

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
)
)
Zhangpu Tongzheng)
Food Co., Ltd.) **Administrator’s Decision**
Fujian, China) **APL-037-20**
)

This Decision responds to an appeal (APL-037-20) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Zhangpu Tongzheng Food Co., Ltd. (Zhangpu) by Kiwa BCS Oko-Garantie GmbH (Kiwa), 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 November 3, 2011, Zhangpu was certified organic in crops, specifically plums, by Kiwa.
2. On June 3, 2019, Kiwa issued a Notice of Proposed Suspension to Zhangpu.
3. On November 26, 2019, Zhangpu and Kiwa entered into a Settlement Agreement to resolve the prior adverse action.
4. On January 23, 2020, Kiwa issued a Notice of Proposed Suspension to Zhangpu after finding that Zhangpu had failed to abide by the terms of their Settlement Agreement.
5. On February 3, 2020, Zhangpu requested mediation; however, Kiwa hadn't issued a decision on whether to grant mediation prior to Zhangpu filing an Appeal.
6. On February 27, 2020, Zhangpu filed an Appeal which was accepted.
7. On June 24, 2020, NOP offered a Settlement Agreement to Zhangpu to mediate terms that would bring the operation into full compliance. Zhangpu did not respond to this offer.

DISCUSSION

The USDA organic regulations at 7 C.F.R. §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: ... (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 §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling, state that, “To be sold or labeled as “100 percent organic,” ...the product must be produced and handled without the use of: (a) Synthetic substances and ingredients....”

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 ... 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 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; (2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable; (3) A description of the monitoring practices and procedures to be performed and maintained...”

The organic regulations at §205.202, Land requirements, state that, “Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic,” must: ... (b) Have had no prohibited substances, as listed in §205.105, applied to it for a period of 3 years immediately preceding harvest of the crop...”

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...”

Certifier Kiwa issued a Notice of Proposed Suspension to Zhangpu, citing to a breach of their November 26, 2019 Settlement Agreement, which had required Zhangpu to take corrective actions after a finding of a prohibited substance during a prior inspection.

Zhangpu admitted in its Appeal that it missed the deadline for submitting the required documentation regarding corrective actions it was to take.

The evidence substantiates that on April 8, 2018, Kiwa conducted an inspection of Zhangpu's operation and took a sample of plum fruit from Plot TZ-1 of Zhangpu's plum crop. A subsequent Alex Stewart China, Ltd. lab report of April 19, 2018, shows that prohibited substance/fungicide Pyraclostrobin at 0.073 mg/kg was found on the sample. There is no EPA tolerance level for this substance. Therefore, it is prohibited in agricultural production at any level. Kiwa issued a Notice of Proposed Suspension on June 3, 2019, citing to the prior finding of the prohibited substance on plums in the TZ-1 plot sampled at the April 8, 2018 inspection. The Inspection Reports from April 2018 show that Zhangpu previously engaged in only conventional production of plums, and that an internal investigation revealed that the managing personnel of Plot TZ-1 had secretly used the prohibited substance Pyraclostrobin without the permission of Zhangpu. Therefore, Zhangpu was also instructed by Kiwa to remove Plot TZ-1 from organic production and that the plums harvested from that plot could not be sold as organic.

Zhangpu and Kiwa subsequently entered into a Settlement Agreement on November 26, 2019, pursuant to which Zhangpu agreed to submit a detailed action plan to Kiwa with a detailed description of the monitoring system practices and procedures to be performed and maintained by Zhangpu including the frequency with which they would be performed, to prevent a reoccurrence of the use of prohibited substances on the plum crop in TZ-1 or any other plot of Zhangpu's operation. The deadline for submission of the plan was set at December 31, 2019.

Zhangpu also agreed to Kiwa conducting 2 additional inspections per year in 2020 and 2021, at Zhangpu's expense, and at which samples would be taken of the plum crop and Kiwa would verify the implementation of Zhangpu's corrective action plan. The Settlement Agreement contained a provision that failure to meet the terms of the agreement would void the agreement and result in issuance of a Notice of Proposed Suspension. Therefore, after Zhangpu failed to submit the detailed corrective action plan required under the Settlement Agreement by the stated deadline, Kiwa issued a Notice of Proposed Suspension on January 23, 2020.

Zhangpu admits in its Appeal that it missed the submission deadline for the corrective action plan required per the Settlement Agreement. With its Appeal, Zhangpu submitted its internal investigative report of February 13, 2020, which acknowledges the finding of the prohibited substance in Plot TZ-1 and that the use of the fungicide had been confirmed with its personnel with the spraying apparatus being found on the edge of the warehouse. The report states that Zhangpu has instructed its management personnel and operators that they can't use this substance, and that training was conducted on June 26 and 27, 2019 on production-related matters and that a supervision-management program has been established to prevent future use of the substance. Training records from June 2019 show training of 6 personnel on the Operational Techniques for Production and Cultivation of Organic Plum, covering various topics including the prevention of the use of prohibited substances and also including pictures taken at the training. Zhangpu also submitted its Base Operating Procedures which cover crop planting, harvest and transportation of crops, warehouse storage and sales, fertilizer usage, machinery, the prevention of contamination by prohibited substances, input management, the prevention of commingling of organic and non-organic production, and quality control.

NOP concluded that although Zhangpu failed to meet the deadline set in the Zhangpu-Kiwa Settlement Agreement for submitting a detailed corrective action plan to prevent future contamination of organic crops by a prohibited substance, it has now prepared documents setting forth corrective actions and conducted training of personnel. However, Kiwa needed to review this documentation for sufficiency. Therefore, NOP offered a Settlement Agreement to Zhangpu, whereby it would agree to several terms to come into compliance, including implementing its corrective action plan and additional oversight mechanisms.

The offered NOP Settlement Agreement was sent to Zhangpu initially on June 24, 2020, to the same email address from which Zhangpu had submitted its Appeal and which appears on its Application for Certification – along with a cover letter stating that Zhangpu had 15 days from the date of receipt of the offer to sign and date the settlement agreement and return it to NOP. The letter provided the phone number and email address of the NOP Appeals Specialist to which Zhangpu could submit any questions. After receiving no response, NOP transmitted the documents three additional times, on July 8, 2020 and on July 14, 2020, and on September 4, 2020. However, as of the time of this Decision, NOP has not received a reply from Zhangpu.

The prior November 26, 2019 Settlement Agreement between Zhangpu and Kiwa states that Zhangpu agrees to the specified corrective actions and to implement them by the December 31, 2019 deadline set in the agreement. The Zhangpu-Kiwa agreement also states that, “The operator (Zhangpu) agrees that failure to comply with this settlement agreement shall automatically void numeral 1 above, and that Kiwa BCS may thereafter institute a proposed suspension of certification against the operator.” The “numeral 1” referenced states, “Kiwa BCS agrees not to suspend/revoke the certification of the operator based on the previously detected

noncompliance, as listed below, and which gave rise to this agreement.” Zhangpu signed the settlement agreement with Kiwa.

However, Zhangpu didn't comply with the terms of the Zhangpu-Kiwa Settlement Agreement, prompting Kiwa to issue the forewarning Notice of Proposed Suspension on January 23, 2020. Zhangpu failed to take the agreed upon corrective actions, pursuant to its agreement with Kiwa, to correct noncompliances which violated the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.105; 7 C.F.R. §205.201; and 7 C.F.R. §205.202. Zhangpu filed an Appeal to the notice admitting that it didn't meet the terms of the agreement with Kiwa. However, when presented with a settlement offer by NOP, by which Zhangpu was being given a second chance to meet the terms of the prior agreement with Kiwa, Zhangpu didn't reply.

Additionally, during the pendency of the Appeal, Kiwa notified NOP on September 15, 2020, that a sampling and testing of plum leaves on May 7, 2020, had again resulted in a finding of a prohibited substance. The laboratory report of June 2, 2020 from Alex Stewart China, Ltd. shows that prohibited substance/fungicide Pyraclostrobin at 0.065 mg/kg was found on the sample. As stated above, there is no EPA tolerance level for this substance and therefore it is prohibited in agricultural production at any level. A picture of the sample bag attached to the laboratory report documented that the sample was taken from Field TZ-3. The lab report of April 19, 2018 from the same laboratory had revealed a finding of the same prohibited substance/fungicide. As noted above, Zhangpu acknowledged this prior finding and stated in its February 13, 2020 internal investigative report that it instructed its management personnel and operators that they can't use this substance, and that it had conducted training on this and other matters in 2019. However, the May 7, 2020 inspection, which included the sampling and testing of plum leaves, again found the prohibited substance from a different field.

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, Zhangpu has been unable to comply with the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.105; 7 C.F.R. §205.201; and 7 C.F.R. §205.202. Therefore, in accordance with the terms of the breached Zhangpu-Kiwa settlement agreement, Kiwa issued a Notice of Proposed Suspension to Zhangpu. Additionally, evidence shows that Zhangpu has continued to use a prohibited substance on its plum crop. Therefore, pursuant to 7 C.F.R. §205.400, NOP finds that Zhangpu can't remain certified at this time.

DECISION

Zhangpu's February 27, 2020 Appeal of the January 23, 2020 Notice of Proposed Suspension is denied, and Zhangpu's certification is suspended. Zhangpu's organic certification is to be suspended for 3 years from the date of the last sampling for which prohibited substances were found, namely May 7, 2020. Barring the interim use of prohibited substances on the land or crops, Zhangpu's operation will be eligible to apply for reinstatement of organic certification on May 6, 2023. In addition, Zhangpu may not sell, represent, or label its agricultural products as

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

Done at Washington, D.C., on this 2nd
day of November, 2020.

**BRUCE
SUMMERS**

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SUMMERS
Date: 2020.11.01 09:13:56 -05'00'

Bruce Summers
Administrator
Agricultural Marketing Service