Slip-Op. 05–91

BEFORE: GREGORY W. CARMAN

FORMER EMPLOYEES OF MERRILL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 03–00662

[Plaintiffs' Motion for Judgment Upon the Agency Record is DENIED. The Department of Labor's negative determination is REMANDED for further investigation.]

Dated: July 28, 2005

Frank H. Morgan (White & Case), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; Jeanne E. Davidson, Assistant Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Cheryl L. Evans*, Trial Attorney, U. S. Department of Justice, Civil Division, Commercial Litigation Branch; *Peter Nessen*, Of Counsel, Office of Solicitor, U.S. Department of Labor, for Defendant.

OPINION

CARMAN, JUDGE: This matter comes before this Court on Plaintiffs' Motion for Judgment upon an Agency Record pursuant to USCIT Rule 56.1 ("Plaintiffs' 56.1 Motion"). Plaintiffs challenge the United States Department of Labor's ("Labor" or "Defendant") determination regarding the agency's denial of Plaintiffs' claim for trade adjustment assistance under the Trade Act of 1974 ("Trade Act"), 19 U.S.C. §§ 2291–2298 (2000). *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance* ("Initial Results"), 68 Fed. Reg. 43,372 (Dep't Labor July 22, 2003). After voluntary remand, Labor upheld its initial decision. *Merrill Corporation, St. Paul, MN; Notice of Negative Determination on Reconsideration on Remand* ("Remand Results"), 69 Fed. Reg. 20,645 (Dep't Labor Apr. 16, 2004). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(d) (2000).

As set forth below, this Court holds that the Remand Results are not supported by substantial evidence. Accordingly, this matter is **REMANDED** to Labor for further investigation consistent with the specific instructions contained herein.

BACKGROUND

Plaintiffs were employed by Merrill Corporation ("Merrill"). (Former Employees of Merrill Corp.'s Mem. of P. & A. in Supp. of a USCIT R. 56.1 Mot. for J. upon an Agency Rec. ("Pls.' 56.1 Mot.") at 1.) As a result of market and technology changes, in June 2003, Merrill announced the elimination of certain positions at its St. Paul, Minnesota, and Boston/Woburn operations. (AR at 3.) The eliminated employees worked as typesetters, proofreaders, and conversion specialists. (Pls.' 56.1 Mot. at 3.)

> Merrill Corporation is a communications and document services company providing printing[,] photocopying and document management services to the financial, legal and corporate markets. Merrill's services integrate traditional composition, imaging and printing services with online document management and distribution technology for the preparation and distribution of business-to-business communication material.

(AR at 12.) Merrill is organized in four business groups: Financial Document Services (FDS), Document Management Services (DMS), Strategic Communication Services (SCS), and Print and Operations Group. (Pls.' 56.1 Mot. at 2.) Among the documents that Merrill provides its clients are "SEC compliance documents, annual reports and other financial documents, and promotional materials." (AR at 13.)

Plaintiffs were part of the FDS group. (Pls.' 56.1 Mot. at 2.) Plaintiffs' application for TAA stated that the separated employees produced "typeset and html [sic] financial, corporate & legal documents for printing and filing with the SEC." (AR at 2.) Typesetters at Merrill received faxed, electronic, and hard copy documents from Merrill's Customer Service group. (Suppl. AR at 10.) The typesetters then typed, edited, and formatted documents to meet customer and SEC specifications. (Suppl. AR at 10.) Proofreaders audited documents for accuracy. (Suppl. AR at 10.) Once the documents were finalized, Merrill filed them with the SEC. (Suppl. AR at 10.) Merrill provided printed copies of SEC filings at the customer's request. (Suppl. AR at 10.) Merrill's Customer Service group arranged for document printing. (Suppl. AR at 10.)

On June 10, 2003, Plaintiffs filed for Trade Adjustment Assistance ("TAA"). *Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance*, 68 Fed. Reg. 41,182, 41,183 (July 10, 2003). Labor issued a negative determination for worker adjustment assistance after finding that Plaintiffs' former employer

did not produce an "article" as required for certification under the Trade Act. *Initial Results*, 68 Fed. Reg. at 43,372–73.

On September 9, 2003, Plaintiffs requested judicial review from this Court of Labor's negative determination. (Suppl. AR at 1.) This Court granted Defendant's motion for voluntary remand for further investigation. *Former Employees of Merrill Corp. v. U. S. Dep't of Labor*, 28 CIT ___ , Slip. Op. 04–02 (Jan. 4, 2004). In its remand notice, Labor affirmed its original determination, denying Plaintiffs' request for certification for TAA because the items produced by Merrill "have no commercial value and the company is a service provider. . . ." *Remand Results*, 69 Fed. Reg. 20,645. Plaintiffs' objected to the Remand Results and filed Plaintiffs' 56.1 Motion. Plaintiffs' 56.1 Motion is fully briefed, and the case is now ready for this Court's determination.

PARTIES' CONTENTIONS

I. *Plaintiffs' Contentions*

Firstly, Plaintiffs contend that the Labor concluded that Merrill was a service provider after an inadequate investigation. (Pls.' 56.1 Mot. at 4.) Plaintiffs charge that Labor ignored Merrill's statements that it produced printed materials. (Pls.' 56.1 Mot. at 4.) Plaintiffs also argue that Merrill considers itself a manufacturer rather than a service provider. (Pls.' 56.1 Mot. at 4.)

Secondly, Plaintiffs allege that Labor applied an incorrect standard in determining that Merrill did not produce an article for purposes of the Trade Act. (Pls.' 56.1 Mot. at 4.) Plaintiffs stated that there is no basis in law, statute, or legislative history for Labor's position that because the documents Merrill produced had no commercial value they were not articles under the Trade Act. (Pls.' 56.1 Mot at 4–5.)

Thirdly, application of existing case law to the facts of this case makes clear that Merrill produces an article for purposes of the Trade Act. (Pls.' 56.1 Mot. at 5.) The documents that Merrill produces are "tangible commodities" and "new and different articles." (Pls.' 56.1 Mot. at 5.) As such, the displaced workers produced an "article" as the term is contemplated in the Trade Act. (Pls.' 56.1 Mot. at 5.)

II. *Defendant's Contentions*

Labor argues that the Court should sustain the remand results because they are in accordance with the law and supported by substantial evidence. (Def.'s Mem. in Opp'n to Pls.' Mem. of P. & A. in Supp. of USCIT R. 56.1 Mot. for J. upon the Agency R. ("Def.'s Resp.") at 6.) Labor asserts that a threshold requirement of the Trade Act is that the company from which the affected workers were separated produce an "article." (Def.'s Resp. at 7.) From the information Labor

compiled during its investigation, it concluded that the documents Merrill produces are "not commercially marketable and are not sold or marketed individually or as a component to an article as required by the Trade Act" and that "Merrill is a service provider." (Def.'s Resp. at 8.) Labor notes that there is no dispute between the parties about "what product petitioners created." (Def.'s Resp. at 8.) According to Labor, "the only issue before the Court is whether Labor properly applied the law in concluding that Merrill did not create an 'article'. . . ." (Def.'s Resp. at 8.)

STANDARD OF REVIEW

This Court has exclusive jurisdiction to review final determinations by Labor "with respect to the eligibility of workers for" TAA. 28 U.S.C. § 1581(d)(1) (2000). The Trade Act also provides for judicial review of Labor's eligibility determinations. 19 U.S.C. § 2395(a) (West Supp. 2005).[1] Such review is based upon the administrative record before the Court. *Former Employees of Rohm & Haas Co. v. Chao*, 246 F. Supp. 2d 1339, 1346 (2003); 28 U.S.C. § 2640(c).

In reviewing Labor's determinations, findings of fact are conclusive "if supported by substantial evidence." 19 U.S.C. § 2395(b) (2000). "Substantial evidence" must be sufficient to reasonably support the agency's conclusion and must be more than a "mere scintilla." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also Former Employees of Swiss Industrial Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637 (1993). However, the statute is silent with regard to this Court's review of Labor's determinations of law. *See Former Employees of Murray Eng'g, Inc. v. Chao*, 346 F. Supp. 2d 1279, 1282 (CIT 2004) ("Murray I"); *Former Employees of Murray Eng'g, Inc. v. Chao*, 358 F. Supp. 2d 1269, 1271 (CIT 2004) ("Murray II").

Absent instructive language in the applicable statute concerning judicial review, courts may look to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 (2000), for guidance. *Murray II*, 358 F. Supp. 2d at 1271. The APA provides for judicial review of agency decisions, 5 U.S.C. § 702, provided the statutes do not preclude such, 5 U.S.C. § 701(a). Reviewing courts are instructed by the APA to "set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(a). Thus, " 'the rulings made

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[1] 19 U.S.C. § 2395 states that

> A worker, group of workers, . . . aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis.' " *Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 611 (1990) (*quoting Int'l Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978)).

For "good cause shown," this Court may remand a case to Labor for further investigation and findings. 19 U.S.C. § 2395(b). "Good cause" is present when Labor's methodology is so marred that its "finding is arbitrary or of such nature that it could not be based on 'substantial evidence.' " *Cherlin v. Donovan*, 7 CIT 158, 162, 585 F. Supp. 644 (1984) (*quoting United Glass & Ceramic Workers of N. Am., AFL-CIO v. Marshall*, 584 F.2d 398, 405 (D.C. Cir. 1978).

DISCUSSION

The Trade Act provides assistance to workers who were displaced from their jobs due to increases in "imports of articles like or directly competitive with articles produced by" the displaced workers or due to a shift of production outside the United States. 19 U.S.C.A. § 2272(a) (West Supp. 2005). Displaced workers will qualify for assistance if they satisfy one of the two methods set forth in the Trade Act. The first method applies to circumstances where there has been a decrease in sales or production at the company from which the workers were separated. To be eligible for assistance the workers must prove that

> (1) [A] significant number or proportion of workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and
>
> (2)(A)(i) [T]he sales or production, or both, of such firm or subdivision have decreased absolutely;
>
> (ii) [I]mports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and
>
> (iii) [T]he increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision.

19 U.S.C. § 2272(a). The second method applies when there has been a shift in production. To be eligible for assistance under the second method the workers must prove that

> (1) [A] significant number or proportion of workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially sepa-

rated, or are threatened to become totally or partially separated; and

(2)(B)(i) [T]here has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii)(I) [T]he country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) [T]he country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) [T]here has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. § 2272(a). The workers must satisfy each of the statutory requirements of the respective method to be eligible for TAA. *Former Employees of Shaw Pipe v. U. S. Sec'y of Labor*, 21 CIT 1282, 1285, 988 F. Supp. 588 (1997).

Due to their remedial nature, the TAA provisions of the Trade Act are construed liberally to effectuate legislative intent. *Pemberton v. Marshall*, 639 F.2d 798, 800 (D.C. Cir. 1981); *Woodrum v. Donovan*, 5 CIT 191, 198, 564 F. Supp. 826 (1983); *Former Employees of Elec. Data Sys. Corp. v. U. S. Sec'y of Labor*, 350 F. Supp. 2d 1282, 1290 (CIT 2004) ("EDS"). However, there are limitations to how far assistance extends. For instance, services are not covered by the Trade Act. *Pemberton*, 639 F.2d at 800; *see also Fortin v. Marshall*, 608 F.2d 525, 528 (1st Cir. 1979); *Nagy v. Donovan*, 6 CIT 141, 144, 571 F. Supp. 1261 (1983). To be eligible for assistance, the separated workers must have worked for a company that produced an article. *Pemberton*, 639 F.2d at 800; 19 U.S.C. § 2272(a). However, the Court disagrees with Labor's legal conclusion in the manner it defined "article" in this case. For the reasons that follow, this case is remanded to Labor for further investigation consistent with this opinion.

I. *Labor Incorrectly Defined "Article" for Purposes of TAA Eligibility.*

A. Printed Matter is an "Article" for Purposes of the Trade Act.

"[T]he definition of the statutory term 'article' is a question of law." *EDS*, 350 F. Supp. 2d at 1291. Whether particular items produced by separated workers are covered by the definition of "article" is a question of fact for Labor to determine. *Id.*

_____ This Court and predecessor courts that have reviewed TAA determinations have created a long history in defining "article." The *Fortin* court stated that "[w]hen read in the context of the entire Trade Act [ ], it becomes clear that the term 'article' was plainly meant to refer to a tangible thing. . . ." 608 F.2d at 527. In reviewing the Trade Act, the court stated that throughout it an "article" is referred to as something subject to duty and in one section as "something that can be placed in a warehouse." *Id.*

In *Pemberton*, the court suggested that creation of something new entering the stream of commerce would satisfy the definition of "article." 639 F.2d at 800. The court also indicated that "article" embodied the concept of transformation and that it was something more that a "mere refurbishing of what already existed." *Id.*

The *Nagy* court, 6 CIT at 144, adopted the "tangible thing" definition set forth in *Fortin* and enunciated the rule that in the context of TAA eligibility cases the term "article" "does not embrace activity by a worker that does not result in the creation or manufacture of a tangible commodity, or that does not cause the transformation of an existing product into a new and different article," *Id.* at 145.

In a more recent decision, this Court further explained the concept of transformation. If the product at issue is simple, minor changes might reasonably result in transformation to a new and different article. *Shaw Pipe*, 21 CIT at 1287. However, the converse is not necessarily true; minor alterations or repairs to a complex product are not likely to effect a transformation of the product at issue. *Id.*

In addition to transformation and tangibility, the Court has also accepted the dutiability concept suggested in *Fortin* as a way to define "article" under the Trade Act. In fact, this Court recently recognized that "Labor's regulation indicates that Labor chose to reference the [Harmonized Tariff Schedule of the United States ("HTSUS")] in deciding what constitutes an article as a matter of law." *EDS*, 350 F. Supp. 2d at 1288. Labor's regulations for Certification of Eligibility to Apply for Worker Adjustment Assistance state that "[i]f available, the petition [ ] should include . . . the United States tariff provision under which the imported articles are classified." 29 C.F.R. § 90.11(c)(7). The court further stated that "recourse to the HTSUS is indeed sanctioned by the language of the [Trade] Act, which consistently refers to 'an article' as a dutiable item." *EDS*, 350 F. Supp. 2d at 1287; *see also Murray II*, 358 F. Supp. 2d at 1272 n.7 ("[T]he language of the [Trade] Act clearly indicates that the HTSUS governs the definition of articles, as it repeatedly refers to 'articles' as items subject to duty.").

In *Murray II*, Labor's investigation revealed that the employer's designs were written to CD-ROM and most were also provided in print. 358 F. Supp. 2d at 1272. The court held that – because the designs were classifiable in the HTSUS (in heading 4911 for the printed designs and heading 8524 for the designs written to CD-

ROM) – the items at issue were "articles" for purposes of the Trade Act. *Id.* at n.7. The court noted that saving data to a blank CD-ROM works a tariff shift and produces a new article for purposes of the HTSUS. *Id.* Similarly, printing to blank paper also creates "a new and distinct article under the [Trade] Act." *Id.* at 1273 n.7. *See also*, *EDS*, 350 F. Supp. 2d at 1288, 1292 ("software or a computer program on a carrier medium is dutiable merchandise" and printed material is classifiable in Chapter 49 of the HTSUS).

It is clear from the discussion of the cases cited herein that if an item is included within the HTSUS that it is also an "article" for purposes of the Trade Act.[2] *See*, *e.g.*, *Murray I*, 346 F. Supp. 2d at 1284; *Murray II*, 358 F. Supp. 2d at 1273–74 n.7; *EDS*, 350 F. Supp. 2d at 1288. The administrative record reveals that Merrill prints and photocopies financial, corporate, and legal documents (AR at 2, 12, 13) and prepares business-to-business communication materials (AR at 12). The printed documents include "SEC compliance documents, annual reports and other financial documents, and promotional materials." (AR at 13.) In its negative determination, Labor acknowledged Merrill's printing and photocopying activities. (AR at 17.) Printed matter (*i.e.*, SEC compliance documents, annual reports, prospectuses, proxy statements) is classifiable in Chapter 49 of the HTSUS[3]. Accordingly, this Court finds that the Merrill produced an article for purposes of the Trade Act.

B. Commercial Value Is Not Relevant to Determining Whether an Item Is an "Article."

At no point has commercial value been an accepted standard for judging what is an "article" for purposes of the Trade Act. Although Labor stated that "[a]n 'article' . . . is a tangible item of value which is marketable, fungible, and interchangeable for commercial purposes" (Def.'s Resp. at 12), Labor cited no authority for its proposition. On the other hand, this Court agrees with Labor that an " 'article' must be capable of being measured or compared with other items." (Def.'s Resp. at 12.) The HTSUS provides a ready means of accomplishing such comparison. If the item produced by the employer in question is classifiable in the HTSUS, Labor can readily compare the item to those imported under the same tariff classification. Labor provided no rationale for why such a comparison is not possible, feasible, or otherwise inadequate.

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[2] The HTSUS may not provide the only basis upon which to determine whether an item is an "article" within the purview of the Trade Act. It is not now before this Court, nor will this Court pass judgment on, whether an item not found in the HTSUS may be an "article" for purposes of the Trade Act.

[3] Chapter 49 of the HTSUS covers "[p]rinted books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans."

In its response brief, Labor seemed to confuse issues. Labor correctly noted that it need not analyze the other statutory requirements if Plaintiffs failed to produce an "article." (Def.'s Resp. at 12.) However, Labor then cited cases discussing whether products are "like or directly competitive." (Def.'s Resp. at 13–15.) However, the administrative record does not reflect that Labor reached the "like or directly competitive" issue presumably because Labor did not find that Plaintiffs produced an article. The "like or directly competitive" issue would logically only be considered by Labor *after* the agency determined that Plaintiffs produced an article. *See Shaw Pipe*, 21 CIT 1282 (finding first that the plaintiffs produced an article under the Trade Act and then finding that plaintiffs were not separated due to increases in imports of like or directly competitive articles). Because Labor did not find that Plaintiffs' produced an "article," whether there are "like or directly competitive" articles is not before this Court. Thus, the "like or directly competitive" discussion in Labor's response brief is inapposite to the matter before the Court.

The Court's holding herein is consistent with the legislative intent behind the Trade Act. One purpose of the Trade Act is "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm [sic], workers, and communities to adjust to changes in international trade flows." 19 U.S.C. § 2102(4); *see also Fortin*, 608 F.2d at 525. Therefore, Labor is obligated to assess whether "changes in international trade flows" may be responsible for Plaintiffs' separation from Merrill, which is a task that Labor did not undertake. That the items Plaintiffs' produce may have not commercial value does not relieve Labor of its obligation, nor has Labor indicated why available means of comparison are inadequate.

C. The Designation of Merrill as a Service Provider is Not Relevant to Determining Whether an Item Is an "Article."

As justification for determining that Merrill does not produce an article, Labor stated that Merrill is a service provider. Labor listed Merrill's Standard Industrial Classification Code ("SIC") as 7334, for services. (Def.'s Resp. at 23.) However, the SIC has no bearing on whether a company produces an "article." *See Murray I*, 346 F. Supp. 2d at 1289.

In *Murray II*, the court addressed Labor's use of sources that categorized industries as either service or manufacturing. 358 F. Supp. 2d at 1273 n.8. The court stated that "[t]hese sources, however, are not relevant to understanding the way the term 'article' is defined under the [Trade] Act." *Id*. Sources such as the SIC "do not speak to the definition of the word 'article' as used in the [Trade] Act, but rather to the categorization of industries for entirely other purposes." *Id*. The court concluded that the Trade Act "requires only

that the object made be within the embrace of the HTSUS." *Id.* This Court agrees.

Certainly, the Trade Act does not extend eligibility for TAA to services. *See, e.g., Pemberton*, 639 F.2d at 800; *Woodrum*, 5 CIT at 194; *Fortin*, 608 F.2d at 528. However, the Trade Act does not limit eligibility to only those "articles" produced by manufacturing facilities. Rather, the Trade Act embraces all "articles" regardless of the source of production. If another purpose is to be drawn from the Trade Act, it is incumbent upon Congress to revise the language of the statute. This Court cannot read into the statute a limitation that does not exist.

As Labor correctly noted, "what is relevant is whether the workers' firm . . . produces an article." (Def.'s Resp. at 24 (*citing Former Employees of Pittsburgh Logistics Sys., Inc. v. U. S. Sec'y of Labor*, Slip Op. 03–111, 2003 WL 22020510, *4 (CIT Aug. 28, 2003)).) This Court holds that printed matter is an "article" for purposes of the Trade Act. The SIC code Labor deemed applicable to Merrill's business is irrelevant to the Court's decision in this matter.

II. *Labor's Factual Determinations Are Not Supported by Substantial Evidence.*

While Labor has wide latitude in conducting its investigations, it must make a reasonable inquiry. *EDS*, 350 F. Supp. 2d at 1291; *Former Employees of Sun Apparel of Tex. v. U. S. Sec'y of Labor*, Slip Op. 04–106, 2005 Ct. Int'l Trade LEXIS 105, *22–23 (CIT Aug. 20, 2004). If Labor fails to undertake a reasonable inquiry, the investigation cannot be sustained upon substantial evidence before the Court. *Sun Apparel*, 2004 Ct. Int'l Trade LEXIS 105, at *23. Further, this Court owes Labor no deference if its investigation was inadequate. *EDS*, 350 F. Supp. 2d at 1291; *Former Employees of Hawkins Oil & Gas, Inc. v. U. S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111 (1993).

Labor admitted that it had not determined in its investigation how many or what percentage of the SEC filings that Merrill produced resulted in printed copies. (Def.'s Resp. at 17 ("it is not clear whether all or most SEC filings would properly be deemed 'tangible' since many, if not most, are filed electronically").) This admission alone makes clear that Labor's determination that Plaintiffs did not produce an article is not supported by substantial evidence. Labor failed to undertake even a minimal investigation of Merrill's production of printed matter. The administrative record is devoid of any information concerning the percentage of – for instance – SEC filings that resulted in a printed document or the number of annual reports, prospectuses, and other documents that the Merrill printed.

Although both the Plaintiffs and their employer described articles Merrill produced, Labor based its determination that Plaintiffs were ineligible for TAA upon the nature of the work performed (*i.e.*, ser-

vice) and the lack of commercial value of the products produced. Labor's two brief questionnaires to Merrill together with Plaintiffs' refutations and explanations thereof are insufficient to support Labor's negative determination. *See EDS*, 350 F. Supp. 2d at 1292–93. This Court finds that the administrative record lacks substantial evidence upon which to affirm Labor's decision. Therefore, this case must be remanded to Labor for further investigation.

CONCLUSION

Because Labor did not conduct an investigation into whether an increase in imported articles or a shift in production contributed importantly to Plaintiffs' separation, this Court remands to Labor for further investigation consistent with this opinion. At a minimum, Labor must determine whether (1) Plaintiffs were engaged in "production" of printed matter or other articles; (2) the volume of articles produced by Plaintiffs; (3) Merrill's customers contracted for the production of printed matter; (4) sales or production (or both) have decreased; (5) there has been or is likely to be an increase in imports of articles like or directly competitive with Merrill's articles; (6) any increase in imports contributed importantly to Plaintiffs' separation from Merrill and to its decline in sales or production; and (7) there was shift in production to a foreign country of articles like or directly competitive with Merrill's articles, and if so, to what country. With respect to each finding, the Court directs Labor to explain its determination and refer to the relevant document(s) in the administrative record. Labor's remand results together with any supplemental administrative record are due on or before October 3, 2005. Plaintiffs' comments thereon are due on or before November 2, 2005. Labor's reply is due on or before November 16, 2005.

Slip Op. 05–93

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LARRY CABANA, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No. 04–00634

Defendant, United States Secretary of Agriculture ("USDA"), moves pursuant to USCIT R. 12(b)(5) to dismiss for failure to state a claim upon which relief may be granted. The USDA contends that plaintiff, Larry Cabana, has failed to allege sufficient facts in the complaint to find eligibility for trade adjustment assistance ("TAA"). Specifically, the USDA asserts that Cabana is not eligible for TAA benefits because his net fishing income in 2002 was not less than his 2001 net fishing income. Cabana responds that the statute references "net farm income" and that he properly alleges in

the complaint that his net fishing income in 2002 was less than his 2001 net fishing income although his business income increased marginally during the relevant time period.

Held: Defendant's USCIT R. 12(b)(5) motion is denied.

August 1, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*William F. Marshall*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Jeffrey Kahn*, Office of the General Counsel, United States Department of Agriculture, for defendant.

OPINION & ORDER

TSOUCALAS, Senior Judge: Defendant, United States Secretary of Agriculture ("USDA"), moves pursuant to USCIT R. 12(b)(5) to dismiss for failure to state a claim upon which relief may be granted. The USDA contends that plaintiff, Larry Cabana, has failed to allege sufficient facts in the complaint to find eligibility for trade adjustment assistance ("TAA"). Specifically, the USDA asserts that Cabana is not eligible for TAA benefits because his net fishing income in 2002 was not less than his 2001 net fishing income. Cabana responds that the statute references "net farm income" and that he properly alleges in the complaint that his net fishing income in 2002 was less than his 2001 net fishing income although his business income increased marginally during the relevant time period.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395 (2000) *amended by* 19 U.S.C. § 2395 (Supp. II 2002).[1]

STANDARD OF REVIEW

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

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[1] Section 284(a) of the Trade Act of 1974 was amended, effective August 6, 2002, and provided this Court with jurisdiction over trade adjustment assistance matters brought by agricultural commodity producers. *See Trade Act of 2002*, Pub. L. No. 107–210, § 142, 116 Stat. 953 (2002). In relevant part the statute states that "an agricultural commodity producer (as defined in section 2401(2) of this title) aggrieved by a determination of the Secretary of Agriculture under section 2401b . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination." 19 U.S.C. § 2395(a). Accordingly, the Court "shall have jurisdiction to affirm the action of the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c).

which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Halperin Shipping Co., Inc. v. United States*, 13 CIT 465, 466 (1989). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A pleading that sets forth a claim for relief must contain "a short and plain statement" of the grounds upon which jurisdiction depends and "of the claim showing that the pleader is entitled to relief. . . ." USCIT R. 8(a). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993). Accordingly, the Court must decide whether plaintiff is entitled to offer evidence in support of its claim, and not whether plaintiff will prevail in its claim. *See Halperin*, 13 CIT at 466.

DISCUSSION

The USDA contends that Cabana's complaint fails to allege facts sufficient to find eligibility for TAA benefits. *See* Def.'s Mem. Supp. Mot. Dismiss Failure State Claim Upon Which Relief May Be Granted ("USDA's Mem.") at 6–8. The USDA notes that to be certified by the USDA, the statute requires, *inter alia*, that the producer's "net farm income (as determined by [the USDA]) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under [the statute]." *Id.* at 6 (emphasis omitted) (quoting 19 U.S.C. § 2401e(a)(1)(C) (Supp. II 2002)). The USDA's regulations require the producer to establish "that net farm or fishing income was less than that during the producer's pre-adjustment year." *Id.* (quoting 7 C.F.R. § 1580.301(e)(4) (2004)). The USDA argues that Cabana has failed to certify that his net fishing income for 2002 was less than his net fishing income for 2001. *See id.* at 7. Cabana concedes in his complaint that his original case was disqualified because his application for certification showed that his income in 2002 was more than that of 2001. *See id.* at 8. The USDA argues that Cabana's assertion, that his income from salmon was higher in 2001 than in 2002, is not relevant because "[n]othing in the relevant statutes or regulations provides for a determination of an applicant's 'farm or fishing income' based upon earnings according to *individual fish species*." *Id.* (emphasis retained). The USDA further asserts that Cabana's "2002 net fishing income was $37,331, which is higher than his 2001 net fishing income of $35,759." *Id.* The USDA maintains that Cabana does not qualify for TAA benefits and, therefore, fails to state a claim upon which relief may be granted. *See id.*

Cabana responds that the administrative record established his eligibility for TAA benefits. *See* Pl.'s Resp. Def.'s Mot. Dismiss Failure State Claim Upon Which Relief May Be Granted ("Cabana's Resp.") at 3–5. Cabana asserts that he submitted his application for benefits "along with business records clearly identifying the total salmon catch for both 2001 and 2002 as well as tax returns submitted to the Internal Revenue Service." *Id.* at 4. Cabana argues that the statute does not define the term "net farm income." *See id.* Cabana contends, however, that the USDA's definition of "net farm income" is contrary to the statutory language. *See id.* at 4–5. Cabana asserts that "if Congress intended to base eligibility for trade adjustment allowances on income, [then] it would not have qualified [net income] with the term farm. . . ." *Id.* at 5. Cabana maintains that the statutory language indicates Congress' intent to grant TAA benefits to agricultural producers whose income from farming decreased because of competing imported agricultural commodities. *See id.* Cabana asserts that his income from fishing in 2001 and 2002 was $31,663 and $31,195, respectively. *See id.* Cabana argues that while his net business income increased marginally, his net income from fishing decreased. *See id.* Accordingly, Cabana maintains that the USDA's motion to dismiss should be denied. *See id.*

After considering the motion before the Court and all relevant papers filed thereto, the Court finds that Cabana has alleged a claim upon which relief may be granted. Under the Administrative Procedures Act, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000). Having accepted all well-pleaded facts as true and viewed in the light most favorable to Cabana, the Court finds that Cabana has sufficiently alleged a cause of action entitling him to present evidence to support his claim that the definition of "net farm income" in the USDA's regulations is contrary to the statutory language of 19 U.S.C. § 2401e. *See Halperin*, 13 CIT at 466. It does not appear "beyond a doubt" that Cabana is unable to present facts in support of his claim. For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss for failure to state a claim upon which relief may be granted is **Denied**; and its is further

ORDERED that the parties proceed on the merits of the case.

Slip Op. 05–94

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF PHILIPS LIGHTING COMPANY, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant,

Court No. 04–00651

JUDGMENT ORDER

On March 9, 2005, the Court granted the United States Department of Labor's ("Labor") Consent Motion for Voluntary Remand. On June 9, 2005, Labor filed a Notice of Revised Determination of Alternative Trade Adjustment Assistance on Remand ("*Remand Results*"). Plaintiffs did not file comments to the *Remand Results*.

In the *Remand Results*, Labor found that Plaintiffs, who became totally or partially separated on or after September 2,2003, through September 29, 2006, are eligible to apply for trade adjustment assistance under 19 U.S.C. § 2272 (2000) and alternative trade adjustment assistance under 19 U.S.C. § 2813 (Supp. II 2002). Under 29 C.F.R. § 90.16 (2004), Labor determined that the certification period could not be extended to include employees separated before September 2, 2003, one year prior to the date Plaintiffs filed their petition for adjustment assistance benefits. Upon consideration of the *Remand Results*, upon all other papers filed herein, and upon due deliberation, it is hereby

ORDERED that the *Remand Results* are sustained; and it is further

ORDERED that this action is dismissed.