

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

**Carnitas De Nicaragua Fritanga
Torilleria,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206017

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 August 4, 2017, FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Carnitas De Nicaragua Fritanga Torilleria (hereinafter, “Appellant” and/or “Carnitas De Nicaragua Fritanga Torilleria”) 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 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Carnitas De Nicaragua Fritanga Torilleria to participate in the SNAP via letter dated December 11, 2017.

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 December 11, 2017, the Retailer Operations Division informed Appellant that the application of Carnitas De Nicaragua Fritanga Torilleria 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).

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 August 4, 2017, together with information and materials resulting from a store visit conducted by FNS contracted personnel on November 20, 2017.

Via letter postmarked December 19, 2017, received in the office of the Chief of the Administrative Review Branch on December 30, 2017, 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 food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Commercially processed foods and prepared mixtures with multiple ingredients 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 normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purposes of determining eligibility under § 278.1(b)(1) of this chapter. Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm. However,

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

accessory foods that are offered for sale in authorized retail food stores are eligible food items which may be purchased with SNAP benefits.”

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) states in relevant part, that in order for a retail store to qualify for authorization 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... (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...”

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 (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 August 4, 2017, which indicates that Carnitas De Nicaragua Fritanga Torilleria is selling a variety of staple food products in three (3) of the four (4) staple food groups; indicating that Appellant does not carry staple foods in the Meat/Poultry/Fish category. No response is indicated for question 18b – “Do you stock fresh, frozen or refrigerated foods in at least two of these categories?”

Appellant's 2016 Business Tax materials record total annual retail sales in tax year 2016 of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and the document indicates that 50 percent of those sales were attributed to staple foods; 30 percent to "other" foods; and, 20 percent to non-food items and/or hot foods.

APPELLANT'S CONTENTIONS

In the request for administrative review Appellant, in an unsigned letter, indicates repeated attempted contact with FNS without response and asks "let us know what is it that you need us to sent [send] you so we can get approved."

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 November 20, 2017, under the authority of a self-identified "Manager". 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.

Criteria A:

The store visit materials include a general report indicating that Carnitas De Nicaragua Fritanga Torilleria is located at the address as reported on the application, in retail space of approximately 700 square feet; equipped with a commercial kitchen; selling hot food; with seating for approximately 30 individuals. A deli with prices posted for meats/cheeses and other refrigerated food is identified. Notably the store signage is identified to say "Carnitas Fritanga Restaurante" and the certified photographs show a hot food cafeteria style food serving arrangement.

The store visit materials include an inventory sheet reporting staple food stock to include:

- Two (2) varieties of food in the dairy products category consisting of cheese and milk.
- Five (5) varieties of fruits/vegetables staple foods were identified with the only fresh/refrigerated or frozen food in the category identified as 100 percent fruit juice.
- Seven (7) varieties of bread and cereal staple foods were identified, with two (2) of those in quantities of less than six (6) units each.
- Three (3) varieties of meat, poultry and seafood staple foods were identified.

The four (4) most expensive items identified at the store visit include:

- presto coffee in a 250 gram container selling for \$13;
- crackers in a 14 ounce package priced at \$6;

- crumbling cheese priced at \$7 per pound; and,
- chorizo sausage selling for \$6 per pound.

The report also indicates that Carnitas De Nicaragua Fritanga Torilleria includes non-food stock consisting of only cleaning products with no significant amounts of other non-foods identified.

The record shows that on the date of the store visit Appellant was deficient in one (1) of the four (4) staple food categories, therefore not meeting 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”. The record includes a proof of inventory letter dated November 28, 2017 requesting Appellant provide proof of dairy products available for sale prior to the date of the visit; and, verification of actual gross sales for the last three (3) months. Documentation in the record indicates that some materials were provided, however, it is indicated those materials were not sufficient to meet the requirements for materials as requested.

In summary, on November 20, 2017, the day of the store visit, Appellant was deficient in one (1) of the four (4) staple food groups; and, therefore did not meet the conditions as specified in SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii). The regulations are specific that staple food stock must be available on “on any given day of operation”.

Criteria B:

The August 4, 2017 SNAP Retailer application provided for consideration under the signature of ownership indicates that Carnitas De Nicaragua Fritanga Torilleria derived approximately 50 percent of its 2016 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** total annual retail sales from the sale of staple foods; 30 percent from the sale of “other” foods such as snack foods, soft drinks, or condiments; and 20 percent from non-foods or foods ineligible for SNAP purchase.

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”. The August 4, 2017 application, together with the materials resulting from the November 20, 2017 contracted store visit, do not support a conclusion that more than 50 percent of Carnitas De Nicaragua Fritanga Torilleria’s estimated annual retail sales would derive from staple foods. Appellant did not provide evidence to either support or contradict the declarations made on the application.

Therefore, the Retailer Operations Division decision that Carnitas De Nicaragua Fritanga Torilleria did not meet the eligibility conditions of criterion B is affirmed.

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

Information Requested:

It is important to clarify that Appellant ownership’s request for FNS to provide information on what is needed to become authorized cannot be honored. It is incumbent on ownership to provide a complete application form, together with any and all materials requested by the Retailer Operations Division so that a determination can be made as to the potential eligibility for SNAP authorization of a firm.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Carnitas De Nicaragua Fritanga Torilleria to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) Carnitas De Nicaragua Fritanga Torilleria 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, December 11, 2017.

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 25, 2018

³ Regulatory Changes: Please know that any SNAP retailer authorization applications submitted after December 30, 2017 are subject to a final rule titled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" (the 2016 final rule), which was published on December 15, 2016. This rule makes changes to Criteria A and B requirements. The regulations at 7 CFR have not yet been updated, therefore for updated information please visit see the USDA website at <https://www.fns.usda.gov/snap/retailer/eligible> or e mail RPMDHQ-WEB@fns.usda.gov.