

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

Ghulem LLC,

Appellant,

v.

Case Number: C0203818

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Ghulem LLC to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) and that the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(k)(1) and (2) in its administration of the SNAP when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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

The Appellant applied to participate in the SNAP as an authorized retailer on August 14, 2017. In a letter dated October 24, 2017, the Retailer Operations Division informed the Appellant that the store did not carry a sufficient variety of

staple food items in the meat/poultry/fish category, one (1) of the four (4) required staple food categories, and therefore did not meet eligibility Criterion A. The Retailer Operations Division also determined that the store failed to meet eligibility Criterion B because the store's *staple* food sales comprised 50 percent or less of its annual gross retail sales. Therefore, the store's application was denied.

In a letter postmarked October 31, 2017, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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.

CONROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and its implementing regulations at Part 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

*An establishment ... 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 ... including perishable foods in at least two of the categories (**Criterion A**); or **have more than 50 percent of the total gross retail sales ... in staple foods (Criterion B.)** [Emphasis added.]*

7 CFR § 271.2, defines *Staple food*, in relevant 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 Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.

7 CFR § 278.1(b)(1)(ii) states in part:

In order to qualify under [Criterion A] firms shall:

- (A) ***Offer for sale ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories....*** [Emphasis added.]
- (B) *Offer for sale perishable staple food items in at least two staple food items. 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 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 intended for home preparation and consumption, such as, but not limited to, 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 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* [Emphasis added.]

7 CFR § 278.1(k) reads, in relevant 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 ... **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.*** [Emphasis added.]

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- When opening the business, the owner had some delays in getting into the store location and then when the store ordered its supplies it had additional delays.
- The store was unsure what was included in the meat, poultry and fish category. The store has since ordered additional food products to meet the SNAP eligibility requirements.
- The store is located in an impoverished neighborhood and it is important for the store to be able to accept SNAP benefits.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

Store Visit Results

The case record documents that in reaching its decision to deny the Appellant's SNAP application, the Retailer Operations Division considered information obtained during two (2) store visits conducted on October 3, 2017 and October 4, 2017 by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. The store visit report and photographs documented that the inventory of staple food items at the time of the visit included only two (2) varieties of staple food in the meat/poultry/fish category (meat jerky and pork rinds).

After reviewing the store visit report, the Retailer Operations Division sent the Appellant a proof of inventory letter dated October 10, 2017. That letter requested any invoices and receipts dated prior to the store visit which would document that the store normally carries at least three (3) varieties of food in the meat/poultry/fish category. In response, the Appellant provided four pages of invoices; however, none of these were dated before the October 3, 2017 store visit.

Criterion A

The SNAP regulations at 7 CFR § 278.1(b)(1)(ii) states that a firm must carry no fewer than three (3) different varieties of food in each of the four (4) staple food

categories on a continuous basis. The Appellant was denied under Criterion A because on both days of the store visit it carried only two (2) varieties of staple food in the meat/poultry/fish category.

The Appellant states that a delay in opening the store and a delay in the delivery of food supplies caused the store to not be fully stocked at the time of the store visit. Regarding this contention, it is the retailer's responsibility to be open and fully stocked when it applies for SNAP authorization. The Appellant submitted its application on August 14, 2017 and stated that the store would be open for business on August 15, 2017. The store visit did not take place until October 3, 2017 and October 4, 2017. It is no excuse that the store visit occurred before the store was fully stocked.

The Appellant states that the store was unsure what was included in the meat, poultry and fish category and that it has since ordered additional food products to meet the SNAP eligibility requirements. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. Therefore, this review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. There is no evidence in the case record that the store carried the minimum three (3) varieties of staple food in the meat/poultry/fish category at the time of the store visit. All of the invoices and receipts provided by the Appellant are dated after the store visit. SNAP regulations at 7 CFR § 278.1(b)(1)(ii)(A) requires that in order to qualify under Criterion A, a retailer must **"offer for sale ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories..."** [Emphasis added.] Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion A at the time of the store visit.

Criterion B

The Retailer Operations Division determined that the Appellant did not meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its gross retail sales. This is confirmed by the Appellant's application which estimated its staple food sales at 25 percent of its gross retail sales with accessory food items such as snack foods, condiments and soda accounting for 10 percent and nonfood items at 65 percent. There is nothing in the case record which would indicate that these percentages are not accurate. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Economic Hardship

The Appellant contends that the store is in an impoverished neighborhood where many in the community receive SNAP benefits and that it will suffer an economic hardship if it is not authorized for the SNAP. With regard to this contention, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible hardship to either the community, the owner personally or the firm. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Ghulem LLC is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after October 25, 2017, the effective date of the denial letter.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

December 22, 2017