

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

Beteseb Ethiopian Store And Cafe,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0254918

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Beteseb Ethiopian Store And Cafe (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Stores denied SNAP authorization are not eligible to reapply for a period of six months from the date of denial. Given that Beteseb Ethiopian Store And Cafe’s denial was effective on May 19, 2022, the six-month period has been served.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of SNAP when it denied the retailer application of Beteseb Ethiopian Store And Cafe.

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 SUMMARY

Appellant, Beteseb Ethiopian Store And Cafe, submitted an application to participate as a SNAP retailer on April 05, 2022. On the application, Appellant reported that around 80 percent of its gross retail sales were from the sale of staple foods. The application also reported that the firm carried at least three different varieties of foods in each of the four staple food categories, with a

minimum depth of stock of three stocking units for each variety. On April 23, 2022, an FNS contractor conducted an onsite store visit to verify the firm's reported staple food stock.

On May 11, 2022, the Retailer Operations Division requested additional information regarding the firm's sales as the previously submitted documentation was deemed inadequate to demonstrate the store's SNAP eligibility. Appellant submitted eighteen pages of documents, including register tapes, notes for interpreting the register tapes, and copies of a spreadsheet breaking down the store's sales by category.

After reviewing the store visit report and photographs, sales information submitted by the store, and re-evaluating Appellant's application, the Retailer Operations Division determined the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1) of SNAP regulations.

In a letter dated May 19, 2022, the Retailer Operations Division informed Appellant that its SNAP application was denied for a period of six months pursuant to regulation, at 7 CFR § 278.1(k)(2). The letter stated Appellant failed to meet Criterion A because it did not offer for sale a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories and it failed to meet Criterion B because staple food sales did not comprise more than 50 percent of annual gross retail sales. The letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations, found at 7 CFR § 278.1(b)(6), but determined that Appellant did not qualify for SNAP authorization under this provision.

In an e-mail dated May 20, 2022, Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) The firm 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.... 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 § 271.2 defines a *retail food store* as:

(1) 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 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 stockkeeping units, or other inventory or accounting recordkeeping 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* as:

...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,

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 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>.

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) states, 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

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(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 the 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(b)(6) states:

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 as described in paragraph (a) of this section.

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 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>.

APPELLANT'S CONTENTIONS

Appellant made the following contentions in its request for administrative review, summarized in relevant part:

- Appellant unknowingly miscategorized the food sales categories due to a language barrier during their initial application and communications with FNS. Appellant has since sought assistance from an outside resource to help them understand what the different FNS food categories represent.
- Appellant is a woman and minority owned business committed to providing affordable and nutritional staple foods to the East African community in Seattle and the surrounding areas. This community currently has very limited access to its desired cultural food offerings.
- Because the firm has only been in business since April 2022, the sales percentages provided to FNS only covered a one week period. Appellant feels this period is insufficient to evaluate what percentage of the store's total sales are staple food sales.
- Appellant primarily carries staple foods, but a language barrier may have prevented FNS from identifying the staple foods carried at the firm. Siga is beef. Siga and milk products comprise 45% of the store's sales. Glutton-free teff, a whole grain substitute, is another staple food sold at the store. Twenty percent of the store's sales were teff.
- Nineteen percent of the store's sales were reported to be hot food. These hot food sales included, in part, cultural specialty bread and cereal products prepared onsite. Appellant contends some of these items should have been counted as staple foods.
- Appellant contends 83 percent of the store's sales are staple foods.
- Appellant provided a new sales breakdown by category for May 10, 2022, through May 19, 2022.
 - Staple Foods (including enjera, siga, teff, fruit, milk, vegetables, eggs, and fish) - \$3,525.20, or 72.75%
 - Hot Foods (including sambuusa, tibs, gored) - \$687.50, or 14.18%
 - Cold Foods Prepared Onsite (including salad, fruit cocktail) - \$252.00, or 5.19%
 - Accessory Foods (including kolo, biscuits, dab Okolo) - \$382.00, or 7.88%

Appellant submitted an undated photograph of "enjera", a specialty prepared bread product, in support of its contentions.

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

After reviewing the record, as well as evaluating the contentions submitted by Appellant, this review finds that Appellant does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization under Criterion A, nor do its staple foods sales meet eligibility requirements under Criterion B. Appellant is also ineligible for authorization under the Need for Access provision. Accordingly, Appellant's SNAP authorization was properly denied for a period of six months.

Criterion A Eligibility

For a firm to be eligible under Criterion A, it 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 variety. In addition, retailers must meet Criterion A eligibility requirements on a continuous basis, as demonstrated at the time of the store visit.

Regarding Appellant, the record shows that the firm did not have enough inventory in the meat, poultry, or fish products staple food category on the day of the store visit to meet Criterion A eligibility requirements. The Retailer Operations Division found that the firm had adequate stocking units of only one meat, poultry, or fish product variety: beef/veal. The firm did not offer stock in additional varieties of meat, poultry, or fish products. Accordingly, Appellant was six stocking units short of meeting Criterion A eligibility requirements in the meat, poultry, or fish staple food category.

In the administrative review request, Appellant contended it offers fish as part of its staple food stock. Appellant did not provide any evidence that the firm regularly offered additional varieties of meat, poultry, or fish products in addition to the beef noted in the April 23, 2022, store visit report.

Based upon a review of the record, this review agrees with the Retailer Operations Division's assessment of Appellant's inventory at the time of the store visit and finds that Appellant's contentions do not demonstrate that it met Criterion A eligibility requirements continuously. Accordingly, the Retailer Operations Division correctly determined that Appellant is not eligible for SNAP authorization under Criterion A.

Criterion B Eligibility

Eligibility under Criterion B requires that more than 50 percent of the firm's total gross retail sales be from the sale of staple foods. The Retailer Operations Division determined that Appellant did not meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its gross retail sales.

Appellant reported about 80 percent of its total sales were staple foods on the SNAP retailer application. On May 11, 2022, the Retailer Operations Division requested additional information regarding the firm's sales as the previously submitted documentation was deemed inadequate to demonstrate the store's SNAP eligibility. In response to this request, Appellant submitted eighteen pages of documents, including photographs of register tapes, notes for interpreting the register tapes, and copies of a spreadsheet breaking down the store's sales by category.

The thirteen pages of register tapes submitted provided transaction level totals that did not identify the individual items purchased or what portion of the sale was staple foods, accessory foods, hot foods, etc. Seven register tapes included handwritten entries identifying what items were sold, such as teff, injera, tea, or vegetables. The remaining six pages of register tapes were illegible due to blurriness and did not include any reference to what was purchased. Appellant indicated this information was from the credit and debit card sales completed at the firm from May 1, 2022, through May 9, 2022. Some of the register tapes provided appeared to be duplicative submissions.

Appellant also included two copies of a legend defining injera, siga, sambuusa, and paste. This legend also included a May 11, 2022, printout of cash sales identified as having been completed from May 2, 2022, through May 9, 2022, for the items “Enje,” “PA,” “Sambuusa,” “Late,” “Teff,” “5Enjera,” “Beer,” and “Siga.”

In addition, Appellant submitted two copies of a spreadsheet that categorized its gross sales by hot prepared and heated foods, cold foods prepared on-site, staple foods, accessory foods, nonfood items, and charges for food heating services from May 2, 2022, through May 9, 2022. According to the sales information provided by the store, almost 49 percent of the firm’s gross sales were staple foods. Based on the information provided by Appellant, the Retailer Operations Division determined that less than 50 percent of Appellant’s gross sales were from the sale of staple foods. Accordingly, the Retailer Operations Division determined that Appellant did not meet the Criterion B eligibility requirements to become a SNAP authorized retailer.

In its administrative review request, Appellant argued that it had inadvertently miscategorized some of its sales due to a language barrier and the limited time the store had been in operation. Appellant contended it had inadvertently included staple foods in the prepared foods categories in the information it provided to the Retailer Operations Division. Appellant now contends that 83 percent of the store’s gross sales are from the sale of staple foods and provided a new sales breakdown by category for, May 10, 2022, through May 19, 2022, to support the 83 percent staple food figure.

While it may be true that the store miscategorized some of its sales information, Appellant provided no evidence to support their updated sales figures. Given Appellant did not submit evidence to show that staple foods are more than 50 percent of its total gross retail sales, this review finds that the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Hardship to SNAP Households/Need for Access

Appellant argues that the store is committed to providing affordable and nutritional staple foods to the East African community in Seattle and surrounding areas, which currently have limited access to their desired cultural food offerings. Without Appellant, customers are forced to travel over thirty miles to find similar products. This contention implies that a denial of the firm’s application will cause hardship to SNAP households.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is possible whenever a retail food store’s SNAP application is denied, and households

are forced to spend their benefits elsewhere. To address such situations, regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether the firm furthers the purposes of the program.

As for Beteseb Ethiopian Store And Cafe, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm is not located in an area with significantly limited access to food and thus, does not qualify for SNAP authorization under this provision. After reviewing the agency's record, this review agrees that authorization under this provision is not appropriate.

CONCLUSION

Based on a preponderance of the evidence, it is the finding of this review that Appellant, Beteseb Ethiopian Store And Cafe, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the determination by the Retailer Operations Division to deny the application of Beteseb Ethiopian Store And Cafe to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), stores are ineligible to reapply for participation as a retailer in SNAP for a minimum period of six months from their effective date of the denial. Appellant's effective date of the denial was May 19, 2022. As such, the six month denial period has been served.

Questions regarding the application process can be handled by contacting FNS' Retailer Service Center at 877-823-4369, or by consulting USDA's website for SNAP retailer information at <https://www.fns.usda.gov/snap/retailer>.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

January 4, 2023