

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

**A&d 2017, Llc, #2,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214316**

**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 Retailer Operations Division (Retailer Operations) properly denied the application of A&d 2017, Llc, #2 (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took action consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278.1(b)(1), in its administration of SNAP when it denied the authorization of Appellant to participate as a SNAP retail food store.

**AUTHORITY**

7 U.S.C. § 2023 and the 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**

The owner completed an application for SNAP authorization October 12, 2018. FNS-contracted personnel conducted an onsite store visit October 20, 2018, to ascertain Appellant’s eligibility to participate in SNAP. By letter dated November 13, 2018, the application of Appellant to participate as a retail food store in SNAP was denied 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 or sale a variety of staple foods in sufficient stocking units on a continuous basis in the established staple food categories, specifically the dairy staple food category.

The letter also states that the firm failed to meet Criterion B because Appellant's staple food sales comprise 50% less of its annual gross retail sales. Additionally, the letter states that FNS considered Appellant's eligibility under the Need for Access provision at 7 CFR § 278.1(b)(6), and determined that Appellant does not qualify for SNAP authorization 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).

By letter dated November 14, 2018, an administrative review of the agency's decision was requested. The appeal was granted by letter dated November 28, 2018.

### STANDARD OF REVIEW

In an appeal of adverse action, 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 argument 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, 7 U.S.C. § 2018 and 7 CFR § 278. In particular, 7 CFR § 278.1(b)(1) provides 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(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,

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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>

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 stock keeping 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

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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>.

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...

- (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

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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>.

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 presented have been considered in rendering this decision whether listed or not:

- We are a new business; fear losing business by turning SNAP customers away. Please reconsider your decision and give us a second evaluation.
- When the gentlemen came to the store and took pictures, I personally showed him where the items were that he was asking about inside the store. The only item I did not have was infant formula.

### **ANALYSIS AND FINDINGS**

The purpose of this review is to validate or invalidate the November 13, 2018, 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 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 is deficient in the dairy staple food category. This review finds that the only dairy variety, in sufficient quantities in the store on the day of the contractor's visit, was cow's milk. 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 five stocking units in two dairy varieties.

It must be made clear that in order for a firm to be authorized in SNAP it must stock sufficient staple food inventory on a continuous basis. A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot be authorized. This review is limited to consideration of the facts as they existed at the time of the contractor's visit to the store. It is not the authority of this review to consider subsequent remedial actions – such as purchasing additional inventory – that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for reversal of a denial determination on the basis of corrective actions implemented subsequent to the finding of a firm's ineligibility.

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. With only cow's milk in appropriate quantities, and one unit of cheese in stock, Appellant does not have sufficient stock in the dairy staple food category and is not eligible for SNAP authorization under Criterion A.

Based on Appellant's application, Retailer Operations determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). Appellant's staple food sales were self-reported as being 1% of total retail sales; this percentage is under the regulatory threshold of 50% to qualify under Criterion B. No evidence was provided by the owners that Appellant met Criterion B at the time of the denial. Retailer Operations also properly assessed the firm for Need for Access as per the regulations at 7 CFR § 278.1(b)(6), and found that it did not qualify.

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).

### **Hardship to Appellant**

Appellant contends denial of authorization might create financial hardship to the business. Economic hardship is a likely consequence whenever a store's SNAP authorization is denied. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been denied from the program in the past for similar deficiencies. Therefore, Appellant's contention that it might incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the denial of Appellant's application.

The regulations at 7 CFR § 278.1(k) state, 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 of less than six months when a firm does not meet the eligibility requirements for authorization.

## **CONCLUSION**

Based on a review of the evidence, the determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retail food store is sustained. The firm did not meet the requirements of a retail food store as set forth in 7 CFR § 278.1(b)(1). The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retail food store in SNAP for a minimum period of six months from November 13, 2018, which is the effective date of the denial.

General questions regarding the application process can be handled by contacting 877-823-4369. Operational questions regarding the denial should be directed to the office that initially took the action to deny Appellant. Please contact Johnathon Snyder at (312) 582-7802 or [johnathon.snyder@usda.gov](mailto:johnathon.snyder@usda.gov).

## **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 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 Appellant's owners reside or are 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

December 3, 2019