

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

Ace Liquor,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0227502

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 to deny the application of Ace Liquor (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on February 18, 2020.

AUTHORITY

7 U.S.C. § 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 February 18, 2020, Retailer Operations Division informed Appellant that its inventory of staple foods was marginal, and requested invoices/receipts to verify that the store carried at least three stocking units of three different varieties of foods in the dairy products staple food category. Appellant was informed that it had 10 days, from receipt of the letter, to provide the requested documentation.

The record reflects that Appellant provided one receipt dated February 16, 2020, to show that it normally carried the required number of staple food items in the dairy products category. In a

letter dated February 18, 2020, Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on observations during a store visit on January 31, 2020, documentation provided as proof of inventory, as well as information provided on the firm's retailer application.

Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter stated the Appellant failed to meet the inventory requirements under Criterion A because your store does not carry three stocking units in at least three varieties of foods in the dairy product staple foods category(s). The denial letter also states your firm also fails to meet Criterion B because your firm's staple food sales comprise 50 percent or less of your annual gross retail sales.”

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

In a letter dated February 22, 2020, Appellant appealed Retailer Operation's decision and requested an administrative review of this action. 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

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

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . 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 § 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.”

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) of the SNAP regulations define perishable staple foods as "... 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)(C) of the SNAP regulations define variety as "... 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. . . ."

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; or (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 authorized 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."

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its response to the denial letter and its request for administrative review, in relevant part:

1. I disagree with the decision because our store meets all four categories in Criteria A.
2. Our annual sales report is also 50 percent of food because we are located in a low income residency with the only close convenient store nearby.

In subsequent correspondence Appellant provided one purchase receipt dated March 11, 2020. The receipt is dated well after the store visit date and is therefore ineligible during this review.

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

ANALYSIS AND FINDINGS

In regards to Appellant's contentions, through counsel, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP.

Section 278.1(b)(ii)(A) of the SNAP regulations state in part “...firms shall 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.” Therefore, Appellant’s contentions do not provide any valid basis for dismissing or mitigating the adverse action imposed.

Additionally, Appellant was provided an opportunity to submit evidence to show that it normally carried the required number of staple food items in the dairy staple foods category and the record reflects that Appellant purchase receipts provided by Appellant did not show proof of additional dairy stock purchased within 21 days prior to the January 31, 2020, store visit.

Appellant reported on its retailer application that one (1) percent of its projected total annual gross retail sales were from the sale of staple foods. Appellant’s application, the photographs and firm inventory provided from the firm visit, confirm that Appellant did not derive more than 50 percent of its projected total annual gross retail sales from the sale of staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The regulations also provide a definition of “*Ineligible firms*” as “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 to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation.

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.

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision.

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 or the

completion of the contracted store visit. Similarly the regulations do not support re-visiting following a final determination by the Retailer Operations Division.

CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the application of Ace Liquor to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective February 18, 2020.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

May 13, 2020