

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

1252 Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207587

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision by the Retailer Operations Division, to deny the December 22, 2017, FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of 1252 Deli Grocery Corp (hereinafter, “Appellant” and/or “1252 Deli Grocery Corp”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was proper. As a result **1252 Deli Grocery Corp** shall not be eligible to submit a new application for a minimum period of six (6) months from the effective date of the denial.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2; 7 CFR § 278.1(b)(1); and, 7 CFR § 278.1(b)(6), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of 1252 Deli Grocery Corp to participate in the SNAP via letter dated March 28, 2018.

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 CHRONOLOGY

In a letter dated March 28, 2018, the Retailer Operations Division informed Appellant that the application of 1252 Deli Grocery Corp to participate as an authorized retailer in SNAP was being

denied because it did not meet the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(6). This determination is documented to have been made as a result of a review of the electronic form FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (Application) initially received by FNS on December 22, 2017; information and materials resulting from a store visit conducted by FNS contracted personnel on February 14, 2018; and, a Need for Access evaluation as conducted under SNAP regulations at 7 CFR § 278.6(b)(6).

Via letter postmarked April 5, 2018, received in the office of the Chief of the Administrative Review Branch on April 13, 2018, Appellant requested an administrative review of the action to deny authorization to participate as a SNAP Retailer. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).²

7 CFR § 271.2 of the SNAP regulations define “*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 ~~seven~~ [three]³ 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~~ [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

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

³ As implemented effective January 17, 2018 via SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer/eligible> . References to implementation adjustments are identified with strikethrough of the number presented in the text of the regulation followed by [number] * throughout the remaining document.

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 considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 of the SNAP regulations define “*Staple Food*” as:

“*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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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)(A) relays specific program requirements for retail food store participation, which reads, in part,

“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 ... including perishable foods in at least ~~three~~ [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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) Application of Criterion A. In order to qualify under this criterion, 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 ~~seven~~ [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 ~~three~~ [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. 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.”

“(B) Offer for sale perishable staple food items in at least ~~three~~ [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 within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store 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...”

7 CFR § 278.1(b)(6) describes regulatory considerations regarding SNAP participant access to authorized retail stores, reading,

“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.”

7 CFR § 278.1 (k) reads, in part,

“FNS shall deny the application of any firm if it determines that (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section...”

7 CFR § 278.1 (k)(2), reads, in relevant 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

APPELLANT’S CONTENTIONS

In the request for administrative review Appellant, through its ownership, provides that:

- It is believed Appellant meets the SNAP eligibility requirements and requests re-inspection.
- Appellant represents a new store with an owner who states he has limited English speaking abilities. Those limitations with the English language are indicated to have inhibited clear communication with the contractor completing the February 14, 2018 store visit.

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The Application dated December 22, 2017, indicates that 1252 Deli Grocery Corp, is operating as a convenience store; open from 6:30AM until 11:30PM, seven (7) days per week.

The Application, Questions 18, 19, and 20, report Appellant to be selling at least three (3) varieties of staple food products in each of the four (4) staple food categories or groups, with perishable food products available in at least two (2) of the four (4) staple food groups. Further, in the December 22, 2017 Application Appellant estimates total retail sales for calendar year 2018, with 79 percent attributable to staple foods.

Because of the change in SNAP regulations effective January 17, 2018 Appellant was requested to file a new application, with edited questions numbers 19, 20, and 21. Again the materials report that Appellant is selling at least three (3) varieties of staple food products in each of the four (4) staple food groups with perishable items in at least two (2) categories. The February 1, 2018 Application, in question 22, reports that 70 percent of the total estimated gross retail sales are derived from staple foods.

On February 14, 2018 a FNS contractor conducted a store visit in an effort to determine whether or not Appellant met the regulatory eligibility requirements to be authorized to redeem SNAP benefits. During the store visit photographs were taken of the firm as well as its stock and inventory; an interview was conducted with the self-identified “worker” who authorized the visit; and a written report detailing observations made was completed that includes an assessment of inventory and a sketch of the store layout.

It is important to clarify that the purpose of the instant review is to ascertain whether or not the decision reached by the Retailer Operations Division was correct at the time it was made. There is no provision in the SNAP regulations for consideration of changes made following the submission of the materials responsive to requests from the Retailer Operations Division; and/or completion of the contracted store visit.

Criteria A:

The store visit materials include a general report indicating that 1252 Deli Grocery Corp is located at the address as reported on the application, in retail space of approximately 400 square feet operating under signage identifying “5 Star Candy & Grocery”.

The store visit materials include an inventory sheet reporting staple food stock, which has been reconciled by Retailer Operations Division to include:

- One (1) variety of food in the dairy products category consisting of more than 20 units of milk (canned and fresh). The fresh milk is considered perishable.
- Six (6) varieties of fruits/vegetables staple foods; each documented to include more than three (3) stocking units; with two (2) varieties identified as perishable.
- Three (3) varieties of bread and cereal staple foods; each with more than three (3) stocking units identified; and one (1) of those identified as perishable.

- Two (2) varieties of meat, poultry and seafood staple foods consisting of more than 20 units of canned tuna; and, three (3) units of eggs. The eggs are considered to represent a perishable food variety.

The reports indicates that store personnel has confirmed the reviewer's assessment that there are fewer than four (4) SNAP eligible food items priced at \$5 or higher.

The certified photographs included in the store visit report show a significant portion of the inventory to include accessory food items which are "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"⁴. The materials also evidence the availability of non-food items including paper goods, cleaning products, health and beauty aids, and, the services of an ATM or money transfer service.

The record shows that on the date of the store visit Appellant was deficient in two (2) of the four (4) staple food categories, identified as Dairy products; and, Meats, Poultry, Fish.

Ownership has explained that he is not proficient in English language communication, which hindered the communication of information during the February 14, 2018 contracted store visit. However, on review it is noted that the owner did not authorize the contracted store visit; and, is not evidenced to have been interviewed. Instead the visit was authorized by a self-identified "worker" who provided responses to the questions asked by the reviewer. There is no indication that the reviewer and the worker had any language communication challenges. Therefore, Appellant's contention regarding communications limitations having hindered the information provided during the store visit cannot be accepted as a basis to mitigate or reverse the findings of the Retailer Operations Division.

In electronic mail routed to the Administrative Review Officer on May 3, 2018 from Community Consultants (@ gmail.com) a copy of the April 19, 2018, letter accepting the request for review postmarked on April 5, 2018, together with 12 color photographs, were provided for consideration. Those materials were forwarded to the Retailer Operations Division as new information. In electronic mail dated May 15, 2018 the Retailer Operations Division reported having carefully assessed the photographs provided and determining that because the photographs are not date or time stamped they cannot be accepted as evidence that 1252 Deli Grocery Corp met the SNAP regulatory requirements of offering "for sale, **on a continuous basis**, [Emphasis added] a variety of qualifying foods in each of the four categories of staple foods" as delineated in the SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii) at or before the time of the contracted store visit. Therefore, Appellant's photographs provided with the May 3, 2018 electronic mail cannot be considered a mitigating factor in the Retailer Operations Division determination. Appellant's assertion that it is believed that SNAP regulatory requirements have been met cannot be affirmed.

⁴ Excerpt from Staple Food definition cited in 7 CFR § 271.2.

On review, the Retailer Operations Division decision that 1252 Deli Grocery Corp did not meet the eligibility conditions of criterion A is affirmed.

Criteria B:

The SNAP regulations at 7 CFR § 278.1 (b)(1) under Criterion B require that **more than 50 percent** of the total gross retail sales must be in **staple foods**. Staple foods are specifically defined in 7 CFR § 271.2 as “those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products”.

The December 22, 2017 SNAP Retailer application provided for consideration under the signature of ownership indicates that 1252 Deli Grocery Corp expects to derive approximately 79 percent of its estimated gross annual retail sales from staple foods. The application dated February 1, 2018 calculates to indicate that staple food sales comprise 70 percent of its estimated annual retail sales. However, the Retailer Operations Division notes that the February 14, 2018 store visit materials, most specifically the certified photographs, show a majority of the inventory identified to be accessory foods as defined in 7 CFR § 271.2.

On review it is determined that the Appellant materials do not support a conclusion that more than 50 percent of 1252 Deli Grocery Corp’s estimated annual retail sales would derive from staple foods in light of the significant stock of accessory foods as defined in 7 CFR § 271.2.

Therefore, the Retailer Operations Division decision that 1252 Deli Grocery Corp did not meet the eligibility conditions of criterion B is affirmed.

Need for Access:

7 CFR § 278.1(b)(6) provides that “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.” This evaluation also includes other factors such as distance to the nearest SNAP-authorized firms, transportation options, the extent of Appellant’s stocking deficiencies, and whether or not Appellant is considered to further the purposes of SNAP.

The record indicates that the Retailer Operations Division evaluated 1252 Deli Grocery Corp and determined that it was not located in a Low Food Access Area; and, therefore the firm does not qualify for SNAP authorization under this provision.

A review of the documentation contained in the official record affirms the Retailer Operations Division determination.

Reapplication:

As indicated above SNAP regulations at 7 CFR § 278.1(k)(2) states, in part that “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 . . . **for a minimum period of six months from the effective date of the denial.**” [Emphasis Added].

CONCLUSION

Based on the discussion above, the decision by the Retailer Operations Division to deny the application of 1252 Deli Grocery Corp to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) 1252 Deli Grocery Corp is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the letter of determination, March 28, 2018.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this 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.

NANCY BACA-STEPAN
Administrative Review Officer

May 17, 2018