

**TRADE ADJUSTMENT ASSISTANCE CASES:  
28 U.S.C. § 1581(d)—DEPARTMENT OF LABOR AND  
DEPARTMENT OF AGRICULTURE DECISIONS  
UNDER THE TRADE ADJUSTMENT ASSISTANCE  
STATUTES**

PATRICIA M. MCCARTHY AND EMILY S. ULLMAN\*

I. INTRODUCTION

Trade adjustment assistance (“TAA”) statutes were created by Congress to assist workers suffering from the adverse effects of increased competition from imports or shifts in production to other countries. Eligible workers may receive benefits such as employment services, vocational training, or cash payments.<sup>1</sup> Since 1974, the Department of Labor (“Labor”) has primarily administered programs dealing with manufacturing employees. In 2002, Congress placed the Department of Agriculture (“USDA”) in charge of new programs for farmers and fishermen.<sup>2</sup>

The Court of International Trade (“CIT”) has jurisdiction to review certain TAA determinations made by Labor and USDA.<sup>3</sup> In 2006, the CIT and the United States Court of Appeals for the Federal Circuit (“CAFC”) continued to clarify the criteria under which workers are permitted to take advantage of these benefits, such as the manner of job performed and the measure of trade effects.

II. JURISDICTIONAL CASES

The CAFC and the CIT each addressed one case dealing with their

---

\* Ms. McCarthy is an Assistant Director of the Commercial Litigation Branch, Civil Division, United States Department of Justice, and Ms. Ullman is a second-year student at the Harvard Law School. The views articulated in this article are those of the authors and not of the Department of Justice. © 2007, Patricia McCarthy & Emily Ullman.

1. *See Former Employees of BMC Software, Inc. v. U.S. Sec’y of Labor*, 454 F. Supp. 2d 1306, 1309-10 (Ct. Int’l Trade 2006).

2. In the 2002 amendments to the TAA program, Congress added agricultural commodity producers to the list of potentially eligible participants. Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107-210, 116 Stat. 938 (2002).

3. The Court of International Trade reviews certain TAA determinations by Labor pursuant to 28 U.S.C. § 1581(d) (2000). When Congress amended title 19 in 2002 to grant the Court of International Trade jurisdiction to review certain TAA determinations by USDA, *see* 19 U.S.C. § 2395 (Supp. 2004), it did not make a conforming change to title 28.

jurisdiction over aspects of the TAA statutes in 2006.

In *Former Employees of Quality Fabricating v. U.S. Secretary of Labor*, the CAFC held that the CIT lacked jurisdiction to entertain cases regarding TAA benefits for secondarily-affected workers.<sup>4</sup> Primarily-affected workers, those whose employers were directly affected by increased imports or shifts of production to other countries, have received benefits under various TAA programs. For example, benefits were established by the Trade Act of 1974 and the NAFTA-TAA program, which were specifically designed to provide benefits to workers affected by shifts in production to, or imports from, Canada and Mexico.<sup>5</sup> The Trade Act of 2002 combined those two programs.<sup>6</sup> By contrast, secondarily-affected workers were employed by firms that supplied materials or components to a directly-affected firm. Instead of receiving benefits through the Trade Act of 1974, they received benefits under the Job Training Partnership Act (“JTPA”) as authorized by the Statement of Administrative Action (“SAA”).<sup>7</sup>

Plaintiffs in this case were employed by Quality Fabricating, a firm that had lost business with firms whose production had shifted to Mexico or Canada as well as sales because of increased imports from Mexico or Canada.<sup>8</sup> Therefore, in June 2001, plaintiffs sought certification under either the NAFTA-TAA program as primarily-affected workers or under JPTA as secondarily-affected workers.<sup>9</sup> Although Labor certified the group as having been secondarily-affected, it erred in publishing its findings, initially denying the petition entirely. The employees appealed to the CIT; Labor, noticing the mistake, published notice that the employees had been secondarily-affected and were eligible to apply for benefits.<sup>10</sup> At this point, the Government filed a motion to dismiss the case for mootness and lack of subject matter jurisdiction regarding the secondarily-affected workers.<sup>11</sup>

Pursuant to 28 U.S.C. § 1581(d), the CIT possesses jurisdiction to review Labor’s TAA determinations under the Trade Act. Title 28, United States Code, section 1581(i)(4) similarly limits review to Labor’s enforcement and administration of Trade Act determinations

---

4. See 448 F.3d 1351, 1357 (Fed. Cir. 2006).

5. See *id.* at 1352.

6. *Id.*

7. *Id.*

8. *Id.* at 1352.

9. See *id.* at 1353.

10. *Id.*

11. *Id.* at 1353-54.

TRADE ADJUSTMENT ASSISTANCE CASES

under section 1581(d).<sup>12</sup> Therefore, the CAFC concluded, the trial court possessed jurisdiction to review the secondarily-affected worker benefits program only if it fell under the scope of the Trade Act.<sup>13</sup>

The CAFC noted that the SAA specifically distinguishes between the primarily-affected worker programs and the secondarily-affected worker programs, explaining that only the NAFTA-TAA program was incorporated into the Trade Act, while the secondarily-affected programs remained under the JTPA.<sup>14</sup> The NAFTA Implementation Act, which provides judicial review of the NAFTA-TAA program under the Trade Act in the CIT, does not mention the secondarily-affected programs at all.<sup>15</sup> Therefore, despite Labor's practice of handling both types of claims in a single petition, the Court held that there was no explicit statutory authority allowing the CIT to review secondarily-affected worker benefits determinations.<sup>16</sup> The CAFC emphasized that neither it nor the CIT possessed authority to create a unified trade program or plan for judicial review, concluding that the CIT lacked jurisdiction to entertain plaintiff's claims. It remanded the case for dismissal.<sup>17</sup>

In *Independent Steelworkers Union v. U.S. Secretary of Labor*, the CIT held that it possessed jurisdiction to entertain complaints dealing with the extension of TAA eligibility certifications.<sup>18</sup> The plaintiff union filed the case on behalf of steel workers, many of who had been laid off as a result of bankruptcy concerns.<sup>19</sup> In April 2002, Labor certified employees who had been laid off since July 2000. The certification, however, was set to expire in two years, meaning that employees who lost jobs after April 2004 would not be eligible.<sup>20</sup> The remaining 300 workers filed a petition with Labor before the certification's expiration to extend it for three and a half weeks so that they would still be eligible when they were released.<sup>21</sup> Labor denied the request and the request for a new certification. The workers appealed to the CIT.<sup>22</sup> the Government contended that the Court lacked subject matter jurisdiction to

---

12. *Id.* at 1355 (citing 28 U.S.C. § 1581(i)(4)).

13. *Id.*

14. *See id.* at 1355-56.

15. *Id.* at 1355 (citing NAFTA Implementation Act, 19 U.S.C. § 3311 (2000)).

16. *See id.* at 1356-57.

17. *See id.* at 1357.

18. *See No.* 04-00492, 2006 WL 3354281, at \*11 (Ct. Int'l Trade 2006).

19. *See id.* at \*1-2.

20. *See id.* at \*2.

21. *Id.* at \*8.

22. *Id.* at \*2, \*4.

review a challenge to a denial of an extension request.<sup>23</sup>

Pursuant to 28 U.S.C. § 1581(d)(1), the CIT has exclusive jurisdiction to entertain claims challenging a final determination of Labor that relates to the certification of a group of workers as eligible to apply for TAA benefits.<sup>24</sup> Title 19, United States Code, section 2395(c) gives the Court jurisdiction to review Labor's determination as to whether a group of employees meets the requirements set forth in 19 U.S.C. § 2272.<sup>25</sup> The Court read these two statutes together to conclude that it possessed jurisdiction to review Labor's decision upon a request to extend if that decision was both a final determination and regarded the requirements for certification found in section 2272.<sup>26</sup>

The Court acknowledged that there is no clear definition of when a decision is "final," but characterized it generally as a point at which judicial review will not interfere with the agency's ordinary process of adjudication and at which legal rights and obligations are determined.<sup>27</sup> Despite the informality of Labor's decision, which was expressed in a letter to the plaintiffs, the Court held that Labor intended the letter to be binding on the plaintiffs and that Labor had no intention of revisiting the decision. The Court thus judged the decision to be final.<sup>28</sup>

In addressing the second requirement for jurisdiction, the Court commented that Labor's stated basis for denial was that the workers' firm was not adversely affected by imports, one of the requirements under section 2272.<sup>29</sup> In fact, the Court suggested, Labor's decision to deny plaintiff's request would not have been based upon substantial evidence had it not undertaken some sort of section 2272 analysis.<sup>30</sup> Having determined that Labor's actions constituted a final determination relating to section 2272 requirements, the Court held that it possessed jurisdiction pursuant to sections 1581(d) and 2395(c).<sup>31</sup> In the alternative, the Court held that, even if it did not possess jurisdiction pursuant to section 1581(d), it would possess jurisdiction pursuant to 28 U.S.C. § 1581(i)(4), which provides the Court with residual

---

23. *See id.* at \*8.

24. *See id.*; 28 U.S.C. § 1581(d) (2005).

25. *See id.*; 19 U.S.C. § 2395(c) (2005).

26. *Independent Steelworkers*, 2006 WL 3354281 at \*9.

27. *Id.* at \*9.

28. *Id.*

29. *See id.* at \*8, \*10.

30. *Id.* at \*10.

31. *Id.*

## TRADE ADJUSTMENT ASSISTANCE CASES

jurisdiction to entertain complaints about the administration or enforcement of trade laws by an agency.<sup>32</sup> Plaintiff's complaint in this case, the Court ruled, was a challenge to Labor's administration and enforcement of section 2272. Therefore, section 1581(i)(4) created an alternative basis for the Court's jurisdiction.<sup>33</sup>

### III. DEPARTMENT OF LABOR CASES

#### A. *Software as An Intangible Article*

In determining whether workers are eligible for certification to apply for TAA, Labor relies upon the criteria set forth in 19 U.S.C. § 2272(a). Section 2272(a) requires, among other things, that "imports of articles like or directly competitive with articles produced by [the workers'] firm or subdivision have increased."<sup>34</sup> In ascertaining whether a worker's firm has produced an article, Labor has relied upon the Harmonized Tariff Schedule ("HTSUS"), which refers to articles as items subject to a duty.<sup>35</sup> Where Labor has determined that a firm does not produce articles, it has not certified the firm's workers as eligible for TAA.<sup>36</sup>

Since at least 2004, Labor maintained that the design and development of software, particularly software that is not sold as a manufactured product to the general public or embodied in tangible form at any point, was not the production of an article. Under this position, workers who engage in software design and development were service providers and not eligible for TAA.<sup>37</sup> Labor's position led the CIT to remand numerous cases in past years.<sup>38</sup>

In *Former Employees of BMC Software, Inc. v. U.S. Secretary of Labor*, the

---

32. *Id.*; 28 U.S.C. § 1581(i)(4) (2005).

33. *Independent Steelworkers*, 2006 WL 3354281 at \*10.

34. Trade Act of 1974, 19 U.S.C. § 2272(a)(2)(A)(ii) (2005).

35. See *Former Employees of Computer Scis. v. U.S. Sec'y of Labor (Computer Scis. I)*, 414 F. Supp. 2d 1334, 1341 (Ct. Int'l Trade 2006).

36. See, e.g., *Former Employees of Murray Eng'g, Inc. v. Chao*, 346 F. Supp. 2d 1279, 1283-84 (Ct. Int'l Trade 2004) (reversing Labor's decision that custom designs for industrial machinery were not articles).

37. See *Former Employees of BMC Software, Inc. v. U.S. Secretary of Labor*, 454 F. Supp. 2d 1306, 1315 (Ct. Int'l Trade 2006).

38. See, e.g., *Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec'y of Labor*, 387 F. Supp. 2d 1346 (Ct. Int'l Trade 2005) (remanding for lack of a thorough factual investigation); *Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor (EDS I)*, 408 F. Supp. 2d 1338 (Ct. Int'l Trade 2005) (remanding for a factual and legal analysis of Labor's position that software transmitted intangibly is not an article).

Court sustained a finding by Labor on remand that the workers in question contributed to the production of tangible, mass-replicated software as well as to design and development. The Court did not reach the issue of whether workers engaged in the production of intangible software were eligible for certification.<sup>39</sup> It did, however, produce a 52-page opinion excoriating Labor for what it perceived as Labor's failure to conduct a thorough investigation of the workers' original petition for certification, accusing the agency of not exploring and resolving inconsistencies and discrepancies in the information presented to it, over-relying upon employer-provided information, and ignoring publicly-available sources of evidence.<sup>40</sup> The Court reiterated Labor's affirmative duty to conduct its own factual inquiries and to weigh all of the evidence provided by employees, employers, and third parties in making its determinations.<sup>41</sup> Emphasizing the deleterious effects of delay upon the workers, the Court stated that it saw its duty to expedite litigation in TAA cases. The Court hinted that in future cases, it might limit the number and duration of remands to ensure the full effectiveness of granted benefits.<sup>42</sup> In fact, the Court suggested that it might even avoid granting the Government's motions for voluntary remands, on the theory that forcing the Government to defend Labor's actions on the strength of the original investigation would have a salutary effect on the depth of that initial investigation.<sup>43</sup>

The Court faced the tangibility requirement for articles in *Former Employees of Computer Sciences v. U.S. Secretary of Labor*. Rejecting Labor's determination that software code not embodied on a physical medium is not found in the HTSUS, the Court held that any telecommunications transmission, which includes code imported via the Internet, is a good under HTSUS, even though it is exempt from duties.<sup>44</sup> The Court then examined rulings from the United States Bureau of Customs and Border Protection, charged by Congress with interpreting the HTSUS, and the United States International Trade Commission, responsible for reviewing and modifying the HTSUS.<sup>45</sup> Citing a Customs ruling that

39. See *BMC Software*, 454 F. Supp. 2d at 1322-23.

40. See *id.* at *passim*.

41. *Id.* at 1328-29, 1339.

42. *Id.* at 1348-49. While the Court acknowledged that state courts possess jurisdiction to handle disputes regarding the specific TAA benefits to which individual workers are entitled, it suggested that the CIT still retained sufficient jurisdiction over the cases on its docket to concern itself with the effectiveness, if not the composition, of those benefits. *Id.* at 1347-48.

43. *Id.* at 1340.

44. *Computer Scis. I*, 414 F. Supp. 2d 1334, 1341-42 (Ct. Int'l Trade 2006).

45. *Id.* at 1342.

declared software imported via the Internet to be an “importation of merchandise,”<sup>46</sup> albeit one that did not require payment of a duty, and an opinion from the International Trade Commission that deemed software an article of importation regardless of its physical form or lack thereof,<sup>47</sup> the Court deemed Labor’s limited definition of “article” to be inconsistent with the interpretations of these agencies. Having combined its own reading of HTSUS with that of the two agencies most intimately concerned with HTSUS interpretation, the Court declared Labor’s position to be inconsistent with the law.<sup>48</sup> On a final remand, Labor announced a change in policy consistent with the Court’s decision and determined that “[s]oftware and similar intangible goods that would have been considered articles for the purposes of the Trade Act if embodied in a physical medium will now be considered articles regardless of their method of transfer.”<sup>49</sup> Labor also created the category of intangible articles, distinct from both tangible articles and services.<sup>50</sup>

As a result of Labor’s policy change with respect to software, a flurry of cases were either remanded by the Court or revised on voluntary remand. Another group of plaintiffs who developed and tested software and information systems was found eligible for TAA.<sup>51</sup> Plaintiffs who performed electronic indexing services were now judged to be eligible because they produced electronic documents, which qualified under the new policy as intangible articles.<sup>52</sup> Similarly, digitized embroidery designs, which would have been considered articles if embodied in

---

46. *Id.* (citing Customs Ruling Letter 114459, 1998 U.S. CUSTOM HQ LEXIS 640 (Sept. 17, 1998)).

47. *Id.* at 1342-43 (citing Commission Opinion on Remedy, the Public Interest, and Bonding, *in* The Matter of Certain Hardware Logic Emulation Systems and Components Thereof, USITC Pub. 3089, Inv. No. 337-TA-383, at 28-29 (Mar. 30, 1998)).

48. *Id.* at 1343.

49. *Former Employees of Computer Scis. Corp. v. U.S. Sec’y of Labor (Computer Scis. II)*, 427 F. Supp. 2d 1361, 1362 (Ct. Int’l Trade 2006) (quoting Notice of Revised Determination on Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut, 71 Fed. Reg. 18,355, 18,355 (Dep’t Labor Apr. 11, 2006)).

50. *Former Employees of IBM Corp., Global Services Division v. U.S. Sec’y of Labor (IBM II)*, 462 F. Supp. 2d 1239, 1241 (Ct. Int’l Trade 2006) (citing Notice of Revised Determination on Remand, 71 Fed. Reg. at 18,355).

51. *See* *Former Employees of IBM Corp., Global Services Division v. U.S. Sec’y of Labor (IBM I)*, 435 F. Supp. 2d 1335, 1336 (Ct. Int’l Trade 2006).

52. *See* *Former Employees of Gale Group, Inc. v. U.S. Sec’y of Labor*, 441 F. Supp. 2d 1348, 1349 (Ct. Int’l Trade 2006). In *Gale Group*, the Government sought a voluntary remand to implement Labor’s policy change, even though the CIT had sustained Labor’s final determination denying certification, and the case was on appeal to the CAFC.

a tangible medium, were found to be intangible articles and, accordingly, the plaintiffs responsible for creating them became eligible for benefits.<sup>53</sup> In *Former Employees of Electronic Data Systems, Corp. v. U.S. Secretary of Labor*, the Court affirmed Labor's decision to certify workers from a firm where a significant portion of employees produced intangible articles, including new software and software code.<sup>54</sup>

The Court did have one case following the policy change in which it held that workers were not engaged in the production of articles, but instead provided services: *Former Employees of Gateway Country Stores, LLC v. U.S. Secretary of Labor*.<sup>55</sup> Here, the plaintiffs were workers in the retail outlets of a computer manufacturer. In addition to providing customer service and sales, retail sales, and training, the company required the employees to perform some computer upgrades and component installation to customize computers to the purchaser specifications.<sup>56</sup> The Court held that the administrative record supported Labor's conclusion that employees spent almost all of their time in activities not related to the production of the computers.<sup>57</sup> In addition, the computers were shipped as fully-functional units that qualified as articles before plaintiffs worked on them; the components introduced to the products by plaintiffs were items like off-the-shelf software and hardware, and were, therefore, insufficient to transmute the products into new articles.<sup>58</sup>

#### B. *Awarding Attorney Fees Under The Equal Access To Justice Act*

The policy change also created a new ramification for the awarding of attorney fees under the Equal Access to Justice Act ("EAJA"). The EAJA authorizes awards of fees to a party in litigation against the United States if it meets four criteria, including having a "prevailing"

---

53. See *Former Employees of Lands' End Bus. Outfitters v. U.S. Sec'y of Labor*, No. 05-00517, 2006 WL 1273899, at \*1 (Ct. Int'l Trade 2006).

54. 427 F. Supp. 2d 1359, 1360 (Ct. Int'l Trade 2006). In 2007, Labor would go on to clarify that, in its opinion, workers for firms that produce intangible articles in association with the provision of a service were not eligible for TAA benefits. The Court rejected this as an inappropriate distinction between tangible and intangible articles, holding that once Labor has determined that workers were engaged in the production of any type of article, those workers have satisfied the Trade Act's "article" requirement. See *Former Employees of Merrill Corp. v. United States*, 483 F. Supp. 2d 1256, 1267-68 (Ct. Int'l Trade 2006).

55. No. 04-00588, 2006 WL 539129 (Ct. Int'l Trade 2006).

56. See *id.* at \*2.

57. *Id.* at \*7.

58. *Id.* at \*8-9.

TRADE ADJUSTMENT ASSISTANCE CASES

party in the litigation.<sup>59</sup> To be a prevailing party, the party must have received either a judgment upon the merits or a settlement agreement enforced through a consent decree, (both of which materially alter the legal relationship between the parties).<sup>60</sup> The CAFC has held that, while remand of a claimant's case to an administrative agency does not always grant prevailing party status, the claimant has prevailed if the remand required further administrative proceedings due to agency error and the plaintiff was successful in the remand proceedings.<sup>61</sup>

Plaintiffs who were certified as eligible for TAA benefits as a result of a voluntary remand by Labor applied for attorney fees under the EAJA, claiming to be prevailing parties.<sup>62</sup> In evaluating this claim, the Court noted that precedent disqualifies parties from attorney fees where the plaintiffs base their claim upon the "catalyst" theory, in which the actions of the claimant are viewed as the catalyst of a voluntary change in the Government's conduct. Under this theory, the conduct change lacks the "necessary judicial *imprimatur*" to warrant a classification as a prevailing party.<sup>63</sup> Because the benefits awarded to plaintiffs in this case were the result of a voluntary reconsideration by the Government, the Court held that the catalyst theory under girded plaintiffs' claims and could not justify awarding fees under the EAJA.<sup>64</sup> The results of the voluntary reconsideration, while favorable to plaintiffs, sprang from the policy change and not from success on the merits of the case.<sup>65</sup> Although the results of the revised determination on remand were affirmed by the Court, this too was an insufficient hook to qualify as a prevailing party, as the court did not evaluate plaintiffs' case further but only held that Labor's determination was supported by substantial evidence and was in accordance with the law.<sup>66</sup>

---

59. *IBM II*, 462 F. Supp. 2d 1239, 1241 (Ct. Int'l Trade 2006) (appeal pending). The other three criteria are that the Government's position in the litigation must not have been substantially justified, that there are no special circumstances that make the awarding of fees unjust, and that the fee application must be timely and itemized. *Id.*

60. *Id.* at 1241-42 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & H.R.*, 532 U.S. 598, 604 (2001)).

61. *See Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003).

62. *See IBM II*, 462 F. Supp. 2d at 1242; *Former Elec. Data Sys. Corp. v. U.S. Sec'y of Labor (Elec. Data Sys. II)*, No. 03-00373, 2006 WL 3326778, at \*1 (Ct. Int'l Trade 2006).

63. *IBM II*, 462 F. Supp. 2d at 1242 (quoting *Buckhannon*, 532 U.S. at 605).

64. *Id.* at 1243.

65. *Id.*

66. *Id.*

C. *The Meaning Of “Like or Directly Competitive With”*

Although less tumultuous than the debate over the meaning of “article,” in 2006 the Court also addressed the meaning of the Trade Act phrase “like or directly competitive with,” a category of imports related to the articles produced by claimants that must increase for claimants to be eligible for TAA benefits.<sup>67</sup> In a case where plaintiffs designed machinery and tools to meet the individual engineering needs of customers, Labor initially denied certification on the grounds that, while the workers in question produced articles, those articles were not mass-produced.<sup>68</sup> Rather, each article was customized to the point where there were no other articles “like or directly competitive” with it. Designs created abroad, Labor reasoned, were incapable of competing with the workers’ designs because they were not interchangeable or for the same use, being manufactured solely for a single customer use.<sup>69</sup>

The Court held that a mass-production eligibility requirement was not in accordance with the law, as it is not found anywhere in either the governing statutes or regulations. In addition, the Court noted that the specialized, labor-intensive jobs required to customize articles were among the most likely to be outsourced and therefore it was particularly appropriate to grant TAA benefits to workers who had lost such jobs.<sup>70</sup> It also invoked Labor’s own precedent of certifying workers who customized software.<sup>71</sup> The Court then characterized Labor’s approach to the requirement that articles be directly competitive as “overly narrow,”<sup>72</sup> by omitting the important contexts of marketing and manufacturing.<sup>73</sup> Instead, the Court suggested, Labor should undertake a thorough analysis of the uses and commercial purposes of articles to determine whether the articles were actually in competition with imports.<sup>74</sup> The Court reasoned that customers would not have moved production of these designs offshore were they not directly competitive with the designs produced by the claimants, as no cost savings would

---

67. Trade Act of 1974, 19 U.S.C. § 2272(a)(2)(A)(ii) (2005).

68. Former Employees of Tesco Tech, No. 05-00264, 2006 WL 3419786, at \*4 (Ct. Int’l Trade 2006).

69. *Id.*

70. *Id.* at \*5.

71. *Id.* (citing *EDS I*, 408 F. Supp. 2d at 1343).

72. *Id.* at \*6 n.10.

73. *Id.* at \*6.

74. *Id.*

## TRADE ADJUSTMENT ASSISTANCE CASES

have resulted in that case.<sup>75</sup> Finally, the Court emphasized that, while Labor had been treating “like” and “directly competitive” as synonyms, the agency’s own regulations distinguished between the two. An analysis of whether products are “like” as well as whether they are “directly competitive” is required to determine whether a group is eligible for certification.<sup>76</sup>

### IV. DEPARTMENT OF AGRICULTURE CASES

In 2002, Congress extended TAA to encompass farmers and fishermen through a USDA administered program.<sup>77</sup> Under the statute, a farmer or fisherman, once his relevant group (of producers of an “agricultural commodity”) has been certified, may receive a cash benefit if he can establish that his “net farm income (as determined by the Secretary) for the most recent year is less than [his] net farm income for the latest year in which no adjustment assistance was received.”<sup>78</sup> Although the Court possesses jurisdiction to review determinations regarding both certification and individual eligibility, TAA cases during 2006 involving USDA have focused upon the latter—claims involving individual eligibility for TAA. Thus, the Court reviewed which income items, calculations, and tax documents should be used to determine a producer’s net farm or fishing income. The Court also addressed the issue of when equitable tolling may be available in cases where plaintiffs are delayed in either filing for benefits or in filing an appeal of a benefits denial.

#### A. *Reasonable Inquiry*

The CIT began the year by reaffirming its view that USDA is obligated to conduct a reasonable inquiry into each individual claimant’s finances in order to determine whether he is eligible for benefits.<sup>79</sup> On a motion to supplement the administrative record with previously missing tax forms, the Court held that USDA needed to examine those

---

75. *Id.*

76. *See id.* at \*7 (stating that “like” articles are “those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.)”) (quoting Certification of Eligibility to Apply for Worker Adjustment Assistance, 29 C.F.R. § 90.2 (2005)).

77. *See Steen v. United States*, 468 F.3d 1357, 1358-59 (Fed. Cir. 2006).

78. Trade Act of 2002 § 141, 19 U.S.C. § 2401e(a)(1)(C) (2005); *See Steen*, 468 F.3d at 1359.

79. *See Wooten v. U.S. Sec’y of Agric.* (*Wooten I*), 414 F. Supp. 2d 1313, 1316 (Ct. Int’l Trade 2006).

tax forms in order to correctly evaluate plaintiff's eligibility.<sup>80</sup> The Court rejected USDA's determination that the plaintiff was obliged to provide these forms and that he had indicated his awareness that an incomplete application would deny him benefits, holding that a reasonable inquiry required the agency to investigate beyond the initial application and to request missing documents from claimants.<sup>81</sup> Similarly, in a case where there was debate over whether plaintiff had provided documents in a timely fashion in response to a letter indicating that his record was deficient, the Court relied upon the remedial purpose of the TAA program to permit the plaintiff to supplement the record with the disputed documents.<sup>82</sup> Again, the Court held that USDA had failed to conduct a reasonable inquiry because it had not investigated the discrepancies between plaintiff's statements and the administrative record, and had not subsequently permitted plaintiff to rectify those discrepancies.<sup>83</sup> In contrast, the Court sustained USDA's determination in a case where the plaintiff submitted, 30 days past the date of the decision, a single letter from his accountant to substantiate his claim that his tax return contained non-fishing income and that his net fishing income had actually declined between 2001 and 2002.<sup>84</sup> Noting that the letter contained no explanation of what the plaintiff meant by non-fishing income, the Court concluded that even the remedial nature of the TAA program was insufficient to give the letter credence.<sup>85</sup>

B. *The Definitions of "Net Farm Income" And "Net Fishing Income"*

Although the CIT forcefully applied a duty of reasonable inquiry to USDA in 2006, it generally deferred to the agency's definition and calculations of "net farm income" and "net fishing income." In *Cabana v. U.S. Secretary of Agriculture*, the Court held that the definition of "net farm income" promulgated by USDA is supported by statutory authority and is in accordance with statutory language because 19 U.S.C. § 2401 clearly provides that the term is to be defined by the Secretary.<sup>86</sup> USDA's regulations for a person filing for benefits as an individual provide that net farm or fishing income shall be the net profit or loss as

---

80. *See id.*

81. *Id.* at 1315-16.

82. *See Anderson v. U.S. Sec'y of Agric.* 429 F. Supp. 2d 1352, 1354-55 (Ct. Int'l Trade 2006).

83. *Id.* at 1356.

84. *See Cabana v. U.S. Sec'y of Agric.*, 427 F. Supp. 2d 1232, 1236 (Ct. Int'l Trade 2006).

85. *Id.* at 1236, n.3.

86. *Id.* at 1235.

reported to the IRS.<sup>87</sup> Therefore, the Court held, it was appropriate for the agency to deny a claim for benefits based on information reported on the claimant's Schedule C to the Internal Revenue Service ("IRS"), even though the claimant argued that his Schedule C included non-fishing income.<sup>88</sup>

The plaintiff in *Wooten v. U.S. Secretary of Agriculture* argued that the definition of "net farm income" adopted by USDA violates the intent of Congress.<sup>89</sup> Plaintiff's application was denied because his net income from fishing increased from a loss of over \$125,000 to a loss of approximately \$86,500 from 2001 to 2002.<sup>90</sup> Although he admitted that, as currently defined, his income had increased between the two years, he argued that USDA should establish the level of income at zero when a claimant suffers a net loss in fishing income in consecutive years, and waive the requirement to prove that income had declined. Otherwise, he claimed, farmers and fishermen adversely affected by imports, like himself, might not receive TAA benefits and Congressional intent would thus be undermined.<sup>91</sup> Applying the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>92</sup> the Court determined that Congressional intent, as described in the plain language of the statute, was to give the Secretary of Agriculture broad discretion in choosing a definition.<sup>93</sup> It further held that the definition chosen was reasonable and rational, and therefore permissible under *Chevron*.<sup>94</sup> As a result, it granted the Government's motion to dismiss.

The Court also held that USDA's definition of net fishing income is reasonable under a *Chevron* analysis in *Do v. U.S. Secretary of Agriculture*. Plaintiffs claimed that the term should be interpreted to include gains or losses from the sale of business assets rather than solely an IRS Schedule C gain or loss.<sup>95</sup> The Court reasoned that Congress had specifically limited "net income" by including the word "fishing." If USDA were to include the sale of business assets in its income calculations, producers whose income had been affected merely by their choice to sell assets rather than by the effect of trade might receive

87. 7 C.F.R. § 1580.102 (2007).

88. *Cabana*, 427 F. Supp. 2d at 1236.

89. *Wooten v. U.S. Secretary of Agriculture (Wooten I)*, 441 F. Supp. 2d 1253 (Ct. Int'l Trade 2006).

90. *Id.* at 1256.

91. *Id.* at 1257.

92. 467 U.S. 837 (1984).

93. *Wooten II*, 441 F. Supp. 2d at 1258.

94. *Id.*

95. 427 F. Supp. 2d 1224, 1231 (Ct. Int'l Trade 2006).

benefits, contrary to the intent of the program.<sup>96</sup> The Court also noted that its own precedent appeared to approve the use of Schedule C as a method of determining net fishing income.<sup>97</sup>

The plaintiffs in *Do* also claimed that each of their vessels should be considered a “producer” eligible for TAA benefits.<sup>98</sup> As such, they submitted two Schedule C forms to USDA, one for each vessel. USDA made its determination on the aggregate of those Schedule C returns, arguing that its regulations do not qualify vessels as producers.<sup>99</sup> The Court, mindful that an agency’s interpretation of its own regulations is to be accepted unless it is clearly erroneous or inconsistent with the regulation, determined that, to be a producer, an entity must both be considered a person and have a catch that competes in the marketplace and is reported to the IRS.<sup>100</sup> While a vessel is a person under admiralty law, the Court held that this was a legal fiction confined to admiralty law and did not apply in TAA cases, ruling that a vessel was not a person and therefore not entitled to its own TAA benefits.<sup>101</sup>

The plaintiff in *Selivanoff v. U.S. Secretary of Agriculture*, like that in *Do*, claimed that his Schedule C did not accurately reflect his net income, but argued for an exclusion of Schedule C items rather than an inclusion.<sup>102</sup> Plaintiff contended that his repair expenses were unusually high in 2001 due to significant storm damage and therefore his net income as reported on Schedule C that year was an inappropriate baseline against which to measure the effect of trade in subsequent years.<sup>103</sup> The Court considered this argument plausible, reasoning that the precedent of *Do* indicated that extraordinary gains and losses might be non-fishing events and therefore should be excluded.<sup>104</sup> It reprimanded the agency for failure to investigate the plaintiff’s claims further, stating that “Congress mandated that the Secretary *determine* net farm income, not merely determine the *meaning* of net farm income; rote reliance upon a single line item ‘reported to the Internal Revenue Service’ without further analysis or, as necessary, further

---

96. *See id.*

97. *Id.* (citing *Rood v. U.S. Sec’y of Agric.*, No. 05-00303, 2005 Ct. Int’l Trade LEXIS 120, at \*5 (Ct. Int’l Trade 2005)).

98. *See id.* at 1227.

99. *Id.* at 1226-27.

100. *See id.* at 1228-29.

101. *See id.* at 1229-30.

102. *See Selivanoff v. U.S. Sec’y of Agric. (Selivanoff I)*, No. 05-00374, 2006 WL 1026430, at \*4 (Ct. Int’l Trade 2006).

103. *See id.* at \*3.

104. *See id.* at \*4.

TRADE ADJUSTMENT ASSISTANCE CASES

investigation will not suffice.”<sup>105</sup> The Court remanded the case to USDA, directing the agency to determine whether each of the plaintiff’s expenses was extraordinary and whether it should be included or excluded from plaintiff’s net fishing income.<sup>106</sup>

On remand, USDA again denied Mr. Selivanoff benefits, on the grounds that repairs from storm damage, depreciation, and change in crew size were a normal part of a fishing business and would not qualify as extraordinary items.<sup>107</sup> In addition, it endorsed an “all-inclusive” concept of net income; all items affecting the owner’s equity other than dividends and capital transactions are part of net income in its view, including extraordinary items.<sup>108</sup> Although the Court expressed skepticism regarding this decision, Mr. Selivanoff’s failure to submit comments to the Court made the remand binding and therefore affirmed USDA’s determination.<sup>109</sup> Thus, the issue of whether net income should be all-inclusive may change in the future if it is raised again in another case.

The CIT rejected outright USDA’s definition of net farm income, rather than merely its method of applying that definition, in *Anderson v. U.S. Secretary of Agriculture*. In that case, the plaintiff had filed his income tax returns with the IRS using the “cash method” of accounting, in which income items are listed in the year in which they are actually received.<sup>110</sup> In contrast, the “accrual method” of accounting requires listing income items in the year in which the right to receive them is acquired.<sup>111</sup> Because USDA’s definition does not distinguish between the two methods, the Court reasoned that by merely accepting the information as it is reported, it would be possible for one farmer to qualify for TAA benefits while another farmer with the same income but a different accounting method might not.<sup>112</sup> Plaintiff argued that, while his tax returns showed an increase in income using the cash

---

105. *Id.* at \*3.

106. *Id.* at \*6.

107. *See Selivanoff v. U.S. Sec’y of Agric. (Selivanoff II)*, No. 05-00374, 2006 WL 2067037, at \*1-2 (Ct. Int’l Trade 2006).

108. *See id.* at \*2-4.

109. *See id.* at \*4.

110. *See Anderson v. U.S. Sec’y of Agric. (Anderson I)*, 462 F. Supp. 2d 1333, 1335, 1336 n.8 (Ct. Int’l Trade 2006).

111. *Id.* at 1336 n.8.

112. *See id.* at 1336-37. To illustrate the difference between these two methods, hypothesize a farmer makes a \$10 sale in year 1 and does not collect the proceeds until year 2. Under the cash method, he would report \$0 of income in year 1 and \$10 of income in year 2. Under the accrual method, he would report \$10 of income in year 1 and \$0 of income in year 2. USDA, examining

method, his actual income, as calculated via the accrual method, had decreased.<sup>113</sup> The Court held that claimants elect their accounting method long before they would be able to tell what effect it would have on their eligibility for TAA benefits and that it could not therefore be a meaningful election. It also stated that the cash method is well-known to distort the true income of a taxpayer on a yearly basis, which is the interval used by USDA's calculations.<sup>114</sup> The discriminatory result from this problem, the court held, required a meaningful explanation from USDA.<sup>115</sup> The Court remanded the case for USDA to consider the reasonableness of its regulation as applied to the plaintiff in light of the inequities created and to consider alternative methods of applying the regulation.<sup>116</sup>

The CAFC saw one case relating to the TAA agriculture program this past year, *Steen v. United States*, which followed the decisions described above. Plaintiff fished, among other species, Pacific salmon, making him a member of a certified group of Washington fishermen facing competition from imported Pacific salmon.<sup>117</sup> While plaintiff's income from catching Pacific salmon declined between 2001 and 2002, his overall income derived from fishing, measured as net profit on his IRS Schedule C form, increased.<sup>118</sup> He claimed that the phrase "net fishing income" should be interpreted to equate to net income from the certified commodity in question, rather than net income from all fishing, thereby qualifying him for a cash benefit.<sup>119</sup> The CAFC rejected this analysis, holding that it was contrary to Congressional intent and that USDA's analysis of the term was reasonable and should receive deference.

Examining language in the surrounding portions of the statute, the

---

the farmer's tax returns, would certify him for TAA benefits if he used the accrual method, because he would have had a decline in income, but not if he used the cash method. *Id.*

113. *Id.* at 1335.

114. *See id.* at 1340.

115. *See id.* at 1342. Stating that "there exist some circumstances where it is impermissible for a rule to arbitrarily distinguish between similarly situated individuals," the Court hinted that satisfying it with such an explanation might be difficult. *See id.* at 1339.

116. *Id.* at 1342. Upon remand, USDA continued to object to the Court's position on the accrual method, applying it to Mr. Anderson's finances "under protest," but determining that Mr. Anderson would be eligible for TAA benefits if his income were calculated via that method. The Court affirmed only the results of USDA's remand. *See Anderson v. U.S. Sec'y of Agric. (Anderson II)*, 439 F. Supp. 2d 1288, 1290, 1292 n.6, 1294 (Ct. Int'l Trade 2007).

117. *Steen v. United States*, 468 F.3d 1357, 1360 (Fed. Cir. 2006).

118. *Id.*

119. *Id.*

TRADE ADJUSTMENT ASSISTANCE CASES

CAFC noted that Congress, in describing other components of the TAA program, had used language that restricted the statutory provisions to include only the certified commodity. For example, producers are eligible for information and technical assistance to react to increased importation of the certified commodity.<sup>120</sup> The Court read this to create a strong implication that Congress did not intend to restrict the net farm income provision.<sup>121</sup> It also rejected plaintiff's contention that USDA's reading of the term would defeat the purpose of the statute, holding that one of the legislative goals of the program was to assist farmers in adjusting to pressure from imports; a claimant whose total income had increased despite that pressure has already adjusted and would not require the same amounts of assistance.<sup>122</sup>

More significantly, the CAFC noted that, since the statute grants express authority to the Secretary of Agriculture to define net farm income, the court's deference to that definition must be very broad.<sup>123</sup> The regulations promulgated by the agency in such a case will not be overturned unless they are capricious, arbitrary, or contradictory to statutory intent.<sup>124</sup> In this case, USDA's regulations equated the net profit or loss reported on the Schedule C or C-EZ tax form to net farm income.<sup>125</sup> Although plaintiff argued that the Trade Act required a more individualized evaluation of the net farm income of each individual, the appellate court held that the regulation was not impermissibly rigid and that the use of Internal Revenue Code standards was not a cause of legal error.<sup>126</sup> It noted that this was not a case where the tax returns in question gave an inaccurate or distorted reflection of plaintiff's fishing income. If it were, the CAFC suggested, USDA would be obliged to take other sources of information into account.<sup>127</sup> Nonetheless, the decision appeared to support the general rule that tax

---

120. *Id.* at 1360-61 (citing 19 U.S.C. § 2401e(a)(1)(D)).

121. *Id.*

122. *See id.* at 1361-62.

123. *Id.* at 1362-63.

124. *Id.* at 1363 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

125. *Id.* at 1359 (citing 7 C.F.R. § 1580.102 (2004)). § 1580.102 was revised on November 1, 2004 to omit the reference to Schedule C, defining net farm income as "net farm profit or loss . . . reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102 (2006). As plaintiff's benefits application was submitted and decided upon before the revision, the Court applied the earlier version. *See Steen*, 468 F.3d at 1359-60.

126. *See id.* at 1363.

127. *Id.* at 1364.

return information should be used to determine net farm income.

The two opinions handed down by the CIT on the “net farm income” issue limited the effect of the *Steen* decision by seizing upon the Federal Circuit’s caveat regarding potential distortion of a claimant’s income by his tax returns. In the *Anderson* case, the Court determined that USDA had refused to comply with the Court’s remand order, and rejected USDA’s argument that *Steen* had affirmed the agency’s definition of “net farm income” and that it therefore did not need to reconsider the claimant’s application using the accrual method of income calculation.<sup>128</sup>

The CAFC clearly did not intend for its opinion to be read to render the pro forma use of the net income line from the IRS’s Schedule C in accordance with law in all circumstances. On the contrary, the CAFC specifically instructed that the *Steen* decision did not apply to claims such as Mr. Anderson’s that his tax returns distort the net amount of his income derived from all fishing sources in the two relevant years when considered on an accrual basis.<sup>129</sup>

The Court remanded the case again and ordered USDA to show why it had not violated Rule 11(b) of the USCIT, which requires that legal contentions be warranted under existing law, but typically applies to pleadings in litigation and not to the administrative determinations.<sup>130</sup>

In *Lady Kim T., Inc. v. U.S. Secretary of Agriculture*, the Court combined *Steen* with *Selivanoff* to hold that a level of inquiry greater than that of simply citing one line on a tax return with no further investigation into the claimant’s finances is required in benefit claims evaluations.<sup>131</sup> The USDA claimed that a comparison of the “Ordinary income (loss) from trade or business activities” line on the plaintiff’s tax returns from 2002 and 2003 showed that net income did not decrease in those years. The plaintiff, however, argued that this line inappropriately included deductions for depreciation and suggested that its income be measured

---

128. See *Anderson II*, 469 F. Supp. 2d at 1300.

129. *Id.* at 1301.

130. *Id.* The Court asserted that the agency had been wrong not only on the law but also procedurally, in that it was not free to invoke its own interpretation of precedent and should have instead moved for reconsideration or rehearing. *Id.* The threat of USCIT 11(b) sanctions seems to have reflected the Court’s belief that its authority had been disrespected. *Id.*

131. See *Lady Kim T., Inc. v. U.S. Sec’y of Agric. (Lady Kim I)*, 469 F. Supp. 2d 1262, 1266 (Ct. Int’l Trade 2006).

instead by the “Total Income (Loss)” line (which would have shown that the plaintiff’s income decreased between 2002 and 2003).<sup>132</sup> The Court, which did not address plaintiff’s proposed substitute definition, rejected USDA’s explanation of its decision as a *post hoc* rationalization, holding that the agency’s final determination—the letter denying plaintiff benefits—offered no reason for the denial.<sup>133</sup> As in *Selivanoff*, the Court took issue not with the agency’s definition of net farm income but with its methodology in applying it, emphasizing that USDA was required to “determine” claimants’ incomes by including a more elaborate analysis and explanation in its final decision.<sup>134</sup> On remand, when the agency returned with a decision justifying its use of the ordinary income line based on its statutes and regulations, the Court considered this a sufficient and cogent explanation and affirmed the determination.<sup>135</sup>

### C. *Equitable Tolling*

The CIT has held that equitable tolling may apply in TAA cases involving the USDA where the plaintiff has failed to file suit disputing a denial of benefits within the 60-day time limit set forth in 19 U.S.C. § 2395(a).<sup>136</sup> Whether the 90-day window for filing for TAA benefits is also subject to equitable tolling, however, was a case of first impression brought before the Court in 2006. In *Lady Kelly v. U.S. Secretary of Agriculture*, USDA did not receive the plaintiff’s application until more than 180 days after its group’s eligibility was re-certified.<sup>137</sup> The plaintiff contended that the application had been mailed well within the 90 days and that the deadline should be equitably tolled as a result.<sup>138</sup>

In addressing this issue, the Court asserted that equitable tolling is presumptively available in deadlines for filing suits against the Government and has been found to be available in administrative deadlines as

132. *See id.* at 1264.

133. *Id.* at 1267-68.

134. *See id.* at 1266, 1268.

135. *See* *Lady Kim T., Inc. v. U.S. Sec’y of Agric. (Lady Kim II)*, 491 F.Supp. 2d 1366, 1372-73 (Ct. Int’l Trade 2007).

136. *See* *Lady Kelly, Inc. v. U.S. Sec’y of Agric.*, 427 F. Supp. 2d 1171, 1174-75 (Ct. Int’l Trade 2006). The statute reads as follows: “[A plaintiff] may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.” *Id.* at 1175 (quoting 19 U.S.C. § 2395(a) (2005)).

137. *Id.* at 1173.

138. *Id.*

well.<sup>139</sup> It interpreted the lack of relevant language in 19 U.S.C. § 2401e to indicate that Congress did not intend to forbid equitable tolling. The Court further relied upon the existence of equitable tolling for the deadline found in 19 U.S.C. § 2395(a), which similarly lacks such language.<sup>140</sup>

The Court noted in *Lady Kelly* that despite the availability of equitable tolling, it should be granted only sparingly, and reiterated that the test for equitable tolling requires the plaintiff either to have pursued his judicial remedies by filing a defective pleading during the statutory period or to have been misled by another party's conduct into missing that period.<sup>141</sup> This test, derived from *Irwin v. Department of Veterans Affairs*, has been interpreted as requiring the plaintiff to have exercised due diligence.<sup>142</sup> The Court held that USDA's determination that the plaintiff had not exercised due diligence was supported by substantial evidence—the only evidence proffered in plaintiff's favor was a photocopied envelope with handwritten notations giving the date of its mailing—and therefore granted judgment in favor of USDA.<sup>143</sup>

Having established that the section 2401e deadline was subject to tolling, the Court subsequently decided when that tolling may occur. Expanding on the *Irwin* test, the Court held in *Kyong Truong v. U.S. Secretary of Agriculture* that a failure by the Government to provide notice of TAA benefits to potential claimants is sufficient to toll the filing deadline.<sup>144</sup> The Court asserted that CAFC precedent prohibiting the imposition of deadlines by agencies without notice and the intent of Congress to provide assistance to claimants required tolling the deadline if the Government failed to meet the notice requirements in 19 U.S.C. § 2401d.<sup>145</sup> The Court noted, however, that the claimant did not necessarily have to receive the notice to prevent tolling. For example, tolling is unavailable where agency error played no role in preventing the claimant's receipt of notice.<sup>146</sup> Citing precedent that referenced the Due Process Clause, the doctrine that statutory notice regulations represent legislative judgments on what is required of a reasonable plaintiff, and the belief that agencies can be reasonably relied upon to

---

139. *Id.* at 1174-75.

140. *See id.* at 1175.

141. *See id.* at 1175-76 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

142. *Id.* at 1176.

143. *See id.* at 1176-77.

144. *See* 461 F. Supp. 2d 1349, 1354 (Ct. Int'l Trade 2006).

145. *See id.* at 1353-54.

146. *Id.* at 1354.

## TRADE ADJUSTMENT ASSISTANCE CASES

perform their duties, the Court also held that the plaintiff had alleged the appropriate level of diligence, as a plaintiff's ignorance is excusable when the Government fails to provide notice.<sup>147</sup>

In a case where the plaintiff had failed to timely file his case with the CIT under 19 U.S.C. § 2395(a), the Court held in *Alaniz v. United States Secretary of Agriculture* that there was neither misleading Government action nor due diligence on the part of the plaintiff that would justify equitable tolling.<sup>148</sup> Although the plaintiff claimed that the denial letter sent him by USDA was confusing in using both "review" and "appeal" to describe the same process, the Court noted that the letter unambiguously provided a deadline and sources for obtaining further information.<sup>149</sup> While the plaintiff also alleged that he had exercised due diligence by filing a timely appeal that was lost in the mail, for which he could provide no substantiation, and by having his wife contact his employer. The Court, however, held that these efforts did not rise to a level sufficient to warrant equitable tolling.<sup>150</sup> The Court also clarified language from an earlier decision in *Former Employees of Quality Fabricating v. U.S. Secretary of Labor*, which stated that "equitable tolling does not depend on the defendant's wrongful conduct; it focuses on whether there was an 'excusable delay by the plaintiff' in bringing a claim."<sup>151</sup> Observing that the Court in *Quality Fabricating* had identified evidence of misleading Government action in the case, the Court emphasized that such action was necessary to pass the *Irwin* test.<sup>152</sup>

## V. CONCLUSION

Recent case law has refined substantially how agencies and courts should interpret the USDA and Labor portions of the TAA statute. The policy change instituted by Labor in response to *Former Employees of Computer Sciences* had an enormous and immediate effect on the CIT and the CAFC dockets, permitting a new category of employees to succeed in obtaining benefits.

Likewise, important definitions on the USDA side are gradually being hammered out. While *Steen* might have been expected to settle

---

147. *Id.* at 1354-55.

148. *See* No. 05-00594, 2006 WL 3326776 (Ct. Int'l Trade 2006).

149. *Id.* at \*3.

150. *Id.* at \*5-6.

151. *Id.* at \*4 (quoting *Former Employees of Quality Fabricating v. U.S. Sec'y of Labor*, 259 F. Supp. 2d 1282, 1285 (Ct. Int'l Trade 2003)).

152. *Id.*

the debate over “net fishing income,” the continuing controversy over this term’s meaning since 2006 suggests that this discussion is far from over.<sup>153</sup> Despite the longstanding existence of TAA programs, the Court’s TAA jurisprudence evolved dramatically in 2006 and seems likely to continue do so in 2007.

---

153. *See, e.g.*, *Dus & Derrick, Inc. v. U.S. Sec’y of Agric.*, 469 F. Supp. 2d 1326 (Ct. Int’l Trade 2007).