

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

Abugeda Grocery LLC,

Appellant,

v.

Case Number: C0205342

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to deny the application of Abugeda Grocery LLC (Abugeda Grocery or Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Appellant may not reapply for six months from the date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Abugeda Grocery to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the 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 December 6, 2017, the Retailer Operations Division informed ownership that the application of Abugeda Grocery to participate as an authorized retailer in SNAP was denied because Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the November 1, 2017, FNS store visit, the Retailer Operations Division determined that Abugeda Grocery failed to meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category. The Retailer Operations Division sent Appellant a proof of inventory letter dated November 21, 2017, to determine if Abugeda Grocery normally stocks

three varieties of food in the dairy staple food category. Appellant did not timely reply to the Retailer Operations Division's request for documentation. The Retailer Operations Division also determined that the firm failed to meet Criterion B because staple food sales comprised less than 50 percent of its total gross retail sales.

As the firm failed to meet either eligibility criterion for approval, ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter postmarked December 15, 2017, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

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, inter alia 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)"

7 CFR § 271.2 defines staple food, in part, 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. . . . Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm"

7 CFR § 278.1(b)(1)(i) imparts specific program requirements for retail food store participation, which reads, in part, "An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items **on a continuous basis** (emphasis added) 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.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “. . . 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”

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, it must “. . . have more than 50 percent of . . . 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 . . .”

7 CFR § 278.1(k)(2) reads, 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 . . . for a minimum period of six months from the effective date of the denial.”

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its December 13, 2017, administrative review request, in relevant part:

- The owner never received a request to provide proof of its dairy stock.
- More than 50% of the store’s sales are from the sale of staple food.
- Appellant provided three invoices to show that it purchased butter.
- Appellant found a request for documentation in its email on December 4, 2017, and faxed documentation on December 6, 2017.
- A significant amount of sales comes from meat, Ethiopian soft bread, different flours, lentils, beans, chick peas, dairy products, and cooking spices.
- These products comprise more than 80% of its inventory and generate more than 75% of its sales.
- Given the delay of the letter and that more than 50% of its sales are staple food items. Appellant requests that its application be reconsidered.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

The record reflects that ownership submitted an application to participate as a SNAP retailer on July 26, 2017, wherein it estimated that staple foods accounted for 45% of total gross retail sales. The accessory "other" food items showed an estimate of 45% of the firm's total gross retail sales. The owner estimated 10% of sales come from non-food items. A review of Appellant's food inventory was conducted by FNS contracted staff as a routine part of the authorization process on November 1, 2017. The store visit revealed insufficient stock in the dairy staple food category; thus, not meeting Criterion A according to 7 CFR § 278.1(b)(1)(ii).

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that in order to qualify for SNAP authorization under Criterion A (**emphasis added**), a firm shall "offer for sale . . . 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." This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The record shows that on the day of the store visit, Appellant only had one variety of food in the dairy staple food category (condensed sweet cream) and no varieties of food in the meat, poultry, or fish staple food category.

On November 21, 2017, the Retailer Operations Division sent Appellant a letter requesting documentation to show that the firm normally carries at least three different varieties in the dairy staple food category. Appellant did not timely reply to the Retailer Operations Division. Appellant re-submitted its invoices with its administrative review request to show that it carried a sufficient variety of dairy food items. The invoices only support that Appellant sold butter. However, this is only a second variety of dairy. Appellant is still missing a third variety of dairy. Therefore, the evidence does not support that Appellant maintained a sufficient variety of staple foods to be eligible to accept SNAP benefits under Criterion A.

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii). Appellant's own SNAP application estimates that 45 percent of its gross annual retail sales come from the sale of staple foods. The store visit photographs and report show that there was an extensive stock of non-food items. The evidence does not support Appellant's contention that more than 50% of its total sales are from the sale of staple food items. Therefore, the Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

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 . . . for a minimum period of six months from the effective date of the denial.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

Request for Documentation

Appellant contends that it never received the request to document its inventory of dairy products. The record shows that a letter was sent to Appellant on November 21, 2017. The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division’s adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that the Retailer Operations Division’s determination should be reversed. Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, has now been considered in rendering the final agency administrative decision in this case. The record does not indicate any departure from established procedures with regard to Appellant’s right to a fair and thorough review.

CONCLUSION

The Retailer Operations Division’s decision to deny the SNAP application of Abugeda Grocery is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant is not eligible to submit a new application for six months from December 6, 2017, the date of the denial letter.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant’s owner resides or is 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.

Mary Kate Karagiorgos
Administrative Review Officer

March 21, 2018