

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

In re Application of:)
)
Katrina E.A. Lindell) Decision on Request
Serial No. 10/481,053) under 37 C.F.R. § 1.304(a)(3)(i)
)
_____)

MEMORANDUM AND ORDER

On September 30, 2011, patent applicant Katrina E.A. Lindell (“Lindell”) filed a request under 37 C.F.R. § 1.304(a)(3)(i) for additional time in which to seek judicial review of the Board decision in the above-captioned application. The two-month deadline set by 37 C.F.R. § 1.304(a)(1) for seeking judicial review in this case was October 1, 2011.

The additional time is granted for the reasons stated herein.

The Director may extend the time for filing an appeal or commencing a civil action for good cause shown if requested in writing before the expiration of the period for commencing the action. 37 C.F.R. § 1.304(a)(3)(i). Because Lindell filed her request one-day prior to the deadline for seeking judicial review, the “good cause” standard governs. In her request, Lindell explains that on June 30, 2011, she filed a Request for Rehearing of the Board’s initial May 3, 2011 decision in this case; the Request argued, among other things, that the Board had entered a “new grounds of rejection” in its decision. On August 1, 2011, the Board issued a decision denying the Rehearing Request in which it, among other things, rejected Lindell’s “new grounds” argument. Shortly thereafter, the Court of Appeals for the Federal Circuit issued a decision in In re Leithem (2011-1030) (Sept. 19, 2011), which addressed issues relating to “new grounds of rejection.” On September 30, 2011, Lindell filed a Second Request for Rehearing based on the Leithem decision, arguing that the Board should rehear their decision in light of the intervening precedent.

Recognizing that the governing Board rules prohibit more than one request for rehearing (37 C.F.R. § 42.51(a)(1)), Lindell also filed a Petition to Suspend the Rules under 37 C.F.R. § 1.183 (“Rule 183 Petition”), to permit the filing of the second rehearing request. On November 21, 2011, Lindell’s Rule 183 Petition to waive 37 C.F.R. § 42.51(a)(1) was denied. Accordingly, Lindell’s underlying request for additional time under Rule 304(a)(3)(i) is now ripe for decision.

The Director finds that the totality of the present circumstances constitute “good cause.” It should be noted that the 37 C.F.R. § 41.52(a)(1) clearly prohibits additional requests for rehearing. Accordingly, the act of filing additional rehearing requests on the Board Decision will generally not constitute “good cause” to provide additional time for an applicant to seek judicial review under Rule 304. Encouraging the orderly conclusion of Board proceedings and respect for the Board’s procedural rules compels as much. The Director concludes that this situation presents a unique exception to that general rule, given the rare instance here of intervening precedent by our reviewing Court speaking directly to an issue raised by applicant in their first rehearing request. That the particular issue goes to the finality of the Board’s Decision, and thus the judiciary’s ability to review the decision in the first instance, made Lindell’s filing arguably justifiable. Further, Lindell respected the Board’s rule prohibiting additional requests for rehearing by simultaneously filing her Rule 183 Petition to waive Rule 41.52(a)(1). While the Rule 183 Petition was not granted, Lindell should not lose her ability to seek judicial review of the Board decision as a result. The Director makes these observations to clarify that practitioners should not perceive this Decision as license to file additional papers with the Board or USPTO after the Board proceedings have finished, or assume that such papers will necessarily form a proper basis for granting additional time under Rule 304.

ORDER

For the reasons stated herein, it is ORDERED that the request for an extension of time under 37 C.F.R. § 1.304(a)(3)(i) is granted.

Lindell's time for seeking judicial review under 37 C.F.R. § 1.304(a)(1) in the above-captioned application is extended from October 1, 2011, to January 23, 2012.

Raymond Chen

Deputy General Counsel

for

Intellectual Property Law and Solicitor

Dated: December 22, 2011