- (1) From any action or requirement of any examiner in the ex parte prosecution of an application, or in ex parte or inter partes prosecution of a reexamination proceeding which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court;
 - (2) In cases in which a statute or the rules specify that the matter is to be

determined directly by or reviewed by the Director; and

(3) To invoke the supervisory authority of the Director in appropriate circumstances. For petitions involving action of the Board of Patent Appeals and Interferences, see § 41.3 of this title.

(b) Any such petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda, if any, in support thereof should accompany or be embodied in the petition; and where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) must accompany the petition.

(c) When a petition is taken from an action or requirement of an examiner in the ex parte prosecution of an application, or in the ex parte or inter partes prosecution of a reexamination proceeding, it may be required that there have been a proper request for reconsideration (§ 1.111) and a repeated action by the examiner. The examiner may be directed by the Director to furnish a written statement, within a specified time, setting forth the reasons for his or her decision upon the matters averred in the petition, supplying a copy to the petitioner.

(d) Where a fee is required for a petition to the Director the appropriate section of this part will so indicate. If any required fee does not accompany the petition the petition will be dismissed.

(e) Oral hearing will not be granted except when considered necessary by the Director.

(f) The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

(g) The Director may delegate to appropriate Patent and Trademark Office officials the determination of petitions.

37 CFR 1.104(c) states:

(c) Rejection of claims.

(1) If the invention is not considered patentable, or not considered patentable as claimed, the claims, or those considered unpatentable will be rejected.

(2) In rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his or her command. When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified.

(3) In rejecting claims the examiner may rely upon admissions by the applicant, or the patent owner in a reexamination proceeding, as to any matter affecting patentability and, insofar as rejections in applications are concerned, may also rely upon facts within his or her knowledge pursuant to paragraph (d)(2) of this section.

37 CFR 1.111(b) states:

(b) In order to be entitled to reconsideration or further examination, the applicant or patent owner must reply to the Office action. The reply by the applicant or patent owner must be reduced to a writing **which distinctly and specifically points out the supposed errors in the examiner's action and must reply to every ground of objection and rejection in the prior Office action** (emphasis added). The reply must present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references. If the reply is with respect to an application, a request may be made that objections or requirements as to form not necessary to further consideration of the claims be held in abeyance until allowable subject matter is indicated. The applicant's or patent owner's reply must appear throughout to be a bona fide attempt to advance the application or the reexamination proceeding to final action. A general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section.

37 CFR 1.113 states:

(a) On the second or any subsequent examination or consideration by the examiner the rejection or other action may be made final, whereupon applicant's, or for ex parte reexaminations filed under § 1.510, patent owner's reply is limited to appeal in the case of rejection of any claim (§ 41.31 of this title), or to amendment as specified in § 1.114 or § 1.116. Petition may be taken to the Director in the case of objections or requirements not involved in the rejection of any claim (§ 1.181). Reply to a final rejection or action must comply with § 1.114 or paragraph (c) of this section. For final actions in an inter partes reexamination filed under § 1.913, see § 1.953.

(b) In making such final rejection, the examiner shall repeat or state all ground of rejection then considered applicable to the claims in the application, clearly stating the reasons in support thereof.

(c) Reply to a final rejection or action must include cancellation of, or appeal from the rejection of, each rejected claim. If any claim stands allowed, the reply to a final rejection or action must comply with any requirements or objections as to form.

37 CFR 1.136(b) states:

(b) When a reply cannot be filed within the time period set for such reply and the provisions of paragraph (a) of this section are not available, the period for reply will be extended only for sufficient cause and for a reasonable time specified. Any request for an extension of time under this paragraph must be filed on or before the day on which such reply is due, but the mere filing of such a request will not affect any extension under this paragraph. In no situation can any extension carry the date on which reply is due beyond the maximum time period set by statute. See § 1.304 for extensions of time to appeal to

the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extensions of time in ex parte reexamination proceedings; § 1.956 for extensions of time in inter partes reexamination proceedings; and §§ 41.4(a) and 41.121(a)(3) of this title for extensions of time in contested cases before the Board of Patent Appeals and Interferences. Any request under this section must be accompanied by the petition fee set forth in § 1.17(g).

MPEP 710.06 states in part:

710.06 [R-6] Situations When Reply Period Is Reset or Restarted

Where the citation of a reference is incorrect or an Office action contains some other error that affects applicant's ability to reply to the Office action and this error is called to the attention of the Office within 1 month of the mail date of the action, the Office will restart the previously set period for reply to run from the date the error is corrected, if requested to do so by applicant. If the error is brought to the attention of the Office within the period for reply set in the Office action but more than 1 month after the date of the Office action, the Office will set a new period for reply, if requested to do so by the applicant, to substantially equal the time remaining in the reply period. For example, if the error is brought to the attention of the Office 5 weeks after mailing the action, then the Office would set a new 2-month period for reply. The new period for reply must be at least 1 month and would run from the date the error is corrected. See MPEP § 707.05(g) for the manner of correcting the record where there has been an erroneous citation.

Where for any reason it becomes necessary to refile any action (MPEP § 707.13), the action should be correspondingly redated, as it is the refile date that establishes the beginning of the period for reply. For Image File Wrapper (IFW) processing, see IFW Manual.

A supplementary action after a rejection explaining the references more explicitly or giving the reasons more fully, even though no further references are cited, establishes a new date from which the statutory period runs.

If the error in citation or other defective Office action is called to the attention of the Office after the expiration of the period for reply, the period will not be restarted and any appropriate extension fee will be required to render a reply timely. The Office letter correcting the error will note that the time period for reply remains as set forth in the previous Office action.

DECISION

Introduction

At the outset, it is noted that the instant petition is captioned "PETITION TO INVOKE SUPERVISORY AUTHORITY OF THE DIRECTOR AND PETITION FOR RULE MAKING." To the extent that the petition is concerned with invocation of the Director's supervisory authority with regard to issues involving application number 10/113,841, it is treated herein as a petition under 37 CFR 1.181(a)(3) to review the decision of the Technology Center Director dated August 13, 2010. However, insofar as the petition is a "petition for rule making," the Director denies the petition without prejudice to refiling as a separate petition. Ex parte prosecution of particular patent application is not the appropriate venue for a broad discussion of the rule making rights and duties of the Office.

A number of petitioners' requests for relief concern Office-wide examiner guidance and/or rule making policy,¹ which are separate issues from any particular alleged error in the instant case. Because neither future examiner guidance nor rule making constitutes relief that can be granted directly **in this application**, neither is an appropriate subject for a petition invoking the Director's supervisory authority to review the decision of the Technology Center Director under 37 CFR 1.181(a)(3). Furthermore, 37 CFR 1.4(c) states:

(c) Since different matters may be considered by different branches or sections of the United States Patent and Trademark Office, each distinct subject, inquiry or order must be contained in a separate paper to avoid confusion and delay in answering papers dealing with different subjects.

Insofar as the requests for relief rest on questions of Office compliance with administrative law and the President's Bulletin for Agency Guidance Practices, these matters suggest purely generalized prospective action rather than action on this immediate case. Thus the petition of October 13, 2010 fails to comply with the "separate paper" requirement of 37 CFR 1.4(c), and is improper. To the extent that petitioners' allegations of error and requests for relief concern issues raised in the prosecution of the instant application, they will be addressed herein. To the extent petitioners' request for relief suggests generalized prospective rule making and guidance changes the Office may take, petitioners' request is considered a petition for rule making and

¹ The following non-case-specific requests for relief made in the petition of October 13, 2010 are not treated on their merits herein: Page 3: "The PTO should implement the President's Bulletin for Agency Guidance Practices. As one part of this implementation, examiners and SPE's should be instructed that they do not have the authority to grant themselves waivers from MPEP requirements – waivers can only be obtained through procedures that the PTO will establish in its implementation of the Good Guidance Bulletin." Page 3: "The Director should add guidance to the MPEP instructing examiners that they are required to consider claims limitation-by-limitation." Page 3: "Petitions decision-makers should be instructed that they do not have the authority in deciding petitions to overrule or ignore precedential decisions of the Director, the Board on questions of the Board's jurisdiction, the United States Supreme Court on issues of law, the Executive Office of the President, regulations issued by the Executive for governing conduct of executive branch employees, or administrative law statutes and OMB regulations." Page 4: "Petitions decision-makers should be instructed that they do not have the authority to redefine issues presented on petition." Page 10: "Petition for rule making: the Director should issue formal guidance to ensure that future Actions address all claim limitations."

denied without prejudice for failing to file the requests as a separate petition. This denial without prejudice of your petition for rule making and generalized suggestions for Office practice is not a decision on the merits and is not a final agency action. *See* MPEP § 1002.02.

The petition addressed herein requests review of the Technology Center Director's decision of August 13, 2010 which determined that the Office action of February 19, 2009 was properly designated as a final Office action. Petitioners' arguments and allegations of error² in the Technology Center Director's Decision of October 14, 2009 are addressed in section I. Various modes of relief are requested in the petition. The requests for relief are addressed in section II.

I. The Finality of the Office Action Mailed on February 19, 2009

Four papers are central to the issue of proper finality: the non-final rejection of January 23, 2008; the replies filed February 25, 2008 and April 23, 2008; and the final rejection mailed February 19, 2009.

The non-final rejection included the following:

a rejection under 35 U.S.C. § 101 of claims 70-125, 140-149 and 157-174;

a rejection under 35 U.S.C. § 112 of claims 1-64, 70-133 and 139-174;

a rejection under 35 U.S.C. § 102(e) of claims 1-5, 7-11, 13-15, 17, 33-35, 57-64, 70-74, 84, 86, 90 and 126-133 as anticipated by Waelbroeck 2002/0010672 (Waelbroeck); and

a rejection of claims 6, 16, 18-32, 36-56, 75-83, 85, 87-89, 91-125 and 139-174 under 35 U.S.C. § 102(e) or in the alternative under 35 U.S.C. § 103(a) as anticipated or obvious over Waelbroeck.

In response to this non-final rejection, petitioners filed on February 25, 2008 a reply titled REQUEST FOR COMPLETION OF OFFICE ACTION PURSUANT TO MPEP § 710.06 AND REQUEST FOR RECONSIDERATION OF THE ISSUE OF PREMATURE FINAL REJECTION (Request). On April 23, 2008, petitioners filed a SUPPLEMENTAL AMENDMENT (Amendment).

The Request raised the issue of premature finality of a previous final Office action mailed April 11, 2007 and requested remailing of an action under MPEP 710.06. The examiner responded to both these issues in the Response to Arguments portion of the final Office action mailed February 19, 2009.

² The absence of a discussion of a contention or allegation by petitioners should not be taken as agreement with petitioners as to the contention or allegation.

The Amendment of April 23, 2008 included, again, a request for reconsideration of the finality of the final Office action mailed April 11, 2007 and for remailing of an action under MPEP 710.06. The examiner responded to both these issues in the final Office action of February 19, 2009. The Amendment contains at item 12 on page 5 a discussion of the term “penalty” and this appears to be an argument by applicant that the reference does not meet this limitation, although applicant does not specifically indicate what claim(s) might have this term. The Amendment further included amendments to various claims. However, this Amendment contained no remarks in regard to the amended claim language and how such changes to the claims render the claims patentable over the applied references as required under 37 CFR 1.111(b).

In response to the Request and Amendment, the examiner mailed a final Office action on February 19, 2009. This final Office action included the following:

a rejection under 35 U.S.C. § 112 of claims 1-10, 13-64, 70-133 and 139-174;

a rejection under 35 U.S.C. § 102(e) of claims 1-5, 7-10, 13-15, 17, 33-35, 57-64, 70-74, 84, 86, 90 and 126-133 as anticipated by Waelbroeck; and

a rejection of claims 6, 16, 18-32, 36-56, 75-83, 85, 87-89, 91-125 and 139-174 under 35 U.S.C. § 102(e) or in the alternative under 35 U.S.C. § 103(a) as anticipated or obvious over Waelbroeck.

Petitioners argue that “[t]he August 2010 Decision misstates the law by excusing the Examiner from considering the claim language in a final action.” (page 7)

Petitioners argue that appeal to the Board is foreclosed because the Technology Center Director did not require the examiner to consider the claim language before issuing the final Office action of February 19, 2009. According to petitioners at page 9:

The Examiner’s failure to engage with the claim language deprives applicant of any remedy at the Board. If the T.C. Director will not compel the Examiner to put the application in condition for appeal, this petitioners – as so many appellants before – is just dead stuck.

Petitioners’ assessment is incorrect. The Technology Center Director properly considered the issue of the Examiner’s treatment of the claim limitations in view of the applied prior art. The Technology Center Director determined that the requirements of 37 CFR 1.104(c)(2) regarding explanation of the pertinence of a reference that forms the basis of a prior art rejection had been met. This is consistent with the requirement of 35 U.S.C. § 132(a) for a statement of reasons for a rejection such that applicant may judge “the propriety of continuing the prosecution of his application.” The Technology Center Director did not misstate the law, but instead properly determined that no return of the application to the Examiner was warranted.

Furthermore, it is not a requirement of the law that a rejection under 35 U.S.C. § 132(a) specify each and every feature of the claimed invention and where it can be found in the applied reference. As noted by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in response to an applicant's argument³ that the procedural requirements for a *prima facie* case of obviousness had not been met because the examiner had failed to provide an

[o]n-the-record showing of a reasonable, broadest reasonable claim construction and . . . a record showing that there is evidence bridging the facial differences between that reasonable claim construction and the purported anticipatory reference ,

the Federal Circuit pointedly disagreed, stating that there is no requirement for such an explicit showing under 35 U.S.C. § 132(a):

There has never been a requirement for an examiner to make an on-the-record claim construction of every term in every rejected claim and to explain every possible difference between the prior art and the claimed invention in order to make out a *prima facie* rejection. This court declines to create such a burdensome and unnecessary requirement. . . . [A]ll that is required of the office to meet its *prima facie* burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice requirement of § 132. As the statute itself instructs, the examiner must "notify the applicant," "stating the reasons for such rejection," "together with such information and references as may be useful in judging the propriety of continuing prosecution of his application."

See In re Jung, 637 F.3d 1356, 1363 (Fed. Cir. 2011).

The Federal Circuit's decision in *Jung* follows its earlier consideration of the requirements of § 132 in *Chester v. Miller*, 906 F.2d 1574 (Fed. Cir. 1990). In the context of an anticipation rejection, the *Chester* court noted that "[s]ection 132 is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection." *Id.* at 1578 (citing *In re Wilke*, 314 F.2d 558, 562 (CCPA 1963)). As explained in the previous decision, in this case the examiner specifically explained which portions of references applied were relevant to which claims. Thus the grounds of rejection were made clear and the requirements of § 132 were met.

If it is petitioners' contention that the examiner failed to establish a *prima facie* case as to any ground of rejection, then such argument would be the basis for an appeal and not a petition to the Director. Contrary to petitioners' contention that the Technology Center Director's decision mailed August 13, 2010 did not provide reasoning for her decision, the Technology Center Director specifically stated in her decision (page 7) the following:

³ During oral argument (at 8:15-8:50).

In the instant application, the examiner maintained the same statutory basis of rejection and relied upon the same references. The final Office action merely elaborated on the rejections in response to the applicants' arguments, and thus it did not change the basic thrust of the rejections. Accordingly, the final Office action did not introduce any new grounds of rejection within the meaning of MPEP 706.07(a).

With regard to the rejections for obviousness, petitioners' attention is drawn to the Supreme Court's decision in *Dann v. Johnston*, 425 U.S. 219 (1976). The Court in that case cautioned against an unwarranted attempt to focus on an element-by-element comparison of the claimed invention to the prior art. To the contrary, the Court reaffirmed that a proper obviousness analysis views the claimed subject matter (that is, the invention as a whole) from the vantage point of a person of ordinary skill in the art. The Court stated:

[I]t must be remembered that the "obviousness" test of § 103 is not one which turns on whether an invention is equivalent to some element in the prior art but rather whether the difference between the prior art and the subject matter in question "is a different sufficient to render the claimed subject matter unobvious to one skilled in the applicable art. . . ."

Id. at 228 (quoting *In re Johnston*, 502 F.2d 765, 771 (CCPA 1974), Markey, C. J., dissenting).

Contrary to petitioners' statement quoted above, they are not "stuck." Appeal to the Board under 35 U.S.C. § 134 remains an avenue open to the applicant in this case. If the applicant believes that the rejection over the Waelbroeck reference is untenable because the examiner has failed to make out a proper *prima facie* case, appeal to the Board is an appropriate next step. At page 9 of the Decision of August 13, 2010, the Technology Center Director reminded petitioners of this procedure, and also appropriately cautioned that "arguments drawn to the merits of a rejection" are not petitionable under 37 CFR 1.181. The Board decisions noted at pages 8-9 of the Petition of October 13, 2010 do not dictate a different conclusion. While those decisions may involve failure of an examiner to provide a sufficiently detailed explanation of a rejection such that the Board cannot render a decision on the basis of the merits of the rejection, they do not result in the Board refusing to take action in the case. For example, *Ex parte Forest*, quoted on page 8 of the Petition of October 13, 2010, resulted not in dismissal of the appeal, but rather in vacatur of the examiner's rejection. Contrary to petitioners' apparent view of the case, *Forest* was not denied relief simply because the examiner's rejection was inadequate. Rather, because the Board could not evaluate the rejection on its merits, it granted relief by means of the procedural tool of vacatur. In this case, even if petitioners were correct about the alleged deficiency of the Examiner's rejections, he would not be left without an avenue for redress.

37 CFR 1.181 makes clear that matters subject to appeal to the Board are not petitionable. Issues related to the merits of a patentability rejection are appealable to the Board rather than petitionable to the Director. See 35 U.S.C. § 134 and MPEP §§ 706.01 and 1201. The issue of whether a rejection made by the examiner sets forth a *prima facie* case of obviousness and the issue of whether the examiner sets forth sufficient reasoning to support an obviousness rejection

are directed to the merits of the examiner's rejection, which have been held to be appealable matters rather than petitionable matters. See, for example, *Boundy v. U.S. Patent & Trademark Office*, 73 USPQ2d, 1471 (E.D. Va. 2004). It is well settled that the Director will not, on petition, usurp the functions or impinge upon the jurisdiction of the Board. See, for example, *In re Dickinson*, 299 F.2d 954, 958 (CCPA 1962); *Bayley's Restaurant v. Bailey's of Boston, Inc.*, 170 USPQ 43, 44 (Comm'r Pat. 1971); and *In re Oku*, 25 USPQ2d 1155, 1157 (Comm'r Pat. 1992). Furthermore, if such a review is permitted pursuant to a petition under 37 CFR 1.181 for withdrawal of the finality of an Office action, petitioners would be permitted to seek review of a non-final Office action from the Director and courts as a petitionable matter, which would be contrary to the legal precedents. Individual examiners' actions are not final actions subject to review as a final agency action under the Administrative Procedure Act, 5 U.S.C. 701-06. *Boundy*, 73 USPQ2d at 1471.

In summary, the examiner issued a non-final Office action, and petitioners elected to respond by arguing the merits of a previous Office action and requesting a remailing of the non-final Office based on alleged incompleteness of the action. However, no specifics of incompleteness were presented. Petitioners then filed an amendment to the claims but did not properly argue the rejections of record as required under 37 CFR 1.111(b). The examiner properly repeated the art-based rejections with comments as the examiner felt necessary given the minimal arguments presented by petitioners. In view of the above, the Technology Center Director's decision that: (1) the requirements for making the Office action final under 37 CFR 1.113 were met; and (2) there is no need for a supplementary action explaining the references more explicitly or giving the reasons more fully, was not in error.

Petitioners argue that “[t]he August 2010 Decision erred in failing to provide a written decision.” (pages 12 and 26)

Petitioners argue that the failure of the Technology Center Director to address with specificity each and every issue raised in the Petition amounts to a lack of “reasoned decision making” as required, for example, by the Supreme Court in *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). In support of his contention, petitioners cite a statement on page 9 of the August 13, 2010 decision of the Technology Center Director: “Finally, it should be noted that all issues raised by Petitioner in the petitions filed on October 14, 2009 and March 19, 2010 have been considered. Issues not specifically addressed in the instant decision, while considered, neither address the merits nor change my decision.”

Under the Administrative Procedure Act (APA), an agency action denying a petition must be accompanied by a “brief statement of the grounds for denial.” 5 U.S.C. § 555(e). See also *I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283-84 (1987). Here, the Technology Center Directors denied the petition by stating that the issues not specifically addressed in the decision had been considered but did not “address the merits.” Accordingly, the denial was accompanied by a “brief statement of the grounds of denial” and satisfied the requirements of § 555(e). Moreover, even if the Technology Center Director's denial could be read as violative

of the APA, additional reasoning based on *Jung* has been included in the instant decision. Thus, petitioners have been provided with a reasoned decision in accordance with the law.

In addition, 37 CFR 1.181 provides for review of actions or requirements of an examiner in the *ex parte* prosecution of an application, and is not a forum for general complaints about USPTO practices or procedures. Accordingly, the Technology Center Director's decision addressed all the relevant issues related to actions taken or requirements made in the instant application that were presented in the petition under 37 CFR 1.181 filed on October 14, 2009, and is thus in compliance with 5 U.S.C. § 555(e).

Furthermore, petitioners' claim that the August 2010 decision "depart[ed] from 'matter presented' too widely to constitute a sustainable decision under 5 U.S.C. § 555(b)," (page 26), misconstrues § 555(b). 5 U.S.C. § 555(b) relates solely to an applicant's right to counsel in agency proceedings. Section 555(b) provides that "[a] person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a *matter presented* to it." (emphasis added to indicate the only use of the phrase petitioners quoted in the cited section). Petitioners were entitled to, and in fact were, represented by counsel throughout the proceeding, thus the Office's actions and decisions have complied with § 555(b). Moreover, nothing in § 555(b) suggests any limitation on the permissible scope of an agency's decision such that an agency could "depart[] from the 'matter presented' too widely to constitute a sustainable decision under 5 U.S.C. § 555(b)." But, even if § 555(b) could be read to constrain the permissible scope of an agency's decision, both the examiner's and the Technology Center Director's decisions related solely to the patentability of petitioners' claims, which clearly was the "matter presented" to the Office. Accordingly, petitioners' argument under § 555(b) is without merit.

Petitioners argue that "[t]he August 2010 Decision erred by setting a § 1.136(b) extension period other than that requested with no explanation whatsoever." (page 14)

On August 13, 2010, the Technology Center Director granted petitioners' request for an extension of time by stating, "The petition under 37 CFR 1.136(b), requesting extensions of time for filing an appeal brief, is **GRANTED** to the extent that a one-month time period is provided for applicants to file an appeal brief in compliance with 37 CFR 41.37." (page 1). Petitioners argue that the Technology Center Director's decision fails to comply with 5 U.S.C. § 555(e) because it provides no reasoning in support of the decision to grant a one-month extension under 37 CFR 1.136(b) to file an appeal brief, rather than a two-month extension as had been requested. Under 5 U.S.C. § 555(e), "a brief statement of the grounds *for denial*" (emphasis added) of a petition is required unless "the denial is self-explanatory." Petitioners' request for an extension of time was granted the Technology Center Director, and petitioners were allowed a one-month extension. Because petitioners' request was not denied, the APA does not require any explanation of the decision.

Nevertheless, to reduce the issues of disagreement, this decision **grants** the request for an extension of time to the extent petitioners are given a time period of **TWO (2) MONTHS** from the mail date of this decision to file an appeal brief in compliance with 37 CFR 41.37. Thus, an appeal brief in compliance with 37 CFR 41.37 must be filed within **two months** from the mailing date of this decision to avoid dismissal of the appeal by operation of 37 CFR 41.37. This time period is **not** extendable under 37 CFR 1.136 or any other provision.

Petitioners should expect **no** further extensions of the time period for filing an appeal brief in compliance with 37 CFR 41.37, even if petitioners seek to file additional submissions continuing to contest the matters that have been finally decided in this decision, or any other matter. Specifically, it is brought to petitioners' attention that "[t]he mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings." See 37 CFR 1.181(f). Thus, the failure to file an appeal brief in compliance with 37 CFR 41.37 within **two (2) months** from the mailing date of this decision will result in the dismissal of the appeal by operation of 37 CFR 41.37, regardless of what additional submissions are filed in this application.

Petitioners argue that "[t]he August 2010 Decision erred by failing to address Supreme Court authority on the consequences of the PTO's invocation of mootness." (page 14)

Petitioners correctly note that the examiner stated at page 18 of the Office action of February 19, 2009 that "any arguments with respect to the premature nature of said Final Office action are moot." Inexplicably, petitioners then cite *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) – a case involving alleged racial bias in hiring of firefighters – in an attempt to support the view that the examiner's assertion of mootness carries with it an assurance that any conduct alleged by petitioners to be wrongful will not recur, and that any effects of such conduct will be eradicated.

The point being made by the examiner was that because the request for continued examination of October 11, 2007 complied with 37 CFR 1.114(d) and 1.17(e) and was therefore granted, finality of the April 1, 2007 Office action had been withdrawn and the application, at that time, was not under final rejection. See page 18 of the Office action of February 19, 2009. Because the application was not, at that time, under final rejection, the examiner correctly noted that any argument about premature finality was moot. The examiner's usage of the term "moot" would appear to be in accordance with current understanding of the term as defined in *Black's Law Dictionary*, 8th ed., Thomson-West 2004, page 1029: "Having no practical significance; hypothetical or academic." Because the arguments had no bearing on the case at that time, the examiner properly declined to address them. The question of finality of the April 1, 2007 Office action is not at issue here.

The *County of Los Angeles* case concluded that there was no longer a case or controversy between the parties sufficient to confer jurisdiction on the federal court because the issue in question – possible discriminatory effects of hiring practices for firefighters – had become moot. The case is completely irrelevant to the issue at hand because the USPTO is not a federal court and does not depend on notions of jurisdiction applicable to federal courts for its authority.

Therefore, the Technology Center Director did not err by failing to address petitioners' arguments based on this case.

Petitioners argue that the Office improperly refused to enter the August 2009 amendment because "under the Paperwork Reduction Act, the PTO lacks authority to foreclose submission of the amendment of August 2009." (page 19)

Petitioners' argument is that under 44 U.S.C. § 3512 and 5 CFR 1320.6, 37 CFR 1.113 and 1.116 cannot be enforced because petitioners allege that the Office did not implement 37 CFR 1.113 and 1.116 in accordance with the Paperwork Reduction Act [PRA].

Firstly, the Office complies with the PRA. 37 CFR 1.116 addresses amendments to the patent application filed after a final Office action. These amendments are collected pursuant to the Information Collection Request governed by OMB Control Number 0651-0031, Patent Processing. 37 CFR 1.113 merely explicates which Office actions are final Office actions. The Office does not receive anything, information or otherwise, via 37 CFR 1.113. Thus, the PRA has no impact on 37 CFR 1.113. Accordingly, the Office has fully complied with the PRA in implementing 37 CFR 1.113 and 1.116, and the Technology Center Director's decision cannot be overturned on this basis.

Secondly, petitioners misunderstands the PRA. The PRA provides that "no person shall be subject to any penalty for failing to comply with a collection of information that is subject to the requirements of [the PRA] if . . . [t]he collection of information does not display, in accordance with § 1320.3(f) and § 1320.5(b)(1), a currently valid OMB control number assigned by the Director in accordance with the Act . . ." 5 CFR 1320.6(a)(1). Although in an effort to provide the greatest transparency to the public, the Office has obtained an OMB control number (Number 0651-0031) for amendments after final Office actions, neither 37 CFR 1.113 nor 1.116 collects information as defined in the PRA. The PRA defines a "collection of information" to be "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posted to, or identical reporting, recordkeeping, or disclosure requirements imposed upon, ten or more persons . . ." 5 CFR 1320.3(c). But, the PRA then explains that "[i]nformation does not include items in the following categories [:] . . . Facts or opinions obtained or solicited through nonstandardized follow-up questions designed to clarify responses to approved collections of information[.]" 5 CFR 1320.3(h)(9). Amendments pursuant to 37 CFR 1.116 allow applicants to provide "[f]acts or opinions" that "follow-up" the examiner's "nonstandardized" rejections of claims in the application, and the claims in the application are collected pursuant to OMB Collection Number 0651-0032, Initial Patent Applications. Thus, the amendments collected pursuant to 37 CFR 1.116 do not collect "information" under the PRA. Additionally, as previously noted, nothing is collected under 37 CFR 1.113, and thus it is not subject to the PRA. Accordingly, petitioners' amendment after final is not subject to the PRA and petitioners' argument does not provide a basis for overturning the Technology Center Director's decision.

Thirdly, even if 37 CFR 1.113 and 1.116 could be characterized as subject to the PRA and even if the USPTO had not obtained an OMB control number for the collection (which it has), petitioners have not been “subject to any penalty for failing to comply with a collection of information[.]” See 5 CFR 1320.6(a)(1). Petitioners’ claims have been rejected because they do not appear to meet the conditions for patentability set forth 35 U.S.C. §§ 102, 103, and 112 for the reasons outlined in the final rejection of February 19, 2009, and not because petitioners failed to respond to an information collection requirement. Accordingly, the public protection provisions of the PRA are not a defense to the rejection of pending claims of petitioners’ application.

Petitioners argue that “[t]he August 2010 Decision erred in its jurisdictional analysis by failing to ‘carefully observe’ the issue presented and applicable law,” “because it misstates the issue presented,” and “because it departs from the applicable agency regulation, and ignores applicable agency precedent.” (page 21)

Petitioners cite MPEP 1201 concerning the differences between appealable and petitionable decisions, and argues that the distinction was not “carefully observed.” Petitioners attempt to draw a fine line between the issue of the teachings of the Waelbroeck reference *per se* and the examiner’s allegedly deficient explanation of how the teachings of the Waelbroeck reference apply to the claims. Petitioners’ position appears to be that because the content of the reference is not at issue, the matter is petitionable.

Petitioners correctly state that under 37 CFR 1.181(a)(1), an examiner’s action that is not appealable is petitionable. As explained above, the question presented in this case is appealable, and thus not petitionable. As petitioners have pointed out, the Board might possibly conclude on appeal that the case cannot be decided on the basis of the merits of the rejection. In such a situation, the Board may choose to vacate the examiner’s action and remand. This outcome would not mean that the case was not appealable, but only that the Board decided the matter on procedural grounds. The Technology Center Director’s decision of August 13, 2010 did not fail to distinguish petitionable from appealable matters.

It is agreed that the content of the reference is not under discussion here. However, it does not follow that the matter is therefore petitionable. A question about the examiner’s alleged failure to provide an explanation of a rejection that amounts to a proper *prima facie* case is a question about the merits of the rejection: Did the examiner, by a preponderance of the evidence, establish that the claim was unpatentable over the reference applied? Such a question is properly addressed by the Board. The characterization of the issue in Technology Center Director’s decision of August 13, 2010 did not result in an erroneous conclusion.

Petitioners argue that “[t]he August 2010 Decision erred by reframing the issues presented, and instead relying on non sequiturs.” (page 25)

At issue is the examiner’s alleged failure to address the term “penalty.” As discussed above, the Technology Center Director’s decision of August 13, 2010 carefully reviewed the prosecution history and properly concluded that the examiner complied with applicable laws and regulations. Such a thorough treatment does not constitute “reframing the issues” or “relying on non sequiturs.” An alleged failure to address, in a detailed and explicit manner, how every claim limitation is met by the prior art applied, does not compel the conclusion that the examiner has failed to do his job properly, even if the allegation is true. As recently stated in *Jung*, “[t]here has never been a requirement for an examiner to make an on-the-record claim construction of every term in every rejected claim and to explain every possible difference between the prior art and the claimed invention in order to make out a prima facie rejection.” *Jung*, 637 F.3d at 1363.

Petitioners argue that “[t]he August 2010 Decision errs in defining ‘error.’ ” (page 26)

Petitioners cite the Technology Center Director’s statement in the decision of August 13, 2010 at page 8 that Petitioner had provided “no showing in support of an error in the non-final Office action” of January 23, 2008. To the extent that petitioners’ allegation can be understood, it appears that petitioners are arguing that the Technology Center Director misunderstands what is meant by “error” in this context. Contrary to petitioners’ assertion, it does not appear that the Decision attempts to define “error” at all.

The Technology Center Director references 37 CFR 1.111(b) in the paragraph immediately preceding the quoted passage. That regulation requires an applicant who wishes to have an Office action reconsidered to submit a reply that “distinctly and specifically points out the supposed errors in the examiner’s action” and that replies “to every ground of objection and rejection in the prior Office action.” The regulation further states that “[a] general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section.”

The responses of February 25, 2008 and April 23, 2008 do indeed allege premature finality and failure to explain the pertinence of the references. However, the issue being raised by the Technology Center Director appears to have been that the regulations require more than procedural complaints and vague allegations of failure to explain a rejection. A degree of specificity that points out why the claims are patentable over the references applied is needed. Nevertheless, the Technology Center Director did not direct the examiner to hold applicant’s responses to be non-compliant with 37 CFR 1.111(b). Thus it cannot be said that the Technology Center Director has erred in her assessment of the issue of compliance with 37 CFR 1.111(b).

Petitioners argue that “[t]he August 2009 [sic, 2010] Decision errs in its consideration of the MPEP § 710.06 issue.” (page 27)

Petitioners allege that certain Office actions were so unclear as to have affected the applicant’s ability to reply. Thus, petitioners assert that the Technology Center Director erred in her conclusion that remailing a new action under the provisions of MPEP 710.06 was not warranted.

Petitioners have failed to provide evidence or reasons why any Office action in this case was so defective as to affect applicant’s ability to reply. A mere allegation of error or simple request for a new action is insufficient. As pointed out by the Technology Center Director, the fact that applicant has been able to submit responses to every Office action provides ample evidence that any lack in the various Office actions was not so great as to affect applicant’s ability to reply. No error is seen in the Technology Center Director’s consideration of the MPEP § 710.06 issue regarding remailing of Office actions.

II. Response to Petitioners’ Requests for Relief

1. Premature finality of the action of February 19, 2009 should be vacated.

For the reasons presented in section I above, the February 19, 2009 Office action was properly designated as a final Office action. Accordingly, the relief requested is **denied**, and the action will not be vacated.

2. The amendment of July 28, 2009 was a proper reply to the Office action of February 19, 2009 and is sufficient to toll any further need for extension of time.

This request for relief is predicated on the view that the Office action of February 19, 2009 was not properly made final. As noted above, the finality of the February 19, 2009 Office action, was proper. Therefore the amendment filed July 28, 2009 is an amendment filed after final rejection, and its entry is governed by 37 CFR 1.116. As noted in the advisory action mailed August 14, 2009, this amendment did not place the application in condition for allowance and was thus not a proper response to the final Office action. The period for response to the final Office action continued to run from the date of the final Office action.

3. The amendment of August 19, 2009 should be entered, either as a supplemental reply or pursuant to 5 CFR 1320.6.

This amendment of August 19, 2009 is an amendment after final rejection and thus its entry is subject to the conditions of 37 CFR 1.116.⁴ 37 CFR 1.116 is specific as to the conditions that must be met for an amendment after final rejection to be entitled to entry, and the amendment of

⁴ While the amendment of August 19, 2009 is not a supplement to a reply under 37 CFR 1.111, it does not in any event meet the conditions of 37 CFR 1.111(a)(2) to be entered as a matter of right.

August 19, 2009 does not meet the conditions for entry specified in 37 CFR 1.116. An Advisory Action mailed September 11, 2009 noted this amendment did not place the application in condition for allowance.

For the reasons outlined on page 14 above, nothing in 5 CFR 1320.6 requires the Office to enter petitioners' amendment after final rejection because: (1) the Office complied with the PRA and collects amendments such as this one under OMB Control Number 0651-0031; (2) 37 CFR 1.113 and 1.116 are not collections of "information" as defined by the PRA; and (3) the claims of petitioners' application was rejected for the reasons explained in the examiner's final rejection and the Technology Center Director's denial of reconsideration, not for any failure of the petitioners to submit information in accordance with an unapproved collection of information.

4. Any fee charged for the Notice of Appeal of August 19, 2009 was charged by mistake.

Since the claims of this application were twice rejected, the Notice of Appeal filed on August 19, 2009 was a proper response under 37 CFR 1.113 to the Office action of February 19, 2009. Insofar as petitioners argue that the Notice of Appeal of August 19, 2009 was "conditional," note MPEP 714.13 II:

The U.S. Patent and Trademark Office does not recognize "conditional" authorizations to charge an appeal fee if an amendment submitted after a final Office action is not entered. Any "conditional" authorization to charge an appeal fee set forth in 37 CFR 1.17(b) will be treated as an unconditional payment of the fee set forth in 37 CFR 1.17(b).

An appeal fee is required by law upon filing a notice of appeal. *See* 35 U.S.C. § 41(a)(6)(A). Accordingly, the appeal fee was not paid by mistake or in excess within the meaning of 35 U.S.C. § 42(d) and 37 CFR 1.26, and thus will not be refunded. *See Meissner v. United States*, 228 F.2d 643 (D.C. Cir. 1955).

5. The examiner's assertion of mootness of finality is irrevocable, the PTO is bound to "eradicate all effects" of previous premature assertions of finality, and to "cease all offending conduct" going forward.

As explained above, the examiner's use of the term "moot" was in reference to applicant's argument of premature finality at a stage in prosecution when the case was no longer under final rejection. There was no assertion "of mootness of finality" as here alleged by petitioners. There is not seen to be any basis for relief associated with the issue of "mootness." Petitioners' request the Office "eradicate all effects" is denied.

6. To “eradicate effect” as required by the examiner’s assertion of mootness, the PTO must refund the RCE fee charged October 2007 or January 2008, and set the application in a status where it continues to accrue term extensions under 35 U.S.C. § 154(b)(1)(B), without the exception of 35 U.S.C. § 154(b)(1)(B)(i).

As noted above, petitioners’ “mootness” argument provides no basis for relief. To the extent that Petitioners argue that the October 11, 2007 paper was merely a conditional request for continued examination, note MPEP 706.07(h) III C:

C. Treatment of Conditional RCE. If a submission is accompanied by a “conditional” RCE and payment of the RCE fee under 37 CFR 1.17(e) (i.e., an authorization to charge the 37 CFR 1.17(e) fee to a deposit account in the event that the submission would not otherwise be entered), the Office will treat the “conditional” RCE and payment as if an RCE and payment of the fee set forth in 37 CFR 1.17(e) had been filed.

The question of determination of the appropriate patent term adjustment is not before the Office at this time. Any patent term adjustment under 35 U.S.C. § 154(b) will be indicated on the Notice of Allowance if the Office subsequently allows the instant application after an examination on the merits. See 37 CFR 1.705. Any request for reconsideration of the patent term adjustment indicated on any Notice of Allowance that issues in the instant application must be presented in compliance with 37 CFR 1.705(b) after the Office issues a Notice of Allowance in this application.

7. The PTO should implement the President’s *Bulletin for Agency Guidance Practices*.

A significant portion of the petition addresses whether the USPTO guidance and other informational documents (e.g., MPEP and memoranda to the Patent Examining Corps) complies with Executive order 12866 (Sept. 30, 1993) (Regulatory Planning and Review)⁵ and the Office of Management and Budget (OMB) Bulletin on Good Guidance Practice. The USPTO fully complies with Executive Order 12866 and the Bulletin on Good Guidance Practices. Furthermore, a petition in a particular patent application is not the proper forum for requesting that the Office issue general guidance. However, it is noted that Section 11 of Executive order 12866 expressly indicates that: “[t]his Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its agencies or instrumentalities, its officers or employees, or any other person.” See *Executive Order 12866 of September 30, 1993; Regulatory Planning and Review*, 58 *Fed. Reg.* 51735 (Oct. 4, 1993). The Bulletin on Good Guidance Practice is a bulletin issued by OMB in a Federal Register notice entitled *Final Bulletin for Agency Good Guidance Practices*, published at 72 *Fed. Reg.* 3432 (Jan. 25, 2007). Similar to Executive order 12866, the Final Bulletin for Agency Good Guidance Practices expressly indicates that “[t]his Bulletin is intended to improve the internal management of the Executive Branch and is not intended to, and does not, create any right or benefit,

⁵ Executive order 12866 (Sept. 30, 1993) was amended by Executive order 13258 (Feb. 26, 2002), Executive order 13422 (Jan. 18, 2007), and Executive order 13497 (Jan. 30, 2009).

substantive or procedural, enforceable at law or equity, against the United States, its agencies, or other entities, its officers or employees, or any other person.” See *Final Bulletin for Agency Good Guidance Practices*, 72 *Fed. Reg. at 3440*. Any person may bring issues of alleged non-compliance on the part of the USPTO with Executive order 12866 or the Final Bulletin for Agency Good Guidance Practices to the attention of the Department of Commerce or the Office of Management and Budget by sending inquiries, comments, or complaints regarding USPTO guidance documents via email sent to guidance@doc.gov with the word “GUIDANCE” in the subject heading, or by mail to:

Department of Commerce
Office of General Counsel
ATTN: Guidance Herbert C. Hoover Building
14th & Constitution Avenue, NW, Room 5876
Washington, DC 20230

Petitioners issues concerning compliance or non-compliance with Executive order 12866 or the Final Bulletin for Agency Good Guidance Practices, however, do not provide a basis for setting aside or otherwise disturbing the TC Director’s decision in the above-identified application. See, e.g., *Teledyne, Inc. v. United States*, 50 Fed. Cl. 155, 190 (Fed. Cl. 2001) (plaintiff cannot rely upon an Executive Order that, by its plain terms, precludes judicial review of an agency’s compliance with its directive as a basis for challenging agency action). Accordingly, no action is warranted with respect to Executive Order 12866 for this application.

8. The Director should add guidance to the MPEP instructing examiners that they are required to consider claims limitation-by-limitation.

As stated above, a petition in a particular patent application is not the proper forum for requesting that the Office issue general guidance. As noted in the Foreword to the MPEP, suggestions for improvements to the MPEP may be sent to:

Mail Stop MPEP
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Furthermore, as has already been explained, the examiner in this case acted in accordance with applicable law when providing an explanation of the rejection. Under 37 CFR 1.181, applicant may have review of actions or requirements of an examiner in the *ex parte* prosecution of an application, but 37 CFR 1.181 is not a forum for general complaints about USPTO practices or procedures. Accordingly, the Technology Center Director’s decision addressed all the relevant issues related to actions taken or requirements made in the instant application that were presented in the petition under 37 CFR 1.181 filed on October 14, 2009, and is thus in compliance with 5 U.S.C. § 555(b) and (e). As to item 8, no action is warranted with respect to this case.

9. Petitions decision-makers should be instructed that they do not have the authority in deciding petitions to overrule or ignore precedential decisions of the Director, the Board on questions of the Board's jurisdiction, the United States Supreme Court on issues of law, the Executive Office of the President, regulations issued by the Executive for governing conduct of executive branch employees, or administrative law statutes and OMB regulations.

As stated above, a petition in a particular patent application is not the proper forum for requesting that the Office issue general guidance. The Office provides instruction and training for its employees concerning applicable laws and procedures. No relief on this basis is warranted.

10. Petitions decision-makers should be instructed that they do not have the authority to redefine issues presented on petition.

As stated above, a petition in a particular patent application is not the proper forum for requesting that the Office issue general guidance. Appropriate instruction is provided for Office employees. Insofar as it is necessary to construe arguments presented in a petition in order to provide an appropriate response, such interpretation is not contrary to law. No relief on this basis is warranted.

Petitioners' request for a telephone hearing to assist on issues of administrative law is appreciated but is respectfully declined.

CONCLUSION

The petition under 37 CFR 1.181(a)(3) requesting review of the Technology Center Director's decision of August 13, 2010 is **granted** to the extent that the decision has been reviewed.

For the reasons stated above, the Technology Center Director's decision of August 13, 2010 is not shown to be in error. The record establishes that the Technology Center Director had a reasonable basis to support her findings and conclusion. Additional reasoning in support of this decision is provided herein. Accordingly, the petition is **DENIED** with respect to grant of any relief. The decision of August 13, 2010 will not be disturbed. This decision is a final agency action within the meaning of 5 U.S.C. § 704 upon entry of a final decision by the Board. *See* MPEP § 1002.02(b).

The finality of the final Office action mailed on February 19, 2009 is **not** withdrawn and entry of the after final amendment filed on July 28, 2009 and August 19, 2009 is **denied**. An appeal brief in compliance with 37 CFR 41.37 must be filed within **two (2) months** from the mailing date of

this decision to avoid dismissal of the appeal by operation of 37 CFR 41.37. This time period is **not** extendable under 37 CFR 1.136 or any other provision, and petitioners should expect **no** further extensions.



Robert W. Bahr
Senior Patent Counsel

Acting Associate Commissioner for
Patent Examination Policy