

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch**

**Ethio Mini Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0248612**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division properly withdrew the authorization of Ethio Mini Market (hereinafter “Ethio Mini Market” or “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Ethio Mini Market as a SNAP retail store.

**AUTHORITY**

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

FNS regulations require that SNAP retail stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and an onsite visit by an FNS contractor is then conducted to determine the Appellant’s continued eligibility to participate as a SNAP retailer.

The record shows that the Appellant applied for reauthorization in an application that was signed on November 6, 2020. In a letter dated July 27, 2021, the Retailer Operations Division informed the Appellant that its authorization to participate as an authorized retailer in the SNAP was being withdrawn. This withdrawal action was based on evidence obtained during a store visit on July 9, 2020 by an FNS contractor in an effort to determine whether or not the firm met eligibility

requirements to be reauthorized in the SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations. The withdrawal action was also based on information provided on the firm's reauthorization application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter states "In order for a firm to be eligible to participate in the SNAP, it must offer for sale staple foods intended for home preparation and consumption and meet either Criterion A or B, as set forth in Section 278.1(b)(1) of the SNAP regulations. Under Criterion A, a firm must offer for sale, on a continuous basis, a minimum of three stocking units of three varieties of foods in each of four staple food categories, including three stocking units of one variety of perishable foods in at least two of those categories. The four staple food categories are: 1) bread or cereals; 2) dairy products; 3) vegetables or fruits; and 4) meat, poultry, or fish. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in staple foods." The Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in the dairy products and the meat, poultry, or fish staple food categories. Also, the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total gross retail sales.

The withdrawal letter also states that the Retailer Operations Division considered the Appellant's eligibility under the Need for Access provision at Section 278.1(b)(6) of the SNAP regulations. However, the Appellant did not qualify for SNAP authorization under this provision.

In a letter postmarked August 5, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated September 1, 2021 and implementation of the withdrawal was held in abeyance pending completion of this review. In an email correspondence of September 20, 2021, the Appellant, through counsel, provided additional information in support of the request for administrative review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1) establish the authority upon which a retail food store or wholesale food concern may be withdrawn from participation in the SNAP.

7 CFR § 278.1(l)(1)(iii) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

7 CFR § 271.2 defines a retail food store, in part, as:

An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple food variety, including at least one variety of perishable foods in at least two such categories (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stock keeping units, or other inventory or accounting record keeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter .....

7 CFR § 271.2 defines staple food, in part, as:

... those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory foods exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

An establishment...will effectuate the purposes of the program if it sells food for home preparation and consumption and meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods...including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) states, in part:

In order to qualify under Criterion A firms shall:

(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...

(B) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and

(C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items...such as...cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by FNS.

7 CFR § 278.1(b)(1)(iii) states, in part:

In order to qualify under Criterion B firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income ....

7 CFR § 278.1(k)(2) states, in part:

Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

7 CFR § 278.1(b)(6) states, in part:

Need for access. FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process ....

### **APPELLANT'S CONTENTIONS**

In the request for administrative review and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant seeks reversal of the SNAP authorization withdrawal determination.
- The Appellant is a specialty Ethiopian grocery providing a variety and quality of staple food items to the surrounding areas. These items include chicken, hot dogs, canned meats, juice, pitted dates, fava beans, eggs, milk, butter, Ethiopian cooking butter, ambasha bread, sambusa bread, Ethiopian biscuit bread, dabo kolo bread, teff injera bread, injera bread, and additional food items.
- As was noted in the 2016 study by Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.
- Additionally, in 2016, consumer's shopping habits trended towards an increase in the use of convenience stores, small grocers, and ethnic food stores. Specifically, according to the FMI U.S. Grocery Shopping Trends 2016 annual report, limited assortment stores (stores which have the main food items though not necessarily in a wide variety) saw an increase of consumers who use them as a primary grocer by 3% over 2015, convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer and ethnic food stores saw a rise of 1% in a primary grocer usage.
- The reviewer who conducted the July 9, 2020 store visit failed to include and/or failed to properly categorize all of the inventory stocked at the store.
- The store visit report should have reflected that the store's inventory including the following items, but not limited to: Breads—ambushash bread (12 fresh daily), sambusa bread (30+ fresh daily fresh), Ethiopian biscuits bread (30+ fresh daily), dabo kolo bread (24+), teff injera bread (30+ fresh daily), and regular injera bread (30+ fresh daily); Dairy—milk (2%, buttermilk, and whole milk varieties—3-5 units each), Ethiopian cooking butter (13), ghee butter, and strawberry yogurt; Fruits/Vegetables—100% mango juice (11), 100% guava juice (12), 100% apple juice (12), 100% orange juice (9), pitted dates (6), fava beans (4), 100% tomato paste (9), V-8 juice (13), and ketchup (7); and Meats—canned tuna fish (white and albacore varieties—8 each), Cornish hen (4), beef jerky (5), chicken hot dogs links (3), dozen white and brown eggs (3 each), and ½ dozen white and brown eggs (2 each).

- Between the sales records and the purchase records, it is clear the store stocks an adequate amount of foods from the meat, poultry or fish, bread or cereals, and vegetables and fruits staple food categories.
- The delay between the store visit and the withdrawal letter is impermissible as it does not reflect the accurate inventory contents or levels more than a year after the last visit.
- Additionally, 7 CFR 278.1(a) indicates that the application is to be processed within 45 days – albeit a completed application. In the instance case, more than a 45 day period passed with no pending document request outstanding. Such circumstances do not warrant a violation of the Department’s obligation under the regulation.
- According to USDA’s website, there are only 15 participating SNAP retailers within a one mile radius of the Appellant. There are no stores located within a reasonably close proximity to the Appellant’s store that are comparable with regard to the quantity and quality of the assortment of foods sold. If the Appellant is withdrawn from the SNAP, the surrounding SNAP households would be gravely burdened.
- In the 9<sup>th</sup> Congressional District of Washington, wherein the Appellant is located, approximately 12% of the households in the district receive SNAP benefits. The store is located in an economically depressed area surrounded by poverty and many low-income families.
- The Appellant’s location is easily accessible to the surrounding SNAP participants who are elderly, have young children, and/or have limited traveling options. Therefore, a SNAP withdrawal would impose a hardship on surrounding SNAP households.
- Based upon the financial documentary evidence provided by the Appellant during the application statements, and a review of the inventory, it is clear that the Appellant satisfies Criterion B in that more than 50% of the firm’s gross retail sales are in staple food items.
- In the event that the Appellant is found to have stock deficiencies in meeting Criterion B, the firm requests that it be issued a “need for access” authorization exception pursuant to 7 CFR 278.1(b)(6).
- To deny the Appellant’s authorization to accept SNAP benefits would blatantly go against the purposes of the program.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.

In support of its contentions, the Appellant, through counsel, submitted the following documents for review:

- Monthly bank statements for April 2020 – July 2020 and May 2021 – July 2021;
- 24 vendor purchase invoices/receipts for food purchases dated in March 2020 – July 2020;
- Combined excise tax returns for filing periods March 31, 2020, June 30, 2020, September 30, 2020, December 31, 2020, March 31, 2021, and June 30, 2021;
- Photos of current food stock (14 total);
- 2020 U.S. Individual Tax Return;
- Transaction receipts dated June 1, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20, 22, 24, 25, 26, 28, and 29, 2020 and July 1, 2, 3, 4, 5, 8, and 9, 2020; and
- Profile of SNAP Households in 2018 for Washington Congressional District 9, USDA FNS.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

### **Criterion A**

With regard to the Appellant's contentions with respect to Criterion A, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the varieties of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each food variety and at least one variety of perishable foods in at least two staple food categories. A store visit was conducted by an FNS contracted reviewer on July 9, 2020. According to the reviewer's written record and photos taken of the store's stock, the firm had insufficient inventory in the dairy products and the meat, poultry, or fish staple food categories, making the business ineligible under Criterion A as the firm stocked the following staple food items in these two staple food categories: Meat, poultry, or fish: 3 units of chicken eggs and 5 units of canned tuna; and Dairy products: 10 units of butter, 10 units of butter-ghee, and 1 unit of milk.

SNAP authorization is dependent solely upon whether the firm meets the eligibility requirements for participation at the time of the reauthorization application, and subsequently abides by the statute and implementing regulations. The evidence supports that Ethio Mini Market did not meet the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered.

In support of the request for administrative review, the Appellant submitted 24 vendor purchase invoices/receipts for food purchases. 5 U.S.C. § 552 (b)(7)(E). The three acceptable receipts indicate that 3 stocking units of milk were purchased from the dairy products staple food category. As such, the acceptable receipts indicate that the Appellant offered a minimum depth of stock of three stocking units of three different varieties of food items in the dairy products staple food category at the time that the withdrawal action was rendered. However, no documentation or evidence was provided that validates that the firm offered for sale a minimum of three stocking units of three varieties of foods in the meat, poultry, or fish staple food category at the time that the withdrawal action was rendered. The store stock photos provided for review are current and cannot be used to assess inventory of required items at the time that the withdrawal action was rendered.

Therefore, the Retailer Operations Division correctly concluded that Ethio Mini Market did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis”.

With regard to the Appellant’s contention that a SNAP authorization withdrawal will impose a hardship on SNAP customers, there are no provisions in the Food and Nutrition Act or SNAP regulations allowing hardship to SNAP customers as a consideration in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Ethio Mini Market is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

### **Criterion B**

The Appellant contends that based upon the financial documentary evidence provided by the firm during the application statements, and a review of the inventory, it is clear that the Appellant satisfies Criterion B in that more than 50% of the firm’s gross retail sales are in staple food items.

However, an evaluation of the percentages of staple food sales reported on the Appellant’s SNAP Retailer Reauthorization Application, as well as the photographs and store inventory information provided from the store visit and financial and other documentary evidence provided by the Appellant indicate that Ethio Mini Market did not receive more than 50 percent of its projected annual sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined that Ethio Mini Market was not eligible for SNAP authorization under Criterion B.

### **Need for Access**

The Appellant requests that the firm be issued a “need for access” authorization exception pursuant to 7 CFR § 278.1(b)(6).

The SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, the extent of the Appellant’s stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

### **FOIA**

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* was based on outdated regulations.



## **CONCLUSION**

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Ethio Mini Market to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

October 29, 2021