

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

Neptali Peguero LLC,

Appellant,

v.

Case Number: C0208438

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 Neptali Peguero LLC (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 Neptali Peguero LLC.

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

The Appellant firm, Neptali Peguero LLC, originally applied to participate as a retailer in SNAP on February 8, 2018. According to the firm's application, the store was opened for business under the current ownership on September 7, 2017.

On February 26, 2018, the Appellant store was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be authorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing the Appellant's application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient variety or quantity of staple foods to be eligible for SNAP participation under Criterion A or Criterion B as outlined in regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy and meat/poultry/fish staple food categories, making the Appellant ineligible under Criterion A. Additionally, both the application and the store visit report indicated that Appellant was not eligible under Criterion B.

In a letter dated March 28, 2018, and sent to the firm on April 5, 2018, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in all four staple food categories as required under Criterion A. The letter also informed the Appellant that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods. Additionally, the letter stated 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 does 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 April 18, 2018, the Appellant 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:

* 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>.

...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:

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, 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.

* 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>.

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:

- Coincidentally, the same week that the FNS contractor visited the store, the firm had just removed much of its inventory because the food was expired. If the contractor had entered the back office, it would have seen the inventory that it had pulled, making the store appear empty.
- Appellant only recently purchased the convenience store and inherited the inventory.
- Store does sell staple foods like milk, fruit cereal, juice, soup, pasta, etc. It does meet the eligibility criteria.
- Firm really needs EBT. The community continues to ask for it and the firm wants to serve them.

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 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 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.

On February 8, 2018, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of staple foods in each of the four staple food categories with a minimum depth of stock of at least three stocking units in each staple food variety. The Appellant's application also estimated that 11 percent of the firm's gross retail sales were from the sale of staple foods, while 9 percent of its sales were in other SNAP-eligible foods, such as snacks, soft drinks, and condiments. The Appellant estimated that 80 percent of its sales were from items not eligible for purchase with SNAP benefits, such as hot food, gasoline, alcoholic beverages, tobacco products, and other nonfood merchandise.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm 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 food variety and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food.

Based on a review of the contractor's store visit report, Neptali Peguero LLC is clearly not eligible for SNAP participation under Criterion B, as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. Additionally, the Appellant indicated on its SNAP application that staple foods constitute just 11 percent of the firm's gross sales. It should be noted that Criterion B is generally reserved for stores such as butcher shops or bakeries, which normally do not carry food items in all four staple food categories, but which have most of their revenue in the sale of staple food items.

Because the firm is not eligible under Criterion B, it must meet requirements under Criterion A in order to be authorized. However, 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 meet SNAP eligibility requirements under Criterion A and thus, is not eligible for SNAP participation.

As best as can be determined by this review, the only dairy item in the store on the day of the contractor's visit was one unit of milk. In the meat/poultry/fish category, the only items were three packages of frozen chicken. This review also determined that the Appellant was short in the bread/cereals category, with only pasta and one cereal bar available for purchase.

The Appellant has argued that the same week that the contractor visited the store, the firm had just removed much of its expired inventory. It claims that it only recently purchased the store and had inherited the inventory. The firm also argues that it does, in fact, meet eligibility requirements, selling a variety of staple foods.

Unfortunately, the firm has offered no evidence to support its claims that it meets eligibility requirements. The store visit report plainly shows that the firm does not carry enough staple food inventory to be eligible under either Criterion A or Criterion B. As to the removal of inventory shortly before the contractor's visit, this assertion does not provide a valid basis for reversing the agency's decision. According to regulation at 7 CFR § 278.1(b)(1), a firm only meets eligibility under Criterion A if it offers for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods. This means that on any given day of operation, as well as nights, weekends, or immediately prior to a contractor's store visit, the firm must offer for sale a sufficient variety and quantity of staple foods. In this case, the store visit shows numerous empty shelves, and an extremely limited quantity of staple foods.

Hardship to SNAP Households

The Appellant argues that the firm really needs SNAP authorization because customers continue to ask for this service and the firm would like to serve these households. This contention implies that if the firm is not authorized to accept SNAP benefits, households that use such benefits would experience some level of hardship by not being able to use them at the Appellant's store.

Unfortunately, this contention has no bearing on the Appellant's eligibility for SNAP authorization. A store may only accept SNAP benefits if it meets the minimum required eligibility criteria for authorization.

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other 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 Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for

SNAP authorization under this provision. After a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Neptali Peguero LLC, does not meet eligibility requirements under Criterion A or B outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions presented by the Appellant are not sufficient to prove 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 Neptali Peguero LLC 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 April 5, 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

June 6, 2018