

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

**2nd Stop Food Store,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0219759**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division (Retailer Operations) properly denied the application of 2<sup>nd</sup> Stop Food Store (hereinafter “Appellant”) to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

**ISSUE**

The issue accepted for review is whether or not Retailer Operations took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of Appellant.

**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 July 22, 2019, Retailer Operations denied Appellant’s SNAP application due to its failure to meet program eligibility requirements. This denial action was based on observations made during a store inspection which occurred on June 14, 2019, as well as information provided on Appellant’s SNAP application dated April 30, 2019.

Retailer Operations determined that Appellant did not meet eligibility under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated the Appellant failed to meet the requirements of Criterion A, because in at least one of the four

staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. It also stated that Appellant failed to meet the requirements of Criterion B, because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that Appellant 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's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter dated July 26, 2019, Appellant requested an administrative review of the agency's decision. The request was granted by letter dated August 8, 2019.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as an application denial, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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**

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) 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 § 271.2 defines a 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 *[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, 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter...

7 CFR § 271.2 defines staple food as:

...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, 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) states, in part:

An establishment...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 *[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).

7 CFR § 278.1(b)(1)(ii) states, in part:

In order to qualify 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 *[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 *[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...

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

(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; and

(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 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) states, in part:

In order to qualify 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) states:

*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.

## **APPELLANT'S CONTENTIONS**

Appellant's contentions, in its request for administrative review, are summarized below, in relevant part:

- We disagree with the determination.

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

- Since the inspection from USDA we have met the stocking requirement under Criterion A.
- With the additional stock of the food, the sales of such food will certainly meet the food sales of 50% as stated in Criterion B.

In support of its contentions, Appellant submitted 11 receipts.

## **ANALYSIS AND FINDINGS**

The purpose of this review is to either validate or invalidate the July 22, 2019, denial determination made by Retailer Operations. This review is limited to consideration of the relevant facts as they existed at the time of the contractor's visit to the store and at the time the agency rendered its decision.

After reviewing the store visit report and photographs as well as evaluating the contentions and evidence submitted by Appellant, it is the determination of this review that Appellant does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization. Specifically, Appellant was deficient in the dairy staple food category on the day of the contractor's visit. In order for a firm to be eligible under Criterion A, it must 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 variety. In this case, Appellant was deficient by one stocking unit in the dairy staple food category.

On July 11, 2019, Retailer Operations sent Appellant a letter stating that the firm was lacking stock in the dairy staple food category. The letter gave Appellant an opportunity to provide invoices/receipts as evidence that Appellant normally carries appropriate varieties and quantities of dairy products. The letter stated that the invoices/receipts must be dated no more than 21 calendar days prior to the June 14, 2019, store visit and may not be dated on or after the date of the store visit. The record shows one receipt from Walmart was received on July 17, 2019; however, the receipt was dated July 16, 2019, which falls outside the required 21-day timeframe noted above.

In its request for administrative review, Appellant submitted 11 receipts from various vendors, including Walmart, Ice Cream Warehouse, Sam's Club, Save a Lot, and Bimbo Bakeries USA. Unfortunately, none of the receipts provided fall within the required 21-day timeframe noted above. The agency's July 11, 2019, letter explicitly states that receipts dated more than 21 calendar days prior to the store visit or on or after the date of the store visit cannot be accepted. Accordingly, Appellant's documentation cannot be considered by this review because it does not provide an accurate representation of store conditions and inventory as of the date of the contractor's visit.

After considering all available evidence in this case, it is clear to this review that Appellant was deficient in its staple food inventory on the day the contractor visited the store (or as stated in the regulations, "on any given day of operation"), and no evidence has been provided to prove otherwise. Appellant does not have sufficient stock in the dairy staple food category and is not eligible for SNAP authorization under Criterion A. Appellant is also not eligible for SNAP

participation under Criterion B, as the sale of staple foods does not exceed 50 percent of Appellant's total retail sales. According to Appellant's SNAP application, just 10 percent of its sales come from staple food sales.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered. Appellant has not offered a preponderance of evidence to support that it met the eligibility criteria at the time the determination was rendered. It is the finding of this review that the application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b) and (k)(2).

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that Appellant does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision to deny the application of 2<sup>nd</sup> Stop Food Store to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from July 22, 2019, which is the effective date of the denial.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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 22, 2019