

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

La Buena Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0208363

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision by the Retailer Operations Division, to withdraw the authorization of **La Buena Market** [hereinafter, “La Buena Market” and/or “Appellant”] to participate in the Supplemental Nutrition Assistance Program (SNAP) as a retailer was proper. As a result **La Buena Market** shall not be eligible to reapply to again become a SNAP authorized retailer for a minimum period of six (6) months from the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2; 7 CFR § 278.1(b)(1); and, 7 CFR § 278.1(b)(6), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the retailer authorization of La Buena Market to participate in the SNAP via letter dated April 12, 2018.

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

SNAP regulations require that authorized retailers be reevaluated for continued eligibility. Owners are required to complete and submit an online form FNS-252R, “Supplemental Nutrition

Assistance Program Reauthorization Application for Stores” (FNS-252R). The record shows that Appellant provided the required form FNS-252R on January 29, 2018.

In a letter dated April 12, 2018, the Retailer Operations Division informed Appellant that the SNAP retailer authorization of La Buena Market was being withdrawn because it no longer met the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(6).

This determination is documented to have been made as a result of a review of the form FNS-252R; information and materials resulting from a store visit conducted by FNS contracted personnel on February 24, 2018; and, a Need for Access evaluation as conducted under SNAP regulations at 7 CFR § 278.6(b)(6).

Via letter dated April 16, 2018, received in the office of the Chief of the Administrative Review Branch on April 19, 2018, Appellant requested an administrative review of the action to withdraw its authorization to participate as a SNAP Retailer. The appeal was granted and the withdrawal has been held in abeyance pending the outcome of this review in accordance with 7 CFR § 279.4(a).¹

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended (the “Act”)² 7 USC 2018 and promulgated through regulation at 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.1(l)(1) of the SNAP regulations read, in relative part:

“FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons: The firm’s continued participation in the program will not further the purposes of the program; The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section ;

¹ Due to delays in processing Appellant’s appeal request SNAP authorization was withdrawn between April 12, 2018 and May 1, 2018 with reinstatement made effective May 2, 2018 to allow pendency of decision during administrative review.

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

The firm fails to meet requirements for eligibility under Criterion A or B as specified in paragraph (b)(1)(i) of this section ... for the time period specified in paragraph (k)(2) of this section...”

7 CFR § 271.2 of the SNAP regulations define “*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 ~~seven~~ [*three*]⁴ 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 ~~three~~ [*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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in §278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food 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 carry-out are not eligible for SNAP participation as retail food stores under §278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 of the SNAP regulations define “*Staple Food*” as:

“*Staple food* means those 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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,

⁴ As implemented effective January 17, 2018 via SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion> . References to implementation adjustments are identified with strikethrough of the number presented in the text of the regulation followed by [number] * throughout the remainder of this document.

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)(A) relays specific program requirements for retail food store participation, which reads, in part,

“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 ~~three~~ *[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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) Application of Criterion A. In order to qualify under this criterion, 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 ~~seven~~ *[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 ~~three~~ *[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. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.”

“(B) Offer for sale perishable staple food items in at least ~~three~~ *[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 within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g.,

vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category.

Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

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, firms “... must have more than 50 percent of their total gross retail sales in staple food staples. 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...”

7 CFR § 278.1(b)(6) describes regulatory considerations regarding SNAP participant access to authorized retail stores, reading,

“*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.”

7 CFR § 278.1 (k) reads, in part,

“FNS shall deny the application of any firm if it determines that (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section...”

7 CFR § 278.1 (k)(2), reads, in relevant 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

APPELLANT'S CONTENTIONS

In the request for administrative review Appellant, through its ownership, provides that all the food that is required has been bought.

The preceding may represent only a brief 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 FNS-252R dated January 29, 2018, indicates that La Buena Market, is operating a convenience store; open from 7AM until 10PM, seven (7) days per week. The material at Questions 9, 10, and 11, report Appellant to be selling at least three (3) varieties of staple food products in each of the four (4) staple food categories or groups; maintaining at least three (3) stocking units of each variety; and, stocking fresh, frozen or refrigerated foods in at least two (2) of those categories. Further, in the January 29, 2018 FNS-252R Appellant reports total retail sales for tax year 2017, with 23 percent attributable to staple foods.

On February 24, 2018 a FNS contractor conducted a store visit in an effort to determine whether or not Appellant met the regulatory eligibility requirements to continue to be authorized to redeem SNAP benefits. During the store visit photographs were taken of the firm as well as its stock and inventory; an interview was conducted with the self-identified "owner" who authorized the visit; and, a written report detailing observations made was completed that includes an assessment of inventory and a sketch of the store layout.

It is important to clarify that the purpose of the instant review is to ascertain whether or not the decision reached by the Retailer Operations Division was correct at the time it was made. There is no provision in the SNAP regulations for consideration of changes made following the submission of the materials responsive to requests from the Retailer Operations Division; and completion of the contracted store visit.

Criteria A:

The store visit materials include a general report indicating that La Buena Market is located at the address as reported on the FNS-252R, in retail space of approximately 2100 square feet operating under signage identifying "La Buena Mkt".

The store visit materials include an inventory sheet reporting staple food stock, which has been reconciled by Retailer Operations Division to include:

- One (1) variety of food in the dairy products category consisting of more than 20 units of milk (fresh, canned, and powdered), identified as perishable.
- Twelve (12) varieties of fruits/vegetables staple foods; with each of those identified to include more than three (3) stocking units; and, two (2) varieties identified as perishable.
- Seven (7) varieties of bread and cereal staple foods; each stocking more than three (3) varieties; and, two (2) identified as perishable.
- Five (5) varieties of meat, poultry and seafood staple foods; four (4) with more than three (3) stocking units each; and two (2) varieties identified as perishable.

The store visit materials indicate that through observation and discussion with the self-identified owner authorizing the visit, there are no SNAP eligible items priced at \$5 or higher sold at Appellant.

The report also indicates that La Buena Market sells non-food stock consisting of lottery tickets, tobacco products, alcohol, automobile products, health and beauty aids, paper goods, and cleaning products.

The store visit photographs identify a hot food entity with signage “5 U.S.C. § 552 (b)(6) & (b)(7)(C)” located on premises. The record indicates that the Retailer Operations Division requested clarification regarding whether or not lottery or hot food sales were occurring at Appellant; and, proof of the purchase of additional dairy inventory in a letter dated March 15, 2018. Materials documented as received on March 26, 2018 include a letter dated March 15, 2018 from Appellant’s ownership indicating the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) business is a sub-lease, operating independent of Appellant; and, providing several inventory purchase receipts for consideration. Retailer Operations Division documents that the receipts/inventory purchase materials were evaluated and determined not to reflect any additional dairy products; with only two (2) showing dairy purchases, both dated after the February 24, 2018 store visit.

The record shows that on the date of the store visit Appellant was deficient in one (1) of the four (4) staple food categories, identified as dairy products; therefore Appellant did not meet the eligibility requirements to “Offer for sale, on a continuous basis, [Emphasis added] a variety of qualifying foods in each of the four categories of staple foods” as delineated in the SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii).

On review, the Retailer Operations Division decision that La Buena Market did not meet the eligibility conditions of criterion A is affirmed.

Criteria B:

The January 29, 2018 FNS-252R provided for consideration under the signature of ownership indicates that La Buena Market derived approximately 23 percent of its 2017 gross retail sales from staple foods.

The SNAP regulations at 7 CFR § 278.1 (b)(1) under Criterion B requires that **more than 50 percent** of the total gross retail sales must be in **staple foods**. Staple foods are specifically defined in 7 CFR § 271.2 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”. Neither the January 29, 2018 FNS-252R nor the materials resulting from the February 24, 2018 contracted store visit, support a conclusion that more than 50 percent of La Buena Market’s estimated annual retail sales would derive from staple foods.

Therefore, the Retailer Operations Division decision that La Buena Market did not meet the eligibility conditions of criterion B is affirmed.

Need for Access:

7 CFR § 278.1(b)(6) provides that “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.” This evaluation also includes other factors such as distance to the nearest SNAP-authorized firms, transportation options, the extent of Appellant’s stocking deficiencies, and whether or not Appellant is considered to further the purposes of SNAP.

The record indicates that the Retailer Operations Division evaluated La Buena Market and determined that it was not located in a Low Food Access Area; therefore, Appellant does not qualify for SNAP authorization under this provision.

A review of the documentation contained in the official record affirms the Retailer Operations Division determination.

Necessary Food Bought:

On appeal Appellant’s ownership indicates that all the necessary food has been purchased; however, the SNAP regulations do not support consideration of actions taken after the occurrence of the contracted store visit in assessing eligibility to serve as an authorized retailer.

Reapplication:

As indicated above SNAP regulations at 7 CFR § 278.1(k)(2) states, in part that “FNS **shall** deny[withdraw] 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 [withdrawal].**” [Emphasis Added].

CONCLUSION

Based on the discussion above, the decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of La Buena Market is sustained. The withdrawal will become effective 30 days from receipt of this decision by Appellant in accordance with 7 CFR § 279.5(f).

Further, in accordance with 7 CFR § 278.1(k)(2) La Buena Market is ineligible to reapply to again be authorized as a SNAP retailer “for a minimum period of six months from the effective date of the denial [withdrawal]”.

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.

NANCY BACA-STEPAN
Administrative Review Officer

July 9, 2018