

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

Omar Cell and Tobacco,

Appellant,

v.

Case Number: C0219993

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division’s decision to deny the application of Omar Cell and Tobacco (Omar Cell and Tobaccoor Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). 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)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Omar Cell and Tobacco to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the 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 24, 2019, the Retailer Operations Division informed ownership that the application of Omar Cell and Tobacco to participate as an authorized retailer in SNAP was denied because Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the July 21, 2019, FNS store visit, the Retailer Operations Division determined that Omar Cell and Tobacco failed to meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category. The store also failed to meet

Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales. Lastly, the Retailer Operations Division determined that the firm did not qualify under the need for access provision of 7 CFR § 278.1(b)(6).

By letter dated August 1, 2019, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 USC § 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 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

* 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>.

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) ...

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 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.

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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:

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

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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

Appellant made the following summarized contention in its administrative review request postmarked August 1, 2019, in relevant part:

- Appellant took over the store from the previous owner and was not aware that is was missing stock.
- Appellant states that is will have the minimum stocking requirements on a continuous basis and requests another review.

On September 3, 2019, Appellant submitted 50 color photographs of its food now in stock.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

The record reflects that ownership submitted an application to participate as a SNAP retailer on July 5, 2019, wherein it estimated that staple foods accounted for 13 percent of total gross retail sales. The accessory "other" food items showed an estimate of 25 percent of the firm's total gross retail sales and cold prepared food showed an estimate of two percent. The owner estimated 60 percent of its sales come from non-food items including lottery, alcohol, tobacco, hot food, and other nonfood items. A review of Appellant's food inventory was conducted by FNS contracted staff as a routine part of the authorization process on July 21, 2019.

Criterion A

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that in order to qualify for SNAP authorization under Criterion A, a firm 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. This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A.

The Retailer Operations Division determined that Appellant was not eligible under Criterion A on the day of the store visit because Appellant was missing two qualifying varieties in the dairy staple food category. The photographs taken during the store visit support this determination.

Appellant states that it was not aware that it was missing stock. Appellant provides assurance that it will have the minimum stocking requirements and it submitted photographs as documentation. It is important to note that Appellant indicated on the application that it only carried two varieties of dairy staple food items. The purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action. There are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory criteria.

The evidence supports that the Retail Operations Division correctly determined that Appellant was not eligible under Criterion A at the time of the store visit.

Criterion B

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii). Appellant's own SNAP application estimates that 13 percent of its gross annual retail sales come from the sale of staple foods. The store visit photographs and report show that there were limited staple food items.

The evidence supports that Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

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. The Retailer Operations Division determined that the Appellant firm did not qualify for SNAP authorization under this provision.

CONCLUSION

The Retailer Operations Division's decision to deny the SNAP application of Omar Cell and Tobacco is sustained. Appellant is not eligible to submit a new application for SNAP authorization until six months after July 25, 2019, the effective date of the denial decision.

Please call 877-823-4369 with general questions regarding the application process and consult the USDA website for more retailer information.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

September 12, 2019