UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

BEFORE THE ADMINISTRATOR

In re:	)	
Noadiam USA, LLC,	)	**Administrator's Decision**
dba Sky Organics	)	
Delray Beach, Florida	)	**APL-036-18**
	)	

This Decision responds to an appeal (APL-036-18) of a Notice of Noncompliance and Proposed Suspension of National Organic Program certification issued to Noadiam USA, LLC, dba Sky Organics of Delray Beach, Florida, by Quality Certification Services. 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. Noadiam USA, LLC, dba Sky Organics (Sky) was initially certified organic by Quality Certification Services (QCS) on October 27, 2016.
2. On September 13, 2017, Sky submitted a renewal application to QCS.
3. On March 15, 2018, QCS conducted an unannounced inspection of the facility of Worldwide Wholesale Warehouse (3W) in Norfolk, Virginia. 3W does private label manufacturing and packaging for Sky. Sky holds the organic certification for its products manufactured by 3W, and 3W's prior facility in North Dakota was listed on Sky's certificate.
4. On June 5, 2018, QCS issued a Notice of Noncompliance and Proposed Suspension to Sky, stating that the Organic System Plan (OSP), inspection reports, and market surveillance of Sky products reveal that Sky is not following the agreed upon OSP, and has demonstrated an inability to comply with the National Organic Program (NOP) organic regulations.
5. On June 8, 2018, QCS denied Sky's June 7, 2018 request for mediation.
6. On July 6, 2018, Sky filed an Appeal.

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:...(f) Immediately notify the certifying agent concerning any:... (2) Change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and 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. (b) The USDA Seal must replicate the form and design of the example in figure 1 and must be printed legibly and conspicuously: (1) On a white background with a brown outer circle and with the term, "USDA," in green overlaying a white upper semicircle and with the term, "organic," in white overlaying the green lower half circle; or (2) On a white or transparent background with black outer circle and black "USDA" on a white or transparent upper half of the circle with a contrasting white or transparent "organic" on the black lower half circle. (3) The green or black lower half circle may have four light lines running from left to right and disappearing at the point on the right horizon to resemble a cultivate field."

The organic regulations at §205.103, Recordkeeping by certified operations, state that, "(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food groups(s))." (b) Such records must: (1) Be adapted to the particular business that the certified operation is conducting; (2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited; (3) Be maintained for not less than 5 years beyond their creation; and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part. (c) The certified operation must make such records available for

inspection and copying during normal business hours by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent."

QCS proposed a suspension of Sky's organic certification which would prohibit the sale, labeling, or representation of its products as organic. Presenting the reasons for proposing a suspension, QCS stated that Sky's OSP, inspection reports, and market surveillance of Sky products reveal that Sky is not following the agreed upon OSP and has demonstrated an inability to comply with the National Organic Program (NOP) organic regulations.

QCS states that Sky failed to immediately inform them of the move of their contract processor, 3W, from North Dakota to Norfolk, Virginia when it occurred in the spring of 2017. Sky didn't notify QCS of the move until October 26, 2017. In the interim and thereafter, Sky continued to handle alleged organic products at an uncertified facility. During the March 15, 2018 inspection at the 3W facility in Norfolk, Virginia, the inspector observed products labeled as "Certified Organic by Oregon Tilth," although Sky isn't certified by Oregon Tilth Certified Organic (OTCO) which is also a USDA accredited certifier. QCS states that one of OTCO's clients produces lip balm for Sky, but the products aren't certified and the labels aren't approved by QCS or OTCO. A noncompliant label for castor oil with the USDA organic seal obscured by the image of a castor bean was also found during the inspection, along with other Sky products labeled with the USDA organic seal, which were not included in Sky's OSP. QCS determined that the products were not certified, and the labels were not approved, by QCS or any other certifier.

Additionally, Sky's records don't consistently differentiate between organic and conventional products, both of which are produced at the 3W facility; and only some of the new invoices have added the 'CO' designation for conventional product and lot numbers. Further, the

records presented at the inspection and subsequent to the appeal filing, were not sufficient to be able to conduct a traceability audit for castor oil and lemongrass, and hence, the alleged organic status of the products can't be confirmed. Therefore, QCS found that Sky violated the organic regulations at 7 C.F.R. §205.400, General requirements for certification; 7 C.F.R. §205.311, USDA seal; and 7 C.F.R. §205.103, Recordkeeping by certified operations.

In the appeal, Sky contends that it notified QCS on September 13, 2017, of 3W's facility move, but believed that a former employee had already done so at the time of the move in June 2017. Further, Sky notes that QCS waited until March 15, 2018 to conduct an inspection of the 3W Norfolk, Virginia facility. Sky states that its various products found at the inspection with labels denoting USDA organic certification were not produced or packaged at 3W facility and were merely in the facility for shipment purposes. Sky explained that 3W performs drop shipping for entities which merely store product at the 3W facility prior to shipment by 3W. Additionally, the castor oil label seen by the inspector was only a draft, and a different label was subsequently approved. Regarding recordkeeping, Sky states their invoices from 3W provide a product description, differentiate organic from conventional product, and show the lot number. Lastly, Sky states the inspector didn't request to conduct a traceability audit on castor oil and lemongrass; and lemongrass is only 3% of the ingredients in their bug spray products.

Although Sky may have believed an employee had notified QCS of the relocation of 3W's facility when it occurred in June 2017, it was Sky's responsibility to ensure that QCS was timely informed of the relocation of its contract processing /packing facility from North Dakota to Virginia. This was necessary so that QCS could conduct an inspection at the new facility to determine if it could be added to Sky's certificate, as the North Dakota facility had been listed. However, Sky only provided proof of said notification occurring via email on September 13,

2017, though QCS states they were not notified until October 26, 2017, as seen in the March 15, 2018 Inspection Report documentation. Further, it appears the relocation occurred even prior to that time. Some of the 3W invoices show 3W at the Norfolk, Virginia location dating back to at least March 2017.

Sky sells various oils, lotions, lip balms, bath bombs and other skincare products on its website; however Sky does not manufacture any of its products. 3W is a separate entity which imports skincare items and ingredients, and does private label manufacturing and packaging for Sky and other entities. Pursuant to their contractual arrangement, Sky sends bulk wholesale ingredients to 3W, which then bottles or packages them for sale by Sky. The processes include melting, pouring, filling and sealing products. 3W invoices Sky for the completed and/or packaged products. 3W's Norfolk, Virginia facility has not been certified organic by QCS or another other certifier, and was denied certification by QCS on October 12, 2018. Sky 'holds' the organic certification for the products and 3W's prior facility in North Dakota was listed on Sky's certificate. Per arrangements with its other clients, 3W sells their imported ingredients/bulk wholesale to their clients and also does private label manufacturing for them. 3W manufactures/processes conventional and organic products at its facility.

A review of the documentation shows that the inspector noted on the March 15, 2018 Processing/Handling Inspection Checklist Report that the prior year's inspection report referenced the 3W facility moving to Virginia. The inspector further stated that it was his impression that the QCS should have notified Sky of the need for an additional facility application when the 2016 inspection report was reviewed. However, the prior Processing/Handling Inspection Checklist Report of October 13, 2016 only notes that 3W "may move to Norfolk, VA in 2017." Therefore, while it appears that QCS may have known of a

possible facility move in October 2016, the move did not actually occur until the spring of 2017. Again, it was Sky's responsibility to notify QCS. However, it is noted that even upon the emailed notification of September 13, 2017 by Sky, QCS didn't conduct the inspection of the Norfolk, VA location until March 15, 2018. Nevertheless, taking all this information into consideration, NOP finds Sky violated the organic regulations by failing to provide timely notice to QCS when 3W actually moved its processing facility from North Dakota to Norfolk, Virginia.

Evidence further shows that Sky products were handled and processed/packaged at the uncertified 3W Norfolk, Virginia facility in violation of the organic regulations. Multiple invoices dated from March of 2017 through the winter of 2018 and afterward show 3W, at the Virginia location, billing Sky for products, substantiating that Sky had products processed/packaged at an uncertified facility for several months. Sky also acknowledged in its appeal that its products were handled and processed/packaged at the uncertified 3W Virginia location. The 3W facility in North Dakota had been listed on Sky's organic certificate as an approved facility, and therefore, Sky knew, or should have known, that the 3W Norfolk, Virginia facility would need to be inspected and specifically added to its organic certificate before Sky could have its products handled and processed/packaged there. It is Sky's responsibility to be aware of the requirements for organic certification and to comply with said requirements. It is noted that 3W applied for organic certification through QCS on December 14, 2017, several months after the move to Virginia and after it had already handled and processed/packaged Sky products while uncertified. QCS inspected 3W's Norfolk, Virginia facility on May 2, 2018; and subsequently issued a Notice of Noncompliance and Denial of Certification to 3W on October 12, 2018.

Sky products were handled and processed/packaged at an uncertified facility, thereby negating any alleged organic nature of the products. This situation is comparable to the case of In re: Michael Tierney, dba Birchwood Farms, 73 Agric. Dec. 512 (Oct. 9, 2014), in which organically-raised livestock was slaughtered in an uncertified non-organic facility and then the meat was labelled as organic, thereby violating the organic regulations. The USDA Administrative Law Judge (ALJ) in Tierney ruled that the supplying of and placing of organic labels on product at an uncertified slaughterhouse circumvented the USDA organic regulations and this "overt circumvention of the regulations...lulled consumers to believe that the meat bearing the USDA label was organic." Tierney was ordered to cease and desist from violating the organic regulations and its organic certification was revoked. The Judicial Officer affirmed the ALJ Tierney decision (73 Agric. Dec. 578 (Dec. 29, 2014)).

The review of the documentation submitted by Sky and QCS also reveals conflicting, as well as confusing and inaccurate information. Sky initially applied for organic certification as a handler on September 7, 2016. However, Sky, in its original 2016 application, lists 3W's North Dakota plant address as its own plant without stating that the plant is owned by a separate entity and is only used by Sky for processing via a contractual relationship. In fact, Sky checked the 'not applicable' box in the section for information on Contract Processors. This section specifically asks if the applicant contracts with any handling/processing facility and if that facility is certified organic. However, at the October 13, 2016 inspection of the 3W facility in North Dakota, 3W was identified as a private label contract manufacturer, and the contract processor box was checked. The 2016 Handler/Processor Plan also identified 3W as a contract processor.

Then, the Processing/Handling Inspection Checklist Report for the March 15, 2018 inspection, while naming the inspected entity as Sky, checks the entity identification box for a 'processor operation' instead of a 'handler operation,' and further identifies the processing operation as a 'primary' rather than 'contract processor.' However, the report also lists Henry Behle, owner of 3W, as an inspection attendee. However, an Inspection Agreement contained within the March 15, 2018 inspection report, which is in reality an application for certification of the 3W Norfolk, VA facility, and which identifies the applicant as Sky, was signed on March 15, 2018, by Behle and the inspector, with no reference to the fact that the facility is not owned by Sky, but rather is a contract processing facility owned by 3W. Sky Organics is a trade name of Noadiam USA LLC, a Florida limited-liability corporation established on February 10, 2012; while 3W, Worldwide Wholesale Warehouse, was originally registered in North Dakota, but was re-registered as a Virginia domestic corporation on May 11, 2017.

Addressing other noncompliances cited by QCS, although QCS found an unapproved label for castor oil at the 3W facility during the March 15, 2018 inspection, this label was never used on the product and a different label was approved by QCS. The retention of unapproved or draft labels at the 3W facility is problematic but is not a violation of the organic regulations.

The QCS inspector also found several Sky products at the 3W facility, labeled with the USDA organic seal, though these products are not in Sky's OSP filed with QCS, and Sky is not certified for these products by QCS. However, it was found that 3W does 'drop shipping' for Sky and other entities, storing their products at the 3W facility prior to shipment by 3W. Sky states these products were not manufactured or packaged at the 3W facility but have approved labels. Sky has private label manufacturing arrangements with (b) (4) which is certified by Oregon Tilth Certified Organic (OTCO), and (b) (4) which is certified by

Ecocert ICO. Both OTCO and Ecocert ICO are certifying agents accredited by the USDA. The organic certificate of (b) (4) lists 6 flavors of organic lip balm manufactured for Sky, while the (b) (4) lists 3 organic deodorants manufactured for Sky. Sky states because it does not have its own warehouse, it 'dropped' these completed products at the 3W facility for shipping. This can account for the inspector observing several Sky products at the 3W facility which were not manufactured by 3W and which do not appear on Sky's OSP with Certifier QCS.

However, while QCS acknowledged that a certified operation may hold or resell organic product for another entity if no additional processing, repacking or re-labeling is done, this must be disclosed to the certifier. Sky didn't include the deodorant, oils, or lip balms manufactured by (b) (4) on its OSP and QCS wasn't aware of them until the labeled products were found at the 3W facility during the March 15, 2018 inspection. Sky and 3W state that Sky no longer 'drops' products, manufactured elsewhere, at the 3W facility for shipping; however, this does not negate the prior failure to notify QCS of such activity.

Further, although the organic certificates of (b) (4) show they are certified to produce several products for Sky, there were additional Sky products found at the 3W facility, manufactured by (b) (4) that are not listed on the organic certificates of those two entities. These products include champagne tinted lip balm, produced by (b) (4) which is only certified for 6 flavors of regular organic lip balm for Sky, and Cedarmusk men's organic deodorant which Ecocert ICO stated it does not certify. Additionally, Sky's website shows the continued sale of alleged organic products and labels of which QCS has not been informed, including castor oil eyelash growth serum, extra virgin

coconut oil, jojoba oil, hemp seed oil, lavender essential oil, tea tree oil, and eucalyptus essential oil.

QCS issued a Notice of Noncompliance to Sky on December 15, 2017 also regarding noncompliant labels, and while that noncompliance was resolved, as documented by a Notice of Resolution on February 21,2018, the above-discussed additional noncompliant labels were found shortly thereafter during the March 15, 2018 inspection. Sky also had received a January 23, 2018 Notice of Noncompliance for noncompliances regarding documentation substantiating the organic nature of certain ingredients used in products. QCS issued a Notice of Resolution for those noncompliances on February 22, 2018.

Regarding Sky's alleged recordkeeping noncompliances, although Sky claims that the 3W invoices to Sky provide a product description, lot number, and distinguish whether a product is organic or conventional, QCS states only newly submitted invoices contain that information. The newly submitted invoices are different as they include the 'CO' notation for conventional product and the lot number, which were not previously on 3W invoices. A review of 3W invoices from the first half of 2017 with those from the latter few months of 2017 and 2018, substantiate QCS's claim that only newer invoices contain lot numbers and the 'CO' designation. However, even the newer invoices do not consistently contain the lot numbers, with some invoices not showing any lot numbers for products and others having just one or two items with lot number identification. The appearance of lot numbers and 'CO' designations on the invoices increased in the later invoices found in the file which run into the summer of 2018.

Further, QCS found that Sky has no lot numbering system for the production of multi-ingredient products. Sky acknowledged on their September 2016 original certification application that it has not implemented a lot numbering system, while stating in their October 3,

2016 Handler/Processor Plan that their recordkeeping system does allow for balancing organic ingredients used in products with the finished organic products. However, the March 15, 2018 inspection showed that a lot numbering system still has not been created or implemented, with the inspector noting on the Processing/Handling Inspection Checklist Report that since Sky does not have a lot numbering system, the lot numbers on incoming ingredients used in products can't be tied to the products packaged on site in non-retail containers. Further, the records that Sky provided for a traceability audit of castor oil and lemongrass, are in actuality for a mass balance audit. Since Sky's lot numbers are not linked to production runs, a traceability audit can't be conducted and hence, the organic status of the products can't be confirmed. A Production Log for castor oil from January 2017 contains a column for lot numbers, but no lot numbers are written down for any of the numerous runs of castor oil. Sky submitted Production Logs for castor oil purporting to be for January, February and March of 2018, which contain lot numbers. However, these logs were not available during QCS's inspection of March 15, 2018 leading one to question their authenticity.

Lastly, on November 21, 2018, five months after QCS issued the Notice of Noncompliance and Proposed Suspension which is the subject of the appeal, QCS issued a Notice of Noncompliance after market surveillance revealed two Sky products with noncompliant labels for products not certified by QCS. Notices of Noncompliance are not appealable under the organic regulations, and QCS asked Sky to submit a description of corrective actions to address the noncompliance.

CONCLUSION

The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA organic seal are produced and handled in accordance with the organic regulations. Sky violated the organic regulations at 7 C.F.R. §205.400, 7 C.F.R. §205.311, and 7 C.F.R. §205.103.

Specifically, Sky violated the organic regulations by not timely informing QCS of the relocation of its processing/packaging contractor 3W, and having its products handled and processed/packaged at the uncertified facility. Documentation shows that Sky had organic product handled/processed/manufactured at an uncertified facility from the spring of 2017, throughout 2017 and up to the time of notification in the fall of 2017, to QCS of the 3W facility's new location, and then continuing in 2018, up to and after the 3W facility's inspection on March 15, 2018. The 3W facility also applied for its own separate certification on December 14, 2017 but continued to handle/process/manufacture organic product for Sky while awaiting a determination on its application, which was ultimately denied on October 12, 2018. Sky also appears to have misrepresented the exact nature of its relationship with the 3W facility which is a contract processor. Sky also has used the USDA organic seal on several products for which Sky is not certified; and has held alleged organic product at its contractor 3W's processing facility for other entities without informing QCS. Sky's records also do not contain all required information, and Sky does not have a lot numbering system to allow for lot numbers on incoming ingredients used in products to be linked to packaged products at the 3W facility, thereby not providing for a traceability audit to be conducted and the organic status of the products to be confirmed.

DECISION

The appeal is denied and Sky's organic certification is to be suspended. Attached to this formal Administrator's Decision denying Sky's appeal is a Request for Hearing form. Sky has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

If Sky waives the hearing, the Agricultural Marketing Service will direct QCS to issue a Notice of Suspension. At any time after suspension, Sky may, "…submit a request to the Secretary for reinstatement of its certification. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part."

Done at Washington, D.C., on this 14th day of February, 2019.

Bruce Summers
Administrator
Agricultural Marketing Service