

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)	
)	
Productos Organicos)	
el Capricho S.P.R. de R.L. de C.V.)	Administrator's Decision
)	APL-031-21
Baja California Sur, Mexico)	
)	

This Decision responds to an Appeal (APL-031-21) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Productos Organicos el Capricho S.P.R. de R.L. de C.V. (Capricho) of Baja California Sur, 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 believe they are adversely affected by a noncompliance decision of a certifying agent may appeal

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

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. On February 6, 2018, Capricho was certified organic in crops by OTCO.
2. On December 9, 2020, OTCO issued a Notice of Noncompliance to Capricho.
3. On January 29, 2021, OTCO issued a Notice of Proposed Suspension.
4. On April 7, 2021, OTCO issued a Notice of Denial of Mediation to Capricho’s mediation request of March 24, 2021.
5. On May 3, 2021, Capricho filed an Appeal.
6. On June 4, 2021, USDA/AMS entered into a Settlement Agreement with Capricho.
7. On March 25, 2022, OTCO reported to NOP that Capricho had breached the June 4, 2021 Settlement Agreement.
8. On March 30, 2022, NOP issued a Notice of Noncompliance and Request for Corrective Action to Capricho.

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...”

Certifier OTCO issued a Notice of Noncompliance on December 9, 2020, stating that Capricho had failed to pay outstanding certification-related fees. OTCO had issued Invoice 20142148 to Capricho on October 31, 2020, for \$785.04 representing inspection fees; and Invoice 20141300 on August 25, 2020, for \$957.00 representing 2020 certification fees. After Capricho again failed to submit the outstanding fees, OTCO issued a Notice of Proposed Suspension on January 29, 2021. Capricho requested mediation on March 24, 2021, which OTCO denied on April 7, 2021. Capricho subsequently filed an Appeal on May 3, 2021, stating that it had paid all the fees owed to OTCO in full. OTCO confirmed to NOP on May 6, 2021 that Capricho had paid all outstanding fees on April 23, 2021.

Although Capricho violated the organic regulations at 7 C.F.R. §205.400(e) and 7 C.F.R. §205.406, by failing to pay certification-related fees over several months despite invoices and reminders issued by OTCO, the noncompliance had been subsequently resolved and no other noncompliances were noted by OTCO. Therefore, NOP offered Capricho a Settlement Agreement which was executed on June 4, 2021. Pursuant to the agreement, Capricho agreed to pay all certification-related fees, including the yearly certification fee and inspection-related fees, for 2021 and 2022, by the deadline set by OTCO unless Capricho notified OTCO before the deadline and OTCO agreed to an extended deadline for submission of the fees. Capricho also agreed to respond to all requests for documentation and information by the deadline set by OTCO unless OTCO agreed to an extension.

However, on March 25, 2022, OTCO reported to NOP that Capricho had not paid its certification fees, had surpassed OTCO’s 90-day allowance for payment of fees, and wasn’t

responding to OTCO's communications. OTCO had sent past due reminders to Capricho on January 13, 2022, February 1, 2022, and March 14, 2022. Capricho is delinquent on paying its 2022 annual renewal certification fees of \$1,421.00, which were due December 23, 2021; and the inspection fees for the November 12, 2021 inspection, in the amount of \$1,447.24, which were due January 8, 2022. The total amount Capricho owes OTCO is \$2,868.24.

On March 30, 2022, NOP issued a Notice of Noncompliance and Request for Corrective Action to Capricho, giving Capricho 20 days from the receipt of the notice to comply with the terms of the Settlement Agreement and take the corrective action of paying the overdue certification fees owed to OTCO. At the end of the allowed 20 days, NOP contacted OTCO and learned that Capricho has still not paid the certification fees.

Capricho agreed, per Term 4A of the June 4, 2021 Settlement Agreement to pay all certification-related fees, including the yearly certification fee and inspection-related fees for 2021 and 2022 by the deadline unless OTCO agreed to an extension. Further, the Settlement Agreement in Term 4D states that, "Capricho agrees that the failure to abide by the terms of paragraphs (A-B) immediately above shall result in USDA, AMS possibly pursuing an administrative hearing process against Capricho." Clause 3D of the Settlement Agreement states that, "Capricho 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 Capricho 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 Capricho on June 4, 2021 with the executed agreement also stated that, "... failure to abide by the terms of the

agreement shall automatically void the settlement agreement and USDA, AMS may pursue an administrative hearing process.”

CONCLUSION

Capricho has violated the organic regulations at 7 C.F.R. §205.400, and 7 C.F.R. §205.406, by failing to pay the applicable certification fees time after time despite Invoices from OTCO, reminders, Notices of Noncompliance, and a June 4, 2021 Settlement Agreement with NOP which Capricho has breached, thereby reviving the initial January 29, 2021 Notice of Proposed Suspension. Capricho can't remain certified at this time.

DECISION

Capricho's May 3, 2021 Appeal of the January 29, 2021 Notice of Proposed Suspension is denied, and Capricho's certification as to crops is suspended. Pursuant to the organic regulations at 7 CFR §205.662(f), Capricho may apply for reinstatement at any time after it has made full payment of all delinquent certification fees to OTCO. The request for reinstatement must be accompanied by evidence demonstrating that said full payment has been made, and that Capricho is also in compliance with all other organic regulations. While under suspension, Capricho may not sell, label, or represent any products as organic.

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

Done at Washington, D.C., on this _____
day of _____, 2022.

BRUCE SUMMERS Digitally signed by BRUCE
SUMMERS
Date: 2022.05.09 21:17:18 -04'00'

Bruce Summers
Administrator
Agricultural Marketing Service