

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

1901 Anderson Lane LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211808

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (Retailer Operations) to withdraw the authorization of 1901 Anderson Lane LLC (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and its 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

FNS regulations require that stores be reauthorized on a set schedule. FNS-contracted personnel conducted an onsite visit June 15, 2018, to ascertain Appellant's continued eligibility to participate as a SNAP retail food store. By letter dated July 30, 2018, Retailer Operations provided the Appellant the opportunity to provide proof of inventory within 21 days of the store

visit, as evidence that the Appellant normally carries the minimum required number of varieties, stocking units, and perishables, specifically in the dairy products staple food category.

By letter dated August 8, 2018, the authorization of Appellant to participate in the SNAP was withdrawn, because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1).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 foods in sufficient quantities on a continuous basis and was found to carry too few items in the staple food categories. The letter also informed the owners that the Appellant 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. The letter informed the owners that the Appellant's eligibility under the need for access provision was considered, but the Appellant does not qualify for SNAP authorization under this provision.

The owner was informed that firms withdrawn from participation shall not be eligible to re-apply for SNAP participation for a minimum period of six months from the effective date of this withdrawal, as provided in § 278.1(k)(2).

The store manager requested administrative review of the Determination by a letter dated August 11, 2018. The appeal was granted by letter dated August 20, 2018.

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 relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

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 three 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 stock keeping 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 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. 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. 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) imparts program requirements for retail food store participation which states: “(A) 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 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 in order for a retail store to qualify for authorization 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 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.” 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)(B) provides that in order to qualify under Criterion A firms shall: “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)(iii) provides that in order 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)(6) states: “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(l)(1) Withdrawing authorization reads: “FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons. (i) The firm’s continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or 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, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.”

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision.

- I am the new store manager, effective August 4, 2018, and I am a certified Food Manager for the City of Austin. The previous manager has been relieved from his responsibilities.
- I have started bringing the store back into compliance; almost all of the food required for this program is in the market or will be available as soon as possible.

- We already have the equipment, system, and products, so only a small amount of additional effort is necessary for us to fulfill the requirements.
- I humbly request a second chance to ensure that the store fulfills the requirement of FNS and greatly appreciate the extra time you give me.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to either validate or to invalidate the determination made by Retailer Operations. This review is limited to the facts at the time Retailer Operations rendered its decision. It is not within the scope of this review to consider actions the owner may take to qualify for authorization in the SNAP subsequent to that determination. The authorization of a store to participate in the SNAP must be in accord with the Act and the applicable regulations; those requirements cannot be waived.

The onsite visit report by a FNS contractor supports by a preponderance of the evidence that Appellant was deficient in the dairy staple foods category and did not meet Criterion A. The store manager admits that the store was not carrying required merchandise on the date of the store visit. The owner was given the opportunity to provide invoices/receipts, as evidence that the store normally carries the minimum required number of varieties in the dairy product staple food category within 21 days of the store visit. The owner provided no evidence to demonstrate that Appellant met the requirements at the time the decision was rendered. That Appellant may now be properly stocked is not an issue under review. The regulations are clear that the stocking units and variety in the four staple food categories must be available on a continuous basis.

Appellant also did not meet Criterion B; it does not have more than 50 percent of its total gross retail sales in staple foods. The eligibility requirements to participate as a SNAP retail food store must be met. The owner provided no evidence to demonstrate that Appellant met the requirements at the time the decision was rendered.

There are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory eligibility criteria.

As Appellant failed to meet Criterion A and B, Retailer Operations did give consideration to the Appellant's eligibility under the need for access provision at 7 CFR § 278.1(b)(6) and determined Appellant does not qualify for SNAP authorization under this provision.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm did not meet the eligibility requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations is sustained. Appellant shall not be eligible to submit a new application for authorization in the SNAP for a minimum period of six months from August 8, 2018, the effective date of the withdrawal. Please call 877-823-4369 with any general application questions.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 with respect to applicable rights to a judicial review of this determination. 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 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.

Kim Dameron
Administrative Review Officer

October 24, 2018