

A-570-504
Scope Review
PUBLIC DOCUMENT
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By Certified Mail, Return Receipt Requested

To All Interested Parties:

On February 21, 2002, the Department of Commerce (the Department) received requests from John Carrier, LCHB 15309, on behalf of Interpro International, for scope rulings on whether six types of candles it plans to import are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC).

In accordance with 19 CFR 351.225(k)(1), the Department has determined that all of the subject candles are inside the scope of the antidumping duty order on petroleum wax candles from the PRC.

Enclosed is a memorandum containing the Department's analysis. We will notify the U.S. Customs Service of this decision. If you have any questions, please contact Brett L. Royce at (202) 482-4106.

Sincerely,

Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII
Import Administration

Enclosure

MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

FROM: Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII

SUBJECT: Final Scope Ruling; Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504);
Interpro International

Summary

On February 24, 2002, the Department of Commerce (the Department) received requests from Interpro International (Interpro) for scope rulings on six candles (one metallic green and gold-swirled round candle; one metallic gold round candle; one red, green, and white-striped oval disc candle; one blue floating candle; one red and white striped floating candle; and one vanilla scented textured round candle) to determine if they are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (the Order).

See Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986) (the Order); see also Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination). In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that all six of these candles fall within the scope of the Order.

Background

Section 351.103(b) of the Department's regulations state that "no document will be considered as having been received by the Secretary unless it is submitted to the Central Records Unit (CRU) with the date and time of receipt." On January 28, 2002, the Department received two improperly filed scope requests from Interpro. The Department subsequently contacted Interpro, who requested that the Department retain the enclosed samples and allow Interpro to submit its requests in proper order. On February 24, 2002, the Department, again, received two improperly filed scope requests from Interpro. If an analyst receives an improperly filed request, the proper

procedure is to send it back so there is no correlation with the analyst filing it; we did it as a courtesy. The Department filed Interpro's request with the CRU on March 18, 2002. The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the International Trade Commission (the Commission), the initial investigation, and the antidumping duty order. This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d).

Conversely, where the descriptions of the merchandise are *not* dispositive, the Department will consider the five additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In the instant case, the Department has evaluated Interpro's requests in accordance with 19 CFR 351.225(k)(1) and the Department finds that the descriptions of the products contained in the petition, the final determinations of the Secretary (including prior scope determinations) and the Commission, the initial investigation, and the antidumping duty order are, in fact, dispositive. Therefore, the Department finds it unnecessary to consider the additional factors set forth at 19 CFR 351.225(k)(2).

Documents and parts thereof from the underlying investigation deemed relevant by the Department to this scope ruling were made part of the record of this determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the administrative record for this scope determination.

In its petition of September 4, 1985, the National Candle Association requested that the investigation cover:

[c]andles [which] are made from petroleum wax and contain fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars; votives; and various wax-filled containers. These candles may be scented or unscented ... and are generally used by retail consumers in the home or yard for decorative or lighting purposes (Antidumping Petition, September 4, 1985, at 7).

The Department defined the scope of the investigation in its notice of initiation. This scope language carried forward without change through the preliminary and final determinations of sales at less than fair value and the eventual antidumping duty order:

[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers. Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Final Determination; and the Order.

The Commission adopted a similar definition of the “like product” subject to its determinations, noting that the investigations did not include “birthday, birthday numeral and figurine type candles” (Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination)).

Also of relevance to the present scope inquiry is a notice issued to the United States Customs Service in connection with a July 1987 scope determination concerning an exception from the Order for novelty candles, which states:

The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum-wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes and symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (*e.g.*, religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (*e.g.*, animals or numerals), (CIE N-212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987) (emphasis added).

Interpro's Scope Request

Interpro argues that all of its candles subject to this inquiry (one metallic green and gold-swirled round candle; one metallic gold round candle; one red, green; and white-striped oval disc candle; one blue floating candle; one red and white striped floating candle; and one vanilla scented textured round candle) are festive candles, and are not covered by the scope of the Order. Specifically, Interpro argues that the green and gold round candles simulate Christmas tree ornaments and that the red, green and white striped and red and white-striped candles simulate

peppermint candies. Interpro further argues that the novelty texture of its vanilla textured round candle implies the similarity or replication of a whipped cake having a foamed surface. Other than its overall statement that the candles in this request are “festive” candles, Interpro does not make further argument with respect to the blue floating candle. Interpro has not explicitly stated whether its subject candles are made of petroleum wax and contain fiber or paper-cored wicks.

The National Candle Association’s Comments

In its comments, the NCA retraces the history of this antidumping duty order, including the import surges and resultant injury suffered by domestic manufacturers which prompted the original September 1985 antidumping petition. Petitioner contends that the antidumping statute and antidumping duty orders are remedial in nature and exceptions to them should be construed as narrowly as possible to preserve the efficacy of the Order. In support of its assertion, petitioner cites a Court of International Trade conclusion, with regards to the novelty exception, that “. . . a candle must be specifically designed for use only in connection with a religious holiday or special event to fall within the novelty candle exception.” See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2nd 1184, 1194 (CIT July, 1999) (Russ Berrie). Thus, petitioners argue that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season.

Turning to the candles, at issue, the NCA notes that all of Interpro’s candles are made of petroleum wax and contain fiber or paper-cored wicks. With regards to the green and gold “hanging Christmas tree ornament” candles, the NCA first notes that the green candle with gold-swirled designs does not depict any Christmas scene or symbol, and that the gold candle is without any designs. The NCA claims that the candles’ flat bottoms may be viewed from the bottom and from all sides. However, the NCA argues that Christmas tree ornaments are completely round, without flat surfaces, and, thus, that the characteristics of a Christmas tree ornament are not visible from most angles. See Final Scope Ruling—Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon Products Inc. (April 8, 2002). Therefore, according to the NCA, Interpro’s gold and green “hanging Christmas tree ornament candles are not in the shape of identifiable objects, and are not novelty candles. The NCA states that the subject candles are rounds, which are included within the scope of the Order.

Despite Interpro’s claim that two of its candles simulate peppermint candy, the NCA argues that the Department has previously found that a red and white striped round candle packaged as peppermint candy is a round candle within the scope of the Order. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Hallmark Cards/Institutional Finance Services April 9, 1997 (Hallmark Ruling) Further, the NCA points out that the Department has found that floating disk and floating round candles are within the scope of the Order, citing Final Scope Ruling – Antidumping Duty Order

on Petroleum Wax Candles From the People's Republic of China (A-570-504); Meijer, Inc. and Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Endar Corp. December 24, 1998. Quoting Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Avon Products, Inc. July 11, 2001 (Avon 2001 Ruling), the NCA claims that, “[a] disk is simply a common shape and not an identifiable object *per se*.” The NCA notes the candle at issue is almost identical to Interpro’s oval disc-shaped “peppermint candy” candle. See Id. The NCA also maintains that the subject candles are rounds and are specifically within the scope of the Order. In addition, NCA states that there is nothing in the subject candles’ designs for use only in connection with the Christmas holiday.

Further, the NCA claims that Interpro’s blue floating candle is in the shape of a disk. As stated previously, the NCA contends that disks are not identifiable objects *per se*. The NCA argues that the Department has ruled that floating disk candles are rounds and covered by the scope of the Order. The NCA maintains that there is no design in the subject candle; therefore it is not designed for use only in connection with a holiday season. The NCA maintains that this candle falls specifically within the scope of the Order.

As for Interpro’s “whipped iced cake” candle, the NCA first argues that the respondent describes the subject candle as a round candle. The NCA notes that round candles are specifically within the scope of the Order. Further, the NCA remarks that there is nothing in the texture of the surface of the subject candle that makes it look like a whipped iced cake. Moreover, the NCA contends that the texture of the alleged party cake candle is similar to the texture of the “mini loaf” candle in the Barthco scope investigation in which the Department found the candle to be a straight-sided, rectangular shaped column. See Final Scope Ruling–Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Barthco Trade Consultants. April 30, 2001 (Barthco Ruling). The NCA argues that Interpro cannot change a round candle into an identifiable object by merely adding a textured surface. See Final Scope Ruling–Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); American Greetings. (May 4, 2000). Finally, the NCA notes that, since this candle is not specifically designed for use only with respect to a special holiday or event, it falls within the scope of the Order.

The NCA notes that Interpro’s candles compete in the same channels of trade as the candles subject to the Order, and that their sale without the antidumping duty will severely injure the U.S. candle producers. It further notes what it characterizes as the long-standing efforts of candle importers to “expand the ‘novelty candle’ loophole in the Order through a continuing stream of scope requests, causing the Order on PRC candles to be subjected to over seventy Final Scope Rulings and many more requests.” Petitioner maintains that the success of the scope requests in eroding the Order has resulted in geometric increases in the volume of PRC candles coming into the United States. Petitioner concludes by stating that Interpro is now asking the Department to narrow the scope of the Order so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority.

Analysis

When determining whether or not a particular product claimed as a novelty candle is within the scope of the antidumping duty order, the Department's first line of inquiry is whether the shape of the candle falls within those shapes listed by the inclusive language of the Order's scope, *i.e.*, "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." If a candle falls within one of the above delineated shapes, it will be determined to be within the Order's scope. Candles of a shape not listed by the inclusive language of the Order's scope will then be evaluated to determine whether they are "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks."

The Department has changed its practice on this issue. In past scope rulings, the Department had determined that candles not of a shape listed by the language of the Order's scope were outside the scope. See, e.g., Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Endar Corp. (Jan. 11, 2000) (Endar Corp.) ("dragonfly" candle, in the shape of a rough-hewn stone with a dragon fly carved on top, not within scope because it is of a shape not listed by the scope); American Drug Stores, Inc. (Mar. 16, 1998) (sphere or ball shaped candle not within scope because it is a shape not listed by the scope); and Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); San Francisco Candle Co. (June 10, 1993) (ball shaped candle not within scope because it is of a shape not listed by the scope). The reason for the change is that, upon review of the text of the scope of the Order, the text of the first sentence of the scope covers "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks." The text following this broad inclusive sentence provides a list of shapes, which list is not modified by any express words of exclusivity. The result of our prior practice of excluding candles of a shape other than those listed was inconsistent with the fact that such candles were "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks." We have now determined that this practice was incorrect because it had the effect of narrowing the broad coverage of the first sentence of the Order's scope. The list of shapes in the second sentence of the Order's scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the Order's scope. Accordingly, in order to give full effect to the first sentence of the inclusive language of the scope, the Department normally will evaluate whether candles of a shape not listed by the inclusive language of the Order's scope are scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); J.C. Penney (November 9, 2001) (JC Penney Ruling).

This approach of evaluating such candles in light of the entire text of the scope is in keeping with the opinion of the Court of International Trade (CIT), noting that a better approach in scope rulings is to avoid subjective issues of intent and, instead, look to the petition's language to determine whether the class or kind of merchandise at issue was expressly included. Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (CIT 2001) (Duferco Steel). Such an approach is a departure from past CIT precedent that required Commerce to give ample deference to the

petitioner's intent when examining a petition's description of the subject merchandise, see, e.g., Torrington Co. v. United States, 995 F. Supp. 117, 121 (CIT 1998).

Although the specific scope decision in Duferco Steel has recently been overturned by the United States Court of Appeals of the Federal Circuit (CAFC) in Duferco Steel, Inc. v. United States, 01-1443 (July 12, 2002) (Duferco Steel II), we do not believe that the Court's decision undermines the Department's decision in JC Penney Ruling. The plain language of the scope of the Order clearly states "[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers" fall within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles falling within the Order, but, as the Courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated that ". . . the petitions that led to the issuance of the order did not need to specifically identify the [product] in order to cover [it]; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity."¹ It further stated "[a]s a matter of law, a petition need not list the entire universe of products . . . in order [for the petition] to cover those products."² Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.³ In fact, if the list were exhaustive, there would have been no need for the Department to render a decision on novelty candles or any other candle that was not explicitly listed as a shape in the scope of the Order. However, the Department did render the novelty candle exception that offered a narrowly-construed exclusion, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines that the candle is made from petroleum wax and has a fiber or paper-cored wick, but the candle possesses characteristics set out in the July 1987 novelty candle exception, it will fall outside the scope of the Order. In order for a candle to qualify for this exception, the characteristic which is claimed to render it a novelty candle (i.e., the shape of an identifiable object or a holiday-specific design) should be easily recognizable in order for the candle to merit exclusion from the Order. Specifically, among other determining factors, the Department will examine whether the characteristic is identifiable from most angles and whether or not it is minimally decorative, e.g., small and/or singularly placed on the candle. If the identifiable object or holiday-specific design is not identifiable from most angles, or if the design or characteristic is minimally decorative, the Department may determine that the candle does not

¹Novosteel SA v. United States, No. 01-1274, slip. op. at 2 (Fed. Cir., March 26, 2002) (reh'g and rehr'g en banc denied).

²Id.

³See Petroleum Wax Candles from China, USITC Pub. No. 3226, Investigation No. 731-TA-282 (Review), at 18 (August 1999) ("Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines.").

qualify for exclusion from the Order under the novelty candle exception. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney Purchasing Corp. (May 21, 2001); San Francisco Candle Co. (Feb. 12, 2001); Endar Corp. (Jan. 11, 2000). If a candle does not possess characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented petroleum wax candle made from petroleum wax and having fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

With respect to the instant request, we find, for the reasons outlined below, that these six candles fall within the scope of the Order. We note that, since Interpro has claimed its candles are outside the scope of the Order and the NCA has commented that the candles are made of petroleum wax and contain fiber or paper-cored wicks, we find that these characteristics (petroleum wax composition and fiber or paper-cored wick) are implied in Interpro's submissions to the Department. Furthermore, there is no evidence to the contrary on the record of this scope inquiry.

Metallic Green and Gold-Swirled Round Candle

This metallic-green coated candle is decorated with gold-swirled designs, and measures approximately 3 inches in width. Interpro claims that this candle is in the shape of a “hanging Christmas tree ornament,” thus, implying that it is in the shape of an identifiable object. We disagree with Interpro that this candle is in the shape of a “hanging Christmas tree ornament” because it is flat on the bottom, rather than rounded like a holiday ball-shaped ornament. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon Products, Inc. April 8, 2002 (Avon 2002 Ruling). As such, the subject candle is not in the shape of an identifiable object. Further, with regard to the green color and swirled gold designs, we do not find that these colors and designs are by themselves indicative of the Christmas season. Finally, as noted by the petitioner, Interpro describes this candle as a round. A round is a shape listed by the inclusive language of the Order’s scope. For all of the reasons mentioned above, we find that the subject candle falls within the scope of the Order.

Metallic Gold Round Candle

This metallic-gold coated candle measures approximately 3 inches in width. Interpro claims that this candle is in the shape of a “hanging Christmas tree ornament,” thus, implying that it is in the shape of an identifiable object. We disagree with Interpro that this candle is in the shape of a “hanging Christmas tree ornament” because it is flat on the bottom, rather than rounded like a holiday ball-shaped ornament. See Avon 2002 Ruling. As such, the subject candle is not in the shape of an identifiable object. Further, with regard to the gold color, we do not find that this color by itself is indicative of the Christmas season. Finally, as noted by the petitioner, Interpro describes this candle as a round. A round is a shape listed by the inclusive language of the Order’s scope. For all of the reasons mentioned above, we find that the subject candle falls within the scope of the Order.

Green, Red, and White Striped Oval Disc Candle

Interpro notes that its “red, green and white striped oval disc” candle, is 3 inches in diameter and 1 inch in height and resembles a peppermint candy, thus, implying that it is the shape of an identifiable object. The Department has held in the past that candles alleged to be in the shape of peppermint candies were not identifiable objects and also did not contain scenes or symbols of holidays or other special events. See Hallmark Ruling. In addition, the Department has previously ruled that similar candles were rounds, and covered by the scope of the Order. See Id. and See also Avon 2001 Ruling. We find that the same holds true for Interpro’s candle, in that it is a flattened round. Further, we find that this candle does not possess any design or feature that denotes its affiliation with a particular holiday. Therefore, for the aforementioned reasons, this candle is within the scope of the Order.

Red and White Striped Floating Candle

Interpro argues that its red and white striped floating candle, 1.75 inches in diameter and .75 inches in height, simulates a peppermint candy, thus, implying that it is the shape of an identifiable object. The Department has held in the past that candles alleged to be in the shape of peppermint candies were not identifiable objects and also did not contain scenes or symbols of holidays or other special events. See Hallmark Ruling. In addition, the Department has previously ruled that similar candles were rounds, and covered by the scope of the Order. See Id. and See also Avon 2001 Ruling. We find that the same holds true for Interpro’s candle, in that it is a round. Further, we find that this candle does not possess any design or feature that denotes its affiliation with a particular holiday. Therefore, for the aforementioned reasons, this candle is within the scope of the Order.

Blue Floating Disc Candle

Interpro notes that its “blue floating” candle, is 3 inches in diameter and 1 inch in height. The Department has previously ruled that similar disc candles were rounds, and covered by the scope of the Order. See Avon 2001 Ruling. We find that the same holds true for Interpro’s candle, in that it is a flattened round. Second, this candle does not possess any design or feature that could denote its affiliation with a particular holiday. This candle is simply a blue disc. Therefore, for the aforementioned reasons, this candle falls within the scope of the Order.

Vanilla Scented Textured Round Candle

Finally, Interpro contends that its vanilla scented textured round candle, with red, blue and green colored sprinkles, is 4 inches in diameter and 4.125 inches in height and is recognizable as a “whipped iced cake having a foamed surface.” Interpro also claims that this candle is a festive candle, which is designed for “consumers seeking items to celebrate a personal festive occasion,” as per its textured surface and packaging. First, the Department notes that Interpro distinguishes this candle as a round, with a “whipped” texture and colored flecks. A round is a shape listed by the inclusive language of the Order’s scope. Moreover, it is not identifiable as a “whipped cake” from any angle. See Barthco Ruling. Second, the Department holds that the subject candle itself, which is the object of the Department’s examination in this inquiry, does not possess any design

or feature that could denote its affiliation with a particular occasion or holiday. Therefore, for the aforementioned reasons, this candle falls within the scope of the Order.

Summary

For the foregoing reasons, we find that Interpro’s metallic green and gold-swirled round candle; metallic gold round candle; green, red, and white striped oval disc candle; blue floating disc candle; red and white striped floating candle; and vanilla scented textured round candle are rounds, a shape listed by the inclusive language of the Order’s scope. In addition, the subject candles do not fall within the July 1987 novelty candle exception. This conclusion is consistent with the scope of the investigation and the Order, as defined in the petition, as well as the Department’s and the Commission’s prior determinations.

Recommendation

Based on the preceding analysis, we recommend that the Department find that these six candles fall within the scope of the Order.

If you agree, we will send the attached letter to the interested parties, and will notify the U.S. Customs Service of our determination.

_____ Agree

_____ Disagree

Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

Date