

review pursuant to 37 C.F.R. § 11.2(d). Petitioner requests that the Director “make an exceptional ruling by granting” him registration.

The provision now codified at 37 C.F.R. § 11.7(e) was revised in 2004 to provide that “[n]otification of the exam results is final.” 69 Fed. Reg. 33428, 35455, June 24, 2004. The preamble to the notice explained that the USPTO had determined that regrading of examinations was no longer necessary, in part because the current rule permits an applicant who fails an exam to retake it 30 days later. 69 Fed. Reg. at 35439.

In making notification of examination results final and eliminating exam regrades, the regulations necessarily contemplated that an applicant who answered sufficient questions correctly to pass, but was denied a passing score through USPTO error, would have no recourse other than retaking the exam. Even viewing the facts here in the light most favorable to Petitioner, the most that could be concluded is that he might have attained a passing score absent a flaw in administration of the exam. Petitioner, therefore, is in a substantially similar situation to an applicant whose examination was mis-scored.

37 C.F.R. § 11.3 permits waiving a rule contained in 37 C.F.R. part 11 only “[i]n an extraordinary situation, when justice requires.” 37 C.F.R. § 11.7(e) necessarily contemplates that an applicant who would have received a passing score on the examination but for a USPTO error will be required to retake the examination. Because Petitioner’s situation is one contemplated by the regulation, it cannot be said to be “extraordinary.” Put another way, if merely being required to retake the examination due to a USPTO error was an extraordinary situation, the finality provision of 37 C.F.R. § 11.7(e) would never be applied.

Further, even if Petitioner's situation could be considered "extraordinary," 37 C.F.R. § 11.3 would afford relief to Petitioner only to the extent "justice requires." While the USPTO makes every effort to ensure that the examination is administered in a way that is fair to and convenient for applicants, the examination's primary purpose is to ensure that patent applicants are represented only by competent practitioners. To the extent "justice" is considered, therefore, the overriding concern must be the protection of applicants through the admission of only those practitioners who have demonstrated that they have the knowledge and skills necessary to pass the examination. Unlike an applicant whose examination was mis-scored, however, Petitioner can only speculate that he might have passed the examination absent the alleged malfunction. Indeed, Petitioner alleges both that he lost time because he had to click the mouse many times to activate the MPEP's zoom function, and that he was prevented from using the MPEP altogether, which allegations appear to be inconsistent. With respect to the lost time, it is possible to determine neither the amount of time lost nor the effect, if any, that the loss of time had on Petitioner's score.² In short, justice does not require that Petitioner be admitted to the patent bar without demonstrating that he can pass the examination. Petitioner has already been afforded an opportunity to retake the examination at no cost; this is the most to which he might be entitled.

Because Petitioner cannot establish that the alleged problems in the administration of his examination constitute an extraordinary situation within the ambit of 37 C.F.R. § 11.3, or that justice requires that he be admitted without passing the examination, his petition must be denied.

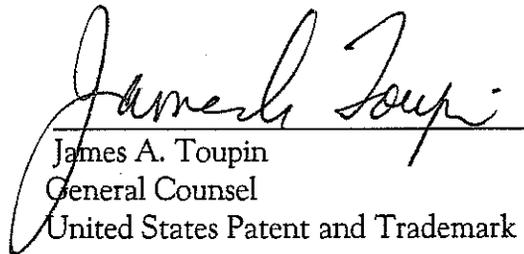
² We note that Petitioner's doctor suggested that an additional 80% to 100% of the time normally allotted for the examination would be appropriate to compensate for Petitioner's vision problems; the USPTO granted a full 100% extra.

ORDER

Upon consideration of the petition to the USPTO Director for registration to practice before the USPTO in patent cases, it is

ORDERED that the petition is DENIED.

By delegation from the Under Secretary of Commerce for Intellectual Property and Director of the United State Patent and Trademark Office:


James A. Toupin
General Counsel
United States Patent and Trademark Office

Date: July 12, 2006