

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

**Katyas Bakery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

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**Case Number: C0265065**

**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 Katyas Bakery (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

**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 Katyas Bakery.

**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**

In a letter dated January 27, 2023, the Retailer Operations Division denied the Appellant’s SNAP application due to its failure to meet basic program eligibility requirements. This denial action was based on observations made during a contractor’s store inspection on December 19, 2022, as well as information provided on the firm’s SNAP application received on December 7, 2022.

The Retailer Operations Division determined that the firm did not meet eligibility requirements under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated the Appellant failed to meet the requirements of Criterion A because in at

least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, 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 the Appellant did not qualify for SNAP under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an e-mail dated January 18, 2023, the 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 AND REGULATIONS**

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, 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,

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\* 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>.

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*

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\* 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>.

*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.

### **APPELLANT'S CONTENTIONS**

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

- Appellant stated that the firm carried wheat and white bread.
- Appellant has five different vegetable salads. Also, the firm sells cold soup with vegetables and meat.
- Many of the firm's pastries have beef, chicken, and salmon. Appellant makes sandwiches and dumpling with meat.
- The firm makes Vareniki which is sold cold and frozen.
- Most of the items sold in the store are cold and prepared by customers at home.

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\* 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 requested a walkthrough of the firm when the owners are present and all of the products are out. Some of the items quickly sell out and are unavailable by the end of the day.

In support of its contentions, the Appellant provided nine photos via email on Monday, February 13, 2023.

The preceding may represent only a summary of the 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**

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time of the agency's determination.

After reviewing the inspector's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that Katyas Bakery does not carry sufficient staple food inventory to be eligible for SNAP authorization. Specifically, the firm is deficient in the dairy, meat/poultry/fish, and bread or cereals categories.

### **Criterion A Eligibility**

As described in regulations cited earlier, a firm must meet either Criterion A or Criterion B to be eligible for SNAP participation. For a firm to be eligible under Criterion A, it must continuously offer for sale no fewer than three different varieties of food in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety.

Appellant contends that it sells white and wheat bread. This is true. According to the inspector's report, the only breads or cereals varieties Appellant had in sufficient quantities at the time of the inspection were breads, causing the firm to need two additional categories of breads or cereals. Further, Appellant carried no meat/poultry/fish or dairy varieties.

Appellant also reports that it has five different vegetable salads; sells cold soup with vegetables and meat; makes sandwiches, dumplings with meat, and Vareniki which is sold cold and frozen. These items are considered prepared food items and not staple food items.

In its request for administrative review, the Appellant submitted 9 undated photographs. Unfortunately, these photos have no probative value as they were very likely taken after the store received the denial letter. While the Appellant's evidence shows a modest increase in inventory, there is no evidence that these additional products were in the store when the inspection occurred.

The Appellant's administrative review request petitioned for another store visit when the owners were present. Also, it requested a morning visit to see all the items for sale before they sell out. Regarding this request, it bears repeating that this review is limited to consideration of the facts as they existed at the time of the agency's determination.

SNAP regulations state that in order for a firm to be eligible for program authorization, it must continuously maintain sufficient staple food inventory (see 7 CFR § 278.1(b)(1)(i) and (ii)). A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot be authorized.

### **Criterion B Eligibility**

The firm is also not eligible for authorization under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total retail sales. 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. Based on the SNAP retailer application, Appellant reported approximately 30 percent of the store's gross retail sales were in staple food items. To note, the evidence submitted by Appellant did not provide any information demonstrating this low percentage of staple food sales to gross retail sales is inaccurate. Based on the preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Because deficiencies in Criterion A and Criterion B exist at Katyas Bakery, it is the finding of this review that the application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2).

### **Need for Access**

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined Appellant did not qualify for SNAP authorization under this provision. This review agrees that authorization under the Need for Access provision is inappropriate in this case.

SNAP regulations, at 7 CFR § 278.1(b)(6), state that FNS will consider whether Appellant 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 Appellant's stocking deficiencies, and whether Appellant furthers the purposes of the program.

As for Kaytas Bakery, 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.

## **CONCLUSION**

Based on a preponderance of the evidence, it is the finding of this review that the Appellant firm, Katyas Bakery, 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 the 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 Katyas Bakery to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from January 11, 2023, which is the effective date of the denial.

## **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.

MYA DUPREE  
Administrative Review Officer

April 3, 2023