

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

La Tiendita,

Appellant,

v.

Case Number: C0211424

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 withdrew the authorization of La Tiendita (hereinafter “Appellant”) from participation as a 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 withdrawal.

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 withdrew the authorization of La Tiendita.

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 July 17, 2018, the Retailer Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm’s failure to meet basic program eligibility requirements. This withdrawal decision was based on observations made during an April 14, 2018, store visit as well as information provided on the firm’s

reauthorization application dated April 2, 2018, and inventory evidence provided by the Appellant on June 19, 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 withdrawal letter stated the Appellant failed to meet the requirements of Criterion A because in at least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. 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 authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked July 27, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted and implementation of the withdrawal action has been held in abeyance pending the outcome of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;

- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the 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 § 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...

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

* 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>.

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:

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*

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*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, 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) 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 made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant does not agree with the determination to withdraw the firm's SNAP authorization because it feels that it meets program eligibility under Criterion A.
- In response to FNS's letter asking for purchase invoices for dairy products, the Appellant submitted 15 pages of invoices showing milk, cheese, butter, and ice cream.
- FNS's letter requesting proof of inventory stated that the contractor's store visit occurred on April 23, 2018, but the determination letter stated that the store visit had

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occurred on April 14, 2018. The incorrect store visit date and the fact that the determination letter did not address any of the inventory records submitted by the Appellant are strong indications that the withdrawal determination was not made carefully or correctly.

- In order to prove that the firm carries staple foods in all four categories, Appellant has submitted photographs of the store as well as additional inventory invoices. From this evidence, the Appellant contends that La Tiendita carries food in all four staple food categories and perishable foods in at least two categories.
- Appellant recognizes the importance of compliance with SNAP regulations. The firm has participated in SNAP for many years and has never violated any rules or regulations.

In support of these contentions, the Appellant submitted 28 inventory invoices, 15 undated photographs of the store, and a copy of all materials submitted to the Retailer Operations Division on June 19, 2018, which includes 15 pages of inventory invoices and receipts.

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 submitted, 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 July 17, 2018, withdrawal determination made by 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 visit to the store 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 evidence submitted by the Appellant, it is the determination of this review that at the time of the contractor's visit to the store, the Appellant firm did not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP participation. Specifically, the firm was deficient in the dairy category. As best as this review can determine, the only dairy variety in sufficient quantities in the store on the day of the contractor's visit was milk. 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. In this case, the firm was deficient in two varieties of dairy.

On June 13, 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 store visit, and may not be dated after the store visit.

In response to this request, the Appellant submitted 15 pages of inventory receipts and invoices from various vendors dated between March 28, 2018, and May 30, 2018. Several receipts showed the purchase of milk and a couple showed the purchase of cheese, but no other dairy staple foods are listed anywhere on the receipts. As such, the firm remains one dairy variety short for program eligibility.

It should be noted that eggs and ice cream are not staple food varieties in the dairy category. Eggs are part of the meat/poultry/fish category and ice cream is considered an accessory food rather than a staple food. It should also be noted that while the Appellant stated that it submitted receipts containing milk, cheese, butter, and eggs, none of the receipts provided on June 19, 2018, list any butter.

The Appellant is correct in arguing that the June 13 letter from the Retailer Operations Division erroneously indicated that the store visit had occurred on April 23, 2018, when the actual visit date was April 14, 2018. However, this has no bearing on the outcome of this case because none of the invoices provided – whether 21 days prior to April 23 or 21 days prior to April 14 – prove that the firm had any dairy items besides milk and cheese.

In its request for administrative review, the Appellant submitted an additional 28 invoices and receipts to prove that the firm carries a sufficient variety and quantity of staple foods. However, all but one of the receipts are dated after April 23, 2018 (one was dated three months prior to the store visit), and thus cannot be considered an accurate depiction of the store's inventory and circumstances at the time of the contractor's visit to the store. The same is true for the 15 undated photographs provided by the Appellant. These were almost certainly taken after the firm received the withdrawal letter and thus do not represent conditions at the store at the time of the contractor's visit.

Based on the evidence in this case it is clear to this review that on the day of the store visit (or as stated in 7 CFR § 278.1(b)(1)(ii)(A), "on any given day of operation"), the firm did not carry sufficient dairy inventory as required for eligibility under Criterion A. 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 reauthorization application, less than 10 percent of the firm's total sales come from the sale of staple foods.

As to the Appellant's contention that it has been authorized in SNAP for years without any program violations, such an argument has no bearing on this case. A store may remain authorized in SNAP only if it continues to meet minimum eligibility requirements.

Need for Access

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 La Tiendita, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm did not qualify for SNAP authorization under this provision. As part of this 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, La Tiendita, does not meet program eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the evidence and contentions presented by the Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of La Tiendita is sustained.

Pursuant to 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 the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the authorization withdrawal of La Tiendita shall become effective 30 days after receipt of this decision.

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

February 19, 2019