

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

Nto Okure Inc,

Appellant,

v.

Case Number: C0213628

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Nto Okure Inc. to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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 Retailer Operations Division received an application from the Appellant on August 31, 2018. In a letter dated October 2, 2018, the Retailer Operations Division informed the Appellant that the store did not carry the minimum three (3) stocking units in at least three (3) varieties of foods in the Dairy staple food category and therefore did not meet eligibility Criterion A. The

Retailer Operations Division also determined that the store failed to meet eligibility Criterion B because the store's **staple** food sales comprised 50 percent or less of its annual gross retail sales.

Lastly, the store did not meet the need for access provision at 7 CFR § 278.1(b)(6) as the store was not located in a low food access area. Therefore, the store's application was denied.

In a letter postmarked October 18, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review 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, might 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) 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, in part, as:

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

* 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>

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, in part, as:

... 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. 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)(A) reads, 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

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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.

7 CFR § 278.1(b)(6) states in part:

* 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>

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

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The business serves low income people and is convenient to them as many do not have transportation.
- The store has never been cited with a violation in the 20+ years it has been in business.
- Receipts for dairy products will be kept for a minimum of 90 days in the future.

The preceding may represent only a brief summary of the 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

Criterion A

Under new regulations implemented on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of stock of three (3) stocking units for each qualifying variety and at least one (1) variety of perishable foods in at least two (2) staple food categories. In addition, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements "on a continuous basis."

A store visit conducted on September 11, 2018 documented that Nto Okure Inc. did not carry any varieties of dairy staple food at the time of the store visit. The Retailer Operations Division sent a proof of inventory letter to the Appellant on September 13, 2018 requesting that the store submit any purchase invoices or receipts documenting that the store normally carried three (3)

varieties of dairy staple food in sufficient stocking units. The letter stated that the invoices/receipts had to be dated no more than 21 days prior to the date of the store visit and not on or after the store visit. In response, the Appellant submitted a single purchase receipt dated September 3, 2018. This receipt only documented the purchase of four (4) stocking units of milk products and no other dairy staple foods. Therefore, the Retailer Operations Division determined that the store did not meet the minimum requirements to be eligible under Criterion A.

The store visit report and photographs taken during the store visit support the decision of the Retailer Operations Division that the store was deficient in the Dairy staple food category at the time of the store visit. Therefore, based on a preponderance of the evidence, the Retailer Operations Division correctly determined that the Appellant store was ineligible under Criterion A.

Criterion B

The Retailer Operations Division determined that the Appellant store did not meet Criterion B because the store's **staple** food sales did not comprise more than 50 percent of its gross retail sales. The Appellant's application estimated its **staple** food sales **at only seven (7) percent** of its annual gross retail sales. There is nothing in the case record which would indicate that this percentage of staple food sales to gross retail sales is inaccurate.

The application estimated the store's "accessory" food sales (items such as snack foods, ice cream, potato chips, carbonated and non-carbonated drinks, spices and condiments) at four (4) percent of its gross retail sales. Although accessory foods may be purchased with SNAP benefits, they are not used in determining eligibility.

The store's application also estimated that 90 percent of the store's gross annual retail sales are in non-food items (primarily alcohol, tobacco and lottery sales). Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B as **staple** food sales did not exceed 50 percent of its gross retail sales.

Need for Access

The Appellant states that local SNAP customers who lack transportation find shopping at the store convenient. 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 case record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP

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

Prior Authorization History

The Appellant states that the previously authorized store at this location was never cited with a violation in the 20+ years it was in business. Regarding this contention, it should be noted that the owner was issued warning letters on February 10, 1995 and May 23, 2007 for violations during two separate Retailer Investigation Branch investigations conducted at this store location. However, whether or not the Appellant store owner did or did not have any prior violations is not at issue in this administrative review. There is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis that it has never been cited with a violation when it was authorized in the past. The store must still meet the eligibility requirements under Criterion A or Criterion B, or must meet the Need for Access provisions if not eligible under Criterion A or Criterion B.

Basis of Determination

The Appellant states that the store will keep its dairy invoices and receipts in the future. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division's action. Whether or not the store has since stocked up its food inventory is not relevant to this case. The store may reapply for the SNAP six (6) months from the effective date of the denial and its updated food inventory will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Nto Okure Inc. is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after October 2, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you

reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

December 12, 2018