

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

Xpress Market,

Appellant,

v.

Retailer Operations Division

Respondent.

Case Number: C0256213

FINAL AGENCY DECISION

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

According to 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 on May 7, 2022, Appellant applied to participate as a SNAP retail food store. According to its application, Appellant opened for business on June 2, 2022. An FNS contractor visited Appellant on June 4, 2022, in an effort to determine whether or not it met SNAP eligibility requirements. 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 requested invoices/receipts to verify that Appellant carried at least three stocking units of three different varieties of foods in the bread or cereals staple food category. Appellant was informed that it had 10 days, from receipt of the letter, to provide the requested documentation. The record reflects that Appellant responded to the proof of inventory request on June 27, 2022, within the 10-day required timeframe.

In a letter dated June 29, 2022, Retailer Operations denied Appellant's application to participate as a SNAP-authorized retail food store. This denial action was based on evidence obtained during a store visit on June 4, 2022, as well as information provided on Appellant's retailer application. Retailer Operations determined that Appellant did not meet eligibility Criterion A or Criterion B under § 278.1(b)(1) of the SNAP Regulations.

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 the bread or cereals staple food category. Appellant also failed to meet the requirements of Criterion B, because staple food sales did not comprise more than 50% of its total gross retail sales.

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's SNAP application was denied for a period of 6 months pursuant to 7 CFR § 278.1(k)(2).

By email on July 1, 2022, Appellant appealed Retailer Operations' decision and requested an administrative review of this determination. The appeal was granted by letter dated July 7, 2022.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. This 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 shall deny the application of any firm which fails to meet established eligibility requirements.

7 CFR § 271.2 defines a **Retail Food Store** 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 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), 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 stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry. Entities that have more than 50% of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

7 CFR § 271.2 defines ***Staple Food*** 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. **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.**

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).

7 CFR § 278.1(b)(1)(i) states: 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 in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: 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), as currently implemented, 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), as currently implemented: 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) as currently implemented: 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 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.

7 CFR § 278.1(b)(6) deals with the 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.

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.

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 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 retailer 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

November 7, 2022