



DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Certain Ethernet Gateway Products

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 certain ethernet gateway products known as AirLink gateways. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the AirLink gateways for purposes of U.S. Government procurement.

DATES: The final determination was issued on February 23, 2018. 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 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Ross M. Cunningham, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade (202) 325-0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on February 23, 2018, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain ethernet gateway products known as AirLink gateways, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H250154, was issued 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, based upon the facts presented, the programming and downloading operations performed in the United States, using U.S.-origin software, substantially transform non-TAA country AirLink gateways. Therefore, the country of origin of the AirLink gateways is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination 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: February 23, 2018.

Alice A. Kipel,
Executive Director,
Regulations and Rulings,
Office of Trade.

February 23, 2018

OT:RR:CTF:VS H250154 GaK/RMC

CATEGORY: Origin

Mark J. Segrist
Sandler, Travis & Rosenberg, P.A.
225 West Washington Street, Suite 1640
Chicago, IL 60606

Re: U.S. Government Procurement; Country of Origin of Gateway Products; Substantial Transformation

Dear Mr. Segrist:

This is in response to your letter dated October 25, 2013, and your supplemental submissions dated February 27, 2014 and March 21, 2014, requesting a final determination on behalf of your client, Sierra Wireless (“Sierra”), pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection (“CBP”) Regulations (19 C.F.R. Part 177). A meeting was held at our office on October 3, 2014, where you and your client explained the software development process and the product. A further submission dated April 18, 2017, was provided.

This final determination concerns the country of origin of Sierra’s secure Ethernet gateway products (“gateways”). We note that as a U.S. importer, Sierra is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

Per your letter dated September 22, 2014, we have reviewed your request for confidentiality pursuant to 19 C.F.R. § 177.2(b)(7) with respect to the information submitted. As that information constitutes privileged or confidential matters, it has been bracketed and will be deleted from any published versions.

FACTS:

Sierra produces gateways that provide secure internet connectivity for mobile stations allowing a variety of enterprises, mainly law enforcement, to monitor their infrastructure and instruments by transmitting and receiving data from a central location. The gateways are designed for entities that require 24/7 unmanned operation of remote assets and broadband connectivity. The gateways are frequently installed in police cars and provide a 24/7 internet connection and allow police officers to access information stored in the central location. The gateway also acts as a firewall server, which ensures that the connection between the mobile station and the main office is

secure and that unauthorized persons cannot access information transmitted over the internet. Sierra's submissions include details on four different gateway products, branded "AirLink," to be covered by this final determination: GX400, GX440, LS300, and ES440. The different series of gateways are designed differently to meet the needs of a variety of customers¹, but they have the same functions and operate with the same software, referred to as Aleos.

The hardware components consist of a case/kit that holds the module, a printed circuit assembly ("PCA") that includes a radio module, a decorative cover placed over the case/kit, and various nuts and screws to close the case/kit and hold the cover in place. All the hardware components are designed in the United States and produced and assembled in China. Sierra imports the completed gateways into the United States, where authorized retailers install the ALEOS software. Sierra states that, at the time of importation, the fully assembled gateway is not functional because it does not contain the ALEOS software. Sierra also states that the gateway in its condition as imported has only the basic ability to communicate with a software installation tool to facilitate the download of the ALEOS software. The radio module contains firmware to control its internal function of sending and receiving to/from the network, which cannot take place until the ALEOS software is loaded onto the gateway. Sierra states that the PCA design and the firmware in the radio module are proprietary and are designed to work only with the ALEOS software and that any attempts to install other software will cause the system to crash.

ALEOS was developed entirely in the United States in five steps:

1. Research: A list of ideas and potential features of the product is compiled, product roadmap is developed, and product requirements are defined.
2. Development of Software Specification: The chief architects create a software design, which is developed by the development team to meet the defined product requirements.
3. Programming of Source Code: The development team receives the software development tasks, which results in the source code files written by the software developers.
4. Software Integration and Build: The team integrates the source code files by compiling the source code into a binary file that runs on the hardware. During this phase, the developers work out the incompatibilities or bugs by rewriting or correcting source code as needed until a build is complete and ready for testing.
5. Testing and Validation: The software package is tested based on functional specifications defined in the product requirements. Once the test case pass rate is met, the software is ready for release.

¹ The GX series are designed for in-vehicle field deployments, such as connecting police cars or fire trucks to their network at headquarters. The LS series is designed for hazardous environments and for industrial deployments, such as surveillance of pipelines or meters. The ES series is designed to provide connectivity when landline connections are unavailable and can be used to maintain kiosks and retail operations online.

Since 1993, approximately [] engineer hours were spent in the development of the ALEOS software in the United States. Some minor software maintenance, such as repair and validation, is conducted in Canada and France, which accounts for approximately []% of the engineer hours spent. Sierra states that the gateways are approximately \$45 at import and after the ALEOS software is installed, are valued at between \$479 and \$899. We assume for purposes of this decision that the figures provided are correct. You also submitted an affidavit from the Vice President of Marketing at Sierra describing the software and installation process, a user guide, an end-user warranty, and a PowerPoint presentation that included photographs and component lists.

LAW AND ANALYSIS:

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, 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.*).

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).

You argue that the country of origin of the GX400, GX440, LS300, and ES440 gateway products is the United States because you believe that the last substantial transformation occurs in the United States. You state that the fully-assembled gateways are not functional when they are imported into the United States and that the gateways gain their ability to function as intended only after U.S.-origin software is installed in the United States. In support, you cite, among others, *Data General v. United States*, 4 C.I.T. 182 (1982), Headquarters Ruling (“HQ”) H052325, dated February 14, 2006, and HQ H175415, dated October 4, 2011.

In *Data General*, the court determined that the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In the United States, the programming bestowed upon each circuit its electronic function, that is, its “memory” which 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. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded 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. *See also Texas Instruments v. United States*, 681 F.2d 778, 782 (CCPA 1982) (holding that the substantial transformation issue is a “mixed question of technology and customs law”). Accordingly, the programming of a device that confers its identity as well as defines its use generally constitutes a substantial transformation. *See* HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions that allow it to perform certain functions that prevent piracy of software constitutes a substantial transformation; and HQ 733085, dated July 13, 1990.

CBP has also focused on where the programming took place. For example, in HQ H258960, dated May 19, 2016, CBP considered the country of origin of network transceivers in two different scenarios. In Scenario One, the importer purchased “blank” transceivers from Asia. The transceivers were then loaded with U.S.-developed software in the United States, which made the transceivers functional. In Scenario Two, the importer purchased the transceivers with a generic program preinstalled, which was then removed so that the U.S.-developed software could be installed. We held that, in Scenario One, because the transceivers could not function as network devices without the U.S.-developed software, the transceivers were substantially transformed as a result of the downloading of the U.S.-developed software performed in the United States. However, in Scenario Two, because the transceivers were already functional when imported, the identity of the transceivers was not changed by the downloading performed in the United States, and no substantial transformation occurred.

Similarly, in HQ H175415 dated October 4, 2011, CBP held that imported Ethernet switches underwent a substantial transformation after U.S.-origin software was downloaded onto the devices’ flash memory in the United States, which allowed the devices to function. In China, the printed circuit board assemblies, chassis, top cover, power supply, and fan were assembled. Then, in the United States, U.S.-origin software, which gave the hardware the capability of functioning as local area network devices, was loaded onto the hardware. CBP noted that the U.S.-origin software “enables the imported switches to interact with other network switches” and that “[w]ithout this software, the imported devices could not function as Ethernet switches.” Under these circumstances, CBP held that the country of origin of the local area network devices was the United States. *See also* HQ H052325, dated March 31, 2009 (holding that imported network devices underwent a substantial transformation in the United States after U.S.-origin software was download onto the devices in the United States, which gave the devices their functionality); and HQ H034843, dated May 5, 2009 (holding that Chinese USB flash drives underwent a substantial transformation in Israel when Israeli-origin software was loaded onto the devices, which made the devices functional).

In each case, the nature of the article and the effect of the processing performed must be evaluated. Here, like the network devices and Ethernet switches at issue in HQ H175415, HQ H052325, and HQ H258960 (under Scenario One), the Sierra GX400, GX440, LS300, and ES440 gateways are imported into the United States in a non-functional state. It is only after the installation of U.S.-origin software that the devices can function as intended. Moreover, as in HQ H175415, HQ H052325, and HQ H258960, the gateway products at issue here derive their core functionality as communication devices from the installation of the U.S.-developed software. We

note that this case is distinguishable from Scenario 2 in HQ H258960, as Sierra's products do not contain pre-installed software when they are imported from China, and they are non-functional at the time of importation to the United States. Therefore, we find that the country of origin of the Sierra GX400, GX440, LS300, and ES440 gateways is the United States.

HOLDING:

Based on the facts provided, the country of origin of the gateways is the United States for purposes of U.S. 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. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the *Federal Register* Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel, Executive Director
Regulations & Rulings
Office of Trade

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