

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

**Aria’s Sunrise Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214498**

**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 Aria’s Sunrise Market (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 record shows that Appellant applied for SNAP authorization on September 29, 2018. Retailer Operations sent letters to Appellant on October 2, 2018, and October 5, 2018, requesting additional information needed to continue the SNAP authorization process. In response to Retailer Operations’ requests, Appellant provided a copy of its current business license and a signed, dated signature page of the SNAP application. The application was accepted as complete on October 17, 2018. FNS-contracted personnel conducted an onsite store visit October 23, 2018, in an effort to determine whether or not Appellant met eligibility requirements

to be authorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photographs, Retailer Operations determined that Appellant did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy staple food category making the firm ineligible under Criterion A. Additionally, both the application and the store visit report indicate that Appellant was not eligible under Criterion B.

Retailer Operations sent a proof of inventory letter to Appellant on October 29, 2018, requesting any purchase invoices or receipts documenting that it normally carries at least three stocking units of three different varieties of foods in the dairy staple food category be submitted. The letter stated that the invoices or receipts must be dated no more than 21 days prior to the date of the store visit, and may not be dated on or after the date of the store visit. Appellant's owners provided invoices and one photo that showed inventory in the dairy staple food category. None of the invoices or photo provided displayed a date. Also included with the invoices and photo was an explanation as to why the items were missing on the day of the store visit.

In a letter dated November 16, 2018, Retailer Operations informed Appellant that its authorization to participate as an authorized retail food store in SNAP was denied because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed Appellant that it did not have more than 50% of its total gross retail sales in staple food sales, as required for authorization under Criterion B. Additionally, the letter stated that FNS considered Appellant'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.

By letter postmarked September 27, 2018, Appellant requested an administrative review of Retailer Operations' decision. The request was granted by letter dated December 7, 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 untrue.

### **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, 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

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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>

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...
- (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*

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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>.

*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:

- The numbers provided are not exact, because we have only been here six months. The previous owner passed away and could not provide insight on annual sales. Numbers will change and sales will be more than 50% of the annual sales once we can accept EBT.
- The store accepted EBT and met SNAP requirements before we purchased it, and we have more inventory.
- We are losing sales every day because we cannot accept EBT, and customers are being denied sales because they cannot make EBT purchases. We are honest and will meet all of the SNAP requirements. Please consider giving us a chance to be a proud owner and to serve our community with SNAP.

In support of its contentions, Appellant provided one receipt and eight photographs showing inventory purchased.

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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>.

## ANALYSIS AND FINDINGS

Under **new regulations** implemented on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three different varieties of staple food in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying variety and at least one variety of perishable foods in at least two staple food categories. In addition, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements “on a continuous basis.”

After reviewing the store visit report and photographs, as well as evaluating the contentions and supporting documents provided 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. Appellant provided one receipt and eight photographs in its request for administrative review. The receipt and photos provided are not dated and cannot be considered for purposes of this review. This review finds that the only dairy varieties, in sufficient quantities in the store on the day of the contractor’s visit, were cow’s milk and cheese. 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 three stocking units in one dairy variety.

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 and cheese in appropriate quantities in stock, Appellant does not have sufficient stock in the dairy staple food category and is not eligible for SNAP authorization under Criterion A.

An evaluation of the percentages of staple food sales reported on Appellant’s retailer application and reported on a subsequent phone call with Retailer Operations, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50% of its estimated annual sales from the sale of staple foods. Accordingly, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

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 SNAP Households/Need for Access**

Appellant contends that every day it has customers asking when the store will be authorized to accept EBT cards and has to deny their EBT purchases. Appellant claims that it just wants to be a proud owner and serve our community with SNAP. This contention implies that the firm's customers will experience hardship if it is not authorized to accept SNAP benefits.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail store's SNAP application is denied and households are forced to shop elsewhere. To address such situations, regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

The record indicates that Retailer Operations conducted a Need for Access evaluation and determined that the firm does not qualify for SNAP authorization under this provision. After an analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

### **Hardship to Appellant**

Appellant contends that it has lost a lot of sales and customers by not being able to accept EBT. Such a contention has no bearing on this matter. A store may only participate in SNAP if it meets all eligibility requirements. Economic hardship to a store is not a consideration under the regulations.

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 is losing sales because

it cannot accept EBT does not provide a valid basis for dismissing the denial of Appellant's application.

### **Basis of Determination**

Appellant states that the previous owner had been authorized in the past and claims that it has more inventory. This review is limited to what circumstances existed at the time of the store visit which forms the basis of Retailer Operations' action. Whether or not the store was authorized in the past under different ownership is not relevant to this case. The store may reapply for SNAP six months from the effective date of the denial and any updated food inventory will be taken into consideration at that time.

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 Krimy Almodovar at (404) 562-1914 or [Krimy.Almodovar@usda.gov](mailto:Krimy.Almodovar@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 9, 2019