

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

M & M Convenience Store #30669,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204474

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 initial decision by the Retailer Operations Division to deny the application of M & M Convenience Store #30669 (hereinafter, “Appellant” and/or “M & M Convenience Store”) to participate in the Supplemental Nutrition Assistance Program¹ (SNAP) as an authorized retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of M & M Convenience Store in a letter dated November 2, 2017.

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 November 2, 2017, the Retailer Operations Division informed Appellant that the application of M & M Convenience Store to participate as an authorized retailer in SNAP was

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

being denied because it did not meet the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR § 278.1(b)(1). This determination was made as a result of a review of the electronic form FNS-252E Supplemental Nutrition Assistance Program Application for Stores (Application) initially submitted on August 9, 2017 together with materials provided in response to a request for dairy inventory information.

Via letter dated November 8, 2017, received in the office of the Chief of the Administrative Review Branch on November 20, 2017, an administrative review of this action was requested through Appellant's ownership, appealing the Retailer Operations Division's decision. The appeal was granted.

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

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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.1(b)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements, reading, in relevant part:

“The nature and extent of the food business conducted by the applicant – (i) Retail food store. (A) 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 as defined in §271.2 of this chapter 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).” [Emphasis Added]

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 https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.1(b)(1)(ii) of the SNAP regulations define “Continuous Basis” as:

“An eligible store must offer for sale the required variety of food items on any given day of operation.” [Emphasis Added]

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 food categories: meat, poultry, or fish; bread r cereals; vegetables or fruits; and dairy products. Commercially processed foods and prepared mixtures with multiple ingredients 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 normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purposes of determining eligibility under § 278.1(b)(1) of this chapter. 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. However, accessory foods that are offered for sale in authorized retail food stores are eligible food items which may be purchased with SNAP benefits.”

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 . . . for a minimum period of six months from the effective date of the denial.”

APPLICATON SUMMARY

The administrative record includes form FNS-252E Supplemental Nutrition Assistance Program Application for Stores dated August 9, 2017, which indicates that M & M Convenience Store is selling a variety of staple food products in each of the four (4) staple food groups; and, stocking fresh, frozen or refrigerated foods in at least two (2) of those categories. (See excerpt from application below)

18 Do you stock at least three different items in each of these food categories? Include fresh, frozen, canned, packaged. See instructions for more information.		
Breads/Grains	(Examples: bread, cereal, pasta, rice, flour, etc.)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Dairy	(Examples: milk, butter, cheese, yogurt, infant formula, etc.)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Fruits/Vegetables	(Examples: frozen corn, dried beans, applesauce, canned peas, bananas, 100% juice, etc.)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Meat/Poultry/Fish	(Examples: canned meats and fish, ground beef, deli meats, bacon, frozen chicken, eggs, etc.)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
18a	What percent of your total retail sales comes from these food categories?	<input type="text" value="30"/> %
18b	Do you stock fresh, frozen or refrigerated foods in at least two of these categories?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

The material indicates that M & M Convenience Store estimated annual retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), 30 percent of those sales to staple foods; one (1) percent to “other” foods; and, 69 percent to non-food items and/or hot foods. (See excerpts from application below)

5 U.S.C. § 552 (b)(7)(E)

18a	What percent of your total retail sales comes from these food categories?	<input type="text" value="30"/> %
18b	Do you stock fresh, frozen or refrigerated foods in at least two of these categories?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
19	Do you sell "other" foods, such as snack foods, soft drinks, or condiments?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
19a	If Yes, what percent of your total retail sales comes from these items?	<input type="text" value="1"/> %
20	Do you sell non-food items or food that is hot at the time the customer pays for it?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
20a	If Yes, check the items you carry: <input checked="" type="checkbox"/> tobacco products <input checked="" type="checkbox"/> alcohol <input checked="" type="checkbox"/> lottery <input type="checkbox"/> gasoline <input type="checkbox"/> hot food <input type="checkbox"/> other	
20b	If Yes, what percent of your total retail sales comes from these non-food and hot food items?	<input type="text" value="69"/> %
<small>The sum of the three percentage figures above (18a, 19a and 20b) must equal 100%.</small>		

APPELLANT’S CONTENTIONS

In the request for administrative review letter from Appellant’s ownership dated November 8, 2017 it is contended that Appellant has 75 percent of food; and, that it is believed the inspector “did not check of quantity of beers”, providing a contact at Beverage Distributors in Abilene, Texas as available verification.

Subsequent to Appellant’s request, in electronic mail dated December 21, 2017, the Administrative Review Officer was copied on information being submitted to the Freedom of Information Act (FOIA) Office. The materials indicated that Appellant was being represented by counsel. The administrative review was held in abeyance pending satisfaction of Counsel’s FOIA request, and allowing 21 days for the provision of additional materials for consideration.

In a final “Brief” dated March 23, 2018 counsel seeks the reversal of the Retailer Operations Division’s denial stating that:

- In response to the Retailer Operations Division’s letter of October 18, 2017, Appellant submitted receipts and invoices evidencing stocking of Appellant with dairy products including items such as milk, cheese, butter, yogurt, etc.
- Appellant carries qualifying food items in three (3) staple food categories; and, that the photographs and inventory records “taken by the Department’s on-site reviewer” make it plain to see that M & M Convenience Store has “more than 50 percent of their business involving fish and staple items.”

The Brief is supplemented with invoices, a Sam’s Club item summary for Appellant; and more than 40 photographs of inventory, explained to have been taken in December 2017.

The preceding represents 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 record includes materials from a contracted store visit, conducted on October 6, 2017 under the authority of a self-identified "Co-owner" The materials include an inventory checklist that is completed by the store visit contractor; a series of questions that are marked as answered in cooperation with the individual who authorized the store visit; a sketch of the store layout; and, certified photographs.

Criteria A:

The store visit materials include a general report indicating that M & M Convenience Store is located at the address as reported on the application, in retail space of approximately 400 square feet.

The store visit materials include an inventory sheet reporting staple food stock to include:

- One (1) variety of food in the dairy products category including more than 20 units of milk. Please note that milk is considered a single variety whether it is one (1) or two (2) percent, whole, condensed, or dry.
- Eight (8) varieties of fruits/vegetables staple foods including one (1) large bag of potatoes; six to 20 units of greens; and more than 20 units of 100 percent fruit juice; beans/nuts, onions, squash, tomatoes, and soups/stews. The store visit inventory sheet does not note that the greens identified in the store visit photographs are both canned and frozen.
- Eight (8) varieties of bread and cereal staple foods were identified including between six (6) and 20 units of four (4) of those varieties; and, more than 20 units of the remaining four (4) varieties. Notably the inventory materials identify 20 to 50 pound bags of various types of flour.
- Three (3) varieties of meat, poultry and seafood staple foods consisting of one (1) unit of eggs; and more than 20 units of canned meats and canned and frozen fish.

The four (4) most expensive items identified at the store visit include:

- Wheat flour in 50 pound bags selling @ \$39 per bag.
- Corn flour in 50 pound bags selling @ \$50 per bag.
- Yam flour in 20 pound bags selling @ \$40 per bag.
- Oat flour in 50 pound bags selling @ \$50 per bag.

The report indicates that Appellant is reporting selling Ethnic African Foods as a primary food.

The report also indicates that M & M Convenience Store includes non-food stock consisting of tobacco products, alcohol (beer)⁴, mobile phones/accessories, health and beauty aids, paper goods, and cleaning products.

The record includes a letter dated October 18, 2017 addressed to Appellant from the Retailer Operations Division indicating that the contracted store visit revealed that there were not enough varieties of dairy products for Appellant to be SNAP authorized; requested invoices for dairy products purchased prior to the date of the store visit; and, advised that the store visit materials identified milk as available.

The record documents that Retailer Operations Division received a response on October 27, 2017 that included 10 invoices and receipts dated between July 31, 2017 and October 8, 2017. The only dairy product identified in any of the materials was milk (one (1) percent and whole). Notably the store visit report had already identified milk as an available variety, noting that Appellant normally carries fresh although none was in stock at the time of the visit.

On review it is determined that the October 27, 2017 materials submitted in response to the October 18, 2017 letters from the Retailer Operations Division did not evidence availability of dairy products beyond milk.

It is clear from the contracted store visit materials that on the date of the store visit Appellant was deficient in one (1) of the four (4) staple food categories, therefore not meeting the eligibility requirements to “Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods”. The regulations are specific that staple food stock must be available on “on any given day of operation”.

In summary, on October 6, 2017, the day of the store visit, Appellant was deficient in one (1) of the four (4) staple food groups; did not provide evidence of the availability of products beyond the milk identified at the store visit; and therefore did not meet the conditions as specified in SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii).

Criteria B:

The August 9, 2017 SNAP Retailer application provided for consideration under the signature of ownership indicates that M & M Convenience Store derives approximately 30 percent of its estimated 5 U.S.C. § 552 (b)(6) & (b)(7)(C) total annual estimated retail sales from the sale of staple foods; one (1) percent from the sale of “other” foods such as snack foods, soft drinks, or condiments; and 69 percent from non-foods or foods ineligible for SNAP purchase. (See snippet from Application above)

⁴ In the initial request for administrative review Appellant ownership references that a variety of types of beer are available which it is believed were not considered during the official store visit. Beer, no matter the type or amount, is considered an alcoholic beverage and is therefore not considered for SNAP eligibility.

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**. A review of the Appellant's application submission evidences that M & M Convenience Store does not 1) report more than 50 percent of its estimated annual retail sales would derive from staple foods; and 2) did not provide evidence at the time of initial application to support the contention provided on administrative review request that the business derived consists of more than 50 percent foods. The photographs and materials dated after the contracted store visit which occurred on October 6, 2017 are not admissible for consideration⁵.

Therefore, the Retailer Operations Division decision that M & M Convenience Store does not meet the eligibility conditions of criterion B is affirmed.

As indicated above SNAP regulations at 7 CFR § 278.1(k)(2) states, in part that "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.**" [Emphasis Added].

Regulatory Changes:

Please know that any SNAP retailer authorization applications submitted after January 17, 2018 are subject to a final rule titled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" (the 2016 final rule), which was published on December 15, 2016. This rule makes changes to Criteria A and B requirements. The regulations at 7 CFR have not yet been updated, therefore for updated information please visit see the USDA website at <http://www.fns.usda.gov/snap/enhancing-retailer-standards-supplemental-nutrition-assistance-program-snap> or e mail RPMDHQ-WEB@fns.usda.gov.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of M & M Convenience Store to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) M & M Convenience Store is ineligible to participate as a SNAP authorized retailer "for a minimum period of six-months from the effective date of the denial", which is six-months from November 2, 2017.

⁵ Clearly the materials appended to the Brief provided by Counsel indicate that significant change in stocking has occurred at Appellant. Those stocking changes will be considered when the new application, submitted after the required six-month wait period, is submitted.

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

March 29, 2018