U.S. Customs and Border Protection

Slip Op. 10–71

ROYAL UNITED CORP., Plaintiff, – v – UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 09–00351

[Complaint dismissed for lack of subject matter jurisdiction.]

Dated: June 25, 2010

Hume & De Luca, PC (*Robert T. Hume* and *Stephen M. De Luca*) for the Plaintiff.
Tony West, Assitant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), and, of counsel, *Aaron P. Kleiner*, Attorney-International, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant UnitedStates. for the Defendant.

OPINION

Pogue, Judge:

Introduction

In this matter, Plaintiff, an importer of axes/adzes from the People's Republic of China ("China" or "PRC"), seeks re-liquidation of two of its entries at the cash deposit rate, rather than at the assessment rate determined by the Department of Commerce ("Commerce" or "the Department") in its periodic administrative review of the antidumping duty order covering Plaintiff's entries. Plaintiff, however, did not participate in that administrative review proceeding, despite constructive notice of the opportunity to do so. Because of Plaintiff's failure to so participate, and because Plaintiff's complaint would require the court to review Commerce's administrative proceeding, the Plaintiff has failed to satisfy a statutory prerequisite for judicial review and therefore lacks standing to bring its Complaint. Accordingly, the court must dismiss the action for lack of jurisdiction.[1]

[1] In response to Plaintiff's Complaint, Defendant moves to dismiss for failure to state a claim for which relief may be granted, pursuant to USCIT Rule 12(b)(5). Because it lacks jurisdiction, the court will not decide Defendant's motion.

Background

The administrative proceeding at issue was a review of a 1991 antidumping duty order on four classes of heavy forged hand tools, which included axes/adzes. *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China*, 56 Fed. Reg. 6622 (Dep't Commerce February 19, 1991) (notice constituting antidumping duty orders).[2] Commerce initiated this administrative review in response to four separate requests for review, all made in late February 2006. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Reviews*, 71 Fed. Reg. 17,077 (Dep't Commerce Apr. 5, 2006) ("*Notice of Initiation*"); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China*, 72 Fed. Reg. 10492 (Dep't Commerce Mar. 8, 2007) (preliminary results and partial rescission of the 2005–2006 administrative reviews) ("*Preliminary Results*") (noting the four requests for initiation of review)

Because the goods at issue come from China, which Commerce considers to be a nonmarket economy ("NME"), Commerce employed its rules and practices for NMEs in these proceedings. Specifically, for goods imported from an NME, Commerce employs a presumption that all exporters in the NME are under state control. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)(upholding the presumption of state control as within Commerce's authority).[3]

Applying its presumption of state control, it is Commerce's practice to "conditionally" cover, in a review, an NME-wide entity, even when no review of a NME-wide entity has been requested. Commerce gives notice of its practice by publication in the Federal Register. After such notice, if at least one named exporter[4] fails to demonstrate independence from government control, the NME-wide entity, and therefore

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[2] In considering a motion to dismiss, "the court may consider matters of public record." *Sebastain v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[3] *See also Decca Hospitality Furnishings, LLC v. United States*, 29 CIT 920, 921, 391 F. Supp. 2d 1298, 1300 (2005) ("While Commerce presumes that all companies [operating in a non-market economy] are under state-control, a company may rebut this presumption, and therefore qualify for an antidumping duty rate separate from the PRC-wide rate, if it demonstrates *de jure* and *de facto* independence from government control."). Companies qualifying for such "separate" rates are referred to as having "separate rate status." Commerce requires an exporter from an NME to demonstrate its entitlement to such separate rate status. *Sigma Corp.*, 117 F.3d at 1405 (citing *Tianjin Mach. Imp. & Exp.Corp. v. United States*, 16 CIT 931, 935, 806 F. Supp. 1008, 1013–14 (1992)).

[4] Reference to a "named exporter" throughout this opinion refers to exporters for whom review was explicitly requested, and whose name appears in the notice of initiation of review.

all exporters who fail to demonstrate their independence, are also covered by the results of the review.

Pursuant to this conditional coverage practice, when it initiates a review, Commerce instructs the Bureau of Customs and Boarder Protection ("CBP" or "Customs") to suspend liquidation of entries of subject merchandise from all unnamed exporters from the NME who have not demonstrated entitlement to a company-specific rate. Upon completing its review, Commerce may then order the entries liquidated at the rate it assesses against the products of the NME-wide entity.[5]

The two Chinese exporters of the merchandise at issue in this case, Jiangsu Sainty and Shanxi Tianli, were not among those companies for whom review was requested in the administrative review in question. However, following its conditional coverage practice, Commerce included the following language in the *Notice of Initiation*, as a footnote to its list of companies to be reviewed:

> If . . . one of the above-named companies does not qualify for a separate rate, all other exporters of [axes/adzes] from . . . China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

Notice of Initiation, 71 Fed. Reg. at 17,079 n.6.[6]

As anticipated by Commerce's notice, at least one of the named exporters for whom review was requested failed to qualify for separate rate status. Commerce accordingly included the China-wide en-

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[5] *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1379–80 (Fed. Cir. 2002) ("*Transcom IV*") (discussing 19 C.F.R.§ 353.22(e)(2) (1994), renumbered as 19 C.F.R.§ 351.212(c)(2)(2007)). The Court of Appeals for the Federal Circuit ("Federal Circuit") initially rejected the practice of subjecting unnamed exporters to the results of administrative review as part of an NME-wide entity, on the ground that such exporters were entitled to express notice. *Transcom, Inc. v. United States*, 182 F.3d 876, 882–83 (Fed. Cir. 1999). The court, however, later upheld Commerce's response to this requirement, finding the language in its notice of initiation of administrative review as sufficient to reasonably inform unnamed interested exporters, in light of announced departmental policy, to satisfy due process notice requirements. *Transcom IV*, 294 F.3d at 1377–82.

[6] Defendant correctly points out that language essentially identical to that used by the Department in this case previously has been upheld by the Federal Circuit as sufficient to notify unnamed exporters from the relevant NME country that they may be subject to the results of the review as part of the NME-wide entity, unless they prove their entitlement to separate rate status. ([Def.'s] Mot. to Dismiss 9.) *Compare Notice of Initiation*, 71 Fed. Reg. at 17,079 n.6 *with Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1377 (Fed. Cir. 2003) (quoting *Initiation of Antidumping and Countervailing Duty Administrative Review, Requests for Revocation in Part and Deferral of Administrative Reviews*, 63 Fed. Reg. 58,009, 58,010 (Dep't Commerce Oct. 29, 1998)). *See Huaiyi* n, 322 F.3d at 1377–78 (upholding the language used as sufficient to "satisf[y] controlling statutory and regulatory requirements").

tity within the scope of this review. *Preliminary Results*, 72 Fed. Reg. at 10,494 ("Jafsam (with respect to all four classes or kinds [of merchandise subject to the antidumping duty order, including axes/adzes]) failed to respond to the Department's requests for information. . . . By failing to adequately respond to the Department's requests for information, . . . Jafsam . . . ha[s] not demonstrated [that it is] free of government control, [is] therefore not eligible to receive a separate rate, and [is] accordingly being treated as part of the PRC-wide entity."); *see also id.* at 10,497 & n.2 (listing PRC-wide rate for "Heavy Forged Hand Tools from the PRC: Axes/Adzes," and noting that "[t]he PRC-wide entity for Axes/Adzes includes Jafsam.").[7]

Affirming these preliminary results, Commerce, in its final results, applied a 189.37 percent dumping margin on axes/adzes from the China-wide entity. *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 72 Fed. Reg. 51,787, 51,790 (Dep't Commerce Sept. 11, 2007) (final results and rescissions of the 2005–2006 administrative reviews). Based on these final results, Commerce then issued liquidation instructions to CBP, directing CBP to liquidate entries covered by the review in accordance with the final results. (*See* Am. Compl. ¶ 13.)

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[7] Plaintiff erroneously claims that, because "Jafsam did not respond to [Commerce's] questionnaires[,] [it] therefore did not participate [in the administrative review proceeding]," and that accordingly Jafsam's failure to qualify for separate rate statusmay not be used to invoke the conditional coverage provision in the notice of initiation. (Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Resp.") 9–10.) Plaintiff, however, does not accurately characterize the nature of the conditional coverage doctrine. As quoted above, Commerce's *Notice of Initiation* explained that if "one of the []named companies does not qualify for a separate rate," then "all other exporters of [axes/adzes] from . . . China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part." *Notice of Initiation*, 71 Fed. Reg. at 17,079 n.6. As explained by the Department in the *Preliminary Results*, one of the named companies — Jafsam — failed to respond to Commerce's requests for information and therefore failed to qualify for separate rate status. 72 Fed. Reg. at 10,494. Accordingly, the "condition" on which the PRC-wide entity and any Chinese exporters of subject merchandise failing to prove independence therefrom were "conditionally covered" was satisfied. *See also Transcom IV*, 294 F.3d at 1377–83 (upholding the invocation of conditional coverage provision where those named exporters who failed to demonstrate entitlement to separate rate status had failed to provide information to Commerce, and thus had been assessed a PRC-wide rate based on facts available).

For this same reason, Plaintiff's request to stay this case, pending final decision in a case involving another respondent inthis review (Pl.'s Resp. 1, 12), is irrelevant. Regardless of the outcome of a case in which the separate rate status of *another* respondent may or may not be subject to change, *Jafsam* remains a named exporter of axes/adzes from China who did not qualify for a separate rate, and was therefore deemed by Commerce to be part of the PRC-wide entity. By failing to qualify for a separate rate, Jafsam subjected the PRC-wide entity and all entities who failed to prove independence therefrom, including the Chinese exporters at issue here, to the results of the review of the order on axes/adzes from China.

Plaintiff's two entries at issue are axes/adzes subject to the antidumping duty order on heavy forged hand tools from China, entered during the period of administrative review, in August 2005 and November 2005. (Am. Compl. ¶ 1.)[8] Accordingly, after notification to Plaintiff, in early 2008, CBP liquidated Plaintiff's two entries at the China-wide assessment rate of 189.37 percent. (*Id.* ¶ 11.)[9] Plaintiff filed a protest of the liquidation and requested an application for further review, both of which were denied by CBP on the ground that the liquidations were executed in accordance with Commerce's instructions at the close of the review. (*See id.* ¶ 13.)

Seeking review of CBP's action, Plaintiff, in its Complaint, now requests an order directing CBP to re-liquidate these entries at the cash deposit rate paid at their time of entry. (*Id.* ¶ 15.) Plaintiff contends that because no interested party requested review of the specific Chinese exporters of the products Plaintiff imported,[10] the merchandise was improperly liquidated at the assessment rate from the administrative review, which included antidumping duties. Plaintiff argues, in essence, that the exporters of its merchandise were unlawfully covered by the results of the instant administrative review of the antidumping duty order on axes/adzes from China. (*See id.* ¶¶ 2, 7–15.)

Plaintiff asserts that it has a cause of action under the Administrative Procedure Act ("APA")[11], and that this court has jurisdiction over its claim pursuant to 28 U.S.C. § 1581(i)(2006). (Am. Compl. ¶¶ 1–3.) However, as further explained below, the court concludes that,

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[8] There is no indication, and Plaintiff's complaint does not allege, that this merchandise was produced or exported by entities which should have been declared by Commerce to qualify for separate rate status.

[9] In other proceedings reviewing the final results, the court has concluded that Commerce's use of adverse facts available ("AFA") as the basis for the China-wide assessment rate on axes/adzes was supported by substantial evidence. *Shandong Mach. Imp. & Exp. Co. V. United States*, Slip Op. 09–64, 2009 Ct. Intl. Trade LEXIS 76, at *16 (CIT June 24, 2009). The assessment rate of 189.73 percent was higher than the rate in effect at the merchandise's time of entry.

[10] Although Plaintiff's complaint ambiguously alleges that "[n]o interested party within the meaning of 19 U.S.C.§§ 1516a(f)(3) and 1677(9)(A) . . . requested an administrative review for the axes/adzes sold and entered during the 2005–2006 review period conducted by Commerce" (Am. Compl. ¶ 8), Plaintiff has confirmed that the intended meaning of this allegation is that no interested party requested an administrative review of the specific Chinese exporters of the two entries at issue in this case, and that Plaintiff does not contest that interested parties within the meaning of the antidumping statute did request an administrative review for axes/adzes sold and entered during the 2005–2006 review period. (Status Conf. Tr. [Dkt. No. 23], 4, Jan. 26, 2010; *see also* Pl.'s Resp. 2.)

[11] Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to review." 5 U.S.C.§ 704. Section 702 of that Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* at § 702.

based on the facts alleged in Plaintiff's complaint, Plaintiff could and should have brought its claim under Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2006),[12] and may not now use the broad provisions of the APA and 28 U.S.C. § 1581(i) to circumvent the special statutory procedures and prerequisites enacted by Congress for the adjudication of a Section 1516a claim in this Court. *See, e.g.*, *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556–57 (Fed. Cir. 1988) (if claim could have been brought under Section 1516, jurisdiction under Subsection 1581(i) may not be invoked to adjudicate the same claim under the APA, because doing so would circumvent the proper procedures of Section 1516).

As is also further explained below, "the true nature of [Plaintiff's] action"[13] is such that the sole potential basis for jurisdiction is pursuant to 28 U.S.C. § 1581(c). *See Transcom, Inc. v. United States*, 121 F. Supp. 2d 690, 693, 695–96 (CIT 2000) ("*Transcom III*"), *aff'd*, 294 F.3d 1371 (Fed. Cir. 2002). However, because Plaintiff — by failing to participate in the administrative review proceeding the results of which Plaintiff now seeks to challenge[14] — has failed to meet a statutory prerequisite for this Court's exercise of jurisdiction under Subsection 1581(c), the Plaintiff lacks standing to bring its action, and the court therefore lacks subject matter jurisdiction to hear Plaintiff's claim. *See Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987) (affirming dismissal of claim over which plaintiff sought jurisdiction under § 1581(i), because "[the] action falls clearly under § 1581(c)" but plaintiff failed to participate in the administrative proceeding sought to be reviewed).

Standard of Review

In considering a motion to dismiss, the court accepts all factual allegations in a plaintiff's complaint to be true. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). However, courts are not bound to accept

[12] Further citation to the Tariff Act of 1930, as amended, isto Title 19 of the U.S. Code, 2006 edition.

[13] *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (noting that "a party may not expand a court's jurisdiction by creative pleading," and that courts must "look to the true nature of the action" in determining jurisdiction (internal quotation marks and citation omitted)).

[14] *See* 28 U.S.C. § 2631(c) ("A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter a rose."); *Nucor Corp. v. United States*, 31 CIT __, 516 F. Supp. 2d 1348, 1349 (2007) (dismissing action because plaintiff did not participate in administrative review to the extent necessary to qualify as a party to that proceeding for purposes of bringing an action under Subsection 1581(c)).

the truth of legal conclusions stated in the complaint. *Id.* at 1949–50. Moreover, the court will not accept as true Plaintiff's claimed basis for jurisdiction. Instead, "[e]very federal court has the responsibility to determine whether it . . . has jurisdiction." *Martin ex rel. Martin v. Sec'y of Health & Human Servs.*, 62 F.3d 1403, 1406 (Fed. Cir. 1995)). *See also Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) (federal court may assess whether it has subject matter jurisdiction over the case before it *sua sponte* at any time).

To determine the appropriate basis for jurisdiction, if any, the court must glean from Plaintiff's complaint "the true nature of the action." *Norsk Hydro*, 472 F.3d at 1355 (internal quotation marks and citation omitted). The court "must have its own independent basis for jurisdiction under 28 U.S.C. § 1581." *Shinyei Corp. of America v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004).[15]

Plaintiff bears the burden of establishing that its cause of action is within the reach of Subsection 1581(i). Miller, 824 F.2d at 964. As explained below, Plaintiff has failed to meet this burden.

Discussion

It is, of course, axiomatic that this Court exercises jurisdiction pursuant to Subsection 1581(i) to adjudicate a cause of action under the APA.[16] The court exercises its 1581(i) jurisdiction, however, when,

[15] Subsection (i) confers residual jurisdiction to the court, and is available when jurisdiction under subsections (a)-(h) is unavailable or when relief under the appropriate subsection would be inadequate. *Shinyei*, 355 F.3d at 1304–05. Subsection (i) specifically states that "[t]his subsection shall not confer jurisdiction over an antidumping [] duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930," jurisdiction overwhich is granted pursuant to 28 U.S.C. § 1581(c). 28 U.S.C. §1581(i). *See also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003); *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that subsection would be manifestly inadequate." (emphasis, quotation marks and citation omitted)). As the Federal Circuit explained in *Shinyei*, if the plaintiff alleges an error by CBP, its claim falls under 19 U.S.C. § 1514, governing the protest of CBP decisions, a denial of which is reviewable by this Court under jurisdiction conferred by 28 U.S.C. § 1581(a). *Shinyei*, 355 F.3d at 1302 n.2. On the other hand, if a plaintiff's complaint alleges that Commerce's instructions to CBP were not in accordance with the results of its own determinations from the administrative review, then jurisdiction would be proper under 28 U.S.C. § 1581(i)(4), as a challenge to the manner in which Commerce administered the results of its final determinations. *See Consol. Bearings*, 348 F.3d at 1002. Finally, if a plaintiff's complaint directly challenges a final determination made by Commerce, the court's jurisdiction flows from 28 U.S.C. § 1581(c). *See, e.g.*, *Transcom III*, 121 F. Supp. 2d at 693, 695–96 (2000). *Accord Belgium v. United States*, 551 F.3d 1339, 1347 (Fed. Cir. 2009) (correlating these three types of actions with their respective bases for jurisdiction under subsections 1581(a), (c), and (i)).

[16] *See, e.g., Nat'l Fisheries Inst., Inc. v. United States*, __CIT __, 637 F. Supp. 2d 1270, 1281 (2009) (noting that when this Court exercises jurisdiction pursuant to Subsection 1581(i),

on the facts alleged in a plaintiff's complaint, jurisdiction under Subsections 1581(a) through (h) could not have adequately covered the true nature of Plaintiff's action. *Shinyei*, 355 F.3d at 1304–05.

As provided by the APA, if an agency action is "made reviewable by statute [in this case, under 19 U.S.C. § 1516a over which the court has jurisdiction under 1581(c)]," 5 U.S.C. § 704, then "[t]he form of proceeding for judicial review [of such an action] is the special statutory review proceeding relevant to the subject matter in a court specified by statute." *See id.* at § 703. Only if the challenged final agency action is one "for which there is no other adequate remedy in a court," *id.* at § 704, does the APA provide an independent cause of action. *See id.* at § 703–04. *See also, e.g.*, *Bowen v. Mass.*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action[,] [and] . . . § 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." (quotation marks, footnotes and citations omitted)); *Abitibi-Consol. Inc. v. United States*, 30 CIT 714, 718, 437 F. Supp. 2d 1352, 1357 (2006) (noting that Section 704 of the APA "is mirrored in the court's residual jurisdiction case law, which . . . prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate").

Accordingly, the APA provides a plaintiff with an independent cause of action where that plaintiff pleads facts sufficient to establish that it could not have availed itself of an existing statutory cause of action. *See, e.g.*, *Nereida Trading Co., Inc. v. United States*, __ CIT __, 683 F. Supp. 2d 1348, 1357 (2010) (no independent cause of action under the APA when plaintiff "has not demonstrated that the actions it attributes to [the agency] fall beyond 5 U.S.C. § 704's first prong ("[a]gency action made reviewable by statute") and under [5] U.S.C. § 704's second prong ("final agency action for which there is no other adequate remedy in a court").

Plaintiff's amended complaint appears to claim a cause of action under the APA, alleging that "as [an] importer [of subject merchandise], [Plaintiff] was adversely aggrieved by CBP's improper liquidation of the entries using an antidumping duty rate other than the rate in effect at the time of entry" (Am. Compl. ¶ 3 (citation omitted)). The facts alleged in Plaintiff's complaint, however, do not amount to a

"the cause of action generally is considered to arise under the APA" (citing *Motion Sys. Corp. v. Bush*, 28 CIT 806, 818, 342 F. Supp. 2d 1247, 1258 (2004), *aff'd per curiam*, 437 F.3d 1356 (Fed. Cir. 2006))).

claim of error on the part of Customs.[17] (*See id.* ¶ 13 (alleging that CBP notified Plaintiff that its entries were liquidated pursuant to Commerce's instructions); Pl.'s Resp. 7 (noting that "CBP merely carried out Commerce's liquidation instructions").) Rather, on the facts pled in Plaintiff's amended complaint and the arguments presented in Plaintiff's subsequent briefing, the true nature of Plaintiff's action is as a challenge to Commerce's decision to include Plaintiff's entries within the coverage of the final results of Commerce's administrative review, *see Transcom IV*, 294 F.3d at 1375–77 (describing facts very similar to those alleged in this case, and characterizing the plaintiff's claim as a challenge to the legality of subjecting non-individually named exporters to the results of administrative reviews through the doctrine of conditional coverage), and Plaintiff has confirmed this to be case. (*See* Tel. Conf. Tr. [Dkt. No. 26], 3, June 9, 2010.)

Plaintiff particularly claims that no interested party within the meaning of 19 U.S.C. §§ 1516a(f)(3) and 1677(9)(A) specifically requested a review of the exporters of the two entries in question (Am. Compl. ¶¶ 8, 15[18]), and that, accordingly, the results of an administrative review under Section 1675(a) cannot apply to these entries, such that their liquidation is properly governed by Section 1504(a). (*See* Am. Comp. ¶¶ 7–15.)[19] Thus, the true nature of Plaintiff's

[17] The factual allegations in Plaintiff's complaint are that: 1) no interested party within the meaning of the statute requested an administrative review of antidumping duties to be imposed on products from the two specific exporters at issue (Am. Compl. ¶ 8); 2) that Customs liquidated these entries pursuant to Commerce's instructions, following the final results of an administrative review (*see id.* ¶¶ 11, 13); and 3) that Plaintiff filed a protest of the liquidation with Customs (*id.* ¶ 12). On the basis of these facts, Plaintiff claims that it was aggrieved by agency action, because its entries should have been "deemed liquidated" under 19 U.S.C. § 1504(a), rather than liquidated atthe rate established by the final results of Commerce's administrative review. (*See id.* 3, 15.)

[18] *See supra* note 10.

[19] Section 1504 states that, "*except as provided in section 1675(a)(3) of this title*, an entry of merchandise for consumption not liquidated within 1 year from . . . the date of entry of such merchandise . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record." 19 U.S.C. § 1504(a)(1) (emphasis added). The emphasized exception is applicable here. Specifically, Section 1675(a)(3) applies to entries covered by a periodic administrative review of the amount of antidumping duties owed on them, *see* 19 U.S.C. §§ 1675(a)(1)(B) & (3)(B), and exempts such entries from the requirements of Section 1504(a). *See* 19 U.S.C. § 1504(a)(1). (Liquidation of entries covered by a periodic administrative review under Section 1675(a)(3) is suspended pending the results of such review, *see* 19 C.F.R. § 159.58(a); accordingly, such entries are not "deemed liquidated" under Section 1504(a), one year from the date of entry. However, entries subject to administrative review may nevertheless be "deemed liquidated" if, absent certain procedural conditions, CBP fails to liquidate such entries six months after receiving notice of the removal of suspension of liquidation following completion of the administrative review. 19 U.S.C. § 1504(d). *See Int'l Trading Co. v. United States*, 412 F.3d 1303, 1310–12 (Fed. Cir. 2005).)

complaint is as a challenge to Commerce's authority to review and impose duties pursuant to an administrative review conducted under 19 U.S.C. § 1675(a).[20]

This challenge to Commerce's final determination under Section 1675 must be brought under 19 U.S.C. § 1516a(a)(2)(A)(i)(I), by invoking the court's jurisdiction under 28 U.S.C. 1581(c) after satisfying the statutory prerequisites for access to judicial review of the agency action. *See, e.g.*, *Transcom III*, 121 F. Supp. 2d at 693, 695 (jurisdiction pursuant to 1581(c) when plaintiff "contends that under 19 U.S.C. § 1675(a) . . . Commerce lacked authority to review and impose the resulting determinations upon entries of any company other than those identified by name in the *Notice of Initiation*" (citations omitted)). *See also Miller*, 824 F.2d at 964 (holding that action challenging Commerce's authority to conduct review and subject respondents to its final results falls under 28 U.S.C. § 1581(c), because "[u]nder 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a[n] [antidumping] duty determination, as well as the merits, are subject to judicial review"); 28 U.S.C. § 1581(i) ("This subsection shall

More specifically, a condition precedent to the applicability of Section 1675(a), and hence to the exemption of Plaintiff's entries from the requirements of Section 1504(a), is that a review of antidumping duty determinations must have been requested with respect to those entries. 19 U.S.C.§ 1675(a)(1) (providing that Commerce shall review its determination of antidumping duties for entries of merchandise covered by an antidumping duty order only if, *inter alia*, "a request for such a review has been received").

[20] Moreover, while Plaintiff argues that the entries at issue were improperly liquidated pursuant to Commerce Message No. 7310202 (*see* Am. Compl. ¶¶ 1, 13), Plaintiff does not allege that the message contained any ministerial error or that it otherwise failed to accurately reflect the final results of Commerce's determinations in the instant review. (*See generally* Am. Compl.). Thus the true nature of Plaintiff's challenge is not to the consistency of Commerce's liquidation instructions with the final results of the administrative review, over which jurisdiction would be proper under subsection 1581(i) as a challenge to Commerce's administration of the results of its review, *Consol. Bearings*, 348 F.3d at 1002. Rather Plaintiff's action is a challenge to those final results themselves. *See, e.g.*, *Huaiyin Foreign Trade Corp. (30) v. U.S. Dep't of Comm.*, 26 CIT 494, 495,201 F. Supp. 2d 1351, 1352 (2002), *aff'd*, 322 F.3d 1369 (Fed.Cir. 2003); *Transcom III*, 121 F. Supp. 2d at 693, 695–96. *Compare, e.g.*, *Shinyei* 355 F.3d at 1302–05 (challenge to instructions that failed to include plaintiff's imported merchandise from manufacturers properly covered by final results of review appropriately brought under 19 U.S.C. § 702, invoking the court's jurisdiction under 28 U.S.C. § 1581(i)); *Consol. Bearings*, 348 F.3d at 1002 ("[Plaintiff] does not object to the final results. Rather [Plaintiff] seeks application of those final results to its entries of [subject merchandise] manufactured by [a particular producer]. . . . Because [Plaintiff] is not challenging the final results, subsection (c) is not and could not have been a source of jurisdiction for this case. . . . Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. Thus, [Plaintiff] challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action."); *Am. Signature, Inc. v. United States*, 598 F.3d 816 (Fed. Cir. 2010) (jurisdiction under subsection 1581(i) is proper over challenge to allegedly erroneous

not confer jurisdiction over an antidumping [] duty determination which is reviewable [] by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 . . . ."); 5 U.S.C. § 703 ("The form of proceeding for judicial review [of agency action] is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . .").

Thus, the facts stated in Plaintiff's complaint essentially allege a cause of action which could and should have been brought under 19 U.S.C. § 1516a, jurisdiction over which claim is proper in this Court pursuant to 28 U.S.C. § 1581(c). Plaintiff, however, by choosing not to participate in the applicable administrative review (Am. Compl. ¶ 4), has failed to meet an essential prerequisite for bringing its cause of action under Section 1516a, and Plaintiff may not now use the APA and Subsection 1581(i) to circumvent the statutory requirements imposed by Congress for bringing precisely the type of claim that Plaintiff seeks to have adjudicated. *Nat'l Corn Growers Ass'n*, 840 F.2d at 1560; *Miller*, 824 F.2d at 964. Plaintiff lacks standing to proceed under 1581(c) due to its own failure to participate in the administrative review proceeding. *See* 28 U.S.C. 2631(c).

Further, recourse to an independent cause of action under the APA and this Court's residual jurisdiction under 28 U.S.C. § 1581(i) is not available to Plaintiff on the ground that jurisdiction under subsection (c) would have been manifestly inadequate. As the Federal Circuit held in *Miller*, the use of "the § 1581(c) remedy" by other litigants in Plaintiff's position is persuasive of its adequacy. *Miller*, 824 F.2d at 964. As noted above, "the § 1581(c) remedy" has repeatedly and consistently been used by litigants in Plaintiff's position to bring precisely the types of claims for which Plaintiff now seeks relief.

The fact that Plaintiff "chose not to participate in the applicable administrative review and hence ha[s] no standing under 28 U.S.C. § 1581(c)" (Am. Compl. ¶ 4) does not make the remedy itself inadequate. *See Miller*, 824 F.2d at 964 (jurisdiction under Subsection 1581(i) not available because plaintiff could have availed itself of the remedy under Subsection 1581(c), despite plaintiff's failure to par-

liquidation instructions, where final results themselves were not contested) *with Huaiyin Foreign Trade Corp.*, 26 CIT at 495, 201 F. Supp. 2d at 1352 (jurisdiction under 1581(c) over challenge to Commerce's inclusion within scope of review coverage entries from producers/exporters for whom no review was specifically requested but who were determined to be covered by review as part of the PRC-wide entity pursuant to the doctrine of conditional coverage); *Transcom III*, 121 F. Supp. 2 dat 693, 695 (jurisdiction pursuant to 1581(c) when plaintiff "contends that under 19 U.S.C. § 1675(a) . . . Commerce lacked authority to review and impose the resulting determinations upon entries of any company other than those identified by name in the *Notice of Initiation*" (citations omitted)); *Transcom, Inc. v. United States*, 22 CIT 315, 320, 5 F. Supp. 2d 984, 988 (1998) (same), *rev'd on other grounds*, 182 F.3d 876 (Fed. Cir. 1999).

ticipate in review and consequent lack of standing to bring action under Subsection 1581(c); fact that other plaintiffs brought similar challenges to that brought by plaintiff in that case showed that remedy under 1581(c) was not manifestly inadequate). Indeed, as noted above, the broad provisions of the APA and Subsection 1581(i) were not intended to allow claimants to get around the statutory requirements for bringing a claim in this Court which could and should have been brought under Section 1516a. *See Nat'l Corn Growers Ass'n*, 840 F.2d at 1557 ("[Plaintiffs] may not circumvent the proper jurisdictional statute by asserting that their decision not to proceed under the proper congressional mechanism renders their available remedies manifestly inadequate." (citation omitted)).[21]

Moreover, this is not a case where Plaintiff could not possibly have availed itself of the remedy under Subsection 1581(c), as would be the case if Plaintiff had received *no* notice of its entries being subjected to the review in time for Plaintiff to participate in the administrative proceeding. While Plaintiff argues, in its response to Defendant's motion to dismiss, that "despite the so-called 'conditional notice' language in the *Initiation Notice*, until the final results were published in this review, [Plaintiff] had no reason to believe that its entries would be subject to a revised antidumping rate" (Pl.'s Resp. 9), Plaintiff does not dispute that the *Notice of Initiation* did contain such "'conditional notice' language." (*See id.*)

As the court noted in *Transcom III*, "[t]he statement that '[a]ll other exporters of [subject merchandise] are conditionally covered by this review' gave [Plaintiff], a seasoned importer, more than sufficient constructive notice that the particular entries in which [Plaintiff] had an interest could possibly be affected by the administrative review." *Transcom III*, 121 F. Supp. 2d at 701 (footnote omitted). In the case at bar, as in *Transcom III*, "[h]ad [Plaintiff] been in doubt about the meaning of the term ['conditionally covered'], it was but a phone call away from the answer." *Id.* at 702; *see also id.* at 701 n.10 (noting that constructive notice includes inquiry notice (quoting *Black's Law Dictionary* 1062 (6th ed. 1990))); *Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380 (Fed. Cir. 2010) (parties are deemed to have had notice of announcements published in the Federal Register (citing 44

[21] *See id.* at 1558 ("[W]here Congress has prescribed in great detail a particular track for a claimant to follow, in administrative or judicial proceedings, and particularly where the claim is against the United States or its officials in their official capacity, the remedy will be construed as exclusive without a specific statement to that effect. The claimant will not be allowed to sail past carefully constructed limitations simply by invoking other and more general legislation. This is so even when the general legislation might have been construed to cover the case if the specific legislation had not been enacted.").

U.S.C. § 1507; *Stearn v. Dep't of Navy*, 280 F.3d 1376, 1384 (Fed. Cir. 2002)).[22]

Therefore, because Sections 1516a and 1581(c) adequately provided potential relief for the true nature of Plaintiff's complaint, a cause of action under the APA, with residual jurisdiction pursuant to § 1581(i), is unavailable. *Consol. Bearings*, 348 F.3d at 1002; *Miller*, 824 F.2d at 963–64. Further, because Plaintiff received inquiry notice that its entries may be affected by the instant administrative review, *see Transcom III*, 121 F. Supp. 2d at 701, and yet nevertheless "chose not to participate" (Am. Compl. ¶ 4), Plaintiff may not now avail itself of the court's jurisdiction pursuant to Subsection 1581(c) because it lacks standing to do so. *Nucor*, 31 CIT at __, 516 F. Supp. 2d at 1349 (dismissing action because plaintiff did not participate in administrative review to the extent necessary to qualify as a party to that proceeding under Subsection 1581(c)).[23]

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[22] Plaintiff contends that it did not participate in the review because, due to the withdrawals of a number of requests for review, Plaintiff had no reason to believe that there remained any entries subject to the review until it was revealed, late in the proceeding, that an entry had been mistakenly overlooked. Plaintiff argues that it therefore had no reason to anticipate, until after its opportunity to participate in the review had expired, that the antidumping duty rates applicable to its entries were subject to change. To the contrary, however, Plaintiff had every reason to believe that, absent a showing of independence from the China-wide entity by the producers/exporters of its merchandise, Plaintiff's entries would be subject to the final results of Commerce's administrative review when Jafsam's failure to qualify for a separate rate brought all producers/exporters of subject merchandise deemed part of the China-wide entity within the coverage of those final results. Plaintiff has confirmed that it is not contesting that it did not have adequate notice of this policy under *Transcom IV* (*see* Tel. Conf. Tr. [Dkt. No. 26], 12, June 9, 2010.), and there is no indication that the request for review of Jafsam was ever rescinded. Accordingly, the fact that an entry from another company was later revealed to have been overlooked is irrelevant: Plaintiff should have known that the antidumping duty rate applicable to its entries was potentially subject to change as of the *Notice of Initiation*, and certainly as of Jafsam's failure to qualify for a separate rate. Moreover, Plaintiff's challenge to all or part of Commerce's conduct in this review could and should have been brought, in the first instance, before the agency and, as necessary, before this Court under 28 U.S.C. § 1581(c).

[23] The court is also precluded from exercising Subsection 1581(c) jurisdiction over this case because Plaintiff's complaint is untimely for purposes of that subsection. 28 U.S.C. § 2636(c) states that "[a] civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 [as amended, 19 U.S.C. § 1516a] is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section." Section 516A, as amended, 19 U.S.C. § 1516a, in turn specifies that an interested party may commence an action challenging a final determination made by the Department of Commerce under 19 U.S.C. § 1675 within thirty days after the date of publication in the Federal Register of the notice of such determination. 19 U.S.C. § 1516a(a)(2)(A)(i)(I). The Federal Circuit has concluded that the time restrictions in these statutory provisions are a plain and unambiguous element of the court's jurisdiction. *NEC Corp. v. United States*, 806 F.2d 247, 248–49 (Fed. Cir. 1986); *see also Former Employees of IBM Corp. v. Chao*, 292 F. App'x 902, 908 (Fed. Cir. 2008) (holding that when a statute "specifies that a plaintiff's action is 'barred' unless filed within 60 days after the date of notice of the Department [of Labor]'s determination, failure to comply with the terms divests the court of jurisdiction over the plaintiff's claims"). In the instant case, the final

Conclusion

For the foregoing reasons, the court concludes that the Plaintiff lacks standing to invoke the court's subject matter jurisdiction to hear its claim. This case must therefore be DISMISSED. Judgment will be entered accordingly.

It is **SO ORDERED**.

Dated: June 25, 2010
New York, N.Y.

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, JUDGE

Slip Op. 10–73

FORMER EMPLOYEES OF INVISTA, S.A.R.L., Plaintiffs, v. U.S. SECRETARY OF LABOR, Defendant

Court No. 07–00160

[Granting Plaintiffs' application for attorneys' fees and expenses under the Equal Access to Justice Act]

Dated: June 28, 2010

Ruskin Moscou Faltischek, P.C. (*Thomas A. Telesca*), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice.

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results of Commerce's administrative review were published on September 11, 2007. Plaintiff filed its summons on August 21, 2009. Plaintiff did not commence suit within the specified time frame. Thus, Plaintiff's suit is "barred." 28 U.S.C. § 2636(c).

The court notes also that, to the extent Plaintiff might seek to preserve for judicial review the denial of its protest by Customs, Plaintiff has not paid the contested duties, and has therefore failed to meet the prerequisites for protest jurisdiction under 19 U.S.C. §§1514–15 and 28 U.S.C. 1581(a). *See* 28 U.S.C. § 2637(a) ("A civil action contesting the denial of a protest under [19 U.S.C. § 1515] may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced. . . ."); *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983) ("It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. 1581(a) [providing for jurisdiction over a cause of a challenge to the denial of a protest under 19 U.S.C. §§ 1514–15], it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i)." (internal quotation marks and citation omitted)).

OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, former employees of the Chattanooga, Tennessee plant operated by Invista, S.a.r.l. ("the Workers") contested the determinations of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") and alternative trade adjustment assistance ("ATAA"). The determinations at issue included the Labor Department's original denial of the Workers' petition, as well as the agency's denial of the Workers' request for reconsideration, and the agency's negative determination following a voluntary remand. *See* 72 Fed. Reg. 7907, 7909 (Feb. 21, 2007) (notice of denial of petition); 72 Fed. Reg. 15,169 (March 30, 2007) (notice of denial of request for reconsideration); 73 Fed. Reg. 32,739 (June 10, 2008) (notice of negative determination on voluntary remand, or "Remand Determination").

Invista I reviewed the Workers' challenge to the Labor Department's negative Remand Determination (*i.e.*, the negative determination in the voluntary remand proceeding), and remanded this matter to the agency for a second time. *See Former Employees of Invista, S.a.r.l. v. U.S. Sec'y of Labor*, 33 CIT ____, 626 F. Supp. 2d 1301 (2009) ("*Invista I*"). As a result of the investigation in the course of the second remand, the Labor Department granted the Workers' Petition, amending the agency's 2004 TAA/ATAA certification of Invista workers to cover the Workers at issue here. *See* Notice of Revised Determination on Remand, 74 Fed. Reg. 51,195 (Oct. 5, 2009) ("Second Remand Determination"); Supplemental Administrative Record ("Second Supplemental Administrative Record"). That determination was sustained in *Invista II*. *See Former Employees of Invista, S.a.r.l. v. U.S. Sec'y of Labor*, 33 CIT ____, 657 F. Supp. 2d 1359 (2009) ("*Invista II*").[1]

[1] The administrative record in this action consists of three parts — the initial Administrative Record, which the Labor Department filed after this action was commenced; the Supplemental Administrative Record, which was filed after the agency's negative determination on remand; and a second Supplemental Administrative Record (the "Second Supplemental Administrative Record"), which was filed with the Second Remand Determination.

Expressing concern that much of the information in the administrative record that had been designated "confidential" by the Labor Department in fact was not confidential, *Invista II* instructed the Labor Department to review and resubmit the entire administrative record, including specific justification (with citations to appropriate legal authority, and supported by the requisite factual showings) for each proposed redaction. *See Invista II*, 33 CIT at ____ n.1, 657 F. Supp. 2d at 136061 n.1. The Government has now made that

Now pending before the Court is Plaintiffs' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act, seeking an award in the sum of $13,463.20,[2] which the Government opposes. *See* Plaintiffs' Memorandum of Law in Support of Equal Access to Justice Act Application ("Pls.' EAJA Application"); Defendant's Response to Plaintiffs' Application for Attorney Fees and Expenses ("Def.'s Response").

For the reasons set forth below, Plaintiffs' Application for Fees and Other Expenses must be granted.

II.
Background

As *Invista II* noted, "[t]his should have been a relatively easy case for the Labor Department. The agency previously certified former Invista employees who did *the same jobs* at *the same plant* as the Workers at issue here." *See Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1361 (*citing Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1305). The only significant issue which the Labor Department had to resolve in this case was whether the termination of these Workers was "attributable to the basis for [the 2004 TAA/ATAA] certification" — that is, whether the termination of these Workers was "attributable to" the 2004 shift of production to Mexico.[3] *See, e.g.*, Weirton Steel Corporation, Weirton, WV: Negative Determination on Remand, 73 Fed. Reg. 52,066, 52,068 (Sept. 8, 2008) ("Weirton Steel") (articulating standard

submission. *See* Defendant's Filing Pursuant to the Court's October 9, 2009 Order. Although the merits of some of the Government's arguments concerning confidentiality are questionable, the resubmitted administrative record itself complies with the instructions in *Invista II*. In addition, the Government advises that it is working to identify "ways that [the Labor Department's] Trade Adjustment Assistance ('TAA') procedures for obtaining and filing confidential information in Court proceedings may be improved in the future." *Id*. at 2.

Even as resubmitted, however, all three parts of the record include confidential business information. Therefore, both public and confidential versions of all three parts of the record have been filed with the court. References herein to the public version of the initial Administrative Record (as resubmitted) are noted as "A.R. ____"; references to the public version of the Supplemental Administrative Record (as resubmitted) are noted as "S.A.R. ____"; and references to the public version of the Second Supplemental Administrative Record (as resubmitted) are noted as "S.S.A.R. ____." There are no cites to the confidential record herein.

[2] As discussed in section II.B below, this figure does not include a cost of living adjustment.

[3] In its Response, the Government repeatedly states that the issue before the Labor Department was whether "plaintiff's jobs . . . were . . . shifted to Mexico." *See* Def.'s Response at 15; *see also id*. at 12 (same); *id*. at 13 (same). However, the Government simply has it wrong. As discussed in greater detail below, no one ever contended that the *plaintiff Workers' jobs* had shifted to Mexico. Instead, the issue in this case was whether the termination of these Workers in early 2007 was "attributable to" the 2004 shift of production to Mexico, so as to warrant the amendment of the agency's 2004 TAA/ATAA certification to cover the Workers here.

for amendment of TAA/ATAA certification to extend period of coverage to include worker separations occurring after expiration date of original TAA/ATAA certification).[4] The Labor Department nevertheless required "four bites at the apple" to conduct the thorough investigation mandated by statute, delaying for more than two and a half years the Workers' certification for the TAA/ATAA benefits to which the Labor Department ultimately determined they are entitled. *See Invista II*, 33 CIT at ____, ____, 657 F. Supp. 2d at 1361, 1364–65 (citations omitted).

As detailed in *Invista I* and *Invista II*, the plaintiff Workers in this case are former employees of the Nylon Apparel Filament Fibers Group at Invista's Chattanooga, Tennessee plant. At the time of their termination on January 31, 2007, they processed orders for apparel fiber in support of apparel fiber production at an Invista plant in Mexico. Apparel fiber had previously been manufactured at the Chattanooga plant, until domestic production ceased and all such production was shifted to a facility in Mexico in 2004. Since the 2004 shift of production, only nylon performance filament fiber ("performance fiber") has been produced at the Chattanooga plant. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1305; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1361.

The 2004 shift of production to Mexico led to widespread layoffs of production workers and support personnel at the Chattanooga plant. At that time, Invista management filed a petition for TAA and ATAA benefits on behalf of the terminated workers, which the Labor Department granted. Specifically, the Labor Department's 2004 certification certified as eligible for TAA and ATAA all Invista workers "engaged in *employment related to the production of*," *inter alia*, apparel fiber "who became totally or partially separated from employment on or after June 7, 2003, through two years from the date of certification [*i.e.*, two years from August 20, 2004]." *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1305–06 (*quoting* 69 Fed. Reg. 54,320, 54,321 (Sept. 8, 2004)) (emphasis added); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1361.

The Workers at issue here survived the 2004 layoffs, and continued their work at the Chattanooga site in support of apparel fiber production, even after that production shifted to Mexico. However, on November 14, 2006 — a mere three months after the Labor Depart-

[4] For further explanation of the Labor Department's practice of amending TAA/ATAA certifications, *see generally United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers v. U.S. Sec'y of Labor*, 33 CIT ____, ____, 2009 WL 1175654 at * 3–8 (2009) ("*Steelworkers II*"); *see also Invista I*, 33 CIT at ____ & n.5, 626 F. Supp. 2d at 1309 & n.5 (citing various cases involving requests to amend certifications to extend certification period).

ment's 2004 TAA/ATAA certification expired — the Workers were notified that they were being terminated effective January 31, 2007. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1361.

Shortly thereafter, Invista's Chattanooga Plant Manager filed the TAA/ATAA petition at issue here, on behalf of the Workers. In the TAA/ATAA Petition, Invista's Plant Manager attested, under oath, that the Workers' terminations were "a continuation of the shift in production to Mexico as described in [the 2004 TAA/ATAA certification] that expired August 20, 2006." *See* A.R. 2; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. The Plant Manager further explained that — notwithstanding the 2004 shift of production to Mexico — "all orders [for apparel fiber had] continued to be processed from the United States" up to the time of the filing of the 2006 TAA/ATAA Petition, but that, for the future, all such work was being transferred to "CSR's [*i.e.*, Customer Service Representatives] located in South America." *See* A.R. 2; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306 (citation omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. The TAA/ATAA Petition also noted that several of the subject Workers were age 50 or older, that their skills were "not easily transferable," and that "[c]ompetitive conditions within the industry are adverse." *See* A.R. 2; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362.

The Labor Department denied the Workers' TAA/ATAA Petition. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306 (*citing* 72 Fed. Reg. at 7909 (denying TAA/ATAA Petition on grounds that "[t]he workers' firm does not produce an article as required for certification")); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. The Labor Department found that "domestic production of an article within . . . [Invista's] Nylon Apparel Filament Fibers Group [had] ceased more than one year [before]" the Workers' termination, and that the petitioning Workers thus "were not in support of domestic production *within the requisite one year period*" — an allusion to 29 C.F.R. § 90.2, which concerns cases involving allegations of "increased imports" (not "shift of production" cases such as the case at bar). *See* A.R. 31 (emphasis added); 29 C.F.R. § 90.2 (2006)[5]; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. The Labor Department therefore concluded that the Workers could not be "considered import impacted or affected by a shift in production of an article"; and, because the agency determined that the Workers were not eligible for TAA, the Workers'

[5] All citations to regulations are to the 2006 edition of the Code of Federal Regulations.

petition for ATAA was also denied. *See* A.R. 31–32; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. At no time in the course of its initial investigation did the Labor Department consider amending the 2004 TAA/ATAA certification to extend the period of coverage to include the Workers at issue here.

The Workers requested that the Labor Department reconsider its denial of their TAA/ATAA Petition, underscoring that they had "missed the opportunity of receiving . . . [TAA and ATAA] benefits by less than 3 months," and emphasizing that they would have been covered by the 2004 TAA/ATAA certification — and thus would have been eligible for TAA/ATAA benefits — if only Invista management had notified the Workers of their impending terminations "in August, versus November of 2006." *See* A.R. 35–38; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306–07; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362. Significantly, echoing a point made by Invista's Chattanooga Plant Manager in the TAA/ATAA Petition, the Workers' Request for Reconsideration stated that their layoffs were, in effect, the culmination of the 2004 shift of production of apparel fiber to Mexico — the "direct result of the . . . apparel machines going to Mexico, the loss of textile manufacturing in the U.S. the bigger picture." *See* A.R. 36; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362.

Notwithstanding the statements in the Workers' Request for Reconsideration linking their termination to Invista's 2004 shift of production, the Labor Department again gave no consideration to amending the 2004 TAA/ATAA certification to extend the period of coverage to include the Workers here. Instead, the Labor Department denied the Workers' Request for Reconsideration, with no further investigation whatsoever. *See* 72 Fed. Reg. at 15,169. The Labor Department acknowledged the Workers' claim that their termination was "a direct result of the same shift in production to Mexico . . . which resulted in workers certification for TAA in 2004." *See* A.R. 45; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1362–63. However, the Labor Department stated that, pursuant to agency regulations, it only "considers production that occurred one year prior to the date of the petition" — once again alluding to 29 C.F.R. § 90.2 (even though, on its face, the referenced provision of the regulation is limited to cases involving "increased imports," and has nothing to do with "shift of production" cases like this). *See* A.R. 46; 29 C.F.R. § 90.2; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363. The Labor Department

concluded that, because the Chattanooga plant had ceased production of apparel fiber in 2004, the Workers' TAA/ATAA Petition was "outside of the relevant period." *See* A.R. 46; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.

This action followed. The Workers sought judgment on the agency record, arguing, *inter alia*, that the Labor Department had denied the Workers' TAA/ATAA Petition based on the agency's determination that the Workers "were not in support of domestic production within the requisite one year period," but that the agency had failed to identify the authority for any such asserted one-year limitation. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363. In addition, the Workers faulted the Labor Department for "fail[ing] to adequately consider the relevancy of the prior [TAA/ATAA] certification." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.

Conceding that, by its express terms, the one-year limitation set forth in 29 C.F.R. § 90.2 applies only in cases where layoffs result from "increased imports," the Government sought — and was granted — a voluntary remand to permit the Labor Department to consider in the first instance the relevance of 29 C.F.R. § 90.2's "one-year rule" in "shift of production" cases such as this. *See* 29 C.F.R. § 90.2 (defining "increased imports" by reference to a "representative base period" which is "one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of the petition"); *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted); *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.

In its Negative Determination on Remand (the determination at issue in *Invista I*), the Labor Department abandoned its reliance on the one-year time limitation in 29 C.F.R. § 90.2. Instead, the Labor Department denied the Workers' TAA/ATAA claims based on the agency's determination that the Workers' terminations "[were] not related to the shift of production of apparel nylon filament to Mexico in 2004," but, rather, were the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization." *See* 73 Fed. Reg. at 32,739; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.[6]

[6] In light of its conclusion that "the shift of production to a foreign country was not a cause of the workers' separations," the Labor Department reserved judgment as to "the impact of the fact that no production took place at the subject firm during the twelve month period prior to the filing of the petition." *See* 73 Fed. Reg. at 32,740; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307–08; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.

The principal evidence supporting the Labor Department's finding was the conclusory statement of an Invista lawyer, who attributed the Workers' termination not to "the decision made in 2004 to stop production of Nylon Apparel at the Chattanooga Site," but rather to "a business decision to improve the efficiency of the customer service organization." *See* S.A.R. 18; *see also Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309–10. Although the statement of the Invista lawyer was in direct conflict with other evidence already on the record — including, most notably, the sworn statement of Invista's Chattanooga Plant Manager — the Labor Department made no attempt to reconcile the inconsistency. *Compare*, *e.g.*, A.R. 2 (Invista Plant Manager's sworn statement attesting that the Workers' terminations were "a continuation of the [2004] shift in production to Mexico") *with* S.A.R. 18 (unsworn statement of Invista lawyer, asserting that Workers' separations were not attributable to 2004 shift of production). Nor did the Labor Department articulate any rationale for its decision to credit the statement on which it relied and to disregard the other, conflicting record evidence. Because the Labor Department determined that the Workers were not eligible for TAA, their petition for ATAA was denied as well. *See* 73 Fed. Reg. at 32,740; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1308; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1363.

The Workers' renewed challenge to the Labor Department's denial of their TAA/ATAA Petition was the subject of *Invista I*. *Invista I* addressed in detail the Labor Department's affirmative obligation to investigate TAA/ATAA claims "with the utmost regard for the interests of the petitioning workers." *See generally Invista I*, 33 CIT at ____, ____, 626 F. Supp. 2d at 1304–05, 1308 (*citing Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d 26, 31 (1st Cir. 1981); *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT 1315, 1321, 454 F. Supp. 2d 1306, 1312 (2006) ("*BMC I*") (collecting additional cases)).[7] *Invista I* explained that, in a case such as this, where there is a potentially relevant prior TAA/ATAA certification, the Labor Department must consider the

[7] *See also*, *e.g.*, *Former Employees of Warp Processing Co. v. U.S. Dep't of Labor*, 33 CIT ____, ____, 2009 WL 424491 at * 2 (2009) (underscoring agency obligation to conduct TAA investigations with "the utmost regard" for interests of petitioning workers); *Former Employees of Welex, Inc. v. U.S. Sec'y of Labor*, 32 CIT ____, ____, ____, ____, 2008 WL 7020688 at * 2, 9, 13 (2008) (same); *Former Employees of Elec. Mobility Corp. v. U.S. Sec'y of Labor*, 32 CIT ____, ____, 2008 WL 7020689 at * 5 (2008) (same); *Former Employees of Fairchild Semi-Conductor Corp. v. U.S. Sec'y of Labor*, 32 ____, ____, 2008 WL 1765519 at * 3 (2008) (same); *Chen v. Chao*, 32 CIT ____, ____, 587 F. Supp. 2d 1292, 1298 (2008) (same); *Former Employees of Joy Techs., Inc. v. U.S. Sec'y of Labor*, 31 CIT 1835, 1842, 523 F. Supp. 2d 1369, 1377 (2007) (same).

possibility of doing what it has done in other, similar cases — that is, the Labor Department must consider amending the prior certification to extend coverage to the new group of petitioning workers. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309; *see also Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364.

Invista I observed that the administrative record in this case was replete with evidence supporting the Workers' claim that their terminations were "attributable to the basis for [the original, *i.e.*, the 2004] certification" — that is, the 2004 shift of apparel fiber production to Mexico; and, moreover, that the evidence to the contrary (including, in particular, the statement of the Invista lawyer) was "not only scant, but also weak." *See Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309–10 (*quoting* Weirton Steel, 73 Fed. Reg. at 52,068). As *Invista I* noted, the Labor Department's own standards required the Workers' certification if there was a "causal nexus" between the 2004 shift of production and their terminations, notwithstanding the fact that the terminations occurred more than two years after the original 2004 TAA/ATAA certification (and thus after the original 2004 TAA/ATAA certification had expired). *See id*., 33 CIT at ____, 626 F. Supp. 2d at 1311 (*quoting* Weirton Steel, 73 Fed. Reg. at 52,068); *see also id*., 33 CIT at ____, 626 F. Supp. 2d at 1309.

Invista I therefore remanded this matter to the Labor Department for a second time, with instructions requiring the agency to "thoroughly and independently investigate the facts of the case, and — based on that investigation — . . . [to] consider all legal theories under which the petitioning Workers might be eligible for certification, including the possible amendment of the 2004 TAA/ATAA certification." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311; *see also Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364.

Remarkably, in the second remand proceeding, it took just *a single phone call* between the Labor Department and a senior representative of Invista to confirm what Invista's Chattanooga Plant Manager and the Workers themselves had been telling the agency for more than two and a half years — that is, that the Workers' termination was a direct (albeit delayed) result of Invista's 2004 shift of apparel fiber production to Mexico (which, in turn, was the basis for the Labor Department's 2004 TAA/ATAA certification of the Workers' former Invista colleagues). *See Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364 (*citing* S.S.A.R. 45, 69–71 (documenting Aug. 21, 2009 phone call)). As a result of that phone conversation, the Labor Department reversed its three prior denials and granted the Workers' TAA/ATAA Petition, extending the agency's 2004 certification of eligibility to

apply for both TAA and ATAA to cover the Workers here. *See* 74 Fed. Reg. 51,195–96; *Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364–65.

III. *Analysis*

Under the Equal Access to Justice Act ("EAJA"):

> [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 . . . , including proceedings for judicial review of agency action, brought by or against the United States . . . , 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) (2000).[8] Thus, although the court retains a measure of discretion as to the size of the award, under the EAJA "a trial court *must* award attorney's fees where: (i) the claimant is a 'prevailing party'; (ii) the government's position was not substantially justified; (iii) no 'special circumstances make an award unjust'; and (iv) the fee application is timely submitted and supported by an itemized statement." *Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) (citations omitted) (emphasis added) (also noting "the imperative language" of EAJA statute); *accord Hubbard v. United States*, 480 F.3d 1327, 1331 (Fed. Cir. 2007) (acknowledging "mandatory" nature of EAJA award); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002) (same).[9]

The Government here does not dispute that the Workers were "prevailing parties." Nor does the Government argue either that there are "special circumstances" that would render an award unjust,[10] or that the Workers' application for fees and expenses was

[8] Except as otherwise indicated, all statutory citations are to the 2000 edition of the United States Code.

[9] The Government effectively *reverses* the applicable standard, asserting that "[t]he EAJA allows an award of attorney fees and other expenses to a prevailing party *only if the Court determines that the position taken by the Government was not substantially justified* . . . ." *See* Def.'s Response at 8 (emphasis added). However, to prevail here, the Workers are not required to prove that the Government's position *was not* "substantially justified." Rather, the Government must prove that its position *was* "substantially justified." *See, e.g.*, *Libas*, 314 F.3d at 1365 (citations omitted). If the Government fails to carry that burden, the trial court "*must* award attorney's fees . . . ." *Libas*, 314 F.3d at 1365 (citations omitted) (emphasis added).

[10] The EAJA's "special circumstances" exception to an award of fees and expenses serves as a "'safety valve' [which] helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." *Devine v. U.S. Customs Service*, 733 F.2d 892, 895–96 (Fed. Cir. 1984) (*quoting* H.R. Rep. No. 1418, 96th

untimely or excessive. The Government's opposition to the Workers' request for an award of fees and expenses thus rests entirely on its contention that the United States' position was "substantially justified," both at the agency level and in litigation. *See generally* Def.'s Response at 1 (explaining that Government "challenge[s] neither plaintiffs' prevailing party status, nor the reasonableness of the amount of fees they seek," and bases its opposition to an award of fees and expenses solely on its position that "the Government's position in this matter was substantially justified").

As discussed in greater detail below, the United States' position at the administrative level, at a minimum, was not "substantially justified." The Workers are therefore entitled to an award of attorneys' fees and expenses under the EAJA.

A. *Whether the Government's Position Was "Substantially Justified"*

The Government bears the burden of proving that its position was "substantially justified." *See, e.g.*, *Libas*, 314 F.3d at 1365 (citations omitted); *Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995) (citations omitted). To be "substantially justified," the Government's position must be "justified in substance or in the main — that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). That a party other than the Government prevailed in an action does not establish that the Government's position was not substantially justified. *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988).

In determining whether substantial justification exists, a court is to weigh not only "the position taken by the United States in the civil action, [but also] the action or failure to act by the agency upon which the civil action is based," taking into consideration the "totality of the circumstances." 28 U.S.C. § 2412(d)(2)(D); *Kelly v. Nicholson*, 463 F.3d 1349, 1355 (Fed. Cir. 2006); *Doty*, 71 F.3d at 385–86 (citations omitted); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) ("trial courts are instructed to look at the entirety of the government's conduct and make a judgment call" as to "the government's overall position"); *Essex Electro Eng'rs, Inc. v. United States*, 757 F.2d 247, 253 (Fed. Cir. 1985) (articulating "totality of the circumstances" standard).

Cong., 2d Sess. 11, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990). *See, e.g.*, *Taylor v. United States*, 815 F.2d 249, 252 (3d Cir. 1987) (explaining that "special circumstances" provision permits consideration of traditional equitable principles in determining whether fee award is warranted); *Oguachuba v. Immigration & Naturalization Service*, 706 F.2d 93, 98 (2d Cir. 1983) (same).

Reaching a determination on substantial justification requires that a court reexamine the legal and factual circumstances of a case through the EAJA "prism" — "a different perspective than that used at any other stage of the proceeding." *Luciano Pisoni*, 837 F.2d at 467; *Libas*, 314 F.3d at 1366 (*quoting United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000)). Nevertheless, "the court's merits reasoning may be quite relevant to the resolution of the substantial justification question." *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996). And strong language criticizing the Government's position in an opinion discussing the merits of a key issue is evidence in support of an award of fees. *See Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir. 1994) (*cited in Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004)). "[A] string of losses can be indicative" as well. *Pierce v. Underwood*, 487 U.S. at 569.

Moreover, in evaluating the existence of substantial justification, a trial court is entitled to take into consideration "insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." *Pierce v. Underwood*, 487 U.S. at 560; *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting propriety of deference to trial court's "superior understanding of the litigation") (*quoted in Comm'r, Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 161 (1990)); *Libas*, 314 F.3d at 1366 n.1 (in determining substantial justification, trial court may consider "not only the actual record," but also "for example, any insights which [it] may have gleaned from settlement conferences or other pretrial activities that are not conveyed by the actual record") (*citing Pierce v. Underwood*, 487 U.S. at 560).[11]

1. *The Role of the Labor Department in TAA Cases*

The "substantial justification" analysis in this action cannot be conducted in a vacuum. The justification for the Government's position instead must be analyzed in the context of the trade adjustment

[11] *Accord Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1256, 1257 (10th Cir. 2005) (noting that trial court enjoys "the benefit of a degree of familiarity with trial court proceedings [the appellate court] cannot hope to match," and that trial court has an "inherent advantage in passing on a fee request given its familiarity with the proceedings below"); *Interfaith Community Organization v. Honeywell Int'l*, 426 F.3d 694, 718 (3d Cir. 2005) (deferring to trial court's "far greater understanding of the deadlines it imposed and the complexity of the underlying litigation"); *Lyden v. Howerton*, 731 F. Supp. 1545, 1553 (S.D. Fla. 1990) (noting, in analysis of "substantial justification," that "[o]ften times, as here, the published record of the case does not reveal the full aura and nuances of the litigation. Although the court finds that the public record justifies finding the government without substantial justification in both law and fact, the history, procedure, and the historical context, specifically within this court's knowledge, buttresses this conclusion.").

assistance ("TAA") statute, and the special duties and obligations that the Labor Department owes to workers in its administration of that statute. *See generally BMC I*, 30 CIT at 1315–22, 454 F. Supp. 2d at 1307–13 (summarizing policy underpinnings, legislative history, and practical implications of TAA).

The TAA laws are remedial legislation,[12] designed to assist workers who have lost their jobs as a result of increased import competition from — or shifts in production to — other countries, by helping those workers "learn the new skills necessary to find productive employment in a changing American economy." *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT 1272, 1273, 245 F. Supp. 2d 1312, 1317 (2002) (*quoting* S. Rep. No. 100–71, at 11 (1987)).

The TAA program entitles eligible workers to receive benefits which may include employment services (such as career counseling, resume-writing and interview skills workshops, and job referral programs), vocational training, job search and relocation allowances, income support payments (known as "Trade Readjustment Allowance" or "TRA" payments), and a Health Insurance Coverage Tax Credit. *See generally* 19 U.S.C. § 2272 *et seq*. (2000 & Supp. II 2002). In addition, one of the newer features is the wage insurance benefit for older workers, known as Alternative Trade Adjustment Assistance ("ATAA"). ATAA allows eligible workers age 50 or older, for whom retraining may not be appropriate, to accept reemployment at a lower wage and receive a wage subsidy. *See, e.g.*, *Invista I*, 33 CIT at ____ n.2, 626 F. Supp. 2d at 1304 n.2; *BMC I*, 30 CIT at 1318 n.5, 454 F. Supp. 2d at 1309 n.5.[13]

TAA benefits historically have been viewed as the *quid pro quo* for U.S. national policies of free trade. *See generally BMC I*, 30 CIT at 1316, 454 F. Supp. 2d at 1307–08 (and authorities cited there). As

[12] *See, e.g.*, *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1301 (Fed. Cir. 2004) (Mayer, C.J., dissenting) (emphasizing "remedial" nature of TAA statute); *UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978) (noting "general remedial purpose" of TAA statute, and that "remedial statutes are to be liberally construed" to effectuate their intended purpose); *Fortin v. Marshall*, 608 F.2d 525, 526, 529 (1st Cir. 1979) (same); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 500, 502 (1st Cir. 1977) (highlighting "remedial" purpose of TAA statute); *BMC I*, 30 CIT at 1320–21 & n.9, 454 F. Supp. 2d at 1311 & n.9 (collecting additional cases) (explaining that TAA laws are "remedial legislation" to be "construed broadly to effectuate their intended purpose"); *see also Fairchild Semi-Conductor Corp.*, 32 CIT at ____, 2008 WL 1765519 at * 3 (same); *Chen v. Chao*, 32 CIT at ____, 587 F. Supp. 2d at 1301 (noting "remedial purpose" of TAA statute); *Welex*, 32 CIT at ____, 2008 WL 7020688 at * 2 (stating that TAA laws are "remedial legislation and, as such, are to be construed broadly"); *Former Employees of Merrill Corp. v. United States*, 31 CIT 415, 426, 483 F. Supp. 2d 1256, 1266 (2007) (explaining that "courts liberally construe the TAA provisions of the Trade Act to effectuate legislative intent").

[13] *See generally Former Employees of Independent Steel Castings Co. v. U.S. Dep't of Labor*, 31 CIT 1172 (2007) (and authorities cited there) (discussing policy underpinnings of, and

UAW v. Marshall explains, "much as the doctrine of eminent domain requires compensation when private property is taken for public use," the trade adjustment assistance laws similarly reflect the country's recognition "that fairness demand[s] some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a [job] loss." *UAW v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978). Absent TAA programs that are adequately funded and conscientiously administered,[14] "the costs of a federal policy [of free trade] that confer[s] benefits on the nation as a whole would be imposed on a minority of American workers" who lose their jobs due to increased imports and shifts of production abroad. *Id*.[15]

> The TAA laws also have been compared to veterans' benefits statutes:
>
> > The purpose of the [TAA statute] is to distribute benefits to American workers whose jobs have been shipped overseas, while the purpose of the [veterans' benefits laws] . . . is to distribute benefits to veterans who have been injured during service. Both are remedial acts designed to provide much needed aid.
>
> *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1301 (Fed. Cir. 2004) (Mayer, C.J., dissenting).
>
> The analogy is an apt one. "[M]uch as Congress has charged the U.S. Department of Veterans Affairs . . . ('VA') with caring for those

eligibility criteria for, ATAA; noting, *inter alia*, that ATAA wage subsidy "is clearly designed to encourage older workers who might have difficulty finding reemployment that utilizes their existing skill-sets to quickly reenter the labor market by accepting lesser-paying jobs").

[14] *BMC I* quoted a *Wall Street Journal* article which emphasized the importance of conscientious implementation of the TAA program:

> Calling attention to workers hurt by trade is uncomfortable for free traders. They prefer to focus on benefits of low-cost imports and high-paying export jobs. But the only way to persuade the public and politicians not to erect barriers to globalization and trade is to equip young workers to compete and protect older workers who are harmed. Creating programs with a few votes in Congress, and then *botching the execution*, doesn't help.

David Wessel, "Aid to Workers Hurt by Trade Comes in Trickle," *Wall Street Journal*, Aug. 11, 2005, at A2 (emphasis added) (*quoted in BMC I*, 30 CIT at 1370 n.84, 454 F. Supp. 2d at 1355 n.84).

[15] Indeed, in introducing TAA in 1962, President Kennedy justified the program in moral terms:

> Those injured by [trade] competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the federal government . . . [T]here is an obligation to render assistance to those who suffer as a result of national trade policy.

BMC I, 30 CIT at 1318, 454 F. Supp. 2d at 1309 (citation omitted).

who have risked life and limb for our freedom, so too Congress has entrusted to the Labor Department the responsibility for providing training and other re-employment assistance to those who have paid for our place in the global economy with their jobs." *BMC I*, 30 CIT at 1370, 454 F. Supp. 2d at 1355 (footnote omitted); *compare*, *e.g.*, 38 U.S.C. § 5103A (captioned "Duty to assist claimants," obligating VA to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim" for veterans' benefits)[16] *with* 29 C.F.R. § 90.12 (Labor Department is obligated to "marshal all relevant facts" in making its TAA determinations).[17]

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[16] *See generally Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991) ("duty-to-assist" and "benefit-of-the-doubt" doctrines embodied in VA law "spring from a general desire to protect and do justice to the veteran who has, often at great personal cost, served our country"), *overruled on other grounds*, *Kuzma v. Principi*, 341 F.3d 1327, 1328–29 (Fed. Cir. 2003).

See also Littke v. Derwinski, 1 Vet. App. 90, 91–92 (1991) (characterizing "VA's duty to assist the veteran in developing the facts pertinent to his or her claim" as the "cornerstone of the veterans' claims process," and emphasizing that "[t]he 'duty to assist' is neither optional nor discretionary"); *Godwin v. Derwinski*, 1 Vet. App. 419, 425 (1991) (once veteran presents plausible claim, burden shifts to VA to assist veteran in developing "*all* relevant facts, not just those for or against the claim"); *Murincsak v. Derwinski*, 2 Vet. App. 363, 370 (1992) (same); 38 C.F.R. § 3.103(a) (VA Statement of Policy, which acknowledges: "Proceedings before VA are *ex parte* in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.").

As *Littke* correctly observes:

> By assisting the claimant in developing pertinent facts, from whatever source, . . . the VA will more adequately fulfill its statutory and regulatory duty to assist the veteran. A well developed record will ensure that a fair, equitable and procedurally correct decision on the veteran's claim for benefits can be made.

Littke, 1 Vet. App. at 92. The same can be said of the Labor Department in TAA cases.

[17] *See also, e.g.*, *Woodrum v. Donovan*, 4 CIT 46, 55, 544 F. Supp. 202, 208–09 (1982) ("the [TAA statute] requires the Secretary of Labor to conduct an investigation of each properly filed petition"); *Former Employees of IBM Corp., Global Services Division v. U.S. Sec'y of Labor*, 29 CIT 951, 955, 387 F. Supp. 2d 1346, 1351 (2005) (rejecting Labor Department's argument that because the workers did not allege certain facts, agency was not obligated to make further inquiry, and holding that — to the contrary — "*it is incumbent upon Labor to take the lead* in pursuing the relevant facts") (emphasis added); *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 129, 814 F. Supp. 1111, 1114 (1993) (Labor Department "has an *affirmative duty* to investigate" whether petitioning workers are eligible for TAA benefits) (citations omitted) (emphasis added); *Former Employees of Sun Apparel of Texas v. U.S. Sec'y of Labor*, 28 CIT 1389, 1399 (2004) ("Labor is under a *mandatory duty* to 'conduct an investigation into each properly filed petition'") (citation omitted) (emphasis added); *Former Employees of Ameriphone, Inc. v. United States*, 27 CIT 1161, 1167, 288 F. Supp. 2d 1353, 1359 (2003) (Labor Department "has an *affirmative obligation* to conduct its own independent 'factual inquiry into the nature of the work performed by the petitioners'"); *Chevron*, 26 CIT at 1284–85, 245 F. Supp. 2d at 1327–28 (same).

And just as veterans' benefits programs are designed to be extraordinarily "veteran-friendly" and "pro-claimant,"[18] so too Congress designed TAA as a *remedial* program, recognizing that petitioning workers would be (by definition) traumatized by the loss of their livelihood; that some might not be highly-educated; that virtually all would be *pro se*; that none would have any mastery of the complex statutory and regulatory scheme; and that the agency's process would be largely *ex parte*. Congress certainly did not intend the TAA petition process to be adversarial. Nor did Congress intend to cast the Labor Department as a "defender of the fund,"[19] sitting passively in judgment, ruling "thumbs up" or "thumbs down" on whatever evidence the *pro se* petitioning workers might manage to present. *Cf. Former Employees of IBM Corp., Global Services Division v. U.S. Sec'y of Labor*, 29 CIT 951, 956, 387 F. Supp. 2d 1346, 1351 (2005) (emphasizing that petitioning workers cannot reasonably be expected to have knowledge of the "sometimes esoteric criteria" for TAA certification).[20]

Quite to the contrary, the Labor Department is charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA claims filed with the agency — and, in the words of the agency's own regulations, to "marshal all relevant facts" before making its

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[18] *See Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998) (emphasizing that the courts "have long recognized that the character of the veterans' benefit statutes is strongly and uniquely pro-claimant"; noting that "Congress itself has recognized and preserved the unique character and structure of the veterans' benefits system," and highlighting legislative history reflecting Congressional intent to maintain "historically non-adversarial system of awarding benefits to veterans"); *Kelly v. Nicholson*, 463 F.3d at 1353 (referring to veterans' benefits system as "uniquely pro-claimant").

[19] *Compare* 38 C.F.R. § 3.103(a) ("it is the obligation of VA . . . to render a decision *which grants every benefit that can be supported in law while protecting the interests of the Government*") (emphasis added); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (emphasizing that "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them") (citation omitted).

[20] *See also Lady Kelly, Inc. v. U.S. Sec'y of Agriculture*, 30 CIT 186, 190, 427 F. Supp. 2d 1171, 1175 (2006) (noting that, in authorizing TAA programs, "Congress has erected an administrative regime to disburse benefits to a class of sympathetic plaintiffs with relatively little sophistication in matters of federal litigation"); *Lady Kelly, Inc. v. U.S. Sec'y of Agriculture*, 30 CIT 82, 84, 414 F. Supp. 2d 1298, 1300 (2006) (observing "the lack of legal sophistication of many TAA plaintiffs").

Compare Akles v. Derwinski, 1 Vet. App. 118, 121 (1991) (rejecting as absurd and inconsistent with agency's "duty to assist" the VA's argument that a claimant should be obligated to "specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits"; contrary to agency's contention, *claimants should not be required "to develop expertise in laws and regulations on veterans benefits* before receiving any compensation") (emphasis added).

determinations. *See* 29 C.F.R. § 90.12.[21] Moreover, both "[b]ecause of the *ex parte* nature of the certification process, and the remedial purpose of the [TAA] program," the agency is obligated to "conduct [its] investigation with *the utmost regard* for the interest of the petitioning workers." *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d at 31 (emphasis added); *see also Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (*citing Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quotations omitted)); *Former Employees of Int'l Business Machines Corp. v. U.S. Sec'y of Labor*, 29 CIT 1360, 1362, 403 F. Supp. 2d 1311, 1314 (2005) ("*IBM I*") (*quoting Stidham*); *Former Employees of Computer Sciences Corp. v. U.S. Sec'y of Labor*, 29 CIT 426, 433, 366 F. Supp. 2d 1365, 1371 (2005).

Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigation of trade adjustment assistance claims, that discretion is by no means without bounds. Instead, "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993); *see also, e.g.*, *Former Employees of Electronic Data Sys. Corp. v. U.S. Sec'y of Labor*, 29 CIT 1334, 1339, 408 F. Supp. 2d 1338, 1342–43 (2005); *Former Employees of Merrill Corp. v. United States*, 31 CIT 415, 423, 483 F. Supp. 2d 1256, 1264 (2007); *Former Employees of Joy Techs., Inc. v. U.S. Sec'y of Labor*, 31 CIT 1835, 1841, 523 F. Supp. 2d 1369, 1376 (2007); *Former Employees of Welex, Inc. v. U.S. Sec'y of Labor*, 32 CIT ____, ____, 2008 WL 7020688 at * 2 (2008); *Former Employees of Fairchild Semi-Conductor Corp. v. U.S. Sec'y of Labor*, 32 CIT ____, ____, ____, 2008 WL 1765519 at * 3, 5 (2008).

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[21] Indeed, 29 C.F.R. § 90.12 is captioned "Investigation." *See also* 19 U.S.C. § 2271(a) (requiring Labor Department to give notice of initiation of agency "investigation"); *Woodrum v. Donovan*, 4 CIT at 55, 544 F. Supp. at 208–09 (noting that "the [TAA statute] requires the Secretary of Labor to conduct an investigation of each properly filed petition"). The definition of "investigation" — a "detailed examination" or "a searching inquiry," "an official probe" — further underscores the nature of the research and analysis which the Labor Department is required to undertake. *See, e.g.*, *BMC I*, 30 CIT at 1334–35 n.29, 454 F. Supp. 2d at 1324 n.29 (*quoting* Webster's Third New International Dictionary (Unabridged) 1189 (2002)); *accord*, *Welex*, 32 CIT at ____ & n.15, 2008 WL 7020688 at * 9 & n.15 (same). As *BMC I* pointed out:

> The bottom line . . . is that Congress has mandated that the Labor Department "investigate" workers' TAA claims — *not* that those claims be, for example, merely "considered," or "evaluated," or "reviewed."

BMC I, 30 CIT at 1334–35 n.29, 454 F. Supp. 2d at 1324 n.29.

Of course, the statute does not entitle every petitioning worker to be certified as eligible to apply for TAA/ATAA benefits.[22] However, every worker *is* entitled to a *thorough* agency investigation of his or her claim – an investigation in which the Labor Department "marshal[s] all relevant facts," and an investigation which the agency conducts with "the utmost regard" for the petitioning workers' interests. *See, e.g.*, *Former Employees of Ameriphone, Inc. v. United States*, 27 CIT 1611, 1618, 288 F. Supp. 2d 1353, 1359–60 (2003); 29 C.F.R. § 90.12.[23] The courts therefore have not hesitated to set aside agency determinations that were the product of perfunctory investigations. *See generally BMC I*, 30 CIT at 1321–22 & n.10, 454 F. Supp. 2d at 1312–13 & n.10 (cataloguing sampling of opinions criticizing Labor Department's handling of TAA cases); *see also Welex*, 32 CIT at ____, 2008 WL 7020688 at * 2; *Joy Techs.*, 31 CIT at 1842, 523 F. Supp. 2d at 1376.

2. *The Government's Position at the Administrative Level*

The Government maintains that the Labor Department's position at the administrative level was substantially justified because it "was reasonably based upon evidence in the administrative record as it existed at the time, as well as controlling precedent" from the Court of Appeals. Def.'s Response at 6–7. According to the Government, an award of fees and expenses is not warranted because — the Government asserts — the Labor Department "examined the evidence before it, applied what it considered to be the appropriate legal standard, and provided an analysis based upon the facts and law as it understood them." *See* Def.'s Response at 7. However, the Government fails to address a number of salient points.

a. *The Agency's Failure to Consider Amending the 2004 TAA/ATAA Certification*

As a threshold matter, the Labor Department repeatedly failed even to consider — much less investigate — the theory under which the Workers here were ultimately certified. In other words, although Invista's Plant Manager and the Workers themselves emphasized

[22] *See generally United Glass & Ceramic Workers v. Marshall*, 584 F.2d 398, 400 (D.C. Cir. 1978) (quoting legislative history explaining that job losses are not covered by TAA if they "would have occurred regardless of the level of imports, *e.g.*, those resulting from domestic competition, seasonal, cyclical, or technological factors").

[23] *Cf. UAW v. Marshall*, 584 F.2d at 397–98 (remanding case to Labor Department, emphasizing that "[e]ven if a more detailed inquiry does not change the result in this case, the class of those seeking or considering adjustment assistance will be afforded (1) a description of the circumstances that the [agency] believes mandate the choice of the plant as the appropriate subdivision and (2) an explanation why [the agency] holds that opinion.").

from the outset that the terminations at issue were attributable to the 2004 shift of production to Mexico, and although the agency had a practice of amending TAA/ATAA certifications in circumstances comparable to the situation here, the Labor Department nevertheless repeatedly failed to consider the possibility of amending the 2004 TAA/ATAA certification to extend coverage to the Workers in this case — first in the agency's initial investigation, then again in the agency's consideration of the Workers' Request for Reconsideration, and once more in the course of the first remand (*i.e.*, the voluntary remand). *See, e.g.*, A.R. 2 (Plant Manager's sworn statement attesting that the Workers' terminations were "a continuation of the [2004] shift in production to Mexico"); *Invista I*, 33 CIT at ____ & n.5, 626 F. Supp. 2d at 1309 & n.5 (citing sampling of cases where TAA/ATAA certifications were amended in comparable situations).[24]

Only after the agency was specifically instructed to do so did the Labor Department finally consider amending the prior TAA/ATAA certification — and it was on that basis that the agency ultimately certified the Workers. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311 (remanding matter to agency with instructions to, *inter alia*, "consider all legal theories under which the petitioning Workers might be eligible for certification, including the possible amendment of the 2004 TAA/ATAA certification"); 74 Fed. Reg. 51,195 (Second Remand Determination, certifying Workers for TAA/ATAA). Nowhere has either the Labor Department or the Government sought to explain why the agency failed for so long to consider amending the 2004 TAA/ATAA certification until expressly ordered to do so by the court.

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[24] *See also Steelworkers II*, 33 CIT at ____, 2009 WL 1175654 at * 4–8 (discussing agency's history and practice of, and criteria for, amending TAA/ATAA certifications); 29 C.F.R. § 90.17(f) (stating that, "[u]pon 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"); *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers v. U.S. Sec'y of Labor*, 32 CIT ____, ____, 2008 WL 1899990 at * 8 (2008) ("*Steelworkers I*") (noting filing of list of "eleven cases in which Labor [had] amended the expiration date of worker certifications," and surveying range of facts in those cases).

In *Steelworkers II*, the Labor Department stated that it "has and continues to amend the expiration date of certifications when the facts of the case show that the later worker separations [*i.e.*, the terminations occurring after the expiration of the original certification] are *attributable to the basis for* [*the original*] *certification* (the increased imports or shift of production to a foreign country)." *Steelworkers II*, 33 CIT at ____, 2009 WL 1175654 at * 4 (emphasis added). The agency elaborated: "[I]f the [original] certification was based on a shift of production, the petitioning worker group must show that the same shift of production (same article, same country, etc.) was the basis for their separations." *Id*., 33 CIT at ____ n.4, 2009 WL 1175654 at * 4 n.4.

b. *The Agency's Reliance on the One-Year Limitation in 29 C.F.R. § 90.2*

The Labor Department and the Government are similarly silent on the Labor Department's repeated invocation of the one-year limitation in 29 C.F.R. § 90.2, the regulation on which the agency relied in denying the Workers' TAA/ATAA Petition, as well as their subsequent Request for Reconsideration. *See* 72 Fed. Reg. 7907, 7909 (Feb. 21, 2007) (notice of denial of petition); 72 Fed. Reg. 15,169 (March 30, 2007) (notice of denial of request for reconsideration); 29 C.F.R. § 90.2 (specifying one-year limitation applicable in TAA/ATAA cases involving allegations of "increased imports"). However, the pertinent provision of that regulation is expressly and unequivocally limited — *on its face* — to cases where layoffs result from "increased imports." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (summarizing history of case, including Government's request for voluntary remand); 29 C.F.R. § 90.2 (specifying one-year limitation applicable in TAA/ATAA cases involving allegations of "increased imports"). Neither the Labor Department nor the Government has ever sought to argue that the agency was somehow justified in relying on that provision of the regulation in "shift of production" cases such as this. Nor could they credibly do so.[25]

In its response to the Workers' EAJA Application, the Government takes the position that such an award is not appropriate if the agency's "position at the administrative level[] *had a reasonable basis in* both *law* and fact." *See* Def.'s Response at 9–10 (emphases added). Assuming that is in fact a fair statement of the applicable standard, the Government has not made — and cannot make — the requisite showing. As outlined above, there is no dispute that the Labor Department twice rejected the Workers' claims based on an agency regulation which was, on its face, patently inapplicable to the facts of this case, while, at the same time, the agency failed over and over again to even consider (much less investigate) the possibility of amending the prior TAA/ATAA certification to extend coverage to the Workers here — the legal theory under which the Workers were ultimately certified. Given these two flagrant legal errors, there simply can be no claim that there was "a reasonable basis in . . . [the] law" for the Labor Department's position at the administrative level in this case. These grounds alone would warrant a determination that the United States' position was not substantially justified.

[25] As section I above explains, the Labor Department and the Government abandoned reliance on the one year limitation in 29 C.F.R. § 90.2 after this action was filed.

c. *The Record Basis for the Agency's Determinations*

Other aspects of the Government's position are similarly lacking in merit. For example, the Government's constant refrain is that the Labor Department's three negative determinations in this matter — *i.e.*, the agency's initial denial of the Workers' TAA/ATAA Petition, its denial of the Workers' Request for Reconsideration, and its denial following the first (voluntary) remand — were each "reasonably based upon evidence in the administrative record *as it existed at the time*," and that the agency simply "examined the evidence before it" in reaching each of its determinations. *See* Def.'s Response at 6–7 (emphasis added).[26] As discussed above, however, the Labor Department's first two determinations were wrong *as a matter of law*, because they were predicated on a regulatory provision applicable only in cases involving "increased imports." *See* A.R. 31 (denying TAA/ATAA Petition because Workers "were not in support of domestic production" of apparel fiber "within the requisite one year period"); A.R. 45–46 (denying Request for Reconsideration, and affirming basis for original denial); 29 C.F.R. § 90.2. Accordingly, at least with respect to the first two of the Labor Department's four investigations, it is of no moment whether or not the agency's determinations were, as the Government claims, "based upon [the] evidence in the administrative record as it existed at the time." *See* Def.'s Response at 6–7. As a practical matter, the Labor Department's legal error in erroneously

[26] *See also, e.g.*, Def.'s Response at 10 (arguing that "Labor examined the evidence before it"); *id*. at 11 (arguing that "Labor relied upon record evidence" to determine that Workers' terminations were not related to 2004 shift of production to Mexico); *id*. at 11 n.2 (arguing that "substantial evidence in the administrative record demonstrated that the shift of production to a foreign country was not a cause of the workers' separation"); *id*. at 12 (arguing that agency's denial of certification was substantially justified "*based upon the record before Labor at the time*") (emphasis in original); *id*. at 13 (arguing that "Labor was . . . substantially justified in relying only upon the existing evidence in the record to make its determination"); *id*. at 14 (arguing that "Labor is bound to make its decisions based upon the record before it," and that "Labor was reasonable in relying only upon the record evidence in making its determination"); *id*. at 15 (arguing that "substantial evidence supported each of Labor's determinations in this case," and that agency's determination was reasonable based "[o]n the record before Labor *at the time it made its determination*") (emphasis in original).

The Government similarly asserts that its litigation position was substantially justified, because it "relied upon the evidence in the administrative record in defending Labor's determination." Def.'s Response at 15; *see also id*. at 16 (arguing that Government "contended that Labor's determination, *based upon the record at the time*, was supported by substantial evidence," and that Government's contentions "constituted a reasonable litigation position, given the existing record").

relying on 29 C.F.R. § 90.2 rendered any facts — *i.e.*, the record evidence — immaterial.[27]

Even more fundamentally, the Government's assertion that the Labor Department's determinations were "reasonably based upon evidence in the administrative record *as it existed at the time*" (*see* Def.'s Response at 6–7 (emphasis added)) fails to take into account the Labor Department's basic, affirmative obligation to investigate TAA and ATAA claims. Nowhere does the Government recognize and address the Labor Department's bedrock obligation in TAA/ATAA cases to affirmatively *develop* the administrative record — by "marshal[ing] all relevant facts" and "conduct[ing] [its] investigation with *the utmost regard* for the interest of the petitioning workers." *See generally* section II.A.1, *supra* (summarizing, *inter alia*, agency's affirmative obligation to proactively investigate TAA/ATAA claims); 29 C.F.R. § 90.12 (requiring agency to "marshal all relevant facts" before making determinations in TAA/ATAA cases); *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d at 31 (emphasis added) (recognizing agency's obligation to conduct TAA investigations "with the utmost regard for the interest of the petitioning workers").

"While '[t]he EAJA does not tell an agency how to handle a case,' the agency 'cannot decline to conduct further inquiry and then plead [its] own failure to investigate as reason to conclude that [its] position was substantially justified.'" *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 31 CIT 1600, 1625, 519 F. Supp. 2d 1306, 1312 (2007) ("*BMC II*") (*quoting Hess Mech. Corp. v. NLRB*, 112 F.3d 146, 150 (4th Cir. 1997)). That is, in essence, what the Government and the Labor Department have sought to do here, by attempting to justify the agency's determinations by relying on the administrative record "as it existed at the time," without acknowledging that the agency had an affirmative legal obligation to proactively develop that record. The plaintiff workers in another TAA case cogently underscored this point:

> [I]t is precisely Labor's *failure to investigate* and form a sufficient record that is without substantial justification. . . .

[27] Although the Government asserts broadly that "Labor's position at the administrative level . . . [was] reasonable at each step," and that "the agency's position at the administrative level . . . [was] substantially justified" (*see* Def.'s Response at 8, 10), the Government actually does not specifically defend either the Labor Department's initial determination denying the Workers' TAA/ATAA Petition or the agency's denial of the Workers' Request for Reconsideration. A review of the substance of the Government's argument reveals that its defense of the Labor Department goes solely to the agency's initial Remand Determination. *See generally* Def.'s Response at 10–15.

> . . . If Labor could argue that its legal positions were substantially justified whenever it evaluates what is in the record, no matter how limited or inadequate that record, it would create a dangerous incentive for administrative agencies to engage in even more perfunctory investigations than is already the case. . . .
>
> This absurd result is no straw man. [The Government's] Response admits that Labor essentially chose to stay ignorant of facts that were clearly discoverable through a modicum of investigation. . . .
>
> In essence, [the Government] suggests that Labor's legal positions were substantially justified even though they relied on an administrative record that lacked essential, readily-available information, because the jobless TAA petitioners were responsible for spoon-feeding Labor . . . all relevant information.

BMC II, 31 CIT at 1625 n.27, 519 F. Supp. 2d at 1312 n.27 (emphasis and alterations in the original).

In the case at bar, the Labor Department plainly failed to properly develop the administrative record as to the relationship between the Workers' terminations and the 2004 shift of production to Mexico. The Labor Department based its first two determinations on 29 C.F.R. § 90.2 and the agency's finding that apparel fiber had not been produced at Invista's Chattanooga plant since August 2004. As discussed above, the Labor Department's erroneous application of a "one-year rule" to these facts resulted in the wrongful denial of both the Workers' TAA/ATAA Petition and their Request for Reconsideration. *See* A.R. 31; A.R. 45–46; 29 C.F.R. § 90.2. Relying on the "one year rule," the Labor Department therefore paid no heed to the existing record evidence that the Workers' separations were the direct result of the 2004 shift of production to Mexico (which, in turn, had led to the 2004 TAA/ATAA certification). That evidence was not controverted. *See, e.g.*, A.R. 2 (stating that the Workers' separations were "a continuation of the shift in production to Mexico" which was the subject of the

2004 certification).[28] Similarly uncontroverted was record evidence establishing that the Workers were being replaced by personnel in South America. *See, e.g.*, A.R. 2 (stating that "[t]he Customer Service Representatives (CSR's) losing their job[s] are being replaced by CSR's located in South America").[29]

When the Labor Department's request for a voluntary remand was granted (and the agency abandoned its reliance on 29 C.F.R. § 90.2 and the fact that production of apparel fibers had ceased at the Chattanooga facility more than one year before the Workers' terminations), the Labor Department assertedly sought to focus for the first time on the relationship between the Workers' termination and the 2004 shift of production to Mexico. However, rather than analyzing and further developing the existing ample and uncontroverted record evidence on that point (summarized above), the Labor Department instead opted to premise its remand determination largely on the negative response of an Invista lawyer[30] to a single question

[28] *See also, e.g.*, A.R. 9 (indicating that the "workers are SI [shift-impacted]" and that "[t]he shift impacted the workers"); A.R. 25 (stating that "[t]he shift in production to Mexico did broadly affect workers at the Chattanooga site"); A.R. 26 (indicating that petitioning workers "were part of the [Apparel Fibers Group] and handled sales and marketing of nylon apparel filament (a product that has not been made at the Chattanooga site since August 2004 and is made at the company's facility in Mexico)," and explaining that the petitioning workers "did not perform sales or marketing functions for the [Performance Fibers Group]"); A.R. 27 (stating that petitioning workers "performed sales and marketing for the [Apparel Fibers Group]" and had supported the workers who were covered by the 2004 TAA/ATAA certification); A.R. 35 (disputing Labor Department's determination that Workers "cannot be considered import impacted"; stating that Workers were "kept on to work while the plant was in transition," till shift of production to Mexico was complete); A.R. 36 (stating that the Workers' terminations are "a continuation of the original issue" — *i.e.*, the shift of production to Mexico; emphasizing that "[a]ll the apparel people were let go. This is a direct result of the Type 95 apparel machines going to Mexico, the loss of textile manufacturing in the U.S. the bigger picture"); A.R. 37–38 (stating that Workers' terminations are "a continuation of the original issue," *i.e.*, "the apparel machines going down to Mexico").

[29] *See also* A.R. 3 (explaining that Workers "are being replaced by Customer Service Representatives who are located in South America"); A.R. 21 (stating that "all of the Apparel Customer Service Representatives jobs are going away"); A.R. 29 (noting that Invista official stated that the Workers' positions "were outsourced to Brazil"); A.R. 36 (explaining that, although signatory Worker "was downsized, . . . there were people hired in Brazil to do [her] work"); A.R. 37 (stating that Worker was informed that her job "was being split up; part of it going to Brazil"); A.R. 38 (indicating that, although signatory Worker "was downsized, . . . there were people hired in Brazil to do [the] jobs" that she and her co-Workers had previously done).

[30] The Government refers broadly to this source as "management at Invista," although her title is "Senior Counsel, Labor and Employment." *Compare* Def.'s Response at 11, *and* S.A.R. 6. Neither the Labor Department nor the Government offers any explanation as to why the agency did not accord "management" weight to the statement of the Chattanooga Plant Manager, who — unlike the senior staff attorney here — was clearly part of the ranks of Invista "management," and who attested under oath that the Workers' termination was "a continuation of the [2004] shift in production to Mexico." *See* A.R. 2.

which was framed in terms of the "ultimate fact" to be determined by the agency: "Was the business decision to reorganize the Customer Service Organization [which led to the separation of the Workers here] the result of the shift of production [to Mexico] two years earlier?" *See* S.A.R. 17–18; 73 Fed. Reg. at 32,739–40.[31]

In short, notwithstanding its obligations to conduct its investigation with "the utmost regard" for the interests of the Workers and to "marshal all relevant facts" in reaching its determination on the Workers' TAA/ATAA Petition, the Labor Department ignored all other (previously uncontroverted) evidence of the causal relationship between the Workers' termination and the 2004 shift of production to Mexico, and instead chose to rely on the Invista lawyer's conclusory response to a single question as a basis for denying the Workers' claims yet again. *See* 73 Fed. Reg. at 32,739–40 (concluding that Invista's "shift of nylon apparel filament production to Mexico was not a factor in the subject workers' separations").

Incredibly, *even now*, the Government maintains that there was "no record evidence, at the time, to contradict [the] statement [of the Invista lawyer]." *See* Def.'s Response at 13; *see also id*. at 12 (asserting that, at the time that the Invista lawyer made her statement, "it was not contradicted by any other evidence"). As discussed at some length herein, the statement of the Invista lawyer was squarely contradicted by much of the other record evidence on point — including, in particular, the sworn statement of Invista's Chattanooga Plant

[31] In contrast to the information provided by others (summarized in the text and in notes 28 and 29 above), which indicated that the Workers' terminations indeed were attributable to the 2004 shift of production to Mexico (and, further, that employees in Brazil and elsewhere had taken over the Workers' jobs), the Invista lawyer stated:

> The decision to reorganize the customer service organization was not connected to the decision made in 2004 to stop production of Nylon Apparel at the Chattanooga Site. It was a business decision to improve the efficiency of the customer service organization. The Apparel Nylon customer service work was being performed at four locations, Canada, South America, Wilmington, and Chattanooga. The customer service work was consolidated to two (2) locations; Wilmington, Delaware, and at the Apparel Nylon Site in Paulinia, Brazil.

S.A.R. 18.

The Government insists that "Labor's reliance upon these facts [as set forth by Invista's lawyer] was reasonable, and *based upon the record before Labor at the time*, Labor's determination that plaintiffs were ineligible for TAA was substantially justified." *See* Def.'s Response at 11–12 (emphasis in the original). By its use of emphasis in the quoted sentence, the Government implicitly acknowledges that the Labor Department later reversed its position, and determined that the Workers' terminations were in fact attributable to the 2004 shift of production to Mexico. However, the Government fails to acknowledge that there was ample evidence on point which was already on the record at the time that Invista's lawyer gave her conflicting statement. And certainly the Government cites no authority which would suggest that the Labor Department was free to simply turn a blind eye to that earlier, contrary evidence.

Manager. *See* A.R. 2. If — as the Government says — "Labor found no record evidence, at the time, to contradict [the] statement [of the Invista lawyer]" (*see* Def.'s Response at 13), then the agency simply was not looking. *Cf. Joy Techs.*, 31 CIT at 1839–41, 1843, 1846, 523 F. Supp. 2d at 1375–76, 1378, 1379–80 (criticizing agency for failing to recognize as "record evidence" statements submitted by petitioning workers addressing, *inter alia*, facts surrounding shift of production to Mexico).[32]

In any event, the Labor Department made no attempt to confront the Invista lawyer with the ample record evidence tying the Workers' terminations to the 2004 shift of production to Mexico. The Invista lawyer thus had no opportunity to refine or clarify her statement to the agency; and the Labor Department had no basis for reconciling her statement with the numerous earlier statements to the contrary. Similarly, the Labor Department made no effort to use the statement of the Invista lawyer to confront those who had earlier given the agency statements linking the Workers' separations to the 2004 shift of production. Those individuals therefore had no opportunity to refine or clarify their statements, and the Labor Department had no basis for reconciling their statements with the conflicting statement

[32] It is frankly difficult to know what to make of the Government's outlandish assertion that, at the time that the Invista lawyer made her statement, "it was not contradicted by any other evidence." *See* Def.'s Response at 12. The Government fails even to acknowledge, much less seek to explain, the patent conflict between the statement of the Invista lawyer and the statement of Invista's Chattanooga Plant Manager. *Compare* S.A.R. 18 (statement of Invista lawyer that Workers' terminations were "not connected to the decision made in 2004 to stop production of Nylon Apparel at the Chattanooga Site," but were instead the result of "a business decision to improve the efficiency of the customer service organization") *and* A.R. 2 (sworn statement of Invista's Chattanooga Plant Manager that Workers' terminations were "a continuation of the [2004] shift in production to Mexico").

It is also worth noting that the administrative record indicates that the Labor Department never sought to contact Invista's Chattanooga Plant Manager to follow up on his statement, made under oath, that the Workers' terminations were "a continuation of the [2004] shift in production to Mexico." A.R. 2. The Invista Plant Manager's statement was unambiguous and unequivocal; and, as discussed elsewhere herein, it was corroborated by other statements of the Workers and other Invista representatives. If the Labor Department did not understand the gist of those statements, the agency was duty-bound to inquire further. Petitioning workers in TAA/ATAA cases have no obligation to "spoon feed" the Labor Department and serve up evidence "on a silver platter." *See, e.g.*, *Former Employees of IBM Corp., Global Services Division v. U.S. Sec'y of Labor*, 29 CIT at 956, 387 F. Supp. 2d at 1351 (rejecting Labor Department's argument that, because petitioning workers did not allege certain facts, agency was not obligated to make further inquiry; holding that, to the contrary, because petitioning workers cannot reasonably be expected to have knowledge of the "sometimes esoteric criteria" for TAA certification, "it is incumbent upon Labor to take the lead in pursuing the relevant facts"); *BMC II*, 31 CIT at 1625 n.27, 519 F. Supp. 2d at 1312–13 n.27 (rejecting notion that "jobless TAA petitioners were responsible for spoon-feeding Labor") (internal quotation marks and citation omitted).

given by the Invista lawyer. *See generally Invista I*, 33 CIT at ____ n.6, 626 F. Supp. 2d at 1310 n.6 (criticizing agency for failure to "confront sources with conflicting information provided by others," thereby "depriving [the sources] of the opportunity to clarify discrepancies, and diminishing the usefulness of the information elicited by the agency").[33]

In short, not only did the Labor Department fail to state on the record any rationale for privileging the single, conclusory statement made by the Invista lawyer over the numerous statements to the contrary given by other individuals, but — in fact — the administrative record is devoid of anything on which the agency could have based such a statement of rationale. In TAA/ATAA investigations, the Labor Department is obligated to develop a proper record by seeking to reconcile conflicting evidence on key points before the agency reaches a determination on petitioning workers' claims. *See Welex*, 32 CIT at ____, 2008 WL 7020688 at * 9–11 (faulting agency for its failure to identify and resolve discrepancies and inconsistencies in record evidence); *Former Employees of Elec. Mobility Corp. v. U.S. Sec'y of Labor*, 32 CIT ____, ____, 2008 WL 7020689 at * 4–6 (2008) (same); *BMC I*, 30 CIT at 1335–39, 454 F. Supp. 2d at 1324–28 (same).[34] Further, contrary to the Government's implication, no agency is free to pick and choose, willy-nilly, the evidence on which it will rely to reach a key determination without offering at least *some* explanation of the basis for its decision to credit certain information over other conflicting evidence in the administrative record. *See generally Invista I*, 33 CIT at ____ n.6, 626 F. Supp. 2d at 1310 n.6 (criticizing "the agency's failure to explain why it credited some sources of information and rejected other information"); *Former Employees of Int'l Business Machines Corp. v. U.S. Sec'y of Labor*, 31 CIT 463, 508–10, 483 F. Supp. 2d 1284, 1324–26 (2007) ("*IBM II*") (emphasizing that, in reaching TAA/ATAA determination, "substantial evidence" standard requires agency to take into consideration all

[33] *See also, e.g.*, *Welex*, 32 CIT at ____, 2008 WL 7020688 at * 9 (criticizing agency for failure to confront sources with contrary information, depriving sources of opportunity to clarify inconsistencies and discrepancies in record); *Elec. Mobility Corp.*, 32 CIT at ____, 2008 WL 7020689 at * 5 (same).

[34] *See also, e.g.*, *Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 27 CIT 685, 694, 264 F. Supp. 2d 1322, 1330 (2003) (indicating that agency should take steps to "resolve any inconsistencies" between information provided by petitioning workers and that provided by employer); *Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 28 CIT 1571, 1576, 1584, 1588–89, 350 F. Supp. 2d 1075, 1081, 1087, 1091 (2004) (awarding attorneys' fees and expenses under EAJA, finding Government's litigation position not "substantially justified," based, *inter alia*, on Government's reliance in litigation on record where agency had failed to "resolve the seemingly contradictory information provided by [the employer]" and had failed to "resolve any inconsistencies" in record evidence).

evidence that "fairly detracts" from its determination) (discussing *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)); *Inter-Neighborhood Hous. Corp. v. NLRB*, 124 F.3d 115, 122 (2d Cir. 1997) (finding lack of substantial justification where, in declining to investigate further, agency investigator must have concluded that a witness was lying and falsifying documents, but where administrative record included "no basis for such conclusions").

Moreover, it is manifestly clear that there is no reason why the Labor Department could not have earlier obtained the information on which it ultimately based its certification of the Workers here. The evidence which caused the agency to reverse course (and thus to certify the Workers) was information supplied in an August 2009 phone conversation between agency staffers and Invista's former Chief Legal Counsel for Labor and Employment (who, in 2008, had become Associate General Counsel for Labor and Employment at a Koch "shared service organization" supporting Invista and other Koch-affiliated companies). *See* S.S.A.R. 69–70. However, that conversation simply reaffirmed what the Workers (and, indeed, several representatives of Invista, including Invista's Chattanooga Plant Manager) had been telling the agency all along — that is, that the Workers' terminations "were a direct (albeit delayed) result of the 2004 shift of apparel fiber production to Mexico." *See Invista II*, 33 CIT at ____, 657 F. Supp. 2d at 1364. Nothing in that August 2009 phone conversation should have been a revelation to the Labor Department. Indeed, the information provided in the phone conversation was almost entirely cumulative of other evidence in the record, dating back to the initiation of the original investigation.[35] Nowhere does either the which the agency could not have obtained much earlier. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. at 560 (explaining that, in evaluating "substantial justification," trial court is entitled to take into consideration "insights not conveyed by the record," including "whether critical facts could easily have been verified by the

[35] *Compare, e.g.*, S.S.A.R. 69–70 (summarizing Aug. 21, 2009 phone conversation between agency staff and Associate General Counsel for Labor and Employment at Koch "shared service Labor Department or the Government identify any "new information" garnered in that conversation organization"), *with* A.R. 2 (sworn statement of Invista's Chattanooga Plant Manager, attesting that Workers' termination was "a continuation of the [2004] shift in production to Mexico," and that the work was now being done by personnel "located in South America"), and other evidence cited in nn. 28–29 (summarizing record evidence indicating that Workers' termination was attributable to 2004 shift of production, as well as record evidence that Workers' customer service duties were assumed by personnel in Brazil).

Government"); *see also* section II.A & n.11, *supra* (collecting additional cases on point).[36]

d. *The Agency's Delegation of Authority*

Invista I identified other significant flaws in the Labor Department's investigation as well. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1310–11. As the Government notes, for example, *Invista I* criticized the Labor Department for — in essence — "delegat[ing] to the Invista [lawyer] the power to decide the Workers' TAA/ATAA petition." *See* Def.'s Response at 12; *Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1310. After referring to that criticism in *Invista I*, however, the Government proceeds to brief an entirely different matter. In other words, in its Response, the Government completely misses the point. Rather than arguing whether it is permissible for the Labor Department to (in effect) base its determination in a TAA/ATAA case on a source's conclusory response to the "ultimate question" (which is the "delegation" concern to which the Government briefly refers), the Government's Response instead proceeds to argue that the Labor Department was entitled to rely on statements made by representatives of the Workers' former employer. That is a different issue.

The confusion on the part of the Government leaves uncontested and intact *Invista I* 's conclusion that "[t]he Labor Department erred by substituting [the Invista lawyer's] conclusory opinion for [the agency's] own probing inquiry into all the relevant underlying facts concerning the relationship between the 2004 shift in production to Mexico and the Workers' subsequent terminations." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1310. As *Invista I* explained, the only real issue for decision by the Labor Department in this case was whether the Workers' termination was "attributable to" the 2004 shift

[36] Indeed, it is clear beyond cavil that the Labor Department could have reached its affirmative determination much earlier, if the agency had relied on the ample evidence in the existing administrative record (which, after all, included not only statements by the Workers, but also the *sworn statement* of *a senior Invista official*), rather than seeking to elicit other information from the Invista lawyer. *See, e.g.*, A.R. 2 (TAA/ATAA Petition, filed by Invista's Chattanooga Plant Manager, attesting under oath that Workers' termination was "a continuation of the [2004] shift in production to Mexico"); *see also* nn.28–29 (summarizing record evidence indicating that Workers' termination was attributable to 2004 shift of production, as well as record evidence that Workers' customer service duties were assumed by personnel in Brazil). In the alternative, the Labor Department could have reached its affirmative determination much earlier if — after the agency received the conflicting information from the Invista lawyer — the agency had proceeded to further probe the matter, in an effort to reconcile the newly-created inconsistencies in the record evidence in a timely fashion, before rendering yet another negative determination on the Workers' claims.

of production to Mexico (*i.e.*, the basis for the 2004 TAA/ATAA certification). Thus, by asking the Invista lawyer whether the company's "business decision" to reorganize its customer service organization and terminate the Workers was "the result of the shift of production two years earlier":

> . . . the Labor Department, in effect, asked the Invista [lawyer] . . . the "ultimate question." In essence, the agency delegated to the Invista representative the power to decide the Workers' TAA/ATAA petition. But "it is Labor's responsibility, not the responsibility of [a] company official, to determine whether a former employee is eligible for [TAA/ATAA] benefits."

Invista I, 33 CIT at ____, 626 F. Supp. 2d at 1310 (*quoting BMC I*, 30 CIT at 1340, 454 F. Supp. 2d at 1328 (quotation omitted)). The same agency practice has been roundly condemned in a number of other cases as well. *See, e.g.*, *BMC I*, 30 CIT at 1339–41, 454 F. Supp. 2d at 1328–29 (cataloguing wide range of TAA/ATAA opinions criticizing agency for phrasing questions posed to sources/contacts in terms of "ultimate facts," and thereby — in effect — impermissibly delegating the agency's power to decide petitioning workers' claims and abdicating agency's responsibility to conduct its own independent factual investigations and to reach its own independent legal conclusions).[37]

e. *The Agency's Reliance on Invista's Lawyer's Statement*

Rather than briefing the "delegation" issue which it raises, the Government invokes Court of Appeals precedent including *Barry Callebaut* and *Marathon Ashland Pipe Line*, and argues at some length that the Labor Department was entitled to rely on the statement of the Invista lawyer to conclude (in the course of the voluntary remand proceeding) that the Workers were not entitled to TAA/ATAA certification. *See generally* Def.'s Response at 12–13 (*citing Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377 (Fed. Cir. 2004); *Former Employees of Marathon Ashland Pipe Line, LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004)). The Government's argument misses the mark, in several significant respects.

First, although decisions in some other TAA/ATAA cases have criticized the Labor Department's tendency to accept on faith virtually

[37] *See also, e.g.*, *Independent Steel Castings Co.*, 31 CIT at 1176–77 (explaining that "Labor 'cannot simply adopt as its own the legal conclusions of employers . . . . Rather, the agency must reach its own conclusions, based on its own thoughtful, thorough, independent analysis of all relevant record facts.'") (*quoting IBM I*, 29 CIT at 1382, 403 F. Supp. 2d at 1331); *id*. (noting that "'it is Labor's responsibility, not the responsibility of [a] company official, to determine whether a former employee is eligible for benefits'") (*quoting Former Employees of Federated Merch. Group v. United States*, 29 CIT 137, 144 (2005)).

anything an employer says (while discounting or disregarding the information provided by petitioning workers), that specific criticism was not raised in either *Invista I* or *Invista II*. *Compare, e.g.*, *Welex*, 32 CIT at ____, 2008 WL 7020688 at * 11–12 (analysis captioned "The Labor Department's Over-Reliance on Employer-Provided Information"); *BMC I*, 30 CIT at 1339–49, 454 F. Supp. 2d at 1328–37 (same); *with Invista I*, 33 CIT ____, 626 F. Supp. 2d 1301, *and Invista II*, 33 CIT ____, 657 F. Supp. 2d 1359. The Government's argument thus targets a "straw man."[38]

Moreover, contrary to the Government's implications, *Barry Callebaut* and *Marathon Ashland Pipe Line* have little (if any) application here, given the circumstances of this case. As the Government emphasizes, the Court of Appeals concluded in *Barry Callebaut* and *Marathon Ashland Pipe Line* that the Labor Department is entitled to rely upon information provided by the former employers of petitioning workers in TAA/ATAA cases — but only where (1) "the Secretary reasonably concludes that [the employer's] statements are creditworthy," and (2) the employer's statements "are not contradicted by other evidence." *See* Def.'s Response at 12–13 (*quoting Marathon Ashland Pipe Line*, 370 F.3d at 1385 (*citing Barry Callebaut*, 357 F.3d at 1383)) (internal quotation marks omitted) (alteration in original).

Neither condition is met in this case. As discussed in some detail above, the administrative record is devoid of any explanation to support a Labor Department conclusion that the statement of the Invista lawyer was — in the words of the Court of Appeals — "creditworthy." And, even more to the point (and the Government's assertions notwithstanding), the statement of the Invista lawyer was indisputably "contradicted by other evidence" already in the administrative record.[39]

The Government inexplicably asserts that, at the time it was made, the statement of the Invista lawyer "was not contradicted by any

[38] In other words, the focus of the "delegation" concern expressed in *Invista I* and *Invista II* goes to the form or phrasing of questions posed by the Labor Department, rather than the identities or affiliations of the sources to whom the questions are put.

[39] It is also noteworthy that, at least in *Barry Callebaut*, the employer's statements were sworn. *See Barry Callebaut*, 357 F.3d at 1383 (quoting oaths included with affidavits of three company executives). In contrast, in the case at bar, the statement of the Invista lawyer was not made under any sort of oath or affirmation. Indeed, the sole record evidence in this case that is under oath is the statement of Invista's Chattanooga Plant Manager — and, as discussed elsewhere herein, the Plant Manager stated flatly and unequivocally that the terminations of the Workers at issue were "a continuation of the [2004] shift in production to Mexico," and that the Workers "losing their job[s] [were] being replaced by CSR's [Customer Service Representatives] located in South America." *See* A.R. 2.

other evidence." *See* Def.'s Response at 12; *see also id*. at 13 (asserting that there was "no record evidence, at the time, to contradict Invista's statement"). To the contrary, that statement was in direct conflict with ample existing record evidence that the Workers' terminations were directly attributable to the 2004 shift of production to Mexico — including, most notably, the sworn statement of Invista's own Chattanooga Plant Manager. In the TAA/ATAA Petition itself, the Invista Plant Manager attested in no uncertain terms that the Workers' separations were "a continuation of the [2004] shift in production to Mexico" (which, in turn, had led to the 2004 TAA/ATAA certification). *See* A.R. 2 (statement of Invista's Chattanooga Plant Manager, made under oath/affirmation, including warning of federal penalties for, *inter alia*, violations of federal material false statements statute; declaring "[u]nder penalty of law, . . . that to the best of [his] knowledge and belief the information . . . provided is true, correct and complete"); *see also id*. (further attesting that the Workers "losing their job[s] are being replaced by CSR's [Customer Service Representatives] located in South America").[40]

Under these circumstances, it is difficult enough to fathom how the Labor Department could ignore the ample record evidence existing at the time, and — without seeking to reconcile the contradictory accounts — simply choose to credit the conflicting statement given by the Invista lawyer. But the repeated assertions in the Government's Response that there was "no record evidence, at the time, to contradict Invista's [lawyer's] statement" are simply baffling.

In sum, *Marathon Ashland Pipe Line* and *Barry Callebaut* afford the Labor Department and the Government no refuge, given the circumstances of this case. *See Marathon Ashland Pipe Line*, 370 F.3d at 1385; *Barry Callebaut*, 357 F.3d at 1383. Nothing in either of those cases excuses the Labor Department from explaining its decision to rely on certain information and to disregard other conflicting information. Indeed, the Court of Appeals emphasized that "the Secretary [must] reasonably conclude[] that [the employers'] statements are creditworthy." *See* Def.'s Response at 12–13 (*quoting Marathon Ashland Pipe Line*, 370 F.3d at 1385 (*citing Barry Callebaut*, 357 F.3d at 1383)) (internal quotation marks omitted) (alteration in original). And, further, nothing in either of those cases authorizes the Labor Department to rely on the statements of employers where — as here — those statements "are . . . contradicted by other evidence" in the record. *See id*. (*citing Barry Callebaut*, 357 F.3d at 1383).[41]

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[40] Other record evidence to the same effect is summarized in notes 28 and 29, above.

[41] *See also, e.g.*, *Joy Techs.*, 31 CIT at 1839–41, 1843, 1844–46, 523 F. Supp. 2d at 1375–76, 1378, 1379–80 (castigating Labor Department for arguing that agency is entitled to base a

f. *The Agency's Reliance on Other Evidence*

In arguing that the Labor Department was entitled to rely on the statement of the Invista lawyer because that statement was — according to the Government — not contradicted by other evidence (an argument that is disposed of immediately above), the Government alludes in passing to "other record evidence that [the Labor Department] deemed creditworthy," which the agency cited in an effort to buttress the conclusion in its initial Remand Determination that the Workers' terminations were not related to the 2004 shift of production to Mexico. *See* Def.'s Response at 13 (alluding to 73 Fed. Reg. at 32,739–40). But *Invista I* expressly and painstakingly addressed that evidence. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311. And, significantly, neither the Labor Department nor the Government has ever called into question any aspect of that part of the analysis in *Invista I*.[42]

TAA determination on "unverified" statements of petitioning workers' former employer where employer's statements were contradicted by other evidence in the record, and for failing to recognize as "record evidence" statements submitted by petitioning workers).

[42] Specifically, the Labor Department's initial Remand Determination asserted that "two of the four separated workers worked on a product line (Performance Materials) whose production was not shifted to Mexico." *See* 73 Fed. Reg. at 32,739. However, as *Invista I* explained, "the evidence on that point . . . is in conflict and unclear (and, in any event, obviously says nothing about the terminations of the two other workers)." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311.

The Labor Department's conclusion that two of the Workers were employed solely in "Performance Materials" and had no relationship to "Apparel Fibers" (the line of production which was shifted to Mexico in 2004) was squarely at odds with much of the record evidence — including essentially *all* of the record evidence compiled up to the voluntary remand proceeding. *See* A.R. 1–2 (attesting that termination of four Workers – *i.e.*, "3-Customer Service Representatives, 1Product Coordinator" — was "a continuation of the [2004] shift in production to Mexico"); A.R. 21 (indicating that one named Worker was "previous vacation relief," and another named Worker was "current vacation relief" up to date of termination); A.R. 21 (explaining that the Workers could "relieve each other if one [was] on vacation, but they [were] not capable . . . of performing other functions," and that, as of the date of terminations "there [were] no job openings . . . at [the] Chattanooga site, . . . and all of the Apparel Customer Service Representatives jobs are going away"); A.R. 26 (stating that the petitioning Workers "were part of the Nylon Apparel Filament Fibers Group," and that they "did not perform sales or marketing functions for the Nylon Performance Filament Fibers Group"); A.R. 27 (stating that the Workers "performed sales and marketing for the Nylon Apparel Filament Fibers Group," and had worked "in support of the production workers previously certif[ied]" under the 2004 TAA/ATAA certification); A.R. 28–29 (indicating that Workers "were engaged in" and "were responsible for sales and marketing activities of nylon apparel filament fibers," and that "[t]he Nylon Apparel Filament Fibers Group were not engaged in the production of nylon performance filament fibers, nor did they support [such] production"); A.R. 36 (noting that one named Worker "was vacation relief for the apparel sales group," and explaining how other workers who were originally working in Performance Fibers were displaced to allow the company to give their jobs to more senior Apparel Fibers personnel, and were consequently terminated as "a direct result of the . . . apparel machines going to Mexico"); S.A.R. 8 (indicating that November 2006 reorganization of

g. *The Record Basis for Invista I*

The Government's final point in support of its claim that the Labor Department's conduct in this matter was "substantially justified"

Invista's Customer Service Organization resulted in termination of "two (2) Apparel Nylon Customer Service Representatives located at Chattanooga, one (1) Performance Materials Customer Service Representative located at Chattanooga, and one (1) Performance Materials Product Coordinator located at Chattanooga"); S.A.R. 11 (indicating that named individual "supervised 2 apparel nylon customer service representatives and 1 performance materials customer service representative at Invista's Chattanooga, TN facility . . . , that the work that the 2 apparel nylon customer service representatives performed [was] split between an existing production facility in Delaware . . . and an existing production facility in Brazil . . . , that the 2 apparel nylon customer service representatives sold nylon yarn produced in Mexico . . . The work that was performed by the performance materials customer service representative stayed . . . [at the Chattanooga plant] but the worker was let go as part of the reorganization of work"); S.A.R. 18 (stating that "[t]he decision to reorganize the customer service organization was not connected to the decision made in 2004 to stop production of Nylon Apparel at the Chattanooga Site. It was a business decision to improve the efficiency of the customer service organization. . . . The decision [to consolidate the customer service organization] was made in November, 2006. In the following weeks, it was determined that two (2) Apparel Nylon Customer Service Representatives, one (1) Performance Materials Customer Service Representative, and [o]ne (1) Performance Materials Product Coordinator located at Chattanooga would not be retained"); S.A.R. 19 (identifying by name the four individual Workers at issue); S.A.R. 21 (indicating that responsibilities of named Worker included, *inter alia*, "servicing . . . customers buying Invista SARL nylon Apparel yarns"); S.A.R. 22 (indicating that responsibilities of named Worker included, *inter alia*, serving as "Customer Service Representative" and providing "Vacation relief for Chattanooga based CSR [Customer Service Representative] team," including both "Apparel and Performance Fibers"); S.A.R. 23 (indicating that named Worker was employed as "Customer Sales Specialist"); S.A.R. 24 (indicating that named Worker was employed as "Product Coordinator — Nylon 2005 R.R.E.").

The record reveals that — in reaching its first Remand Determination — the Labor Department made no effort to reconcile the glaring inconsistencies in the evidence concerning the petitioning Workers' job responsibilities, their relationship (if any) to the production of apparel fiber, and the connection (if any) between the Workers' terminations and the 2004 shift of the production of apparel fiber to Mexico. For example, the agency ignored evidence indicating that some of the Workers who had responsibilities related to the production of performance materials in fact also had links to the production of apparel fiber, and thus were terminated as a result of the 2004 shift of production of apparel fiber to Mexico. *See, e.g.*, A.R. 21 (including, *inter alia*, discussion of "vacation relief" responsibilities); A.R. 36 (discussing, *inter alia*, "vacation relief" responsibilities, as well as displacement of Performance Materials personnel to create position in Performance Materials for Apparel Fibers supervisor, to avoid termination of that supervisor). Nor did the Labor Department offer any justification for its selective reliance on certain evidence, and its complete disregard for contrary record evidence. In any event, the Labor Department's eventual amendment of the 2004 TAA/ATAA certification to cover the Workers here reflects the fact that the agency ultimately concluded that the Workers' terminations indeed were attributable to the 2004 shift of production to Mexico. *See* 74 Fed. Reg. 51,195 (Second Remand Determination).

The second piece of ostensibly corroborating evidence cited in the Labor Department's initial Remand Determination was the fact that more than two years elapsed between the 2004 shift of manufacturing operations to Mexico and the terminations of these Workers. *See* 73 Fed. Reg. at 32,739–40. But, as *Invista I* explained, "that is the very point of the Labor Department's procedure for amending TAA/ATAA certifications to extend the

focuses on a specific point made in *Invista I*. Criticizing the Labor Department for its failure to probe the facts underpinning the Invista lawyer's statement that the reorganization of the company's customer service organization and the resulting terminations of the Workers at issue were based on "a business decision to improve . . . efficiency," and were wholly unrelated to the 2004 shift of production to Mexico, *Invista I* explained:

> [T]here is a false dichotomy embodied in the Labor Department's conclusion that the Workers' terminations "[were] not related to the shift in production of apparel nylon filament to Mexico in 2004," but were instead the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization." *See* 73 Fed. Reg. at 32,739–40. As a matter of pure logic, the fact that a company states that layoffs are part of a plan to "increase efficiency," "restructure," or "save money" says nothing about whether or not those layoffs are attributable to effects of international trade. As a general principle, companies are obviously *always* striving to operate in an efficient and cost-effective manner. *No doubt the 2004 shift in production was the result of a "business decision" designed to "increase efficiency," "restructure," and "save money" in the manufacture of apparel fiber. But the driving force behind that "business decision" was unquestionably foreign competition.*

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expiration period: The Labor Department has implicitly recognized that, in certain cases, the employment of some trade-impacted workers may extend for a time beyond the presumptive two-year period reflected in the agency's standard TAA/ATAA certification." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311. Again, the fact that the Labor Department finally amended the 2004 TAA/ATAA certification to cover the Workers here demonstrates that the agency ultimately concluded that, notwithstanding the delayed timing of the Workers' terminations, those terminations in fact were attributable to the 2004 shift of production to Mexico. *See* 74 Fed. Reg. 51,195 (Second Remand Determination).

As its third and final piece of corroborating evidence, the Labor Department noted in its initial Remand Determination that the Workers were replaced not by personnel in Mexico, but instead by workers in Brazil and elsewhere. *See* 73 Fed. Reg. at 32,739–40. But, as *Invista I* explained, the Labor Department's observation missed the point:

> The gravamen of the Workers' case is that, if production had not been shifted to Mexico in 2004 (but rather had continued at the Chattanooga plant), the Workers would still have their jobs supporting domestic production. Nothing in law or logic requires that the Workers' jobs necessarily have shifted to Mexico [the new locus of production]. Under the Labor Department's own standards, if there is a "causal nexus" between the 2004 shift in production and the Workers' terminations, they are entitled to certification.

Invista I, 33 CIT at ____, 626 F. Supp. 2d at 1311. Once more, the fact that the Labor Department finally amended the 2004 TAA/ATAA certification to cover the Workers here demonstrates that the agency ultimately concluded that, although the Workers' jobs shifted to Brazil and elsewhere, the Workers' terminations nevertheless were attributable to the 2004 shift of production to Mexico. *See* 74 Fed. Reg. 51,195 (Second Remand Determination).

> The Labor Department cannot premise its determinations in TAA/ATAA cases on conclusory assertions about companies' "business decisions" or on euphemisms such as "enhanced competitiveness" and "increased efficiency." For purposes of a TAA/ATAA analysis, the relevant question as to any asserted "business decision" is: *Why* ? In this case, why did Invista feel the need to "improve the efficiency" of its customer service organization, and how (if at all) was it related to the 2004 shift in production to Mexico (or otherwise related to the pressures of foreign competition)?

Invista I, 33 CIT at ____, 626 F. Supp. 2d at 1310–11 (*citing BMC I*, 30 CIT at 1338 n.32, 454 F. Supp. 2d at 1326–27 n.32; *IBM II*, 31 CIT at 520–22 n.72, 483 F. Supp. 2d at 1334–35 n.72) (initial and final alterations in the original).

In its Response, the Government focuses on the two sentences highlighted at the end of the first paragraph quoted immediately above, and implies that *Invista I* unfairly criticized the Labor Department by (in essence) looking beyond the administrative record as it then existed. *See* Def.'s Response at 16 (arguing that United States' position was "substantially justified" because Government "relied upon the statutory standard that a review of a negative TAA determination is based solely upon the facts in the administrative record before the Court and nothing else"); *id*. at 14 (same). Specifically, the Government protests that "there was nothing in the record before Labor [at the time of the voluntary remand] to suggest that the driving force behind Invista's decision [to terminate the Workers] was competition from Mexico." *See* Def.'s Response at 13–14. But there are at least three problems with the Government's position.

First and foremost, if the Government had read the relevant part of *Invista I* (quoted above) carefully and completely, the Government would have realized that the excerpt on which it relies (italicized in the quotation above) clearly refers *not* to the basis for the termination of the instant Workers, but — rather — to the basis for the 2004 shift of production to Mexico. And there has never been any doubt in this case that the 2004 shift of production was the result of foreign competition (*i.e.*, cheaper production costs abroad). The Labor Department's 2004 TAA/ATAA certification was predicated on that fact. *See* A.R. 5–6 (2004 TAA/ATAA certification granted based on finding of shift of production to Mexico); 69 Fed. Reg. 54,320 (same). The question presented in this case was the relationship, if any, between the 2004 shift of production to Mexico (which led to the 2004 TAA/ATAA

certification) and the termination of the Workers here. *See, e.g.*, *Steelworkers II*, 33 CIT at ____, 2009 WL 1175654 at * 4 (quoting Labor Department's statement that it "has and continues to amend the expiration date of certifications when the facts of the case show that the later worker separations [*i.e.*, the terminations occurring after the expiration of the original certification] are *attributable to the basis for* [*the original*] *certification* (the increased imports or shift of production to a foreign country)" (emphasis added)).

The Government's Response is therefore patently wrong to the extent that the Government asserts that *Invista I* concluded that "the driving force" behind the termination of the Workers here "was undoubtedly foreign competition." *See* Def.'s Response at 13–14. Quite apart from the plain text of the two sentences themselves (which, on their face, clearly address the reasons for the 2004 shift of production to Mexico, and say nothing about the reasons for the termination of these Workers), the paragraph immediately following the highlighted passage further underscores the fact that *Invista I* left open the question of the relationship, if any, between the Workers' termination and foreign competition, asking: "*Why*? In this case, why did Invista feel the need to 'improve the efficiency' of its customer service organization, and how (if at all) was it related to the 2004 shift in production to Mexico (or otherwise related to the pressures of foreign competition)?" *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1311. The Government's claim that *Invista I* looked beyond the then-existing administrative record is thus entirely lacking in merit.

The Government's argument is equally wrong to the extent that the Government contends that — until the final remand, when the Labor Department certified the Workers — the record was devoid of evidence on which the agency could have based a determination that the termination of the Workers here was attributable to the 2004 shift of production to Mexico. *See* Def.'s Response at 13–14 (asserting that, until the final remand, "there was nothing in the record before Labor to suggest that the driving force behind Invista's decision" to reorganize its customer service workforce and terminate the Workers was foreign competition); *see also id*. (arguing that the agency "was. . . substantially justified in relying only upon the existing evidence in the record to make its determination," and that "Labor is bound to make its decisions based on the record before it"). Quite to the contrary, as discussed in some detail above, there was in fact ample record evidence — beginning with the filing of the TAA/ATAA Petition itself — to support an agency determination that the Workers' terminations were attributable to the 2004 shift of production to Mexico.

See A.R. 2 (Invista Plant Manager attesting under oath that Workers' termination was "a continuation of the [2004] shift in production to Mexico"); *see also* nn. 28–29, *supra* (surveying record evidence in Administrative Record and Supplemental Record indicating that Workers' termination was attributable to 2004 shift of production to Mexico, and that Workers' jobs were being filled by workers in, among other places, Brazil).

Further, at the core of this argument by the Government is the Government's oft-repeated assertion that "Labor is bound to make its decisions based upon the record before it." *See* Def.'s Response at 13–14 (also arguing that the agency "was . . . substantially justified in relying only upon the existing evidence in the record to make its determination," and that "Labor was reasonable in relying only upon the record evidence in making its determination"). To be sure, the Labor Department must render its TAA/ATAA determinations based on the administrative record. But, as discussed in detail above, it is also clear that the Labor Department has a fundamental legal obligation to *develop* that record, by "marshal[ing] all relevant facts" in an agency investigation conducted with "the utmost regard" for the interests of the petitioning workers. *See, e.g.*, 29 C.F.R. § 90.12; *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d at 31 (emphasis added) (noting agency's duty to conduct TAA investigations "with the utmost regard for the interest of the petitioning workers"). Particularly given the repeated and relatively egregious nature of the shortcomings in the agency's investigation in this case, the Labor Department cannot justify its failure to reach a correct determination by pleading the limitations of an administrative record that the agency itself failed to properly develop. *See, e.g.*, *Hess Mech. Corp.*, 112 F.3d at 150 (emphasizing that, while "[t]he EAJA does not tell an agency how to handle a case," the agency also "cannot decline to conduct further inquiry and then plead [its] own failure to investigate as reason to conclude that [its] position was substantially justified").

h. *The Agency's Reliance on Euphemisms as Rationale*

Finally, although the Government's Response mentions the matter in passing, nothing in the Government's Response addresses the concerns expressed in *Invista I* about the "false dichotomy" reflected in the Labor Department's first Remand Determination in this case (and in other TAA/ATAA cases as well), by which the agency seems to assume that layoffs due to "business decisions" aimed at "increasing efficiency" and "enhancing competitiveness" are never attributable to foreign competition (*i.e.*, increased imports or shifts of production

abroad). *See* Def.'s Response at 13 (*quoting Invista I*, 33 CIT ____, 626 F. Supp. 2d at 1310–11); *see also* 73 Fed. Reg. at 32,739 (stating, *inter alia*, that "[i]nformation provided by [Invista] during the remand investigation revealed that the workers' separations are not related to the [2004] shift of production," but were instead the result of "a business decision to improve the efficiency of [Invista's] customer service organization").

Invista I explained, however, that the fact that workers are terminated as the result of "a business decision to improve the efficiency" of a company by no means logically precludes a finding that the workers' terminations were due to foreign competition (whether increased imports, or — as here — a shift of production to a foreign country). *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1310–11. *Invista I* therefore admonished the Labor Department that the agency "cannot premise its determinations in TAA/ATAA cases on conclusory assertions about companies' 'business decisions' or on euphemisms such as 'enhanced competitiveness' and 'increased efficiency.'" *Id*., 33 CIT at ____, 626 F. Supp. 2d at 1310–11. Instead, the agency must probe the reasons behind an employer's perceived need to enhance competitiveness and increase efficiency, to ascertain whether the company's drive for competitiveness and efficiency (and the termination of the workers at issue) are in fact based on the pressures of foreign competition. *Id*., 33 CIT at ____, 626 F. Supp. 2d at 1311.

The Labor Department's unquestioning acceptance of the "false dichotomy" reflected in the first Remand Determination in this case is a phenomenon that has been the subject of criticism in other cases in the past. *See, e.g.*, *BMC I*, 30 CIT at 1338 n.32, 454 F. Supp. 2d at 1326–27 n.32; *IBM II*, 31 CIT at 520–22 n.72, 483 F. Supp. 2d at 1334–35 n.72. It constitutes yet another serious flaw in the agency's investigation here.

i. *Summary*

The Labor Department's first three investigations in this matter – the agency's initial investigation, the agency's review of the Workers' Request for Reconsideration, and the agency's investigation in the course of the voluntary remand — would not provide "substantial justification" for the Government's position, even if the Labor Department owed no special obligation to petitioning workers. The unique nature of the agency's responsibilities in its administration of the TAA/ATAA program, outlined in section II.A.1 above, merely strengthens the Workers' hand.

The straightforward recitation of the facts of this case alone suffices to refute any suggestion that the Labor Department here properly discharged its duties to "marshal all relevant facts" and to conduct its investigation with "the utmost regard" for the interests of the Workers, and — further — definitively establishes that there was no "substantial justification" for the agency's position at the administrative level. *See Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (holding that "'substantial justification' requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts") (footnote omitted).[43]

3. *The Government's Position in Litigation*

The Government maintains that its position in litigation was substantially justified, citing "the same reasons" that it contends the Labor Department's position was substantially justified. *See* Def.'s Response at 15; *see generally id*. at 6–7, 8–10, 15–16. The Government contends that it properly "relied upon the evidence in the administrative record in defending Labor's determination, and upon precedent from this Court and the Federal Circuit in determining its litigation positions." *Id*. at 15; *see also id*. at 6–7 (arguing that "the Government's position in litigation . . . was substantially justified because [it] was reasonably based upon evidence in the administra-

[43] The conclusion that the Government's position at the administrative level was not substantially justified is buttressed by the Labor Department's "track record" in other TAA cases filed with the Court of International Trade in recent years. *See Pierce v. Underwood*, 487 U.S. at 569 (noting that "a string of losses can be indicative" on the issue of "substantial justification"). As *BMC I* observed, as a result of the inadequate record developed at the administrative level,"the Labor Department's *modus operandi* increasingly is to seek a voluntary remand in TAA cases that are appealed to the court"; thus, "[r]equests for voluntary remands have become all but routine." *See BMC I*, 30 CIT at 1352–53 & nn. 59–60, 454 F. Supp. 2d at 1339–40 & nn. 59–60; *see also id*., 30 CIT at 1367–68, 454 F. Supp. 2d at 1352–54 (summarizing statistics concerning TAA actions filed with Court of International Trade in recent years, and noting that — during four year period analyzed there — agency never successfully defended a denial of a TAA petition without at least one remand).

More recently, a review of all Labor Department TAA and ATAA cases in which opinions were issued between January 2008 and the present indicates that a voluntary remand was sought in all but two of those cases, reflecting the Government's judgment that the existing administrative records were not sufficient to support the Labor Department's determinations. Moreover, in one of the two cases where the Government did not seek a voluntary remand, there were multiple court-ordered remands. Indeed, a number of the cases required *multiple* remands.

Strong language criticizing the Government's position in an opinion on the "merits" of a case has also been held to be evidence in support of an award of fees and expenses. *See Marcus v. Shalala*, 17 F.3d at 1038. On this score, the language of *Invista I* and *Invista II* speaks for itself. *See generally Invista I*, 33 CIT ____, 626 F. Supp. 2d 1301, *passim* ; *Invista II*, 33 CIT ____, 657 F. Supp. 2d 1359, *passim*.

tive record as it existed at the time, as well as controlling precedent of the United States Court of Appeals for the Federal Circuit"). As set forth below, the Government argues four specific points in an effort to establish that its positions in the course of this litigation were substantially justified.

The Government first asserts that its litigation position was substantially justified because the Government "relied upon precedent [holding] that although Labor has a duty to investigate, 'the nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials.'" *See* Def.'s Response at 15–16 (*quoting Former Employees of CSX Oil & Gas Corp. v. United States*, 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989); additional citation omitted). But surely the Government does not contend that the Labor Department's "sound discretion" is unbounded, and that the agency's investigations are immune from judicial review. As set forth in section II.A.1 above, it is axiomatic that — although the Labor Department is vested with considerable discretion in the conduct of its investigation of TAA/ATAA claims — "there exists a threshold requirement of reasonable inquiry." *Hawkins Oil & Gas*, 17 CIT at 130, 814 F. Supp. at 1115; *see also* section II.A.1, *supra* (and authorities cited there). The analysis above has detailed numerous ways in which the Labor Department's investigations in this matter failed to satisfy that "threshold requirement of reasonable inquiry."

In addition, the Government recycles its claim that each of "Labor's determination[s], *based upon the record at the time*, was supported by substantial evidence." *See* Def.'s Response at 16.[44] This argument is also addressed and refuted above. *See* section II.A.2.c, *supra*. As detailed more fully there, the Government's argument fails to account

[44] The Government's Response actually states that the Government "relied upon the evidence in the administrative record in defending Labor's *determination*" (singular). *See* Def.'s Response at 15 (emphasis added). And, as note 27 above points out, the Government's defense of the United States' position at the administrative level focuses essentially exclusively on the Labor Department's first Remand Determination. *See* n.27, *supra*. The Government's reference to "Labor's determination" (singular) here thus may refer only to the Labor Department's first Remand Determination. *See* Def.'s Response at 15.

In any event, there were a total of three agency proceedings which preceded the final investigation (where the Labor Department determined that the 2004 TAA/ATAA certification should be amended to cover these Workers) — *i.e.*, the agency's initial investigation of the Workers' TAA/ATAA Petition, the agency's consideration of the Workers' Request for Reconsideration, and the agency's investigation in the course of the first (voluntary) remand. Under these circumstances, even if the Labor Department's first Remand Determination were found to be substantially justified, it would be difficult — if not impossible — to find that the United States' position at the administrative level was substantially justified based on a review of that first Remand Determination alone. And the Government's silence as to the agency's first two determinations is deafening.

for the Labor Department's affirmative obligation in TAA/ATAA cases to proactively develop the administrative record, by "conduct[ing] [its] investigation with the utmost regard for the interest of the petitioning workers" and "marshal[ling] *all* relevant facts" before reaching its determination. *See Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO v. Marshall*, 643 F.2d at 31; 29 C.F.R. § 90.12 (emphasis added); *see also Hess Mech. Corp. v. NLRB*, 112 F.3d at 150 (holding that agency cannot decline to conduct further inquiry and then plead its own failure to investigate as reason to conclude that its position was substantially justified); section II.A.1, *supra* (discussing policy bases for Labor Department's special obligations in TAA/ATAA cases).

Moreover, even assuming that the Labor Department owed petitioning workers no special obligations in TAA/ATAA cases, there still would be no merit to the Government's assertion that — in the case at bar — each of "Labor's determination[s], *based upon the record at the time*, was supported by substantial evidence." *See* Def.'s Response at 16. As explained in section II.A.2.c above, even if the Labor Department's various determinations are reviewed solely on the basis of the administrative record before the agency at the time each determination was rendered, without regard to the agency's obligation to fully develop the record, those determinations still could not pass muster. *See* section II.A.2.c, *supra*.

The Labor Department's first two determinations in this matter — the agency's initial denial of the Workers' TAA/ATAA petition and the agency's denial of the Workers' Request for Reconsideration — were based on a provision of the regulations which has no application to this case, and thus were wrong as a matter of law. The adequacy or inadequacy of the administrative record was therefore immaterial. *See generally* section II.A.2.c, *supra*.

In addition, the Labor Department consistently failed to identify and seek to reconcile inconsistencies and discrepancies in the administrative record, and — in reaching its first Remand Determination — failed to properly consider and address the record evidence that "fairly detract[ed]" from the agency's conclusion. *See, e.g.*, *Consol. Bearings Co.*, 412 F.3d at 1269; *Gerald Metals*, 132 F.3d at 720. Most importantly, as discussed in detail above, there is simply no truth to the Government's claim that — at the time the Labor Department issued its first Remand Determination — there was "no record evidence" to undermine the agency's conclusion that the Workers' termination was not attributable to Invista's 2004 shift of production to Mexico. *See, e.g.*, section II.A.2.c, *supra*. As outlined above, the agency's determination was in stark conflict with ample record evidence,

starting with the statement of Invista's Chattanooga Plant Manager, who attested under oath that the termination of the Workers was "a continuation of the [2004] shift in production to Mexico." *See* A.R. 2; *see also* nn. 28–29, *supra* (summarizing record evidence indicating that Workers' termination was attributable to 2004 shift of production, as well as record evidence that Workers' customer service duties were assumed by personnel in Brazil).

For all these reasons and more, there can be no claim that Labor's determinations were supported by substantial evidence "based upon the record at the time" that each was rendered. *See* Def.'s Response at 16 (original emphasis omitted). Like the Government's first argument, this argument too provides no support for the Government's claim that its litigation position was substantially justified.

Citing *Barry Callebaut* and *Marathon Ashland Pipe Line*, the Government further argues that its pursuit of this litigation was substantially justified because "it was appropriate to defend Labor's reliance upon evidence provided by company employees." *See* Def.'s Response at 16 (discussing *Barry Callebaut*, 357 F.3d at 1383; *Marathon Ashland Pipe Line*, 370 F.3d at 1385). As explained more fully above, however, neither *Invista I* nor *Invista II* concluded that the agency had erred simply by relying on information provided by the Workers' former employer. *See* section II.A.2.d, *supra*. Instead, the Labor Department was faulted for — in effect — improperly delegating to an Invista lawyer the power to decide the Workers' TAA/ATAA claim, by framing its inquiries in terms of the "ultimate fact" to be determined by the agency — specifically, whether the Workers' termination was attributable to the 2004 shift of production to Mexico. *See id*.

In any event, as discussed above, *Barry Callebaut* and *Marathon Ashland Pipe Line* are inapposite here. Those cases hold that the Labor Department is entitled to rely upon information provided by employers in TAA/ATAA cases — but only where (1) "the Secretary reasonably concludes that [the employer's] statements are creditworthy," and (2) the employer's statements "are not contradicted by other evidence." *See generally* section II.A.2.e, *supra* (discussing *Barry Callebaut*, 357 F.3d at 1383; *Marathon Ashland Pipe Line*, 370 F.3d at 1385). And, as explained above, neither of those conditions was met in this case. *See id*.

Finally, the Government asserts that its litigation position was substantially justified because the Government "relied upon the statutory standard that a review of a negative TAA determination is based solely upon the facts in the administrative record before the Court and nothing else." *See* Def.'s Response at 16 (citations omitted).

This argument refers back to the Government's claim that *Invista I* looked beyond the administrative record — an argument which is addressed, and disposed of, above. *See* section II.A.2.g, *supra*. As explained at some length there, the Government's argument is predicated on an obvious misreading of *Invista I*.

Contrary to the Government's implication, *Invista I* plainly did not conclude that the termination of these Workers was attributable to foreign competition. *See* section II.A.2.g, *supra*. In the excerpt which the Government highlights, *Invista I* noted only that foreign competition led to Invista's 2004 shift of production to Mexico (which, in turn, led to the 2004 TAA/ATAA certification). *See id*. And the basis for the 2004 TAA/ATAA certification was never in dispute in this case. Indeed, it is fully documented in the administrative record in this action. *See id*.; *see also* A.R. 5–6 (Labor Department's 2004 TAA/ATAA certification of Invista workers); 69 Fed. Reg. 54,320 (same). There is thus no merit to the Government's argument that *Invista I* was not "based solely upon the facts in the administrative record before the Court and nothing else." *See* Def.'s Response at 16 (citations omitted). As such, the Government cannot rely on that claim to establish that its litigation position here was substantially justified.

In light of the above, and given that the Government expressly argues that its litigation position in this matter was substantially justified "for the same reasons" that it asserts the Labor Department's position was substantially justified (*see* Def.'s Response at 15), the conclusion that the Government's litigation position was not substantially justified seems almost inexorable. Under the circumstances, however, there is no need to reach that issue.

On the facts of this case, even assuming that the Government's litigation position was substantially justified, the overall position of the United States was not. *See generally Chiu v. United States*, 948 F.2d at 715 (noting, with approval, that — in making EAJA award — trial court "assumed the government's position in litigation . . . to be reasonable, but found that the lack of substantial justification [for the agency's action at the administrative level] outweighed any reasonable positions taken thereafter"). "As exemplified in the EAJA and [Rule 11 of the Federal Rules of Civil Procedure], . . . the processes of litigation presuppose some reasonable investigation . . ." *Hess Mech. Corp.*, 112 F.3d at 150; *cf. id*. at 147 (criticizing "flimsiness" of administrative record of investigation). In the case at bar, "any justification for the litigation phase cannot outweigh the lack of substantial justification for the original agency action." *Chiu v. United States*, 948 F.2d at 715 (internal quotation marks and quotation omitted).

Accordingly, there is no need to further parse the merits of the Government's conduct of this litigation before concluding that, for purposes of an EAJA award, the United States' position was not substantially justified. *See, e.g.*, *Kelly v. Nicholson*, 463 F.3d at 1355 (concluding that government's position was not substantially justified based solely on lack of justification for agency's actions at administrative level); *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 967–68 (D.C. Cir. 2004) (noting that, even assuming that government's litigation position was "substantially justified," plaintiff was eligible for EAJA award based on lack of substantial justification for agency's actions); *BMC II*, 31 CIT at 1626–27, 519 F. Supp. 2d at 1313–15 (same); *cf. Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 28 CIT 1571, 1576 n.2, 350 F. Supp. 2d 1075, 1089 n.2 (2004) (finding a lack of substantial justification in TAA case without considering Labor Department's position at the administrative level, where "the Government's position during . . . litigation was not substantially justified").

Because the United States' position in this matter was not substantially justified, the Workers are entitled to an award of attorneys' fees and expenses under the EAJA. What remains to be determined is the amount of that award.

B. *The Calculation of the Workers' EAJA Award*

To determine the size of a reasonable award of attorneys' fees under the EAJA, a "lodestar" figure is calculated by multiplying "the number of hours reasonably expended" by "a reasonable hourly rate." *See Hensley v. Eckerhart*, 461 U.S. at 433. In support of their EAJA Application, the Workers have submitted an affidavit from their counsel, as well as a computer-generated statement captioned "Matter Worked Detail Report" accounting for the time and expenses that counsel incurred in this action. *See* Declaration of Thomas A. Telesca in Support of Application for Fees and Other Expenses Under EAJA ("Telesca Declaration"); Pls.' EAJA Application, Exh. B. The Telesca Declaration attests, *inter alia*, that the rates reflected in the computer-generated statement are the standard hourly rates charged by the Workers' counsel. *See* Telesca Declaration ¶ 8. The computer-generated statement lists entries in chronological order, and — for each entry — includes the date the work was done, the number of hours billed (in six-minute increments), the total fee for the time billed in the entry (at counsel's standard hourly rate at the time), and a summary description of the tasks performed. *See* Pls.' EAJA Application, Exh. B. The statement also specifies the total fees calculated at counsel's standard hourly rates. *Id*.

The second component of the "lodestar" figure — after "the number of hours reasonably expended on the litigation" — is "a reasonable hourly rate of compensation." *See Hensley v. Eckerhart*, 461 U.S. at 433. The EAJA caps attorneys' fees at $125 per hour, "unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii). The computer-generated statement submitted by the Workers indicates that the standard hourly billing rates of their counsel exceeded the $125 per hour statutory cap. *See* Pls.' EAJA Application, Exh. B; *see also* Telesca Declaration ¶ 8. Thus, all attorney hours reasonably expended on the Workers' behalf are compensable at the rate of at least $125 per hour (and more, if justified by "an increase in the cost of living or a special factor").[45]

A review of the computer-generated statement submitted by the Workers indicates both that counsel devoted a total of 104.8 hours to this matter, and that the tasks that he completed and the amount of time devoted to each of those tasks were reasonable. Accordingly, absent any objection by the Government to those figures, the Workers are entitled to an award reflecting a total of 104.8 hours reasonably expended by their counsel on their behalf. *See* Def.'s Response at 1 (explaining that Government does not challenge "the reasonableness of the amount of fees" that Workers seek).

As to the "reasonable hourly rate" to be used in calculating the award of attorneys' fees, the Workers do not argue that there are any "special factors" present which might justify a fee higher than the statutory cap. Nor do the circumstances of this case suggest the need for such a "special factors" enhancement. A cost of living adjustment to the EAJA $125 per hour statutory cap is appropriate, however. *See generally BMC II*, 31 CIT at 1683–87, 519 F. Supp. 2d at 1364–67 (and authorities cited there). Using the Consumer Price Index — All Urban Consumers ("CPI-U") data for March 1996 as the baseline for calculations,[46] and adjusting those data to reflect increases in the cost of living as of March of the respective year at issue, the applicable EAJA statutory cap is $164.88 per hour for attorney time expended in 2007, $171.38 per hour for attorney time expended in 2008, and $170.75 per hour for attorney time expended in 2009. The Workers are thus entitled to an award of attorneys' fees in the sum of $4,732.06 for the 28.7 hours expended by counsel in 2007, $9,048.86 for the 52.8 hours expended by counsel in 2008, and $3,978.48 for the

[45] The Workers are not seeking an award for "paralegal fees." *See* Pl.'s EAJA Application at 7 n.2.

[46] The EAJA statutory cap of $125 per hour became effective in March 1996. *See Atlantic Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 490 n.1 (1st Cir. 2000).

23.3 hours expended by counsel in 2009 — for a total award of attorneys' fees in the sum of $17,759.40.

In addition to attorneys' fees, the Workers also seek an award of $363.20 for expenses incurred by counsel in the course of this litigation. *See* Pls.' EAJA Application, Exh. B. In support of their request, the Workers have supplied the requisite "itemized statement," including "a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case." *See id*.; *Naporano Iron and Metal Co. v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987); 28 U.S.C. § 2412(d)(1)(B) (requiring submission of "itemized statement").

The documentation provided by the Workers supports their request for $123.96 for reproduction costs, $121.33 for computer-assisted legal research expenses, $57.74 for postage, $39.00 for binding, and $21.17 in telephone charges — sums which appear to be entirely reasonable under the circumstances. *See* Pls.' EAJA Application, Exh. B. Moreover, the Government does not object to the sum that the Workers seek. *See* Def.'s Response at 1 (explaining that Government does not challenge "the reasonableness of the amount" that Workers seek). Accordingly, the Workers' request for an award of $363.20 for expenses shall be granted.

IV. *Conclusion*

The Court of Appeals has spoken eloquently to the importance of the EAJA in veterans' benefits cases, beginning with the proposition that "'[t]he essential objective of the EAJA [is] to ensure that persons will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in the vindication of their rights.'" *Kelly v. Nicholson*, 463 F.3d at 1353 (quotation omitted). The Court of Appeals has emphasized that "[r]emoving such deterrents is imperative in the veterans benefits context, which is intended to be uniquely pro-claimant, . . . and in which veterans generally are not represented by counsel [at the administrative level]." *Id*. (citations omitted). Thus, the Court of Appeals has concluded, "EAJA is a vital complement to this system designed to aid veterans, because it helps to ensure that they will seek an appeal when the VA has failed in its duty to aid them or has otherwise erroneously denied them the benefits that they have earned." *Id*.

There are powerful parallels between the statutory scheme governing veterans' benefits and that governing trade adjustment assistance for workers whose jobs have been sacrificed to international trade, for the greater good of the nation. *See* section II.A.1, *supra*;

BMC I, 30 CIT at1370–73, 454 F. Supp. 2d at 1355–58 (comparing TAA and veterans' benefits schemes). And, much as it does in the veterans' benefits context, the EAJA plays a critical role in fulfilling the purpose and the promise of the TAA/ATAA laws, as enacted by Congress. *See Kelly v. Nicholson*, 463 F.3d at 1353; *BMC II*, 31 CIT at 1688–89, 519 F. Supp. 2d at 1368–69.

In short, what the Court of Appeals has said of the EAJA in veterans' benefits cases applies with equal force in the context of TAA/ATAA: "EAJA is a vital complement to . . . [the TAA/ATAA program] designed to aid . . . [displaced workers], because it helps to ensure that they will seek an appeal when the [Labor Department] . . . has failed in its duty to aid them or has otherwise erroneously denied them the benefits that they have earned." *See Kelly v. Nicholson*, 463 F.3d at 1353.

The plaintiff Workers here have their *pro bono* counsel to thank for securing for them the TAA/ATAA benefits that the Labor Department thrice denied them. For all the reasons set forth above, the Workers are also entitled to an award of attorneys' fees and expenses under the EAJA, in the sum of $18,122.60.

So ordered.

Dated: June 28, 2010 New York,
New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY JUDGE

Slip Op. 10–74

CANEX INTERNATIONAL LUMBER SALES LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 02–00596

[Plaintiff's motion for summary judgment and cross-cross-motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

Dated: June 29, 2010

Joel R. Junker & Associates (*Joel R. Junker*) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Aimee Lee*); *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge:

Introduction

This matter is before the court on cross-motions for summary judgment by plaintiff Canex International Lumber Sales Ltd. ("Canex") and defendant United States ("the Government") pursuant to USCIT Rule 56. Canex claims that Customs' treatment of Canex's merchandise violated 19 U.S.C. § 1625(c) by effectively modifying or revoking two of Customs' prior ruling letters without proper notice and comment. Canex also challenges the tariff classification of its imported merchandise. U.S. Customs and Border Protection ("Customs"), formerly the U.S. Customs Service, classified the merchandise as sawn lumber under subheading 4407.10.0015 of the Harmonized Tariff Schedule of the United States (2000) ("HTSUS").[1] Canex asserts that the proper classification is under subheading 4418.90.4020 as roof truss components, or alternatively under 4421.90.9840 as other

[1] The relevant portion of Chapter 44 of the HTSUS reads:

4407	Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm:
4407.10.00	Coniferous
. . . .	
	Other:
. . . .	
	Not treated:
[4407.10.00]15	Mixtures of spruce, pine, and fir ("S-P-F").

It should be noted that the numbering of relevant subheadings varies in subsequent versions of the HTSUS, but will be cited here as used by the parties, and as listed when this dispute arose.

articles of wood.[2] For the reasons below, the court grants the Government's motion for summary judgment and denies Canex's motions.

Background

Between April and November 2000, Canex, a Canadian remanufacture/wholesale company for lumber products, entered the merchandise at issue at the Port of Blaine, Washington. (Pl.'s Rule 56 Statement of Material Facts Not in Dispute ("Pl.'s SMF") ¶¶ 1, 8; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Issue ("Def.'s Resp. SMF") ¶¶ 1, 8; Mem. P. & A. Supp. Pl.'s Rule 56 Mot. Summ. J. ("Pl.'s Br.") Ex. A.) The merchandise consisted of 2x4 and 2x6 spruce-pine-fir ("SPF") machine stress rated ("MSR") lumber of lengths of six, eight, ten, twelve, fourteen, sixteen, eighteen, and twenty feet. (Pl.'s Cross-Mot. Rule 56 Statement of Material Facts Not in Dispute ¶¶ 2, 6; Def.'s Resp. to Pl.'s Cross-Mot. Statement of Material Facts Not in Dispute ¶¶ 2, 6.) The lumber was cut on one end at an angle of 67.4/22.6 degrees (5/12 pitch), 71.6/18.4 degrees (4/12 pitch), or 76.0/14.0 degrees (3/12 pitch) and square cut on the opposite end. (Def.'s Statement of Undisputed Material Facts ("Def.'s SMF") ¶¶ 2–3; Pl.'s Resp. to Def.'s Statement of Material Facts Not in Issue

[2] The relevant portion of Chapter 44 of the HTSUS reads:

4418	Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes:			
. . . .				
4418.90		Other:		
. . . .				
4418.90.40			Other	
. . . .				
[4418.90.40]20				Roof trusses
. . . .				
[4418.90.40]90				Other
. . . .				
4421	Other articles of wood:			
. . . .				
4421.90		Other:		
. . . .				
			Other:	
. . . .				
4421.90.98				Other
. . . .				
[4421.90.98]40					Other.

("Pl.'s Resp. SMF") ¶¶ 2–3.) According to Canex, its customer, wholesaler Lignum Ltd., would ship the lumber to end user truss manufacturers in the United States.[3] (Pl's SMF ¶¶ 3, 10–11.)

After reviewing two prior classification rulings issued by Customs to other importers, Canex entered the merchandise as truss components under heading 4418, HTSUS. (Pl.'s Br. 6–7.) Canex filed an end use statement with each entry summary certifying that the lumber was purchased for use as truss components and that the angle was used in finished trusses. (Pl.'s SMF ¶¶ 23, 25; Def.'s Resp. SMF ¶¶ 23, 25.) Occasionally, truss diagrams accompanied the end use statements. (Pl.'s SMF ¶ 25; Def.'s Resp. SMF ¶ 25.) Canex, however, never confirmed that the lumber corresponded to the truss diagrams. (Def.'s SMF ¶ 8; Pl.'s Resp. SMF ¶ 8.)

Customs sent Canex a Notice of Action on Customs Form 29 ("CF 29") stating that the lumber was classifiable under heading 4407, HTSUS, and that Customs would assess liquidated damages if Canex did not submit within twenty days a permit for the merchandise required under the U.S. and Canada Softwood Lumber Agreement.[4] (Pl.'s SMF ¶ 27; Def.'s Resp. SMF ¶ 27.) Canex did not submit permits within the allotted time. (Pl.'s SMF ¶ 30; Def.'s Resp. SMF ¶ 30.) Customs subsequently liquidated the merchandise under heading 4407 and issued notices of liquidated damages. (Pl.'s SMF ¶¶ 29–30; Def.'s Resp. SMF ¶¶ 29–30.) Canex timely filed two protests, which Customs denied. (Compl. ¶¶ 2–3; Ans. ¶¶ 2–3; *see* Pl.'s Br. Ex. A.) In September 2002, Canex commenced the present action.

Canex moved for summary judgment, arguing that Customs' treatment of Canex's merchandise violated 19 U.S.C. § 1625(c). (*See* Pl.'s Br. 3.) The Government filed a cross-motion for summary judgment on the grounds that the merchandise was properly classified under heading 4407. (*See* Mem. Opp'n Pl.'s Mot. Summ. J. & Supp. Def.'s Cross-Mot. Summ. J. ("Def.'s Br.") 7–17.) Canex subsequently filed a cross-cross-motion for summary judgment, alleging that the correct classification is under heading 4418, or alternatively, heading 4421. (*See* Mem. P. & A. Supp. Pl.'s Reply Def.'s Resp. Mot. Summ. J. with Respect to 19 U.S.C. § 1625(c), Pl.'s Resp. Gov't's Cross Mot. Summ.

[3] Canex also sent one shipment of 2x3 stud grade lumber to another company. (Pl.'s Br. Ex. A, Attach. B, Ex. C, at 7.)

[4] At the time, Customs' regulations required that a bond for importation and entry contain a condition that the principal agrees to "establish to the satisfaction of Customs" within twenty business days that the Government of Canada has issued an export permit for a softwood lumber product for which a permit is required under Softwood Lumber Agreement. 19 C.F.R. § 113.62(k) (2000). If the principal defaults on that agreement, the obligors must "pay liquidated damages equal to $100 per thousand board feet of the imported lumber." *Id.* § 113.62(l)(5).

J. on Classification, & Pl.'s Further Cross Mot. Summ. J. on Remaining Classification Issues ("Pl.'s Reply Br.") 11–12.)[5]

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate if "there is no genuine issue as to any material fact," and "the movant is entitled to judgment as a matter of law." USCIT R. 56(c). The proper construction of a tariff provision is a question of law, and whether the subject merchandise falls within a particular tariff provision is a question of fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002). Where, as here, "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law," and the court reviews Customs' classification decision *de novo*. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

Discussion

I. Customs' actions did not violate 19 U.S.C. § 1625(c).

Canex claims that Customs' issuance of the Notice of Action on CF 29 and liquidation of Canex's imports modified or revoked two of Customs' prior ruling letters, NY B88564 and NY B81359, without proper notice and comment in violation of 19 U.S.C. § 1625(c). (Pl.'s Br. 11–18.) This claim lacks merit.

Section 1625(c) mandates that Customs "give interested parties an opportunity to submit . . . comments" whenever Customs issues "[a] proposed interpretive ruling or decision which would--(1) modify . . . or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or (2) have the effect of modifying the treatment previously accorded by [Customs] to substantially identical transactions." 19 U.S.C. § 1625(c). Although a ruling letter may be an "interpretive ruling," *id.* § 1625(a), 19 C.F.R. § 177.9(b)(2) expressly provides that a ruling letter classification applies only to articles that are *identical* to those in the ruling letter, *see* 19 C.F.R. § 177.9(b)(2) ("Each ruling letter . . . will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.").

Canex's merchandise was not identical to the merchandise in NY B88564 and NY B81359, which clearly were destined for specific use as part of a roof truss system. NY B88564 describes lumber with

[5] Canex's Reply to Defendant's Response on Cross Motion for Summary Judgment on Classification is stricken because it was filed late. In any event, this document does not add anything meaningful to the court's understanding of the case.

"[m]ost pieces" cut at an angle other than 90 degrees on both ends and states that each shipment was accompanied by illustrative literature showing how the pieces were designed to fit together to make a roof truss. *See* NY B88564 (Sept. 9, 1997). NY B81359 describes lumber which was cut to specific sizes and angles that would "depend on the size of the roof truss," and also was accompanied by diagrams that showed where the pieces would fit in a completed roof truss. *See* NY B81359 (Feb. 6, 1997).

By contrast, the intended end use of Canex's lumber was uncertain, as the pieces neither appeared to be roof trusses, nor were accompanied by any illustration or diagram that would indicate placement in a completed roof truss. (*See* Moulds Dep. 152:23–155:22, July 24, 2009, *available at* Def.'s Br. Ex. 1.) Even in the occasional instances where Canex submitted a diagram, Canex never located where the angle cut pieces would fit within the particular diagram. (*See id.* at 154:1–4.) Unlike the merchandise described in the two ruling letters, all of Canex's lumber was cut to a specific angle only on one end. (*See id.* at 54:23–55:6.) Because the merchandise described in the ruling letters was not identical to Canex's, notice and comment pursuant to 19 U.S.C. § 1625(c) was not required.[6]

II. Customs properly classified Canex's merchandise.

Canex correctly identifies the only potentially applicable HTSUS headings: 4407, 4418, and 4421. (Pl.'s Reply Br. 11–12.) Of the three, heading 4407 is the proper classification.

The General Rules of Interpretation ("GRIs") of the HTSUS direct the proper classification of merchandise entering the United States. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). Under GRI 1, HTSUS, "classification shall be determined according to the terms of the headings and any relevant section or chapter notes." The court is bound by the legal construction of the relevant HTSUS headings set forth in *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326 (Fed. Cir. 2009) ("*Millenium II*").[7]

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[6] Because the prior ruling letters did not properly apply to Canex's merchandise, the court need not determine whether the liquidation or Notice of Action on CF 29 would have constituted a proposed interpretive ruling or decision.

[7] The court is deeply concerned by the failure of Canex's counsel to cite *Millenium II* or the court's opinion in *Millenium Lumber Distribution Ltd. v. United States*, Slip Op. 07–56, 2007 WL 1116148 (CIT Apr. 16, 2007) ("*Millenium I*") as relevant authority in his initial summary judgment papers, even though he was the plaintiff's counsel in that case. *See* Wash. Rules of Prof'l Conduct R. 3.3(a)(3), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=gar pc3.3 (last visited June 25, 2010) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the

A. Heading 4407

Heading 4407, HTSUS covers "[w]ood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm." It "serves as a general category," *Millenium I*, 2007 WL 1116148, at *2, which "[w]ith a few exceptions . . . covers all wood," World Customs Organization, *Harmonized Commodity Description & Coding System Explanatory Notes*, Explanatory Note 44.07, 676 (2d ed. 1996) ("Explanatory Note(s)").[8] The wood "need not necessarily be of rectangular (including square) section nor of uniform section along the length." *Id.* Canex's merchandise, which is sawn lumber meeting the thickness requirement, falls within heading 4407. Accordingly, the court next considers whether the merchandise meets the more specific terms of heading 4418. Items covered by heading 4418 are excluded from heading 4407. *Id.*

B. Heading 4418

Heading 4418, HTSUS covers "[b]uilders' joinery and carpentry of wood." It "applies to woodwork . . . used in the construction of any kind of building, etc., in the form of assembled goods or as recognisable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly)." Explanatory Note 44.18, at 686. "[U]nassembled pieces must be more than just basic material generally suitable for use in the finished article." *Millenium II*, 558 F.3d at 1329. "To qualify as recognizable unassembled pieces of particular articles, the subject merchandise must be dedicated solely or principally for use in those articles." *Id.* (internal quotation marks and citation omitted); *see also Finn Bros. v. United States*, 454 F.2d 1404, 1406 (CCPA 1972) ("[I]f an item in its imported condition has been so far advanced beyond the stage of materials as to be dedicated to and commercially fit only for use as a particular article, it is properly classifiable, albeit in an unfinished condition, under the *eo nomine* designation for that article."). Additionally, "if the item as imported can be made into *multiple* parts of articles, the item must identify and fix with certainty the individual parts that are to be made from it." *Millenium II*, 558 F.3d at 1329 (internal quotation

position of the client and not disclosed by opposing counsel."). It is of no moment that this matter is before the same judge. There is no guarantee that cases will not be reassigned for administrative purposes, and each case record stands on its own.

[8] The World Customs Organization Explanatory Notes are not binding but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

marks and citation omitted); *see also Millenium I*, 2007 WL 1116148, at *3 (holding that unassembled pieces must be "discernable as pieces of specific product structures, not just 'the making of [the products] in the abstract' (quoting *Bendix Mouldings, Inc. v. United States*, 388 F. Supp. 1193, 1194 (Cust. Ct. 1974)).

The court notes that the merchandise in this case is identical in all pertinent respects to the merchandise at issue in *Millenium I* and *Millenium II* (collectively, "*Millenium*"). In *Millenium I*, the court held that 2x3, 2x4, and 2x6 SPF lumber of even lengths, which was cut to a precise angle on one end and square cut on the other end and intended to be used in trusses, was correctly classified as standard dimension lumber under heading 4407 and was not classifiable under heading 4418. 2007 WL 1116148, at *1–7. The Federal Circuit affirmed on appeal. *Millenium II*, 558 F.3d at 1331. As this case is materially indistinguishable, the court follows the reasoning of those cases and reaches the same conclusion here.[9]

1. The merchandise is not sufficiently advanced as to be dedicated solely or principally for use in roof trusses.

Canex has not argued that the imported merchandise was dedicated solely or principally for use in roof trusses. Even assuming that the testimony of Canex's expert witness is true, Canex has not presented any evidence that its merchandise as imported is sufficiently advanced beyond basic material generally suitable for use in a truss to be considered "carpentry" under heading 4418.[10] *See Millenium II*, 558 F.3d at 1329; *Millenium I*, 2007 WL 1116148, at *5–6. Like Millenium, *see Millenium I*, 2007 WL 1116148, at *6, Canex admits that its lumber could be used by purchasers as ordinary dimension lumber through recutting for other purposes subsequent to importation (Pl.'s Resp. SMF ¶ 10). Canex, however, argues that the fact that further recutting is required for the lumber to be used as ordinary dimension lumber renders it something else. (Pl.'s Reply Br. 22–24.) This argument fails because "wood products not processed beyond sawing and planing, etc., do not lose their character as lumber . . . unless they are a new and different article, having a specific name and function . . . ." *Acme Venetian Blind & Window Shade Corp. v. United States*, 56 Cust. Ct. 563, 570 (1966).

[9] The Government argues *stare decisis* applies. That is likely so, but out of an abundance of caution the court addresses anew all arguments of plaintiff.

[10] Carpentry is "woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc." Explanatory Note 44.18, at 686.

Here, the reduction in material as result of the angle cut was negligible, as the lumber could be recut for use in general construction as a stud, wall panel, floor truss, or roof truss. (Woeste Report 4, 7, *available at* Def.'s Br. Ex. 4.)[11] Although MSR graded lumber is of a higher grade than required in general construction and may be too expensive for most general use purposes, Canex's expert admits that the "MSR designation does not, in and of itself, determine the use of the lumber."[12] (Runyon Report 6.) The statements of intended use that Canex submitted also are not sufficient to meet the requirements of heading 4418. *See Millenium I*, 2007 WL 1116148, at *5; *see also Benteler Indus., Inc. v. United States*, 840 F. Supp. 912, 917 (CIT 1993) ("[P]roof of use is not sufficient."). Thus, the imported merchandise here, like the imported merchandise in *Millenium*, "was not sufficiently advanced at the time of importation to be classified under 4418" because it "maintained its identity and usefulness as general sawn lumber for potentially numerous purposes." *Millenium I*, 2007 WL 1116148, at *6.

Canex has merely presented evidence that the merchandise as imported is suitable for use in two practices related to truss construction. (*See* Pl.'s Reply Br. 17–20.) The first, splicing, involves the joining together of the square ends of two shorter pieces of lumber via a metal connector to create a truss chord of a needed length. (Runyon Report 5; Runyon Dep. 71:1–13, 92:11–93:24.) Second, according to Canex's expert, a truss manufacturer that produces a finished truss will often leave the ends of a truss chord with overhangs uncut, or "wild," for trimming in the field after the truss has been installed. (Runyon Report 4.) Although Canex's imported merchandise could be used in splicing or as truss chords with "wild" tails subject to a certain level of trimming after installation, this "does not mean . . . that the subject merchandise was 'dedicated solely or principally for use in' a finished truss so that the merchandise could be fairly characterized as 'in the form of . . . recognizable unassembled pieces' of a truss." *Millenium II*, 558 F.3d at 1330 (citation omitted).

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[11] Although plaintiff disagrees with the use of the conclusory term "negligible" and denies that the imported lumber has these possible uses, its own expert admits that the merchandise could have been recut for different functions. (Runyon Report 7, *available at* Pl.'s Reply Br. Ex. 2.) He states that "[w]ood is wood, and so long as the size and quality is sufficient, one can always use something made of wood for something different by re-cutting it." (*Id.*) Thus, Canex's position does not give rise to a *genuine* issue of material fact.

[12] According to Canex's expert, the stud grade lumber could only be used in the webs of trusses, which must be cut to precise lengths at the time of assembly. (Runyon Report 4; Runyon Dep. 57:22–23, Mar. 25, 2010, *available at* Mem. Opp'n Pl.'s Cross-Mot. Summ. J. & Supp. Def.'s Cross-Mot. Summ. J. ("Def.'s Reply Br.") Ex. 1.) The stud grade lumber therefore is not recognizable as part of a truss in its as-imported condition.

2. The merchandise was not identifiable or fixed with certainty as truss components at the time of importation.

The merchandise also was not identifiable or fixed with certainty as unassembled pieces of wood trusses at the time of importation. Here, as in *Millenium*, the evidence demonstrates that there is no genuine issue as to the fact that some or all of the lumber as imported would require significant additional processing, including recutting, to be assembled into wood trusses. *See Millenium I*, 2007 WL 1116148, at *4. A truss consists of top chords, a bottom chord, and webs. (Runyon Report 4.) Canex's expert admits that bottom chords and webs must be cut to precise lengths at the time of assembly. (*Id.*) Canex's lumber, as imported in even-foot lengths, would thus require recutting or splicing, another significant alteration to the lumber, after importation to become bottom chords or webs.

Further, the only uses Canex cites for an even-foot length of lumber in top chord construction involve splicing or recutting. Indeed, the practice of using the lumber as top chords with "wild" tails necessarily requires recutting the lumber to a precise length in the field.[13] (Runyon Report 4.) According to Canex's expert, truss manufacturers maintained Canex's lumber in an inventory of available truss components. (Runyon Report 7; Runyon Dep. 82:9–13.) His company, one of the end users of the imported merchandise, otherwise keeps only square cut lumber as inventory. (Runyon Dep. 21:2–8.) *Millenium II* held that such evidence that the imported merchandise could be used in splicing and maintained in an inventory of truss components showed that the imported lumber was "more raw material for trusses or other purposes generally than . . . identifiable parts of a specific finished truss." 558 F.3d at 1330.

This is particularly true where the end user "may not know which specific truss design a truss component will go into." *Id.* (internal quotation marks omitted). Here, as in *Millenium*, Canex never located where its imported merchandise fit within a specific truss design, and its merchandise was not bundled as a truss kit or as specific components of completed trusses. *See Millenium II*, 558 F.3d at 1330. Thus, no reasonable fact-finder could find that the merchandise as imported was identifiable or fixed with certainty as unassembled truss pieces. Because the imported merchandise was not

[13] Although the Government's expert does not assert specifically that recutting is necessary to account for shrinkage or swelling resulting from exposure to heat or moisture during transport as he did in *Millenium I*, shrinking and swelling was only one of the several factors contributing to the need for recutting described in *Millenium I*. *Id.* at *4. The absence of that contention does not create a genuine issue of material fact here, as Canex claims. (Pl.'s Reply Br. 25–27.)

identifiable or fixed with certainty as roof truss pieces and was not sufficiently advanced to be dedicated solely or principally for use in roof trusses, it is not classifiable under heading 4418.

3. The imported merchandise is not sufficiently similar to beams, rafters, and roof struts to be classified as carpentry.[14]

Canex contends that the imported merchandise is classifiable as "carpentry" under heading 4418 as a matter of law because it is fundamentally the same as the beams, rafters, and roof struts listed as exemplars of carpentry in Explanatory Note 44.18. (Pl.'s Reply Br. 28.) Canex's comparison is based on the fact that each example is comprised of pieces of wood that meet species, grade, and load bearing tensile strength requirements and have dimensions and angle cuts necessary for structural purposes. (*Id.*) Nonetheless, species, grade, and load bearing tensile strength requirements are not specified by the terms of heading 4418 and Explanatory Note 44.18. Beams, rafters, and roof struts are exemplars of carpentry because they are the result of advanced processing. Each of these types of carpentry is cut to a specific length and has a unique set of cuts or other features distinguishing it from standard dimension lumber. (*See* Runyon Dep. 118:6–24, 54:21–55:4, 127:10–130:23; Woeste Rebuttal Report 4–5, *available at* Def.'s Reply Br. Ex. 2.) As discussed *supra*, although Canex's imported merchandise was angle cut on one end and could be used for structural purposes with additional recutting, the merchandise as imported does not fall within the terms of heading 4418. It is not a complex type of wood product as indicated by the words "carpentry" and "joinery." *See* Explanatory Note 44.18, at 686–87.

C. Heading 4421

Canex alternatively asserts that if its merchandise is not classifiable under heading 4418, it should be classified under 4421 because it has parts and functions beyond standard dimension lumber. (Pl.'s Reply Br. 28–30.) Heading 4421, HTSUS covers "[o]ther articles of wood" but excludes "those specified or included in the preceding headings." Explanatory Note 44.21, at 688; *see Millenium II*, 558 F.3d at 1331. Here, the court has established that Canex's merchandise falls under heading 4407. The additional parts and functions to which Canex refers appear to be the MSR grade, species, load bearing tensile strength, and precision angle cut at one end of the lumber, none of which preclude classification under heading 4407. *See Millenium II*, 558 F.3d at 1331; Explanatory Note 44.07, at 675–76. Because heading 4421 excludes merchandise specified under heading

[14] There seems to be no contention that this merchandise is "joinery" under heading 4418.

4407, the merchandise cannot be classified under heading 4421. Thus, under GRI 1, the merchandise is classified under heading 4407.

Conclusion

For the foregoing reasons, the defendant's cross-motion for summary judgment is granted, and the plaintiff's motion for summary judgment and cross-cross-motion for summary judgment are denied. Customs' classification of the subject merchandise under subheading 4407.10.0015, HTSUS, is sustained.

Dated: This 29th day of June, 2010.
New York, New York.

/*s*/ *Jane A. Restani*
JANE A. RESTANI
CHIEF JUDGE