ORIGINAL

APPEAL NO. 23 - 200 IN THE SUPREME COURT OF

THE UNITED STATES

BYUNGMIN CHAE
Petitioner. Appellant

V.

JANETYELLEN. THEUNITED STATES SECRETARY OF THE TREASURY
ALEJANDRO MAYORKAS. THE UNITED STATES SECRETARY OF THE HOMELAND SECURITY.
THE UNITED STATES DEPARTMENT OF THE TREASURY
UNITED STATES DEPARTMENT OF THE HOMELAND SECURITY.
AND THE UNITED STATES
Respondents. Appellees

PETITION FOR REHEARING EN BANC

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QUESTION PRESENTED FOR REVIEW

Which of the following mail articles are not subject to examination or inspection by Customs?

A. Bona-fide gifts with an aggregate fair retail value not exceeding $800 in the country of shipment

B. Mail packages addressed to officials of the U.S. Government containing merchandise

C. Diplomatic pouches bearing the official seal of France and certified as only containing documents

D. Personal and household effects of military and civilian personnel returning to the United States upon the completion of extended duty abroad

E. Plant material imported by mail for purposes of immediate exportation by mail

LIST OF ALL PARTIES

PETITIONER:
BYUNGMIN CHAE

EXAMINEE FOR THE CUSTOMS BROKER LICENSE
IN THE MONTH OF APRIL 2018

RESPONDENT:
JANET YELLEN, THE UNITED STATES SECRETARY OF THE TREASURY ALEJANDRO MAYORKAS, THE UNITED STATES SECRETARY OF THE HOMELAND SECURITY
THE UNITED STATES DEPARTMENT OF THE TREASURY
THE UNITED STATES DEPARTMENT OF THE HOMELAND SECURITY, AND THE UNITED STATES

LIST OF RELATED PROCEEDINGS

1. THE UNITED STATES COURT OF INTERNATIONAL TRADE COURT NO. 20-00316 BYUNGMIN CHAE v. JANET YELLEN THE DEPARTMENT OF THE TREASURY, ALEJANDRO MAYORKAS, THE DEPARTMENT OF HOMELAND SECURITY AND THE UNITED STATES
   JUDGEMENT ENTERED: JUNE 6, 2022

2. THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT COURT NO. 22-2017 BYUNGMIN CHAE v. JANET YELLEN THE DEPARTMENT OF THE TREASURY, ALEJANDRO MAYORKAS, THE DEPARTMENT OF HOMELAND SECURITY AND THE UNITED STATES
   JUDGEMENT ENTERED: APRIL 25, 2023

3. THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT COURT NO. 22-2017 BYUNGMIN CHAE v. JANET YELLEN THE DEPARTMENT OF THE TREASURY, ALEJANDRO MAYORKAS, THE DEPARTMENT OF HOMELAND SECURITY AND THE UNITED STATES
   JUDGEMENT ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC ENTERED: JUNE 12, 2023

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TABLE OF CITED AUTHORITIES

CITATIONS OF OPINIONS AND ORDERS

1. The opinion of the Court of International Trade Appeals appears on that court's web site as Slip Op. 22-59 as "chae vs secretary of the treasury" https://www.cit.uscourts.gov/content/slip-opinions-2022

2. The order of the court of appeals for the federal circuit appears on that court's web site as Court No 22-2017 with the docket number 29 dated on April 25 2023 https://ecf.cafc.uscourts.gov/n/beam/servlet/TransportRoom

3. The order of the court of appeals for the federal circuit appears on that court's web site as Court No 22-2017 with the docket number 35 dated on June 12 2023 https://ecf.cafc.uscourts.gov/n/beam/servlet/TransportRoom

BASIS FOR JURISDICTION

1. Byungmin Chae seeks to have the Supreme Court review a judgment of a panel of the United States Court of Appeals for the federal circuit , which was entered on April 25, 2023
2. Byungmin Chae timely filed a Petition for Writ of Certiorari, now pending before this Court.
3. Jurisdiction is conferred upon this Court to review the court of appeals' judgment by 19 U.S.C § 1641(b)(2).

STATEMENT OF THE CASE

This case involves the appeal of the administrative decision of the U.S. Customs and Border Protection ("CBP") denying Plaintiff's request for the credit for the question number 27 in the Customs Broker License Examination ("CBLE") dated on April 25, 2018.

In reviewing the legal question in the CBLE, this Court reviews the basis of Customs' decision to deny credit in accordance with the Administrative Procedure Act ("APA"). O'Quinn v. United States, 24 C.I.T. 324, 325 (2000). Such a review ensures that the agency engages in reasoned decision-making in grading the exam.Id. For the reasons set forth in the brief below, the record lacks substantial evidence to support CBP's decision to deny Plaintiff credit for the question at issue in this matter. Therefore, Plaintiff requests that the Supreme Court to review the question number 27 of the Customs Exam administered on the April 25, 2018 and to award the Plaintiff with the credit for the question.

On April 25, 2018, Plaintiff sat for the CBLE in Flushing, New York. On May 18, 2018, Plaintiff was informed that he had received a score of 65% on the Exam and had therefore not achieved the requisite minimum passing score of 75%. Subsequently, on June 18, 2018, Plaintiff timely appealed thirteen of the questions from the April 2018 Exam, namely question numbers 2, 5, 24, 27, 28, 33, 39, 43, 50, 54, 57, 68, and 77. On August 23, 2018, Plaintiff received the written notification that he, along with other applicants of the April 2018 exam, received credit for three additional questions, namely questions 28, 66, and 68. Because Plaintiff already had a correct answer to one of those questions, question 66, he received two additional correct answers, raising his score to 67.5%.

By way of the letter dated on August 23, 2018 Plaintiff was also informed that he did not receive credit for any of the questions originally appealed. On September 28, 2018, Plaintiff filed a timely appeal of eleven questions to the Assistant Commissioner, Office of Trade, as instructed by the CBP's letter. Specifically, Plaintiff appealed questions, 2, 5, 24, 27, 33, 39, 43, 50, 54, 57, and 77. On October 29, 2019, the CBP emailed Plaintiff a copy of a letter dated on May 23, 2019, granting his appeal on three questions (2, 24, and 54), but still leaving him short of a passing score.

Plaintiff's score was 71.25% and he still needed to require a score of 75% to pass. On October 30, 2019, Plaintiff asked the CBP how he could appeal the May 23, 2019, decision. Plaintiff was informed that he had no other recourse. Specifically, Plaintiff was told, "[t]here was no 3rd appeal."As a result of this false information from the CBP, Plaintiff took no immediate action, believing he had no further recourse. Contrary to this false information, Plaintiff subsequently learned that the information provided by CBP was incorrect and that he could appeal to the Court of International Trade ("CIT").

Consequently, on March 4, 2020, Plaintiff filed a petition with the CIT seeking the review of the previous denials of his appeals. Following motion practice, the Court of the International Trade possessed the jurisdiction as this case involved a challenge to the denial of the customs broker license by U.S. Customs and Border Protection and entered an order permitting Plaintiff one credit out of 5 questions on the day of June 6, 2022. Shortly after the announcement of the decision by the Court of International Trade the plaintiff filed the additional petition with the United States Court of Appeals for the Federal Circuit to further review the denials of the appeals on the day of July 11, 2022. Following the additional motion practices the Court of the Appeals for the Federal Circuit entered an order permitting plaintiff one credit out of 3 questions on the day of April 25, 2023.

However, the plaintiff would like to bring the issue of the credit from the question No. 27 on the April 2018 Customs Broker License examination to the attention of the Supreme Court to diagnose and challenge the CBP's decision to deny the plaintiff's credit.

REPLY ARGUMENTS

The denial of a broker's license will be overturned if the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Kenny v. Snow, 401 F.3d 1359, 1361 (Fed.Cir. 2005). A final administrative decision by the Secretary denying a Customs broker's license will be set aside if it is not supported by substantial evidence. Carrier v. U.S., 20 CIT 227, 228, Slip. Op. 96-36 (Feb. 13, 1996).

A license may be denied if the applicant fails to meet certain basic requirements. 19C.F.R. § 111.16. One of the requirements is establishing that the applicant has sufficient knowledge of customs and related laws and regulations and procedures as evidenced by attaining a passing grade of 75% or higher on a written examination. 19 U.S.C.§ 1641(b)(2). See also, 19 C.F.R. § 111.11(a)(4). However, "[t]he express objective of the customs broker license exam is to gauge an applicant's command of Customs' position on the relevant rules and regulations."Dunn-Heiser v. U.S., 374 F.Supp.2d 1276, 1280 (CIT May 31, 2005).

The agency must have engaged in reasoned decision-making in grading the exam. O'Quinn v. U.S., 24 CIT 324, 325, 100 F.Supp.2d 1136, 1138 (2000).

A. The Failure to Credit Plaintiff's Answers to the Challenged Question Is Not Supported by Substantial Evidence.

In order for the findings of the Secretary to be upheld, they must be supported by substantial evidence. 19 U.S.C. § 1641(e)(3). "Substantial evidence" is more than a mere scintilla of evidence. Germscheid v. U.S., 19 CIT 706, 708-9, 888 F.Supp. 1197, 1200 (1995). It is that which a reasonable person would accept as adequate to support a conclusion.Id.

1. Question 27

Plaintiff appeals the denial of credit for his response to Question 27 of the April 2018 CBLE.

Question 27 states:

> Which of the following mail articles are not subject to examination or inspection by customs?
>
> **A.** Bona fide gifts with an aggregate fair retail value not exceeding$800 in the country of shipment
> **B.** Mail packages addressed to officials of the U.S Government containing merchandise
> **C.** Diplomatic pouches bearing the official seal of France and certified as only containing documents
> **D.** Personal and household effects of military and civilian personnel returning to the United States upon the completion of extended duty abroad
> **E.** Plant material imported by mail for purposes of immediate exportation by mail

A. Plaintiff answered "B" on Question 27 on the exam. Customs' official answer to Question 27 on the exam is "C". Plaintiff contends there are multiple correct answers to this question. While answer "C" is accurate, Plaintiff's answer, choice "B", is also accurate under the following reasons.

1) **The coverage of the customs territory**

According to 19 CFR § 101.1 the customs territory of the United States includes only the United States, the District of Columbia, and Puerto Rico. In addition, as noted in the 19 CFR § 7.2 the insular possessions of the United States other than Puerto Rico are also American territory but, because those insular possessions are outside the customs territory of the United States, those mail packages addressed to officials of the U.S. government containing merchandise are not subject to examination or inspection by the customs.

2) **The diplomatic bag**

As noted in the 19 CFR § 148.83 (a) the contents of the diplomatic bags are restricted to diplomatic **documents and articles** intended exclusively for official use and if these bags contain the articles of merchandise such as newspaper or magazines for official use these diplomatic bags shall not be opened or detained nor shall they be subject to duty or entry.

Based on the foregoing, there is no substantial evidence in support of the denial of Plaintiff's challenge to the denial of credit for his response to this question. Credit should be given for the question answered by Plaintiff where there are multiple correct answers amongst the choices. Refusing to provide Plaintiff credit for his answer to Question 27 is arbitrary, unreasonable, and capricious as Plaintiff has demonstrated (a) that the question was at best ambiguous, and (b) by his explanation that Plaintiff understands the CBP's position on relevant rules and regulations.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for Judgment on the Record and remand the case to the U.S. Customs and Border Protection with directions to allow credit for Plaintiff's answers to questions number 27 of the April 2018 Customs Broker License Examination.

Certificate of good faith by Petitioner

I, Byungmin Chae, certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in supreme court rule 44 of the rules of this court

Certification

I declare under the penalty of perjury that the foregoing is true and correct. I furthermore swear that I have mailed the original petition to this court plus a copy to the U.S. Solicitor General, with the USPS priority mail service.

Dated: November 17, 2023 Respectfully submitted

Byungmin Chae

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APPENDIX

1. THE UNITED STATES COURT OF INTERNATIONAL TRADE COURT NO. 20-00316
   JUDGEMENT ENTERED: JUNE 6, 2022

2. THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT COURT NO. 22-2017
   JUDGEMENT ENTERED: APRIL 25, 2023

3. THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT COURT NO. 22-2017
   JUDGEMENT ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC
   ENTERED: JUNE 12, 2023

UNITED STATES COURT OF INTERNATIONAL TRADE

BYUNGMIN CHAE,

Plaintiff,

v.

JANET YELLEN, United States Secretary of the Treasury, ALEJANDRO MAYORKAS, United States Secretary of Homeland Security, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and UNITED STATES,

Defendants.

Before: Timothy M. Reif,

Judge Court No. 20-00316

OPINION

[Denying plaintiff's motion for judgment on the agency record.]

Dated: June 6, 2022

Matthew C. Moench, King Moench Hirniak & Mehta, LLP, of Morris Plains, N.J., argued for plaintiff.

Marcella Powell, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S.Department of Justice, of New York, N.Y., argued for defendants. With her on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Justin R. Miller, Attorney-in-Charge, International Trade Field Office, and Aimee Lee, Assistant Director.

Of counsel on the brief was Mathias Rabinovitch, Office of the ssistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

* * *

Reif, Judge: Plaintiff, Byungmin Chae, brings this action pursuant to U.S. Court of International Trade ("USCIT" or the "Court") Rule 56.1 to challenge the decision of U.S. Customs and Border Protection ("Customs") upholding the denial of plaintiff's appeal of his result on the Customs Broker License Exam ("CBLE" or "exam").[1] Am. Compl., ECF No. 20; Br. in Supp. of Pl.'s Mot. for J. on the R. ("Pl. Br."), ECF No. 39; Reply ("Pl. Reply Br."), ECF No. 43; section 641(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(e) (2018).[2] Customs denied plaintiff's appeal based on his failure to attain a passing score of 75% or higher on the CBLE held on April 25, 2018 ("April 2018 exam"). Def.'s Opp. to Pl.'s Mot. for J. on the R. ("Def. Resp. Br."), ECF No. 40; 19 C.F.R. § 111.11(a)(4).

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[1] The court notes with appreciation the participation of Matthew C. Moench as pro bono counsel in this action.

[2] Further citations to the Tariff Act of 1930, as amended, are also to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

Plaintiff appeals to the court Customs' decision to deny plaintiff credit for five questions on the April 2018 exam.[3] *See* Pl. Reply Br. at 2. Should plaintiff receive credit for three of the five contested questions, he would attain a passing score of 75%. Plaintiff contends also that he is eligible to receive attorney fees and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

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3 Plaintiff appealed initially Customs' decision to deny plaintiff credit for seven questions on the exam. *See* Pl. Br.at 1; Am. Compl. Following the filing of defendants' memorandum in opposition to plaintiff's motion, however, plaintiff "concede[d] to the Government's interpretation and explanation" of two questions on the exam, and consequently withdrew his challenges to those questions. Pl. Reply Br. at Accordingly, plaintiff contends that he should receive credit for five questions: questions 5, 27, 33, 39 and 57. *Id.*

See Pl. Br. at 13- 14. Defendants oppose plaintiff's motion and argue that Customs' decision to deny plaintiff credit for each contested question was supported by substantial evidence. *See* Def. Resp. Br. at 8; Def.'s Answer to First Am. Compl., ECF No.27. On this basis, defendants assert that plaintiff did not attain a passing score of 75% or higher on the April 2018 exam and, consequently, that Customs' "decision not to grant plaintiff a license due to his failure to attain a passing score . . . was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Def. Resp. Br. at 5-6, 22- 23; 5 U.S.C. §706 (2)(A). Defendants contest also plaintiff's argument that he is entitled to attorney fees and other expenses under the EAJA. *See id.* at 21-23. For the reasons discussed below, plaintiff's motion is denied.

BACKGROUND

Plaintiff sat for the CBLE on April 25, 2018. *See* Am. Admin. R., Ex. A, ECF No. 51. On May 18, 2018, Customs notified plaintiff that he had received a score of 65% — 10% below the passing score of 75%. *See id.* Plaintiff appealed this result, and the Broker Management Branch ("BMB") of Customs notified plaintiff on August 23, 2018,

that, upon further review, his score had improved by two questions, resulting in a score of 67.5% — still short of the 75% score required to pass. *See* Am. Admin. R., Exs. B, C. Plaintiff then initiated with Customs' Executive Assistant Commissioner ("EAC") a review of the BMB's decision. *See* Am. Admin. R., Ex. D. By letter dated May 23, 2019, the EAC informed plaintiff that his score had improved by three additional questions, resulting in a 71.25% score — again, short of 75%. *See* Am. Admin. R., Ex. L.

Plaintiff inquired how to appeal the EAC's decision but was informed that "[t]here is no 3rd appeal." Am. Admin. R., Ex. M. Plaintiff learned subsequently, however, that he had been able to appeal his result to the USCIT and attempted to file a complaint on March 4, 2020. *See* Pl. Br. At 2 The Court docketed plaintiff's complaint on September 11, 2020.[4]

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4 "It is unclear what exactly precipitated such a lengthy delay between [plaintiff's] filing and the Court's docketing; however, the court notes that plaintiff's original filing coincided with the onset of the COVID-19 pandemic." *Chae v. Sec'y of the Treasury* (*Chae I*), 45 CIT 518 F. Supp. 3d 1383,1390(2021)

In a decision dated May 7, 2021, the court denied defendants' motion to dismiss plaintiff's complaint, granted plaintiff leave to amend his complaint to bring it into compliance with the procedural requirements of USCIT Rule 10(a), and sua sponte invited plaintiff to amend his complaint to bring it into compliance with the substantive requirements of USCIT Rule 12(b)(6). *Chae I*, 45 CIT at, 518 F. Supp. 3d at 1389-90. On July 6, 2021, plaintiff filed an amended complaint seeking review of Customs' decision to deny plaintiff's appeal. *See* Am. Compl. at 1-2.

LEGAL FRAMEWORK

I. Application for a customs broker's license

Customs brokers are responsible for the application of statutes and regulations "governing the movement of merchandise into and out of the customs territory of the United States." *Dunn-Heiser v. United States*, 29 CIT 552, 553, 374 F. Supp. 2d 1276, 1278 (2005). Pursuant to 19 U.S.C. § 1641(b)(2), the Secretary of the Treasury is vested with "broad powers" with respect to the licensing of customs brokers. *DePersia v. United States*, 33 CIT 1103, 1105, 637 F. Supp. 2d 1244, 1247 (2009).

19 U.S.C. § 1641(b)(2) provides:

> The Secretary may grant an individual a customs broker's license only if that individual is a citizen of the United States. Before granting the license, the secretary may require an applicant to show any facts deemed necessary to establish that the applicant is of good moral character and qualified to render valuable service to others in the conduct of customs business. In assessing the qualifications of an applicant, the Secretary may conduct an examination to determine the applicant's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters.

19 U.S.C. § 1641(b)(2).

Customs has promulgated several regulations to implement this Statute. For instance, 19 C.F.R. § 111.11(a) details the "[b]asic requirements" for an Individual to obtain a customs broker's license:

> (a) INDIVIDUAL. In order to obtain a broker's license, an individual must:
>
> (1) Be a citizen of the United States on the date of

> submission of the application . . . and not an officer or employee of the United States Government;
>
> (2) Attain the age of 21 prior to the date of submission of the application . . . ;
>
> (3) Be of good moral character; and
>
> (4) Have established, by attaining a passing (75 percent or higher) grade on an examination taken within the 3-year period before submission of the application . . that he has sufficient knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters to render valuable service to importers and exporters.
>
> 19 C.F.R. § 111.11(a)(1)-(4).
>
> Further, 19 C.F.R. § 111.12(a) provides information with respect to the submission of an application for a customs broker's license, and 19 C.F.R. §111.13 regulates the examination that is described in 19 C.F.R. § 111.11(a)(4).
>
> *See* 19 C.F.R. §§ 111.12(a), 111.13.

II. Customs Broker License Exam

Customs' regulations provide that "[t]he examination for an individual broker's license" — referred to as the CBLE — is

"designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." *Id.* § 111.13(a); *see* 19 U.S.C. § 1641(b)(2). The fact that this "comprehensive written licensing exam" constitutes one of the requirements to obtain a customs broker's license reflects the "complex[ity]" of the applicable statutes and regulations as well as the "integral role [of customs brokers] in international trade." *Dunn-Heiser*, 29 CIT at 553-54, 374 F. Supp. 2d at 1278.

Customs administers the CBLE twice each year, in April and October. 19 C.F.R. § 111.13(b). The exam consists of 80 multiple choice questions. *See* Am. Admin. R., Ex. N, at *1. In addition, "[t]he exam is open book," and applicants are advised to bring certain specified materials to which they may refer during the exam, including the Harmonized Tariff Schedule of the United States ("HTSUS") and Title 19 of the Code of Federal Regulations ("CFR").[5] *Dunn-Heiser*, 29 CIT at 554, 374 F.Supp. 2d at 1278.

[5] *See also Customs Broker License Exam (CBLE)*, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/trade/programs-administration/customs-brokers/license-examination-notice-examination (last visited June 1, 2022) (providing a list of permitted reference materials).

As noted, an applicant is required to attain a score of 75% or higher to pass the CBLE. 19 C.F.R. § 111.11(a)(4); 19 U.S.C. § 1641(b)(2). However, an applicant who does not attain a passing score is entitled to retake the exam without penalty. 19 C.F.R.§ 111.13(e). In addition, an applicant who does not attain a passing score is entitled to appeal this result to the BMB. *Id.* § 111.13(f). Should the BMB affirm the result, the applicant is entitled to request that the EAC review the BMB's decision. *Id.* Should the EAC uphold the BMB's decision, the applicant is then entitled to appeal the EAC's decision to the USCIT. 19 U.S.C. § 1641(e)(1) ("[An] applicant . . . may appeal . . . by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part.").

STANDARD OF REVIEW

This Court has jurisdiction to hear plaintiff's appeal pursuant to 28 U.S.C. §1581(g)(1) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review . . .

any decision of the Secretary of the Treasury to deny a customs broker's license.").

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has determined that two elements of review apply with respect to the appeal of an applicant's result on the CBLE. *See Kenny v. Snow*, 401 F.3d 1359, 1361 (Fed. Cir. 2005).

The first element addresses whether Customs' decision to deny an applicant credit for a contested question was supported by "substantial evidence." *Id.* at 1361-62 (concluding that the "decision to deny credit [for the contested question] [was] supported by substantial evidence") (citing 19 U.S.C. § 1641(e)(3)).

The second element addresses whether, on the basis of an applicant's failure to attain a passing score on the CBLE, Customs' decision to deny the applicant a customs broker's license was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1361 (citing 5 U.S.C.§ 706).

I. "Substantial evidence"

In reviewing Customs' decision to deny an applicant credit for a contested question on the CBLE, the Court must determine whether the decision was supported by "substantial evidence." 19 U.S.C.

§1641(e)(3). In *Kenny*, a case involving the appeal of an applicant's result on the CBLE, the Federal Circuit stated:

> Underpinning a decision to deny a license arising from an applicant's failure to pass the licensing examination are factual determinations grounded in examination administration issues . . . which are subject to limited judicial review because "[t]he findings . . . as to the facts, if supported by substantial evidence, shall be conclusive."

Kenny, 401 F.3d at 1361 (citing 19 U.S.C. § 1641(e)(3)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Further, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence."

DePersia, 33 CIT at 1104, 637 F. Supp. 2d at 1247.

With respect to the appeal of questions on the CBLE, the substantial evidence standard does not require that Customs draft

perfect questions. *See Di Iorio v. United States*, 14 CIT 746, 748-49 (1990) ("While not perfect, the question was adequate so that, as to this question, plaintiff's appeal was rejected reasonably."); *Harak v. United States*, 30 CIT 908, 922-23 (2006) ("[A] question or answer choice need not reflect the precise wording of the regulation in order to be valid.....Though the question is not a perfect reflection of the regulation's language, it is not inadequate."). For instance, in *Di Iorio*, the court reviewed the plaintiff's appeal of a question concerning copyright infringement as provided in 19 C.F.R. § 133.43(a):

> (a) NOTICE TO THE IMPORTER. If the district director has any reason to believe that an imported article may be an infringing copy or phonorecord of a recorded copyrighted work, he shall withhold delivery, notify the importer of his action, and advise him that if the facts so warrant he may file a statement denying that the article is in fact an infringing copy and alleging that the detention of the article will result in a material depreciation of its value, or a loss or damage to him. The district director also shall advise the importer that in the

absence of receipt within 30 days of a denial by the importer that the article constitutes an infringing copy or phonorecord, it shall be considered to be such a copy and shall be subject to seizure and forfeiture.

19 C.F.R. § 133.43(a) (1989); *see Di Iorio*, 14 CIT at 748. The question that the plaintiff contested stated:

Your client, who is just starting to import toy stuffed dinosaurs, has a shipment under detention by Customs for possible copyright violation. Following your advice, he wrote to the District Director of Customs asserting that: (1) the articles are not piratical copies, and (2) because the dinosaurs are sold seasonally, continued detention will force him out of business. The District Director will:

A. Release the shipment to the importer unconditionally because they are seasonal and the District Director has authority to determine if they violate the copyright.

B. Furnish the copyright owner with a sample and release the shipment if he does not respond within 30 days.

C. Release the shipment if the importer agrees to post an additional bond.

D. Consider the goods to be restricted and seize the shipment.

Id. The plaintiff selected answer choice (D), whereas Customs designated answer choice (B) as the correct response. *See id.*

In support of his appeal, the plaintiff argued that the contested question was ambiguous because the question required an applicant to make three assumptions: (1) the District Director of Customs "actually received" a written statement from the client; (2) the District Director received such a statement within 30 days; and (3) such a statement constituted "an acceptable denial" within the meaning of 19 C.F.R. § 133.43(a). *Id.* According to the plaintiff, Customs "erred in rejecting [his] appeal because requiring the examinee to leap through these assumptions in arriving at the correct answer placed an unreasonable burden on any test-taker." *Id.* In rejecting this appeal, the court stated that the question, "[w]hile not perfect" in view of the absence of the foregoing information, nonetheless provided the applicant with sufficient information to apply 19 C.F.R. § 133.43(a) and to select the correct answer choice. *Id.* at 748-49. On this basis, the court concluded that Customs' decision to deny the plaintiff credit for this question was reasonable. *See id.*

The Court's standard of review with respect to questions on the CBLE is one of reasonableness. *See Rudloff v. United States*, 19 CIT 1245, 1249 (1995), *aff'd*, 108 F.3d 1392 (Fed. Cir. 1997) ("[T]he question is fair as it reasonably tests 'an applicant's knowledge of customs and related laws, regulations and procedures.'" (citing 19 U.S.C. § 1641(b)(2))); *Di Iorio*, 14 CIT at 747 ("[T]his court notes that, as a general matter, it will not substitute its own judgment on the merits

of the Customs examination, but will examine decisions made in connection therewith on a reasonableness standard."). The Court "must necessarily conduct some inquiry into plaintiff's arguments and defendant's responses concerning each of the . . . challenged test questions." *Di Iorio*, 14 CIT at 747. However, the Court is not "some kind of final reviewer" of the CBLE, *id.* at 752, and Customs is "entitled to certain latitude in the design and scoring of" the exam.

Dunn-Heiser, 29 CIT at 556, 374 F. Supp. 2d at 1280.

In determining whether Customs' position with respect to a contested question is reasonable and meets the substantial evidence standard, the Court previously has stated that "susceptibility of

different meanings" does not necessarily render a question or term used therein ambiguous, and that the meaning of the question or term "may be colored by the context in which it is used." *DePersia*, 33 CIT at 1110-12, 637 F. Supp. 2d at 1251. Further, the fact that a question or term is susceptible of more than one interpretation will fail to meet the substantial evidence standard only in limited circumstances. *See, e.g.*, *Harak*, 30 CIT at 928; *O'Quinn v. United States*, 24 CIT 324, 328, 100 F. Supp. 2d 1136, 1140 (2000). These circumstances include that: (1) the omission of relevant statutory or regulatory language would result in the question falsely characterizing the applicable provision, *see Harak*, 30 CIT at 928 (citing *Carrier v. United States*, 20 CIT 227, 232 (1996)); (2) the inclusion or omission of language would result in "the question's incorrect use of" a relevant term, *O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140; or (3) the inclusion or omission of language would result in the question "not contain[ing] sufficient information [for an applicant] to choose an answer." *Id.*

II. "Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

Customs' regulations list four requirements for an individual to obtain

a customs broker's license, one of which is that the applicant "attain[] a passing (75 percent or higher) grade on" the CBLE. 19 C.F.R. § 111.11(a)(1)-(4).

In reviewing Customs' decision to deny a customs broker's license, the Court must determine whether such a decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Kenny*, 401 F.3d at 1361; *Dunn-Heiser*, 29 CIT at 555, 374 F. Supp. 2d at 1279; *Di Iorio,* 14 CIT at 747. Should the Court determine that Customs' decision to deny an applicant credit for contested questions on the CBLE was supported by substantial evidence, and consequently that an applicant attained less than a 75% score on the exam, then Customs' denial of a customs broker's license will not have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

DISCUSSION

The court concludes that Customs' decision to deny plaintiff credit for questions 5, 27, 33 and 39 on the April 2018 exam was supported by substantial evidence, but that Customs' decision with respect to question

57 was not supported by substantial evidence. On this basis, On this basis, plaintiff does not establish that he scored 75% or higher on the April 2018 exam.

Accordingly, the court concludes that Customs' decision to deny plaintiff a customs broker's license was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court concludes also that plaintiff is not entitled to receive attorney fees and other expenses under the EAJA. 28 U.S.C. § 2412(d).

I. Customs's denial of credit for the contested questions

A. Question 5

First, plaintiff appeals Customs' decision to deny plaintiff credit for question 5 on the April 2018 exam. *See* Pl. Br. at 4. Question 5 states:

Which of the following customs transactions is NOT required to be performed by a licensed customs broker?

A. Temporary Importation under Bond

B. Transportation in bond

C. Permanent Exhibition Bond

D. Trade Fair Entry

E. Foreign Trade Zone Entry

1. Positions of the parties

Customs designated answer choice (B) as the correct response to question 5.

See Def.Resp.Br at 8. Plaintiff selected answer choice (E) but does not contest that answer choice (B) is also correct. See Pl.Br.at 4. Accordingly, the parties dispute only whether Customs' decision to deny plaintiff credit for his selection of answer choice (E) was supported by substantial evidence.

See id.at 5;Def.Resp.Br.at 9-10. Plaintiff contends that Customs' decision to deny plaintiff credit for his selection of answer choice (E) was not supported by substantial evidence. See Pl.Br.at 5.

Plaintiff argues that answer choice (E) is correct because "Foreign Trade Zone Entry" is *not* required to be performed by a licensed customs broker.

See id. at 4. Plaintiff applies a "common understanding" of the term "entry" and contends that the process of "admission" set forth in 19 C.F.R. § 146.32 (a)(1) — which does not require a customs broker's license pursuant to 19 C.F.R. § 111.2(a) —

constitutes a type of "Foreign Trade Zone Entry." *Id.*

Plaintiff points first to 19 C.F.R. § 146.32(a)(1). *See id.* This regulation provides: § 146.32 APPLICATION AND PERMIT FOR ADMISSION OF MERCHANDISE.

(a)(1) APPLICATION ON CBP FORM 214 AND PERMIT. Merchandise may be admitted into a zone only upon application on a uniquely and sequentially numbered CBP Form 214 ("Application for Foreign Trade Zone Admission and/or Status Designation") and the issuance of a permit by the port Director. The applicant for admission shall present the application to the port director and shall include a statistical copy on CBP Form 214-A for transmittal to the Bureau of Census, unless the applicant has made arrangements for the direct transmittal of statistical information to that agency.

19 C.F.R. § 146.32(a)(1). Plaintiff and defendants agree that the process of Admission set forth in this provision does not constitute "customs business" that is required to be performed by a licensed customs broker. *See* Pl. Br. at 4;

Oral Arg. Tr. at 4:3-9, ECF No. 52; 19 C.F.R. §§ 111.1 (defining "customs business"), 111.2(a)(2)(vi) (providing that an activity such as admission into a foreign trade zone, which does not "involve the transfer of merchandise to the customs territory of the United States," is not required to be performed by a licensed customs broker).

Next, plaintiff argues that the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1) falls within a "common understanding" of the term "entry," which plaintiff asserts to be "the act of entering or the acting of making or entering a record." Pl. Br. At 5.

Plaintiff contends that the use of this "common understanding" is appropriate because answer choice (E) — "Foreign Trade Zone Entry" — is not a term of art that appears in Customs' regulations.[6] *See id.* at 4; Oral Arg. Tr. at 20:9-13 (contending that use of a "common understanding" of a term is appropriate if the term is "not otherwise defined"). In support of his interpretation of the term "entry," plaintiff refers also to an article on Customs' website, of which plaintiff requests that the court take judicial notice. *See* Pl. Reply Br. at 4-5 n.1; Oral Arg. Tr. at 9:18-10:19. Plaintiff points to the use in this article of the term "entry" to challenge defendants' "hyper-technical distinction between 'admission' and 'entry.'" *See* Oral Arg. Tr. at 10:15-17.

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[6] In addition, plaintiff argues in his memorandum in support of his motion for judgment on the agency record that the use of a "common understanding" of the term "entry" is appropriate because the phrase in answer choice (E) is not capitalized. *See* Pl. Br. at 4. At oral argument, however, plaintiff notes that the parties learned subsequent to the submission of their respective briefs that the phrase in answer choice (E) — "Foreign Trade Zone Entry" — had in fact been capitalized in the April 2018 exam. *See* Oral Arg. Tr. at 11:21-14:6. The record has since been corrected to include the full exam. *See* Am. Admin. R., Ex. N. Accordingly, plaintiff withdraws his argument with respect to the capitalization of the term "entry."

On this basis, plaintiff argues that, applying a "common understanding" of the term "entry," the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1) constitutes a type of "Foreign Trade Zone Entry" that does not require a customs broker's license pursuant to 19 C.F.R. § 111.2(a). Pl. Br. at 4-5.

Accordingly, plaintiff contends that answer choice (E) is also correct. *See id.* at 4. Defendants argue that answer choice (E) is not correct. *See* Def. Resp. Br. At 8-10. According to defendants, plaintiff applies mistakenly a "common understanding" of the term "entry," which leads plaintiff to rely incorrectly upon 19 C.F.R. § 146.32(a)(1). *See id.* Rather, defendants argue that plaintiff should have but did not rely upon 19 C.F.R. §146.62 in responding to the question. See id.

To start, defendants refer to 19 C.F.R. § 146.62, which provides:

> § 146.62 ENTRY.
>
> (a) GENERAL. Entry for foreign merchandise that is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse, will be made by filing an in-bond application pursuant to part 18 of this chapter, CBP Form 3461, CBP Form 7501, or other applicable

> CBP forms. If entry is made on CBP Form 3461, the person making entry shall file an entry summary for all the merchandise covered by the CBP Form 3461 within 10 business days after the time of entry.

19 C.F.R. § 146.62(a); *see id.* § 146.63-146.64. Defendants note that Customs' regulations provide that the process of "entry" set forth in 19 C.F.R. § 146.62 constitutes "customs business" that is required to be performed by a licensed customs broker. *See* Def. Resp. Br. at 10; 19 C.F.R. §§ 111.1, 111.2(a)(1).

According to defendants, plaintiff should have relied upon 19 C.F.R. § 146.62 in responding to question 5, as the phrase in answer choice (E) — "Foreign Trade Zone Entry" —"reasonably refers" to the process of "transferring or removing merchandise from an FTZ" that is described in the regulation. Def. Resp. Br. at 9-10.

Defendants argue that, rather than relying upon 19 C.F.R. § 146.62, plaintiff applies mistakenly a "common understanding" of the term "entry." *See id.* Defendants contend that this "common understanding" leads plaintiff to rely incorrectly upon the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1). *See id.* at 9.

Defendants point to the substantive differences between the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1) and the process of "entry" set forth in 19 C.F.R. § 146.62. *See id.* According to defendants, "admission" as set forth in 19 C.F.R. § 146.32(a)(1) concerns the process through which "animporter brings merchandise into a [foreign trade zone]." *Id.*

In contradistinction, defendants note that "entry" as set forth in 19 C.F.R. § 146.62 concerns the process through which "merchandise is transferred or removed from a zone for consumption or warehouse." *Id.* To emphasize further this distinction, defendants note that 19 C.F.R. § 146.32(b)(2), a subsection of the regulation to which plaintiff points, itself distinguishes "admission" from "entry." *See* Oral Arg. Tr. at 8:1-8 (citing 19 C.F.R. § 146.32(b)(2) ("The applicant for *admission* shall submit with the application a document similar to that which would be required as evidence of the right to make *entry* for merchandise in Customs territory.") (emphasis supplied)).

On this basis, defendants argue that plaintiff conflates erroneously "admission" pursuant to 19 C.F.R. § 146.32(a)(1) with "entry" pursuant to 19 C.F.R. § 146.62.

See Def. Resp. Br. at 8-9.

According to defendants, the proper interpretation and application of 19 C.F.R. § 146.62 supports the conclusion that "Foreign Trade Zone Entry" *is* required to be performed by a licensed customs broker and, consequently, that answer choice (E) is not correct. *See id.* at 8-10. Accordingly, defendants argue that Customs' decision to deny plaintiff credit for question 5 was supported by substantial evidence. *Id.* at 10.

2. Analysis

Customs' decision to deny plaintiff credit for question 5 was supported by substantial evidence. Plaintiff's position with respect to question 5 is not persuasive for three reasons. First, plaintiff applies mistakenly a "common understanding" of the term "entry" in arguing that answer choice (E) is correct. Second, the article on Customs' website to which plaintiff refers does not support his position with respect to question 5. Third, plaintiff conflates erroneously the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1) with the process of "entry" set forth in 19 C.F.R. § 146.62. First, plaintiff applies mistakenly a "common understanding" of the term "entry." The Court previously has stated that an applicant is required to consult "customs and related laws, regulations and procedures" in responding to questions on the CBLE. *Rudloff*, 19 CIT at 1249 (citing

19 U.S.C. § 1641(b)(2)). Provided that a contested question "reasonably tests" an applicant's knowledge of the foregoing authorities, the Court will accord "a measure of deference" to Customs' determination with respect to the question. *Id.*; *Dunn-Heiser*, 29 CIT at 556, 374 F. Supp. 2d at 1280.

Plaintiff argues that his use of a "common understanding" of the term "entry" is appropriate because the phrase "Foreign Trade Zone Entry" is not a term of art that appears as a standalone phrase in Customs' regulations. *See* Pl. Br. at 4-5. This argument, however, is not consistent with the Court's standard for evaluating questions on the CBLE. A phrase in a contested question is not required to appear in Customs' regulations for the phrase to refer "reasonably" to the regulations. *See Harak*, 30 CIT at 922 ("[A] question or answer choice need not reflect the precise wording of the regulation in order to be valid."); *Di Iorio*, 14 CIT at 748-49 ("While not perfect, the question was adequate so that, as to this question, plaintiff's appeal was rejected reasonably.").

With respect to question 5, the phrase in answer choice (E) — "Foreign Trade Zone Entry"— "reasonably test[ed]" plaintiff's ability to identify the relevance of and to apply 19 C.F.R. §146.62. *See Rudloff*, 19 CIT at 1249. 19 C.F.R. § 146.62 concerns the process of "*[e]ntry* for foreign merchandise that is to be transferred from a *zone*, or removed from a *zone* for exportation or transportation to another port, for consumption or

warehouse."[7] Consequently, Customs determined reasonably that the use of a "common 19 C.F.R. § 146.62(a) (emphasis supplied). Further, 19 C.F.R. § 146.62, which is entitled "Entry," is located in Part 146, "Foreign Trade Zones," of Title 19 of the CFR.

Based on the language of 19 C.F.R. § 146.62 and the context within which the provision is located in Customs' regulations, Customs concluded reasonably that the phrase in answer choice (E)

— "Foreign Trade Zone Entry" — is drafted in a manner that indicates its reference to this provision. Am. Admin. R., Ex. N, at *5. understanding" of the term "entry" is not appropriate in responding to question 5.

Turning to plaintiff's second argument, plaintiff does not establish that the article on Customs' website supports his position with respect to question 5. *See* Pl. Reply. Br. at 4-5 n.1. Plaintiff requests that the court take judicial notice of this article pursuant to Federal Rule of Evidence ("FRE") 201(b)(2), which provides that a "court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.201(b)(2); 28 U.S.C. § 2641(a).

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7 See 19 C.F.R. § 146.1(a) (defining terms used in Part 146 of Title 19 of the CFR) (citing 19 U.S.C. § 81 "The term 'zone' means a 'foreign-trade zone.'")).

Other federal courts have taken judicial notice of information published by a government agency on a government website on the basis that such a website constitutes a "source whose accuracy cannot reasonably be questioned." Fed.R. Evid. 201(b)(2); *see Lopez v. Bank of Am., N.A.*, 505 F. Supp. 3d 961,970 (N.D. Cal. 2020) ("The Court will . . . take judicial notice . . . of the document . . . as it is clear on the face of the document — and the Court has independently confirmed — that it comes from a government agency website."); *Dark Storm Indus. LLC v.Cuomo*, 471 F. Supp. 3d 482, 490 n.2 (N.D.N.Y. 2020), *appeal dismissed, cause remanded sub nom. Dark Storm Indus. LLC v. Hochul*, No. 20- 2725-CV, 2021 WL 4538640 (2d Cir. Oct. 5, 2021). In such circumstances, courts have "considered separately" the "relevan[ce]" of the information of which judicial notice is taken. *Michael v. New Century Fin. Servs.*, 65 F. Supp. 3d 797, 804 (N.D. Cal. 2014).

The article to which plaintiff points is featured on the "Information Center section of Customs' website, and it is "clear on the face of" the article that it was published by Customs. *Lopez*, 505 F. Supp. 3d at 970. The "accuracy" of Customs' website "cannot reasonably be questioned," and consequently the court concludes that this article meets the standard for

judicial notice. Fed. R. Evid. 201(b)(2).

However, the court concludes that this article does not support plaintiff's argument with respect to question 5. The article, which is entitled, "Do I need a Customs Broker to clear my goods through Customs and Border Protection (CBP)?" states that "[t]here is no legal requirement for you to hire a Customs Broker to clear your goods." Pl. Reply Br. at Ex. A.

In addition, the article cites to a publication by Customs, entitled "Importing into the United States,"[8] which provides more comprehensive information to individuals who "choose to file [their] own customs entry." *Id.* However, this publication expressly states that "the information provided [therein] is for general purposes only" and that "reliance solely on th[is] information . . . may not meet the 'reasonable care' standard required of importers." Customs Importing Publication at 1- 2; *see* 19 U.S.C. § 1484(a)(1) (requiring the use of "reasonable care" in providing Customs with "documentation" or "information" with respect to the entry of merchandise). Moreover, the CBLE expressly directs applicants to refer to the following materials: the HTSUS, Title 19 of the CFR, the Instructions for the Preparation of Customs Form 7501, and the Right to Make Entry Directive 3530-002A. *See* Am. Admin. R., Ex. N, at *1.

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8 Importing into the United States, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf (last revised 2006) ("Customs Importing Publication").

The third reason that plaintiff's argument with respect to question 5 is not persuasive is that plaintiff conflates erroneously the processes set forth in 19 C.F.R. § 146.32(a)(1) and 19 C.F.R. § 146.62. 19 C.F.R. § 146.32(a)(1) concerns the process to apply and secure a permit for the "admission of merchandise" into a foreign trade zone. 19 C.F.R.§ 146.1 defines "admit" as "to bring merchandise into a zone with zone status." In contradistinction, 19 C.F.R. §146.62 concerns the process of "[e]ntry for foreign merchandise that is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse." Pursuant to 19 C.F.R. § 111.1 and 111.2, this process of entry constitutes "customs business" that is required to be performed by a licensed customs broker. *See* 19 C.F.R. §111.1 (providing that activities that "concern[] the entry . . . of merchandise" constitute "customs business").

In sum, 19 C.F.R. § 146.32(a)(1) involves bringing merchandise *into* a foreign trade zone, while 19 C.F.R. § 146.62 involves "transferr[ing]" or "remov[ing]" merchandise *from* a foreign trade zone for "consumption or

warehouse." *Compare id.* § 146.32(a)(1) *with id.* § 146.62. The provisions Regulate distinct administrative processes that question 5 reasonably called upon an applicant to distinguish. Plaintiff's counsel presented the most effective possible arguments in briefing and at oral argument; however, ultimately, the arguments cannot save the choice plaintiff made during the exam. Customs' decision to deny plaintiff credit for question 5 was supported by substantial evidence.

B. Question 27

Second, plaintiff appeals Customs' decision to deny plaintiff credit for question 27 on the April 2018 exam. *See* Pl. Br.at 5 Question 27 states:

> Which of the following mail articles are not subject to examination or inspection by Customs?
>
> A. Bona-fide gifts with an aggregate fair retail value not exceeding $800 in the country of shipment
>
> B. Mail packages addressed to officials of the U.S. Government containing merchandise
>
> C. Diplomatic pouches bearing the official seal of France and certified as only containing documents
>
> D. Personal and household effects of military and civilian

personnel returning to the United States upon the completion of extended duty abroad

E. Plant material imported by mail for purposes of immediate exportation by mail

Am. Admin. R., Ex. N, at *13

1. Positions of the parties

Customs designated answer choice (C) as the correct response to question 27. *See* Def.Resp. Br. at 10. Plaintiff selected answer choice (B), but does not contest that answer choice (C) is correct.

See Pl. Br. at 6.

Accordingly, the parties dispute only whether Customs' decision to deny plaintiff credit for his selection of answer choice (B) was supported by substantial evidence. *See id.*; Def. Resp. Br. at 11-12.

Plaintiff advances two arguments with respect to question 27.

First,plaintiff contends that question 27 is ambiguous because the question does not indicate "where the mail packages are coming from." Pl. Br. at 6. Answer choice (B) points to "[m]ail packages addressed to officials of the U.S. Government containing merchandise." Am. Admin. R., Ex. N, at *13.

Plaintiff argues that if the mail packages are sent from a domestic source, then the packages described in this answer choice would not be subject

to examination or inspection by Customs. *See* Pl. Br. at 6. Without this information, however, plaintiff argues that the question is ambiguous. See id.

Second, plaintiff contends that answer choice (B) also is correct. See id.; Pl. Reply Br. at 6. In support of this contention, plaintiff points to two of Customs' regulations. See Pl. Br. at 6. To start, 19 C.F.R. § 145.2(b)(1) provid es that *"[m]ail known or believed to contain only official documents addressed to officials of the U.S. Government" is not "subject to Customs examination."*

Plaintiff next turns to 19 C.F.R. § 145.37. See Pl. Reply Br. at 6. This regulation provides that certain "[b]ooks . . . and engravings, etchings, and other articles . . . shall be passed free of duty without issuing an entry when they are addressed to the Library of Congress or any department or agency of the U.S. Government." Id. (quoting 19 C.F.R. § 145.37(b)). Plaintiff contends that the articles described in 19 C.F.R. § 145.37(b) constitute "[m]ail packages addressed to officials of the U.S. Government containing merchandise" that shall be passed free of duty. See id.; Am. Admin. R., Ex. N, at *13. On this basis, plaintiff argues that answer choice (B) is correct. See Pl. Br. at 6; Pl. Reply Br. at 6-7.

Defendants contest both of plaintiff's arguments. *See* Def. Resp. Br.

at 10-12. First, defendants challenge plaintiff's contention that the mail articles described in question 27 might be sent from a domestic source. *See id.* at 11-12.

According to defendants, question 27 "reasonably assumes that all mail articles identified are imported into the United States" because "[i]f the merchandise was not imported . . . then custom laws would not apply" to the question. *Id.* at 11. Defendants argue that the question and answer choice (B) as drafted reasonably "test the [applicant's] ability to distinguish between imports that require examination or inspection and those that do not." *Id.*

Second, defendants challenge plaintiff's reliance upon 19 C.F.R. § 145.2 (b)(1) and 19 C.F.R.§ 145.37. *See id.* at 10-11. With respect to 19 C.F.R. § 145.2(b)(1), defendants note that this provision excepts from examination by Customs "[m]ail known or believed to contain *only* official documents addressed to Officials of the U.S. Government." *See id.* at 11 (citing 19 C.F.R. § 145.2(b)(1)) (emphasis in original). According to defendants, the plain language of this provision contradicts plaintiff's conclusion that "[m]ail packages addressed to officials of the U.S. Government containing *merchandise*" are not subject to examination or

inspection by Customs. Am. Admin. R., Ex. N, at *13 (emphasis supplied); *see* Def. Resp. Br.at 11.

Defendants then turn to 19 C.F.R. § 145.37. *See* Def. Resp. Br. at 11. Defendants raise two points with respect to this regulation.

First, defendants note that 19 C.F.R. § 145.37(c) distinguishes mail articles that contain "only official documents" from articles that contain "merchandise." *See id.*

According to defendants, this regulation provides that articles that contain "only official documents shall be passed free of duty without issuing an entry." 19 C.F.R. § 145.37(c). In contrast, defendants note that articles that contain "merchandise shall be treated in the same manner as other mail articles of merchandise." *Id.* Accordingly, defendants assert that 19 C.F.R. § 145.37(c) indicates that articles that contain "merchandise" shall be subject to examination by Customs. *See* Def. Resp. Br. at 11. On this basis, defendants contend that answer choice (B) is not correct. *See id.* at 10-12.

In the alternative, defendants note that 19 C.F.R. § 145.37 does not concern "Customs' examination" of the subject articles, but rather concerns how the articles "should be treated . . . for duty

purposes." Oral Arg. Tr. at 27:12-16. According to defendants, the articles described in 19 C.F.R. §§ 145.37(b) and (c) "still would be subject to Customs' examination" even if those articles are "passed free of duty." *Id.* at 27:13-14; 19 C.F.R. § 145.37(b)-(c). On this basis, defendants contend that 19 C.F.R. §145.37 is not responsive to question 27 and consequently does not support plaintiff's selection of answer choice (B). *See* Def. Resp. Br. at 11; Oral Arg. Tr. at 27:12-16. Accordingly, defendants argue that Customs' decision to deny plaintiff credit for question 27 was supported by substantial evidence. *See* Def. Resp. Br.at 12.

2. Analysis

Customs' decision to deny plaintiff credit for question 27 was supported by substantial evidence.

To start, Customs determined reasonably that question 27 presumes that the mail articles described in the question are imported into the United States. This presumption is reasonable based on the fact that the CBLE is designed to examine an applicant's ability to interpret and apply "customs and related laws, regulations and procedures."

Rudloff, 19 CIT at 1249 (citing 19 U.S.C. § 1641(b)(2)). Without the presumption that the mail articles described in question 27 are imported into the United States, the foregoing authorities would not apply to this question. In view of the purpose of the CBLE, Customs engaged in "reasoned decision-making" in concluding that question 27 is drafted in a manner that indicates Customs' intention to examine whether an applicant is able to distinguish imports that are subject to examination or inspection by Customs from imports that are not subject to such examination or inspection. *Harak*, 30 CIT at 919. For this reason, the court accords Customs a "measure of deference" with respect to Customs' "design" of question 27 and concludes that the question is not ambiguous. *Dunn-Heiser*, 29 CIT at 556, 374 F. Supp. 2d at 1280.

Next, Customs determined reasonably that 19 C.F.R. § 145.2(b)(1) and 19 C.F.R. § 145.37 do not support plaintiff's conclusion that answer choice (B) is correct. 19 C.F.R. § 145.2(b)(1) excepts from examination by Customs "[m]ail known or believed to contain *only official documents* addressed to officials of the U.S. Government." 19 C.F.R. § 145.2(b)(1) (emphasis supplied). This regulation does *not* except from examination or inspection by Customs the articles described in answer choice (B) — "[m]ail packages addressed to officials of the U.S. Government containing *merchandise*." Am. Admin. R., Ex. N, at *13 (emphasis supplied).

Further, "official documents" under 19 C.F.R. § 145.2(b)(1) do not constitute "merchandise" within the meaning of Customs' regulations. *See, e.g.*, 19 C.F.R.§ 145.37(c) (distinguishing mail articles that contain "official documents" from mail articles that contain "merchandise"). Accordingly, the plain language of 19 C.F.R. § 145.2(b)(1) contradicts plaintiff's argument with respect to his selection of answer choice (B).

Turning to 19 C.F.R. § 145.37, this provision is not responsive to question 27, which instructs the applicant to determine "[w]hich of the following mail articles are not *subject to examination or inspection by Customs*." Am. Admin. R., Ex. N, at *13 (emphasis supplied). 19 C.F.R. § 145.37 does not address whether certain mail articles are subject to "examination" or "inspection" by Customs. Rather, this provision addresses whether the articles "shall be passed free of duty without issuing an entry." 19 C.F.R. § 145.37 (b)-(c). Whether an article "shall be passed free of duty" is a distinct question from whether an article "shall be subject to examination or inspection by Customs." *Id.*; Am. Admin. R., Ex. N, at*13. On this basis, 19 C.F.R. § 145.37 does not support plaintiff's selection of answer choice (B).

Accordingly, Customs' decision to deny plaintiff credit for question 27 was supported by substantial evidence.

C. Question 33

Third, plaintiff appeals Customs' decision to deny plaintiff credit for question 33 on the April 2018 exam. *See* Pl. Br. at 7. Question 33 states:

> What is the CLASSIFICATION of current-production wall art depicting abstract flowers and birds that is mechanically printed, via lithography, onto sheets of paper, the paper measuring .35 mm in thickness that have been permanently mounted onto a backing of .50 mm thick paperboard?

A. 4911.91.2040

B. 4911.91.3000

C. 4911.99.6000

D. 9701.10.0000

E. 9702.00.0000

Am. Admin. R., Ex. N, at *14.

1. Positions of the parties

Customs designated answer choice (B) as the correct response to question 33. *See* Def. Resp. Br. at 12. Plaintiff selected answer choice (E). *See* Pl. Br. at 7. Plaintiff argues that Customs' decision to deny plaintiff credit for question 33 was not supported by substantial evidence. *See id.* Plaintiff does not contend that his selection of answer choice (E) is correct; rather,

plaintiff argues that question 33 is ambiguous. *See id.* Question 33 describes the subject merchandise as "current-production wall art....that is mechanically printed, via lithography, onto sheets of paper, the paper measuring .35 mm in thickness that have been permanently mounted onto a backing of .50 mm thick paperboard." Am. Admin. R., Ex. N, at *14. Customs designated answer choice (B) as the correct response to question 33. *See* Pl. Br. at 7.Answer choice (B) points to subheading 4911.91.3000 of the HTSUS,[9] which applies to "[l]ithographs on paper or paperboard" that are "[o]ver 0.51 mm in thickness" and that were "[p]rinted not over 20 years at the time of importation." HTSUS, 4911.91.3000; *see* Am. Admin. R., Ex. N, at *14. Further, Additional U.S. Note 1 to Chapter 49 of the HTSUS states that "[f]or the purposes of determining the classification of printed matter produced in whole or in part by a lithographic process . . the thickness of a permanently mounted lithograph is the combined thickness of the lithograph and its mounting." Additional U.S. Note 1, Chapter 49, HTSUS.

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[9] All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2017 Basic Edition. This edition was in effect on April 25, 2018, when plaintiff sat for the ⌣BLE. *See* Am. Admin. R., Ex. N, at *1.

Plaintiff argues that question 33 is ambiguous due to Customs' use of the phrase "current- production." *See* Pl. Br. at 7. Plaintiff asserts that Customs' designated answer choice (B) "presupposes a certain time frame within which the goods are produced." *Id.* However, plaintiff argues that Customs "does not provide such a time in the question, instead expecting the undefined phrase 'current production' to signify the answer." *Id.* Plaintiff contends that the phrase "current-production" does not provide sufficient information to determine that the subject merchandise was "[p]rinted not over 20 years at time of importation" and consequently is classified properly under subheading 4911.91.3000. *See id.*; Oral Argument Tr. at 28:20-29:2.

Accordingly, plaintiff argues that question 33 is ambiguous and that Customs' decision to deny plaintiff credit for the question was not supported by substantial evidence. *See* Pl. Br. at 7.

Defendants contend that Customs' decision to deny plaintiff credit for question 33 was supported by substantial evidence. To start, defendants contest plaintiff's argument that Customs' use of the phrase "current- production" renders question 33 ambiguous. *See* Def. Resp. Br. at 12-14.

Defendants contend that Customs determined that "the term 'current-production' reasonably means that the printed lithography is not over 20

years old." *Id.* at 13.

According to defendants, this phrase, while "not a number of years . . . gives the test-taker a time reference" that provides sufficient information to determine that the subject merchandise is classified properly under subheading 4911.91.3000. Oral Arg. Tr. at 30:3-11; *see* Def. Resp. Br. at 13-14. On this basis, defendants contend that answer choice (B) is correct. *See* Def. Resp. Br. at 13-14.

In addition, defendants argue that plaintiff's selected answer choice (E) is not correct. *See id.* at 14. Answer choice (E) points to Heading 9702.00.000 of the HTSUS, which applies to "[o]riginal engravings, prints and lithographs, framed or not framed." HTSUS, 9702.00.000; *see* Am. Admin. R., Ex. N, at *14. Note 2 to Chapter 97 of the HTSUS states that "[f]or purposes of heading 9702, the expression 'original engravings, prints and lithographs' means impressions produced directly . . . of one or of several plates wholly executed by hand by the artist . . . *not including any mechanical or photomechanical process*.'" Note 2, Chapter 97, HTSUS (emphasis supplied). Notably, question 33 describes the subject merchandise as "mechanically printed." Am. Admin. R Ex.N.at*14.

Accordingly, defendants argue that in view of Note 2, Heading 9702.00.000 does not apply to the subject merchandise. *See* Def. Resp. Br. at 14. On this basis, defendants contend that answer choice (E) is not correct.

See id.

Accordingly, defendants argue that Customs' decision to deny plaintiff credit for question 33 was supported by substantial evidence. *See id.* at 13-14.

2. Analysis

Customs' decision to deny plaintiff credit for question 33 was supported by substantial evidence. Question 33 evaluates the ability of an applicant to interpret and apply the HTSUS. In determining the proper tariff classification of subject merchandise, the Court is required to apply in numerical order the General Rules of Interpretation ("GRIs") of the HTSUS. *See BASF Corp. v. United States*, 482 F.3d 1324, 1325-26 (Fed. Cir. 2007). GRI 1 states that the classification of merchandise "shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. In addition, the Section and Chapter Notes featured in the HTSUS are not "optional interpretive rules," but rather have the force of statutory law. *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005)