

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

Jass, Inc,

Appellant,

v.

Case Number: C0212479

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 Jass, Inc. (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 retailer application of Jass, Inc.

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 August 12, 2018, and delivered to the firm on August 13, 2018, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP for failure to meet basic Program eligibility requirements. This denial action was based on observations made during a June 25, 2018, contractor store visit as well as information provided on the firm’s SNAP application dated June 4, 2018.

The Retailer Operations Division determined that the firm did not meet eligibility under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in required minimum quantities in each of the four staple food categories. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant did not qualify for SNAP under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked August 22, 2018, the Appellant, through counsel, 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

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...

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)(ii) states, in 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>.

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

- (A) Offer for sale and normally display in a public area, 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 with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least *[two]** staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...
- (B) Offer for sale perishable staple food items in at least *[two]** staple food categories. 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 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. Multiple ingredient food items...such as...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,

* 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>.

* 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>.

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(k)(2) states, in part:

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 § 278.1(b)(6) states:

Need for access. 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 as described in paragraph (a) of this section.

APPELLANT'S CONTENTIONS

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

- The location where Jass, Inc. does business has operated a food service program of one sort another for several decades. The most recent store, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** – a SNAP- authorized firm – was sold to the owner of Jass, Inc. on June 5, 2018.
- The location has been a traditional point of service for a large portion of the community that surrounds the store.
- The previous owner provided gross sales information for the six months preceding the sale of the store to Jass, Inc.
- On June 11, 2018, a licensing inspection by the Michigan Department of Agriculture and Rural Development took place at the store. There were no violations or any other negative commentary.
- On August 3, 2018, Jass, Inc. received a request from USDA to provide updated information regarding the sale of staple food as well as additional supporting financial information. During the week of August 6, 2018, the Appellant owner met with his attorney to compile this requested information. The percentage of sales of food stuffs runs between 18-20 percent of the firm's gross sales.

- While the records were being accumulated to accommodate the request of USDA, the Appellant determined that it needed additional time. The Appellant contacted the Retailer Operations Division, but the program specialist was on vacation and would not return until August 20, 2018. But before the Appellant could provide the requested information, it received the denial letter dated August 12, 2018.
- Jass, Inc. recognizes that it was not compliant with either Criterion A or B with regard to program eligibility. However, the Appellant contends that it was “very close to compliance” with regard to Criterion A. The Appellant argues that at the time of its SNAP application, it did not understand that each staple food variety required at least three backups for the food product.
- In terms of the administrative review appeal, the Appellant is essentially relying upon Section 278.1(b)(6) of the SNAP regulations for potential authorization. Appellant then describes in detail the reasons why the firm should be authorized under the Need for Access Provision found in 7 CFR § 278.1(b)(6), including extended operating hours, lack of grocery stores in the area, and convenient location for a residential area with few means of transportation. The Appellant further states that the denial of its application has been quite devastating to this area of the city of Muskegon Heights because the area is economically depressed.
- The Appellant’s failure to comply with Criterion A was an oversight in the sense that the Appellant was not well-schooled in the mandatory requirements of SNAP. That lack of education has been reversed and the Appellant has a very immediate understanding of all of the inventory requirements and obligations for stores that want to accept SNAP.
- In accordance with 7 CFR § 278.1(b)(6), Appellant believes that the store location should be entitled to continue its authorization in SNAP, perhaps subject to monitoring by USDA to ensure future compliance. This is not so much about the economies of the Appellant’s location as it is about the needs of the surrounding community.
- If SNAP authorization would be permitted to continue at this location, Appellant provides its assurance that it would not at all let Criterion A requirements be deficient.

In support of its request for review, the Appellant submitted 24 pages of documentation, including a copy of the prior SNAP permit for 5 U.S.C. § 552 (b)(6) & (b)(7)(C); sales and tax records for JB Hoyt Corp.; a licensing inspection report from the Michigan Department of Agriculture and Rural Development; a copy of the request for sales information from the Retailer Operations Division; Sales and Use Tax Return for the month of June 2018 for Jass, Inc.; a listing of nearby SNAP- authorized stores; a Google map of the area; and three pages of demographic information from the U.S. Census Bureau for the city of Muskegon Heights, Michigan.

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 in this document.

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. It is neither the role nor the authority of this review to overturn or modify an administrative action that fully conforms to existing regulation.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that the Appellant firm does not carry, on a continuous basis, sufficient staple food inventory in the dairy staple food category to be eligible for SNAP participation.

According to the agency's record, the Retailer Operations Division determined that on the day of the store visit, the firm carried sufficient amounts of milk and cheese, but had only one stocking unit of butter. No other dairy varieties were found in the store. In order for a firm to be eligible under Criterion A, it must offer 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 variety.

On July 9, 2018, the Retailer Operations Division sent the Appellant a letter stating that the firm was lacking sufficient staple food inventory. The letter gave the firm an opportunity to provide invoices or receipts as evidence that the store normally carried at least three stocking units of three different varieties of dairy products. The letter stated that the invoices or receipts must be dated no more than 21 calendar days prior to the June 25, 2018, store visit, and may not be dated after the store visit.

In response to this request, the Appellant submitted 11 inventory receipts from local grocery stores. Four of the receipts were dated after the store visit and thus could not be considered. Of the remaining receipts, only one showed dairy inventory other than milk and cheese. That receipt, dated June 19, 2018, showed two units of Blue Bonnet margarine. The other receipts showed non-dairy food items such as milk, bread, and eggs, but did not list other dairy items. Based on the Appellant's own evidence, the firm remains one stocking unit short of SNAP eligibility under Criterion A.

This review acknowledges that that the firm is very close to SNAP eligibility. However, the requirements for authorization as listed in Section 278.1(b)(1) of the SNAP regulations are minimum requirements. This review has no authority to adjust these requirements in any way or to reverse a denial decision on the basis of a firm being very close to eligible.

The firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total sales. According to the Appellant's SNAP application, approximately 11 percent of the firm's total sales come from the sale of staple foods. Considering the large number of snack foods and nonfood items available at the store, this

review finds that it is unlikely that staple foods constitute more than 50 percent of the firm's total sales.

Because deficiencies in Criterion A and Criterion B clearly exist at the Appellant store, it is the finding of this review that the application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2). There is no evidence that the Retailer Operations Division misinterpreted or misapplied the regulation which requires denial of any application in which a firm fails to meet basic eligibility requirements.

As for the sales records that were requested by the Retailer Operations Division, and which the Appellant states it was unable to fully assemble before the denial letter was sent, it should be noted that the Retailer Operations Division contacted the Appellant owner by telephone on August 10, 2018. During this conversation, the owner confirmed that the staple food percentages, as reported on the SNAP application were accurate. This information, combined with the visual evidence from the contractor's store visit report, was sufficient for the Retailer Operations Division to determine that the firm was not eligible for program participation under Criterion B.

Location was Previously Authorized

The Appellant has argued that the location where Jass, Inc. operates was previously authorized to accept SNAP and the site has been a valuable resource for the community for many years.

Unfortunately, this argument has no bearing on this case, as a firm may only be authorized for SNAP participation if the store, as presently constituted, meets established eligibility criteria. This review has no authority to dismiss or ignore these eligibility requirements simply because the location was authorized previously.

Remedial Actions Taken

The Appellant has stated that its failure to comply with Criterion A was an oversight in the sense that it was not well-schooled in the mandatory requirements of SNAP. The Appellant claims that this lack of education has been reversed and the Appellant now has an understanding of the inventory requirements needed for SNAP authorization. The Appellant further states that if the store could be authorized, it would ensure that Criterion A requirements would not be deficient.

With regard to these contentions, it must be restated that 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 that the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider subsequent remedial actions that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of an application denial on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, the Appellant's contentions that the store has made improvements to its staple food inventory and that it will properly maintain that inventory do not provide a valid basis for reversing the Retailer Operations Division's denial determination.

7 CFR § 278.6(b)(6): "Need for Access"

The Appellant, through counsel, has acknowledged that at the time of the contractor's store visit, the firm did not meet either Criterion A or B with regard to program eligibility. As such, it is relying upon Section 278.1(b)(6) of the SNAP regulations for potential authorization. The Appellant contends that the firm should be authorized under this "Need for Access" provision due to a number of factors, including the firm's extended operating hours, a lack of grocery stores in the area, and convenient location for a residential area with few means of transportation. The Appellant further states that the denial of its application has been devastating to the area due to its economically depressed conditions. The Appellant argues that the store location should be entitled to continue its authorization in SNAP, perhaps subject to monitoring by USDA to ensure future compliance. It argues that this entitlement is not so much about the economies of the Appellant's location as it is about the needs of the surrounding community.

When a firm fails to meet Criterion A or B, SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing the firm if it is located in an area with significantly limited access to food provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized firm, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Jass, Inc., the record indicates that the Retailer Operations Division conducted a Need for Access evaluation prior to its denial decision. This evaluation included consideration of each of the factors mentioned by the Appellant as well as others not mentioned, such as distance to the nearest supermarket, overall depth of staple food inventory, compliance history, etc. After completing its evaluation, the Retailer Operations Division determined that the firm did not qualify for SNAP authorization under this provision.

As part of its administrative review, this office has examined the agency's Need for Access evaluation. After a review of all available evidence in this case, this review finds that Need for Access was fully and properly considered in this case and that authorization under this provision is not appropriate.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Jass, Inc., does not meet eligibility requirements under Criterion A or B outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision made by the Retailer Operations Division should

be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Jass, Inc. 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 August 13, 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

October 30, 2018