Slip Op. 08–41

ALLIED TUBE & CONDUIT CORP., IPSCO TUBULARS, INC., and WHEATLAND TUBE COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and TOSÇELIK PROFIL VE SAC ENDUSTRISI A.S., Defendant–Intervenor.

Before: Richard W. Goldberg,
Senior Judge

Court No. 06–00285

PUBLIC VERSION

[Commerce's remand determination is sustained.]

Dated: April 14, 2008

Schagrin Associates (*Roger B. Schagrin*, *Brian E. McGill*, and *Michael James Brown*) for Plaintiffs Allied Tube & Conduit Corp., IPSCO Tubulars, Inc., and Wheatland Tube Company.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Maame A.F. Ewusi–Mensah* and *David S. Silverbrand*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Jennifer I. Johnson* and *Sapna Sharma*), Of Counsel, for Defendant United States.

Law Offices of David L. Simon (*David L. Simon*) for Defendant–Intervenor Tosçelik Profil ve Sac Endustrisi A.S.

OPINION

GOLDBERG, Senior Judge: This case is before the Court following remand to the U.S. Department of Commerce ("Commerce"). In *Allied Tube & Conduit Corp. v. United States*, 31 CIT ___ , Slip Op. 07–107 (July 9, 2007), familiarity with which is presumed, the Court remanded Commerce's determination that Tosçelik Profil ve Sac Endustrisi A.S. ("Tosçelik")'s single U.S. sale was a bona fide transaction. The Court ordered Commerce to explain the reasoning

behind the methodology it used to determine commercial reasonableness. The domestic parties, Allied Tube & Conduit Corp., IPSCO Tubulars, Inc., and Wheatland Tube Company (collectively "Allied Tube") urge the Court to again remand the matter with instructions to rescind Tosçelik's new shipper review. For the reasons that follow, Commerce's remand determination is sustained in its entirety.

I. *STANDARD OF REVIEW*

A court shall hold unlawful Commerce's final determination in an antidumping administrative review if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001).

II. *DISCUSSION*

A. Commercial Reasonableness of the Price of Tosçelik's Sale

In its first new shipper review determination,[1] Commerce employed a "range" methodology to assess the commercial reasonableness of the price of Tosçelik's sale. *See Allied Tube*, 31 CIT at ___ , Slip Op. 07–107 at *8. The "range" methodology is based on Customs and Border Patrol data of all imports of certain welded carbon steel pipe and tube from Turkey that fell within the scope of the antidumping duty order during the relevant period of review ("CBP data"). Commerce ranked the data by the weighted average unit values ("AUVs") of each manufacturer's total imports. Because the AUV of Tosçelik's single U.S. sale fell within this range of AUVs by manufacturer,[2] Commerce determined that the price of the sale was commercially reasonable.

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[1] As discussed at length in *Allied Tube*, if a producer or exporter did not export merchandise that was the subject of an antidumping duty order during a previous investigation period, it may request a new shipper review. A new shipper review can be based on a single U.S. sale, as long as Commerce finds that the sale was a bona fide transaction. A sale is bona fide when it is "commercially reasonable." Commerce looks at the totality of the circumstances to determine whether a sale is "commercially reasonable." *See generally Allied Tube*, 31 CIT at ____ , Slip Op. 07–107 at *3–6.

[2] The AUV of Tosçelik's sale ranked [ ] lowest out of [ ] manufacturers.

Commerce has the discretion to choose whatever methodology it deems appropriate, as long as it is reasonable and its conclusions are supported by substantial evidence. *See Fed.-Mogul Corp. v. United States*, 18 CIT 785, 807–08, 862 F. Supp. 384, 405 (1994). In the present matter, the Court remanded and ordered Commerce to explain, if it is able, why its "range" methodology is a reasonable approach. Specifically, the Court stated:

> [T]he "range" methodology can only be deemed reasonable if Commerce can explain why the allegedly distortive entries, some over [ ] the AUV for the industry, should be included in the range of reasonableness. When Commerce's commercial reasonableness determination hinges on comparing the new shipper sale price to a range of values, it is crucial to make sure the values at both ends of that range are commercially reasonable.

Allied Tube, 31 CIT at ___ , Slip Op. 07–107 at *12. Commerce complied with the Court's order and issued a remand determination. *See Remand Determination Pursuant to Court Remand in Allied Tube & Conduit Corp. v. United States, Court No. 06–00285* (Dep't Commerce Oct. 19, 2007) ("*Remand Determination*"). Commerce explains that the "range" methodology is reasonable because it best reflects the variation of the types of merchandise included in the scope of the order. For example, [ ], which has the lowest AUV in the range, might manufacture only a high volume, low value-added mix of products. On the other hand, [ ], which has the highest AUV, might manufacture only low-volume, high value-added products. Despite this variation, the products manufactured by both companies fall within the scope of the order, and may be reflective of the market conditions at the time of the sale. Even though these two values are considerably different, Commerce believes it is reasonable to include them both in a comprehensive analysis of Tosçelik's sale.

The Court in *Allied Tube* was concerned that the small-quantity, high-value sales included in the "range" analysis might reflect different types of merchandise than the standard pipe imported by Tosçelik.[3] If they are indeed different products, it would be unreasonable to compare those figures to Tosçelik's sale. Commerce admits that there is some product variation in the CBP dataset because it is based on the scope of the antidumping duty order, which includes multiple Harmonized Tariff Schedule ("HTS") numbers. Commerce believes it would be arbitrary to exclude the small-quantity, high value entries that Allied Tube challenges as "aberrational," because

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[3] The manufacturers with high-value sales that concern Allied Tube are those imported by [ ]. *See Allied Tube*, 31 CIT at ____ , Slip Op. 07–107 at *9 n.5. The AUVs of these manufacturers (not including Tosçelik) range from [ ] to [ ] per MT.

it is possible that those sales may, in fact, be the same type of merchandise imported by Tosçelik.

Commerce is correct to conclude that it would be arbitrary to simply disregard the manufacturers with high AUVs and conclude that Tosçelik's sale price was not commercially reasonable. It would be equally arbitrary to assume that the high AUV sales, some over [ ] the overall AUV of the CBP data, are commercially reasonable, without further investigation. In light of the requirement that Commerce must carefully scrutinize new shipper reviews that are based on single sales, *Tianjin Tiancheng Pharmaceutical Co. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1246, 1263 (2005), Commerce should take the additional step of ensuring that it is reasonable to include the disputed high-AUV data in the range.

At the Court's suggestion, Commerce disaggregated the CBP data for the manufacturers to which Allied Tube had no objection.[4] Additionally, Commerce looked at only the data for the HTS category that encompasses Tosçelik's sale. Commerce found that the AUV of Tosçelik's sale fell well within the range of disaggregated entry values.[5] *See Remand Determination* at 22.

Because Commerce does not have access to shipment-specific data,[6] it is uncertain what different types of merchandise are being compared in the disaggregated data analysis. However, the disaggregated data analysis undercuts Allied Tube's assertion that the AUVs of certain manufacturers should be summarily excluded as "aberrational." The manufacturers which Allied Tube implicitly accepts as non-aberrant have small-quantity entries that are well above the AUV of Tosçelik's sale. *See Remand Determination* at 21–22. In response to Commerce's comprehensive *Remand Determination*, Allied Tube relies on the same argument it made in *Allied Tube*: that the AUV of Tosçelik's single sale was higher than the AUVs of all but [ ] percent of all entries by quantity during the period of review. While this may be true, it does not mean that high-priced, low quantity sales are not bona fide. Single sales should be "carefully scrutinized," but they are not inherently commercially unreasonable. *Tianjin Tiancheng Pharm. Co.*, 29 CIT at ___ , 366 F. Supp. 2d at 1263. Additionally, Allied Tube completely ignores Commerce's disag-

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[4] Commerce limited the disaggregated data analysis to the subset of manufacturers comprising [ ] percent of entries by volume. These manufacturers are: [ ]. *See Remand Determination* at 21.

[5] The disaggregated entry values range from [ ] to [ ] per MT. Tosçelik's sale has an AUV of [ ] per MT. *See Remand Determination* at 22.

[6] Commerce notes that during the course of a new shipper review, "it is not within the Department's practice to attempt to obtain the detailed invoices and specific product codes for each and every sale that is reported by CBP for the POR, given the proprietary restrictions of such data." *Remand Determination* at 10. The Court agrees that in the present case, it would be overly burdensome and unnecessary to require Commerce to obtain detailed invoices and shipment-specific data.

gregation analysis. Allied Tube fails to point to any evidence, aside from unsupported assertions, that detracts from Commerce's conclusion.

In its *Remand Determination*, Commerce has sufficiently scrutinized the price of Tosçelik's single U.S. sale, and the agency's conclusion that the price is commercially reasonable is supported by substantial evidence.[7]

B. Shipping Costs

In *Allied Tube*, the Court was concerned with the reasonableness of the high shipping costs associated with Tosçelik's sale. Specifically, as understood from Commerce's original new shipper review determination, Tosçelik's shipment was made by container instead of full vessel load, which contributed to the higher freight charge. Commerce had not adequately explained why it was commercially reasonable for Tosçelik to make the shipment by container. On remand, Commerce explains that a U.S. customer is unlikely to order a full vessel load from a new shipper that does not have a "proven track record for producing to ASTM standards for the U.S. market or have a history of performance and quality in the U.S. market." *Remand Determination* at 26. Furthermore, a container is a reasonable and appropriate means for transporting a quantity the size of Tosçelik's sale. Tosçelik pre-sold the shipment to an unaffiliated U.S. customer who wished to test its suitability for the marketplace, even with the higher expense of containerized shipping. *Id.* at 25–26. All of these factors support Commerce's conclusion that the shipping costs were commercially reasonable.[8]

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[7] In the *Remand Determination*, Commerce took issue with the Court's analysis of the "ordinary course of trade" requirement discussed in *Corus Staal BV v. United States*, 27 CIT 388, 404–05, 259 F. Supp. 2d 1253, 1268 (2003). *See Allied Tube*, 31 CIT at ____ , Slip Op. 07–107 at *11–13. The Court does not intend to suggest that the "commercial reasonableness" test for new shipper reviews involves exactly the same analysis as the "ordinary course of trade" concept defined in 19 U.S.C. § 1677(15). However, "[w]hen Commerce's commercial reasonableness determination hinges on comparing the new shipper sale price to a range of values, it is crucial to make sure the values at both ends of that range are commercially reasonable." *Id.* at ____ , Slip Op. 07–107 at *12; *see Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT ____ , ____ , 374 F. Supp. 2d 1333, 1338 (2005) (holding that "[i]n accordance with the goal of ensuring a realistic U.S. price figure, it is reasonable that Commerce uses the bona fide sale test to exclude sales that are 'not typical of normal commercial transactions in the industry.' " (*quoting Tianjin Tiancheng Pharm. Co.*, 29 CIT at ____ , 366 F. Supp. 2d at 1249–50). Following this principle, Commerce has adequately demonstrated that its range methodology, supported by the disaggregated data analysis, is reasonable.

[8] In *Allied Tube I*, the Court was concerned that the timing of Tosçelik's U.S. entry indicated that it may be commercially unreasonable. Commerce explains that the timing of the sale is irrelevant because given the "lack of predictability in the exact timing of when a waterborne shipment would enter the United States, it is unreasonable to assume that Tosçelik was specifically attempting to time the entry at a date so close to the end of the POR." *Remand Determination* at 28. The Court agrees.

Allied Tube does not directly address the shipping cost issue, other than pointing out that the shipping costs were high. Instead, Allied Tube focuses on the small quantity of the sale. If the sale were a reasonable (i.e., larger) quantity, Allied Tube argues, the higher-cost containerized shipment would not have been necessary. In *Allied Tube*, the Court already determined that substantial evidence supports Commerce's conclusion that the quantity of Tosçelik's sale is commercially reasonable.[9] Allied Tube fails to call into question the reasonableness of the shipping cost.

C. Commerce's Ultimate Determination That Tosçelik's Single U.S. Sale Was a Bona Fide Transaction is Supported by Substantial Evidence

The Court must consider together all of Commerce's findings to ultimately determine whether there is substantial evidence to support its decision that under the totality of the circumstances, Tosçelik's single U.S. sale is a bona fide transaction. *See Tianjin*, 29 CIT at ___ , 366 F. Supp. 2d at 1249–50. As discussed above, the price of Tosçelik's U.S. sale and the associated shipping costs were commercially reasonable. There is also substantial evidence to support Commerce's conclusion that the quantity of the sale was reasonable, and that Tosçelik followed normal business practices in executing the sale. *See Allied Tube*, 31 CIT at ___ , Slip Op. 07–107 at *18, 22–23. Viewed under the totality of the circumstances, there is substantial evidence to support Commerce's conclusion that Tosçelik's sale was bona fide.

III. *CONCLUSION*

In light of the foregoing, Commerce's remand determination is sustained in its entirety. A separate judgment will be entered accordingly.

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[9] In its original determination, Commerce compared Tosçelik's sale to the size of Tosçelik's sales in its home market. "The fact that Tosçelik's single U.S. sale is of a larger quantity than a majority of its home market sales is adequate to support the conclusion that the quantity is commercially reasonable." *Allied Tube I*, 31 CIT at ____ , Slip Op. 07–107 at *18.

SLIP OP. 08–44

GLEASON INDUSTRIAL PRODUCTS, INC., and PRECISION PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and SINCE HARDWARE (GUANGZHOU) CO., LTD., Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Court No. 07–00177

[Plaintiffs' motion for judgment on the agency record denied.]

April 25, 2008

Crowell & Moring, LLP (*Matthew P. Jaffe*) for the plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Irene H. Chen*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Trade Pacific, PLLC (*Robert G. Gosselink* and *Jon M. Freed*) for the defendant-intervenor.

OPINION

Restani, Chief Judge: This matter is before the court on Plaintiffs Gleason Industrial Products, Inc. and Precision Products, Inc.'s ("Plaintiffs") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiffs, domestic producers of hand trucks and parts thereof, challenge the United States Department of Commerce's ("Commerce") final results determination made in the administrative and new shipper reviews of the antidumping duty order on hand trucks from the People's Republic of China ("PRC").[1] (*See* Compl. ¶ 8); *see also Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*, 72 Fed. Reg. 27,287 (May 15, 2007) ("*Final Results*"). For the reasons stated below, the court finds that Commerce's final determination was supported by substantial evidence and is in accordance with law and denies Plaintiffs' motion for judgment on the agency record.

BACKGROUND

Plaintiffs filed a petition with Commerce in November 2003, alleging that various manufacturers from the PRC were importing hand trucks into the United States at less-than-fair value. (Compl. ¶ 1.) An antidumping duty order was placed on hand trucks from the PRC

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[1] Plaintiffs participated as interested parties in the antidumping duty administrative and new shipper reviews within the meaning of 19 U.S.C. §§ 1677(9)(C) and 1516a(f)(3) and thus have standing to bring this action. 19 U.S.C. §§ 1516a(f)(3), 1677(9)(C) (2000).

in December 2004. *See Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 Fed. Reg. 70,122 (Dec. 2, 2004). In February 2006, Commerce initiated an administrative review of the antidumping duty order for the period of May 24, 2004 (subsequently corrected to December 1, 2004), through November 30, 2005. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 Fed. Reg. 5,241 (Feb. 1, 2006). Commerce also initiated a new shipper review[2] of Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware"), a Chinese producer and exporter of hand trucks shipped to the United States. *See Hand Trucks and Certain Parts Thereof From the People's Republic of China; Initiation of New Shipper Review*, 71 Fed. Reg. 5,810 (Feb. 3, 2006).

Commerce considered the PRC a nonmarket economy ("NME")[3] for the purpose of these reviews, and calculated normal value pursuant to 19 U.S.C. § 1677b(c), which requires Commerce to collect data regarding the NME producer's factors of production[4] ("FOP") and value them in relation to FOP prices or costs for merchandise produced in one or more surrogate market-economy countries. *See* 19 U.S.C. § 1677b(c) (2000); *see also Hand Trucks and Certain Parts Thereof From the People's Republic of China; Preliminary Results and Partial Rescission of Administrative Review and Preliminary Results of New Shipper Review*, 72 Fed. Reg. 937, 939 (Jan. 9, 2007) ("*Preliminary Results*"). Commerce selected India as the surrogate country for valuing Chinese hand truck producers' FOP. *Preliminary Results*, 72 Fed. Reg. at 940.

In order to collect the appropriate data for the administrative and new shipper reviews, Commerce submitted questionnaires to the Chinese respondents, including Since Hardware and True Potential Co., Ltd. ("True Potential"), a Chinese trading company that purchases hand trucks from Chinese hand truck producers and resells them to unaffiliated U.S. purchasers for export to the United States.

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[2] A new shipper review has been described as a proceeding where "Commerce is essentially conducting a new antidumping review that is specific to a particular producer [or exporter]." *Tianjin Tiancheng Pharm. Co. v. United States*, 366 F. Supp. 2d 1246, 1249 (CIT 2005). The new exporter or producer of the merchandise must establish that it did not export the merchandise to the United States during the period of investigation and was not affiliated with an exporter or producer that exported the merchandise that is subject to an antidumping or countervailing duty order. 19 U.S.C. § 1675(a)(2)(B)(i) (2000).

[3] A nonmarket economy is defined as "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

[4] 19 U.S.C. § 1677b provides an illustrative, though not exhaustive, list of factors of production used in the manufacturing of merchandise, including "hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

Id. at 937; (*see also True Potential Questionnaire Section A Response*, at A–9 (Administrative R. Doc. No. 700).) Commerce also conducted an on-site verification of Since Hardware's responses. *Preliminary Results*, 72 Fed. Reg. at 939; (*see also Verification of Sales and Factors Responses of Since Hardware (Guangzhou) Co., Ltd.*, at 1 (App. to Mem. of P. & A. in Supp. of Mot. for J. on the Agency R. 8 ("Pls.' App.")).) Since Hardware stated that it sold only one type of hand truck to the United States during the review period, which incorporated two wheel hubs and two bearings ("axis of rotation") for use with two wheels. (*See Since Hardware Questionnaire Section A Response*, at 15 (Pls.' App. 2); *Since Hardware Questionnaire Section C and D Response*, at 10–14 (Pls.' App. 3).) In response to Commerce's inquiry, Since Hardware noted that roller bearings were used in the hand truck. (Since Hardware Questionnaire Section C and D Response, at 13–14 (Pls.' App. 3).)

In its surrogate value submission, Since Hardware proposed that Commerce use Indian Harmonized Tariff Schedule ("HTS") 8483.20.00 ("Bearing Housing, Incorporating Ball/Roller Bearing") to calculate the surrogate value for its axis of rotation material input. (*See Since Hardware Surrogate Value Submission*, at 2 (Pls.' App. 7).) Plaintiffs submitted publicly available information for valuing the FOP, including audited financial statements of an Indian producer of hand trucks. (*See Comments of Petitioners Regarding Surrogate Values* (App. to Def.'s Resp. to Pls.' Mot. for J. Upon the Admininstrative R. 1 ("Def.'s App.")).)

On January 9, 2007, Commerce issued the preliminary results of these reviews and rescinded the administrative review of Since Hardware because its merchandise was being examined in the context of the new shipper review. *See Preliminary Results*, 72 Fed. Reg. at 939. Commerce selected data relevant to merchandise classified under HTS 8483.20.00 to arrive at a surrogate value for Since Hardware's axis of rotation. (*See Factors of Production Valuation Memorandum for the Preliminary Results of the First Administrative Review and Preliminary Results of the First New Shipper Review*, at 2–3 ("*FOP Memorandum*") (Def.'s App. 2).) Commerce also calculated the normal value for True Potential based on the FOP for those Chinese manufacturers from whom True Potential purchased hand trucks during the review period, including selling, general and administrative ("SG&A") expenses and profit ratios, based on the financial statements of surrogate Indian producers of the same or similar merchandise. (*Id.* at 7–8); *Preliminary Results*, 72 Fed. Reg. at 946.

In its post-preliminary determination brief, Since Hardware argued that the preliminary calculation using HTS 8483.20.00 data overstated the cost of the axis of rotation and proposed that Commerce now value this input using HTS 8482.10.11 data ("Adapter Ball Bearings (Radial Type)" not exceeding 50 mm). (*See Since Hard-*

ware Case Brief, at 1–7 (Pls.' App. 13).) Since Hardware maintained that HTS 8482.10.11 was more specific to the housed bearings it used because the bearing size is limited to a 50 millimeter diameter, which is similar to the size of Since Hardware's bearings, while HTS 8483.20.00 contains no size restrictions for bearing housings. (*Id.* at 6–7.) Plaintiffs objected, arguing that Since Hardware's axis of rotation is a housed bearing that incorporates a roller bearing and thus falls clearly within HTS 8483.20.00. (*See Rebuttal Brief on Behalf of Petitioners*, at 7–11 (App. to Def.-Intervenor's Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. 1).) Plaintiffs also argued that Commerce erred in not including the SG&A expenses incurred and additional profits made by True Potential in reselling the hand trucks to its customers and asked Commerce to incorporate reseller SG&A expenses and profit ratios based on the submitted surrogate information in its final determination. (*See Gleason Case Brief*, at 38–42 (Pls.' App. 14).)

On May 15, 2007, Commerce published its final results for the administrative and new shipper reviews. *See Final Results*, 72 Fed. Reg. at 27,287; *see also Issues and Decision Memorandum for the Final Results*, A–570–891, POR 12/1/04 – 11/30/05, at 43–49 (May 9, 2007), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7–9324–1.pdf ("*Issues & Decision Memorandum*"). In its final determination, Commerce altered its preliminary findings and "applied a weighted-average surrogate value derived from imports statistics using both HTS classifications, *i.e.*, 8483.20.00 and 8482.10.11." *Issues and Decision Memorandum* at 49. On this point, Commerce found "the size of the bearing to be more instructive," reasoning that because "HTS 8482.10.11 limits the bearings to a certain size . . . [this] complement[s] the HTS classification used in the *Preliminary Results* [i.e., HTS 8483.20.00]." *Id.* Commerce relied on publicly available information provided by Since Hardware for Nagori, an Indian producer of hand trucks, in order to value the SG&A expenses and profit surrogate ratios for Indian producers of similar merchandise. *Id.* at 19. Commerce, however, denied Plaintiffs' request to incorporate a reseller SG&A ratio and a reseller profit ratio into Commerce's normal value calculation, stating that Plaintiffs had "provided no new information on the activities of the surrogate Indian producers or trading companies to justify a departure from the Department's handling of this same issue in the investigation." *Id.* at 53. Plaintiffs now seek review of these final determinations, claiming that Commerce's decision was not supported by substantial evidence or in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must uphold a final determination by Commerce in an antidumping investigation unless it is "unsupported by substantial evi-

dence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Thus, Commerce's findings must be "reached by reasoned decision-making, including . . . a reasoned explanation supported by a stated connection between the facts found and the choice made." *Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343, 1349 (CIT 2001) ("*Rhodia I*") (quotations omitted).

DISCUSSION

A. Commerce's decision to weight-average the surrogate values for two HTS bearing classifications to calculate a surrogate value for Since Hardware's bearings was supported by substantial evidence and is in accordance with law

Commerce is required to "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1)(B). Commerce must do so "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.* Although the statute does not define what constitutes "best available information," it has been interpreted as "grant[ing] to Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 166 F. Supp. 2d 608, 616 (CIT 2001); *see also Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (noting that "§ 1677b(c) provides guidelines to assist Commerce . . . [and] also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines"); *Coal. for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 258 (CIT 1999) ("Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way.").

After Commerce selected India as the surrogate country for valuing Chinese hand truck producers' FOP, Commerce then selected an Indian HTS classification in order to obtain data relevant to the particular factor input at issue. Plaintiffs argue that Commerce failed to make a reasonable connection between the facts on the record and its determination, and therefore, Commerce's selection of the surrogate value for Since Hardware's axis of rotation was contrary to law and unsupported by substantial evidence. (Mem. of P. & A. in Supp. of Mot. for J. Upon the Agency R. 20 ("Pls.' Br.").) Specifically, Plaintiffs contend that Commerce should have used only the surrogate value data for HTS subheading 8483.20.00, rather than weight-averaging it with HTS subheading 8482.10.11 data, claiming that the record conclusively demonstrates that the axis of rotation incor-

porates a roller bearing, not a ball bearing, and that Commerce's reliance on the size of the bearing, rather than the roller element, was incorrect. (Pls.' Br. 10–20.)

In support of this argument, Plaintiffs cite Since Hardware's response to Commerce's questionnaires stating that the bearing incorporated in the axis of rotation is a roller bearing, as well as to numerous supplemental responses (notwithstanding Since Hardware's post-preliminary brief) that never changed the designation. (*See Since Hardware Questionnaire Section C and D Response*, at 13–14 (Pls.' App. 3); *see also Since Hardware Supplemental Questionnaire Response*, at 7 (Pls.' App. 6).) Plaintiffs state that the record contains no information as to the size, or size range, of the bearing incorporated in the axis of rotation. (Pls.' Br. 19–20.) Plaintiffs further argue that in Commerce's questionnaires, as well as in periodic administrative and five-year (sunset) reviews, the distinction relied on for bearings is the rolling element (i.e., ball bearing, roller bearing, etc.), not the size or size range of the bearing. (*Id.*)

In rebuttal, Defendant argues that weight-averaging the surrogate values derived from data for both HTS classifications constituted the best available information to value Since Hardware's housed bearings. (Def.'s Resp. to Pls.' Mot. for J. Upon the Admininstrative R. 9 ("Def.'s Br.").) Defendant maintains that the exclusive use of HTS 8483.20.00 in the preliminary findings resulted in a disproportionately inflated normal value, as it yielded a cost for the housed bearings that exceeded the total cost of all other direct materials incorporated into the hand truck. (*Id.* at 10.)[5] Defendant also claims that Commerce's use of HTS 8482.10.11 was reasonable given the specificity contained therein, highlighting Commerce's finding that the size range covered by HTS 8482.10.11 "appears to be similar to the size of Since Hardware's bearings examined at verification." (*Id.* at 11.) Defendant argues that because HTS 8482.10.11 complements HTS 8483.20.00, Commerce's use of a weight-average was reasonable in order to determine the most appropriate surrogate value. (*Id.* at 10–12.)

Commerce is required to "articulate in what way the surrogate value chosen relates to the factor input." *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1308 (CIT 2006); *see also Siderca, S.A.I.C. v. United States*, 350 F. Supp. 2d 1223, 1236 n.15 (CIT 2004) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive."). Here, Commerce provided a detailed reasoning for its decision to weight-average the surrogate values for the two HTS commodity classifications. *See Issues and Decision Memorandum* at

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[5] While in some cases the value of one input may outweigh that of all others, there is no evidence that this input is in that category.

47–49. Commerce noted that because Since Hardware reported using a housed bearing in the production of its hand truck and initially suggested using HTS 8483.20.00 to value its bearings, it was still appropriate to use data for this HTS classification as part of the averaged value, as Since Hardware was "in the best position to determine the HTS classification that best describes its input." *Id.* at 48. Commerce noted, however, that solely using HTS 8483.20.00 to value the axis of rotation would result in a surrogate value that "would have exceeded the total cost of all other direct materials incorporated in Since Hardware's hand truck," thereby rendering it "disproportionate to the total cost of materials of the subject merchandise." *Id.* Commerce then sought to balance its reliance upon HTS 8483.20.00 by also using HTS 8482.10.11, which it determined "appears to contain the main characteristics applicable to the [sic] Since Hardware's bearings." *Id.* at 49. Specifically, Commerce found that because there was no evidence on the record regarding the cost of roller bearings versus ball bearings, it would not consider the type of bearing to be "especially relevant." *Id.* Instead, Commerce found the size of the bearing to be most informative, noting that "[t]he fact that HTS 8482.10.11 limits the bearings to a certain size yet, at the same time, includes bearings that may rotate horizontally or vertically, and are in a metal housing, appears to complement the HTS classification used in the *Preliminary Results*." *Id.*

Nonetheless, Plaintiffs argue that Commerce erred when it classified Since Hardware's axis of rotation according to HTS 8482.10.11, because Commerce did not follow the appropriate steps according to the General Rules of Interpretation ("GRI") accompanying the HTS. (Pls.' Br. 17–18.) GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Harmonized Tariff Schedule of the United States, GRI 1. Additionally, "[i]f classification is not resolved by application of GRI 1, the court will refer to the succeeding GRIs in numerical order." *Whirlpool Corp. v. United States*, 505 F. Supp. 2d 1358, 1362 (CIT 2007). Plaintiffs argue that Commerce was required under GRI 1 to first look to the four-digit headings, i.e., 8482 and 8483, followed by the six-digit codes and then the eight-digit codes. (Pls.' Br. 17–18.) Plaintiffs contend that HTS 8483 is more specific because it covers "bearing housings," while HTS 8482 only covers "ball or roller bearings," and therefore, the input in question should be classified under HTS 8483. (*Id.*) Plaintiffs further argue that because the six-digit codes in HTS 8482 classify bearings by rolling element before classifying them by size under the eight-digit code, this demonstrates that bearing type trumps bearing size. (*Id.* at 20.)[6]

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[6] Defendant claims Plaintiffs failed to exhaust their administrative remedies and that the court should disregard two arguments made for the first time in Plaintiffs' brief before the court, that is, Plaintiffs' contention that the GRI preclude Commerce from classifying

Plaintiffs' arguments regarding the binding nature of the GRI on Commerce in the antidumping context are misplaced. For example, "[t]he court distinguishes between the authority of the Customs Service to classify according to tariff classifications (19 U.S.C. § 1500) and the power of the agencies administering the antidumping law to determine a class or kind of merchandise." *Royal Bus. Machs., Inc. v. United States*, 507 F. Supp. 1007, 1014 n.18 (CIT 1980). As opposed to Customs classification cases where "determining the proper specific classification is paramount," in order to assign ordinary duties properly, Commerce cases often involve "using the HTS[I] merely to approximate the cost of a factor of production." *Dorbest*, 462 F. Supp. 2d at 1308 (citations omitted). If the data for an HTS provision substantially overstates the cost, it may be presumed that it is not accurate data, whether or not the correlating part in India could be classified under that provision. The problem may be the lack of a perfect surrogate, for which Commerce must then adjust. As a result, Commerce determined that weight-averaging both bearing categories into a single surrogate value constituted the best available information to value the type of bearings incorporated into Since Hardware's hand trucks. *Issues and Decision Memorandum* at 49. Here, Plaintiffs' preferred valuation method has not been demonstrated to be superior to Commerce's.

Based on the foregoing reasons, the court finds that Commerce acted well within its discretion in determining that a weight-averaged surrogate value constituted the best available information to value Since Hardware's axis of rotation input.

B. Commerce's decision to not include the SG&A expenses and profit of Indian trading companies in the calculation of True Potential's normal value was supported by substantial evidence and is in accordance with law

When constructing the normal value for a respondent in a NME country, Commerce must also take into account those costs that are not covered by the factors of production, such as the "amount for

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housed bearings under HTS 8482.10.11, and Plaintiffs' argument that the bearing's rolling element must be viewed as crucial in Commerce's selection of a surrogate value for the housed bearings. (Def.'s Br. 12.) Defendant claims these arguments should not be considered by a reviewing court because they were not raised by Plaintiffs in the administrative proceeding, thus "depriv[ing] Commerce of the opportunity to analyze these arguments in the first instance." (*Id.* at 14.) Defendant's argument is misplaced, however, because Commerce's partial use of HTS 8482.10.11 to value Since Hardware's input and its corresponding emphasis on the size of the bearing occurred for the first time in the *Final Determination*. Plaintiffs have had no reason to focus on these subarguments of their main argument, which was preserved, that HTS 8483.20.00 data should be used, and therefore, they are not found to have waived their right to have the court review their arguments. *See Rhodia I*, 185 F. Supp. 2d at 1349–50 n.6 (finding that two Chinese companies "were under no notice that Commerce would apply a weighted average. . . . Accordingly, neither [of the Chinese companies] will be required by the court to further exhaust its administrative remedies with regard to this issue").

general expenses and profit plus . . . other expenses." 19 U.S.C. § 1677b(c)(1)(B); *see also Guangdong Chems. Imp. & Exp. Corp. v. United States*, 460 F. Supp. 2d 1365, 1373 (CIT 2006). It is Commerce's usual practice to calculate "separate values for [SG&A] expenses, manufacturing overhead and profit, using ratios derived from financial statements of one or more companies that produce identical or comparable merchandise in the surrogate country." *Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1341 (CIT 2004).

Plaintiffs argue that Commerce's calculation underestimated the normal value of the subject merchandise of True Potential because Commerce failed to include in its calculation the SG&A expenses and profits of both the producer *and* the exporter. (Pls.' Br. 23–24.) Plaintiffs rely primarily on the legislative history of 19 U.S.C. § 1677b and Commerce's normal value calculations for market economy country cases in arguing that "Commerce now should definitely include the SG&A expenses and profits of both the producer and the exporter whenever it calculates a reseller's normal value." (*Id.* at 23.) Plaintiffs note that section 1677b previously limited the general expenses and profit calculation in NME cases only to sales made by the NME producers, *see* 19 U.S.C. § 1677b(c)(1) (1988), but point out that Congress removed this subsection when it passed the Uruguay Round Agreements Act. (Pls.' Br. 22.) Plaintiffs highlight the accompanying Statement of Administrative Action, which explains that,

> [I]n situations where the producer and the exporter are separate companies, the Administration intends that Commerce may continue to calculate constructed value based on the total profit and total SG&A expenses realized and incurred by both companies. In such situations, failing to include the expenses and profits of both companies would understate the true cost of production and constructed value of the merchandise.

(*Id.* at 22 (quoting Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 841 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4177).) Plaintiffs further rely upon 19 U.S.C. § 1677(28), which states that for purposes of section 1677b, Commerce should take into account "both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise." 19 U.S.C. § 1677(28); (Pls.' Br. 21.) Finally, Plaintiffs contend that because it is the practice of Commerce to include the reseller's SG&A expenses and profit in its calculation of normal value in market economy country cases, it would be "unreasonable for Commerce to act inconsistently in NME country cases and ignore a reseller's SG&A expenses (and

profit) when it calculates the normal value of the subject merchandise as sold by companies like True Potential." (Pls.' Br. 23.)

Defendant contends that Commerce was correct in calculating True Potential's normal value using SG&A expenses and profit surrogate ratios for Indian producers of similar merchandise, because such calculations were based on public, audited, and contemporaneous financial information for Indian producers.[7] (Def.'s Br. 15.) Defendant, however, points to the lack of evidence in the record that would have allowed Commerce to add SG&A expenses and profit ratios of Indian trading companies to True Potential's normal value. (*Id.*)

In support of this argument, Defendant argues that *Rhodia I* and *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247 (CIT 2002) ("*Rhodia II*") support its position. In *Rhodia I*, the court found that Commerce erred in applying an Indian surrogate company's overhead-to-raw-material ratio twice, because Commerce had not identified evidence demonstrating that the surrogate companies were less integrated than the Chinese producers, such evidence which would support the underlying basis for such a calculation. *Rhodia I*, 185 F. Supp. 2d at 1346–49. The court remanded, due to the absence of facts in the record to support such a determination, *id.* at 1349, and on remand Commerce applied the overhead ratio once, finding that "the surrogates were representative of the PRC producers' experience," *Rhodia II*, 240 F. Supp. 2d at 1249–50. The court sustained the remand determination, finding that Commerce could not depart from its standard practice of "not generally adjust-[ing] the surrogate values used in the calculation of factory overhead" without "substantial evidence in the record which supports a finding that the surrogate producers are less integrated that [sic] the PRC producers, and as a result have a lower overhead ratio." *Id.* at 1250–51. Defendant argues that the *Rhodia* cases are analogous to the instant case, because there is similarly no evidence in the record "concerning which selling activities were performed by the various Indian producers and resellers." (Def.'s Br. 17.)

In the *Final Determination*, Commerce found that "without knowing the selling activities undertaken by the Indian producers whose information is being used to calculate an SG&A ratio, we cannot say whether or to what extent they differ from the selling activities of True Potential and its suppliers," and thus it did not apply the SG&A expenses and profit of Indian trading companies to the calcu-

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[7] Defendant mistakenly states that Commerce calculated percentage ratios based upon audited financial information from Indian producer, Rexello. (*See* Def.'s Br. 15 (citing *FOP Memorandum* at 7–8).) Commerce only used Rexello in its *Preliminary Results* and instead used Nagori in its *Final Determination*, finding it "the only company [identified by Since Hardware] for whom record evidence exists to definitively demonstrate that it produces identical merchandise, *i.e.*, hand trucks." *Issues and Decision Memorandum* at 19.

lation of True Potential's normal value. *See Issues and Decision Memorandum* at 52–53 (quoting *Issues and Decision Memorandum for the Final Results of the Investigation of Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60980, A–570–891 (Oct. 14, 2004), *available at* http://ia.ita.doc.gov/frn/summary/prc/E4–2608–1.pdf).

With such evidence lacking, the court concludes that Commerce did not err in not including additional reseller SG&A expenses and profit ratios in its calculation of True Potential's normal value. Plaintiffs have not supplied Commerce with the necessary information to support adding reseller exporter's SG&A expenses and profit to the producer-based normal value determination. Plaintiffs have neither explained how it is that Commerce should have obtained this information nor have they claimed that Commerce did an inadequate investigation by not seeking this information in a particular way. Instead, Plaintiffs, in their second surrogate value submission, stated that they provided both "publicly available financial data pertaining to trading companies in India" and "the calculation of financial ratios for trading companies in India." (*See Letter from Crowell & Moring LLP to Sec'y of Commerce* (Feb. 5, 2007) (Pls.' App. 12).) Plaintiffs, however, did not provide any data as to the selling activities of Indian hand truck producers and specifically, of Nagori, whose financial statements Commerce used as the source for calculating the surrogate financial ratios. Without such information, there is no way to compare the selling activities of the Indian hand truck producers with the selling activities of True Potential and its unaffiliated[8] PRC producers. This is particularly important, because, as noted by True Potential, "it is possible that a producer in India performs all of the selling activities itself that are spread between True Potential and its supplier in the PRC," which would then result in double-counting SG&A expenses and profit. *See Issues and Decision Memorandum* at 52. Stated differently, without knowing whether Nagori serves as only a producer, and not an exporter, of hand trucks in India, it is impossible to determine whether applying further SG&A expenses and profit for the reseller would be duplicative, or not.

Similarly, Plaintiffs' reliance upon § 1677(28) is misguided. Section 1677(28) states that in calculating normal values, Commerce should take into account "both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production

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[8] Factual statements in briefs must cite to the administrative record. USCIT R. 56.2(c)(2). Although Plaintiffs have not provided any authority for their assertion that True Potential is unaffiliated with its Chinese producers, True Potential has stated as much to Commerce. (*See True Potential Questionnaire Section A Response*, at A–9 (Administrative R. Doc. No. 700).)

and sale of that merchandise." 19 U.S.C. § 1677(28). By its very language, this section is predicated upon the submission or availability of evidence that will help Commerce to "accurately calculate" the normal values. Thus, while using additional trading company data is now allowed, it is not mandated if a factual basis for its use is absent.

Finally, while *Rhodia I* and *II* are distinguishable from the case at hand, they do support the concept that without adequate information, Commerce cannot ascertain whether, by using additional trading company data, it would be over-calculating the SG&A expenses and profit in determining True Potential's normal value.

Commerce articulated facts in the record which adequately support its decision to not include SG&A expenses and profit of Indian trading companies in calculating True Potential's normal value, and thus, its determination will be sustained.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for judgment on the agency record is denied.

Slip Op. 08–45

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 2911, Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Richard K. Eaton, Judge

Court No. 04–00492

[United States Department of Labor's final negative determination denying plaintiff's application for trade adjustment assistance remanded.]

Dated: April 30, 2008

Stewart and Stewart (*Terence P. Stewart*), for plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*), for defendant.

OPINION AND ORDER

Eaton, Judge: This matter is before the court following remand. The primary remaining issue is whether the United States Department of Labor's ("Labor" or the "Department") justification for deny-

ing plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2911's ("ISU")[1] request to extend Weirton Steel Corporation's ("Weirton") Trade Adjustment Assistance ("TAA") eligibility certification was lawful. *See* Letter Dated Sept. 24, 2004 from Labor to Mr. Terence P. Stewart, Suppl. Admin. R. ("SR") at 16–17 (the "Denial Letter"); Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Traditional Adjustment Assistance, 67 Fed. Reg. 22,112 (Dep't of Labor May 2, 2002) (the "2002 Certification").

In *Independent Steelworkers Union v. United States Secretary of Labor*, 30 CIT ___ , Slip Op. 06–171 (Nov. 17, 2006) (not reported in the Federal Supplement) ("*Steelworkers*"), this court held that it possessed jurisdiction to review Labor's denial of plaintiff's request to extend the duration of its 2002 group eligibility certification. The court, however, reserved judgment on the legal and factual justification for the denial pending Labor's assembly and submission of a complete administrative record relating to the amendment request. *See id.* at ___ , Slip Op. 06–171 at 3, 30–31. Accordingly, the court now examines Labor's reasons for the denial.

Plaintiff contends that Labor's denial of its request to extend the 2002 Certification inadequately addressed prior instances where TAA eligibility certifications had been amended to extend their expiration dates. *See* Pl.'s Rule 56.1 Motion for J. Agency R. ("Pl's Br.") 24–26. Plaintiff thus maintains that, given the record before it, "the Department failed in its obligation to articulate a satisfactory explanation for its action." Pl.'s Br. 28.

Labor asserts that it properly denied plaintiff's amendment request. The Department's primary argument is that it granted past extensions only where production at the workers' plant ultimately ceased. *See* Denial Letter, SR at 16–17; *see also* Def.'s Motion for Leave to Respond to Pl.'s Suppl. Citations and Resp. to Pl.'s Suppl. Citations ("Def.'s Resp. Pl.'s Suppl. Cit.") 2–3. Labor claims that an extension of Weirton's certification would be against its established policy because production at the Weirton plant was continued by its purchaser (albeit without those workers now seeking TAA benefits).

While the court has previously found that jurisdiction lies with 28 U.S.C. § 1581(d)(1) (2000) and 19 U.S.C. § 2395(c) or, alternatively, 28 U.S.C. § 1581(i)(4), for the purposes of this opinion, jurisdiction is assumed only under the latter provision. *See* 28 U.S.C.

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[1] During the pendency of this action, the court granted plaintiff's consent motion to be substituted in this action as plaintiff. *See United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, Local 2911 v. United States Sec'y of Labor*, Court No. 04–492, July 13, 2007 (order substituting party and amending caption). At all times pertinent to this motion and the development of the facts relevant to this litigation, however, plaintiff was known as Independent Steelworkers Union. Therefore, for purposes of convenience, the court refers to plaintiff as "ISU."

§ 1581(i)(4) (stating that the Court has residual jurisdiction over "administration and enforcement" of, among other determinations, any final determination by Labor concerning the eligibility of workers for TAA benefits); *see also Steelworkers*, 30 CIT at ___ , Slip Op. 06–171 at 21–30.

For the following reasons, Labor's negative determination embodied in its Denial Letter is remanded.

BACKGROUND

The procedural history and factual background of this matter need not be repeated in their entirety for purposes of this opinion. *See generally Steelworkers*, 30 CIT ___ , Slip Op. 06–171. Nevertheless, a recapitulation of the salient events preceding and following *Steelworkers* is warranted.

Weirton was a steel producer. Faced with "serious difficulties due to import surges" and financial hardship, the ISU, on Weirton's behalf, successfully petitioned Labor in mid-2001 for eligibility of the Weirton workers to apply for TAA benefits.[2] Pl.'s Br. 3–4 (citations omitted). The resulting 2002 Certification found all Weirton workers

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[2] The group eligibility requirements for TAA benefits are as follows:

> (a) In general
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> A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this part pursuant to a petition filed under section 2271 of this title if [Labor] determines 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 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. *See also* 19 U.S.C. § § 2271, 2273.

who became totally or partially separated from employment on or after July 3, 2000 eligible to apply for TAA cash benefits. *See* 2002 Certification, 67 Fed. Reg. at 22,113. The 2002 Certification was to remain in effect for two years from the date of certification, and thus was to expire on April 23, 2004. *See* 19 U.S.C. § 2291(a). In May 2003, however, approximately one year prior to the 2002 Certification's expiration, Weirton filed for Chapter 11 bankruptcy. *See* Pl.'s Br. 7; *see also* Weirton Steel Corp. Voluntary Pet. Chapter 11 Bankr., AR at 188–89. Thereafter, Weirton officials agreed to sell the company's assets—but not the company itself—to its competitor International Steel Group ("ISG"). *See* Pl.'s Br. 8. To complete the sale, Weirton retained some of its workers to maintain the plant and ensure a smooth transition of the facilities to the new owners.[3] *See* Letter Dated Sept. 14, 2004 from Mr. Terence P. Stewart to Labor, SR at 12–15 (the "Stewart Letter").

On March 9, 2004, the ISU filed a new petition with Labor seeking TAA re-certification for Weirton's workers based on facts present during a 2002 – 2003 investigatory period. *See* Weirton Steel Corp. Petition for TAA Dated Mar. 9, 2004 (the "2004 Petition"), AR at 2–40. Labor filed a negative determination with respect to this petition on June 2, 2004, finding that Weirton workers failed to meet the statutory requirements for certification. That is, Labor found that during the 2002–2003 investigatory period: (1) under 19 U.S.C. § 2272(a)(2)(A)(iii), increased steel imports did not contribute importantly to the worker separations, and, (2) under § 2272(a)(2)(B)(i), steel imports had not led Weirton to shift its production to a foreign country. *See* Weirton Steel Corp., Weirton, WV; Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance (Dep't of Labor May 14, 2004), AR at 101–03 (the "Negative Determination"); Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 31,134, 31,135 (Dep't of Labor June 2, 2004) (notice).

Thereafter, on July 23, 2004, Labor denied plaintiff's request for administrative reconsideration of the Negative Determination. *See* Weirton Steel Corp., Weirton, WV; Notice of Negative Determination Regarding Application for Reconsideration (Dep't of Labor July 23,

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[3] At oral argument, plaintiff's counsel explained plaintiff's characterization of why workers were kept on at the plant, and why steel production continued, as follows:

> If you just idle, cold idle a steel mill, it's hugely expensive to start it back up. You have to keep the furnaces going and while you're doing that you make steel, and that preserves the assets for the new owners that are going to come in and take over the place a few weeks later. So yes, it is accurate that steel production continued. But we characterize, and the company Weirton characterizes what was going on at that time to winding down its steel production operations before transferring to new ownership, new management.

Transcript of Oral Argument at 23, Court No. 04–00492 (July 28, 2005).

2004), AR at 195–97 (the "Reconsideration Denial"); Weirton Steel Corp., Weirton, WV; Notice of Negative Determination Regarding Application for Reconsideration, 69 Fed. Reg. 47,184 (Dep't of Labor Aug. 4, 2004) (notice).

On September 14, 2004, having failed to secure benefits by way of a re-certification, the ISU wrote Labor to "formally request that [Labor] amend the [2002] TAA certification to change its expiration date from April 23, 2004, to May 18, 2004, so as to include all workers of Weirton Steel who were adversely affected by increased imports." *See* Stewart Letter, SR at 12–15. The Stewart Letter details the circumstances that Weirton believed justified an amendment to extend the 2002 Certification. Specifically, it recounts that the 2002 Certification's expiration date of April 23, 2004 "came just a few weeks before substantially all of the production assets of Weirton Steel Corporation were acquired out of bankruptcy" by ISG, and that on May 18, 2004 "Weirton ceased to exist as a producer of steel and [that its remaining] employees were permanently separated from the company."[4] *See* Stewart Letter, SR at 13. It is those workers who remained with the company for the three to four weeks after the 2002 Certification expired, but before Weirton's sale was completed, that are the subject of Weirton's request to extend the 2002 Certification. Stewart Letter, SR at 13–14.

According to plaintiff, the remaining workers "were engaged in preserving Weirton's assets and facilities and preparing them for the sale to ISG."[5] Stewart Letter, SR at 14. Plaintiff maintained that only an amendment of the 2002 Certification "would ensure that all the workers of Weirton Steel who were adversely affected by increased imports are included under [the 2002] Certification and eligible for needed assistance." Stewart Letter, SR at 14.

In addition, the Stewart Letter stated that it was plaintiff's "understanding that the Department has previously amended TAA certifications to extend the period of eligibility where workers have been retained beyond the original expiration date of a certification." Stewart Letter, SR at 14, n. 5 (citing O/Z-Gedney Co., Div. of EGS Elec. Group, Terryville, CT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 43,454 (Dep't of Labor July 20, 2004) ("*O/Z-Gedney*"); Wiegand Appliance Div., Emerson Electric Co., Vernon, AL; Amended Certifica-

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[4] The Stewart Letter notes that Weirton "spent several years trying to stave off bankruptcy," which involved "workforce reductions," and then submitted a re-organization plan to the bankruptcy court "which called for eliminating an additional 950 jobs." *See* Stewart Letter, SR at 13.

[5] The Stewart Letter recounts Weirton's attempt to file a new petition in 2004 and Labor's Negative Determination and Reconsideration Denial, since sustained by this court in *Steelworkers*. *See* Stewart Letter, SR at 14; *Steelworkers*, 30 CIT at ____ , Slip Op. 06–171 at 31.

tion Regarding Eligibility To Apply for Worker Adjustment Assistance, 58 Fed. Reg. 50, 198 (Dep't of Labor Aug. 20, 2003) ("*Wiegand*")).

By letter dated September 24, 2004, Labor denied the ISU's amendment request for two reasons. The first was that the facts presented here were distinguishable from the facts of the two cases cited in plaintiff's amendment request (*O/Z-Gedney* and *Wiegand*), because here production at the plant continued whereas in the other instances "workers were retained to assist with the plant closure *after* production had ceased." *See* Denial Letter, SR at 16 (emphasis added). The second was that, after a "full and careful investigation for the relevant period,"[6] Labor determined that workers' separation from the company was not due to an increase in imports. This second reason was apparently a reference to the 2004 Petition for re-certification. *See* Denial Letter, SR at 16.

In *Steelworkers*, plaintiff sought judicial review of Labor's Negative Determination and Reconsideration Denial concerning its 2004 Petition, as well as the denial of plaintiff's amendment request embodied in Labor's September 14, 2004 Denial Letter. The court sustained Labor's Negative Determination and Reconsideration Denial resulting from plaintiff's 2004 Petition, but denied Labor's motion to dismiss Count IV of plaintiff's complaint (seeking review of the denial of the amendment request) for lack of subject matter jurisdiction. *See Steelworkers*, 30 CIT at ___ , Slip Op. 06–171 at 31. The court, however, reserved judgment on the substantive issues surrounding plaintiff's amendment request "until such time as Labor assembles and submits the administrative record for the requested extension." *Id.* at ___ , Slip Op. 06–171 at 3. Accordingly, *Steelworkers* remanded the matter to Labor "with instructions to assemble and submit to the court the administrative record regarding plaintiff's amendment claim . . . ." *Id.* at ___ , Slip Op. 06–171 at 31.

On remand, Labor compiled a Supplemental Administrative Record and filed it with the court on January 29, 2007. The record consists solely of: (1) the September 14, 2004 Stewart Letter (SR at 12–15); (2) Labor's responsive Denial Letter of September 24, 2004 (SR at 16–17); and, (3) the January 24, 2007 Declaration of Linda G. Poole, Program Analyst in Labor's Employment and Training Administration, Division of TAA (SR at 1–11, with accompanying exhibits (the "Poole Declaration")). The Poole Declaration sets forth, what is represented to be, Labor's policy on amending TAA certifications

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[6] The Denial Letter references plaintiff's 2004 Petition and thus the court assumes that Labor's second reason relates to the denial of plaintiff's application for re-certification and not to its application to extend the period of eligibility under the 2002 Certification. It appears, therefore, that Labor conducted no separate investigation relating to the amendment request and consequently made no findings as to whether the workers were adversely affected by imports.

to extend their coverage periods and seeks to explain Labor's amendment that extended benefits in the investigation *AII Technologies, Inc.*, El Paso, TX, 68 Fed. Reg. 43,757 (Dep't of Labor July 24, 2003) ("*AII Technologies*"). *See* Poole Declaration, SR at 1–2.

On February 9, 2007, plaintiff filed a motion to strike the Poole Declaration from the Supplemental Administrative Record. *See* Mot. Strike Doc. 1 From Suppl. Admin. R. ("Pl.'s Mot. Strike"). Plaintiff argued that the Poole Declaration was a "post hoc rationalization" of Labor's denial, because it was dated almost two-and-one-half years after the agency action, and thus could not have been considered by Labor in its decisionmaking process. *See* Pl.'s Mot. Strike 3. In opposition, Labor argued that the court's *Steelworkers* decision "expressly raised the question whether Labor had a policy of refusing to extend certifications" and that the Poole Declaration addressed both the existence of that policy and distinguished the specific extensions raised by plaintiff. *See* Def.'s Opp. Mot. Strike. Doc. One From Suppl. Admin. R. ("Def.'s Opp. Mot. Strike") 1–3.

On April 11, 2007, the court denied plaintiff's motion to strike. *See Indep. Steelworkers Union v. United States Sec'y of Labor*, Court No. 04–00492 (Apr. 11, 2007) (order). The court concluded:

> Ms. Poole's declaration may be included in the record. Although it is dated long after Labor's final determination was made and so was not before Labor at the time of its decision, the declaration sheds light on what is described therein as Labor's "policy with respect to extension of certifications." It does not appear to be a *post hoc* rationalization but rather a good faith effort to describe her understanding of Labor's administration of the trade adjustment program during 2005.

Id. at 1–2 (citation omitted).

STANDARD OF REVIEW

In cases under 28 U.S.C. § 1581(i), this Court applies the default standard of review set forth in the Administrative Procedure Act ("APA") and therefore will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *See* 5 U.S.C. § 706(2); *see also Former Employees of Alcatel Telecomm. Cable v. Herman*, 24 CIT 655, 658–59, Slip Op. 00–88 at 6–7 (2000). "The scope of review under [the] arbitrary and capricious standard is narrow." *Cathedral Candle Co. v. United States Int'l Trade Comm'n*, 27 CIT 1541, 1545, 285 F. Supp. 2d 1371, 1375 (2003) (citations and quotations omitted). Under this standard, "the court (1) must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment, and (2) analyze whether a rational connection exists between the agency's factfindings and its ultimate action." *See Consol. Fibers,*

Inc. v. United States, 32 CIT ___ , ___ , Slip Op. 08–2 at 17 (Jan. 10, 2008) (citations omitted); *see also Cathedral Candle Co.*, 27 CIT at 1545, 285 F. Supp. 2d at 1375 (reasoning that if this standard is met, "the Court will not substitute its own judgment for that of the agency"). Further, the APA provides that, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

DISCUSSION

I. Plaintiff's Arguments

Plaintiff maintains that Labor's denial is flawed in several respects. First, plaintiff argues that Labor failed in its attempt to distinguish, from the facts of this case, two prior instances where it amended the expiration dates of certifications, i.e., *O/Z-Gedney* and *Wiegand*. *See* Pl.'s Br. 25 (citations omitted). Labor's Denial Letter noted that, in those two cited instances, "workers were retained to assist with the plant closure after production had ceased. That is not the case for workers at Weirton Steel. Production of steel products at the Weirton, West Virginia plant continued during the period relevant to the investigation." Denial Letter, SR at 16.

Plaintiff further argues that Labor's Denial Letter is unlawful because it did not reference Labor's "standard" to encompass all workers "adversely affected by increased imports" and failed to explain the phrase "period relevant to the investigation." *See* Pl.'s Br. 25–26 (quotations and citations omitted). Plaintiff notes that, in the absence of a standard enunciated in the statute or the regulations, in ruling on expiration date amendment requests, Labor has consistently applied the "standard" that it seeks "to include . . . all workers . . . who were adversely affected by increased imports." *See* Pl.'s Br. 26 (citing *AII Technologies*, 68 Fed. Reg. at 43,757).

Plaintiff additionally argues that Labor did not offer an adequate explanation for its determination or demonstrate a "rational connection" between the facts found and the decision rendered. Pl.'s Br. 27.

> The several hundred worker separations that occurred after April 23[,2004] were, like those that occurred earlier, due in large part to imports; the chain of causation . . . was unbroken. These terminations would have happened earlier but for the efforts of the Company to avoid bankruptcy and liquidation though a variety of restructuring plans, all of which ultimately failed to save the company but did preserve some value of the assets for sale.

Pl.'s Br. 27. Plaintiff claims that those workers who remained with Weirton for the several weeks following the 2002 Certification's expi-

ration were, like their counterparts who received benefits, separated from the company as a result of being "adversely affected by increased imports in the earlier time period." Pl.'s Br. 27–28. In plaintiff's view, Labor's failure to reference this information in its Denial Letter rendered its determination unlawful. *See* Pl.'s Br. 28.

II. Labor's Arguments

Labor's brief primarily asserts jurisdictional arguments,[7] however, its arguments for denying plaintiff's amendment request are contained both in (1) Labor's response to plaintiff's motion to strike the Poole Declaration from the record and (2) Labor's response to plaintiff's supplemental citations.

In seeking to include the Poole Declaration in the Supplemental Administrative Record, Labor claimed that the declaration "completes Labor's initial explanation" of the "policy" behind its denial and asserts its belief that the policy was considered in reaching its determination. *See* Def.'s Opp. Mot. Strike 3, 5 (stating that "Labor directly addressed its policy in its denial of ISU's request" and "[t]herefore, Labor's policy regarding requests for extensions is a matter that was considered in reaching the conclusion in this determination") (internal citation omitted).

In responding to plaintiff's list of alleged analogous citations, Labor elaborated:

> [T]he situations addressed by the amendments that extended the time period for coverage of certain workers are not the same as the situation upon which plaintiff based its request to extend the time for an elapsed certification. Here, the undisputed facts are that the company was not closing,[8] it was being sold to a new owner who continued to operate the business . . . .

Def.'s Resp. Suppl. Citations 2.

Put another way, Labor finds the facts here distinguishable from prior cases because Weirton's facility was never fully shut down, as production continued in some limited capacity until the plant was turned over to ISG which continued production. Thus, the fact that

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[7] Labor's decision not to file the administrative record relating to plaintiff's request to amend the 2002 Certification underscores the notion that Labor's first responsive brief does not address this issue in any appreciable fashion. *See* Def.'s Resp. 16, n. 2. Labor's reply brief in further support of its motion to dismiss, too, does not address the substance of its denial, but makes only jurisdictional arguments. *See* Def.'s Reply Pl.'s Resp. Def.'s Mot. Dismiss Count IV Compl.

[8] This statement appears to be at odds with the facts. According to the Stewart Letter and as represented by counsel at oral argument, the company was indeed closing, and it was only the manufacturing facility (described as Weirton's "assets and facilities") that was sold to ISG to continue steel production operations. *See* Stewart Letter, SR at 13–14; *see also supra*, n. 3. Weirton continued producing steel in a limited capacity in order to preserve the production assets for the plant's new owner, ISG.

Weirton's plant was sold, but never closed, was the cornerstone of Labor's denial.

III. Labor Failed Adequately to Explain its Decision

"A fundamental requirement of administrative law is that an agency set forth its reasons for decision." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (quotations omitted). A necessary corollary of this requirement is that the agency's reasoning is presented in a logical fashion "such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations." *Int'l Imaging Materials, Inc. v. United States Int'l Trade Comm'n*, 30 CIT ___ , Slip Op. 06–11 at 13 (2006) (not reported in the Federal Supplement) (quotations omitted). "Explanation is necessary . . . for this court to perform its statutory review function." *Id.* at ___ , Slip Op. 06–11 at 13. This court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Atchinson, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (quotations omitted).

Labor's Denial Letter gives two reasons justifying its refusal to extend the 2002 Certification. *See* Denial Letter, SR at 16. The first is that the *O/Z Gedney* and *Wiegand* certifications cited by plaintiff as precedent for its claim are distinguishable from the facts presented here. Specifically, Labor states that, unlike here, both earlier certifications involved situations where "workers were retained to assist with the plant closure *after* production had ceased." Denial Letter, SR at 16 (emphasis added). The second reason is that Labor "conducted a full and careful investigation" relative to Weirton's 2004 Petition for re-certification, which resulted in a negative determination, and therefore that Labor concluded that the relevant Weirton workers were not adversely impacted by increases in imports.[9] Denial Letter, SR at 16.

With respect to the first argument, Labor has set forth a purported factual distinction between this matter and those others cited by plaintiff. Labor's Denial Letter, however, fails to explain why this factual distinction matters. According to Labor, the end result for the

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[9] Labor now maintains that it lacks authority to extend the 2002 Certification beyond April 23, 2004 and that it exceeded its authority in the past when extending expiration dates. *See* Def.'s Resp. Suppl. Citations 1–2. Labor's purported lack of authority was not raised in its Denial Letter, but rather first raised at oral argument, and then in its supplemental briefs. Labor's position is unpersuasive as this ground was not invoked by Labor in its Denial Letter in the first instance, but rather was first invoked before the court. "The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (quotation omitted). Indeed, the Denial Letter seems to say that, had Weirton's facts been as those in *O/Z Gedney* and *Wiegand*, the extension would be within the precedent and thus presumably approved. *See* Denial Letter, SR at 16.

workers in *O/Z Gedney* and *Wiegand* is that they were separated from their jobs. Denial Letter, SR at 16. The evidence here indicates that, within three to four weeks of the 2002 Certification's expiration, all of Weirton's workers lost their jobs. Stewart Letter, SR at 13. In the *O/Z Gedney* and *Wiegand* cases the manufacturing facilities were seemingly closed. Here, the facility was sold to another corporation, but never fully shut down. The Department seems to suggest that it is significant that the facility was kept in operation after its transfer to ISG. Labor fails, however, to say why this fact is significant. For the court, the salient facts in the *O/Z Gedney* and *Wiegand* line of investigations and *Weirton* are the same. That is, in each case (1) the company's workers were found eligible for benefits; (2) certain workers were retained for some time after the expiration of the certification; and, (3) the jobs of those workers were then terminated.

As to its second reason, the Department's apparent references to its re-certification investigation are wholly irrelevant to the separate issue of whether it should grant an extension to the 2002 Certification. In other words, there does not appear to be any connection between the denial of the March 9, 2004 application for re-certification (which would have re-certified Weirton workers as eligible to apply for benefits for up to two years from the date of certification) and the process resulting in the decision not to extend the 2002 Certification (which would have made Weirton workers eligible to apply for benefits up through and including May 18, 2004). Nor is there any evidence that Labor conducted any investigation under 19 U.S.C. §§ 2271 and 2272 when making its determinations to extendthe period of certification in other cases. *See O/Z Gedney*, 69 Fed. Reg. at 43,454; *Wiegand*, 68 Fed. Reg. at 50,198. This court, therefore, particularly in light of Labor's reference to an "investigation," cannot say that Labor has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *See Former Employees of Chevron Prods. Co. v. United States Sec'y of Labor*, 27 CIT 1135, 1143, 279 F. Supp. 2d 1342, 1349 (2003) (internal citations and quotations omitted).

The inadequacy of Labor's explanation is amplified by the cases cited by plaintiff in its list of supplemental citations, as requested by the court at oral argument. *See* Pl.'s Suppl. Citations Cert. Amendments ("Pl.'s Suppl. Cit."). Plaintiff cites eleven cases in which Labor amended the expiration date of worker certifications. The court's review of these matters reveals that, in recent years, Labor has amended certification periods to cover workers who remained employed beyond the original expiration date in a wide variety of circumstances.

For instance, Labor has extended benefits to workers on both a prospective basis (i.e., where the amendment was made before the workers were separated from the company but after the date of their

planned separation was known) and retroactive basis (i.e., where the amendment was made after the workers were separated from the company). *Compare* Motorola, Inc. Pers. Commc'ns Sector, Harvard, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 68 Fed. Reg. 17,675 (Dep't of Labor Apr. 10, 2003) (on April 10, 2003, extending a certification set to expire on April 13, 2003, until August 15, 2003), *with* Carlisle Engineered Prods., Erie, PA; Amended Certification To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 6,693 (Dep't of Labor Feb. 11, 2004) ("*Carlisle*") (on February 11, 2004, extending the certification that previously expired on January 29, 2004, until May 31, 2004).

Labor has also extended certification periods without regard to whether the extension benefitted a single worker or multiple workers. *Compare* Cooper Wiring Devices—Georgetown, SC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 52,311 (Dep't of Labor Aug. 25, 2004) (one worker), *with* Wolverine Worldwide, Inc., Kirksville, MO; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 68 Fed. Reg. 6,216 (Dep't of Labor Feb. 6, 2003) (one worker) ("*Wolverine*"), *with Carlisle*, 69 Fed. Reg. at 6,693 (unspecified amount of multiple workers). Likewise, Labor has amended certification periods regardless of whether the petition was brought by the employer or by a state agency. *Compare O/Z Gedney*, 69 Fed. Reg. at 43,454 (noting that the amendment request was made by a "company official"), *with Wolverine*, 68 Fed. Reg. 6,217 (noting that the amendment request was made by "the company and the State agency"), *and* Lomac LLC, Muskegon, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 46,573 (Dep't of Labor Aug. 3, 2004) (noting that the amendment request was made solely by a "state agency representative").

Furthermore, and most significantly, although Labor now argues that it only grants extensions where production at the workers' plant ultimately ceases, plaintiff cites two situations where it is unclear whether the plant in question ultimately closed. *See Wiegand*, 68 Fed. Reg. at 50,198; *AII Technologies*, 68 Fed. Reg. at 43,757. In these cases, Labor's published Federal Register notices indicate only that the "company closed," but do not state whether the production facility itself closed, or perhaps remained operational under different ownership, as is the case here. In sum, the court's review of those matters cited by plaintiff provides little guidance as to the criteria by which Labor assesses amendment requests.

Additionally, in this instance Labor relies on its "policy" not to extend certifications under plaintiff's circumstances. But, this reference to its policy does not allow this court, in hindsight, to "follow and review its line of analysis, its reasonable assumptions, and other relevant considerations." *Int'l Imaging Materials, Inc.*, 30 CIT

at ___ , Slip Op. 06–11 at 13 (quotations omitted). The court's review of the citations provided by plaintiff demonstrates that Labor has had a clear policy of extending certifications. *See generally* Pl.'s Suppl. Cit.; *see also* Poole Declaration, SR at 1–2. Indeed, Labor has cited no case where it turned down an application for an extension. *See generally* Def.'s Resp.; Def.'s Resp. Pl.'s Suppl. Cit.; Def.'s Opp. Mot. Strike.

It is well-settled that "[a]n agency is obligated to follow precedent, and if it chooses to change, it must explain why." *M.M. & P. Mar. Advancement, Training, Educ. & Safety Program v. Dep't of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984). Although an agency may modify its policies even absent a statutory change, it must always justify the reason for making the change. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnotes omitted).

Here, Labor has failed to supply the court with any justification or explanation of its claimed evolving policy regarding amendments under the circumstances presented here, let alone a "reasoned analysis." *See British Steel PLC v. United Stated*, 127 F.3d 1471, 1475 (Fed. Cir. 1997); *Atchinson, T. & S.F. Ry. Co.*, 412 U.S. at 807–08 ("Whatever the ground for [an agency's] departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."). Moreover, Labor did not "explain its application of the law to the found facts," which reveal that, though production did not cease at the Weirton plant, the Weirton workers were all separated from the company within weeks of April 23, 2004. *See In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002). Labor's actions were thus arbitrary and capricious, an abuse of discretion, and not in accordance with law, and, therefore, a further remand is warranted. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983) (reasoning that an action is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, [and] offered an explanation for its decision that runs counter to the evidence").

CONCLUSION

Based on the foregoing, the court remands this case to Labor. On remand, Labor is ordered to: (1) clarify the basis of and fully explain any decision it reaches; (2) establish the facts upon which it makes its determination and state precisely why it is, or is not, significant that the Weirton plant did not close; (3) clearly explain why, if it all,

the Weirton workers who lost their jobs after April 23, 2004, should be treated differently than those who lost their jobs prior to that date; (4) set forth its current and past policy regarding amendments tothe expiration date of certifications; (5) explain how this case is different, if at all, from previous cases where it extended worker certifications; (6) set forth all steps, if any, taken to change its policy with respect to extensions, including any measures taken to notify the public, and the dates on which all such steps were undertaken; (7) set forth the criteria upon which it makes any determination to extend or not to extend the subject certification; and (8) explain why its determination is in accord with the remedial nature of the TAA statute.

Remand results are due August 28, 2008. Comments to the remand results are due September 29, 2008. Replies to such comments are due October 13, 2008.