

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
)
)
Avalon Fresh Foods S.)
de R.L. de C.V.)
Fka, Avalon Fresh A.P.R. de R.L.) **Administrator's Decision**
) **APL-006-23**
Allende, Guanajuato, Mexico)
)

This Decision responds to an Appeal (APL-006-23) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Avalon Fresh Foods S. de R.L. de C.V., fka Avalon Fresh A.P.R. de R.L. (Avalon) of Allende, Guanajuato, Mexico by Oregon Tilth Certified Organic (OTCO), a USDA accredited certifying agent. The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the U.S. Department of Agriculture (USDA) organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and/or handling operations to the USDA organic regulations (7 C.F.R. Part 205). Certifying agents also initiate compliance actions to enforce program requirements, as described in section 205.662, Noncompliance procedure for certified operations. Persons subject to the Act who

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

believe they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680 Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. Avalon was certified organic for handling on June 14, 2021.
2. On April 21, 2022, OTCO issued a Notice of Noncompliance to Avalon for failure to pay overdue certification-related fees.
3. On July 21, 2022, OTCO issued a Notice of Proposed Suspension after Avalon failed to respond to the prior noncompliance notice.
4. On August 19, 2022, OTCO accepted Avalon’s August 19, 2022 mediation request and offered Avalon a settlement agreement which was a payment plan for Avalon to pay OTCO the overdue fees.
5. On October 17, 2022, OTCO issued a Notice of Unsuccessful Mediation after Avalon failed to sign and return the offered settlement.
6. On November 7, 2022, Avalon filed an Appeal.
7. On March 7, 2023, Avalon and NOP entered into a Settlement Agreement requiring Avalon to make full payment of overdue certification fees in the amount of 42,953.06 MXN within 15 days of execution of the agreement; and pay any additional fees by the set deadline.
8. On October 4, 2023, OTCO issued a Notice of Noncompliance to Avalon, stating that Avalon has failed to pay overdue certification fees.

9. On October 27, 2023, OTCO reported to NOP that Avalon had breached the NOP Settlement Agreement.
10. On October 27, 2023, NOP issued a Notice of Noncompliance and Request for Corrective Action to Avalon requiring Avalon to pay the overdue fees in the amount of 40,150.73 MXN. The figure differs from that in the NOP Settlement Agreement because Avalon paid the prior overdue invoice but accrued additional overdue fees.

DISCUSSION

The USDA organic regulations at 7 C.F.R. §205.400, General requirements for certification, state that, “A person seeking to receive or maintain organic certification under the regulations in this part must: (a) Comply with the Act and applicable organic production and handling regulations in this part; ... (e) Submit the applicable fees charged by the certifying agent...” Additionally, the organic regulations at §205.406, Continuation of certification, state that, “(a) To continue certification, a certified operation must annually pay the certification fees...”

On June 14, 2021, OTCO certified Avalon for handling. On February 4, 2022, OTCO issued Invoice 1862 to Avalon for certification-related fees in the amount of 42,953.06 MXN, with a due date of March 6, 2022. After Avalon failed to make the required payment, OTCO sent Avalon a Notice of Noncompliance on April 21, 2022, requiring payment of the overdue fees within 21 days. OTCO issued a Notice of Proposed Suspension on July 21, 2022, after Avalon failed to resolve the noncompliance.

On August 19, 2022, Avalon requested mediation, which OTCO accepted that same day. OTCO then offered Avalon a settlement in the form of a Payment Plan, by which Avalon would

pay the overdue 42,953.06 MXN over the course of the next 4 months. OTCO signed the plan and sent it to Avalon. However, after Avalon failed to sign and return the offered settlement/payment plan, OTCO issued a Notice of Unsuccessful Mediation on October 17, 2022.

Avalon filed an Appeal with NOP on November 7, 2022, stating that it had previously had cash flow problems, but now is in a position to make full payment of the overdue certification fees. Therefore, NOP offered Avalon a Settlement Agreement, which was entered into by the parties on March 7, 2023. Per the agreement, Avalon agreed to pay the overdue certification fees from Invoice 1862 in the amount of 42,953.06 MXN, within 15 days of execution of the agreement. Avalon also agreed to pay a then-currently due Invoice from February 14, 2023, by the set deadline. Subsequently, on March 21, 2023, Avalon paid the overdue 42,953.06 MXN, submitting proof of the payment.

However, on October 4, 2023, OTCO issued Avalon a Notice of Noncompliance for failing to pay additional certification fees invoiced since the NOP Settlement Agreement of March 7, 2023. OTCO notified NOP on October 27, 2023, that Avalon had breached the NOP Settlement Agreement by failing to pay the outstanding balance in fees of 40,150.73 MXN. The NOP Settlement Agreement required that OTCO to notify NOP of any breach of the agreement, without the certifier issuing any adverse action notice to the operation.

On October 27, 2023, based on an update from OTCO, NOP issued to Avalon a Notice of Noncompliance and Request for Corrective Action, directing Avalon to pay the overdue fees of 40,150.73 MXN within 30 days of receipt of the notice. NOP acknowledged being informed by OTCO that Avalon had voiced its intention to surrender its organic certification. However, operations can't surrender certification to avoid paying previously incurred certification-related

fees. NOP confirmed with OTCO the amount of the current fees overdue. OTCO submitted its Invoice 2412, sent to Avalon on May 17, 2023, for 40,150.73 MXN. As noted above, the specific amount stated in the Settlement Agreement had been paid, but new charges had been incurred and not paid.

Avalon has not responded to NOP's October 27, 2023 Notice of Noncompliance and Request for Corrective Action, despite a November 26, 2023 deadline. Further, Avalon failed to respond to a NOP email reminder sent on November 28, 2023, or the forwarding of the notice on November 30, 2023, to another Avalon contact provided by OTCO. The reminder sent to Avalon also provided Avalon with an extended deadline of December 7, 2023, in which to make full payment to OTCO of the 40,150.73 MXN. NOP confirmed with OTCO on November 28, 2023, and again on December 8, 2023 that Avalon hadn't made any payment.

NOP and OTCO have provided Avalon with many opportunities to pay the overdue certification fees. However, despite the previous issuance of a notice of noncompliance and notice of proposed suspension by OTCO, and Avalon entering into a Settlement Agreement with NOP, whereby it agreed to make future payments by the deadline, Avalon has failed to do so. Avalon paid the then-overdue fees pursuant to the Settlement Agreement, but Avalon had also agreed in Term 4B of the March 7, 2023 Settlement Agreement to pay all additional invoiced certification-related fees by the deadline.

Further, the Settlement Agreement in Term 4E states that, "Avalon agrees that the failure to abide by the terms of paragraphs immediately above shall result in USDA, AMS possibly pursuing administrative action against Avalon." Clause 3D of the Settlement Agreement states that, "Avalon withdraws its appeal and waives further appeal rights in this matter. Failure to comply with the Settlement Agreement shall automatically void paragraph 2 above." Paragraph

2 states, “USDA, AMS agrees not to issue a formal Administrator’s Decision charging Avalon with alleged violations of the OFPA and the USDA organic regulations for any actions disclosed by the investigation which gave rise to this agreement.” A closure letter sent to Avalon on March 7, 2023 with the executed agreement also stated that, “... failure to abide by the terms of the agreement shall automatically void the Settlement Agreement and USDA, and AMS may pursue an administrative hearing process.” Avalon has breached the March 7, 2023 Settlement Agreement with NOP; and may not remain certified. Although Avalon voiced the desire to surrender its certification, the NOP records will reflect that Avalon’s certification is suspended.

CONCLUSION

Evidence substantiates that Avalon has violated the organic regulations at 7 C.F.R. §205.400, and 7 C.F.R. §205.406, by failing to pay its certification-related fees, despite being given opportunities to do. Avalon has breached its March 7, 2023 Settlement Agreement with NOP. Therefore, the July 21, 2022 Notice of Proposed Suspension is revived. Avalon can’t remain certified at this time.

DECISION

Avalon’s November 7, 2022 Appeal of the July 21, 2022 Notice of Proposed Suspension is denied, and Avalon’s certification is suspended. Pursuant to the organic regulations at 7 CFR §205.662(f), Avalon may apply for reinstatement at any time after it has made full payment of all delinquent certification-related fees to OTCO. The request for reinstatement must be accompanied by evidence demonstrating that said full payment has been made, and that Avalon

is also in compliance with all other organic regulations. While under suspension, Avalon may not produce, handle, sell, label, or represent any products as organic.

Additionally, attached to this formal Administrator's Decision denying Avalon's Appeal is a Request for Hearing form. Should it wish to further appeal this decision, Avalon has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this 6th
day of January, 2024.

BRUCE SUMMERS Digitally signed by BRUCE
SUMMERS
Date: 2024.01.06 14:40:59 -05'00'

Bruce Summers
Administrator
Agricultural Marketing Service