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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
17/081,922	10/27/2020	Rachel Fraser	38767-0015010	9314
26191	7590	04/25/2023		
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			ART UNIT	PAPER NUMBER
			1759	
			NOTIFICATION DATE	DELIVERY MODE
			04/25/2023	ELECTRONIC

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In re Application of Impossible Foods Inc.
Application No.: 17/081,922
Filing Date: 27 October 2020
Attorney Docket No.: 38767-0015010
For: METHODS AND COMPOSITIONS FOR
AFFECTING THE FLAVOR AND AROMA
PROFILE OF CONSUMABLES

**DECISION ON PETITION
UNDER 37 CFR 1.78(c)
AND 1.78(e)**

This is a decision on the petition under 37 CFR 1.78(c) and (e), filed March 28, 2013, to accept an unintentionally delayed claim under 35 U.S.C. 119(e) and 120 for the benefit of priority to one or more prior-filed provisional and nonprovisional/international applications.

Under 37 CFR 1.78(c) and (e), a petition to accept an unintentionally delayed claim under 35 U.S.C. 119(e) and 120 for the benefit of a prior-filed application must be accompanied by:

- (i) the reference required by 35 U.S.C. 119(e) and 120 and 37 CFR 1.78(a)(3) and 1.78(d)(2) to the prior-filed applications, unless previously submitted;
- (ii) the petition fee set forth in 37 CFR 1.17(m); and
- (iii) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(4) and (d)(3) and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

With regard to item (i), intermediate application number 15/913,018 does not contain a proper reference to any of the priority applications sought to be added to the present application.. As set forth in MPEP 211.01(b), Section II., "Benefit Claims to Multiple Prior Applications", "Sometimes a pending application is one of a series of applications wherein the pending application is not copending with the first filed application but is copending with an intermediate application entitled to the benefit of the filing date of the first application. . . . Appropriate references must be made in each intermediate application in the chain of prior applications." Before the petition can be granted, intermediate application number 15/913,018 must be amended to include an appropriate reference to said prior applications.

With regard to item (ii), the petition fee set forth in 37 CFR 1.17(m) has been submitted.

With regard to item (iii), the petition contains a proper statement of unintentional delay. However, this petition was filed more than two years after the date the domestic benefit claim was due.

The USPTO requires additional information concerning whether a delay in seeking acceptance of a delayed benefit claim was unintentional where the petition to accept such benefit claim was filed more than two years after the date the benefit claim was due. See Clarification of the Practice for Requiring Additional Information in Petitions Filed in Patent Applications and Patents Based on Unintentional Delay, 85 FR 12222 (March 2, 2020). Therefore, additional information that provides an explanation of the circumstances surrounding the delay that establishes the entire delay was unintentional is required.

The USPTO is concerned with three periods of delay. Petitioner is reminded the burden of proof to establish that the delay from the due date for the domestic benefit claim until the filing of a grantable petition was unintentional within the meaning of 35 U.S.C. 119 and 120 and 37 CFR 1.78 rests with the petitioner.

The first period of delay petitioner must address on renewed petition is the delay in filing the domestic benefit claim. Petitioner must explain the delay between when the benefit claim was due and when the benefit claim was filed.

The second period of delay petitioner must address on renewed petition is the delay in filing the initial petition pursuant to 37 CFR 1.78. Petitioner must explain why the initial petition was not filed until March 28, 2023.

The third period of delay petitioner must address on renewed petition is the delay in filing a grantable petition pursuant to 37 CFR 1.78.

When addressing each of these three periods of delay, petitioner is reminded that an intentional course of action is not rendered unintentional when, upon reconsideration, the petitioner changes his or her mind as to the course of action that should have been taken. See *In re Maldague*, 10 USPQ2d 1477, 1478 (Comm'r Pat. 1988). Petitioner's failure to carry the burden of proof to establish that the "entire" delay was "unintentional" may lead to the denial of a petition under 37 CFR 1.78, regardless of the circumstances that originally resulted in the failure to timely submit the domestic benefit claim.

Petitioner should note that the party whose delay is relevant is the party having the right or authority to file the domestic benefit claim in the above-identified application. When the applicant assigns the entire right, title, and interest in an invention to a third party (and thus does not retain any legal or equitable interest in the invention), the applicant's delay is irrelevant in evaluating whether the delay was unintentional. See *Kim v. Quigg*, 718 F. Supp. 1280, 1284, 12 USPQ2d 1604, 1607-08 (E.D. Va. 1989). See MPEP 711.03(c)(II)(C)-(F) for additional guidance on the information required to establish that the entire delay was unintentional.

For the reasons above, the petition under 37 CFR 1.78(c) and (e) is **DISMISSED** without prejudice.

Any further correspondence with respect to this matter may be filed electronically via EFS-Web selecting the document description "Petition for review and processing by the PCT Legal Office" or by mail addressed to Mail Stop PCT, Commissioner for Patents, International Patent Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the International Patent Legal Administration.

/George Dombroske/
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