

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

Blaze Oil,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0255305

FINAL AGENCY DECISION

Based on new information provided during the administrative review process, the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the Retailer Operations Division's (Retailer Operations) decision to withdraw the authorization of Blaze Oil (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the determination is **reversed**.

ISSUE

The purpose of this review is to determine whether Retailer Operations took appropriate action, consistent with 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew Appellant's authorization to participate as a SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide, in part, that a food retailer 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 requires that stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and then an onsite visit by an FNS contractor is conducted to determine Appellant's continued eligibility to participate as a SNAP retailer. The record shows that Appellant's owner signed and submitted an online SNAP reauthorization application on February 12, 2022.

By letter dated May 19, 2022, Retailer Operations informed Appellant that on the day of the store visit, it was found to be deficient in three stocking units and one variety in the Dairy products staple food category. Appellant was asked to submit receipts within 10 calendar days of receipt of the letter, **dated no more than 21 calendar days prior to the store visit of April 3, 2022**, to demonstrate that it normally carries the required staple food inventory. The letter also stated that if no documentation is submitted or documentation is unclear, late, or incomplete the application will likely be withdrawn, and Appellant will have to wait at least six months to reapply.

The record reflects that Appellant did not respond to Retailer Operations' request within the required 10-day timeframe. By letter dated June 2, 2022, Retailer Operations informed Appellant that its authorization to participate as a SNAP retailer would be withdrawn due to its failure to meet minimum SNAP eligibility requirements. This withdrawal decision was based on observations during a store visit to Appellant on April 3, 2022, as well as information provided on its reauthorization application.

Retailer Operations determined that Appellant did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1). The withdrawal letter stated 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 each of the four staple food categories. Appellant also failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% of its gross retail sales.

Appellant was informed that it could not submit a new application to participate in SNAP for a period of 6 months, as provided in 7 CFR § 278.1(k)(2). This determination letter also stated that Retailer Operations considered Appellant's eligibility under the **need for access provision** at 7 CFR § 278.1(b)(6). However, the letter stated Appellant did not qualify for SNAP authorization under this provision. Appellant was informed that its SNAP authorization would be withdrawn 10 days from receipt of the letter and instructions were provided on how to request administrative review.

Appellant's owner appealed Retailer Operations' decision and requested an administrative review of this action in an email dated June 6, 2022. Appellant submitted approximately 30 receipts and 21 photos with this request. By letter dated June 7, 2022, the appeal request was granted, and implementation of the withdrawal has been held in abeyance pending completion of this review.

On June 7, 2022, Appellant's Counsel emailed a letter of representation, requested a 10-day extension to submit supporting documentation, and included the same receipts and photos previously submitted by Appellant's owner.

In an email dated June 13, 2022, Counsel requested copies of documents pertaining to the store visit and online application. By email on June 16, 2022, Counsel was advised on how to request documents under the Freedom of Information Act (FOIA), that FOIA is a separate process from administrative review, and that an administrative review cannot be held in abeyance on the basis of a pending FOIA request or appeal in accordance with 7 CFR § 279.6(b). Counsel filed a FOIA request on June 21, 2022.

Multiple emails were sent by Appellant's owner and Counsel, requesting an extension to submit documentation (6/23/22, 6/24/22, 6/27/22). Confirmation of documents received was emailed to Appellant and Counsel on June 27, 2022, along with an extension approval to submit supporting documentation no later than July 5, 2022. Counsel emailed an affidavit from Appellant's owner and 20 receipts on June 27, 2022. This same information was sent by FedEx on June 29, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and 7 CFR § 278. SNAP Regulations at § 278.1(l)(1) establish the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

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

An establishment 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), or has more than 50% of its total gross retail sales in staple foods (Criterion B) 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, 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 food 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 three of the categories (Criterion A); or have more than 50% of the total gross retail sales of the establishment in staple foods (Criterion B).

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

In order to qualify under Criterion A¹, 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

¹As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

(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 products staple food 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) reads, in part:

In order to qualify under Criterion B firms must have more than 50% of its 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(b)(6) reads, 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 applicant firm furthers the purposes of the Program. Such considerations will be conducted during the application process.

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm that has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section, for a minimum period of six months from the effective date of the denial.

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

FNS shall withdraw the authorization of any firm authorized to participate in the Program 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, for the time period specified in paragraph (k)(2) of this section.

ANALYSIS AND FINDINGS

The case record supports that at the time of the store visit, Appellant was deficient in one variety and three stocking units in the Dairy products staple food category, having only two varieties and sufficient stocking units in cow's milk and coconut milk.

The record reflects that Appellant provided 21 photos and 30 receipts in its request for administrative review, to demonstrate that it normally meets the minimum stocking requirements for SNAP authorization. The photos are undated and appear to be of current inventory. The photos cannot be considered as they do not depict Appellant's food inventory at the time of the store visit. The receipts provided cannot be considered as they are dated after the store visit.

The record reflects that Counsel emailed 20 receipts on June 27, 2022. Seven of these receipts were not within 21 days of the store visit and could not be considered (3/2/22, 3/4/22, 3/7/22, 3/9/22, 3/11/22 (2), 4/4/22). Five of these receipts did not have any dairy purchases or had cow's milk, which was already counted during the store visit (3/17/22, 3/19/22, 3/22/22, 3/28/22, 3/31/22). Eight ALDI receipts have the following dairy products:

Receipt Date/Dairy Variety/Quantity

1. 3/14/22: Sour cream (1)
2. 3/15/22: Homestyle spread (1); Sour cream (1)
3. 3/17/22: Imperial spread (5); American cheese slices (2); Homestyle spread (1)
4. 3/19/22: Cream cheese (2)
5. 3/1/22: French onion dip (3)
6. 3/26/22: American cheese slices (2); Homestyle spread (1)
7. 3/31/22: Cream cheese (3); Homestyle spread (1); Imperial spread (3); Sour cream (2)
8. 4/2/22: Mozzarella sticks (2); String cheese (3); Cheese dip (3)

Dairy Variety/Combined Total from Receipts above

Sour cream (4)
Homestyle spread (4)
Imperial spread (8)
American cheese slices (4)
Cream cheese (5)
French onion dip (3)
Mozzarella sticks/String cheese (5)
Cheese dip (3)

A review of the eight receipts supports that Appellant had more than the required varieties and stocking units in the Dairy products staple food category, as indicated above. The preponderance of the evidence supports that Appellant met the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered and does not support Retailer Operations'

determination in this case. Accordingly, it is unnecessary to address Appellant's contentions in this matter.

CONCLUSION

Based on the discussion above, the determination by Retailer Operations to withdraw Appellant's authorization to participate as a SNAP retailer is **reversed**.

This decision is based on the specific circumstances of this case, as documented by information provided by Appellant and Retailer Operations. This decision does not establish policy or supersede Federal law or regulations. This decision does not preclude Retailer Operations from asking for additional information regarding Appellant's eligibility for SNAP authorization. Should Appellant be subject to a subsequent sanction, Appellant will be notified of its appeal rights at that time.

RIGHTS AND REMEDIES

Under the Freedom of Information Act, we are 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.

KIM DAMERON
ADMINISTRATIVE REVIEW OFFICER

July 7, 2022