

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Bryson Investment Holdings Llc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207088

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 decision by the Retailer Operations Division, to deny the December 6, 2017, FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Bryson Investment Holdings Llc (hereinafter, “Appellant” and/or “Bryson Investment Holdings Llc”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was proper.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2; 7 CFR § 278.1(b)(1); and, 7 CFR § 278.1(b)(6), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Bryson Investment Holdings Llc to participate in the SNAP via letter dated February 23, 2018.

AUTHORITY

7 U.S.C. 2023 and its 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 23, 2018, the Retailer Operations Division informed Appellant that the application of Bryson Investment Holdings Llc to participate as an authorized retailer in SNAP was being denied because it did not meet the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(6).

This determination was made as a result of a review of the electronic form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (Application) documented to have been initially received by FNS on December 6, 2017; a FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (Application) documented to have been received by FNS on January 26, 2018; and, information and materials resulting from a store visit conducted by FNS contracted personnel on January 19, 2018.

Via letter postmarked February 28, 2018, received in the office of the Chief of the Administrative Review Branch on March 6, 2018, Appellant requested an administrative review of the action to deny authorization to participate as a SNAP Retailer. 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 AND REGULATIONS

7 U.S.C. § 2023 and its 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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).²

7 CFR § 271.2 of the SNAP regulations define “*Staple Food*” as:

“*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

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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)(A) 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).” [Emphasis Added]

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 (3) different varieties of food items in each of the four (4) staple food categories with a minimum depth of stock of three (3) stocking units for each qualifying staple variety on any given day of operation..

7 CFR § 278.1(b)(1)(ii)(B) references the requirement for stocking perishable foods as:

“(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; and...”

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations define “variety”, in part, as:

“(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, 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(b)(6) describes regulatory considerations regarding SNAP participant access to authorized retail stores, reading,

“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.”

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...”

7 CFR § 278.1 (k)(2), reads, in relevant 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

APPLICATION SUMMARY

The administrative record includes form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* dated December 6, 2017, which indicates that Bryson Investment Holdings Llc is selling a variety of staple food products in each of the four (4) staple food groups; and, stocking fresh, frozen or refrigerated foods in at least two (2) of those categories in Questions 18, 18a, and 18b. The application documented as received by Retailer Operations Division on January 26, 2018 affirms that Bryson Investment Holdings Llc is selling at least three (3) varieties of staple food products in each of the four (4) staple food groups (Questions 19, 19a, 19b, 19c, and 19d). However, in answer to Question 20C Appellant responds “No” to the question “Do you have at least three stocking units of each variety in the Meat, Poultry, and/or Fish category (Examples; 3 cans of tuna, 3 cartons of eggs, etc.)?” Additionally the materials indicated that Appellant did not carry perishable foods in at least two (2) categories on a continuous basis.

The December 6, 2017 application indicates that Appellant estimated total retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), with 33 percent attributable to staple foods, seven (7) percent to “other” foods; and 60 percent to non-foods and hot foods. The January 26, 2018 application indicates that the estimated total sales for Bryson Investment Holdings Llc for one (1) year are 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of that attributable to staple foods.

The administrative record includes a letter dated February 6, 2018, requesting “invoices/receipts to verify that your Store carries at least three stocking units of three different varieties of foods” in the Dairy products category. Documentation indicates that the Retailer Operations Division received, and considered the invoice/receipt materials provided by Appellant, finding that the documents reflected the purchase of cheese, in 4 packs of 5-pounds each; together with milk in various nutrient values and flavors.

The milk invoices were accepted as responsive to the dairy products request, however, because the cheese was in bulk packaging, and included on an invoice from Sysco listing other foods in bulk quantities, it was considered for use in the preparation of hot foods for the hot food takeout table seen in the official store visit photographs. The cheese was determined not to represent staple food for sale to SNAP customers. Further, the materials did not include a third variety of dairy products such as butter or margarine, yogurts or dips, soft-cheese, soy yogurt, almond milk, etc.

APPELLANT’S CONTENTIONS

In the request for administrative review Appellant, through its ownership, provided copies of the invoices/receipts initially provided for consideration to the Retailer Operations Division. The materials indicate that it is believed the person who processed the materials did not go through the materials in sufficient detail to identify the items intended for consideration. The receipts were highlighted and delineated for clarity.

Ownership also indicates that the store has served as an authorized SNAP retailer in the past; and the change in ownership should not result in a “hard time” because ownership has only one (1) store and is trying to do the right thing with no intention of doing anything unlawful.

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

ANALYSIS AND FINDINGS

The record includes materials from a contracted store visit, conducted on January 19, 2018, under the authority of a self-identified “Co-owner” The materials include an inventory checklist that is completed by the store visit contractor; a series of questions that are marked as answered in cooperation with the individual who authorized the store visit; a sketch of the store layout; and, certified photographs.

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 Applications; materials responsive to requests from the Retailer Operations Division; and completion of the contracted store visit.

Criteria A:

The store visit materials include a general report indicating that Bryson Investment Holdings Llc is located at the address as reported on the application, in retail space of approximately 3200 square feet operating under signage identifying “Perkins Express” as operating 14 hours a day, seven (7) days per week.

The store visit materials include an inventory sheet reporting staple food stock to include at least three (3) stocking units in the following staple food categories:

Two (2) varieties of food in the dairy products category consisting of milk and cheese. Notably the presence of ice cream is noted, however, ice cream is considered an accessory food, not a staple food item.

Ten (10) varieties of fruits/vegetables staple foods.

Five (5) varieties of bread and cereal staple foods.

Five (5) varieties of meat, poultry and seafood staple foods.

The four (4) most expensive items identified at the store visit include a four-pack of Red Bull selling for \$7.99; a gallon of milk selling at \$5.99; a 3.25 ounce package of beef jerky selling at \$7.99; and a 24 pack of 16.9 ounce bottles of water selling for \$7.99.

The report also indicates that Bryson Investment Holdings Llc sells non-food stock consisting of tobacco products, alcohol, lottery tickets, gasoline, automobile products, health and beauty aids, paper goods, cleaning products and the services of an ATM. There is a commercial kitchen identified, with separate storage identified for the stock used in hot food preparation. There is a hot-food buffet table with various cooked foods available seen in the store visit certified photographs.

The record shows that on the date of the store visit Appellant was deficient in one (1) of the four (4) staple food categories, identified as the Dairy products category; and, that the materials provided in response to the proof of inventory request did not support evidence that Appellant had at least three (3) stocking units, of at least three (3) varieties of Dairy products. Appellant did not meet the eligibility requirements to “Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods” as delineated in the SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii).

On review, the Retailer Operations Division decision that Bryson Investment Holdings Llc did not meet the eligibility conditions of criterion A is affirmed.

Criteria B:

The December 6, 2017 SNAP Retailer application provided for consideration under the signature of ownership indicates that Bryson Investment Holdings Llc derives approximately 33 percent of its estimated retail sales from staple foods; seven (7) percent from the sale of “other” foods such as snack foods, soft drinks, or condiments; and 60 percent from non-foods or foods ineligible for SNAP purchase. The January 26, 2018 application indicates that of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in estimated annual sales, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 1.79 percent is attributable to staple foods.

The SNAP regulations at 7 CFR § 278.1 (b)(1) under Criterion B requires that **more than 50 percent** of the total gross retail sales must be in **staple foods**. Staple foods are specifically defined in 7 CFR § 271.2 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”. Neither the December 6, 2017 or January 26, 2018 applications, together with the materials resulting from the January 19, 2018 contracted store visit, support a conclusion that more than 50 percent of Bryson Investment Holdings Llc’s estimated annual retail sales would derive from staple foods.

Therefore, the Retailer Operations Division decision that Bryson Investment Holdings Llc did not meet the eligibility conditions of criterion B is affirmed.

Need for Access:

7 CFR § 278.1(b)(6) provides that “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.” The record indicates that the Retailer Operations Division evaluated Bryson Investment Holdings Llc and determined that Appellant did not qualify for SNAP authorization under this provision.

Prior Authorization:

The administrative record affirms Appellant’s contention that Appellant was previously authorized as a SNAP retailer under previous ownership. However, previous authorization is not a consideration for eligibility of new ownership to serve as a SNAP authorized retailer. The SNAP regulations specifically prescribe the conditions that must be met for SNAP retailer authorization. As noted above, in the instant situation, Appellant is not eligible for SNAP authorization.

It is appreciated that new ownership is attempting to establish a small business, with all the best of intentions, however, the situation as described is not considered in the SNAP authorization process.

Reapplication:

As indicated above SNAP regulations at 7 CFR § 278.1(k)(2) states, in part that “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.**” [Emphasis Added].³

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Bryson Investment Holdings Llc to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) Bryson Investment Holdings Llc is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the letter of determination, February 23, 2018.

³ Regulatory Changes: FNS has finalized a rule titled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" that was published on December 15, 2016. This rule makes changes to Criteria A and B requirements. Further information about the changes can be found on the USDA website at <https://www.fns.usda.gov/snap/retailer/eligible> or e mail RPMDHQ-WEB@fns.usda.gov.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN
Administrative Review Officer

April 27, 2018