

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
)
Heritage Fresh Farms Inc.) **Administrator’s Decision**
)
) **APL-041-24**
Hollywood, Florida)
)

This Decision responds to an Appeal (APL-041-24) of a Notice of Noncompliance and Denial of Certification under the National Organic Program (NOP) issued to Heritage Fresh Farms Inc. (HFF) of Hollywood, Florida by Quality Certification Services (QCS), 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 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

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. On September 6, 2022, USDA accredited certifier Oregon Tilth Certified Organic (OTCO) certified HFF for handling.
2. On March 6, 2023, HFF applied to QCS for handling certification; and on March 16, 2023, applied for crop certification.
3. On April 6, 2023, HFF surrendered its OTCO-issued handling certification.
4. On April 5, 2023, QCS rejected HFF's application for certification, stating that there was a conflict of interest between QCS and HFF's organic consultant.
5. On November 1, 2023, HFF reapplied to QCS for certification, but only for handling certification.
6. On January 24, 2024, QCS issued a Notice of Noncompliance and Denial of Certification.
7. On February 12, 2024, HFF requested mediation, which QCS rejected on February 16, 2024.
8. On February 20, 2024, HFF submitted an updated mediation request.
9. On February 23, 2024, QCS issued a Notice of Mediation Rejection as to the updated mediation request.
10. On March 15, 2024, HFF submitted an Appeal.

REGULATORY CITATIONS

The USDA organic regulations at 7 C.F.R. Part 205 were first finalized in 2001 and have been periodically updated through rulemaking since then. On March 19, 2024, a significant update to the organic regulations was implemented. However, the citations as set forth directly below reflect language in place before the regulatory changes, as the noncompliances cited by, and adverse action notices issued by, the certifier in this case occurred before March 19, 2024. Further, only one of the sections cited below was revised in the recent update of the regulations. The revised provision is identified below.

The USDA organic regulations at 7 C.F.R. §205.100, What has to be certified, previously (before March 19, 2024) stated that, “(a) Except for operations exempt or excluded in §205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part ... (c) Any operation that: (1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1) of this title per violation.” This old provision is relevant in this case, as the actions discussed therein occurred before March 19, 2024. However, it is noted that HFF, in anticipation of, and believing that, the revision of this section would require it to be certified organic, applied to QCS for certification. The denial of HFF’s application for certification is the basis of HFF’s Appeal and this case.

The following provisions, which also apply in this case, were unchanged as a result of the March 19, 2024 regulatory updates.

The organic regulations at §205.102, Use of the term, “organic,” state that, “Any agricultural product that is sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be: (a) Produced in accordance with the requirements specified in §205.101 or §§205.202 through 205.207 or §§205.236 through 205.240 and all other applicable requirements of part 205; and (b) Handled in accordance with the requirements specified in §205.101 or §§205.270 through 205.272 and all other applicable requirements of this part 205.”

The organic regulations at §205.300, Use of the term, “organic,” state that, “(a) The term, “organic,” may only be used on labels and in labeling of raw or processed agricultural products, including ingredients, that have been produced and handled in accordance with the regulations in this part.”

The organic regulations at §205.311, USDA Seal, state that, “(a) The USDA seal described in paragraphs (b) and (c) of this section may be used only for raw or processed agricultural products described in paragraphs (a), (b), (e)(1), and (e)(2) of §205.301.”

The organic regulations at §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 ...”

DISCUSSION

HFF was founded on October 1, 2021, with a mailing and principal address in Hollywood, Florida, and with Kenneth Kodish identified as the Owner/President/Director and the Registered Agent. On September 6, 2022, HFF was certified organic for handling by OTCO, but subsequently surrendered this certification on April 6, 2023. The organic regulations as they existed in 2023 didn't require HFF to be certified organic; however, HFF sought to regain certification in anticipation of revised regulations being implemented March 19, 2024, believing that the revision would require HFF to be certified. HFF states in its Appeal of March 15, 2024 that it is a broker and agent for growers and doesn't see, process, possess, or have any physical contact with the agricultural products. Growers harvest products and places them in cold storage. After HFF sells the products, the growers then ship the products directly from cold storage to the buyers. HFF argues that it voluntarily chose to become certified, as it wasn't required to have handler certification at that time. AMS agrees with HFF's determination that it was an uncertified handler pursuant to the organic regulations at 7 C.F.R. §205.101, Exemptions and exclusions from certification; and was exempt from certification before the March 19, 2024 regulatory update.

HFF states that it was notified by OTCO that its handler certification would be "up for renewal" in January 2023. HFF decided to apply for certification with another certifier, because the renewal would have required another payment to OTCO, despite HFF just being certified on September 6, 2022. HFF notes that this application was again voluntary, as certification wasn't required based on its exempt activities. HFF applied to QCS for handling certification on March 6, 2023, and crop certification on March 16, 2023. However, QCS rejected the HFF application on April 5, 2023, citing a conflict of interest related to a HFF consultant's previous role with the

certifier. HFF surrendered its OTCO-issued handling certification the next day, on April 6, 2023. HFF subsequently ended its relationship with the consultant, eliminating the conflict of interest, and reapplied to QCS on November 1, 2023. The QCS application was only for handling certification.

On January 24, 2024, QCS issued a Notice of Noncompliance and Denial of Certification to HFF, stating that 3 Bills of Lading dated April 25, 2023 and April 28, 2023 show that HFF sold (b) (4) cases of organic zucchini after HFF had surrendered its organic handling certification. Additionally, the organic zucchini was obtained from uncertified operations. HFF requested mediation on February 12, 2024, which QCS denied on February 16, 2024. HFF subsequently submitted an updated mediation request on February 20, 2024, which QCS rejected on February 23, 2024. HFF thereafter filed an Appeal on March 15, 2024.

AMS finds QCS was justified in issuing the combined Notice of Noncompliance and Denial of Certification. The organic regulations at §205.405, Denial of certification, state that, “(a) ... When correction of a noncompliance is not possible, a notification of noncompliance and a notification of denial of certification may be combined in one notification... (g) ... if a certifying agent has reason to believe that an applicant for certification has willfully made a false statement or otherwise purposefully misrepresented the applicant’s operation or its compliance with the certification requirements ... the certifying agent may deny certification ... without first issuing a notification of noncompliance.” These provisions remain unchanged in the newly implemented regulations. Evidence substantiates that HFF willfully sold product as organic from operations it knew weren’t certified and denied doing so.

HFF argued in its Appeal to the QCS-issued January 24, 2024 Notice of Noncompliance and Denial of Certification that although it had surrendered its handling certification on April 6,

2023, it was an exempt handler under the organic regulations, and therefore, continued to engage in organic transactions. HFF states it applied for organic certification in anticipation of the new organic regulations being implemented on March 19, 2024, which would require HFF to be certified. HFF further stated that, contrary to QCS' findings, there is no support for the allegation that HFF sold product as organic from uncertified growers/operations.

As HFF was exempt from needing handling certification at the time of the Denial of Certification, the sole fact that HFF engaged in the transactions in April 2023, as evidenced by the 3 Bills of Lading, isn't a violation of the organic regulations and on its own would not be a valid basis for the Denial of Certification. It is noted that the revision to the regulations at 7 C.F.R. §205.100 and the potential impact to HFF is not discussed herein, as the transactions in question occurred before the March 19, 2024 implementation of the revised provision.

However, evidence substantiates that HFF represented/handled/arranged for the sale of product as organic that was produced and obtained from uncertified operations, which is a violation and is a sound basis for the Denial of Certification. The 3 Bills of Lading (BOLs) dated either April 25, 2023 or April 28, 2023, with HFF identified at the top, show that HFF sold a total of (b) (4) cases of organic zucchini. Two of the BOLs identify (b) (4) as the grower, while the third identifies "K.Heritage" as the grower. (b) (4) represents (b) (4) and "K.Heritage" refers to Heritage Fresh Organic Farms Inc. (HFOF).

HFOF is an HFF-related entity that was founded on February 1, 2023, with a mailing address in Hollywood, Florida, and a principal address in Indiantown, Florida. Kenneth Kodish, who is the President/Owner/Director/Registered Agent of HFF, is also identified as serving in the same roles for HFOF and therefore, knew that HFOF wasn't certified organic. HFOF had applied for crop certification on April 25, 2023; however, OTCO issued a Notice of

Noncompliance and Denial of Certification to HFOF on August 23, 2023, stating that evidence substantiates that HFOF had sold and/or advertised product as organic when it wasn't certified. HFF and HFOF are both registered with the Florida Department of State, showing Kodish' relationships to the entities.

(b) (4) also isn't certified organic and wasn't certified at the time of the transactions noted in the April 2023 BOLs. (b) (4) was previously certified organic by (b) (4), but had surrendered certification, and then was suspended effective (b) (4) for a 3 year period. Therefore, (b) (4) wasn't certified organic at the time that zucchini from (b) (4) was brokered, represented, and sold by HFF as organic in April 2023. Further, Kodish was aware that (b) (4) wasn't certified organic at the time of the transactions. (b) (4) emailed (b) (4) on (b) (4) stating that it was surrendering its organic certification as of that date, and copied Kodish. Kodish replied to that email, stating that (b) (4) surrender was a 'shame.'

The finding that HFF sold product from (b) (4) and HFOF as organic is further evidenced by email exchanges between Kodish and (b) (4) in May 2023, when Kodish was attempting to sell organic product to (b) (4) (b) (4) asked Kodish for the identity of the growers of the organic product. Kodish replied that the sources are HFOF, (b) (4) and (b) (4) (b) (4) is certified organic for crops by QCS; however, (b) (4) wasn't the producer/supplier of the zucchini on the BOLs in question. Further, attached to the emails between Kodish and (b) (4) are photos of boxes marked 'organic vegetables' that were "Grown & Packed by Heritage Fresh Organic Farms". HFF's Product List with Suppliers also identifies (b) (4) and HFOF as HFF suppliers.

In regard to HFOF, when denying certification to HFOF, OTCO stated that evidence substantiates that HFOF sold and/or advertised uncertified products as organic. OTCO also referred to photographs of zucchini packed in boxes labeled as “Organic Vegetables ... Grown and Packed by” HFOF with the USDA organic seal; and that the boxes match the box schematic submitted by HFOF to OTCO as part of the application process. In separate evidence, Kodish contends that it was (b) (4) product, and not product from HFOF, seen in the packed boxes. However, Kodish knew that neither (b) (4) nor HFOF were certified. Further, regardless of the origin of the packed zucchini, HFF represented, marketed, and sold product from the uncertified (b) (4) and uncertified HFOF as organic. Even if it was (b) (4) product in the boxes, HFOF, at a minimum, facilitated the misrepresentation of nonorganic product as organic by allowing (b) (4) to pack its uncertified product in HFOF organic labeled boxes. HFF’s representation, marketing, and sale of this product as organic, whether from (b) (4) or HFOF, also violated the organic regulations.

In addition to the evidence substantiating that HFF sold product from uncertified (b) (4) and uncertified HFOF as organic in April 2023, as cited by QCS in its Denial of Certification Notice, and as discussed above, HFF also engaged in other transactions in which it represented uncertified product as organic. Evidence shows that in September 2023, HFOF, with the same Owner/President/Director/Registered Agent as HFF, stated to OTCO that HFF acted as a sales agent for (b) (4) on 16 shipments of organic zucchini from February 16, 2023 to March 9, 2023. Sales Order Forms, Invoices, and print outs of sales substantiate that the uncertified (b) (4) actually sold zucchini, green bell peppers, and yellow squash as organic to HFF from January 23, 2023 through June 16, 2023. These sales include the product then sold as organic by HFF to (b) (4) in April 2023, as evidenced by the 3 BOLs discussed above. These additional

shipments of product from uncertified entities as organic also ‘tie into’ the discussion above regarding the photos of boxes of zucchini marked as being grown by HFOF. There is no definitive proof that the product in the HFOF boxes originated with (b) (4) rather than HFOF. However, regardless of whether the boxed zucchini was from (b) (4) or HFOF, HFF knew that neither producer was certified during the period February 16, 2023 to March 9, 2023. HFF acted as a broker/seller for at least 16 shipments of product labeled as organic that HFF knew was from an uncertified entity; and using boxes marked as organic product grown and packed by the uncertified HFOF.

HFOF argued in its Appeal to OTCO’s denial of certification for HFOF, that the zucchini from (b) (4), placed in HFOF boxes and sold as organic by HFF between February 16, 2023 and March 9, 2023, still qualified as such because it was in the ‘stream of commerce.’ This argument by HFOF is relevant to this HFF case, as both HFOF and (b) (4) are suppliers of produce to HFF, which acts as their broker/handler. HFOF argues the produce was harvested and packed by (b) (4) prior to its (b) (4) suspension. However, zucchini is a perishable vegetable, countering this argument. Further, the (b) (4) documentation shows that all but two of the sales transactions occurred after the (b) (4) suspension of (b) (4) making it unlikely that the produce was packed prior to that date. Lastly, Kodish stated that he had taken the photographs of the HFOF boxes with zucchini packed therein, when he stopped by the (b) (4) operation on (b) (4). This substantiates further that the perishable zucchini was packed in HFOF boxes and sold by HFF after (b) (4) suspension, since the suspension had occurred two weeks prior to the photograph. Therefore, the ‘stream of commerce’ argument does not negate the findings that both HFF and HFOF represented, marketed, labeled, and sold nonorganic product as organic.

Finally, despite Kodish and HFF knowing that (b) (4) and HFOF weren't certified organic, (b) (4) stated in an internal email on May 8, 2023, that Kodish was "still trying to push organic product to us." (b) (4) specifically stated that it had purchased 2 loads of zucchini (b) (4) cases on April 26, 2023, and (b) (4) cases on April 28, 2023) from HFF in good faith, believing that HFF was certified organic and that the zucchini was sourced from an organic supplier/producer. The (b) (4) cases on April 28, 2023, correspond to two of the three BOLs, with (b) (4) and HFOF identified as the producers, and the organic zucchini being shipped to LaFarge, Wisconsin which is the (b) (4) location. Sales Orders and Invoices document the HFF sales were made to (b) (4) (b) (4) stated it asked Kodish for HFF's organic certificate and for the valid organic certificates of the suppliers/producers, but Kodish didn't submit any certificates to (b) (4) Kodish only identified the producers as HFF, (b) (4), and (b) (4) as discussed above. Therefore, HFF was representing, brokering, and selling, uncertified product as organic. After being informed of this by (b) (4), NOP had conducted a separate investigation and issued a Warning Letter to HFF on March 7, 2024, with a subsequent letter on May 22, 2024, stating that (b) (4) allegation that HFF sold product from uncertified operations as organic was confirmed. The HFF sales to (b) (4), and representations by HFF to (b) (4) stating that the product was organic, further supports the Denial of Certification issued by QCS.

AMS closes this discussion by noting that Kodish is the President/Owner, Director, and Registered Agent of both HFOF and HFF, and is a "responsibly connected" person regarding both HFOF and HFF. "Responsibly connected" is defined in the regulations as, "Any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification or accreditation." As the sole owner of HFOF and HFF, Kodish is aware of the organic status of both, specifically, that HFOF isn't certified

organic for crops. Kodish also received notice that (b) (4) was no longer certified. However, Kodish, through HFF, represented, marketed, labeled, and sold product as organic from the uncertified operations of HFOF and (b) (4)

CONCLUSION

AMS finds the evidence substantiates that HFF has violated the organic regulations at 7 C.F.R. §205.100, What has to be certified; 7 C.F.R. §205.102, Use of the term “organic;” 7 C.F.R. §205.300, Use of the term “organic;” 7 C.F.R. §205.311, USDA Seal; and 7 C.F.R. §205.400, General requirements for certification. HFF brokered/sold product it represented as organic despite the product being supplied by uncertified operations, and HFF knowing that the operations weren’t certified at the time of the sales. HFF further continued to represent product from (b) (4) and HFOF as organic; and sold product identified as grown by HFOF in boxes showing the USDA organic seal. AMS finds HFF knowingly and willingly sold uncertified product as organic. Therefore, HFF is ineligible for organic certification.

DECISION

HFF’s March 15, 2024 Appeal of the January 24, 2024 Notice of Noncompliance and Denial of Certification is denied. HFF is denied organic certification.

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

Done at Washington, D.C., on this 23
day of September, 2024.

BRUCE
SUMMERS
Bruce Summers
Administrator
Agricultural Marketing Service

Digitally signed by BRUCE
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