

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

Citgo Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226937

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations), properly denied the application of Citgo Food Mart (hereinafter 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, 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 on November 27, 2019, Appellant's owner submitted an application for SNAP authorization. On December 23, 2019, an FNS-contracted reviewer conducted an onsite store visit, 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.

By letter dated January 22, 2020, the application of Appellant to participate as a retail food store in SNAP was denied because it did not meet the eligibility criteria for stores as required by the

regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed ownership 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 the dairy product staple foods category. Appellant also failed to meet the requirements of Criterion B because staple food sales comprise 50% or less of its annual gross retail sales.

The letter also stated that Retailer Operations considered Appellant's eligibility under the Need for Access provision at § 278.1(b)(6) of the SNAP regulations; however, it did not qualify for SNAP authorization under this provision.

As Appellant failed to meet either eligibility criterion for approval, ownership was informed that an application for Appellant's participation in SNAP could not be submitted for a period of six months, as provided in § 278.1(k)(2).

The owner requested administrative review by letter dated February 11, 2020. The appeal request was granted by letter dated February 20, 2020. The owner submitted additional correspondence for review, dated March 7, 2020.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 USC § 2018) and implemented through regulation under 7 CFR § 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 271.2 states, in part: 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. 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 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 or house-to-house trade route 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% of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations, as currently implemented, defines 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; (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 (C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: 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 included in the staple food category of the main ingredient as determined by the FNS.

7 CFR § 278.1(b)(1)(iii) provides that for firms to qualify for authorization under Criterion B: Firms must have more than 50% 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)(6) deals with 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.

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. 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, as stated in the request for administrative review, have been considered in rendering this decision whether listed or not.

- We have increased our inventory required for SNAP.
- We have been restocking items for sale on a continuous basis required and eligible for SNAP.

ANALYSIS AND FINDINGS

With regard to the owner's contentions with respect to Criterion A, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such, is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the varieties of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the dairy staple food category. 7 CFR § 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.

The case record supports that Appellant did not have sufficient varieties and/or stocking units of dairy products and did not meet Criterion A when the determination was rendered. No evidence was provided to support Appellant met the eligibility requirements at the time the decision was rendered.

The case record finds Appellant's owner reported its staple food sales at 2% of its annual sales. An evaluation of the photographs and store inventory provided from the store visit, clearly show that Appellant did not receive more than 50% of its projected 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 preponderance of 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.

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the firm is located in an area with significantly limited access to food when it fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, the 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 properly accessed Appellant for this provision and found that it did not qualify.

CONCLUSION

Based on a review of the evidence, the Determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant did not meet the requirements of a SNAP 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 will not be eligible for participation as a SNAP retail food store for a minimum period of six months from the effective date of the denial, which is January 22, 2020. As such, the six-month waiting period has passed, which means Appellant's ownership may submit a new application for SNAP authorization at any time.

General questions regarding the SNAP application process can be handled by calling the FNS Retailer Service Center at 877-823-4369. Operational questions regarding the denial should be directed to Betina Morales at (305) 894-3644 or betina.morales@usda.gov.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to 7 CFR § 279.7 with respect to your right to a judicial review of this Decision. 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 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 30 days of delivery of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

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

September 3, 2020