

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

Dollar World Market #3,

Appellant,

v.

Case Number: C0211693

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 Dollar World Market #3 (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of SNAP when it denied Appellant's retailer application to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 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

By letter dated July 19, 2018, Retailer Operations denied Appellant's application to participate as an authorized retailer in SNAP because Appellant did not meet the eligibility requirements as set forth in § 278.1(b)(1) of the SNAP regulations. This denial action was based on observations made during a store visit on July 7, 2018, as well as information provided on the firm's retailer application.

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 in both the dairy products and meat, poultry, or fish staple food categories. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% 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). 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. However, the letter stated Appellant did not qualify for SNAP authorization under this provision.

On August 2, 2018, Appellant appealed Retailer Operations' decision and requested and administrative review of this action. The appeal was granted by letter dated August 15, 2018.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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 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 § 278.1(k)(2) establishes the authority upon which application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

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)(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 three 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)(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.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations define “variety”, in part, as:

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) states in part:

In order to qualify 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 . . .

7 CFR § 278.1(b)(6) defines Need for Access, in part, as:

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 . . .

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm if it determines that . . . [t]he 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.

APPELLANT'S CONTENTIONS

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

- The business is new. The effort to sort, stock, and label the inventory was overwhelming. It took a great deal of over-time work and effort to complete this shortcoming.
- At the time of the inspection, the perishable food merchandise was in the walk-in cold storage, and hadn't been taken out of the shipping box containers.
- All required inventory was purchased and present in the business at the time of the inspection, but it was not stocked and displayed. Invoices were provided to support this contention.
- SNAP customers are 80% of the business.
- The business is now stocked, will continue to be stocked on a regular basis, and will maintain more than sufficient stock of required SNAP staple foods on displays and shelves. Store pictures were provided to support this contention.

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full consideration was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

Appellant contends that the store was newly constructed and it took a lot of time and effort to sort, stock, and label the inventory. Appellant provided six store pictures to show that the store is now stocked. Extenuating circumstances certainly may have contributed to the amount and composition of staple food inventory observed at the firm on the day of the store visit. Nevertheless, no provision in SNAP regulations exists that allows these conditions to establish a valid basis for reversing a denial determination. This review is limited to consideration of the circumstances at the time Retailer Operations' decision was made. It is not within this review's scope to consider actions Appellant may have taken subsequent to this decision to comply with requirements for SNAP authorization, including stocking the store sufficiently or increasing staple food sales to meet SNAP-authorization criteria.

Appellant contends that all of the required inventory was purchased and present in the business on the day of the inspection. Appellant provided five invoices. All of the receipts except one, from Fiesta Market, are after the store visit. Appellant has four stores, and the receipt provided from Fiesta Market could have gone to any of the other three stores since the items on the receipt were not stocked in the store or shown in any of the store visit photographs. A review of the store visit documentation illustrates that on the day of the visit the store was deficient in two of the four food categories that are required for authorization. In particular, the store was deficient

in the dairy products and meat, poultry, or fish categories. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis.”

An evaluation of the percentage of staple food sales reported on Appellant’s retailer application of 16%, as well as the photographs and store inventory provided from the store visit, indicate 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.

Since 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 Appellant to the nearest currently SNAP-authorized firm and the extent of Appellant’s 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).

Appellant contends that SNAP customers are 80% of the business. Unfortunately, this contention does not provide a valid basis for reversal of Retailer Operations’ denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization.

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 Dollar World Market #3 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 until six months after July 19, 2018, which is the effective date of the denial decision.

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 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 owner(s) resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it 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

February 13, 2019