

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) P.Q. Docket No. 09-0141  
)  
Nichingsiang Fish Farm, d/b/a )  
Ni Ching Fish Farm, d/b/a )  
Ni Ching Hsiang Fish Farm, )  
)  
Respondent ) **Decision and Order**

**PROCEDURAL HISTORY**

On June 26, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint. The Administrator instituted this proceeding under the Plant Protection Act, as amended (7 U.S.C. §§ 7701-7786) [hereinafter the Plant Protection Act]; regulations issued under the Plant Protection Act (7 C.F.R. pt. 360); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under Certain Acts (7 C.F.R. pt. 380) [hereinafter the Rules of Practice].

The Administrator alleges that, on or about May 23, 2005, Nichingsiang Fish Farm imported into the United States from Taiwan 13 2-kg bags of *Ipomoea aquatica*

seeds (postal parcel number CC006849002 TW) without a permit, in violation of 7 C.F.R. § 360.300(a)(1) (Compl. ¶ III).

The Hearing Clerk served Nichingsiang Fish Farm with the Complaint, the Administrator's Motion for Adoption of Proposed Default Decision and Order, and the Administrator's Proposed Default Decision and Order.<sup>1</sup> Nichingsiang Fish Farm failed to file an answer to the Complaint within 20 days after service, as required by 7 C.F.R. § 1.136(a), and failed to file objections to the Administrator's Motion for Adoption of Proposed Default Decision and Order, and the Administrator's Proposed Default Decision and Order within 20 days after service, as required by 7 C.F.R. § 1.139.

On May 25, 2010, in accordance with 7 C.F.R. § 1.139, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Default Decision and Order concluding, on or about May 23, 2005, Nichingsiang Fish Farm imported into the United States from Taiwan 13 2-kg bags of *Ipomoea aquatica* seeds (postal parcel number CC006849002 TW) without a permit, in violation of the Plant Protection Act and 7 C.F.R. § 360.300(a)(1) and assessing Nichingsiang Fish Farm a \$20,000 civil penalty (Default Decision and Order at 2).

On July 27, 2010, Nichingsiang Fish Farm filed a timely appeal to the Judicial Officer. On August 19, 2010, the Administrator filed Complainant's Response to

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<sup>1</sup>Memorandum to the file dated April 6, 2010, signed by the Hearing Clerk, L. Eugene Whitfield.

Respondent's Appeal Petition, and on August 23, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision and Order.

## **DECISION**

### **Decision Summary**

Nichingsiang Fish Farm failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to 7 C.F.R. § 1.139.

### **Findings of Fact**

1. Nichingsiang Fish Farm has a mailing address of 91600 82nd Avenue, Thermal, California 92274.
2. On or about May 23, 2005, Nichingsiang Fish Farm imported into the United States from Taiwan 13 2-kg bags of *Ipomoea aquatica* seeds (postal parcel number CC006849002 TW) without a permit.

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the Findings of Fact, Nichingsiang Fish Farm has violated the Plant Protection Act and 7 C.F.R. § 360.300(a)(1).

### **Nichingsiang Fish Farm's Appeal Petition**

Nichingsiang Fish Farm requests an opportunity to respond to the Complaint stating “to its best knowledge, NCH Fish Farm had never been served with any complaint” and Mr. Ching Hsiang Ni, the founder, key manager, and operator of Nichingsiang Fish Farm, passed away on February 26, 2009, and “since then, NCH Fish Farm has encountered extreme difficulty in its day-to-day management and operation.” (Appeal Pet. at 1.)

The Rules of Practice provide for service of a complaint on a party other than the Secretary of Agriculture, as follows:

#### **§ 1.147 Filing; service; extensions of time; and computation of time.**

....  
(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1). The record establishes that, on March 3, 2010, the Hearing Clerk mailed the Complaint to Nichingsiang Fish Farm by certified mail.<sup>2</sup> The United States Postal Service marked the word “unclaimed” on the envelope containing the Complaint and returned the envelope containing the Complaint to the Hearing Clerk.<sup>3</sup> On April 6, 2010, the Hearing Clerk remailed the Complaint to Nichingsiang Fish Farm by ordinary mail using the same address as the Hearing Clerk used when mailing the Complaint by certified mail.<sup>4</sup> Therefore, I conclude that, on April 6, 2010, the Hearing Clerk served Nichingsiang Fish Farm with the Complaint in accordance with the Rules of Practice, and I reject Nichingsiang Fish Farm’s contention that it has never been served with the Complaint.

Moreover, the disruption to the operation of Nichingsiang Fish Farm caused by Mr. Ching Hsiang Ni’s unfortunate death on February 26, 2009, 1 year 2 months prior to the date Nichingsiang Fish Farm was required to answer the Complaint, is not a basis for setting aside the Chief ALJ’s Default Decision and Order.

For the foregoing reasons, the following Order is issued.

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<sup>2</sup>United States Postal Service Domestic Return Receipt for article number 7005 1160 0001 3559 9723.

<sup>3</sup>See the envelope marked as having been returned to the Hearing Clerk on April 5, 2010, and attached to which is United States Postal Service Domestic Return Receipt for article number 7005 1160 0001 3559 9723.

<sup>4</sup>Memorandum to the file dated April 6, 2010, signed by the Hearing Clerk, L. Eugene Whitfield.

**ORDER**

Nichingsiang Fish Farm is assessed a \$20,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture  
APHIS  
U.S. Bank  
P.O. Box 979043  
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture within 60 days after service of this Order on Nichingsiang Fish Farm. Nichingsiang Fish Farm shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 09-0141.

## **RIGHT TO JUDICIAL REVIEW**

The Order assessing Nichingsiang Fish Farm a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.<sup>5</sup> Nichingsiang Fish Farm must seek judicial review within 60 days after entry of the Order.<sup>6</sup> The date of entry of the Order is August 24, 2010.

Done at Washington, DC

August 24, 2010

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William G. Jenson  
Judicial Officer

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<sup>5</sup>7 U.S.C. § 7734(b)(4).

<sup>6</sup>28 U.S.C. § 2344.