

affirmed its finding that the workers of Murray Engineering were not eligible to apply for TAA on the basis that they did not produce a product within the meaning of Section 222 of the Trade Act. Accordingly, the Department issued a Notice of Negative Determination Regarding Application for Reconsideration on March 31, 2003. The Notice was published in the **Federal Register** on April 15, 2003 (68 FR 18264).

In the request for reconsideration, the petitioner made three assertions: (1) That the workers produced a product; (2) that the Department may have been misled by part of the company's name, "Complete Design Service," thinking that the company did not produce a product; and (3) that the Department prematurely concluded the workers were service workers because of the company's name.

In the reconsideration investigation, the Department reviewed the description of the design services provided by the subject firm and determined that, regardless of the mode of conveyance, engineering drawings and schematics prepared by subject firm were services, and not considered production within the meaning of the Trade Act. A review by the Department of the initial investigation and the subsequent reconsideration investigation revealed that no conclusion was drawn based on the company's name. Further, the Department did not rely on the company's name during this voluntary remand investigation.

On April 30, 2003, the petitioner filed a Notice of Appeal in the Court of International Trade. The Department's motion for Voluntary Remand was granted on June 25, 2003.

On August 1, 2003, plaintiff's counsel sent the Department a letter containing arguments for certification. This letter makes two assertions: (1) The Department wrongly determined that the workers of Murray Engineering did not produce an article, and (2) even if the Department was correct in its determination that designs are not an article, the workers of Murray Engineering are adversely affected secondary workers and, as such, are eligible to apply for trade adjustment assistance.

The first issue is whether the workers of Murray Engineering produce an article.

Plaintiff's August 1, 2003 letter relies on *Nagy v. Donovan*, 6 Ct. Int'l Trade 141, 145, 571 F. Supp. 1261, 1264 (Ct. Int'l Trade 1983), to support the position that the designs are articles. *Nagy* held, among other things, that

workers who either create or manufacture a tangible commodity or transform a thing into a new or different thing produce an article. The letter asserts that the designs can be reproduced on paper and, therefore, are a tangible commodity. The letter further asserts that without the designs, the customer could not produce the machines that make the tools, and, therefore, the designs are "part and parcel" of the machines and sometimes incorporated into the body of the machines when the operating instructions are mounted into the machine or fixture.

In its remand investigation, the Department contacted Murray Engineering company officials and issued a detailed information request seeking new information as well as clarification of previously submitted information. The main purpose of this review was to ascertain whether the work performed by the petitioning worker group should be construed as production or service.

Information supplied by the company on remand indicates that Complete Design Service does industrial design for general manufacturing industries, applying design & engineering solutions through AutoCAD and Unigraphics by designing intricate custom drawings that are customized to customer specifications. These custom drawings are delivered to the customer by any or all of the following: (a) Printed drawing on paper, (b) CD or computer diskette, (c) electronic mail.

The customer contacts Complete Design Service with the purchase order and instructions of the job to be done. An employee is assigned to the job and is given all of the pertinent information for the job. The employee then begins the design, in AutoCAD or Unigraphics (computer design programs). Periodically throughout the design process, the customer reviews the design-in-progress to assess whether modifications are necessary. When the design is 100% completed, it is saved on the subject firm's network and given to the customer in their required format (e.g., plotted on paper, on CD or diskette, or e-mailed). The company further states that the customer could not build their products without these designs. The customer pays for the custom designs either by the design or on an hourly basis.

The Department traditionally has deemed designs of any type generated by computer as a service. Electronically generated engineering designs, drawings, and schematics are not tangible commodities. This is supported by the fact that they are not marketable

products listed on the Harmonized Tariff Schedule of the United States (HTS), published by the United States International Trade Commission (USITC), Office of Tariff Affairs and Trade Agreements, which describes all articles imported to or exported from the United States.

However, if workers draft designs by hand, the drawings they produce are classified under HTS number 4906.00.00.00 ("Plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; handwritten text; photographic reproduction on a sensitized paper and carbon copies of the foregoing"). Workers of the subject firm clearly do not fall into this classification, because they produced all designs electronically. That the HTS referenced here is updated periodically and was last published in 2003 supports that the USITC continues to distinguish electronic designs from designs by hand.

Further support that Murray Engineering workers did not produce an article is found in examining what items are subject to a duty. Throughout the Trade Act, an article is often referenced as something that can be subject to a duty. To be subject to a duty on a tariff schedule, an article will have a value that makes it marketable, fungible, and interchangeable for commercial purposes.

However, although a wide variety of tangible products are described as articles and characterized as dutiable in the HTS, informational and design products that historically could be sent in letter form and that currently can be electronically transmitted are not listed in the HTS. Such items are not the type of work products that customs officials inspect and that the Trade Adjustment Assistance program was generally designed to address. Further, informal discussions in the past with several USITC analysts clarified those factors that were used to classify design and drawing work as service instead of production. The USITC industry analysts identified designs as services because the value of the intellectual service is greater than the cost of the materials used to store or transfer it. The analysts also stated that tariffs are based on the cost of the media (such as paper, CD, or computer disk) and not on the value of the service.

In addition, the 2002 edition of the North American Industrial Classification System (NAICS), a standard used by the Department to categorize products and services, designates "establishments primarily engaged in drawing detailed layouts,