

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

Casino Stop Deli and Market,

Appellant,

v.

Case Number: C0209723

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Casino Stop Deli and Market (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on May 23, 2018.

AUTHORITY

7 U.S.C. § 2023 and the 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 May 7, 2018, Retailer Operations Division informed Appellant that its inventory of staple foods was marginal, and requested invoices/receipts to verify that the store carried at least three stocking units of three different varieties of foods in the dairy products staple food category. Appellant was informed that it had 10 days, from receipt of the letter, to provide the requested documentation. The letter also stated “We have tried to reach you using several times at the store telephone number you indicated on your application and it is disconnected. Please provide a valid store telephone number and an alternate phone number such as a cell/mobile number where you can be reached at all times.

The record reflects that Retailer Operations Division received receipts from Appellant, as proof of inventory, on May 23, 2018. In a letter dated May 23, 2018, Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on observations during a store visit on April 11, 2018, the additional requested documentation, as well as information provided on the firm's retailer application.

Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter stated the Appellant failed to meet the requirements of Criterion A because it did not provide adequate documentation to show three stocking units in three varieties of dairy products. Also, the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales.

As the firm failed to meet either eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2).

In a letter dated May 31, 2018, Appellant appealed Retailer Operation's decision and requested an administrative review of this action. 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) establishes 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(b)(1)(i) 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)."

7 CFR § 271.2 defines staple food, in part, 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.”

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) of the SNAP regulations define perishable staple foods as “... 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) of the SNAP regulations define variety as “. . . 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. . . .”

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; or (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.”

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its response to the denial letter and its request for administrative review, in relevant part:

- I was not aware of the 21 day rule where I have to show invoices for qualified purchases dated no more than 21 days before inspection.
- The request for additional documentation was not received in a timely manner.

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

ANALYSIS AND FINDINGS

In regards to Appellant’s contentions it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP.

Section 278.1(b)(ii)(A) of the SNAP regulations state in part "...firms shall 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." Therefore, Appellant's contentions do not provide any valid basis for dismissing or mitigating the adverse action imposed.

Additionally, though Appellant provided purchase receipts as proof of inventory, as requested by Retailer Operations Division, the record reflects that the receipts were dated after the contractor store visit on April 11, 2018, and were therefore considered insufficient. SNAP regulations specifically state that perishable foods are food items that will spoil or suffer significant deterioration in quality within 2-3 weeks. Since Appellant's receipt was dated outside of the three weeks specified by SNAP regulations, it is reasonable to conclude that Appellant did not offer for sale a variety of food in sufficient quantities on a continuous basis in the dairy products category. As Appellant failed to provide adequate documentation, Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the firm did not offer "qualifying staple foods on a continuous basis in each of the four staple food categories."

Appellant reported on its retailer application that 21 percent of its projected total annual gross retail sales were from the sale of staple foods. Appellant's application, the photographs and firm inventory provided from the firm visit, confirm that Appellant did not derive more than 50 percent of its projected total annual gross retail sales from the sale of staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The regulations also provide a definition of "*Ineligible firms*" as "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 to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation.

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 . . . for a minimum period of six months from the effective date of the denial." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the application of Casino Stop Deli and Market to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective May 23, 2018.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

September 6, 2018