

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

Mommies,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207753

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 deny the August 21, 2017, FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Mommies (hereinafter, “Appellant” and/or “Mommies”) to participate in the Supplemental Nutrition Assistance Program¹ (SNAP) as an authorized retailer was proper. As a result **Mommies** shall not be eligible to submit a new application for a minimum period of six (6) months from the effective date of the denial.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2; and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Mommies to participate in the SNAP via letter dated December 5, 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.

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

CASE CHRONOLOGY

In a letter dated December 5, 2017, the Retailer Operations Division informed Appellant that the application of Mommies to participate as an authorized retailer in SNAP was 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 is documented to have been made as a result of a review of the electronic form FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (Application) initially received by FNS on August 21, 2017; and, information and materials resulting from a store visit conducted by FNS contracted personnel on November 30, 2017.

Via letter postmarked March 22, 2018, received in the office of the Chief of the Administrative Review Branch on April 2, 2018, Appellant requested an administrative review of the action to deny authorization to participate as a SNAP Retailer. 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

Part 278.1(b)(1)⁴ 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.

7 CFR § 278.1(b)(1) reads, 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

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

⁴ The SNAP regulations at 7 CFR § 278.1(b)(1) have been modified effective January 17, 2018 in accordance with SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer/eligible> . Any applications filed after January 17, 2018 must conform to the new eligibility requirements.

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]

7 CFR § 278.1(b)(1)(ii) of the SNAP regulations and internal agency directives 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 § 278.1(k)(2) reads, in part, “FNS shall deny the application of any firm if it determines that the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.”

APPELLANT’S CONTENTIONS

In the request for administrative review Appellant, through its ownership, provides that Mommies was intended to be open as a WIC only store, with bulk stock ordered and placed in inventory every two (2) weeks, which leads to inventory being sold out at certain times. Appellant’s ownership declares that he intends to sell milk, eggs, cheese, fruits and vegetables and bread but he will never stock meat. A second chance at meeting eligibility conditions is requested.

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 Application dated August 21, 2017, indicates that Mommies opened for business on September 1, 2017. The Application, Questions 18, 18a, 18b, 19, 19a and 20 report Appellant to be selling at least three (3) varieties of staple food products in each of the four (4) staple food categories; and, stocking fresh, frozen or refrigerated foods in at least two (2) of those categories. Further, in the August 21, 2017 Application Appellant estimates that 95 percent of its total gross retail sales are attributable to staple foods; and, five (5) percent is attributable to the sale of “other” foods, such as snack foods or condiments. Appellant reports selling no non-food items.

On November 30, 2017 a FNS contractor conducted a store visit in an effort to determine whether or not Appellant met the regulatory eligibility requirements 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 Appellant’s 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 Mommies is located at the address as reported on the application, in retail space of approximately 700 square feet, open from 8AM until 9PM seven (7) days per week with two (2) cash registers.

The store visit materials include an inventory sheet reporting staple food stock, which has been reconciled with the certified store visit photographs of November 30, 2017 by Retailer Operations Division to include:

- One (1) variety of food in the dairy products category consisting of between six (6) and 20 stocking units of powdered infant formula.
- Two (2) varieties of fruits/vegetables staple foods; consisting of three (3) units of 100 percent fruit juice and between six (6) and 20 units of peanut butter.
- One (1) variety of bread and cereal staple foods consisting of between six (6) and 20 boxes of cold breakfast cereal.
- No varieties of meat, poultry and seafood staple foods were identified.

The only item identified at the store visit selling for more than \$5 was infant formula selling for \$23.99 for a 12.5 ounce container. The materials document that discussion with Appellant ownership affirmed that there are fewer than four (4) total items selling for more than \$5; none beyond the infant formula was documented.

The report also indicates that Mommies does not sell non-food stock.

The record shows that on the date of the store visit Appellant was deficient in each of the four (4) staple food categories, and did not include perishables in at least two (2) of those categories.

Appellant has explained that the store is stocked every two (2) weeks to leverage buying products in bulk, which can lead to low inventory at times. 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) is fully justified by the Retailer Operations Division. Appellant’s assertion that groceries have been restocked; and, it now meets SNAP eligibility requirements, cannot be considered a mitigating factor in the Retailer Operations Division determination.

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

Criteria B:

The August 21, 2017 SNAP Retailer application provided for consideration under the signature of ownership indicates that Mommies derives approximately 95 percent of its estimated gross retail sales from staple foods. However, no evidence to support that number was presented for consideration by the Retailer Operations Division, nor was supporting material evidenced to have been requested in the official record.

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”. However, the materials resulting from the November 30, 2017 contracted store visit do not support a conclusion that more than 50 percent of Mommies’ estimated annual retail sales would derive from staple foods.

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

2nd Chance:

The purpose of administrative review is to affirm or reject the determination as documented by the Retailer Operations Division. The administrative review process cannot be used to support reevaluation of the application or to incorporate consideration of changes made following the Retailer Operations Division decision.

Reapplication:

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]. .

CONCLUSION

Based on the discussion above, the decision by the Retailer Operations Division to deny the application of Mommies to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) Mommies 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 (6) months from the date of the letter of determination, December 5, 2017. A delay in the delivery of that denial letter was experienced due to challenges in delivery by the

shipping company does not extend the period of ineligibility for Appellant. To avert reoccurrence of the delivery challenges this decision is being sent to the street address of Appellant as well as the street address of the owner.

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

May 16, 2018