

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re: )  
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)  
Heritage Fresh Organic Farms Inc. ) **Administrator’s Decision**  
)  
) **APL-051-24**  
Hollywood, Florida )  
)  
)

This Decision responds to an Appeal (APL-051-24) of a Notice of Noncompliance and Denial of Certification under the National Organic Program (NOP) issued to Heritage Fresh Organic Farms Inc. (HFOF) of Hollywood, Florida by OneCert, Inc. (OneCert), a USDA accredited certifying agent. The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)<sup>1</sup> and the U.S. Department of Agriculture (USDA) organic regulations.<sup>2</sup>

**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

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<sup>1</sup> 7 U.S.C. 6501-6522

<sup>2</sup> 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 August 23, 2023, USDA accredited certifier Oregon Tilth Certified Organic (OTCO) issued a Notice of Noncompliance and Denial of Certification to HFOF, after it had applied for crop certification.
2. On September 21, 2023, HFOF submitted a Request for Mediation to OTCO's denial of certification.
3. On October 3, 2023, OTCO issued a Notice of Denial of Mediation to HFOF. HFOF didn't file an appeal to OTCO's denial of certification.
4. On February 23, 2024, OneCert issued a Notice of Noncompliance and Denial of Certification to HFOF, which had applied to OneCert for crop certification after being denied certification by OTCO.
5. On March 24, 2024, HFOF filed a Request for Mediation to OneCert's denial of certification.
6. On April 12, 2024, OneCert issued a Notice of Rejection of Mediation to HFOF.
7. On May 12, 2024, HFOF filed 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 Notice of Noncompliance and Denial of Certification issued by OneCert occurred before March 19, 2024. Further, only one of the sections cited below was revised in the recent update of the regulations, and the revision isn't applicable to this case.

The USDA organic regulations at 7 C.F.R. §205.100, What has to be certified, previously 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 provision was subsequently revised effective March 19, 2024, but the revision doesn't affect 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 ...”

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**

HFOF was founded on February 1, 2023, with a mailing address in Hollywood, Florida, and a principal (production) address in Indiantown, Florida. Kenneth Kodish (Kodish) is identified as the Officer/Director and the Registered Agent. Per HFOF, the operation was previously certified by OTCO under the name DeShields Farms Inc., which surrendered certification on December 29, 2022. HFOF states it bought the property with the plan of obtaining crop certification.

HFOF previously applied to OTCO for crop certification on April 25, 2023; however, OTCO issued a Notice of Noncompliance and Denial of Certification to HFOF on August 23, 2023. HFOF then applied to OneCert for crop certification. However, OneCert also denied certification issuing a Notice of Noncompliance and Denial of Certification to HFOF on February 23, 2024. In denying certification to HFOF, OneCert cited to the prior denial of certification by OTCO, stating that HFOF failed to provide a sufficient description of actions

taken and documents to correct the noncompliance cited by OTCO in its denial of certification. OneCert stated that on August 4, 2023, OTCO, in considering HFOF's certification application, sent a Request for Information to HFOF, directly asking if HFOF had "brokered, repacked, resold/sold products" as organic prior to "achieving certification." HFOF responded to OTCO on August 7, 2023 stating that it hadn't done so.

OneCert noted that OTCO then 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 uncertified products as organic. OneCert cited to OTCO's finding of photographs of zucchini packed in boxes labeled as "Organic Vegetables ... Grown and Packed by" HFOF with the USDA organic seal. OTCO had stated that the boxes seen in the photos match the box schematic submitted by HFOF to OTCO as part of the application process. The HFOF labeled boxes were seen at (b) (4) which is discussed below. However, OTCO stated that as HFOF hadn't been granted organic crop certification, it had violated the organic regulations by representing, labeling, and selling product as organic when it wasn't certified. HFOF didn't appeal OTCO's denial of certification. It is noted that Kodish of HFOF also took photos of HFOF boxes at (b) (4) on (b) (4) which better show the boxes and the HFOF labeling.

OneCert also stated in its Notice of Noncompliance and Denial of Certification to HFOF that HFOF had willfully made false statements to OTCO when HFOF denied that it had "brokered/repacked/sold/resold" product as organic while uncertified. OneCert stated that as found by OTCO, HFOF's statement was a knowing and willful misstatement of the facts. OneCert also cited to a February 1, 2024 email of HFOF in which it stated it understood that although crops were being grown as organic, HFOF couldn't represent, label, or sell any product

as organic while not certified. However, OneCert stated that HFOF sold product as organic; and failed to disclose prior sales and marketing of products as organic, while it was uncertified.

Lastly, OneCert stated that an entity related to HFOF was also denied certification. Heritage Fresh Farms Inc. (HFF), which was founded on October 1, 2021, with a mailing and principal address in Hollywood, Florida, is a related entity of HFOF. HFF had applied to USDA accredited certifier QCS for handling certification, after having previously surrendered its OTCO-granted handling certification. Kodish is identified as the Officer/Director/President and the Registered Agent of both HFF and HFOF. While HFOF is a producer, HFF is a broker/sales agent for agricultural products. HFF and HFOF are registered as separate legal entities with the Florida Department of State. As OneCert stated, HFF was denied certification on January 24, 2024, by certifier QCS, which issued a Notice of Noncompliance and Denial of Certification to HFF.

On March 24, 2024, HFOF requested mediation of OneCert's certification denial, in which it discussed the HFOF and HFF operations, and denied that HFOF sold any product as organic. HFOF stated that it only gave HFOF labeled boxes, with the USDA organic seal, to another operation, (b) (4), to use, and it was (b) (4) product in the boxes. On April 12, 2024, OneCert denied HFOF's March 24, 2024 mediation request. HFOF appealed to NOP on May 12, 2024.

AMS finds that OneCert 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." This provision remains unchanged in the newly implemented regulations. Evidence substantiates that HFOF willfully represented, marketed, labeled, and sold product as organic despite not being certified; and further, engaged in sales transactions with product identified as organic with operations it knew weren't certified and denied doing so.

HFOF states in its Appeal to the OneCert denial of certification, that it didn't represent, label, or sell any product as organic prior to being certified. HFOF further contends that it merely provided HFOF labeled boxes to (b) (4) to pack (b) (4) product; and that it wasn't HFOF product in the HFOF labeled boxes appearing in the photographs referenced by OTCO and OneCert. Kodish stated in an unnotarized Declaration of March 15, 2024, submitted with the HFOF Appeal, that he gave HFOF boxes to (b) (4) to use during the winter/spring of 2023, and had expected (b) (4) to remove the HFOF markings.

However, AMS finds the evidence substantiates that HFOF represented, marketed, labeled, and sold its product as organic even though HFOF wasn't certified organic. This finding relates to the photograph of HFOF boxes packed with zucchini and labeled as 'organic vegetables' that were "Grown & Packed by Heritage Fresh Organic Farms," and showing the USDA organic seal. However, before addressing HFOF's actions in this regard, it is important to note that (b) (4) to whom HFOF allegedly gave its HFOF labeled boxes to use, isn't and wasn't certified organic at the time the boxes were allegedly given to (b) (4)

(b) (4) was previously certified organic by USDA accredited certifier (b) (4)

However, (b) (4) surrendered its certification on (b) (4) and was

subsequently suspended effective (b) (4) for a 3 year period. Kodish of HFOF was aware that (b) (4) wasn't certified organic, as (b) (4) copied Kodish in the email to (b) (4) stating that it was surrendering certification. Kodish sent a reply email to (b) (4) and (b) (4) stating that (b) (4) surrender was a 'shame.'

Therefore, AMS finds, at a minimum, and assuming arguendo that it was (b) (4) product packed in the boxes, that HFOF/Kodish knowingly allowed an uncertified operation to use its HFOF and organic labeled boxes, thereby allowing the misrepresentation of non-organic product as organic. This finding is supported by looking at the statements made by HFOF in its prior mediation request of September 21, 2023 and the mediation request of March 24, 2024, and its Appeal, which somewhat conflict with the statements made by Kodish. First, HFOF states it didn't give permission to (b) (4) to use the boxes without 'stickering' over the HFOF name, but then states the matter of 'stickering' wasn't discussed with (b) (4). If HFOF didn't discuss the matter, (b) (4) may have assumed it didn't need to sticker over the HFOF name. However, even more of a conflict is HFOF's statement in its Mediation Request of September 21, 2023, that it "assumed that when the time came for (b) (4) to use any (HFOF) boxes, (b) (4) would naturally take care of" HFOF's name on the boxes. But Kodish said he took the photograph of HFOF boxes with (b) (4) zucchini therein when he stopped at the (b) (4) operation on (b) (4). Therefore, Kodish knew then that (b) (4) hadn't 'taken care' of HFOF's name on the boxes; and Kodish could have at that time instructed (b) (4) to 'sticker over' the HFOF name. However, there is no evidence that Kodish voiced any concern to (b) (4) about the boxes at that time, and Kodish knew that (b) (4) wasn't certified on (b) (4).

Further, there is no evidence, other than the statements of HFOF and Kodish, that it was (b) (4) zucchini in the boxes, and not HFOF's uncertified product. HFOF stated in its March



24, 2024 Mediation Request that it didn't obtain any written confirmation from (b) (4) that the boxes were being packed with (b) (4) product. Further, HFOF acknowledged that a photograph of HFOF boxes packed with zucchini was used when it attempted to sell organic product grown at a certified operation. HFOF also stated in its Appeal that, "there is no document or written agreement to prove that (b) (4) owner had asked Mr. Kodish if he could borrow boxes that HFOF had stored at the cooler facility where (b) (4) was packing to fulfil a sales contract between HFF and (b) (4)" AMS finds there is no definitive proof that it was (b) (4) produce in the HFOF labeled boxes and not HFOF product. This further supports the Denial of Certification issued by OneCert.

However, still contending that it was (b) (4) product in the HFOF boxes, HFOF argued in its May 12, 2024 Appeal that the zucchini from (b) (4), placed in HFOF boxes and sold between February 16, 2023 and March 9, 2023, as organic, still qualified as such since it was in the 'stream of commerce.' HFOF stated that "it appears" the produce was harvested and packed by (b) (4) prior to the (b) (4) suspension of (b) (4). However, first, Kodish stated he took the photographs of the HFOF boxes packed with zucchini on (b) (4). Further, the (b) (4) print out of sales and Sales Order forms show that all but two of the sales transactions occurred after the (b) (4) suspension of (b) (4). Therefore, it is unlikely that the produce was packed prior to (b) (4) zucchini is a perishable vegetable. Hence, a stream of commerce argument is unrealistic.

The evidence also substantiates that HFOF represented, marketed, labeled, and sold its product as organic, despite not being certified, when it engaged in organic transactions with the related entity of HFF, allowing HFF to sell HFOF product as organic. HFOF argues that it didn't have any organic crops to sell when alleged sales of HFOF product occurred, and only sold

conventional zucchini. However, a HFF Bill of Lading (BOL) dated April 28, 2023, shows that HFF sold (b) (4) cases of zucchini from HFOF as organic. Specifically, 3 BOLs of April 25, 2023 and April 28, 2023, with HFF identified at the top, show that a total of (b) (4) cases of organic zucchini were sold by HFF. Two of the BOLs identify (b) (4) as the grower, while the third identifies “K.Heritage” as the grower. (b) (4) represents (b) (4) while “K.Heritage” refers to HFOF.

Further, HFOF through Kodish continued to represent and market HFOF product as organic as seen in email communications with (b) (4) in May 2023. As seen in the emails, Kodish was attempting to sell organic product to (b) (4) which 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, as seen above, (b) (4) wasn’t the producer/supplier of the zucchini on any of the three 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.

(b) (4) stated in an internal email on May 8, 2023, that Kodish was “still trying to push organic product to us,” though Kodish knew (b) (4) and HFOF weren’t certified. HFOF stated in its March 24, 2024 Mediation Request that, it “does not have an explanation for why Mr. Kodish responded to (b) (4) that the product currently being shipped was from, among others, HFOF.” Sales Order and Invoices document the sales seen on the 3 BOLs above were made to (b) (4) (b) (4) also 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 HFOF, (b) (4) and (b) (4) as discussed above. The continued attempts to sell product as organic from the uncertified HFOF further supports the Denial of Certification issued by OneCert.

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.” Kodish is the sole owner of HFOF and HFF, and operates HFF as a handler which represents, markets, and sells product from producers HFOF, (b) (4), and (b) (4). 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. While HFF wasn’t required to be certified for handling at the time of the transactions discussed in this decision, Kodish, and hence, HFF, also knew that (b) (4) and HFOF weren’t certified for crops. However, Kodish through HFF represented, marketed, labeled, and sold product from uncertified HFOF and (b) (4) and then with the “HFOF hat” sold non-organic product as organic.

## CONCLUSION

AMS finds the evidence substantiates that HFOF 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. AMS finds that HFOF knowingly and willingly sold its uncertified product as organic; and facilitated the misrepresentation of

nonorganic product from (b) (4) as organic, knowing that neither HFOF nor (b) (4) were certified. Therefore, HFOF is ineligible for organic certification.

## DECISION

HFOF's May 12, 2024 Appeal of the February 23, 2024 Notice of Noncompliance and Denial of Certification is denied. HFOF is denied organic certification.

Additionally, attached to this formal Administrator's Decision denying HFOF's Appeal is a Request for Hearing form. Should it wish to further appeal this decision, HFOF 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**

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Bruce Summers  
Administrator  
Agricultural Marketing Service