

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

Le Mirage Pastries,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0247577

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Office of Retailer Operations and Compliance, (Retailer Operations) properly denied the application of Le Mirage Pastries (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations acted consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that 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 owners completed an application for SNAP authorization wherein accessory foods were stated to make up 95% of the the total retail sales. By email dated February 8, 2021, one owner stated the sales as: Stable Foods 50%, Accessory Foods 35%, Hot Foods 10%, Cold Foods 5%, and Nonfood Items 0%. FNS-contracted personnel conducted an onsite store visit on April 8, 2021, to ascertain Appellant's eligibility to participate in the SNAP. By letter dated May 27, 2021, the application of Appellant to participate as a retail food store in the SNAP was denied because the firm did not meet the eligibility criteria for stores as required by the regulations at 7

CFR § 278.1(b)(1). Retailer Operations' letter informed the owners that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in any of the four staple food categories, and did not meet the perishable foods requirement, for two staple food categories.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed by Retailer Operations. Appellant was found not to meet the established criteria.

One owner requested administrative review by letter postmarked June 8, 2021. The appeal was granted by letter dated July 19, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence that a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: "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 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent 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 a single firm when determining eligibility to participate in SNAP as retail food stores." As

currently implemented, the regulations require establishments 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 qualifying staple variety on any given day of operation.

7 CFR § 271.2 states: “Staple food, means 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.”

7 CFR § 271.2 states: “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 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: “(A) An establishment or house-to-house trade route 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 percent of the total gross retail sales of the establishment or route 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: “(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 enough 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis 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) states: “(B) Offer for sale perishable staple food items in at least three 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) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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) provides that for firms to qualify for authorization 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. 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)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.”

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.”

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.”

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision whether listed or not.

- We are running a simple bakery/pastry with high quality products, and we don't understand the reason to be denied. We have had such hard time communicating with the FNS staff to address the application requirements. Sometimes it took us four calls and left Voicemails and emails to get acknowledgment and responses to our requests.
- As per the inspectors who visited our stores assigned Staples food as 0%. This came to our knowledge during the phone call with FNS.
- Although we had allocated some value to stable food on our initial submission. As a result of that, we have decided to update our Stable food offering to accommodate the state requirements. This will be accomplished by offering different types of sandwiches and drinks.
- I have noticed many other businesses that have the same current offering we have, and they already been approved and using SNAP! A lot of our customers are asking for that and they are acknowledging tat [sic]similar businesses to ours already have it. What can we do to get accepted in addition to the new offering that we plan to have?
- Here is what was our modified food percentage submission after our discussion with our case manager: Staple Foods 0%, Accessory Foods 75%, Hot Foods 10% Cold Foods 15%, Nonfood 0%.
- Please guide us to help unaffordable families to enjoy our pastries and quality food.

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. The onsite review of Appellant’s food inventory revealed insufficient varieties and stocking units in all four staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A, as currently implemented, require that a firm shall offer for sale and normally display in a public area, 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, and at least one variety of perishable foods in at least three staple food categories.

The record supports that when the determination was rendered, Appellant did not have sufficient varieties and/or stocking units of staple food products in a public area and did not meet the perishable foods requirements. Thus, the firm did not meet Criterion A. On review, the responding owner did not provide evidence that the staple foods varieties and stocking units in

the four staple food categories, as required by the regulations under Criterion A, were available at the time that the determination was made.

Based on Appellant's application, Retailer Operations determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). The responding owners initially estimated that Appellant's staple food sales were 0% of total retail sales; this percentage is under the regulatory threshold to qualify under Criterion B. The estimate given by email on February 8, 2021, was not supported by the firm visit information. Insufficient evidence was provided by the owners that Appellant met Criterion B at the time of the denial.

The responding owner maintains this is a bakery/pastry location. The initial application dated January 25, 2021, supports that the owners stated that 95% of the total retail sales were of accessory foods, and the owners self-reported 0% in staple food sales. Upon review, the accessory foods percentage was revised by the responding owner to be 75% of total retail sales. As noted in the regulations cited herein, accessory foods shall not be considered staple foods for purposes of determining the eligibility of any firm. Given the 0% figure the responding owner(s) assigned to staple foods sales on the application, and a review of the store photographs in the record, Appellant does not appear to sell bread. Only bakeries that sell bread at the level to meet Criterion B, as a percentage of total retail sales, may be eligible under Criterion B. The regulations are clear that bakeries that do not sell bread, are considered ineligible firms.

Retailer Operations accessed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6) and found that it did not qualify. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The preponderance of the evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial determination was rendered. Based on the record, this business appears to be a bakery that does not sell bread, and therefore, by regulation, it is not eligible for authorization. A bakery that sells bread, might meet eligibility standards if it can demonstrate under Criterion B, that more than 50 percent of its total gross retail sales are in staple food sales.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. The firm did not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. In accordance with 7 CFR § 278.1(k)(2), the owners will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the denial. The effective date is thirty (30) days after the date of delivery of this decision.

General questions regarding the application process can be handled by contacting 877-823-4369. Operational questions regarding the denial should be directed to the office that initially took the action to deny Appellant. Additional retailer information about the SNAP is available online.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7, with respect to the applicable right to judicial review of this decision. Please note that 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 Appellant's owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of delivery of this Final Agency Decision.

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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

August 11, 2021