

## 3 Years, 3 New US Patent Offices

*Law360, New York (November 30, 2011, 6:22 PM ET)* -- Scientists are filing an increasing number of patent applications with the United States Patent and Trademark Office: nearly tripling from 1990 to 2010.[1] Examiners at the USPTO examine each application to determine whether it should issue as a patent. Examiners must understand applicants' invention and the applicable law and apply the law to uniquely worded applications.

Otherwise, an applicant may be unfairly denied a patent and/or forced to spend additional money during an extended "prosecution" of the patent. Meanwhile, erroneously allowing patent claims to issue may unfairly restrict citizens' access to the alleged invention. Thus, competent examiners are essential to the proper operation of the patent system.

The USPTO has embarked in impressive hiring efforts — hiring over 1,000 examiners each year, 2006 to 2009.[2] Nevertheless, the USPTO has been unable to keep up with the high filing rates. Thus, application backlog has approximately quadrupled since 1990 to over one million, and the average prosecution time (from filing to allowance or abandonment) has doubled to since 1990 to three years.[3][4]

The backlog may be partly explained by examiner attrition: Over 400 examiners were lost by the agency each year, 2006 to 2009.[2] Frequently, the attrition completely or nearly completely matched the hiring. Even at the height of the hiring efforts, hiring efforts were reported to be insufficient to reduce the patent application backlog.[5]

Rather, it was reported that retention was key to efficient prosecution, as "patent examiners require 4 to 6 years of on-the-job experience before they become fully proficient." Median experience among examiners was 5.48 years in 2010, indicating that approximately half of examiners are not fully proficient.[6] Thus, reducing examiner attrition may allow for higher quality and faster examination of applications.

In December 2010, the USPTO announced a new strategy to recruit and retain examiners and reduce backlog: The office would expand from its single-office operation in Alexandria, Va., and open a regional patent office (in Detroit). Detroit was chosen because it "ha[s] a high percentage of scientists and engineers in the workforce; provid[es] access to major research institutions ...; and support[s] a high volume of patenting activity and significant numbers of patent agents and attorneys in the area." [7]

The newly enacted Leahy-Smith America Invents Act expanded the initiative: requiring the USPTO to open three or more regional offices by September 2014.[8] The first regional office will still be in Detroit, but locations for the other offices remain unknown.

## **Office Locations**

Cities are vying to be the home of the other regional offices. Speculation exists that new offices could open in Silicon Valley, Calif.; Denver; Minneapolis; Austin, Texas; and/or Seattle.[9] The USPTO must open two offices by September 2014, and the offices must be geographically diverse.

Because the Alexandria and Detroit offices are located in the eastern portion of the United States, I predict that one of the remaining two offices will be located toward the center of the U.S. (e.g., Denver, Minneapolis or Austin), and the other toward the West (e.g., Seattle or Silicon Valley). Analysis of the AIA and state-specific variables may offer further insight as to where the next offices will be located.

Generally, the regional-office locations must improve: (1) connection between inventors and the USPTO; and (2) attraction and retention of qualified examiners, thereby reducing backlog and improving examination quality.[10] The offices must be geographically diverse and the economic impact on the region is to be considered.

## **Connecting the USPTO with Applicants**

Regional offices should “increase outreach activities to better connect patent filers and innovators with the Office.”[11] For example, any inventor or his patent attorney may “interview” an examiner to, e.g., discuss pending rejections. The USPTO has promoted interviews as a means to improve prosecution efficiency.[12]

However, conducting an in-person interview (which is arguably more effective than telephonic interviews) is easier if the applicant need not travel far. Locating offices in cities with many applicants or easily accessible to applicants may encourage interviews and decrease prosecution durations, thereby reducing the USPTO’s backlog and applicants’ costs.

All five of the above-listed states have a large number of annual patent filings (over 2,000 in each state) and patent attorneys or agents (over 500 in each state).[13][14] California and Texas have higher numbers than do the other three states, though this discrepancy may be partly due to their large geographic size. An office in any of these five states would seemingly improve connections between the USPTO and many local applicants.

A regional office should also be easily accessible by inventors in all other states to promote inventor-examiner interactions. Thus, it may also be useful to consider a city’s airport size, as it will likely be easier for applicants to travel to a large airport (e.g., due to direct-flight options).

All five cities, with the exception of Austin, have or are near an airport ranking among the top 20 airports in the U.S. for a number of boardings.[15] (Austin’s airport ranks 44th.) Denver’s airport ranks highest among the five — having the fifth-most airport boardings in the nation. Thus, it is reasonably likely that nonlocal applicants could book relatively inexpensive and/or direct flights to an office in most of these cities (with the possible exception of Austin).

## **Qualified Populations of Potential Examiners**

The USPTO must consider “the availability of scientific and technically knowledgeable personnel in the region from which to draw new patent examiners at minimal recruitment cost.”[16] Examiners must have a degree in science or engineering.[17] Thus, a relevant variable to the above-quoted objective is the percentage of each state’s population over the age of 25 with a science or engineering degree. A high percentage suggests that the USPTO may be more likely to recruit and retain qualified examiners.

The states' rankings vary rather dramatically. California, Colorado and Washington are amongst the top seven states — each having over 40 percent of their adults with a science or engineering degree.[18] Meanwhile, Minnesota and Texas rank 24th and 27th, having percentages around 35 percent. Therefore, it may be easier for the USPTO to attract qualified examiners in California, Colorado and Washington locations, as compared to Minnesota or Texas locations.

## **Location Summary**

The state-specific data presented herein is incomplete, as the USPTO will certainly be considering other factors (e.g., requisite salaries that would be necessary to retain examiners). Nevertheless, this data relates to factors that the USPTO is required to consider. Generally, the statistics show that each of the five states vying for the new regional offices have at least some qualities that make them attractive candidates.

I predict that the next two offices will open in California and Colorado. The relatively large scientifically educated population would provide the USPTO with the ability to attract qualified examiners and interact with potential or actual applicants. Further, Silicon Valley and Denver are rather centrally located and are near large airports. This would seemingly make it easier for applicants and Washington, D.C.-based USPTO personnel to travel to/from the offices.

## **Regional Office Operations**

The AIA does not specify how regional offices will operate. For example, will each office examine applications across many technology areas, or will offices specialize?

The senior advisor of telework at the USPTO, Danette Campbell, has indicated that the Detroit office will indeed be at least somewhat specialized (though other regional offices may operate differently): “[S]taffing will be driven by the demographics of available candidates in the area and the need of the office to ensure high quality and timely review of applications. As candidates are assessed, they will be matched to the technology area that best fits their education and prior work experience. At each satellite office an effort will be made to focus on similar technologies such that examiner interaction within the office may be maximized.”[19]

This specialization may improve the quality of examination. The USPTO will be able to hire the most qualified applicants, rather than being pressured to hire underqualified applicants in a locally underrepresented field. Further, examiners will be able to interact with each other, and the USPTO may provide site- and technology-specific training.

However, specialization may decrease the local inventors' access to the patent system.

For example, if an inventor files a semiconductor-related application, it would likely be routed to a distant office if a local office does not examine semiconductor applications. Campbell indicated that a supervisory patent examiner at the Alexandria location will route each application based upon application priority and filing dates; applicants will not be able to select an examining-office location.[20]

This approach allows supervisors to manage workloads and assign applications to the most qualified examiners, but it may require, e.g., a Californian inventor to travel to Detroit to conduct an in-person interview, rather than visiting a more local office. This may be of particular concern to applicants prosecuting multiple applications, each being routed to different offices. Rather than being able to interview several cases during a single trip, multiple trips to different cities would be necessary.

Presumably, many applications will be locally routed, as office specialization and local inventions will likely concentrate in similar fields. Potential office integration (e.g., via video conferencing, publication of examiners' inter-office visits, promotion of examiners making inter-office visits, etc.) may further allow local inventors and applicants prosecuting multiple applications to improve their access to the distributed patent system.

## Conclusions

The USPTO is faced with unprecedented workload and difficulty retaining examiners. Three regional patent offices will be opened in an attempt to address this situation. The first will be in Detroit. Other cities being considered for additional offices offer related but distinct profiles of location-desirability characteristics. I predict that the other offices will be located in Silicon Valley, Calif., and Denver — each being easily accessible to applicants and offering a large scientifically trained population, qualified to serve as examiners.

The Detroit regional office will specialize within a particular technology. The specialization may ease administrative concerns and improve examiner training and examination quality. However, it may simultaneously discourage in-person interviews and stifle applicants' access to the office. The USPTO has not yet announced how the other regional offices will operate. Continued review of the operation of each office would allow the USPTO to adjust operations as feedback is received from applicants, USPTO leaders and examiners.

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[1] USPTO, Performance and Accountability Reports (2001-2010; <http://www.uspto.gov/about/stratplan/ar/index.jsp>).

[2] Data from: USPTO, Letter to Katherine Gaudry. (Freedom of Information Act Request No. F-11-00086), March 2011.

[3] USPTO, Performance and Accountability Reports (2001-2010; <http://www.uspto.gov/about/stratplan/ar/index.jsp>).

[4] USPTO, Annual Report (1995-2000; <http://www.uspto.gov/about/stratplan/ar/index.jsp>).

[5] R. M. Nazzaro, "Hiring efforts are not sufficient to reduce the patent application backlog. Testimony before the Subcommittee on Courts, the Internet, and Intellectual Property" (Committee on the Judiciary, House of Representatives. United States Government Accountability Office, Washington DC, 2008, <http://www.gao.gov/new.items/d08527t.pdf>).

[6] Data from: USPTO, Letter to Katherine Gaudry. (Freedom of Information Act Request No. F-11-00086), March 2011.

[7] USPTO, USPTO to Open First Ever Satellite Office in Detroit (Press Release 10-65, 2010; [http://www.uspto.gov/news/pr/2010/10\\_65.jsp](http://www.uspto.gov/news/pr/2010/10_65.jsp)).

[8] Pub. L. No. 112-29, 125 Stat. 284 (2011).

[9] See: S. Brunner, "Regional Patent Offices to Increase Efficiencies, Reduce Backlog of Pending Patent Examinations, Helping to Stimulate the Economy," InsideTrack (State Bar of Wisconsin, 2011; <http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=100022>).

[10] Pub. L. No. 112-29, 125 Stat. 284 (2011).

[11] Pub. L. No. 112-29, 125 Stat. 284 (2011).

[12] D. Kappos, "Interview Program Continues to Find Success," Director's Forum: David Kappos' Public Blog (2010; [http://www.uspto.gov/blog/director/entry/interview\\_program\\_continues\\_to\\_find](http://www.uspto.gov/blog/director/entry/interview_program_continues_to_find)).

[13] USPTO, Performance and Accountability Reports (2001-2010; <http://www.uspto.gov/about/stratplan/ar/index.jsp>).

[14] AveryIndex. Top Patent States (2009; [http://www.averyindex.com/patent\\_states.php](http://www.averyindex.com/patent_states.php)).

[15] Federal Aviation Administration, "Commercial Service Airports (Primary and Nonprimary) CY09 Passenger Boardings," (2011, [http://www.faa.gov/airports/planning\\_capacity/passenger\\_allcargo\\_stats/passenger/media/cy09\\_cs\\_enplanements.pdf](http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/media/cy09_cs_enplanements.pdf)).

[16] Pub. L. No. 112-29, 125 Stat. 284 (2011).

[17] USPTO, View Jobs (<http://usptocareers.gov/Pages/PEPositions/Jobs.aspx>).

[18] United States Census Bureau. Science and Engineering Degrees: 2009 (2010; <http://www.census.gov/prod/2010pubs/acsbr09-14.pdf>).

[19] Danette Campbell, Letter to Katherine Gaudry, September 2011.

[20] Danette Campbell, Letter to Katherine Gaudry, September 2011.