

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

**Panaderia Y Tortilleria La Michoacana,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0223164**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Panaderia Y Tortilleria La Michoacana (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store on September 16, 2019.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 record shows that Appellant applied for reauthorization on November 15, 2018. On March 9, 2019, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized 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 Appellant’s application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient quantity or

variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy; the meat, poultry, or fish; and the fruit or vegetables staple food categories making the firm ineligible under Criterion A. Additionally, both the documentation and emails from compliance and accounting staff submitted in support of this application and the FNS store visit report indicate that the firm was not eligible under Criterion B.

In a letter dated September 16, 2019, the Retailer Operations Division informed Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. 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.

By letter dated September 23, 2019, Appellant, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

### **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 271.2 defines a Retail Food Store as: An establishment 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 seven 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 three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

7 CFR § 271.2 defines staple food 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) states: An establishment or house-to-house trade 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 three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: 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 seven 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 three 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. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

NOTE: Full implementation of the definition of variety and stocking requirements cited above was delayed by the Consolidated Appropriations Act of 2017. Therefore, the three paragraphs below reflect the definition and stocking requirements as currently implemented.

7 CFR § 278.1(b)(1)(ii)(A) as currently implemented defines continuous basis under Criterion A as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) as currently implemented: 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.

7 CFR § 278.1(b)(1)(ii)(C) as currently implemented: 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) provides that for firms to qualify for authorization 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) deals with the 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.

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: FNS shall 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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria "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 withdrawal.

### APPELLANT'S CONTENTIONS

The following may represent a 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:

- Reversal of the withdrawal decision is warranted as the firm has meet and continues to meet established eligibility criteria under Criterion B as the preponderance of evidence proves that the firm's staple food sales comprise 50 percent or more of total gross retail sales. The firm can also prove it qualifies for SNAP authorization pursuant to the Need for Access provision in Section 278.1(b)(6) if the Administrative Review Branch agree with the withdrawal determination for not meeting Criterion B;
- Appellant's SNAP reauthorization application, Exhibit A, was filed on November 15, 2018, and indicated that staple food sales comprise more than 50 percent of gross retail sales. Specifically, staple food sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while total sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in staple food sales accounting for 79.62 percent of total sales. The FNS withdrawal letter, Exhibit B, stated that Appellant could not meet either Criterion A or B and also made an inaccurate finding when it determined that accessory food sales were over 90 percent. The firm also submitted sales data for the three month period of April through June 2019 showing that staple food sales continued to exceed 50 percent of total sales. Exhibit C, a sales summary for this period shows staple food sales of 67.76 percent in April 2019, 61.93 percent in May, and 65.38 percent in June 2019; and,
- The Need for Access provision states that a firm that fails to meet authorization criteria under Criterion A or B can still qualify for SNAP authorization if it is located in an area with significantly [limited] access to food as long as it meets all other eligibility requirements. The Appellant firm furthers the purpose of the SNAP by assisting low-income Americans with the opportunity to purchase food by offering staple foods in all four staple food categories as demonstrated by the photos in Exhibit D. The firm is also surrounded by low income housing apartment complexes and residential houses. Those who live nearby and do not have access to an auto or to public transportation walk to the firm to purchase their food. The withdrawal decision hinders the ability of low-income households in the surrounding area to access and purchase foods.

Appellant submitted a copy of the firm's reauthorization application; the withdrawal letter dated September 13, 2019; a sales summary for April-June 2019; and three photos of store stock in support of these contentions.

## ANALYSIS AND FINDINGS

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, any contentions that the store is now or will be sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed.

Based on a review of the firm's reauthorization application as well as the documentation and emails from compliance and accounting staff submitted in support of this application, it appears that Appellant may not be aware of changes made to SNAP authorization criteria since the firm's last reauthorization in 2014. It is these changes that resulted in the firm being withdrawn after more than 20 years of SNAP program authorization. The 2014 Farm Bill enacted by Congress required strengthened eligibility requirements in the SNAP. While full implementation of the new requirements was delayed by the Consolidated Appropriations Act of 2017, as previously explained in the Controlling Law section of this decision, SNAP regulations were amended effective January 17, 2018, with new definitions of variety and stocking requirements to strengthen eligibility requirements under Criterion A. All SNAP retailers were advised in writing of these changes as well as the change in accessory foods discussed below.

The updated requirements under Criterion A are that a firm must offer for sale, on a continuous basis, 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. This stocking unit provision did not previously exist. Under Criterion B, a firm must still have more than 50 percent of its total gross retail sales in the sale of staple food; however, a more detailed definition of the term "accessory food" was also implemented under the strengthened eligibility requirements. Under the previous definition, accessory foods were those food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices; FNS considered staple foods to be any eligible food item that was not specifically listed as an accessory food. Effective January 17, 2018, the definition of accessory food was significantly expanded to include foods generally considered snack foods or desserts as well as

other food items that complement or supplement meals. Accessory foods now consist of the previously mentioned items plus additional items such as doughnuts, cupcakes, cookies, muffins, pastries, sweet rolls, sweet breads, pies, cakes, etc. These items are eligible for purchase with SNAP benefits at authorized stores, but are not considered staple foods for the purpose of determining SNAP eligibility. In the case of the Appellant firm, the FNS store visit report and photos as well as the documentation and emails from compliance and accounting staff submitted in support of the reauthorization application show that the majority of foods sold are accessory foods.

A store visit was conducted by an FNS contracted reviewer on March 9, 2019. According to the contractor's written record, the firm had insufficient inventory in the dairy; the meat, poultry, or fish; and the fruit or vegetables staple food categories making the firm ineligible under Criterion A. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis". Specifically, Appellant's reauthorization application claims the firm stocked more than 10 varieties in the bread or cereals staple food category; six varieties in the dairy category, five varieties in the meat, poultry, or fish category; and three varieties in the vegetables and fruit category. However, these quantities are not supported by the March 9, 2019, FNS store visit report, staple food inventory report, and numerous photos of stock. These documents show only three varieties (buns/rolls, corn tortillas, and wheat tortillas) in the bread and cereals staple food category; only two varieties (milk and yogurt) in the dairy category, only one variety (chicken eggs) in the meat, poultry, or fish category; and only one variety (orange juice) in the fruit or vegetables category making the firm deficient in three of the four staple food categories and meeting only the minimum requirement in the bread or cereals category.

Appellant's SNAP retailer reauthorization application dated November 15, 2018, shows that staple foods amounted to 79.62 percent of gross annual sales; however, after taking into account the changes in the definition of accessory foods, the firm actually had approximately three percent of sales in staple foods and 92 percent in accessory foods showing that the Appellant firm did not derive more than 50 percent of its annual sales from the sale of staple foods on the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A full review of the store visit materials from the March 9, 2019, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in the dairy; the meat, poultry, or fish; and the fruit or vegetables staple food categories. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from the store visit confirms that staple food sales comprise 50 percent or less of annual gross retail sales.

When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when it signed the online reauthorization application to continue operating as a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet

required stocking requirements for staple foods on a continuous basis; however, the FNS store visit determined that the ownership failed to adhere to this requirement and therefore was in violation of SNAP regulations. Stores that do not meet required stocking requirements are not eligible to be SNAP retailers. Intent to violate is not a required element with regards to stocking deficiencies. Information on staple food stocking requirements has previously been issued to all retail stores and may also be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application and reauthorization application.

### **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 the extent of Appellant's stocking deficiencies, distance to the nearest SNAP authorized firm, transportation options, 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 a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to participate as a retailer in SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

### **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.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

January 7, 2020