

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Brooklyn Bottling)
of Milton, NY, Inc.)
Milton, New York)

Administrator's Decision
APL-055-19

This Decision responds to an appeal (APL-055-19) of a Notice of Proposed Suspension of National Organic Program certification issued to Brooklyn Bottling of Milton, NY, Inc. (Brooklyn) of Milton, New York by the Organic Crop Improvement Association (OCIA). 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 February 22, 2019, OCIA issued a Notice of Noncompliance.
2. On April 1, 2019, OCIA issued a Notice of Proposed Suspension.
3. On May 10, 2019, OCIA denied Brooklyn's May 7, 2019 request for mediation.
4. On May 14, 2019, Brooklyn filed an Appeal to NOP.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 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 (specific 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 §205.103, 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 group(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; ... (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation, except as exempt or excluded under §205.101, intending to sell, label, or represent agricultural products as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling. An organic production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed; ... (3) A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively implemented; (4) A description of the recordkeeping system implemented to comply with the requirements established in §205.103; ... (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.”

The organic regulations at §205.301, Product composition, state that, “(a) ... A raw or processed agricultural product sold, labeled, or represented as “100 percent organic” must contain (by weight or fluid volume, excluding water and salt) 100 percent organically produced ingredients. If labeled as organically produced, such product must be labeled pursuant to §205.303. (b) ... A raw or processed agricultural product sold, labeled, or represented as “organic” must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products. Any remaining product

ingredients must be organically produced, unless not commercially available in organic form, or must be nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List in subpart G of this part. If labeled as organically produced, such product must be labeled pursuant to §205.303.”

The organic regulations at §205.302, Calculating the percentage of organically produced ingredients, state that, “(a) The percentage of all organically produced ingredients in an agricultural product sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” or that include organic ingredients must be calculated... (c) The percentage must be determined by the handler who affixes the label on the consumer package and verified by the certifying agent of the handler. The handler may use information provided by the certified operation in determining the percentage.”

The organic regulations at §205.303, Packaged products labeled “100 percent organic” or “organic,” state that, “(a) Agricultural products in packages described in §205.301(a) and (b) may display, on the principal display panel, information panel, and any other panel of the package and on any labeling or market information concerning the product, the following: (1) The term, “100 percent organic” or “organic,” as applicable, to modify the name of the product; (2) For products labeled “organic,” the percentage of organic ingredients in the product: (The size of the percentage statement must not exceed one-half the size of the largest type size on the panel on which the statement is displayed and must appear in its entirety in the same type size, style, and color without highlighting;” (3) The term, “organic,” to identify the organic ingredients in multi-ingredient products labeled, “100 percent organic”...”

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;
(b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in §205.200; ... (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 §205.401, Application for certification, state that, “A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The application must include the following information: (a) An organic production or handling system plan, as required in §205.200...”

OCIA proposed a suspension of Brooklyn’s organic certification, which would prohibit the sale, labeling, or representation of its products as organic. OCIA stated in the April 1, 2019 Notice of Proposed Suspension that Brooklyn failed to resolve minor noncompliances which were due at the time of its 2019 certification renewal on February 1, 2019, and also didn’t respond to the prior Notice of Noncompliance.

In its Appeal, Brooklyn states that it believed that the corrective actions on the noncompliances weren’t due until its 2020 renewal. Brooklyn also states that OCIA erroneously cited noncompliances regarding products that are not, and won’t be, produced at Brooklyn’s facility.

Brooklyn is an organic handling operation which has been certified since June 6, 2006. However, Brooklyn has a history of noncompliances. On September 29, 2017, OCIA issued a Notice of Proposed Suspension citing fifteen correctable noncompliances, all related to poor recordkeeping by Brooklyn. Brooklyn requested mediation and submitted a package of documentation, which OCIA determined sufficiently addressed all but 2 of the noncompliances.

OCIA denied Brooklyn's mediation request due to the outstanding noncompliances and Brooklyn submitted an Appeal. On February 14, 2018, NOP and Brooklyn entered into a Settlement Agreement to address the remaining noncompliances and provide for Brooklyn's compliance with all recordkeeping requirements.

Brooklyn agreed in the February 14, 2018 Settlement Agreement with the NOP to obtain approval of new and revised product labels prior to use on products represented as "100 organic," "organic," or "made with organic ingredients" for one year after the effective date of the agreement. Brooklyn also agreed to submit all labels and make any needed revisions on labels by the deadline set by OCIA and to submit a complete list of Production Formulation sheets. These terms were also to be in effect for 1 year following execution of the agreement.

However, OCIA noted in a June 28, 2018 Corrective Action Report that there were still unresolved minor noncompliances. Specifically, OCIA stated that all information required for certification of products hadn't been submitted in Brooklyn's Organic System Plan (OSP). Specifically, 1) the Organic Product Ingredients form (OPI) and a label for Inko's Original White Tea with Ginger hadn't been submitted. Further, 2) a label for Inko's Original (Unsweetened) White Tea hadn't been submitted. The report states these materials were due by August 31, 2018.

OCIA also stated that 3) Brooklyn needed to submit documentation from the certifiers of its organic cane sugar suppliers, specifically [REDACTED], that verifies and documents the actual percentage of organic ingredients in the sugar. Additionally, OCIA noted that the OPI forms list [REDACTED] as the supplier of Brooklyn's organic sugar, but the updated Supplier List removed [REDACTED]. Therefore, 4) Brooklyn was asked to provide updated OPIs for the Inko's White Tea products' sugar supplier. As

documentation shows that Brooklyn's Planet Choice brand of Mojito Mint product had been removed from the OSP, 5) Brooklyn was asked to submit an OPI for the 'new' Greenway brand Mojito Mint. OCIA noted further that 6) the OPI for the Nature's Own Ginseng and Honey Green Tea must be revised to list the supplier of the citric acid. Brooklyn must also 7) submit the color labels for the Nature's Own Pomegranate-Blueberry Green Tea (5 calorie) and Nature's Own Pear White Tea (5 calorie) products in the 16-ounce packaging. Lastly, 8) Brooklyn needed to submit current copies of the Private Labeling Application and Private Label Registration for the Inko's, Blue Buddha, Planet Choice and Greenway products. All these materials were due at Brooklyn's 'next renewal.'

Corrective Action Reports of August 27, 2018 and December 5, 2018, again address the noncompliances and reveal that Brooklyn still hadn't submitted the requested documentation for noncompliances 3 – 8 described above. Subsequently, on February 1, 2019, Brooklyn submitted its renewal documentation; however, it still didn't address the noncompliances and submit all requested documentation. Therefore, OCIA issued a Notice of Noncompliance on February 22, 2019 for Brooklyn's failure to address the minor noncompliances which were due at its 2019 renewal. The notice delineated the noncompliances and documentation needed to resolve each. OCIA issued a Notice of Proposed Suspension after Brooklyn's continued failure to resolve the noncompliances.

The February 14, 2018 Settlement Agreement between NOP and Brooklyn states it is effective for 1 year, which is February 13, 2019. Therefore, Brooklyn's 2019 certification renewal due on February 1, 2019 is subject to the terms of the Settlement Agreement. The noncompliances include some issues not covered in the Settlement Agreement, but for which Brooklyn is also responsible. Also, Brooklyn has been certified since June 6, 2006, and should

be well aware of the documentation required to maintain certification, including renewal materials.

However, Brooklyn states in its Appeal that the documentation discussed above was due at its next renewal, which Brooklyn understood to be in February 1, 2020, not 2019. Brooklyn states that it submitted its 2019 renewal materials on February 1, 2019, prior to OCIA issuing the February 22, 2019 Notice of Noncompliance and April 1, 2019 Notice of Proposed Suspension. However, these noncompliances and the documentation needed to resolve them were clearly set forth in the June 28, 2018 and August 27, 2018 Corrective Action Reports, as well as the December 5, 2018 Corrective Action Report, all issued prior to Brooklyn submitting its 2019 renewal materials.

There does seem to be confusion regarding the Nature's Own Pomegranate-Blueberry Green Tea and Nature's Own Pear White Tea, for which OCIA requested labels for the 5 calorie, 16-ounce packaging, which OCIA states are not listed on Brooklyn's OSP. Brooklyn states these products and a 64-ounce version of the Pomegranate-Blueberry product aren't produced, and won't be produced, at their facility and therefore they never had actual printed labels. Brooklyn submitted its Organic Product list where a notation of "NOT MADE" is written next to these 3 products; OCIA confirms this list was submitted at the February 1, 2019 renewal. However, Brooklyn also submitted a Product/Service List with its renewal which lists those 3 products among those for which certification was being requested. This is contrary to Brooklyn's claim that they asked OCIA to remove the products from their list. An Annual Summary of Organic Production and Sales- Handling for January 1, 2018 to December 31, 2018, and submitted with the renewal, doesn't show any of the Pear White Tea or the 64-ounce Pomegranate-Blueberry Green Tea being produced, but does show 894 units of the 16-ounce Pomegranate-Blueberry

Green Tea were produced. Further, OCIA states Brooklyn submitted labels for the 64-ounce Pomegranate-Blueberry and a 64-ounce Pear White Tea, which were noncompliant. Brooklyn states that it also submitted the organic certificate for the [REDACTED] sugar ingredient and isn't using the [REDACTED] product; and that [REDACTED] is no longer a supplier and has been replaced by [REDACTED]

In conclusion, Brooklyn has been unable to come into and remain in compliance regarding several recordkeeping requirements. Brooklyn entered into a Settlement Agreement with NOP on February 14, 2018 to resolve a prior Notice of Proposed Suspension on recordkeeping noncompliances, but several months later still had unresolved noncompliances. OCIA attempted to work with Brooklyn, issuing Corrective Action Reports on June 28, 2018, August 27, 2018, and December 5, 2018, and giving Brooklyn until its next renewal date, February 1, 2019 to submit the majority of missing documentation. However, Brooklyn's subsequent February 1, 2019 renewal application didn't include the requested materials. Brooklyn has also submitted conflicting documentation and made conflicting statements as to certain products it may or may not be producing and for which it is or isn't requesting certification. Brooklyn has displayed an inability to come into and remain in compliance at this time.

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. However, Brooklyn violated the organic regulations at 7 C.F.R. §205.102; 7 C.F.R. §205.103; 7 C.F.R.

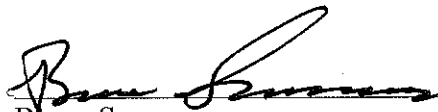
§205.201; 7 C.F.R. §205.301; 7 C.F.R. §205.302; 7 C.F.R. §205.303; 7 C.F.R. §205.400; and 7 C.F.R. §205.401. These noncompliances do not allow for continued certification at this time. Brooklyn was given the chance to come into full compliance through a previous Settlement Agreement with NOP and did not do so. The repeated noncompliances over time demonstrate a systemic inability to comply, which justifies a suspension of Brooklyn's organic certification.

DECISION

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

If Brooklyn waives the hearing, the Agricultural Marketing Service will direct OCIA to issue a Notice of Suspension. At any time after suspension, Brooklyn 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." Brooklyn may work with any certifier to complete a request for reinstatement.

Done at Washington, D.C., on this 27th
day of November, 2019.


Bruce Summers
Administrator
Agricultural Marketing Service