

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

Gupta Son Corporation,

Appellant,

v.

Case Number: C0206207

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Gupta Son Corporation (hereinafter Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP, when it denied the application of Appellant to participate in SNAP by letter dated January 10, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

In a letter dated January 10, 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 products category; the meat, poultry, or fish category; or the vegetables or fruits category as required for authorization under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. In addition, 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 of Section 278.1(b)(1)(iii).

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 7 CFR § 278.1(k)(2). This denial action was based on observations during an onsite store visit on January 8, 2018, as well as information provided on the firm's retailer application.

By letter dated January 26, 2018, store ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 Part 278.1(b)(1) establishes the authority upon which the 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 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."

7 CFR § 278.1(b) states, *inter alia*, "In determining whether a firm qualifies for authorization, FNS shall consider all of the following: (1) The nature and extent of the food business conducted by the applicant – (i) *Retail food store*. (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 . . . 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). (B) A retail food store must meet eligibility determination factors which may be based on, . . . visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry."

7 CFR § 278.1(b)(1)(ii)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) 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.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “. . . 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 . . .”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “. . . have more than 50 percent of . . . 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 . . .”

7 CFR § 278.1(k)(2) 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

In the request for administrative review, Appellant has stated as its position in the matter the following:

- The store is a new business and had just opened on January 1, 2018. On the day of the inspection, the owner’s delivery from his distributors was delayed due to a snow storm and there was not much stock for sale;
- Because the store is new, the owner was getting stock one by one; and,
- The owner requests another inspection.

Appellant submitted no documentation or evidence in support of these contentions, but did include a copy of the first page of the denial letter.

The preceding 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.

ANALYSIS AND FINDINGS

The record reflects that store ownership submitted a SNAP retailer application electronically through the FNS retailer web site on December 13, 2017, that listed the store's opening date as being October 1, 2017. This application estimated that staple foods accounted for 40 percent of the firm's total retail sales. The accessory "other" food items showed an estimate of 30 percent of the firm's total retail sales. Ownership also estimated that 30 percent of retail sales came from nonfood items such as tobacco, lottery, and hot food sales. The application further showed that the business stocked at least three different items in each of the four required staple food categories with the exception of the meat, poultry, or fish category and also showed that the business did stock perishable foods in at least two of the four categories. A review of information submitted by store ownership based upon the results of the FNS store visit lead to the application being revised by the Retailer Operations Division staff to reflect that the Appellant business did not stock at least three different items in the dairy products category or in the vegetables or fruits category. Lastly, it is noted that the same FNS web site utilized by store ownership to submit its SNAP retailer application also contains detailed information on the staple food requirements for businesses to become authorized as SNAP retailers and also states that an onsite inspection is part of the application process.

A store visit was conducted by an FNS contracted reviewer on January 8, 2018. The store visit report noted that the business is operating under the name "5 U.S.C. § 552 (b)(6) & (b)(7)(C)", had many empty coolers and shelves, that the coolers and shelves appeared to have never been used as they still had the plastic ties on them, and that the majority of the business consisted of ineligible nonfood items such as lottery, tobacco, tobacco accessories, etc. The report also showed none of the three required meat, poultry, or fish products in stock; only one (100 percent fruit juices) of the three required vegetables or fruits products in stock; and only one (ice cream) of the three required dairy products in stock meaning that the store failed to meet three of the four required staple food categories. Additionally, the store was minimally stocked in the remaining bread or cereals category. Accordingly, at the time of the FNS store visit, the store was determined to be deficient in three of the four required staple food categories and therefore could not qualify as a SNAP retailer under Criterion A.

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of the Retailer Operations Division, and as such it 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 variety of staples in each of the four staple food categories on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, Appellant's

contention that store deliveries were delayed due to a snow storm does not provide any valid basis for dismissing or mitigating the adverse action imposed.

The SNAP regulations at §278.1(b)(1)(ii) are clear that under Criterion A, a firm shall “offer for sale . . . 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 . . . including perishable foods in at least two of the categories” (emphasis added). The store was deficient in three of the four staple food categories on the day of the FNS contractor visit. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis”.

Staple food sales must exceed 50 percent of overall sales, as required by SNAP regulations at 278.1(b)(1)(iii), in order to qualify as a SNAP retailer under Criterion B. Based on the information from the store owner’s SNAP retailer application and supported by the FNS contracted reviewer’s report and photographs, staple food sales at most accounted for only 40 percent of overall sales so the business did not derive more than 50 percent of its projected annual sales from the sale of staple foods as of the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B. Therefore, the earlier determination by the Retailer Operations Division that Appellant did not meet the requirements for participation in the SNAP at the time such determination was made is correct.

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 . . . for a minimum period of six months from the effective date of the denial.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by 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 sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, 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 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.

ROBERT T. DEEGAN
Administrative Review Officer

April 20, 2018