

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LADY KIM T. INC. :
 :
Plaintiff, : Court No. 05-00511
 :
 v. :
 :
UNITED STATES SECRETARY OF :
AGRICULTURE :
 :
Defendant. :
_____ :

Held: United States Department of Agriculture's Remand Determination is affirmed.

Neville Peterson, LLP, (Curtis Walter Knauss; Laura Martino) for Lady Kim T. Inc., Plaintiff.

Peter D. Keisler, Assistant Attorney General, Jeanne Davidson, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Michael J. Dierberg); of counsel: Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, for the United States Secretary of Agriculture, Defendant.

June 6, 2007

OPINION

Tsoucalas, Judge: This matter is before the Court on motion for judgment upon the agency record filed by Plaintiff, Lady Kim T. Inc. ("Plaintiff" or "Lady Kim"). Plaintiff challenges the final determination of the Foreign Agricultural Service of the United States Department of Agriculture ("Defendant" or "Department") and the subsequent remand determination ordered by this Court in Lady

Kim T. Inc. v. United States, 30 CIT ___, 469 F. Supp. 2d 1262 (“Lady Kim I”), denying its application for trade adjustment assistance (“TAA”) benefits.¹ See Reconsideration Upon Remand of the Application of Lady Kim T. Inc., (Dep’t of Agric. Mar. 14, 2007) (“Remand Determination”). After considering all the briefs and the papers filed herein, and for the reasons that follow, the Court holds that the Department’s findings of fact with regard to this matter are supported by substantial record evidence and that the Department’s legal conclusions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Department’s Remand Determination is affirmed.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (2000).

STANDARD OF REVIEW

When reviewing a determination by the Department, the “findings of fact by the . . . [Department] . . . if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to [the Department] to take further evidence, and [the Department] may thereupon make new or modified findings of fact and may modify [its] previous action . .

¹ See Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107-210, Title I, Subtitle C § 141, 116 Stat. 953 (2002); see also 19 U.S.C. § 2401 et. seq.

. ." 19 U.S.C. § 2395(b). Accordingly, the Court will uphold the Department's determination if its factual findings are supported by substantial record evidence. See id.; Cabana v. United States Sec'y of Agric., 30 CIT ___, 427 F. Supp. 2d 1232 (2006). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court will uphold the Department's legal determination if it is in accordance with law pursuant to the default standard set forth in the Administrative Procedure Act.² See 5 U.S.C. § 706 (2000). In reviewing the Department's determination the Court must "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A). "[T]he 'touchstone' of the 'arbitrary, capricious' standard is rationality." Hyundai Elec. Indus. Co., Ltd. v. United States, 899 F.2d 1204, 1209 (Fed. Cir. 1990). To be sustained, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463

² The Court applies the default standard of review set forth in the Administrative Procedure Act because the TAA statute is silent on questions of law.

U.S. 29, 43, (1983) (internal quotation and citation omitted).

BACKGROUND

The facts of this case were set forth in the Court's previous opinion in this matter. The facts relevant to the instant inquiry are as follows. In February 2005, Plaintiff, a Subchapter S Corporation, applied for TAA benefits for the 2003 marketing year. See Application for Trade Adjustment Assistance for Lady Kim T Inc., (February 14, 2005) ("Application"), Administrative Record ("AR") 1. In its application, Plaintiff provided various business records including copies of its 2002 and 2003 Internal Revenue Service ("IRS") Form 1120S income tax returns ("returns").³ See Pl. Submission, AR at 12-29. On Form 1120S, "Total Income (loss)" is reported on line 6. See Form 1120S, www.irs.gov (last visited June 5, 2007). Line 6 appears in the section of the return entitled "Income." Id. "Ordinary income (loss) from trade or business activities" is reported on line 21, and appears in the section of form 1120S labeled "Deductions." Id. On its 2002 return, Lady Kim reported a total income of \$19,665 in line 6. See

³ As a Subchapter S Corporation, Lady Kim filed its tax returns using IRS Form 1120S. Form 1120S is entitled "U.S. Income Tax Return for an S Corporation." See Form 1120S, www.irs.gov (last visited June 5, 2007).

As directed by IRS Form 1120S, "Total Income (loss)" is calculated by adding "gross profit," "net gain (loss)" and "other income (loss)." See id. "Ordinary income (loss) from trade or business activities" is determined by subtracting "Total deductions" from "Total income." Id.

Br. Supp. Pl.'s Mot. J. Agency R. ("Pl.'s Lady Kim I Br.") at 7. It reported an ordinary income of \$-96,356 in line 21. See Def.'s Resp. Pl.'s Mot. J. Agency Rec. ("Def.'s Lady Kim I Br.") at 3. On its 2003 return, Plaintiff reported a total income of \$3,037 on line 6, and an ordinary income of \$-59,226 on line 21. See Pl.'s Lady Kim I Br. at 8; Def.'s Lady Kim I Br. at 3. Based upon the documentation provided, Lady Kim certified that its 2003 net fishing income declined from the petitions pre-adjustment year. See Application, AR 1; Form 1120S 2003 return, AR 12; Form 1120S 2002 return, AR 13.

The Department denied Lady Kim's application by letter dated July 6, 2005 ("final determination"). See Letter from Ronald Ford, Deputy Director, Import Policies and Program Division, Foreign Agricultural Services, United States Department of Agriculture, to Lady Kim T Inc. (July 6, 2005), AR 58. The letter stated, in relevant part, that the USDA "reviewed the information that [Lady Kim] provided to the Farm Service Agency with [its] application and made a final determination that [Lady Kim is] ineligible for a cash payment. [Lady Kim has] been denied a TAA cash benefit because [its] net fishing income for 2003 was greater than [its] net fishing income for 2002." See id. In Lady Kim I, the Court found that the Department "failed to adequately explain its rationale for the final determination denying Plaintiff TAA benefits." 30 CIT at ___, 469 F. Supp. 2d at 1268. Accordingly, this Court ordered the

Department to explain the basis for its decision and to demonstrate the analysis necessary for it to determine, rather than simply state, whether Plaintiff's net income was greater in 2003 than in 2002. Id. Pursuant to the Court's order, on March 13, 2007 the Department filed its Remand Determination. Thereafter, Plaintiff filed its comments thereto, and Defendant filed its reply to such comments. See Pl.'s Resp. Def.'s Reconsideration Remand Application Lady Kim T. Inc. ("Pl.'s Mem."); Def.'s Reply Pl.'s Comments USDA's Remand Det. ("Def.'s Reply"). Plaintiff challenges the Department's Remand Determination and again seeks this Court's review. See generally Pl.'s Mem. at 2-4.

Plaintiff sets forth several arguments in response to the Remand Determination. It contends that the Department "did not follow the instructions of this Court," and therefore requests that this Court remand the determination and "consider awarding costs to plaintiff for the preparation of this Response." See Pl.'s Mem. at 2. Plaintiff correctly states that the Court ordered that the Department determine whether its net income was greater in 2003 than in 2002. It argues, however, that Defendant "made no attempt to undertake this analysis but merely repackaged its argument." Id. at 2-3 ("Defendant's [Remand Determination] still did not determine net income of Lady Kim T. Inc. as it was directed to do.").

Defendant insists that it "explained the basis for its decision in the remand determination." Def.'s Reply at 3 ("[T]he basis for [the Department's] denial of benefits to Lady Kim may be reasonably discerned in its remand determination."). It contends that Plaintiff failed to demonstrate that its Remand Determination "lacked substantial evidence or was arbitrary and capricious." Id. at 5. It requests that the Remand Determination be affirmed "because [Plaintiff] has not demonstrated that it was unreasonable to conclude based upon the evidence in the record that [Plaintiff's] net income increased, rather than decreased, from 2002 to 2003."⁴ Id. at 6. The Court agrees and, for the foregoing reasons, finds that the Department's Remand Determination be affirmed.

DISCUSSION

In order to be eligible for TAA benefits a producer must meet certain criteria set forth in 19 U.S.C. § 2401e(a). See 19 U.S.C. § 2401e(a) (Supp. II 2002). The statute instructs, in

⁴ Both Plaintiff and Defendant make several other ancillary arguments, none of which the Court need address to reach its decision. Defendant, however, draws one conclusion the Court chooses to briefly address. Contrary to the Defendant's assertion, the Court did not state "that previous cases suggest that [the Department's] methodology is contrary to statute." Def.'s Reply at 3, fn1. Instead, the Court simply observed that the caselaw of this Court and the Court of Appeals for the Federal Circuit "seem to contemplate a certain level of analysis in order . . . to make a determination." Lady Kim I, 469 F. Supp. 2d at 1266. In addition to being irrelevant, Defendant's argument is also misplaced.

relevant part, that in general:

Payment of a [sic] adjustment assistance under this part shall be made to an adversely affected agricultural commodity producer covered by a certification under this part . . . if the following conditions are met:

. . .

- (C) The producer's net farm income (as determined by the Secretary [of Agriculture]) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part.

§ 2401e(a)(1) (emphasis added).⁵ In Lady Kim I, the Court was unable to discern whether the Department "determined," in accordance with § 2401e(a)(1), if Plaintiff's net income was less in 2003 than in 2002. See 469 F. Supp. 2d at 1266-67. Indeed, it found that the caselaw of this Court and the Court of Appeals seem to contemplate that a certain level analysis is necessary. Id. at 1266 (citing Steen v. United States, 468 F.3d 1357, 1363-64 (2006); Selivanoff v. United States, 30 CIT __, __ Slip Op. 06-55 at 7 (Apr. 18, 2006) (not published in the Federal Supplement) ("Congress mandated that the Secretary determine net farm income,

⁵ The statute does not define the phrase "net farm income" and thus, under Chevron, the agency's regulations are usually "given controllable weight" and afforded considerable discretion. Lady Kim I, 469 F. Supp. 2d at 1265 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). In the instant matter, the Department's regulation defines net fishing income as "net 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).

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 . . . will not suffice.")). As such, this Court directed the Department to set forth an analysis demonstrating that it determined, rather than stated, Plaintiff's net income.⁶ Id. at 1268. The Court finds that the Department complied with the Court's order.

Pursuant to the applicable standard of review, this Court will uphold the agency's findings of fact if they are supported by substantial evidence. 19 U.S.C. § 2395(b). On questions of law, the Court will uphold an agency's determination as long as the findings of law are not arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law. See Hyundai Elecs. Indus. Co., Ltd., v. United States, 899 F.2d 1204, 1209 (Fed. Cir. 1990) (The "touchstone" of this standard of review is rationality.). Indeed, a fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

⁶ The Court noted, however, that in reaching a determination the Department need not conduct an independent exploratory investigation into the net income of a producer. In conformity with the statutory and regulatory scheme, the Department need rely only on the information submitted to it by the producer. See Lady Kim I, 30 CIT at __, 469 F. Supp. 2d at 1267.

As explained supra, to be upheld, the Department “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” See id. (internal quotation and citation omitted). This notwithstanding, the Court may “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Bowman Transp. Inc. v. Arkansas-Best Frieght Sys., 419 U.S. 281, 286 (1974) (citing Colorado Interstate Gas Co., v. Fed. Power Comm’n, 324 U.S. 581, 595 (1945)). For the reasons that follow, the Court finds that the Department provided a cogent explanation for its decision to deny Plaintiff’s application for trade adjustment assistance, and therefore affirms the Remand Determination.

A. The Department’s Determination Was Supported By Substantial Evidence and Was Not Arbitrary or Capricious.

Plaintiff complains that the Department did not determine whether its net income was greater in 2003 than in 2002. See Pl.s’ Mem. at 2 (“Defendant’s [Remand Determination] made no attempt to undertake this analysis but merely repackaged it’s [sic] argument in it’s [sic] Response”). The Court, however, disagrees. Not only was the conclusion drawn by the Department reasonable, but the explanation proffered was satisfactory.

Unlike the Department’s initial letter denying Plaintiff TAA benefits, the Remand Determination provides a cogent explanation

indicating how the Department determined Plaintiff's net income.⁷ First, the Department set forth the relevant statutory and regulatory criteria for qualifying for TAA benefits and defined key terms. See Remand Determination at 1 ("One of these criteria is that the individual producer's 'net farm income was less than during the producer's pre-adjustment year.'"). Specifically, it defined "net fishing income" and "pre-adjustment year." Id. (citing 7 C.F.R. § 1580.102). Next, the Department delineated the analysis employed for determining net income. Id. It explained:

To determine whether there has been the requisite decline in net income the agency compared line 21, "[o]rdinary income (loss) from trade or business activities," which the agency believes is the best evidence of net fishing income, on the Form 1120S filed for 2002 and for 2003. Line 21 is calculated by subtracting line 20, '[t]otal deductions,' from line 6, '[t]otal income (loss).' Thus line 21 sets forth the net of total income (or loss) and total deductions, i.e., net income,

⁷ As indicated in Lady Kim I, the Department's letter denying Plaintiff's TAA application was devoid of a cogent explanation for the basis of its decision. In its memoranda to this Court, however, Defendant attempted to explain the rationale for its decision. The Court correctly noted that any explanation offered by Defendant in its briefs is a post hoc rationalization and therefore an insufficient basis for the Court to reach a decision on the legality of its conclusion. In its briefs currently before the Court, Defendant seems to suggest that the Court erred by not accepting this new line of argument. See Def.'s Reply at 2. Defendant misses the point. It is well established that the "courts may not accept appellate counsel's post hoc rationalizations for agency action." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). As such, the Court was correct in basing its decision on the record and original letter denying Plaintiff's TAA benefits, and not Defendant's brief to this Court.

which may be a positive or negative amount. Line 21 is consistent with the definition in the regulation of net fishing income, and accords with the generally accepted definition of net income. Black's Law Dictionary defines 'net income' to mean '[t]otal income from all sources minus deductions, exemptions, and other tax reductions.' It further states: 'Income tax is computed on net income.' Black's Law Dictionary (7th ed., 1999) at 767. Lady Kim's tax returns indicated a net loss of \$96,356, as reported on line 21 of its Form 1120S, for 2002. Lady Kim's tax returns indicated a net loss of \$59,226, as reported on line 21 of its Form 1120S, for 2003. Therefore, Lady Kim's net income did not decline from 2002 to 2003. Thus, Lady Kim does not meet one of the mandatory criteria for eligibility for TAA cash benefits.

Remand Determination at 1-2.

After explaining which statutes and regulations it looked to; the definitions relied upon; and how it calculated net income, the Department then addressed Plaintiff's contentions regarding depreciation. In its initial Motion for Judgment Upon the Agency Record, Plaintiff maintained that the Department erred by not omitting depreciation from its calculation of net fishing income. See generally Pl.'s Lady Kim I Br. at 5 ("Agriculture's negative determination did not omit depreciation from its calculation of net farm income in contravention of the statute."). It maintained that an examination of its proffered tax returns indicated that it experienced a reduction in net income from 2002 to 2003. Id. at 8. The Department rejected Plaintiff's contentions for the following reasons:

The definition of net fishing income in the regulation requires the agency to look to the producer's net income as reported by the producer to the IRS. Lady Kim's net income as Lady Kim reported to the IRS, in fact, included a deduction for depreciation. For example, for 2003, Lady Kim reported a net loss of \$59,226 (line 21), which was based upon total income of \$3,307 (line 6), less total deductions of \$62,263 (line 20). The total deductions (line 20) included a deduction of \$23,787 for depreciation (line 14c) (internal citation omitted).

Remand Determination, at 2. The Department further explained that "even if the regulation defined net income in a way so as to exclude depreciation, Lady Kim would still not have a decline in income from 2002 to 2003, and thus would not be entitled to TAA benefits." Id.

The Court finds that this, and the additional information set forth in the Remand Determination provides a satisfactory explanation for the Department's action and a rational connection between the facts on the record and the choice made. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. In accordance with the Court's remand instructions in Lady Kim I, the Department provided a cogent explanation for its decision, and set forth the analysis undertaken in determining net income. Accordingly, the Court affirms the Department's Remand Determination.

Conclusion

For the reasons stated herein, the Court affirms the Department's Remand Determination denying Plaintiff's application for TAA benefits. Judgment will enter accordingly.

Dated: June 6, 2007

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LADY KIM T. INC.	:
	:
Plaintiff,	: Court No. 05-00511
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v.	:
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UNITED STATES SECRETARY OF	:
AGRICULTURE	:
	:
Defendant.	:
_____	:

JUDGMENT

Upon consideration of the United States Department of Agriculture's Reconsideration Upon Remand of the Application of Lady Kim T. Inc., (Dep't Agric. Mar. 14, 2007) ("Remand Determination"), all other papers filed and proceedings herein, and Commerce having complied with the Court's remand instructions, it is hereby:

ORDERED that the Remand Determination is affirmed; and it is further

ORDERED that this action is dismissed.

Dated: June 6, 2007

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE