

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

Marketplace,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258889

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 Marketplace (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 Marketplace’s denial was effective on September 29, 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 Marketplace.

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

On August 19, 2022, the Appellant submitted an application to participate as a SNAP retailer. On the application, the Appellant reported that approximately five percent of its gross retail sales were from the sale of staple foods. The Appellant also reported that the firm carried at least three different varieties of foods in three of the four staple food categories, with a minimum depth of stock of three stocking units for each variety. Appellant reported having only two varieties in the breads or cereals staple food category. On September 3, 2023, an FNS contractor conducted an onsite store visit to verify the firm’s reported staple food stock.

In a letter dated September 28, 2022, the Retailer Operations Division denied the Appellant's SNAP application due to the Appellant's failure to meet basic program eligibility requirements. The Retailer Operations Division's based its denial action on observations made during the store inspection, as well as information provided on the firm's SNAP application.

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 that 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 the Retailer Operations Division finding the Appellant ineligible for participation under both Criteria A and B, and finding the Appellant ineligible under the Need for Access provision, the Retailer Operations Division denied Appellant's SNAP application for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an email dated October 3, 2022, 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

* 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>.

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
- (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*

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*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 summarized contentions for administrative review, in relevant part:

- At the time of the store visit, the store was in the process of restocking and lacked some of the required items required for participation in the SNAP program.
- The store usually carries all the items listed on the application.
- The store is located in an area that is faced with significant limited access to food and tries its best to provide resources to the members the community.
- The Appellant requests reconsideration of its SNAP EBT authorization.

The Appellant did not submit any additional evidence in support of these contentions on administrative review.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, this review gave full attention 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 submitted by the Appellant, this review determines that Marketplace does not carry sufficient staple food inventory to be eligible for SNAP authorization. Specifically, the firm is deficient in the dairy products staple food category. According to the inspector's report, the firm did not have adequate stocking units in three dairy product varieties. The firm had only two stocking units of margarine and two stocking units of cheese, and did not have any stocking units in a third variety of dairy products. 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 this case, the Appellant was deficient in three dairy varieties.

In the administrative review request, the Appellant acknowledges that at the time of the store visit it lacked some of the required stock, but contends that the store usually carries all the items required for participation in the SNAP Program. The Appellant's contentions do not provide a valid basis for the reversal of the Retailer Operations Division's denial determination. This review is limited to consideration of the facts as they existed at the time of the store visit and the Retailer Operations Division's determination. The available evidence shows the Appellant was deficient in dairy products staple food category when the determination was made. SNAP regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis. Stores that do not meet stocking requirements are not eligible to be SNAP

retailers. All firms must meet SNAP eligibility standards, including stocking requirements, during the authorization and reauthorization process.

After considering all available evidence in this case, this review finds that Marketplace was deficient in its staple food inventory on the day the inspector visited the store (or as stated in the regulations, “on any given day of operation”). With deficiencies in the dairy products staple food category, the firm does not have the necessary variety of staple foods and is not eligible for SNAP authorization under Criterion A. 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. According to the Appellant’s SNAP application, just five percent of its sales come from the sale of staple foods.

Because deficiencies in Criterion A and Criterion B exist at Marketplace, this review finds that the Retailer Operations Division’s application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2).

Need for Access

Appellant contends it is located in an area that is faced with significant limited access to food and tries its best to provide resources to the members the community. SNAP 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 Marketplace, 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, this review finds that the Appellant firm, Marketplace, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Accordingly, the Retailer Operations Division’s determination to deny Marketplace’s application to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), stores denied SNAP authorization are not eligible to reapply for a period of six months from the effective date of denial. Given that Marketplace's denial was effective September 29, 2022, the six-month period has been served and the firm may reapply immediately.

ELIZABETH ALLEN
Administrative Review Officer

April 4, 2023