

(4) The position carries no fixed time limitation as to length of appointment; and

(5) The work schedule (that is, part-time or full-time) of the position is the same as that of the position held by the employee at the Panama Canal Commission.

(c) A Panama Canal Commission employee who resigns prior to receiving an official written notice that he or she will not be offered reasonably comparable employment shall be considered to be voluntarily separated. Section 550.706(a) shall be applied, as appropriate, to any employee who resigns after receiving such notice.

(d) Except as otherwise provided by paragraphs (a) through (c) of this section, the provisions of this subpart remain applicable to Panama Canal Commission employees.

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BILLING CODE 6325-01-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 920

[Docket No. FV97-920-2 FR]

#### Kiwifruit Grown in California; Relaxation in Pack Requirements

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule increases the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and increases the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count. This relaxation was recommended by the Kiwifruit Administrative Committee (committee), the agency responsible for local administration of the marketing order. The committee expects this rule to reduce handler costs, increase grower returns, and allow the kiwifruit industry to meet the increased demand for lower priced kiwifruit.

**EFFECTIVE DATE:** This final rule becomes effective September 22, 1997.

**FOR FURTHER INFORMATION CONTACT:** Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey St., suite 102B, Fresno,

California 93721; telephone: (209) 487-5901, Fax: (209) 487-5906 or George Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456, telephone: (202) 720-2491, Fax: (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Order No. 920 (7 CFR part 920), as amended, regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule will increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by

count, and will increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count.

Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4) of the rules and regulations outlines the pack requirements for fresh shipments of California kiwifruit. Under § 920.302(a)(4)(i) of the rules and regulations, kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays shall be of proper size and fairly uniform in size. Section 920.302(a)(4)(ii) outlines pack requirements for kiwifruit packed in cell compartments, cardboard fillers or molded trays and includes a table that specifies numerical size designations and the size variation tolerances. It also outlines pack requirements for kiwifruit packed in bags, volume fill or bulk containers, and includes a separate table that specifies numerical size designations and size variation tolerances. This section provides that not more than 10 percent, by count of the containers in any lot may fail to meet pack requirements. It also provides that not more than 5 percent, by count, of kiwifruit in any container, (except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent) may fail to meet pack requirements. This size variation tolerance does not apply to other pack requirements such as how the fruit fills the cell compartments, cardboard fillers, or molded trays, or any weight requirements.

Prior to the 1995-1996 season, handlers were experiencing difficulty meeting the size variation tolerance for Size 45 kiwifruit. Size 45 is the minimum size. The committee determined that the best solution was to increase the size variation tolerance, by count, in any one container, for Size 45 kiwifruit. Section 920.302 (a)(4) was revised by a final rule issued June 21, 1995 (60 FR 32257) to include a provision that increased the size variation tolerance, by count, in any one container, from 5 percent to 10 percent for Size 45 kiwifruit.

This increased size variation tolerance for Size 45 kiwifruit has been utilized for two seasons. Handlers are still experiencing difficulty discerning if size variation tolerances for smaller fruit are being met during the packing process.

As the size of the kiwifruit increases, so does the size of the variation allowed. In the larger kiwifruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 42 and

Size 45 packs, however, when the respective 5 and 10 percent tolerances are exceeded, the variation is difficult to detect visually. A size variation of 1/4-inch (6.4 mm) difference is allowed between the widest and narrowest kiwifruit in any Size 42 container utilizing cell compartments, cardboard fillers or molded trays and a 3/8-inch (9.5 mm) size variation difference is allowed between the widest and narrowest kiwifruit in a Size 42 bag, volume fill or bulk container. A 1/4-inch (6.4 mm) size variation difference is allowed between the widest and narrowest kiwifruit in any Size 45 container.

Packers must separate the round and flat shaped kiwifruit into two different containers in order to meet the size variation requirements. During the packing operation, a mechanical sizer routinely sorts the kiwifruit by shape and size. The kiwifruit which is missed by the mechanical sizer must be manually sorted by the handler. If size variation tolerances are not being met, packers must slow down the pack line and increase efforts to separate the round and flat kiwifruit to ensure that current size variation requirements are met. Since it is not economically feasible for each handler to be equipped with a caliper to measure size variation, they rely on their visual judgement. During inspection, calipers are utilized by the inspectors to determine if the size variation is met for Size 42 and Size 45 containers. The industry views this separation of Size 42 and 45 round and flat shaped kiwifruit into two different containers by shape as an added cost, that is particularly detrimental because this fruit returns little if any money back to the grower. The higher costs of sizing the fruit during the packing operation may have cost the industry sales as well.

Further, this sizing of kiwifruit may not be apparent to consumers. Usually a pallet of Size 42 kiwifruit includes containers of round fruit and containers of flat fruit. When a pallet of Size 42 kiwifruit reaches the retailer, a container of round fruit may be displayed. As the kiwifruit is sold, a container of the Size 42 flat fruit may be commingled with the remaining round fruit. The consumer will then see this commingled fruit with slightly different shapes on display. The size variation standards that the packer strived so hard to stay within during the packing process are erased.

The committee met on April 16, 1997, and recommended by a vote of eight in favor and one opposed to relax the pack requirements in effect under the order pertaining to size variation tolerances for Size 42 and Size 45 kiwifruit. The committee recommended increasing

size variation tolerances for kiwifruit, in any one container, from 5 percent, by count, to 10 percent, by count, for Size 42 kiwifruit and from 10 percent, by count, to 25 percent, by count, for Size 45 kiwifruit and further recommended that this rule be effective in September for the 1997–1998 season. The season normally begins the end of September or the first week of October. The increased size variation tolerances will apply to any container of kiwifruit.

This final rule will reduce costs for handlers by allowing them to operate in a more efficient and cost-effective manner and will enable the industry to meet the increased demand in the marketplace for lower priced, uniform containers of kiwifruit. Through these cost savings, growers will be expected to receive higher returns.

There is support in the industry to increase these size variation tolerances. The one committee member who opposed the recommendation believes it will lower the quality of California kiwifruit.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, the AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 60 handlers of California kiwifruit subject to regulation under the order and approximately 450 kiwifruit producers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000, and small agricultural producers have been defined as those having annual receipts of less than \$500,000. One of the 60 handlers subject to regulation has annual kiwifruit sales of at least \$5,000,000, and the remaining 59 handlers have sales less than \$5,000,000, excluding receipts from any other sources. Ten of the 450 producers subject to regulation have annual sales of at least \$500,000, and the remaining 440 producers have sales less than \$500,000, excluding receipts from any other sources. Therefore, a majority of

handlers and producers of California kiwifruit may be classified as small entities.

Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4)(ii) outlines pack requirements for kiwifruit packed in any container and contains tables that specify numerical size designations and size variation tolerances. This rule will increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and will increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count. This relaxation was recommended by the committee, the agency responsible for local administration of the marketing order.

In the larger kiwifruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 42 and Size 45, however, when the respective 5 and 10 percent tolerances are exceeded, the variation is difficult to detect visually. However, packers must separate the round and flat shaped kiwifruit into two different containers in order to meet the size variation requirements within each container for Size 42 and Size 45 kiwifruit. The industry views this separation of Size 42 and 45 round and flat shaped kiwifruit into two different containers by shape as an added cost, that is particularly detrimental because this fruit returns little if any money back to the grower. The higher costs of sizing the fruit during the packing operation may have cost the industry sales as well.

Further, this sizing of kiwifruit may not be apparent to consumers. Usually a pallet of Size 42 kiwifruit includes containers of round fruit and containers of flat fruit. When a pallet of Size 42 kiwifruit reaches the retailer, a container of round fruit may be displayed. As the kiwifruit is sold, a container of the Size 42 flat fruit may be commingled with the remaining round fruit and the current size variation standards that the packer strived so hard to stay within during the packing process are erased.

This final rule should reduce costs for handlers by allowing them to operate in a more efficient and cost-effective manner and to meet the increased demand in the marketplace for lower priced, uniform containers of kiwifruit.

Approximately 74 percent of all kiwifruit shipped during the 1996–1997 season was shipped in bags, volume fill or bulk containers. The increased tolerance for Size 42 from 5 percent, by count, to 10 percent, by count, will increase the number of kiwifruit that

may exceed the  $\frac{3}{8}$ " size variation requirement in bags, volume fill, or bulk containers. Since the individual fruit weight of a Size 42 kiwifruit is approximately 0.160 ounces, a 22-pound volume fill container of Size 42 kiwifruit will contain approximately 138 fruit. An increased tolerance of 10 percent per container will allow approximately 14 kiwifruit to exceed the  $\frac{3}{8}$ " tolerance versus 7 kiwifruit at the 5 percent tolerance rate. As a result, handlers will be able to operate more efficiently with this increased tolerance.

The increased tolerance for Size 45 from 10 percent, by count, to 25 percent, by count, will increase the number of kiwifruit that may exceed the  $\frac{1}{4}$ " size variation requirement. Since the individual fruit weight of a Size 45 kiwifruit is approximately 0.145 ounces, a 22-pound volume fill container of Size 45 kiwifruit contains approximately 151 kiwifruit. An increased tolerance of 25 percent, by count, per container will allow 37 kiwifruit out of 151 kiwifruit to exceed the  $\frac{1}{4}$ " tolerance versus 15 kiwifruit at the 10 percent tolerance rate. With this increased tolerance, handlers expect to be able to pack round and flat shaped kiwifruit into one container, thereby reducing costs.

This action is not expected to reduce the quality of the kiwifruit pack. Consumers will not see any changes to the product at retail, because the produce staff at the stores already commingle round and flat kiwifruit in their display bins. Also, the allowed variation will be at a reasonable level and retailers will still receive a fairly uniform box of fruit.

California kiwifruit packing operations range from very small operations, employing as few as 2 persons, to large operations employing as many as 150 people per shift. The 1997–1998 season crop estimate is projected to be 10 to 12 million tray equivalents. A tray equivalent is 7 pounds of fruit. Handlers pack from several hundred to over 25,000 tray equivalents during the season. Packing costs for volume fill containers range from approximately \$0.25 to \$0.75 per container. The 60 packing sheds can be divided into 3 size categories of small, medium, and large. Small sheds consist of 25 employees or less, medium sheds 26–75 employees, and large sheds consist of 76 or more employees. The committee anticipates that labor devoted to packout, on average, will be decreased by 1 to 3 employees per packing shed. The committee estimates cost savings of approximately \$0.01 per tray equivalent. Based on a projected crop estimate of 10 to 12 million tray equivalents, a savings of \$100,000 to

\$120,000 could be realized for the 1997–1998 season.

The committee discussed numerous alternatives to this change, including eliminating all pack requirements, increasing the size variation tolerance to establish a Size 42–45 container by blending the packing of Size 42 and Size 45 kiwifruit into one container, reducing the minimum size from Size 45 to Size 49, eliminating Size 45 and making Size 42 the minimum size, making Size 45 requirements more restrictive, reducing the maximum to 53 kiwifruit in the 8 pound sample, lowering the minimum maturity to 6.2 percent, and increasing the degree, or size of the variation allowed, from  $\frac{1}{4}$ -inch to  $\frac{3}{8}$ -inch for Size 45 kiwifruit. After lengthy discussion, all of these alternatives were deemed unacceptable. The general consensus was that eliminating all pack requirements could adversely affect quality. The committee wishes to continue utilizing separate Size 42 and Size 45 containers at this time because handlers are able to market each size. Reducing the minimum size from Size 45 to Size 49 would not have benefitted the industry because growers and handlers could not make a profit growing, packing and selling Size 49.

It was the general consensus that eliminating Size 45 and making Size 42 the minimum size, or making Size 45 requirements more restrictive, by reducing the maximum to 53 kiwifruit in the 8 pound sample, would have imposed more stringent requirements on California growers and handlers and eliminate salable fruit from markets. Committee members deemed lowering the minimum maturity to 6.2 percent unacceptable as kiwifruit picked below the current minimum maturity of 6.5 percent may shrivel in cold storage. The last alternative considered was to increase the degree, or size of the variation allowed, from  $\frac{1}{4}$ -inch to  $\frac{3}{8}$ -inch for Size 45 kiwifruit. It was the consensus of the committee that such an increase would have allowed undesired blending of undersize kiwifruit. The end result would have been a container with visibly different fruit sizes, including undersize fruit. This alternative was deemed not acceptable as the industry desires to pack a uniform container of kiwifruit.

This final rule will relax pack requirements under the kiwifruit marketing order and these requirements will be applied uniformly to all handlers. This action will not impose any additional reporting or recordkeeping requirements on either small or large kiwifruit handlers. As with all Federal marketing order programs, reports and forms are

periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

The committee's meeting was widely publicized throughout the kiwifruit industry and all interested persons were invited to attend the meeting and participate in committee deliberations on all issues. Like all committee meetings, the April 16, 1997, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was issued by the Department on July 2, 1997, and published in the **Federal Register** on Wednesday, July 9, 1997 (62 FR 36743). Copies of the rule were mailed to all committee members and kiwifruit handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register.

A 30-day comment period was provided to allow interested persons to respond to the proposal. No comments were received.

After consideration of all relevant matter presented, including the information and recommendation submitted by the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because these changes in size variation tolerances relieve restrictions on handlers and should apply to all Size 42 and Size 45 kiwifruit shipped during the 1997–98 season. Such shipments are expected to begin at the end of September or early October. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule, and no comments were received.

#### **List of Subjects in 7 CFR Part 920**

Kiwifruit, Marketing agreements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

#### **PART 920—KIWIFRUIT GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 920 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. In § 920.302, paragraph (a)(4)(ii) is amended by revising the last sentence to read as follows:

**§ 920.302 Grade, size, pack and container regulations.**

(a) \* \* \*

(4) \* \* \*

(ii) \* \* \* Not more than 10 percent, by count of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any container, (except that for Size 42 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent and except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 25 percent) may fail to meet the requirements of this paragraph.

Dated: September 15, 1997.

**Robert C. Keeney,**

*Director, Fruit and Vegetable Division.*

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Part 316

[INS No. 1861-97]

RIN 1115-AE84

#### **Adding the Missouri Botanical Garden to the Listing of American Institutions of Research**

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Immigration and Naturalization Service (Service) regulations by adding the Missouri Botanical Garden (research and educational programs only) to the list of American institutions of research recognized by the Attorney General for the purpose of preserving residence in the United States for naturalization. Persons and their dependents who expect to be continuously absent from the United States for a year or more because of work at one of the American institutions of research recognized by the Attorney General may be given permission to be absent without interrupting continuous residence for naturalization purposes. This change is necessary because such recognized institutions are published in the Service's regulations. Based on the findings of the St. Louis Officer-in-Charge, the Regional Director of the Central Region determined and ordered on May 9, 1997, that the Missouri Botanical Garden (research and

educational programs only) be recognized as an American institution of research recognized by the Attorney General.

**DATES:** This final rule is effective October 20, 1997.

**FOR FURTHER INFORMATION CONTACT:** Jane B. Barker, Senior Adjudications Officer, Benefits Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-5014.

**SUPPLEMENTARY INFORMATION:** Pursuant to Service regulations, after an applicant has been admitted for permanent residence, he or she must reside in the United States continuously for at least 5 years before filing an application for naturalization. Under certain circumstances, persons and their dependents who expect to be continuously absent from the United States for a year or more because of work at one of the American institutions of research recognized by the Attorney General may be given permission to be absent without interrupting continuous residence for naturalization purposes. Based on the findings of the St. Louis Officer-in-Charge, the Regional Director of the Central Region determined and ordered on May 9, 1997, that the Missouri botanical Garden (research and education programs only) is an American institution of research for the purpose of preserving residence in the United States for naturalization. Accordingly, § 316.20(a) will be amended by adding that institution to the list of American institutions of research recognized by the Attorney General.

#### **Good Cause Exception**

The Service's implementation of its rule as a final rule is based upon the "good cause" exceptions found at 5 U.S.C. 553 (b)(B) and (d)(3). The reason for immediate implementation of this final rule is as follows: This rule is editorial in nature and merely updates the existing institutional listings currently contained in Title 8 of the Code of Federal Regulations.

#### **Regulatory Flexibility Act**

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic effect on a substantial number of small entities because of the following factors. This rule is editorial in nature and merely updates the existing institutional

listings currently contained in Title 8 of the Code of Federal Regulations.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

#### **Executive Order 12612**

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **Executive Order 12988**

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988.

#### **List of Subjects in 8 CFR Part 316**

Citizenship and Naturalization.

Accordingly, part 3 of chapter I of title 8 of the Code of Federal Regulations is amended as follows: