

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

Satya Devi Kat,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258374

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Retailer Operations Division (hereinafter Retailer Operations), to deny the application of Satya Devi Kat (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the determination is reversed.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate as a SNAP retail food store.

AUTHORITY

In accordance with 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, 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

The record shows that Appellant's owner submitted an online application to participate as a SNAP retail food store on August 4, 2022. After receiving and reviewing the application, Retailer Operations marked it as complete on August 15, 2022. According to the application, Appellant opened for business on August 2, 2022. On August 23, 2022, Appellant was visited by an FNS-contractor in an effort to determine whether or not it met eligibility requirements to be authorized in SNAP. During this visit, the contractor took photographs of Appellant and its

inventory, spoke with Appellant personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photos, Retailer Operations determined that Appellant did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with 7 CFR § 278.1(b)(1). According to the contractor's written report, Appellant had insufficient inventory in the dairy products staple food category making it ineligible under Criterion A. Additionally, both the application and store visit report indicate that Appellant was not eligible under Criterion B.

By letter dated and emailed on September 7, 2022, Retailer Operations informed Appellant's owner that the application to participate as a SNAP-authorized retail food store was being denied. The basis of the denial is that Appellant did not offer for sale a variety of foods in sufficient quantities, on a continuous basis, and was found to carry too few items in the four required staple food categories. The letter also informed Appellant's owner that 50% of its total gross retail sales were not in staple food sales, as required for authorization under Criterion B. Additionally, the letter stated that FNS considered Appellant's eligibility under the Need for Access Provision at 7 CFR § 278.1(b)(6), but determined that it does 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, Appellant was denied SNAP authorization for a period of 6 months, pursuant to 7 CFR § 278.1(k)(2).

By email sent on September 22, 2022, Appellant's owner appealed Retailer Operations' decision and requested an administrative review of this determination. The timely request was granted by letter dated and emailed on September 26, 2022. Appellant's owner emailed subsequent correspondence, which included a receipt for dairy products purchased.

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 not true.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and 7 CFR § 278. In particular, 7 CFR § 278.1(b)(1) establishes the authority upon which FNS may deny the application of any firm to participate in SNAP, if it fails to meet established eligibility requirements.

7 CFR § 271.2 Definitions

Retail Food Store means, in part: 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 seven 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 three such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50% 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in this same section.

Staple Food means, in part: 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) states, in part:

- (i) An establishment shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, 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 or route in staple foods (Criterion B).

(ii) In order to qualify under *Criterion A*, a firm 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 [seven]* 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 [three]* 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. Failure to provide verifying information related to stock, when requested, may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

*NOTE: Full implementation of the definition of variety and stocking requirements, cited above, was delayed by the Consolidated Appropriations Act of 2017. Therefore, the three paragraphs below reflect the definition and stocking requirements *as currently implemented*.

7 CFR § 278.1(b)(1)(ii)(A) defines *continuous basis* under *Criterion A* as: Offering 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 qualifying staple variety, on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(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.

7 CFR § 278.1(b)(1)(ii)(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 product 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 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) provides that for firms to qualify for authorization under *Criterion B*, firms must have more than 50% 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. However, a fee directly connected to the processing of staple foods such as raw meat, poultry, or fish, by the service provider, may be calculated as staple food sales under Criterion B.

7 CFR § 278.1(b)(6) deals with *Need for Access* and states, in part: 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.

7 CFR § 278.1(k)(2) states, in part: FNS shall deny the application of any firm if it determines that 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.

APPELLANT'S CONTENTIONS

Responses from Appellant's owner regarding this matter are essentially as follows:

- I had the dairy products when the inspector came.
- I need EBT. I lose a lot of customers when they ask me for EBT.

In support of these contentions, 1 receipt dated within 21 days prior to the store visit was submitted, as proof of having purchased the required dairy inventory.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

A review of the evidence does not support Retailer Operations' determination in this case. Accordingly, it is unnecessary to address Appellant's contentions in this matter.

This administrative review decision is based on the specific circumstances of this case, as documented by materials provided by Appellant's owner and Retailer Operations. In addition, this administrative review decision does not establish policy or supersede Federal law or regulations.

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations to deny the application of Appellant to participate as a SNAP retail food store is reversed.

Retailer Operations should continue to process Appellant's SNAP application to determine eligibility. This decision does not preclude Retailer Operations from asking for additional documentation to assess if Appellant currently meets the regulatory criteria to participate in SNAP.

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.

KIM DAMERON
ADMINISTRATIVE REVIEW OFFICER

October 25, 2022