

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

**Panaderia y Reposteria Ceballos,**

**Appellant,**

**v.**

**Case Number: C0214959**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw Panaderia y Reposteria Ceballos (hereinafter “Appellant”) from authorization as a 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 withdrawal.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Panaderia y Reposteria Ceballos to participate as a 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 Appellant firm, Panaderia y Reposteria Ceballos, was originally authorized to participate as a retailer in SNAP on January 14, 2009. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

On November 2, 2018, the Appellant firm submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document, the Appellant reported that around 10 percent of its gross retail sales were from the sale of staple foods. The application also reported the firm had sufficient staple foods in the dairy products and meat, poultry, and/or fish categories, but the firm carried just two different varieties in the breads and cereals category and no fruits and vegetables. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on December 1, 2018, to verify the firm's reported staple food stock.

After reviewing the store visit report and photographs, and re-evaluating the Appellant's reauthorization application, the Retailer Operations Division determined that the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B as set forth in 7 CFR § 278.1(b)(1) of SNAP regulations. Regarding Criterion A, the firm appeared to be deficient all four staple food categories.

In a letter dated December 6, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation under Criterion A or B. The withdrawal letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated 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 authorization 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 authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked December 12, 2018, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, 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 untrue.

## CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and is promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

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.... 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 § 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

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\* 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>.

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:

...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

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- 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(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

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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 and in additional documentation submitted and postmarked January 28, 2019, in relevant part:

- Appellant disagrees with the withdrawal determination and believes there has been a misunderstanding and a great and necessary provision will be denied the community if the bakery is not authorized to provide nutritious foods to its loyal customers;
- Appellant offers a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories;
- Appellant has future plans to continue complying with SNAP requirements and to offer more nutritious items the community may benefit from;
- Appellant helps the elderly and community members, some of which do not have a vehicle to purchase foods from larger stores located beyond a reasonable walking distance;
- Photos submitted support Appellant's position that a great injustice has transpired to deny children and elderly community members the nutritious foods offered by the firm;
- During the store visit, Appellant was unable to have all SNAP provisions displayed due to a storage lock issue; and
- Appellant asks that the store be re-visited, and that FNS reconsider the determination.

In addition to the request for administrative review, the Appellant submitted undated photographs of store inventory.

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.

After reviewing the 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 carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization.

## **Criterion A and Criterion B Eligibility**

In order for a firm to be eligible under Criterion A, 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 three stocking units for each variety. Eligibility under Criterion B requires that more than 50 percent of the firm's total gross retail sales be from the sale of staple foods.

With regard to Appellant's firm, the record shows that the firm did not have enough inventory in any of the four staple food categories on the day of the store visit to meet Criterion A eligibility requirements. Although Appellant now claims that some of their SNAP or other inventory was inaccessible at the time of the store visit due to a storage lock issue, the store visit report, completed in collaboration with store personnel, specifies that at the time of the store visit, (1) food was not being stored in any storage area out of public view and (2) food regularly sold by the store was not being stored at any locations other than the store itself. The store visit report includes a sketch of the store which, likewise, shows no additional storage areas onsite. Accordingly, there is no evidence that sufficient quantities of products in any staple food category was being stored elsewhere or was temporarily relocated.

When the Retailer Operations Division withdrew the Appellant firm, it found that the firm was short of meeting Criterion A eligibility requirements in all four staple food categories. The firm had more than three units of bread, more than three units of eggs, more than three units each of milk and butter, and more than three units each of grape and orange juice. The firm also had two units of apple juice. The firm was short two varieties (6 units) in both the breads or cereals and meat, poultry, or fish staple food categories; one variety (3 units) short in dairy products, and one unit short in vegetables and fruits.

Appellant submitted undated photographs of store inventory as part of the administrative review, but these were likely taken after the store visit and do not establish that the firm had the required inventory at the time of the store visit. Appellant did not submit any inventory records or other evidence that would show the firm normally carries a sufficient variety and quantity of staple foods. A firm must maintain a minimum and continuous inventory of staple foods to be eligible for SNAP authorization. Available evidence shows the Appellant firm was substantially deficient in staple foods at the time of the store visit.

Due to the firm's insufficient inventory of staple food items in all four staple food categories at the time of the store visit, the firm is not eligible for SNAP authorization under Criterion A. Further, given that the Appellant indicated in the reauthorization application that around 10 percent of the firm's total sales come from the sale of staple food, the firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total retail sales.

## **Future Remedial Actions**

Appellant contends that to have future plans of continuing to comply with SNAP requirements and to offer more nutritious items that the community may benefit from.

With regard to this contentions, it must be restated that 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 that the Retailer Operations Division rendered its withdrawal decision. It is not the authority of this review to consider subsequent remedial actions that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of a withdrawal decision on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, the Appellant's contentions regarding its authorization history and improvements to its staple food inventory do not provide a valid basis for reversing the Retailer Operations Division's withdrawal determination.

### **Need for Access**

Appellant contends that the firm helps elderly and community members, including those that do not have vehicles and must walk to purchase groceries and that withdrawal of the firm means that the community will be denied a great and necessary provision. 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 does 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, Panaderia y Reposteria Ceballos, does not meet eligibility requirements under Criterion A or B outlined in regulations, at 7 CFR § 278.1(b)(1), and is not eligible for authorization under Need for Access, as provided under 7 CFR § 278.1(b)(6). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the withdrawal decision made by the Retailer Operations Division should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the authorization of Panaderia y Reposteria Ceballos to participate as a retailer in SNAP is sustained.



Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for authorization as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Panaderia y Reposteria Ceballos shall become effective 30 days after receipt of this decision.

### **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 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.

MICHELLE WATERS  
Administrative Review Officer

May 22, 2019