

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

CJ's Foodmart LLC,

Appellant,

v.

Case Number: C0212253

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the decision by the Retailer Operations Division to deny the application of CJ's Foodmart LLC (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the determination by the Retailer Operations Division is reversed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP, when it denied the application by letter dated August 20, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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

Appellant applied to participate as a SNAP retailer in an application submitted on June 12, 2018. According to the firm's application, the store opened for business on May 1, 2016.

On July 30, 2018, the Appellant business was visited by an FNS contractor in an effort to determine whether or not the firm 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.

After reviewing Appellant's application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the business did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy category, making the business ineligible under Criterion A. Additionally, both the application and the store visit report indicated that business was not eligible under Criterion B.

SNAP regulations require that when a firm is deficient by three stocking units or less under Criterion A, the firm is to be provided an opportunity to document that it normally meets the requirement. The record documents that the Retailer Operations Division sent a letter to the Appellant, dated August 6, 2018, requesting invoices and receipts dated no more than 21 calendar days prior to the date of the store visit that would show the Appellant firm normally carried at least three stocking units in three different varieties of foods in the dairy staple food category. The administrative record shows Appellant responded to this letter on August 13, 2018, by providing 17 pages of invoices and receipts. The Retailer Operations Division's review of the invoices and receipts determined that they did not provide evidence of additional dairy products that could be added to what was evident at the time of the store visit.

In a letter dated August 20, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not offer for sale on a continuous basis a variety of staple foods in the dairy category as required for authorization under Criterion A. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant does not qualify for SNAP under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

By letter postmarked August 29, 2018, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, such as an application denial, 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 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 law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Parts 278.1(b)(1) and 278.1(k) establish the authority upon which any firm's SNAP retailer application may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 defines staple food, in part, as: 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 . . . 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) defines a retail food store as: (1) An establishment or house-to-house trade route 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 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, including at least one variety of perishable foods in at least two 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter.

7 CFR § 278.1(b)(1)(i) states, in part, An establishment . . . 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 . . . 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 § 278.1(b)(1)(ii) states, in part: In order to qualify 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 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 two 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. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit.
- (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. 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) states, in part: In order for a retail store 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 nonfood merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income.

7 CFR § 278.1(k)(2) reads, in part, “FNS shall deny the application of any firm if it determines that (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 . . . for a minimum period of six months from the effective date of the denial.”

7 CFR § 278.1(b)(6) states: 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.

APPELLANT'S CONTENTIONS

The following may represent a 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:

- The firm acts the same as other Asian stores and there are many smaller stores;
- Request USDA reconsider their decision. When the Inspector came on July 30, 2018, we didn't have all the equipment yet, but did have a freezer containing fish, frozen milk, coconut strips, and 12 loafs of bread that were below the freezer. Also, the ice cream freezer contained Go Gurt and Stoneyfield Yo Kids organic yogurt squeezers. The majority of the firm's merchandise is perishable and all foods qualify for EBT; and,
- The firm also stocked powdered milk, duck eggs, and quail eggs during the review as well as all basic vegetables.

Appellant submitted 13 undated color photos showing store stock and 17 pages of invoices and receipts in support of these contentions.

ANALYSIS AND FINDINGS

A review of the store visit photographs conducted during the administrative review process showed that the firm did, in fact, meet the standard of variety in the dairy products category. One of the photographs showed numerous containers of STAR margarine that were not listed on the store visit inventory report and which provide the needed third variety of dairy products. Therefore, Appellant is eligible to participate as an authorized SNAP retailer under Criterion A as it maintained sufficient stock of qualifying staple foods on a continuous basis. Therefore, Appellant is eligible to participate as an authorized SNAP retailer under Criterion A as it maintained a sufficient stock of qualifying staple foods on a continuous basis.

Store ownership should be aware that FNS does not classify eggs as dairy products, but classifies them under the meat, poultry, or fish staple food category. Also, that the milk variety within the

dairy staple food category includes all milk products regardless of whether the milk is whole, low fat, flavored, canned, single serving sized, condensed, powdered, etc.

CONCLUSION

After a review of all the pertinent documentation, and based on the discussion herein, the initial decision by the Retailer Operations Division to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is reversed. The Retailer Operations Division should continue to process Appellant's SNAP retailer application to determine eligibility. This decision does not preclude Retailer Operations from asking for additional documentation to assess if the firm currently meets the regulatory criteria to participate in the SNAP.

RIGHTS AND REMEDIES

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.

ROBERT T. DEEGAN
Administrative Review Officer

February 21, 2019