

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

AJ Mart LLC,

Appellant,

v.

Case Number: C0210884

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), has decided that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly denied the application of AJ Mart LLC (Appellant) to participate as a retail food store 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 denied the application of Appellant to participate in the SNAP as an authorized retail food store.

AUTHORITY

7 USC § 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

Appellant submitted an online SNAP application on April 10, 2018. FNS-contracted staff conducted an onsite store visit on May 21, 2018. By letter dated June 27, 2018, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility requirements as set forth in § 278.1(b)(1) of the SNAP regulations. Retailer Operations determined that 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, Breads/Cereals, and Meats/Poultry/Fish staple food categories and did not meet Criterion A.

Retailer Operations also determined that the firm did not meet eligibility Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations because its staple food sales did not comprise more than 50 percent of its gross retail sales. This was based on the application information.

The Determination Letter also states that Retailer Operations considered the Appellant's eligibility under the need for access provision at § 278.1(b)(6) of the SNAP regulations. However, the Appellant did not qualify for SNAP authorization under this provision.

Appellant was informed that the firm could not submit a new application to participate in the SNAP for a period of six months as provided in § 278.1(k)(2).

The responding owner requested administrative review of the determination by a letter dated July 9, 2018, and attached five pages of photographs. The appeal was granted by letter dated July 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 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 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 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 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. 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.”

7 CFR § 271.2 states: “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: “(A) An establishment or house-to-house trade route 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 for a retail store to qualify for authorization under Criterion A, a firm 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) states: “(B) 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)(ii) states: “(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides that 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) deals with the 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.”

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. 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.”

APPELLANT’S CONTENTIONS

All contentions, as stated by the responding owner below, have been considered:

- Request to reconsider our application since the day of the visit of the officer of the Food and Nutrition Service were were running low on food inventory.
- Our convenience store is located in a neighborhood that grocery stores at not close by, and base on the average income of our customer almost 70 percent of our clients are always requesting to use their EBT card in our store.

The responding owner attached five pages of pictures to his request for administrative review, to show some of the inventory the store normally has every day.

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision.

The application submitted by Appellant on April 10, 2018, reported store having only two varieties in the Breads/Cereals and two varieties in the Mealt/Poultry/Fish staple food categories. The onsite review of Appellant's food inventory on May 21, 2018, confirmed insufficient varieties in the Breads/Cereals and Meats/Poultry/Fish. The review also revealed insufficient variety in the Dairy staple food category. The SNAP regulations at Section 278.1(b)(1)(ii) are clear that under Criterion A, a firm 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." 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.

While the responding owner did provide five pages of photographs of inventory that Appellant normally has every day, 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.

On the date of the store visit, Appellant failed to meet Criterion A; it was deficient in three of the four required staple food categories. This decision is supported by the Appellant's application, onsite photographs, store report, and admission by responding owner of having low inventory on the day of the store visit.

Based on Appellant's application, Retailer Operations determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). Appellant's staple food sales comprise 50 percent or less of its reported annual gross retail sales. Insufficient evidence was provided by the owners that Appellant met Criterion A or B at the time of the denial.

The responding owner contends the Appellant is located in a neighborhood where grocery stores are not close by. While the Appellant is located in a low food access area, Retailer Operations determined Appellant did not qualify for SNAP authorization under the Need for Access provision at 7 CFR §278.1(b)(6).

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The preponderance of evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered.

CONCLUSION

Based on a review of all the evidence in this matter, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant may not reapply for SNAP authorization for a minimum period of six months from the effective date of the denial. General application questions may be directed to 877-823-4369.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to 7 CFR § 279.7 with respect to applicable rights to a judicial review of this determination. 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 owners reside 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 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

September 19, 2018