

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

DnD 2, Inc,

Appellant,

v.

Case Number: C0212528

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), has decided that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly denied the application of DnD 2, Inc. (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 Title 7 of the Code of Federal Regulations (CFR) Section 278.1(b)(1) in its administration of SNAP when it denied the application of Appellant to participate in SNAP as an authorized retail food store.

AUTHORITY

7 USC § 2023 and its 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 administrative record reveals that Appellant applied to participate in SNAP as an authorized retailer on June 26, 2018. FNS-contracted staff conducted an onsite store visit on July 10, 2018.

By letter dated July 30, 2018, Retailer Operations informed the owners that the store does not appear to be eligible for SNAP authorization based on either minimum staple food inventory requirements (Criterion A), and/or staple food sales requirements (Criterion B) and that additional information or documentation was required in order to determine SNAP eligibility. Retailer Operations provided Appellant an opportunity to supply purchase invoices/receipts

dated within 21 calendar days prior to the store visit as evidence that Appellant normally carries the minimum required number of varieties, stocking units, and perishables in the Dairy staple food category. Retailer Operations also informed the owners of authorization under the “Need for Access” provision and requested the following documents to verify Appellant’s staple food sales as a percentage of firm’s total gross retail sales:

- End-of-day sales summary reports that are electronically generated by firm’s cash register system, such as Z-tapes, to verify 3 representative months of actual retail sales at Appellant’s firm, an overview document (e.g., an Excel spreadsheet) that totals the 3 months of end-of-day sales summary reports and breaks these actual retail sales down into the following categories: 1) heated or prepared foods, 2) non-food, 3) accessory foods, 4) staple foods, and 5) charges for food heating services (if a food is both an accessory and a heated or prepared food, it should be counted as a heated or prepared food).
- Verification of total gross retail sales for the last 1 year period (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).

Having not received a response from Appellant within the 10 calendar days of receipt of this letter, Retailer Operations informed Appellant by letter dated August 20, 2018, that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility requirements as set forth in § 278.1(b)(1) of the SNAP regulations. Retailer Operations determined that Appellant failed to meet the inventory requirements under Criterion A because Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis, specifically in the Dairy staple food category. Also, Retailer Operations determined that the firm did not meet eligibility Criterion B because its staple food sales did not comprise more than 50% of its gross retail sales. This was based on the application information.

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). This Determination letter also stated that Retailer Operations considered Appellant’s eligibility under the Need for Access Provision at Section 278.1(b)(6) of the SNAP regulations and that Appellant did not qualify for SNAP authorization under this provision.

By letter dated August 24, 2018, Appellant appealed Retailer Operations’ decision and requested an administrative review of this action. The appeal was granted by letter dated September 17, 2018. Appellant submitted additional information in support of this appeal by letter dated September 26, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

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 § 278.1(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

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 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 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.”

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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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.”

7 CFR § 271.2 states: “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 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) states: “(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.”

7 CFR § 278.1(b)(1)(ii) states: “(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any 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 for firms 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)(6) deals with the 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.”

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- We respectfully disagree with the determination and would like to request a second visit from an FNS Contractor to show store meets eligibility criteria established by FNS.
- Criterion A is accomplished by selling, milk, cheese, butter and yogurt.
- Criterion B we believe is accomplished by 50% of total gross retail sales in staple foods. Store had only been operational for 18 days when visit occurred. Sales have grown in staple foods leading us to believe we are meeting our goal.

Appellant submitted one photograph to show dairy products (cheese, butter and yogurt) in a small counter cooler, two invoices and four receipts to show purchases of dairy items.

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts at the time of the determination. 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. It is not within the scope of this review to consider actions the owner(s) may take to qualify for participation in SNAP subsequent to that decision.

The onsite review of Appellant’s food inventory on July 10, 2018, confirmed insufficient varieties in the Dairy staple food category. The SNAP regulations at Section 278.1(b)(1)(ii) state that 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.” As currently implemented, the regulations require as Appellant offer for sale on a continuous basis 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.

The responding owner contends that the photograph, invoices, and receipts are proof that Criterion A is accomplished by selling dairy products (milk, cheese, butter, and yogurt).

While the owner did provide a photograph of dairy products in a cooler, two invoices and four receipts of dairy products purchased, these dates are after the date of the store visit conducted on July 10, 2018. That Appellant may now be properly stocked is not an issue under review. The regulations are clear that the stock and variety in the four staple food categories must be available on a continuous basis.

A review of the evidence supports by a preponderance of the evidence that on the day of the store visit Appellant was deficient in the Dairy staple foods category. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis.”

Based on Appellant’s application, as well as the photographs and store inventory report from the store visit, Retailer Operations correctly determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). Appellant does not have more than 50% of its total gross retail sales in staple foods. The eligibility requirements to participate as a SNAP retail food store must be met. The owners provided no evidence to demonstrate that Appellant met the requirements at the time the decision was rendered.

There are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory eligibility criteria.

As Appellant failed to meet Criterion A and B, Retailer Operations did consider whether Appellant is located in an area with significantly limited access to food as required under SNAP regulation 7 CFR § 278.1(b)(6). In determining whether Appellant is located in such an area, Retailer Operations considered factors such as the distance from Applicant to the nearest currently SNAP-authorized firm and the extent of Appellants’ stocking deficiencies in meeting Criterion A and Criterion B. Retailer Operations determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The preponderance of evidence supports that Appellant did not meet

the regulatory requirements of Criterion A or Criterion B at the time the denial determination was rendered.

Although Appellant requested another visit, 7 CFR § 278.1(k) 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 of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on the analysis above, the decision by Retailer Operations to deny the SNAP application of DnD 2, Inc. is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to submit a new application for SNAP authorization for a minimum period of six months from the effective date of the denial (August 20, 2018). General application questions may be directed to 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023 and 7 CFR § 279.7). If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owners reside, 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 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.

Kim Dameron
Administrative Review Officer

May 22, 2019