

## **USPTO Efforts On Patent Bar DEI Miss Underlying Issues**

August 15, 2023

By: [Stephen Weed](#)

In order to represent inventors before the U.S. Patent and Trademark Office, it is necessary to become a member of the patent bar.

To gain access to the patent bar, an individual must first possess an engineering, science or technology degree, and then pass a rigorous examination.

It is no secret that those seeking engineering, science and technology degrees are largely white and predominately male, especially in fields such as electrical engineering and computer science — two areas that give rise to many patentable inventions.

Additionally, individuals with engineering, science and technology degrees can often secure good and stable jobs without the added time and cost associated with studying for and passing the rigorous examination, further reducing the pool of candidates seeking access to the patent bar and skewing that pool of candidates toward those with more privileged backgrounds.

The end result is a diversity, equity and inclusion-challenged patent bar.

A more diverse and inclusive patent bar is essential for ensuring that the U.S. remains a world leader in innovation.

Innovation, the act of introducing something new, requires new thoughts and new ideas. Having a more diverse and inclusive patent bar not only drives innovation from within by leveraging the diverse thoughts and ideas of the patent bar members, but also encourages DEI businesses to engage with the USPTO.[1]

The USPTO recently made announcements that could be interpreted as promising for the DEI of the patent bar.

The announcements are directed to changes to the USPTO's [admissions criteria](#) for representing clients before the USPTO, and the introduction of [a new design patent bar](#) for design patent applications.

According to Kathi Vidal, undersecretary of commerce for intellectual property and director of the USPTO, "[e]xpanding the admission criteria of the patent bar will encourage broader participation" and "[b]y creating a separate design patent bar that better aligns with the backgrounds of those who practice in the design space, we will broaden participation before the USPTO." [2]

While these changes will provide more, albeit minimal, opportunities for all — including women and minorities — to represent clients before the USPTO, they do not tackle the underlying issue that needs to be addressed in order to improve DEI of the patent bar in

the U.S. There are simply not enough women and minorities with science and technology backgrounds to prepare and prosecute patent applications before the USPTO — let alone those interested in doing so.

### **Expansion of Admissions Criteria**

Presently, to practice before the USPTO, an attorney or agent applicant must apply for and pass an examination — with a limited exception for patent examiners.

An "applicant applying for the examination must demonstrate to the Director of the Office of Enrollment and Discipline (OED) that he or she possesses the scientific and technical training necessary to provide valuable service to patent applicants."

There are three categories under which applicants can demonstrate the requisite training: (1) Category A: bachelor's degree, master's degree or doctor of philosophy degree in a recognized technical subject — of which there are presently 46, e.g., various scientific and engineering disciplines, among others, (2) Category B: bachelor's degree, master's degree or doctor of philosophy degree in another subject that is equivalent to a recognized technical subject, and (3) Category C: bachelor's degree and passage of a fundamentals of engineering test developed and administered by a state board of engineering examiners.

Regardless of the category under which an applicant qualifies for admission, once admitted, they have equal rights to represent clients before the USPTO.

The recent admissions criteria changes include: (1) requiring the USPTO to review applicant degrees in Category B every three years to determine whether they should be moved to Category A, (2) making a modification to the accreditation requirement for computer science degrees such that all bachelor of science in computer science degrees from an accredited university or college will be accepted under Category A — regardless of the accrediting agency; previously limited to ABET accreditation, and (3) providing clarifying instructions to applicants for limited recognition.

Regarding the first admissions criteria change for moving subjects to Category A, recognized technical subjects, the list of subjects was last updated in September 2021 and no additional subjects were added at this time — but they must be reviewed within the next three years under the recently implemented changes.

Adding a deadline for reviewing whether technical subjects should be added to the admissions criteria is positive in the sense that doing so will not slip through the cracks. Not adding any new subjects at this time, however, undermines the need for this change and results in no immediate impact on the admission criteria.

Regarding the second change, eliminating the specific agency accreditation will provide broader access to computer science applicants generally — namely those that didn't attend an ABET accredited program.

There are many good computer science programs in the U.S. that are not ABET accredited and, thus, this change makes sense. Whether this change will increase diversity is questionable, however, given that computer science programs in general skew predominately male.[3]

The third change is applicable to non-U.S. citizens. It provides clarifying instructions for those seeking "limited recognition" before the USPTO. Only U.S. citizens or permanent residents can practice law in USPTO patent matters.

However, according to the USPTO, "[i]t has been the long standing practice of the Office to grant limited recognition ... to nonimmigrant aliens who demonstrate that they are authorized to be employed or trained by a specific employer in the capacity of preparing and prosecuting patent applications." [4]

Statistics regarding the number of individuals that have been granted limited recognition are not available, however, I suspect the number is very low.

Thus, the recent admissions criteria changes will have little, if any, impact on the DEI of practice before the USPTO.

### **Design Patent Bar**

The USPTO also announced proposed rules for a design patent bar that will supplement the current patent bar.

Presently, to represent clients seeking a design patent from the USPTO, an agent or attorney applicant must pass the same patent bar exam and is subject to the same admissions criteria as that required for a utility patent application.

To its credit, the USPTO has recognized that those with training in the recognized technical subject may not be the individuals best suited for preparing and prosecuting design patent applications.

The proposal establishes special criteria for admission to a separate design patent bar. The proposed criteria include a bachelor's, master's or Ph.D. degree in one of the areas the USPTO considers when hiring design patent examiners — e.g., industrial design, product design, architecture, applied arts, graphic design, fine/studio arts or art teacher education, or an equivalent.

Similar to the current patent bar, design patent bar applicants would still be required to pass the patent bar examination.

Under the current proposal, design patent bar members have limited access before the USPTO, with the ability to represent clients solely in design patent matters.

Conventional patent bar members, on the other hand, will continue to have full access to the USPTO, with permission to prosecute all types of patent related matters —

including utility, design and plant patent matters.

The separate design patent bar will likely lead to some diversity in practicing before the USPTO.

Replacing the recognized technical subject requirement with a more design focused subject requirement will likely open a door for women, who are generally underrepresented in science and technology fields.

Design patent applications, however, represent less than 10% of the number of utility patent applications filed every year — 47,838 design patent application versus 597,175 utility patent applications in 2020.[5]

Furthermore, the amount of time and effort required to prepare and prosecute a design patent application is significantly less than the time and effort required to prepare and prosecute a utility patent application. Fewer matters and less time — i.e., billable hours — translates into fewer opportunities.

These facts, combined with the ability of conventional patent bar members to also prosecute design patent applications, dilute the impact of a separate design patent bar on DEI.

## **Conclusion**

To summarize, in my opinion, the recent changes to patent bar admissions criteria will have little, if any, impact on DEI.

Furthermore, although the practical impact of creating a design patent bar is a step in the right direction, it is unlikely to have a meaningful impact on the DEI of practice before the USPTO, and does nothing to address the lack of diversity in the "regular" patent bar where the bulk of innovation in the U.S. is taking place.

Therefore, the USPTO admission criteria changes and proposed design patent bar, although steps in the right direction, are mere baby steps in addressing DEI before the USPTO.

---

[1] The American Heritage® Dictionary of the English Language. 5th Edition.

[2] USPTO Patent Alert - USPTO opens opportunities to practice before the agency by evolving admissions criteria for patent bars published on May 16, 2023 and available at <https://www.uspto.gov/subscription-center/2023/uspto-opens-opportunities-practice-agency-evolving-admissions-criteria> and USPTO Patent Alert • USPTO moves forward with rulemaking to create a design patent practitioner bar published on May 15, 2023 and available at <https://www.uspto.gov/subscription-center/2023/uspto-moves-forward-rulemaking-create-design-patent-practitioner-bar>

[3] By the Numbers: Women in STEM: What do the statistics reveal about ongoing gender disparities? By Ishani Singh, Yale Scientific. November 27, 2022.

[4] USPTO - Limited Recognition Web Page; <https://www.uspto.gov/learning-and-resources/ip-policy/becoming-practitioner/limited-recognition>

[5] USPTO U.S. Patent Statistics - [https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us\\_stat.htm](https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm)

---

*The foregoing content is for informational purposes only and should not be relied upon as legal advice. Federal, state, and local laws can change rapidly and, therefore, this content may become obsolete or outdated. Please consult with an attorney of your choice to ensure you obtain the most current and accurate counsel about your particular situation.*

---

**About Culhane Meadows – Big Law for the New Economy®**

Culhane Meadows ([culhanemeadows.com](http://culhanemeadows.com)) is the largest woman-owned (WBE) law firm in America, providing clients with national full-service business counsel . Built to offer experienced attorneys a better way to practice sophisticated law and achieve a work/life balance, they offer their partners a fully remote work environment, transparent math-based compensation structure, and collaborative culture. The firm's clients include individuals, small businesses, and more than 40 Fortune 1000 companies. Culhane Meadows is a proud member of the National Association of Minority and Women Owned Law Firms (NAMWOLF) and Women Owned Law (WOL).