

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

Imagine Multi Services, )  
)  
Appellant, )  
)  
v. )  
)  
Retailer Operations Division, )  
)  
Respondent. )  
\_\_\_\_\_ )

**Case Number: C0194632**

**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 Imagine Multi Services (hereinafter Imagine or Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Appellant may not reapply for six months from the 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(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Imagine to participate as an authorized SNAP retailer.

**AUTHORITY**

7 USC § 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**

In a letter dated October 6, 2016, the Retailer Operations Division informed ownership that the application of Imagine to participate as an authorized retailer in SNAP was denied because Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the FNS contracted store visit conducted on August 31, 2016, Appellant carried too few items in dairy staple food category and did not carry perishables in at least two staple food categories. The Retailer Operations Division sent Appellant a proof of inventory letter dated September 20, 2016, to determine if Imagine normally stocks three varieties of food

in the dairy staple food category as well as perishables in two food categories. Appellant did not reply to the Retailer Operations Division's request for documentation.

The Retailer Operations Division determined that Imagine failed to meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category. The Retailer Operations Division also determined that the firm failed to meet Criterion B because staple food sales comprised less than 50 percent of its total gross retail sales.

As the firm failed to meet either eligibility criterion for approval, ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter postmarked October 11, 2016, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states, *inter alia* 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) . . . Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores . . ."

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. . . . 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)(i) imparts specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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)(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 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.”

### **APPELLANT’S CONTENTIONS**

Appellant made the following summarized contentions in its administrative review request postmarked October 11, 2016, in relevant part:

- Appellant is located in a neighborhood where many customers use SNAP to purchase groceries.
- Appellant’s goal is to become authorized so it can serve its community.
- Appellant sells bread and bananas as perishables.
- Appellant sells Lily butter, which Caribbean people use to cook.
- Appellant sent the receipts but due to Hurricane Matthew they may have been delayed.

In support of its contentions, Appellant submitted the following documentation:

- Eleven page Visit Detail Report from Sam’s Club;

- Three pages of receipts for a variety of items; and
- Two receipts from Family Discount Grocery Store for Lily Butter and bread.

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

## ANALYSIS AND FINDINGS

The record reflects that ownership submitted an application to participate as a SNAP retailer on August 16, 2016, wherein it estimated that staple foods accounted for 50% of total gross retail sales. The accessory "other" food items showed an estimate of 30% of the firm's total gross retail sales. The owner estimated 20% of sales come from non-food items. A review of Appellant's food inventory was conducted by FNS contracted staff as a routine part of the authorization process on August 31, 2016. The store visit revealed insufficient stock in the dairy staple food category; thus, not meeting Criterion A according to 7 CFR § 278.1(b)(1)(ii). In addition, Appellant did not carry perishable items in two of the staple food categories. The only perishable item was bread on the day of the store visit. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii).

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that ... "In order to qualify for SNAP authorization under Criterion A (*emphasis added*), 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." This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The record shows that on the day of the store visit, Appellant had two varieties in the dairy staple food category (canned milk and Laughing Cow cheese). By letter dated September 20, 2016, the Retailer Operations Division requested that Appellant provide proof of inventory of the dairy products and perishables to determine if Appellant normally stocks three varieties of food in this staple food category. The owner did not respond to the request for documentation. Therefore, the Retailer Operations Division correctly determined that Appellant did not maintain a sufficient variety of staple foods to be eligible to accept SNAP benefits under Criterion A.

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Appellant's SNAP application estimates that 50 percent of its annual retail sales come from the sale of staple foods. However, the store visit photographs and report show that many items in stock were ineligible non-food items, including computers, cds, and dvds, or accessory foods items including but not limited to, carbonated and uncarbonated drinks, candy and condiments. Accessory foods are not considered staple foods for the purposes of determining eligibility of any firm according to regulations at 7 CFR § 271.2. Therefore, the earlier determination by the Retailer Operations Division that Imagine did not meet the requirements for participation in the SNAP at the time such determination was made is correct.

Appellant contends that it did response to the request for documentation but due to Hurricane Matthew, the Retailer Operations Division may not have received the documentation. Appellant submitted receipts to document its perishable items and dairy items, including handwritten receipts from Family Discount Grocery. In order to verify these handwritten receipts, the owner of Family Discount Grocery was contacted. However, the owner indicated that not only does he not issue handwritten receipts but he does not carry Lily butter. Thus, although the documentation does support that a second perishable item was purchased, the documentation submitted to support the dairy items by Appellant is not credible.

Appellant contends that most of the people in the area receive SNAP benefits. Regarding this contention, service to SNAP customers and to the community, or any hardship worked upon the same implied by a lack of such service, cannot constitute grounds for reversing the denial decision in the present case. 7 USC 2018 (b)(7)(e).

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**

The decision by the Retailer Operations Division to deny the SNAP application of Imagine Multi Services is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant is not eligible to submit a new application for SNAP authorization for six months from October 6, 2016, the date of the denial letter.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 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 the Appellant’s owners resides 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

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MARY KATE KARAGIORGOS  
ADMINISTRATIVE REVIEW OFFICER

January 25, 2017  
DATE