DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection; Notice of Issuance of Final Determination Concerning a Certain Unified Communications Solution


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 a certain unified communications solution. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the unified communications solution for purposes of U.S. government procurement.

DATES: The final determination was issued on August 2, 2010. 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 30 days from date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Alison Umberger, Valuation and Special Programs Branch: (202) 325–0267.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on August 2, 2010, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of the unified communications solution which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, in HQ H090115, was issued at the request of Avaya 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 has concluded that, based upon the facts presented, the unified communications solution, assembled and programmed in the United States using subassemblies made in China and Israel, and software developed in the United States, is substantially transformed in the United States, such that the United States is the country of origin of the finished article for purposes of U.S. government procurement.

Section 177.29, Customs 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: August 2, 2010.

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

Attachment
HQ H090115
August 2, 2010
OT:RR:CTF:VS H090115 ARU
CATEGORY: Marking

Mr. Stuart P. Seidel, Baker & McKenzie LLP, 815 Connecticut Avenue, NW., Washington, DC 20006–4078, USA

Dear Mr. Seidel: This is in response to your letter dated December 29, 2009, requesting a final determination on behalf of Avaya Inc. (“Avaya”), pursuant to subpart B of part 177, Customs and Border Protection (“CBP”) Regulations (19 CFR § 177.21 et seq.). Pursuant to our request, you provided additional information during a meeting on March 5, 2010.

Under the pertinent regulations, which implement 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 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 an Avaya Unified Communications Solution known as “Communication Manager.” We note that Avaya is a party-at-interest within the meaning of 19 CFR § 177.22(d)(1) and is entitled to request this final determination. In addition, we have reviewed and granted the importer’s request for confidentiality pursuant to section 177.2(b)(7) of the Customs Regulations chapter 19, with respect to certain information submitted.

FACTS:

The end product at issue is a Unified Communications Solution which is made up of numerous electronic components that are assembled and integrated at an end user’s premises in the United States using software known as “Communication Manager.” Communication Manager is the IP telephony software foundation on which Avaya delivers unified communications to large and small enterprises. It can control and expand a system from fewer than 100 users to as many as 36,000 users on a single system to more than one million users on a single network. You state that the programming, assembly and installation of a system will typically take approximately one month to complete. It is stated that Communication Manager adds functionality to certain individual components and changes functionality of other components. Although each installation at an end user’s premises is different, due to the end user’s needs, each system will consist of at least the following components: server, media gateways, circuit packs, and internet protocol (“IP”) telephone sets. Avaya’s Communication Manager software is developed and tested exclusively by Avaya in Denver, Colorado.

Communication Manager is designed to run on a variety of Linux-based media servers. Linux is an open source operating system. Communication Manager provides centralized call control for a resilient, distributed network of media gateways and a wide range of analog, digital, and IP-based communication devices. It also has several advanced built-in applications, including mobility applications, call center features, advanced conference calling, and enhanced emergency 9–1–1 capabilities. Communication Manager is the foundation for building complete enterprise communication networks by supporting SIP, H.323, and other industry-standard communications protocols over a variety of different networks. This protocol support provides centralized voice mail, attendant operations, and call centers across multiple locations.

A. Hardware

1. Media Servers: Each Communication Solution consists of one or more media servers. Some servers are in the form of blades. These are cards (similar to printed circuit boards with components) that are fit or assembled into Media Gateways, while others are standalone units.

   i. G250 Media Gateway: a powerful branch communication solution that packs an IP telephony gateway, an advanced IP WAN router, a VPN gateway and a high-performance LAN switch into a compact, 2U high 19” rack unit.
   ii. G350 Media Gateway: a powerful converged networking solution that packs an IP telephony gateway, an advanced IP WAN router, a VPN Gateway, and a high-performance LAN switch into a compact (3U) modular chassis.
iii. G450 Media Gateway: consists of a 3U high, 19" rack mountable chassis with field-
removable Supervisor Main Board Module, Power Supplies, Fan Tray, DSP resources and
memory.

3. Circuit Packs: A circuit pack, also
known as a circuit card, circuit board, or
printed circuit, is an electronic circuit
consisting of one or more electronic
components arranged on a substrate card
with one of more conductive layers
laminated on one or more insulating layers.
The electronic components on the circuit
pack are inserted into holes or surface
mounted on conductive pads using various
alloys of metal called solder. Such circuit
designs usually leave one or more connectors
to integrate them into the system of which
they are a part. Avaya’s circuit packs are not
stand-alone devices. They are inserted as
components to Avaya’s Media Gateway units.
Avaya offers two types of circuit packs—a
“TN” card and an “MM” card. TN circuit
packs are based on older technology for use
in legacy telephony systems, also called
Telephone Interface Cards. MM circuit packs
are based on newer technology, also called
Media Modules.

4. Telephone Sets: Internet Protocol (“IP”)
telephones that before integration through
Communication Manager have no
functionality.

B. Software

You claim that the integration of the
individual components is achieved through
the use of software called Communication
Manager, which adds functionality to
certain individual components and changes
functionality of the other components.

Avaya’s Communication Manager software
is developed and tested exclusively by Avaya
in Denver, Colorado. Avaya began
development of Communication Manager in
2002 and since that time has spent significant
resources in the development and
maintenance of Communication Manager. All
the engineering, development, and design
were developed in the United States;
however, a small percentage of the ongoing
software development takes place abroad.

C. Assembly

1. Operations in China:

There are 6 main subassemblies that
compose the Communication Manager
solution. Subassemblies made in China
include: Gateways, Servers, Media Modules,
Telsets, and Circuit Packs. The hardware
listed above is manufactured in China. The
raw components for the hardware are
obtained from various countries throughout
Asia and Europe. Certain gateways are also
manufactured in Israel and other countries,
but will eventually be manufactured in
China.

2. Operations in the United States:

All the engineering, development, design
were developed in the United States.
Communication Manager will be installed
onto a solid state drive or hard drive residing
on the server. It will be custom configured at
the end user’s facility or another location in
the United States to integrate the various
components. Although each installation at an
end user’s premises is different, due to the
end user’s needs, each system will consist of
at least the following components: server,
media gateways, circuit packs, and IP
telephone sets. Once actual installation
begins, approximately five (5) days is needed
to customize the Communication Manager
software for the end user. A total of 11 days
is required to assemble the necessary
equipment, install the hardware, and
integrate the hardware and software.
The complex installation and integration requires
both adjustments to hardware and
customization of software. You claim that
due to the number of components
assembled, number of different operations,
time, skill level required, attention to detail,
quality control, the value added to the
Communication Manager, and the overall
employment complexity in development of
the software, the hardware is substantially
transformed when the software is added and
the system is integrated.

ISSUE:

What is the country of origin of
Communication Manager Units for purposes
of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to subpart B of Part 177, 19 CFR
§ 177.21 et seq., which implements Title III
of the Trade Agreements Act of 1979, as
amended (“TAA” 19 U.S.C. § 2511 et seq.),
CBP issues country of origin advisory
rulings and final determinations on 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 at 19

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 respect to name, character, or
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 Procurement Regulations.
See 19 C.F.R. § 177.21. In this regard, CBP
recognizes that the Federal Procurement
Regulations restrict the U.S. Government’s
purchase of products from 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,” 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 to form
completed articles, CBP considers the totality
of the circumstances and makes such
decisions on a case-by-case basis.
The country of origin of the articles
components, the extent of the processing that
occurs within a given country, and whether such
processing renders a product with a new
name, character, and use are primary
considerations in such cases. Additionally,
the extent to which the resources needed for
product design and development, extent and nature
of post-assembly inspection procedures, and
worker skill required during the actual
manufacturing process will be considered
when analyzing whether a substantial
transformation has occurred; however, no
one such factor is determinative.

With respect to the product under
consideration in the instant case, we note
that CBP has not previously considered
whether the components at issue are
substantially transformed when brought
together in the manner set forth above.
However, CBP has considered whether
components of various origins have been
substantially transformed during the
assembly of related products. Though such
rulings may not be directly on point with
the facts under consideration in the instant case,
the guidance supplied by such cases may
nonetheless be applied to resolve the issues
presently before us. The determination will
be in this instance “a mixed question of
technology and customs law, mostly the
law,” Texas Instruments, Inc. v. United
States, 681 F.2d 778, 783 (C.C.P.A. 1982).

You claim that, “[i]n * * * rulings
involving hardware which lacked the
functional ‘intelligence’ characteristics
present in the completed product, and where
the firmware/software provided the
merchandise’s functionality, CBP determined
that the products were substantially
transformed into products of the country
where the software which provided its
functionality was installed and final testing
occurred.” We disagree with the scope of
this statement. While the location of the software
installation and testing is one factor to be
considered, it is not the sole determinant.
The country in which the software
development takes place is also relevant.

In Data General v. United States, 4 CIT 182
(1982), the court determined that for
purposes of determining eligibility under
item 807.00, Tariff Schedules of the United
States, the programming of a foreign PROM
(Programmable Read-Only Memory chip)
substantially transformed the PROM into a
U.S. article. In programming the imported
PROMs, the U.S. engineers systematically
caused various distinct electronic
interconnections to be formed within each
integrated circuit. The programming
bestowed upon each circuit its electronic
function. That is, its “name” could be
retrieved. A distinct physical change was
effected in the PROM by the opening or
closing of the fuses, depending on the
method of programming. This physical
alteration, not visible to the naked eye, could
be discerned by electronic testing of the
PROM. The court noted that the programs
were designed by a project engineer with many years of experience in "designing and building hardware." While replicating the program pattern from a "master" PROM may be a quick one-step process, the development of the pattern and the production of the "master" PROM required much time and expertise. The court noted that it was undisputed that programming alters the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court noted that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device possessing a desired distinctive circuit pattern was no less a "substantial transformation" than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In C.S.D. 84–86, CBP stated:

We are of the opinion that the rationale of the court in Holst in this factual case may be applied in the present case to support the principle that the essence of an integrated circuit memory storage device is established by programming * * * . [We are of the opinion that the programming (or reprogramming) of an EEPROM results in a new and different article of commerce which would be considered to be a product of the country where the programming or reprogramming takes place.

Accordingly, the programming of a device that changes or defines its use generally constitutes a substantial transformation. See also HQ 733085, dated July 13, 1990; and HQ 558686, dated February 23, 1995 (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system and the programming is a permanent change that cannot be undone); HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions on it that allows it to perform certain functions of preventing piracy of software constituted substantial transformation. See also HQ 732870, dated March 19, 1990 (formatting a blank diskette did not constitute substantial transformation because it did not add value, did not involve complex or highly technical operations and did not create a new or different product); HQ 734518, dated June 28, 1993 (concluding that motherboards were not substantially transformed by the implanting of the central processing unit on the board because, whereas in Data General use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imported it).

In HQ 563012, dated May 4, 2004, CBP considered whether components of various origins were substantially transformed when assembled to form a fabric switch which involved a combination of computer hardware. Most of the assembly of computer hardware was performed in China. Then, in either Hong Kong or the United States, the hardware was completed and the United States–origin software was downloaded onto the hardware. CBP noted that the United States–developed software provided the finished product with its "distinctive functional characteristics." In making the determination that the product was substantially transformed in the United States, where the fabric switch was assembled to completion, CBP considered both the assembly process that occurred in the United States and the configuration operations that required United States–origin software. In the scenario where the fabric switch was assembled to completion in Hong Kong, CBP determined the origin for marking purposes was Hong Kong.

In HQ 559255, dated August 21, 1995, a device referred to as a "CardDock" was under consideration for country of origin marking purposes. The CardDock was a device which was installed in IBM PC compatible computers. After installation, the units were able to accept PCMCIA cards for the purpose of interfacing such PCMCIA cards with the computer in which the CardDock unit was installed. The CardDock units were partially assembled abroad but completed in the United States. The overseas processing included manufacturing the product’s injection molded plastic frame and installing integrated circuits onto a circuit board along with various diodes, resistors and capacitors. After such operations, these items were shipped to the United States for further processing that included mating a U.S.–origin circuit board to the foreign-origin frame. The assembled units were subsequently subjected to various testing procedures. In consideration of the foregoing, CBP held that the foreign-origin components, i.e., the ISA boards, frame assemblies and connector cables, were substantially transformed when assembled to completion, and had become an integral part of a new and distinct item which was visibly different from any of the individual foreign-origin components.

In HQ 735027, dated September 7, 1993, a device that software companies used to protect their software from piracy was under consideration for country of origin marking purposes. The device, referred to as the "MemoPlug," was assembled in Israel from parts that were obtained from Taiwan (such as various connectors and an Electronically Erasable Programmable Read Only Memory, or "EEPROM") and Israel (such as an internal circuit board). After assembly, these components were shipped to a processing facility in the United States where the EEPROM was programmed with special software. Such processing in the United States accounted for approximately 50 percent of the final selling price of the MemoPlugs. In finding that the foreign-origin components were substantially transformed in the United States, CBP noted that the United States–processed transformed a blank media, the EEPROM, into a device that performed functions necessary to the prevention of software piracy. We make our determinations based on the totality of the circumstances. Here, we take particular note of the fact that the installation of the Communication Manager software adds functionality to certain individual components and changes functionality of other components. This software is developed and tested exclusively by Avaya in Denver, Colorado. Avaya began development of Communication Manager in 2002 and since that time has spent significant resources in the development and maintenance of the software. In addition, assembly and installation of the hardware components that make up the Avaya Communication Solution will typically take approximately one month to complete and are performed in the United States. While the subassemblies are manufactured in China and Israel, all of the initial engineering, development, and design were developed in the United States.

Based upon the above precedents and the totality of the circumstances, we find that there is a substantial transformation of the component parts in the United States, the location where the final assembly and installation of the hardware as well as the application of the Communication Manager software occur. It follows that we find the country of origin for government procurement purposes is the United States.

**HOLDING:**

Based on the facts provided, the assembly, installation, and programming operations performed in the United States impart the essential characteristic to Communication Manager. As such, Communication Manager will be considered a product of the United States for the purpose of government procurement.

Notice of this final determination will be given in the Federal Register as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 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, Regulations and Rulings, Office of International Trade.

[FR Doc. 2010–19363 Filed 8–5–10; 8:45 am]

BILLING CODE  P

**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**


**Iowa; Major Disaster and Related Determinations**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.