

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

Cafe Esmeralda Cake & Bakery,

Appellant,

v.

Case Number: C0227524

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Cafe Esmeralda Cake & Bakery (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 withdrew the authorization of Appellant to participate as a SNAP retailer.

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 the FNS.

CASE CHRONOLOGY

The owner completed a hardcopy retailer application marked received by FNS on December 9, 2019. A FNS-contractor conducted an onsite visit January 19, 2020, to ascertain Appellant's eligibility to participate in the SNAP. Retailer Operations requested additional information by letter dated January 23, 2020. The owner provided sales information received by Retailer Operations on February 18, 2020.

By letter dated February 25, 2020, the authorization of Appellant to participate as a retail food store in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1).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 owner that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in multiple established staple foods categories.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed. Appellant was found not to meet the established criteria.

The owner requested administrative review of the withdrawal action by letter dated February 28, 2020. The appeal was granted by letter dated March 5, 2020.

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, credible evidence that 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 statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

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 three 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.” 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 § 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. 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. 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 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)(B) states that in order to qualify under Criterion A firms shall: “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)(C) states that in order to qualify under Criterion A firms shall: “Offer a variety of staple foods which means different types of foods within each 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 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)(1)(iv) states: “Ineligible firms: 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 and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons. (i) The firm’s continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or 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, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) deals with denying authorization and states 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 have been considered in rendering this decision.

- Please review this location that carries staple food like breads, cakes, and dairy products. Our retail sales are more than 60 percent.
- Those seniors had been in desperate need of this program been waiting a years [sic].

The owner advanced a SNAP store application email dated February 20, 2020, stating the firm had been authorized.

ANALYSIS AND FINDINGS

This review is to ascertain if Appellant meets the regulations for authorization. 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. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. When a firm is at least once granted authorization to participate in SNAP, this not an unencumbered right or entitlement, and it does not extend in perpetuity. The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. This review is to validate or to invalidate the decision of Retailer Operations. Thus, it is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision.

The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in multiple staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A as currently implemented, require a firm shall offer for sale and normally display in a public area, 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 and at least one variety of perishable foods in at least three staple food categories. A preponderance of the evidence supports that on the date of the firm visit Appellant did not meet Criterion A. Appellant is a self-identified as a bakery, and the onsite visit noted bread in stock. Most of the stock however, consists of accessory foods. Per the cited regulations, accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

No evidence was provided by the owner to support that Appellant met Criterion B per 7 CFR § 278.1 (b)(1)(iii) at the time of the withdrawal. Retailer Operations also properly assessed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6), and found it did not qualify. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application and reauthorization. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was rendered.

The record shows that Appellant should not have been authorized February 20, 2020, nor should it have received the authorization email that it forwarded for review. Retailer Operations initiated the reauthorization process to cure the mistake it made when the firm was erroneously authorized. The owner has not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered.

CONCLUSION

Upon review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant is sustained. The firm does not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations. The firm was incorrectly authorized, and was properly withdrawn to correct this mistake. Federal regulations at 7 CFR 278.1(k)(2) require that firms that are withdrawn for failure to meet program eligibility criteria shall not be eligible to re-apply for SNAP participation for a minimum period of six months from the effective date of this withdrawal. This decision shall take effect 30 days after the date of delivery to the firm.

If you have operational questions, please contact Melissa Wang-Mao at (213) 330-2459. Please review the retailer information available on the USDA web to learn more about what is needed to meet the eligibility requirements.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to the regulations at 7 CFR § 279.7 with respect to applicable rights to a judicial review of this determination. Please note that if 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 owner resides 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 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

April 1, 2020