Decisions of the United States
Court of International Trade

Slip Op. 06–169

FORMER EMPLOYEES OF ELECTRONIC DATA SYSTEMS CORP., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 03–00373
Before: Barzilay, Judge

MEMORANDUM ORDER

[Plaintiffs' application for attorney fees and other expenses pursuant to the Equal Access to Justice Act is denied.]

Decided: November 16, 2006

Yormick & Associates Co., L.P.A. (*Jon P. Yormick*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Patricia M. McCarthy*), Assistant Director; (*Michael D. Panzera*), Trial Attorney, United States Department of Justice, Civil Division, Commercial Litigation Branch; *Stephen Jones*, Office of the Solicitor, United States Department of Labor, of counsel, for Defendant.

BARZILAY, Judge: The issue in this case is whether Plaintiffs, Former Employees of Electronic Data Systems Corporation, qualify for attorney fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412. To be eligible for attorney fees under the Act, a plaintiff must be a "prevailing party." *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & H.R.*, 532 U.S. 598, 603 (2001) ("*Buckhannon*"); *see also Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir. 2002). Plaintiffs applied for attorney fees following this court's affirmation of the Department of Labor's ("Labor") remand determination, which certified them as eligible for TAA. *See Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1359, 1360 (2006) ("EDS III"); *see also Electronic Data Systems Corporation, I Solutions Center, Fairborn, Ohio; Notice of Revised Determination on Remand*, 71 Fed. Reg. 18,355–02, 18,357 (Dep't Labor Apr. 11, 2006) ("*Revised Determination on Remand*"). Since Plaintiffs do not qualify

as "prevailing parties," they cannot recover attorney fees and other expenses.

I. Procedural History

On February 5, 2003, Labor denied Plaintiffs' petition for TAA benefits because the facilities where Plaintiffs worked did not produce "articles" under Section 222 of the Trade Act of 1974, 19 U.S.C. § 2272(a) (2000). *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 64,922–01 (Dep't Labor Oct. 22, 2002); *see also Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 6210–01, 6211 (Dep't Labor Feb. 6, 2003). Specifically, Labor determined that Plaintiffs' production and distribution of software (an intangible good) through a non-physical medium amounted to a service, not an "article." *See Electronic Data Systems Corporation, I Solutions Center, Fairborn, OH; Notice of Negative Determination Regarding Application for Reconsideration*, 68 Fed. Reg. 20,180–01 (Dep't Labor Apr. 24, 2003).

After Labor's denial, Plaintiffs sought review in this Court. On December 1, 2004, the court remanded the case to Labor to further explain its rationale for denying Plaintiffs TAA benefits. *See Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1282, 1293 (2004) ("*EDS I*"). Labor conducted an investigation into the nature of EDS' work and again concluded that Plaintiffs did not produce "articles." *See Electronic Data Systems Corporation, I Solutions Center, Fairborn, OH, Notice of Negative Determination on Remand*, 70 Fed. Reg. 6730–01, 6732 (Dep't Labor Feb. 8, 2005). Upon review of Labor's negative determination, the court remanded the case again and instructed Labor to further investigate the nature of EDS' work and "provide a reasoned explanation . . . why software not sold to the client on a physical medium . . . is not an article." *See Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 408 F. Supp. 2d 1338, 1347–48 (2005) ("*EDS II*").

During the second remand, Labor changed its policy to reflect a ruling in a separate TAA case before this Court, which held that "Labor's determination that software code must be tangible to be an article under the Trade Act is not in accordance with law." *Former Employees of Computer Scis. Corp. v. U.S. Sec'y of Labor*, 30 CIT ___ , ___ , 414 F. Supp. 2d 1334, 1343 (2006) ("*Computer Science*"). Labor's new policy treated software and other intangible goods not embodied in a physical medium as "articles," regardless of their method of transfer. *See Revised Determination on Remand*, 71 Fed. Reg. at 18,356. Consequently, Labor certified Plaintiffs as eligible for TAA benefits, *id.* at 18,357, and the court affirmed this determination. *See EDS III*, 427 F. Supp. 2d at 1360.

Within thirty days of that judgment, Plaintiffs filed this application for attorney fees under the EAJA. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2412.

II. Standard of Review

The Equal Access to Justice Act mandates that

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Thus, the court must award attorney fees under the Act if the moving party satisfies four criteria: "(i) the claimant [must be] a 'prevailing party'; (ii) the government's position [must] not [have been] substantially justified; (iii) no 'special circumstances [must] make an award unjust'; and (iv) the fee application [must be] timely submitted and supported by an itemized statement." *Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) (quoting 28 U.S.C. § 2412(d)(1)(A)–(B)). If the movant cannot satisfy each criterion, its application must fail.

III. Discussion

A. "Prevailing Parties" Under the EAJA

To qualify as a "prevailing party" for the purpose of collecting attorney fees under the EAJA, the Supreme Court requires a moving party to have either "received a judgment on the merits, or obtained a court-ordered consent decree." *Buckhannon*, 532 U.S. at 605 (internal citation omitted). The Court expressly rejected the "catalyst theory" of recovery, which allows a plaintiff to prevail when the defendant voluntarily initiates a change in conduct. In other words, the Court was concerned that a plaintiff could prevail "where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* The Court wanted to preclude the possibility that a "plaintiff could recover attorney's fees if it established that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.' " *Id.* (citation omitted). Permitting a plaintiff to prevail under the "catalyst theory" would therefore encourage favorable EAJA judgments on claims with insufficient legal merit. *Id.*

Accordingly, there must be some form of judicial action that arises from the merits of the case at bar and compels a defendant to change its conduct toward the plaintiff. Intervening events that change the law during judicial proceedings do not amount to a judgment on the merits. *See id.* at 600–02; *see also Former Employees of IBM Corp.,*

Global Servs. Div. v. U.S. Sec'y of Labor, 30 CIT ___, Slip Op. 06–146 (Oct. 3, 2006) (not reported in Fed. Supp.). In *Buckhannon*, a statute enacted during a court proceeding which changed the applicable law and granted plaintiffs their desired relief was insufficient to bestow "prevailing party" status. *See Buckhannon*, 532 U.S. at 600–02. The Court explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605.

These principles also apply to administrative proceedings. When a court retains jurisdiction over a remand proceeding, and the plaintiff's status as a "prevailing party" depends on the "successful completion of the remand proceeding before the [agency,] . . . . [the proceeding] should be considered part and parcel of the [judicial] action for which fees may be awarded." *Sullivan v. Hudson*, 490 U.S. 877, 887–88 (1989). However, in cases "where [the] administrative proceedings are intimately tied to the resolution of the judicial action," a court ordered remand, in itself, does not impart "prevailing party" status to a plaintiff. *Id.* at 888; *see Former Employees of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003) ("*Motorola*"). To attain "prevailing party" status on remand requires the following:

> When there is a remand to the agency which remand grants relief on the merits sought by the plaintiff, and the trial court does not retain jurisdiction, the securing of the remand order is itself success on the merits. When there is such a remand, and the trial court retains jurisdiction, the claimant is a prevailing party only if it succeeds before the agency.

Motorola, 336 F.3d at 1366.

B. Plaintiffs Are Not "Prevailing Parties" Under *Buckhannon*

In this case, the court retained jurisdiction during both remand proceedings. *See EDS II*, 408 F. Supp. 2d at 1347–48; *EDS I*, 350 F. Supp. 2d at 1293. Plaintiffs, however, did not prevail before Labor due to any action or event in the litigation it instituted. Although Plaintiffs ultimately received TAA benefits, the determination of whether to treat the production of software transferred through a non-physical medium as an "article" did not stem from an evaluation of their claims. Instead, Labor altered its position because of a legal ruling contrary to their existing policy. *See Computer Science*, 414 F. Supp. 2d at 1343. The *Computer Science* decision constituted an intervening event that prompted Labor to voluntarily update its policy. Since the Supreme Court rejected the "catalyst theory" of recovery, Plaintiffs do not qualify as "prevailing parties." *See Buckhannon*, 532 U.S. at 605; *see also Perez-Arellano*, 279 F.3d at 795.

Moreover, this court's affirmation of Labor's determination merely ended the remand proceedings. *See EDS III*, 427 F. Supp. 2d at 1360. Without a judgment in favor of Plaintiffs based on the merits of their claim, the judicial affirmation "lacks the necessary judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605. Because Plaintiffs cannot achieve "prevailing party" status under *Buckhannon*, their claim for attorney fees fails. Plaintiffs' motion is denied.

SLIP OP. 06–170

Before THE HONORABLE GREGORY W. CARMAN, JUDGE

GERDAU AMERISTEEL CORPORATION, *Plaintiff*, v. UNITED STATES, *Defendant*, and ICDAS CELIK ENERJITERSANE ve ULASIM SANYAI, A S, *Defendant-Intervenor*

Court No 04–00608

ORDER

Upon consideration of Plaintiff s September 8, 2006 Motion for Rehearing and the parties' responses thereto, it is hereby

ORDERED that Plaintiff's Motion for Rehearing is denied.

SO ORDERED.

Slip Op. 06–171

INDEPENDENT STEELWORKERS UNION, Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Richard K. Eaton, Judge
Court No. 04–00492

OPINION AND ORDER

[Plaintiff's motion for judgment upon the agency record denied in part. Defendant's motion to dismiss denied. Case remanded to United States Department of Labor to assemble and submit administrative record.]

Dated: November 17, 2006

Stewart and Stewart (*Terence P. Stewart, J. Daniel Stirk,* and *Sarah V. Stewart*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen, Director*, Civil Division, Commercial Litigation

Branch, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, International Trade Section, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Claudia Burke*), for defendant.

Eaton, Judge: This matter is before the court on plaintiff Independent Steelworkers Union's ("plaintiff" or "ISU") motion for judgment upon the agency record pursuant to USCIT Rule 56.1, and defendant United States' ("defendant" or "United States") motion on behalf of the United States Department of Labor ("Labor" or the "Department") to dismiss Count IV of plaintiff's complaint for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1).

By its motion, plaintiff contests two actions taken by the Department. First, ISU disputes the Department's denial, after reconsideration, of the petition filed by employees of Weirton Steel Corporation ("Weirton") for certification as eligible for Trade Adjustment Assistance ("TAA") benefits beginning on April 24, 2004. *See* Weirton Steel Corporation, Weirton, West Virginia; Notice of Negative Determination Regarding Application for Reconsideration, AR at 195 (July 23, 2004) ("Reconsideration Denial") (citations to "AR" refer to the Administrative Record); Weirton Steel Corporation, Weirton, West Virginia; Notice of Negative Determination Regarding Application for Reconsideration, 69 Fed. Reg. 47,184 (Dep't Labor Aug. 4, 2004). Second, plaintiff takes issue with the Department's denial of its request to extend Weirton's previously existing certification, which expired on April 23, 2004. *See* Certification Regarding Eligibility to Apply for Worker Adjustment Assistance, 67 Fed. Reg. 22,112 (Dep't Labor May 2, 2002) ("2002 Certification"); Letter from the U.S. Dep't of Labor to Mr. Terence P. Stewart (Sept. 24, 2004) ("Labor Letter").

By its motion, the United States argues that the Reconsideration Denial was fully justified by the law and facts and that the court lacks jurisdiction to hear Count IV of the complaint challenging Labor's denial of plaintiff's request to extend the already existing TAA certification. For the following reasons, the court sustains the Reconsideration Denial, denies defendant's motion to dismiss Count IV of plaintiff's complaint and reserves judgment on plaintiff's challenge to the Department's denial of its request to extend the duration of the 2002 Certification until such time as Labor assembles and submits the administrative record for the requested extension.

BACKGROUND

On July 16, 2001, Labor initiated a TAA certification investigation in response to a petition filed on behalf of workers at Weirton engaged in the production of hot and cold rolled coated carbon steel. *See* Pl.'s Mem. Supp. R. 56.1 Mot. J. Agency R. ("Pl.'s Mem.") at 4–5. The Department's investigation led it to conclude that increased imports of articles competitive with those produced by Weirton "contributed importantly to the decline in sales or production and to the total or partial separation of workers of Weirton Steel." *Id.* at 5. As a

result, on April 23, 2002, the Department certified as eligible for TAA benefits all workers at Weirton who became totally or partially separated from employment on or after July 3, 2000. *See* 2002 Certification, 67 Fed. Reg. at 22,112. The 2002 Certification would remain in effect for two years from the date of certification, and thus expire on April 23, 2004. *See* 19 U.S.C. § 2291 (2000).[1]

In May 2003, approximately one year prior to the expiration date of the 2002 Certification, Weirton filed for Chapter 11 bankruptcy. *See* Pl.'s Mem. at 7; *see also* Weirton Steel Voluntary Pet. Chapter 11 Bankr., AR at 188. After the filing, but prior to the expiration of the 2002 Certification, Weirton officials agreed to sell the company's assets (but not the company itself) to International Steel Group ("ISG"). *See* Pl.'s Mem. at 8.[2]

As a result of the sale, Weirton retained some of its workers to maintain the plant and ensure a smooth transition of the facilities to the new owners. *See* Pl.'s Mem. at 8. Following execution of the sales agreement, both Weirton and ISU contacted the Department and asked that the 2002 Certification be extended beyond its April 23, 2004 termination date so that the retained workers would be eligible to apply for TAA benefits upon being released.[3] *See id.* This request, which was made prior to the expiration of the 2002 Certification, was denied by the Department "as a matter of policy. . . ."[4] *Id*. ("The

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[1] This provision provides, in pertinent part:

> Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part . . . if the following conditions are met:
>
> (1) Such worker's total or partial separation before his application under this part occurred — . . .
>
> (B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made. . . .

19 U.S.C. § 2291(a)(1)(B).

[2] On April 22, 2004, just one day before the 2002 Certification was set to expire, the United States Bankruptcy Court for the Northern District of West Virginia approved the sale of Weirton's assets to ISG, thus making it clear that the retained workers would not become separated from Weirton until after the 2002 Certification expired. *See* Order of Bankr. N.D. W.Va. of 4/22/04.

[3] Neither the date of the initial request for extension of the 2002 Certification nor the denial of that request can be determined from the record or the parties' submitted briefs. As far as the court can determine, the date for both the request and denial was early 2004, sometime prior to March 9, 2004, the date on which the company filed its 2004 petition for certification.

[4] It does not appear to the court that the Department has a policy to deny out-of-hand a petitioning group's request to extend the duration of an existing certification. While ISU referenced two examples where the Department found reason to extend the duration of a previously existing certification, it is apparent that granting these extension requests is an often-engaged-in practice. *See, e.g.*, O/Z Gedney Co., Div. of EGS Electrical Group, Terryville, CT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 43,454 (Dep't Labor July 20, 2004) (extending certification expiration by one year so as to include a worker retained to be engaged in activities related to the

ISU contacted the Department seeking to extend the expiration of the [2002 Certification], but was told by Labor that as a matter of policy, such extensions are not granted."). As an alternative, the Department suggested that Weirton's workers file a new TAA petition. *See id.*

On March 9, 2004, Weirton followed Labor's advice and filed a new petition with the Department in the hope of obtaining certification for the 300 retained workers.[5] *See* Pet. Trade Adjustment Assistance, AR at 2 ("2004 Petition"). In its petition, Weirton stated that it continued to suffer the effects of increased steel imports made from late 1997 through mid-2003. *See id.* Ex. B, AR at 6.

Upon receipt of plaintiff's petition, the Department conducted an investigation, but unlike in 2002, the Department issued a negative determination. *See* Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance, AR at 101–02 ("2004 Determination"); Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 31,134, 31,135 (Dep't Labor June 2, 2004). Labor based the denial on its conclusion that the Weirton workers failed to meet the statutory requirements for certification, specifically 19 U.S.C. § 2272(a)(2)(A)(iii) and § 2272(a)(2)(B)(i). *See*

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close-down process of a production firm); Wiegand Appliance Division, Emerson Electric Company, Vernon, AL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 68 Fed. Reg. 50,198 (Dep't Labor Aug. 20, 2003) (extending certification expiration by five days so as to include workers completing tracking of previous orders to customers).

[5] A petition "shall be filed by a group of workers for a certification of eligibility to apply for adjustment assistance or by their certified or recognized union or other duly authorized representative." 29 C.F.R. § 90.11(a) (2004). The petition shall include:

> (1) the name(s), address(es), and telephone number(s) of the petitioner(s);
>
> (2) the name or a description of the group of workers on whose behalf the petition is filed . . .;
>
> (3) the name and address of the workers' firm or appropriate subdivision thereof;
>
> (4) the name, address, telephone number, and title of an official of the firm;
>
> (5) the approximate date(s) on which the total or partial separation of a significant number or proportion of the workers in the workers' firm or subdivision began and continued, or threatened to begin, and the approximate number of workers affected by such actual or threatened total or partial separations;
>
> (6) a statement of reasons for believing that increases of like or directly competitive imports contributed importantly to total or partial separations and to the decline in the sales or production (or both) of the firm or subdivision;
>
> (7) a description of the articles produced by the workers' firm or appropriate subdivision, the production or sales of which are adversely affected by increased imports, and a description of the imported articles concerned.
>
> If available, the petition should also include information concerning the method of manufacture, end uses, and wholesale or retail value of the domestic articles produced and the United States tariff provision under which the imported articles are classified.

29 C.F.R. § 90.11(c)(1)–(7).

Def.'s Resp. Pl.'s R. 56.1 Mot. J. Agency R. and Def.'s Mot. Dismiss ("Def.'s Resp.") at 9–10. That is, the Department found that increased steel imports did not contribute importantly to the worker separations during the 2002–2003 investigatory period, and that steel imports had not led Weirton to shift its production to a foreign country. *See id.* at 10.[6] Based on its investigation, the Department concluded that Weirton's sales had actually increased from 2003 to 2004. *See* 2004 Determination, AR at 102. In addition, Labor found that, based on a survey of Weirton's major customers regarding their purchases of the products at issue, "[m]ost respondents either did not import or reported declining imports." 2004 Determination, AR at 102.

On June 18, 2004, ISU timely filed its written request that the Department reconsider its denial of Weirton's 2004 Petition. *See* Request for Reconsideration of TA–W–54,455: Former Employees of Weirton Steel Corporation (June 18, 2004), AR at 119 ("Reconsideration Request"); 29 C.F.R. § 90.18(a).[7] In its request, ISU claimed that the Department unreasonably failed to examine any evidence that related to events that occurred outside of the one-year representative base period. *See* Reconsideration Request, AR at 122. For ISU, had the Department considered this evidence when reaching its final determination, it would have been compelled to conclude that increased imports led to Weirton's decline, eventual bankruptcy and worker separation. *See id.* Put another way, ISU argued that considering the evidence outside of the representative period would result in an affirmative determination and, thus, certification of the workers as eligible to apply for TAA benefits. ISU urged the Department, as a matter of policy, to extend the period of investigation because doing so would be "[i]n keeping with the remedial purpose of the statute, and the ability of the Department to deviate from its regulations and prior practice where good cause exists. . . ." Reconsideration Request, AR at 129.

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[6] The Department, in accordance with its regulations, used the import data from the immediately preceding year to determine worker eligibility for certification in 2004. In determining whether increased subject imports contributed importantly to the separation of the petitioning group, the regulations direct the Department to compare import data in what is referred to as the "representative base period." 29 C.F.R. § 90.2. "The representative base period shall be one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of the petition." *Id.*

[7] The regulation provides, in pertinent part:

> (a) *Determinations subject to reconsideration; time for filing.* Any worker, group of workers, . . . or authorized representative of such worker or group, aggrieved by a determination issued pursuant to the Act . . . may file an application for reconsideration of the determination. . . . All applications must be in writing and must be filed no later than thirty (30) days after the notice of the determination has been published in the Federal Register.

29 C.F.R. § 90.18(a).

On July 23, 2004, the Department published its determination denying plaintiff's Reconsideration Request, stating that it "must conform to the Trade Act and associated regulations," which limit its review to evidence from the "relevant period of the current investigation." Reconsideration Denial, AR at 197. Based on the evidence from the representative base period, Labor found that: (1) sales at Weirton increased from 2002 to 2003; and (2) imports did not contribute importantly to the layoffs of Weirton's workers. *See id.*, AR at 196.

On September 14, 2004, having failed in its attempt to persuade the Department to reconsider the denial of Weirton's 2004 Petition, ISU again asked Labor to amend the 2002 Certification to extend its coverage to May 18, 2004, three-and-a-half weeks beyond the established expiration date. See Letter from Mr. Terence P. Stewart to Mr. Timothy F. Sullivan, Director, Division of Trade Adjustment Assistance (Sept. 14, 2004) ("Stewart Letter"). As of May 18, 2004, ISG was the new owner of the plant. *See id.* at 2. As a result, ISU argued that Weirton could no longer be considered a producer of steel and, thus, all of its production employees were permanently separated from that date forward. *See id.* In support of its position, ISU cited two prior instances where Labor granted similar requests. *See id.* at 3. Nevertheless, on September 24, 2004, the Department denied ISU's request to extend the duration of the 2002 Certification because: (1) Weirton was a steel producer; (2) the scenario presented was dissimilar to those in which amendments had previously been granted because, in this case, production at the plant continued whereas in the other instances, workers were retained in decommissioning the plant; and (3) as Labor indicated in its earlier determinations relating to Weirton's workers, increased steel imports simply were not a cause of the workers' separation from the company. *See* Labor Letter.

Plaintiff now challenges Labor's denial of its reconsideration and amendment requests. Jurisdiction over both the denied petition for TAA eligibility and the denied request for an amendment lies with 28 U.S.C. § 1581(d)(1) (2000) and 19 U.S.C. § 2395(c) or in the alternative, with respect to the denied request for an amendment, 28 U.S.C. § 1581(i)(4) provides a separate basis for jurisdiction.[8]

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[8] The court has exclusive jurisdiction over an action commenced to review "any final determination of the Secretary of Labor under [19 U.S.C. § 2273] with respect to the eligibility of workers for adjustment assistance. . . ." 28 U.S.C. § 1581(d)(1). A negative determination on reconsideration "shall constitute a final determination for purposes of judicial review pursuant to . . . 19 U.S.C. § 2395. . . ." 29 C.F.R. 90.18(i). Specifically, the court "shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c). In addition, the United States Court of Appeals for the Federal Circuit has held that the court may exercise jurisdiction pursuant to 28 U.S.C. § 1581(i)(4), but stated that the provision "limits the court's review to Labor's administration and enforcement of Trade Act determinations under § 1581(d)." *Former Em-*

STANDARD OF REVIEW

The court reviews the Department's determination not to reconsider its denial of plaintiff's 2004 Petition for substantial evidence. Specifically, "[t]he findings of fact by the Secretary of Labor . . . if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case . . . to take further evidence, and [the] Secretary may thereupon make new or modified findings of fact and may modify his previous action. . . ." 19 U.S.C. § 2395(b). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted). Good cause for remanding the Department's determination "exists if [its] chosen methodology is so marred that [its] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989) (internal citations and quotation marks omitted). Finally, the court's review of the Department's findings is confined to the administrative record. *See* 28 U.S.C. § 2640(c) ("In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under [19 U.S.C. § 2273] . . . the court shall review the matter as specified in [19 U.S.C. § 2395].").

DISCUSSION

I. Plaintiff's Motion

A. Relevant Law

Under the statutory scheme for determining group eligibility to apply for TAA benefits, petitioning workers must demonstrate to the Department that:

> (1) a significant number or proportion of the 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) the sales or production, or both, of such firm or subdivision have decreased absolutely;
>
> (ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and
>
> (iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation

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ployees of Quality Fabricating, Inc. v. United States Sec'y of Labor, 448 F.3d 1351, 1355 (Fed. Cir. 2006).

> and to the decline in the sales or production of such firm or subdivision; or
>
> (B)(i) there 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) the 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) the 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) there 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)(1),(2)(A) & (B); *see also* 19 U.S.C. § 2273(a) ("As soon as possible after the date on which a petition is filed under section 2271 of this title, . . . the Secretary shall determine whether the petitioning group meets the requirements of section 2272. . . ."). For purposes of 19 U.S.C. § 2272(a)(2)(A)(iii), the petitioning workers need only demonstrate that the increase in imports is an important cause of the separation, "but not necessarily more important than any other cause." 19 U.S.C. § 2272(c)(1). Satisfaction of § 2272(a)(1) and (2)(A) or (2)(B) results in the issuance of a certification of eligibility. The certification must specify the date of worker separation. *See* 19 U.S.C. § 2273(a).

Notably, Labor not only decides whether a group of workers is eligible for TAA benefits, but may also determine when the certification expires. *See* 19 U.S.C. § 2273(d) (permitting Labor to terminate certification where "total or partial separations from [the] firm or subdivision are no longer attributable to the conditions specified in [19 U.S.C. § 2272]. . . ."); *see also* 29 C.F.R. § 90.16(d)(2) ("When applicable, the certification shall specify the date(s) after which the total or partial separations of the petitioning group of workers . . . specified in the certification are no longer attributable to the conditions set forth in paragraph (b) of this section."); 29 C.F.R. § 90.17(f) ("Upon reaching a determination that the certification of eligibility should be continued, the certifying officer shall promptly publish in the Federal Register a summary of the determination with the reasons therefor."). That is, where the Department does not specify a termination date at the time of certification, the statute and regulations anticipate a further investigation by which the Department may decide to terminate or continue the certification based on the circumstances. *See* 19 U.S.C. § 2273(d); 29 C.F.R. § 90.17(f). Absent

such circumstances, the period in which workers are certified to apply for TAA benefits is statutorily limited to two years. *See* 19 U.S.C. § 2291(a)(1)(B); *see also Commc'ns Workers of Am., AFL-CIO v. United States Sec'y of Labor*, 19 CIT 687, 690 (1995) (not published in the Federal Supplement).

B. Plaintiff's 2004 Petition for Certification

Plaintiff first claims that the Department not only unreasonably denied Weirton's 2004 Petition for certification, but compounded that unreasonableness by issuing a negative determination on plaintiff's request for reconsideration of the initial denial. Plaintiff raises two related arguments in support of its contention that the Department should be required to reconsider the negative determination and grant plaintiff's 2004 Petition. First, it insists that the Department unreasonably declined to consider evidence of events that took place outside of the one-year representative base period. *See* Pl.'s Mem. at 13. Second, plaintiff asserts that the remedial purpose of the TAA statute required the Department to consider such factors as the "surges of imports from 1998–2002 [that] drove steel prices to unsustainable lows," causing prices to collapse, even though those events took place outside of the representative base period.[9] *Id*. at 14. Thus, ISU claims that the effects from the same increased steel imports that the Department found contributed importantly to the separation of Weirton's employees in 2002, continued to affect adversely workers beyond April 23, 2004.

In addition, plaintiff argues that while the number of units sold by Weirton may have increased for some of its products, the units actually produced by the company decreased for all but one item during the examined time period.[10] *See* Pl.'s Mem. at 9; Reconsideration Request, AR at 128. Plaintiff asserts that these factors coupled with previous determinations by Labor to extend the one-year representative base period, demonstrate that Labor's denial of plaintiff's 2004 Petition is unsupported by substantial evidence and not in accordance with law.

Labor supports its determination by emphasizing that its denial of Weirton's 2004 Petition was the result of its adherence to its regulations. That is, Labor found that the evidence from the representative base period failed to demonstrate that increased imports contributed importantly to the workers' separation and, in turn, plaintiff failed

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[9] According to ISU, the trade adjustment statutes are remedial in nature and should be administered with high regard to the interest of the workers. *See* Pl.'s Mem. at 13 (citing *Former Employees of Elec. Data Sys. Corp. v. United States Sec'y of Labor*, 28 CIT ____, 350 F. Supp. 2d 1282 (2004)).

[10] For instance, the record indicates that production totals dropped from 15,521 to 14,902 (tons per year in thousands) from 2002 to 2003. *See* Reconsideration Request, Table I, AR at 128.

to satisfy 19 U.S.C. § 2272(a)(2). *See* 2004 Determination, AR at 100–03. Specifically, Labor maintains that during the one year prior to the filing of the petition on March 9, 2004, there were decreasing imports of "hot rolled carbon sheet, cold rolled carbon sheet, hot dipped galvanized sheet and strip, galvanized electrolytic carbon sheet and strip, and tin mill products (black plate, tin plate, tin free). . . ." 2004 Determination, AR at 102; *see also* AR at 71–75. Likewise, the Department concluded that Weirton's relevant sales increased over the same time frame.[11] *See* 2004 Determination, AR at 102.

In response to plaintiff's claim that the Department abused its discretion by not reviewing evidence outside of the representative base period, Labor contends that it acted reasonably by following the limitations imposed by the regulation. The regulation provides that "[t]he representative base period shall be one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of the petition." 29 C.F.R. § 90.2. In Labor's view, limiting its review to the time period prescribed by its regulations demonstrates that it acted in accordance with law. *See* Def.'s Resp. at 15; Reconsideration Denial, AR at 197.

The Department's adherence to the one-year representative period has previously been found to be reasonable. *See Former Employees of Homestake Mining Co. v. Brock*, 12 CIT 270, 272–73 (1988) (not published in the Federal Supplement) ("[T]his Court finds that the Secretary is permitted to confine the investigation to the year of separation and the immediately preceding year in determining under [19 U.S.C. § 2272(a)(2)(iii)] . . . whether the imports found to be increasing 'contributed importantly' to the worker separations and to any decline in sales or production."); *see also Paden v. United States Dep't of Labor*, 562 F.2d 470, 473 (7th Cir. 1977) (holding that by "confining consideration to imports during the year of separation and the immediately preceding year, the Secretary can focus on those imports which are most likely to affect employment in the year of separation while diminishing consideration of those factors which, while affecting employment, are not within the coverage of the act.").

It is well settled that "[w]hen a court reviews an agency's construction of the statute which it administers, . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def.*

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[11] Although not providing the primary basis for its determination, Labor observed that a survey of Weirton's major customers indicated that those customers decreased their reliance on imported steel during the examined time period. *See* Reconsideration Denial, AR at 196.

Council, Inc., 467 U.S. 837, 842–43 (1984). While possibly not permissible in all cases where workers have suffered injury from imports, in this case the regulation appears to be permissible. In the absence of specific statutory language, Labor determined that the one-year representative base period would best promote accurate determinations as to the effects of increased imports on worker separation, and thereby advance the goal of ensuring that only those workers truly injured by competitive imports would be eligible to apply for TAA benefits. Under the facts of this case, plaintiff has not made a compelling argument that this interpretation of the TAA statute embodied in Labor's regulations is unreasonable. This is particularly the case where, as shall be seen *infra*, there is an alternative way to address plaintiff's complaints. Thus, the court finds that Labor's decision to base its denial of plaintiff's 2004 Petition and its denial of plaintiff's Reconsideration Request solely on evidence from the representative base period was reasonable and in accordance with law.

Having found reasonable Labor's decision to rely solely on evidence from the representative base period, the court now turns to the Department's substantive finding. Where petitioning workers assert in a new petition that their present separation is caused by the same factors that led to a prior certification, the Department cannot rely upon its prior findings, but rather must engage in an independent analysis before granting a new certification. *See Commc'ns Workers of America*, 19 CIT at 691.

Here, the Department found in its 2004 Determination that the requirements of § 2272(a)(2)(A) were not met. Labor concluded that the record demonstrated that: (1) Weirton's sales increased absolutely; (2) imports of several articles directly competitive with those produced by Weirton did not increase; (3) increased imports did not contribute importantly to the separation of Weirton's workers; (4) Weirton had not shifted steel production to a foreign country; and (5) there would not likely be an increase in steel imports that would affect adversely Weirton's workers. *See* 2004 Determination, AR at 102. While the court agrees with plaintiff that Labor is required to investigate whether "sales or production, or both" decreased and may not simply rely on an increase in sales in its analysis, the statute is clear in its mandate that petitioning workers must satisfy all of the requirements of either § 2272(a)(2)(A) or (B) to be certified as eligible to apply for TAA benefits. Plaintiff does not argue that for the period reviewed, Labor unreasonably determined that its petition failed to demonstrate that subject imports contributed importantly to the workers' separation. Thus, because the evidence supports Labor's conclusion that plaintiff did not satisfy the statutory requirements for certification, the court sustains Labor's Reconsideration Denial.

C. Plaintiff's Request to Amend 2002 Certification

ISU next challenges Labor's denial of its September 14, 2004 request to amend[12] the 2002 Certification to extend the expiration date by three-and-a-half weeks to cover those 300 workers retained to transfer the plant to ISG. Although Labor has extended the time period for a certification's coverage of workers in other instances, the Department denied plaintiff's request in part because "the situations addressed by the [prior] amendments . . . are not the same as the situation upon which plaintiff based its request. . . ." Def.'s Mot. Leave Resp. Pl.'s Supplemental Citations and Def.'s Resp. Supplemental Citations ("Def.'s Resp. Supplemental Citations") at 2. Specifically, Labor stated that "the company was not closing, it was being sold to a new owner who continued to operate the business and there was undisputed evidence that the company's sales and production had increased since that last certification was issued." *Id.*

With respect to plaintiff's appeal to this court, however, Labor's principal argument is that the court lacks subject matter jurisdiction to hear plaintiff's challenge to its denial of the amendment request. Plaintiff asserts that the court has jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d), or in the alternative, under 28 U.S.C. § 1581(i)(4), the Court's residual jurisdiction provision.

In all cases, the court must, as a threshold matter, determine whether it has subject matter jurisdiction. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004) ("[B]y whatever route a case arrives in federal court, it is the obligation of both . . . court and counsel to be alert to jurisdictional requirements."). The burden of establishing jurisdiction lies with the party seeking to invoke the court's jurisdiction. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). Neither party disputes that the court may hear claims challenging a final determination of the Department that relates to the certification of a group of workers as eligible to apply for TAA benefits. *See* 28 U.S.C. § 1581(d)(1) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review . . . any final determination of the Secretary . . . under [19 U.S.C. § 2273] with respect to the eligibility of workers for adjustment assistance. . . .").

For plaintiff, "[t]he Department's decision to deny [its] request for an amendment of the [2002 Certification] was a final determination of the Secretary of Labor under . . . 19 U.S.C. § 2273, with respect to the eligibility of workers for adjustment

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[12] The court refers to ISU's request for an extension of time as an "amendment," although that term is not used in the relevant statutes or regulations. Both Labor and this Court have used this term in describing previous requests to extend the time period for certification. *See, e.g., Former Employees of Motorola, Inc. v. United States Dep't of Labor*, 27 CIT ____, ____, Slip Op. 03–166 at 3 (Dec. 17, 2003) (not published in the Federal Supplement).

> The letter from the Department to Terence P. Stewart, dated September 24, 2004, denying ISU's request for an extension of the 2002 [C]ertification's expiration date constitutes a final agency action and there is no other adequate remedy in a court. In the letter, the Department provided two reasons for denying the ISU's request. First, the Department noted that the two trade petition certifications referenced by the ISU in its request were distinguishable from Weirton's situation because in those cases, workers were retained to assist with the plant closure after production had ceased. That is not the case for workers at Weirton Steel. Second, the Department noted that it conducted a full and careful investigation in [the 2004 Determination] and issued negative determinations for the initial petition . . . and the subsequent application for reconsideration. Labor concluded that since the Department determined that workers of the firm were not adversely affected by increases in imports we are unable to comply with your request.

Id. at 23 (internal alterations, citations and quotation marks omitted). In other words, plaintiff contends that for Labor to have concluded that an amendment to the 2002 Certification was not warranted, it (1) must have examined the evidence and concluded that the retention of workers for the purpose of shutting down a plant was somehow different from being retained until the plant is turned over to a new company; or (2) must necessarily have analyzed plaintiff's request under the criteria set forth in 19 U.S.C. § 2272.

For its part, Labor first claims that jurisdiction is lacking because on its face "[a] decision denying an extension of time for the period covering a certification . . . is not a determination that a petitioning group meets the requirements of 19 U.S.C. § 2272 and, therefore is not an appealable decision within the jurisdiction of this Court. . . ." Def.'s Resp. at 17 (internal quotation marks omitted).[13] In other words, the Department understands the analysis involved in determining whether to grant or deny a request for an extension of a certification's duration to be independent from that concerning a petition for certification and hence not reviewable by the court.

Read together, 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d) grant the court jurisdiction over final determinations by the Department concerning the petition of a group of workers for certification as eli-

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[13] The Department asserts that the instant dispute is analogous to that presented to the United States Court of Appeals for the Federal Circuit in *Mitsubishi Elec. of Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994). *See* Def.'s Resp. at 16–17. There, the Federal Circuit held that this Court lacked subject matter jurisdiction over any contest of a Customs decision not relating to one of the specifically delineated matters in 19 U.S.C. § 1514(a). The Department, therefore, argues that because review of a Labor determination denying a plaintiff's request to amend an existing TAA certification is not specifically listed in the statute as an action over which the court has jurisdiction, ISU's cause of action should be dismissed.

gible to apply for TAA benefits. Thus, jurisdiction over plaintiff's claim challenging Labor's denial of its request to amend the 2002 Certification may be exercised if the denial is (1) a final determination; and (2) regards the requirements for certification set forth in 19 U.S.C. § 2272.

The court finds that plaintiff established jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d). First, the court recognizes that "final determination" is not defined by statute or regulation. However, the concept of finality as applied to agency determinations is readily understood as referring to an action where the "decisionmaking process has reached a stage where judicial review will not disrupt the orderly process of adjudication." 5 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* § 48.03[1] at 41 (2006); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) ("As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process, . . . [a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.") (internal citations and quotation marks omitted). Here, Labor issued its denial on September 24, 2004 in the form of a letter addressed to plaintiff's counsel. *See* Labor Letter. In the letter, the Department stated that the basis for its denial was its determination that "workers of the firm were not adversely affected by increases in imports" and suggested that "former workers of the firm . . . seek information on other programs administered by the Department. . . ." *Id.* Despite the seeming informality of the Department's determination, the denial was indeed final. *See Natural Res. Def. Council, Inc. v. E.P.A.*, 22 F.3d 1125, 1132–33 (D.C. Cir. 1994) ("[T]he absence of a formal statement of the agency's position . . . is not dispositive: An agency may not, for example, avoid judicial review merely by choosing the form of a letter to express a definitive position on a general question of statutory interpretation.") (internal citations and quotation marks omitted). It is apparent that the Department engaged in a review of plaintiff's request and denied the same with every intention of binding plaintiff and with no intention of revisiting the issue. Thus, the decision to deny plaintiff's request constituted a final determination.

Second, the court finds that Labor's determination was at least in part based upon an analysis of the § 2272 criteria. Indeed, it is unlikely that a decision not to extend the duration of an existing TAA eligibility certification could be based on substantial evidence without evaluating whether the factors found in § 2272 are satisfied. This evaluation appears to have been one of the reasons Labor gave for its decision in its September 24, 2004 letter. Therefore, because the Department's denial of ISU's request to amend the 2002 Certification was a final determination relating to the § 2272 criteria, ju-

risdiction is had pursuant to 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1).

Should it be that the foregoing analysis does not provide a basis for jurisdiction, however, 28 U.S.C. § 1581(i)(4) provides an independent basis for hearing plaintiff's case. Subsection 1581(i)(4) empowers the Court to hear complaints regarding an agency's administration and enforcement of the trade laws. *See* 28 U.S.C. § 1581(i)(4) ("[T]he [Court] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in . . . subsections (a)–(h) of this section."). As has been previously seen, 28 U.S.C. § 1581(d)(1) and 19 U.S.C. § 2395(c) give the Court authority to review any final determination of the Department regarding the eligibility of workers to apply for TAA benefits.

It is clear that plaintiff's action seeking review of the Department's denial of its amendment request is a challenge to the Department's administration and enforcement of 19 U.S.C. §§ 2272 and 2273. In denying plaintiff's application to extend the 2002 Certification, the Department was clearly engaging in the administration and enforcement of that certification. Therefore, an independent basis for jurisdiction over the instant matter is found under 28 U.S.C. § 1581(i)(4).

Labor next advances the argument that, should the court find it has jurisdiction over this matter, plaintiff's action should nevertheless be dismissed as having been untimely commenced. *See* Def.'s Resp. at 16. This position rests on Labor's framing of plaintiff's request as one seeking reconsideration of the 2002 Certification determination. According to 29 C.F.R. § 90.18(a) "[a]ll applications [for reconsideration] must be in writing and must be filed no later than thirty (30) days after the notice of the determination has been published in the Federal Register." According to the Department:

> If ISU wanted to appeal Labor's determination regarding the date the [2002] [C]ertification expired, it should have done so within the time limit to appeal that decision. It did not do so. Therefore, ISU cannot now avoid the time limit for appealing that decision by submitting a request to amend the earlier decision and then appealing the denial of the request to amend.

Def.'s Resp. at 16. Thus, because plaintiff did not seek reconsideration of the Department's 2002 determination within thirty days of its issuance, Labor maintains that the court cannot hear plaintiff's claim.[14]

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[14] It is worth noting that although not cited as a basis for its denial of plaintiff's request, the Department now contends that it has an established policy of dismissing these requests out-of-hand. *See* Def.'s Resp. Supplemental Citations at 2 ("It is these type[s] of amend-

The Department's position is untenable. A request to amend an existing certification based on changed circumstances is not the same as an application for reconsideration of an initial determination. An application for reconsideration seeks the correction of an error discoverable at the time the final determination is issued. The thirty-day period provided by 29 C.F.R. § 90.18(a) confirms that such error must be apparent or capable of being discovered at that time. The making of the application for reconsideration, therefore, is unlike a request for an amendment to an existing certification in that it is not contingent on a change of circumstances. The adoption of Labor's position would require a petitioning group of workers to predict within thirty days of publication of the determination what circumstances might exist as much as two years later. In the present case, the Department would have Weirton look ahead twenty-two months and determine whether certification should extend beyond the two-year statutory period. Thus, the court finds that a petitioning group's request to amend an existing certification as the result of a change in circumstances does not constitute an application for reconsideration as contemplated by 29 C.F.R. § 90.18(a).

As a result of the foregoing, the court finds that it may properly exercise jurisdiction over plaintiff's challenge to Labor's determination not to extend the 2002 Certification and that defendant's other arguments are without merit. The court refrains from reaching the merits of this matter, however, until Labor has submitted the complete administrative record with respect to plaintiff's amendment request.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Labor's determination denying plaintiff's request for reconsideration of Labor's denial of plaintiff's 2004 Petition is sustained;

ORDERED that defendant's motion to dismiss Count IV of plaintiff's complaint is denied; and it is further

ORDERED that this matter is remanded to Labor with instructions to assemble and submit to the court the administrative record regarding plaintiff's amendment claim by December 18, 2006.

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ments that Labor later determined were not within its authority to issue and Labor has advised defendant's counsel that it has ceased issuing them.").

Slip Op. 06–172

MAGNOLA METALLURGY, INC., Plaintiff, v. UNITED STATES, Defendant, U.S. MAGNESIUM LLC, Defendant-Intervenor.

Before: Pogue, Judge
Court No. 05–00617

[Magnola's USCIT R. 56.2 motion for judgment on the agency record denied; judgment entered for the Defendant.]

Decided: November 20, 2006

Baker & Hostetler, LLP (*Elliot Jay Feldman*, *John J. Burke*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Directory, *Stephen Carl Tosini*, Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice; and Office of Chief Counsel for Import Administration, Department of Commerce (*Ada E. Bosque*), of counsel, for Defendant.

King & Spalding, LLP (*Stephen Andrew Jones*, *Jeffrey Mark Telep*, *Joseph W. Dorn*) for Defendant-Intervenor US Magnesium LLC.

OPINION

Pogue, Judge: This is an action for judicial review of the decision of the Department of Commerce ("Commerce") in *Pure Magnesium and Alloy Magnesium From Canada*, 70 Fed. Reg. 54,367 (Dep't Commerce Sept. 14, 2005)(final results of 2003 countervailing duty administrative reviews)("*2003 Final Results*"). Plaintiff, Magnola Metallurgy, Inc. ("Magnola"), a Canadian producer of alloy magnesium, seeks to challenge Commerce's imposition of countervailing duties ("CVD") on its merchandise. More specifically, Magnola moves for judgment on the agency record pursuant to USCIT R. 56.2, asserting that Commerce's imposition of duties was based on an incorrect finding that the Gouvernement du Quebec's ("GDQ") manpower training program provided a *de facto* specific subsidy to Magnola because of the "disproportionately large" amount of funds Magnola received from the program.

For the reasons that follow, the court denies Magnola's motion and, in accordance with USCIT R 56.2(b), grants judgment for the Defendant.

Background

Commerce imposed countervailing duties on pure and alloy magnesium from Canada in 1992. *See Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946, 30,948 (Dep't Commerce July 13, 1992) (final affirmative countervailing duty determinations) ("1992 CVD Determination"). About a decade later, Magnola, as a new shipper, sought and received, review of its U.S. sales of alloy magnesium during calendar year 2001. *See Alloy Magnesium from*

Canada, 68 Fed. Reg. 4175 (Dep't Commerce Jan. 28, 2003) (preliminary results of countervailing duty new shipper review). In the final results of that new shipper review, Commerce concluded that the GDQ's manpower training measure program ("MTM") provided a *de facto* specific subsidy to Magnola, and reiterated its finding from the preliminary determination that:

> Because the grants Magnola received were disproportionately large when compared to other companies, we . . . find them de facto specific on a company basis under section 771(5A)(D)(iii)(III) of the Act [19 U.S.C. § 1677 (5A)(D)(iii)(III)]. In conducting our disproportionality analysis, for the years in which Magnola received grants, we calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the second largest recipient overall, its percentage share was nearly three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries and over ninety times larger than the typical grant amount. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis. In other words, were we to exclude small-scale recipients, Magnola still received a disproportionately large amount of subsidy.

Memorandum from Susan H. Kuhbah, Acting Deputy Assistant Secretary Group I Import Administration, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, *Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada* at 14, Dep't of Commerce (April 21, 2003) *available at* http://ia.ita.doc.gov/frn/summary/canada/ 03-10369-1.pdf; *see also Final Results of Pure Magnesium from Canada*, 68 Fed. Reg. 22,359 (Dep't Commerce Apr. 28, 2003) (note of final results of countervailing duty new shipper review) ("*New Shipper Review*").[1]

Subsequently, pursuant to 19 U.S.C. § 1675(a), Magnola sought a "periodic" or "administrative"[2] review of the countervailing duty or-

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[1] Commerce's determination, including the finding of a *de facto* specific subsidy to Magnola, was upheld upon appeal to a NAFTA panel. *See Alloy Magnesium from Canada: Final Results of U.S. Department of Commerce Countervailing Duty New Shipper Review*, Secretariat File No. USA–CDA–2003–1904–02, Article 1904 binational panel review pursuant to NAFTA (Sept. 9, 2005) *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/Ua03020e.pdf.

[2] All references to the U.S.C. are to the 2000 edition.

der for the 2003 calendar year.[3] *See Pure Magnesium and Alloy Magnesium from Canada*, 70 Fed. Reg. 24,530, 24,530 (Dep't Commerce May 10, 2005) (preliminary results of countervailing duty administrative reviews) ("*2003 Preliminary Results*").

In conducting the 2003 administrative review of Magnola's countervailing duties, Commerce made the following determination:

> In the *New Shipper Review*, the Department found that the MTM program assistance received by Magnola, constituted countervailable benefits within the meaning of section 771(5) of the Act. The assistance is a direct transfer of funds from the [GDQ] bestowing a benefit in the amount of the grants. We also found Magnola received a disproportionately large share of assistance under the MTM program and, on this basis, we found the grants to be limited to a specific enterprise or industry, or group of enterprises or industries, within the meaning of section 771(5A)(D)(iv) of the Act.

2003 Preliminary Results, 70 Fed. Reg. at 24,532.

> It is the Department's policy not to revisit specificity determinations absent the presentation of new facts or evidence (*see, e.g.*, *Pure and Alloy Magnesium From Canada: Final Results of the First (1992) Countervailing Duty Administrative Reviews*, 62 FR 13857 (March 24, 1997); *Carbon Steel Wire Rod From Saudi Arabia; Final Results of Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order*, 59 FR 58814 (November 15, 1994)). In this review, no new facts or evidence has [sic] been presented which would lead us to question that determination.
>
> In proposing that the Department base a POR-specific *de facto* specificity finding on the amounts of benefits from nonrecurring grants allocated to the POR, the respondent appears to be confusing the initial specificity determination based on the action of the granting authority and other circumstances at the time of bestowal with the allocation of the benefit over time.

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[3] The purpose of periodic or administrative review is to provide an opportunity to make adjustments to the duties provided for in AD/CVD orders, based on actual experience. "Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212 (2003).

> If Commerce finds that dumping or subsidization has occurred, and the ITC finds that dumping or subsidization causes, or threatens to cause, material injury to a domestic industry, interested parties may, each year, upon the anniversary of the original findings, request a [periodic] review to adjust the dumping or countervailing duty in light of the importers' actual then current conduct.

Ontario Forest Indus. Ass'n v. United States, 30 CIT ____, ____, 444 F. Supp. 2d 1309, 1311–12 (2006) (citing 19 U.S.C. § 1675).

> These are two separate issues. We agree with the petitioner that once a determination has been made regarding whether a non-recurring subsidy was specific (or not) at the time of bestowal, then that finding holds for the duration of the subsidy benefit barring any new facts or evidence pertaining to the circumstances of the subsidy's bestowal. In the original determination, we considered each of the claims raised by Magnola; the bases of the original specificity determination are still valid. Since no new evidence has been presented which would cause us to revisit the original specificity determination, we continue to find assistance under the MTM Program to be specific and, therefore, countervailable.

Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, *Issues and Decisiom Memorandum for the Final Results of the 2003 Administrative Reviews for the Countervailing Duty Orders of Pure Magnesium and Alloy Magnesium from Canada*, at 14, Dep't of Commerce (Sept. 7, 2005) *available at* http://ia.ita.doc.gov/frn/summary/canada/E5-5018-1.pdf ("*Sept. 7, 2005 Issues & Decision Mem*."); *see also 2003 Final Results*, 70 Fed. Reg. at 54,367.[4]

In the action presently before the court, Magnola, as is its right, seeks judicial review, under 19 U.S.C. § 1516a(a)(2)(B)(iii), of the *2003 Final Results*. In such an action, the party seeking review of an agency determination may contest "any factual findings or legal conclusions upon which the determination is based," 19 U.S.C. § 1516a(a)(2)(A), and "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B).

The court has jurisdiction under 28 U.S.C. § 1581(c).

DISCUSSION

The statute governing Commerce's administrative reviews provides, in relevant part, as follows:

> Administrative review of determinations
>
> (a) Periodic review of amount of duty

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[4] In the *2003 Final Results*, Commerce adopted the Issues and Decision Memorandum, thereby incorporating it into its final determination: "All issues raised in the case and rebuttal briefs by parties to these administrative reviews are addressed in the September 7, 2005, *Issues and Decision Memorandum for the 2003 Countervailing Duty Administrative Reviews of Pure Magnesium and Alloy Magnesium from Canada* ("Decision Memorandum") to Joseph Spetrini, Acting Assistant Secretary for Import Administration, which is hereby adopted by this notice." *2003 Final Results*, 70 Fed. Reg. at 54,367.

> (1) In general
>
> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> (A) review and determine the amount of any net countervailable subsidy. . . .

19 U.S.C. § 1675. Thus the statute requires that Commerce, upon request, conduct an administrative review and determine the amount of Magnola's subsidy. The statute does not, however, specify the precise process and scope of the proceedings necessary to determine the amount of Magnola's subsidy. However, as Congress has authorized agencies to do, Commerce filled the gap in the statute by promulgating regulations that outline the procedures required in an administrative review. *See* 5 U.S.C. § 301;[5] *19 CFR Part 351: Countervailing Duties* (notice of proposed rulemaking and request for public comments) 62 Fed. Reg. 8818 (Dep't Commerce Feb. 26, 1997).

In relevant part, Subpart B of Commerce's Regulations governing Antidumping and Countervailing Duty Procedures provides that: "[t]he procedures for reviews are similar to those followed in investigations." 19 C.F.R. § 351.221(a).[6] With exceptions not applicable here, however, the regulations do not further specify the scope of the proceedings in the administrative review. Accordingly, in the proceeding at issue here, Commerce was required to interpret its own regulation in deciding the scope of the particular administrative review at issue.

In Magnola's 2003 Countervailing Duty Administrative Review, Commerce determined the scope of the review by relying on "the Department's policy not to revisit specificity determinations absent the

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[5] This provision reads:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301.

[6] All references to the Code of Federal Regulations are to the 2003 edition.

presentation of new facts or evidence." *Sept. 7, 2005 Issues & Decision Mem.* at 14. More specifically, Commerce implicitly interpreted its own regulation governing the review, 19 C.F.R. § 351.221, as not requiring Commerce to reopen the specificity determination absent the presentation of new facts or evidence.[7]

Defendant is therefore correct that the issue presented in this action is:

> [w]hether Commerce may decline to reopen the record of a closed new shipper review during a subsequent administrative review, to revisit a countervailability determination for a non-recurring subsidy, that was addressed during the new shipper review and subsequently sustained by a North American Free Trade Agreement ("NAFTA") binational panel.

Def.'s Resp. Magnola's Mot. J. Admin. R. 2 ("Def.'s Resp.").

Accordingly, the court must determine whether the agency's interpretation of its regulation to permit it to refrain from re-opening a specificity determination in a prior review, absent new evidence, is in accordance with law.

As a general matter, courts will find an agency's interpretation of its own regulations to accord with law unless that interpretation is unreasonable. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991)("[i]t is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' ")(quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)); *Dofasco Inc. v. United States*, 28 CIT ___ , ___ , 326 F. Supp. 2d 1340, 1350–51 (2004); *see also Mittal Canada, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–143 at 16–17 (Sept. 22, 2006) (discussing the factors "affecting deference to agencies' regulatory interpretations"). Here, the court cannot conclude that the agency's policy resulting from Commerce's interpretation of its regulation is unreasonable.

First, in the absence of new facts or evidence, there is no reason for the court to believe that the agency's prior determination, which was itself subject to appeal, would be inconsistent with the statutory objective of achieving accuracy in the calculation of antidumping and countervailing duty rates. Second, the agency's policy serves the interest of efficiently using the agency's resources. *Cf. Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003) (describing the size of the Social

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[7] Magnola does not claim that its submission relied on any new facts or evidence. *See Sept 7, 2005 Issues & Decision Mem.* at 14 ("In this review, no new facts or evidence has [sic] been presented which would lead us to question that determination"); Br. Supp. Magnola Metallurgy Inc.'s Mot. J. Agency. R. 33–34 ("Pl.'s Br.") (failing to contest the assertion that no new facts had been presented during the review).

Security system and stating that "[t]he need for efficiency is self-evident")(quoting *Heckler v. Campbell*, 461 US 458, 461, n.2 (1983); *see also Torrington Co. v. United States*, 68 F. 3d 1347, 1351 (Fed. Cir. 1995) ("agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources"); *Alberta Pork Producers' Mktg. Bd. v. United States*, 11 CIT 563 (1987). Third, the regulation specifically provides that *in a specified other review* the agency will, without requiring the submission of new evidence, affirmatively investigate changes in the subsidy programs made by the government of the affected country that affected the estimated countervailable subsidy. *See*, 19 C.F.R. § 351.221(c)(7).[8] This language would be unnecessary if the agency were mandated to investigate such potential changes, absent the submission of new facts or evidence, in every review. The agency's policy is therefore consistent with commonly accepted canons of interpretation. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (The "cardinal principle of statutory construction" is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also Hamdan v. Rumsfeld* 126 S. Ct. 2749, 2765 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

In addition, "the ITA has a longstanding administrative practice of not reinvestigating a program determined not to be countervailable unless the petitioner presents new evidence justifying reconsidera-

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[8] That provision provides as follows:

(7) Countervailing duty review at the direction of the President. In a countervailing duty review at the direction of the President under section 762 of the Act and § 351.220, the Secretary will:

(i) Include in the notice of initiation of the review a description of the merchandise, the period under review, and a summary of the available information which, if accurate, would support the imposition of countervailing duties;

(ii) Notify the Commission of the initiation of the review and the preliminary results of review;

(iii) Include in the preliminary results of review the countervailable subsidy, if any, during the period of review and a description of official changes in the subsidy programs made by the government of the affected country that affect the estimated countervailable subsidy; and

(iv) Include in the final results of review the countervailable subsidy, if any, during the period of review and a description of official changes in the subsidy programs, made by the government of the affected country not later than the date of publication of the notice of preliminary results, that affect the estimated counteravailable subsidy.

19 C.F.R. § 351.221(c)(7)

tion of a prior finding." *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1242 (Fed. Cir. 1992). That practice has been upheld as reasonable by the Court of Appeals for the Federal Circuit. *Id.* Because *PPG Industries* addresses programs determined *not* to be countervailable, it does not mandate approval of a rule against the reinvestigation of a program determined to be countervailable in the absence of new evidence; *PPG Industries* does, however, give support to the conclusion that such a reciprocal or inverse rule is reasonable, that is, that a finding of a *de facto* specific countervailable subsidy holds absent the presentation of new evidence.

In the face of this authority, Magnola argues that its request for review of the *2003 Final Results* does not constitute a request to reopen the *New Shipper Review* determination. Rather, Magnola claims, Commerce itself made a determination of countervailability in the *2003 Final Results* by relying on the determination from the *New Shipper Review.* Magnola's argument, however, is unpersuasive. *See* Reply Br. Supp. Magnola Metallurgy Inc.'s Mot. J. Agency R. 4 ("Pl.'s Reply Br.")("Commerce made a determination of countervailability, including a finding of *de facto* specificity, in the 2003 administrative review.").

It is well-established law that the court reviewing an agency decision "must judge the propriety of such [agency] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Accordingly, *Chenery* requires that the agency's stated finding or legal conclusion is that which we must review. Here, as noted above, the agency's specific finding or legal conclusion, as a result of its regulations and interpretation of its regulations, was that it is "the Department's policy not to revisit specificity determinations absent the presentation of new facts or evidence." *Sept. 7, 2005 Issues & Decision Mem.*, at 14. When faced with no new evidence, Commerce was reasonable in finding that it would not review a specificity determination that it had previously made, and that had been reviewed and affirmed by a NAFTA panel. The statute upon which Plaintiff sues provides the same direction. *See* 19 U.S.C. § 1516a(a)(2)(A)(review of determination available within thirty days of publication of countervailing duty order). Magnola cites no authority directing the court to do otherwise.

In the absence of new evidence that would upset or change the specificity determination, Magnola avers that Commerce's specificity determination during the period of review in question is unsupported by substantial evidence and not in accordance with law.[9] Pl.'s

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[9] Though a change in facts warrants a reconsideration of a specificity determination, *see Al Tech Specialty Corp. v. United States*, 28 CIT ____ , ____ Slip Op. 04–114 at 57 (Sept. 8, 2004) ("remand of repayment issue necessarily reopens the question of whether [the program] conferred a subsidy" therefore "Commerce will have the opportunity to reconsider its specificity determination, in light of its redetermination on the repayment issue. . . ."), a

Reply Br. 14. Magnola claims that Commerce must conduct a separate disproportionality analysis for the period of review. *Id*. Magnola argues that 19 U.S.C. § 1677(5A)(D)(iii)[10] requires that the longevity of the MTM be considered, and by implication requires a separate finding of disproportionality for each period. *Id*. While it is true that this provision does require the length of a program to be taken into account while considering *de facto* specificity, the means by which it is to be evaluated is left ambiguous, through the use of the phrase "taken into account." As such, Commerce's choice to make an initial specificity determination, at the bestowal of the grant, that considers and evaluates various factors with respect to whether or not a grant is specific, is a reasonable interpretation of how Commerce should take the length of a program into account.

Furthermore, Commerce has determined that the best way to allocate the benefits of a countervailable subsidy is to do so over time. *See Sept. 7, 2005 Issues & Decision Mem.*, at 14 ("respondent appears to be confusing the initial specificity determination based on the action of the granting authority and other circumstances at the time of bestowal with the allocation of the benefit over time"). In so doing, Commerce is exercising its discretion as to how to calculate specificity for each period of review, in the absence of a specific statutory mandate. It is not the job of the court to upset a determination made based on Commerce's reasonable exercise of its discretion. To the extent that Magnola is arguing that Commerce's allocation methodology is unreasonable, Magnola has not demonstrated a legal basis for re-opening the determination.

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change in law could also necessitate such reconsideration, *cf. AG der Dillinger Huttenwerke v. United States*, 26 CIT 1091, 1103 (2002) ("Commerce was obligated to address whether the change in law cited by the German Producers has any impact on those programs."). Here, the Plaintiff is also not alleging any change in law that would give rise to a revisitation of the specificity determination.

[10] This provision reads:

> Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
>
> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.
>
> In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

19 U.S.C. § 1677(5A)(D)(iii).

Conclusion

Accordingly, the court concludes that it was appropriate for Commerce, in the administrative review at issue here, to decline to reopen the record of a closed new shipper review, in order to revisit a countervailability determination for a nonrecurring subsidy that was addressed during the new shipper review and subsequently sustained by a North American Free Trade Agreement ("NAFTA") binational panel. Magnola's motion is therefore denied, and judgment is entered for the defendant.

SO ORDERED.

Slip Op. 06 – 173

FORMER EMPLOYEES OF FAIRCHILD SEMI-CONDUCTOR CORP., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 06–00215

Memorandum & Order

[Motion for leave to proceed *in forma pauperis* denied.]

Dated: November 21, 2006

Robert R. Petruska, *pro se.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeffrey S. Pease*); and Office of the Solicitor, U.S. Department of Labor (*Vincent Costantino*), of counsel, for the defendant.

AQUILINO, Senior Judge: In this action, deemed commenced pursuant to 28 U.S.C. §§ 1581(d)(1), 2631(d)(1) for judicial review of the *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* of the Employment and Training Administration ("ETA"), U.S. Department of Labor, TA–W–58,624 (Feb. 28, 2006), comes forth one Robert R. Petruska, *pro se*, designating himself "the key contact person for the Fairchild appealing group" of workers comprising the putative plaintiff class and filing a form Motion For Leave to Proceed in Forma Pauperis.

That form specifies that the motion is made pursuant to 28 U.S.C. §1915(a) for an order permitting prosecution of this action without prepayment of fees and costs or the giving of security therefor and also pursuant to 28 U.S.C. §1915(e) "for an order appointing counsel to serve without fee and to represent him in this action." The form is accompanied by a form affidavit in support of the motion that sets

forth interrogatories to be answered by the affiant as to (1) present employment; (2) any income within the past twelve months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source; (3) cash or checking or savings accounts; (4) ownership of real estate, stocks, bonds, notes, automobiles, or other valuable property; and (5) dependents. In this instance, affiant plaintiff Petruska has answered (1) and (5) in the negative and the other three questions in the affirmative, providing dollar amounts for unemployment compensation, interest, dividends, bank checking, money-market and savings accounts, stocks, and valuable personal property.

Unfortunately, those figures do not add up to the relief requested. That is, this court has sought the guidance of other cases involving a similar request. In *Former Employees of Gateway Country Stores LLC v. Chao*, CIT No. 04–00588, *Former Employees of Sonoco Prods. Co. v. U.S. Sec'y of Labor*, CIT No. 02–00579, and *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, CIT No. 02–00152, for example, leave to proceed *in forma pauperis* was granted — based upon reported, minimal assets nowhere near those of plaintiff Petruska. In *Mertz v. U.S. Customs Service*, 14 CIT 679, 680, 746 F.Supp. 1107, 1108 (1990), on the other hand, assets totaling approximately $73,000.00 (with $58,000 of that value consisting of real property and an automobile), combined with an annual salary of approximately $30,000, were held to "negate[ ] the degree of poverty or indigence necessary to proceed *in forma pauperis*." Suffice it to state herein that the form affidavit in support of the motion at bar for leave to so proceed reports assets well in excess of the total value in *Mertz*, with a much greater percentage apparent liquid assets, albeit without any indicated salary at the time of its execution.

Of course, the *Mertz* and other courts have pointed out that the underlying statute does not require a movant to prove destitution before the requested leave can be granted. *E.g.*, *Potnick v. Eastern State Hospital*, 701 F.2d 243 (2d Cir. 1983). Nor does a movant have to be a "prisoner", as defined in 28 U.S.C. §1915(h), although that status is and has been the primary focus of the statute. Moreover, contrary to the implication of the form motion, subsection 1915(e) only provides that a court "may request an attorney to represent any person unable to afford counsel", not appoint a lawyer to serve without fee.

In necessarily hereby denying *pro se* plaintiff Petruska's Motion For Leave to Proceed in Forma Pauperis in the light of the foregoing, the court can confirm receipt for this kind of action of the nominal filing fee of $25 and also its commitment

> to review this appeal fairly . . . and reply in a timely ma[nn]er as this [ETA] decision affects further participation in job training and unemployment compensation opportunities[,]

to quote from his articulate, written submission on the precise nature of the plaintiff group of workers' appeal.

To this end, the plaintiffs may have until December 29, 2006 to present or re-present in writing their arguments in support of their requested relief on the merits. If there is any such additional written submission, the defendant may respond thereto on or before January 26, 2007.

So ordered.