

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

Ice Cream Snacks and Nutrition,

Appellant,

v.

Case Number: C0210273

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Ice Cream Snacks and Nutrition (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the application of Ice Cream Snacks and Nutrition.

AUTHORITY

7 U.S.C. § 2023 and its 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

In a letter dated June 4, 2018, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a store visit on May 8, 2018, as well as information provided on the firm’s application and evidence submitted by the Appellant.

The Retailer Operations Division determined that the firm was operating primarily as a restaurant because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found

ineligible for participation in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(b)(1) and (k)(2).

In a letter postmarked June 11, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) 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.

7 CFR § 271.2 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...

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

7 CFR § 271.2 defines staple food as:

...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... 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)(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)(iv) states, in part:

...Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. **In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods 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 carryout, shall not qualify for participation as retail food stores under Criterion A or B...** [Emphasis added.]

APPELLANT'S CONTENTIONS

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

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

- Appellant owners are new owners of a store that has operated for at least 10 years with SNAP and WIC under the prior owner.
- The store has all of the required inventory items to qualify under Criterion A.
- As the new owners, the firm has not been able to serve clients that come with SNAP benefits or WIC vouchers because the firm is awaiting permits for those programs.
- The firm is losing clients, resources, and savings to pay for expenses related to the operation of the store.
- The firm's current sales show the sales of fruit juices, ice cream, coffee, and snacks. The firm is waiting for SNAP approval so that it can apply for a WIC permit and then sell the WIC items that the firm currently has in the store. Without this, the firm cannot sell the WIC inventory. In order to be approved for WIC, the firm must first be approved for SNAP.
- The firm is struggling to pay its lease and bills and is not making a profit.
- The firm is not trying to operate as a restaurant, but rather as a WIC store. The firm has equipment like a refrigerator and freezers ready for use to stock staple foods for WIC. The firm also has a register that has been programmed with all WIC items.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and documentation submitted by the Appellant, it is the determination of this review that the Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

It is abundantly evident that the Appellant wishes to be authorized as a vendor in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). The contractor's store visit photographs show a large amount of inventory specifically related to the WIC program, including breakfast cereal, peanut butter, infant formula and other infant foods, bottled fruit juice, milk, fresh produce, canned fish, etc. The Appellant is correct that in order to be authorized to accept WIC vouchers, the firm must first be authorized to accept SNAP benefits. From all indications, the firm has sufficient quantities and varieties of staple foods to be eligible for SNAP participation under Criterion A.

The problem in this case, however, is that the store also sells a large amount of hot and cold prepared foods, including freshly squeezed fruit juice, ice cream in a cup or cone, hot dogs, sandwiches, nachos, hot coffee, etc.

The Appellant provided to the Retailer Operations Division a large amount of documentation in an effort to demonstrate its current sales. The most relevant of this information are six pages of monthly reports between February and April 2018. These reports list specific items sold, including how many and for what amount. The reports categorize each item sold into one of three categories: “Heated or Prepared”; “Accessory Foods”; and “Staple Foods.” Unfortunately in some cases, the Appellant has improperly categorized certain food items. For instance, the Appellant’s documentation shows freshly squeezed fruit juice drinks as a staple food. It also shows freshly-made smoothies as an accessory food. Both of these items, however, are considered cold-prepared foods. They are prepared on-site by the Appellant; they require no additional preparation by the customer; and they are intended for immediate consumption. As such, they are considered prepared food items.

When these items are correctly categorized, the firm’s current sales records indicate that 78.9 percent of the firm’s sales come from the sale of hot and/or cold prepared foods. The remaining 21.1 percent is from the sale of accessory foods, such as bottled drinks and snacks. With fresh fruit juice drinks placed into the proper category, the reports show that the firm did not sell any other staple foods between February and April 2018.

It appears that the Appellant has made the unfortunate decision of not selling its staple food inventory while waiting for WIC authorization. For unknown reasons, this staple food inventory, including milk, breakfast cereal, peanut butter, infant foods, etc. was off-limits except to WIC customers. And since the firm is not yet authorized to accept WIC, the food remains untouched. It is also possible that the only customers attempting to purchase such items were WIC customers, so the inventory did not get purchased because WIC customers could not yet use their vouchers at the store. Either way, it appears that the firm did not sell any staple foods between February and April.

Regulations cited earlier in this document are clear that firms that have more than 50 percent of their total gross sales in hot and/or cold prepared foods not intended for home preparation and consumption shall not qualify for participation as retail food stores under Criterion A or B. In this case, the Appellant’s own evidence proves that at the time of the denial decision, prepared foods were the bulk of the firm’s sales. Accordingly, the firm is not eligible for SNAP participation.

Previous Owner Authorized

The Appellant has argued that the previous owners at the same location were authorized to accept both SNAP and WIC for at least 10 years.

While it may be true that prior ownership was once authorized to accept SNAP benefits, a location’s prior authorization does not provide a valid basis for reversing the Retailer Operations Division’s decision, as it has no bearing on whether or not the firm as presently constituted meets eligibility criteria as established in 7 CFR § 278.1(b)(1).

Hardship to Appellant and SNAP Households

The Appellant claims that because its SNAP application has been denied, the firm has had to turn away many would-be SNAP and WIC customers who want to use their government benefits at the store. As a result, not only are SNAP and WIC households unable to spend their benefits on the foods that they want, but the firm is losing money and struggling to make ends meet.

Unfortunately, these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization. In this case, the firm's sales records show that the store is presently operating as a restaurant. As such, it does not meet the criteria for SNAP authorization.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, as presently constituted, is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Ice Cream Snacks and Nutrition to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from June 5, 2018, which is the effective date of the denial.

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 in Section 279.7 of the SNAP regulations. 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 the Appellant owner 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.

JON YORGASON
Administrative Review Officer

August 7, 2018