9111-14

DEPARTMENT OF HOMELAND SECURITY

U.S. CUSTOMS AND BORDER PROTECTION

Notice of Issuance of Final Determination Concerning

Generation II Military Energizer Flashlights

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of the Generation II military Energizer flashlight, with light-emitting diodes. Based upon the facts presented, CBP has concluded in the final determination that China is the country of origin of the Generation II military Energizer flashlight, for purposes of U.S. Government procurement.

DATE: The final determination was issued on April 29, 2013. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of this final determination within [insert date 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202-325-0132).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on April 29, 2013, pursuant to subpart B of part 177, Customs and Border Protection (CBP) Regulations (19 CFR Part 177, Subpart B), CBP issued a final determination concerning the country of origin of the Generation II military Energizer flashlights which may be offered to the United

States Government under an undesignated government procurement contract. This final determination, in HQ H215657, was issued at the request of Energizer Battery Inc. under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511-18). In the final determination, CBP concluded that the Generation II military Energizer flashlights assembled in the United States from foreign made parts and programmed with U.S. origin software in the United States are products of China for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR § 177.29), provides that notice of final determinations shall be published in the *Federal Register* within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR § 177.30), provides that any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

Dated: April 29, 2013

Sandra L. Bell
Executive Director
Regulations and Rulings
Office of International Trade

HQ H215657

April 29, 2013

MAR-02 OT:RR:CTF:VS H215657 RSD

CATEGORY: MARKING

M. Jason Cunningham, Esq.
30 South Wacker Drive
Suite 2200 No. 41
Chicago, Illinois 60606

RE: Final Determination of U.S. Government Procurement: Country of Origin of Military Energizer Flashlight

Dear Mr. Cunningham:

This is in response to your letter dated March 28, 2012, requesting a final determination on behalf of Energizer Battery, Inc. (Energizer), pursuant to subpart B Part 177 Customs and Border Protection ("CBP") Regulations (19 CFR §177.21 et. seq.). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (codified at 19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government. This final determination concerns the country of origin of a Generation II flashlight. You have provided additional information regarding the processing operations performed on the flashlight in the United States in submissions made through email and a DVD on July 13, 2012, November 8, 2012, and February 14, 2013. We note that Energizer is a party-at-interest within the meaning of 19 CFR § 177.22(d)(1) and is entitled to request this final determination. We regret the delay in our response

FACTS:

The product at issue is a finished second generation military flashlight (Generation II) produced by Energizer Battery Inc. On January 3, 2012, our office issued an advisory ruling, H195536, to Energizer, concerning the Generation II flashlight, in which we stated that the assembly of the various foreign parts and the foreign LED into the Generation II flashlight was not sufficiently complex and significant to constitute a substantial transformation. In the advisory ruling, we indicated that the origin of the LED would determine the origin of the finished flashlight, and because the LED was of Chinese origin, the country of origin of the finished flashlight would also be China. You have subsequently requested that we reconsider our determination in the advisory ruling by requesting this final determination. You have presented additional information regarding the production of the energizer flashlight, photographs of the Generation II flashlight at various stages of manufacture, and a DVD showing the final assembly process of the flashlight.

You advise that Energizer intends to sell the Generation II flashlight to the U.S. military. The Generation II flashlight is designed to be extremely rugged so that it can withstand forceful impacts without compromising its performance or its waterproof operation. It also provides long-lasting LED and infrared lighting, which is invisible to the naked eye, but useful for signaling in military situations. The previous versions of the generation flashlights relied more upon mechanical switches, while the Generation II flashlight uses a microprocessor and programming control, which requires more sophisticated hardware and software programming.

The Generation II flashlight also incorporates two additional innovations. The IFF Mode for the infrared light is an infrared strobe mode used to "Identify Friend or Foe." Although the flashlight is designed to be used with two AA batteries in the field, it can actually operate with a single AA battery while maintaining the same features, but with a shorter battery life.

The production process is as follows:

1. The LED wafer is "grown" in the U.S. and exported to China. In China, the LED wafer is mounted and coated with resin and then shipped to the Energizer facility in Vermont.

2. A third party in the U.S. mounts the Chinese LED wafer onto a Chinese-origin "hex board" and coats it with resin.

3. In Vermont, the LED is combined with various imported subcomponents from China including the main PCBA, switch PCBA, head cover, pivot locks, washers, switch levers, springs, lens rings, screws, buttons, etc., to create the lens head subassembly.

4. The lens head subassembly's wiring, soldering, and physical connections are inspected.

5. At the second work station, the following Chinese-origin flashlight body components are combined with the lens head subassembly to make the Generation II flashlight: body seal ring, end cap top plate, end cap bottom plate, end cap PCBA and switch assembly, body bracket, spring holders, battery cartridge, screws, body with overmold, hinge ring, end cap with overmold, lock wheel with screw and nut insert, belt clip, clip retainer, and clip screws. During the assembly process, one of the more important operations that must be precisely performed is the spot soldering of the wires, switches and other various components to the LED. The assembly process of the flashlight takes approximately seven minutes to complete under actual production conditions with fully trained qualified operators.

According to the information presented in a November 8, 2012, email, Energizer provides all the technical and quality control training necessary for the operators to be designated as qualified to produce the flashlights. The DVD submitted, demonstrates the assembly process involves putting together more than fifty parts and components in a multi-step process. The DVD shows the two work stations at the Energizer facility in St. Albans, Vermont. As explained above, at the first workstation, the operators combine various subcomponents of the lens head subassembly. After the lens heads subassembly is created, it is transferred to a second separate workstation, where the Energizer operators combine the lens head subassembly with approximately 30 other imported components to create the end product, the Generation II military flashlight.

We also note that in producing the flashlights, Energizer installs U.S. origin software that Energizer created in house. The programming allows for battery type detection; battery quantity alternative operation levels; lighting levels; and the control of power, not for the light output, but for the purposes of controlling heat and the protection of the sensitive LEDs. The code writing for the software programing was developed and completed in the United States, but the programming is transmitted to China for flashing the program to the circuitry for the lights. Along with the main white LED light, the flashlight also has four smaller LED's that emit red, blue, green, or infrared light. A modification that Energizer has made to this model is that each of the LEDs that emit visible light, i.e. white, red, blue, and green, can shine at high, medium, or low intensity. The original programming for this feature, like all of the programming for the flashlight, occurs in the United States and will use a proprietary source code. It is stated that Energizer has expended significant resources in connection with the redesign and development of this product in the United States. You have enclosed a spreadsheet that identifies all of the costs and country of origin data of all subcomponents used in the lens head subassembly and all the other components used in the production of the Generation II military flashlight.

ISSUE:

What is the country of origin of the Energizer military Generation II flashlight for purposes of U.S. government procurement?

LAW AND ANALYSIS:

Pursuant to subpart B of part 177, 19 C.F.R. § 177.21 *et seq*., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define "U.S.-made end product" as:

…an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 C.F.R. § 25.003.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. No one factor is decisive, the key issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984).

Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80-111, C.S.D. 85-25, C.S.D. 89-110, C.S.D. 89-118, C.S.D. 90-51, and C.S.D. 90-97. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred.

In C.S.D. 85-25, 19 Cust. Bull. 844 (1985), U.S. Customs Service (legacy agency to CBP) (hereinafter, incorporated with the reference to "CBP") held that for purposes of the Generalized System of Preferences ("GSP"), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

CBP has held in a number of cases that complex and meaningful assembly operations involving a large number of components result in a substantial transformation. For example, in HQ H047362, dated March 26, 2009, CBP found that 61 components manufactured in China and assembled into ground fault circuit interrupters (GCFIs) in Mexico in a two-phase process by skilled workers using sophisticated equipment were substantially transformed in Mexico. In particular, we took into consideration that the first phase involved the assembly of a PCB in a 42-step technically complex process that took 12 minutes and that the completed PCB had the entire major components necessary for the GCFI to fulfill its function. We also took into consideration that in the second phase the PCB would be assembled with 29 other components to form the GCFIs in a 43-step process taking approximately 10 minutes, after which the components lost their individual identities and become an integral part of the interrupters with a new name, character and use.

In HQ 962528 dated February 18, 2000, CBP considered the eligibility of a rechargeable power failure light for duty free treatment under the Generalized System of Preferences (GSP). In that case, the power failure light was assembled in Thailand from various Thai and foreign origin components including a PCB assembled in Thailand. CBP found that the process of assembling various components into a PCB resulted in a substantial transformation of the imported components. Moreover, CBP found that the assembly of the PCB with a bulb holder assembly, a plug blade assembly and an upper and lower housing assembly to make the finished power failure light substantially transformed the PCB.

By contrast, assembly operations that are minimal or simple will generally not result in a substantial transformation. For instance, in HQ 734050, dated June 17,

1991, CBP held that Japanese-origin components were not substantially transformed in China when assembled in that country to form finished printers. The printers consisted of five main components identified as the “head”, “mechanism”, “circuit”, “power source”, and “outer case.” The circuit, power source and outer case units were entirely assembled or molded in Japan. The head and mechanical units were made in Japan, but exported to China in an unassembled state. All five units were exported to China where the head and mechanical units were assembled with screws and screwdrivers. Thereafter, the head, mechanism, circuit, and power source units were mounted onto the outer case with screws and screwdrivers. In holding that the country of origin of the assembled printers was Japan, CBP recognized that the vast majority of the printer’s parts were of Japanese origin and that the operations performed in China were relatively simple assembly operations.

CBP first considered the country of origin of a military flashlight made by Energizer in HQ H008708 dated May 7, 2007. We found that the various imported components (individual parts and subassemblies) were substantially transformed as a result of the operations performed in the United States to produce the replacement lens head assembly and the finished flashlight. Under each manufacturing scenario, we concluded that the imported components lost their individual identities and became an integral part of a new article possessing a new name, character, and use. However, unlike the scenario here, in support of this conclusion, we noted that the U.S. origin LED imparted the essential character to both the replacement part and the finished product, as it generated the primary light of both products. We also recognized that Energizer had expended significant resources in connection with the design and development of the flashlight in the United States. We also pointed out that the U.S.-origin LED and the labor performed in the United States during the assembly and testing operations represented the majority of the costs associated with the production of both the replacement lens head subassembly and the finished flashlight.

In HQ H017620, dated February 5, 2008, CBP considered the country of origin of the prior model Generation I flashlight for government procurement purposes. We determined that the manufacturing operations performed in the U.S. to produce the replacement lens head subassembly and the finished flashlight resulted in a substantial transformation of the imported components. In support of this conclusion, we explained that the U.S.-origin LED imparted the essential character to both the replacement part and the finished product, as it generates the primary light of both products. We also recognized that Energizer had expended significant resources in connection with the design and development of the subject flashlight in the United States. Moreover, the U.S.-origin LED and the labor performed in the United States during the assembly and testing operations represented a majority of the costs associated with the production of both the replacement lens head subassembly and the finished flashlight. We followed this analysis in an advisory ruling, HQ H057777 dated July 16, 2009, concerning the revised Generation II flashlight and determined that the various imported components (individual parts and subassemblies) were substantially transformed as a result of the operations performed in the U.S. to produce both the lens head subassembly and the finished flashlight. In support of this conclusion, we agreed that the U.S. origin LED imparts the essential character to the Generation II flashlight as it generates the primary light of the flashlight.

As previously noted, in contrast to HQ H017620 and HQ H057777, we indicated in the advisory ruling H195536 that the U.S. assembly of the various foreign parts and LED into the military Generation II flashlight did not result in a substantial transformation. We mentioned that the LED still imparted the essential character of the finished flashlight, and since it was not of U.S. origin, the country of origin of the flashlight for government procurement purposes would not be the United States. You have now provided additional information with this request for a final determination regarding the assembly process of the Generation II military flashlight. Some of the information was presented on a DVD showing the assembly process.

Upon consideration of the additional information that you have provided and our observations of the assembly process shown in the DVD, we continue to believe that our conclusion in advisory ruling H195536 that the foreign made components and parts do not undergo a substantial transformation when they are assembled together in the United States was correct. We note virtually all of the components of the military Generation II flashlight, including the most important component, the LED, are of Chinese origin. All of the components arrive in the United States ready for assembly into the Generation II flashlight. Only the assembly process is done in the United States. Although the assembly process involves putting together a number of different parts to produce the flashlight, most of this work consists of rather simple insertions, relatively simple attaching and fastening of the components and parts together. This work seems to involve following a fairly straightforward routine and does not seem to be exceptionally complex, and it only takes several minutes to complete. You point out that the operators must solder some of the components together, but we do not believe that the soldering involved in this case is a particularly complex operation that is indicative of

a substantial transformation, when compared to the operation performed in China in creating the various parts including the LED of the flashlight.

It is also noted that in the United States, the Generation II flashlight is programmed with software that is written in the United States. We observe, however, that the programming is not essential to the basic operation of the flashlight. The programming constitutes only an enhancement how the flashlight operates, but it does not change its fundamental nature. While the programming does provide the flashlight with some additional features, such as being able to detect the battery type installed in the flashlight, and controlling the power level for protection of the LEDs, the programming is not sufficiently complex enough to change the identity or the character of the device. The flashlight could still function as a flashlight without the software programming; after the software is loaded onto the device, it still remains a flashlight.

Consequently, we find that the assembly and programming operations Energizer performs in the United States on the various imported components (individual parts and subassemblies) do not create a new article of commerce with a new name, character, and use. Therefore, we find the imported components, including the LED, from China are not substantially transformed as a result of the operations performed in the United States to produce both the lens head subassembly and the completed Generation II military flashlight. Accordingly, we find that the country of origin of the Generation II military flashlight for government procurement purposes remains the country of origin of the components and subassemblies, including the LED, China.

HOLDING:

Based upon the specific facts of this case, we find that the imported components of the flashlight and replacement lens head subassembly are not substantially transformed as a result of the described assembly operations and programing operations performed in the United States. The country of origin for government procurement purposes of the Generation II military flashlight is China.

Notice of this final determination will be given in the Federal Register, as required by 19 CFR § 177.29. Any party-at-interest other than the party which requested the final determination may request, pursuant to 19 CFR § 177.31, that CBP reexamine the matter anew and issue a new final determination. Any

party-at-interest may, within 30 days after publication of the Federal Register notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell, Executive Director,
Office of Regulations and Rulings,
Office of International Trade

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