

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Pescaderia Mar De Cortez,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203560

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence that the Retailer Operations Division properly denied the application of Pescaderia Mar De Cortez (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 Pescaderia Mar De Cortez.

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, Pescaderia Mar De Cortez, originally applied to participate as a retailer in SNAP on August 25, 2017. According to the application, the store was opened for business under the current ownership on August 5, 2017.

On September 27, 2017, a store visit was conducted by an FNS contractor to determine whether or not the firm met eligibility requirements to be authorized in SNAP. After reviewing the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in order to be eligible to participate in SNAP under Criterion A. To meet this requirement, a firm must offer for sale on a continuous basis a variety of foods in each of the four staple food categories. According to the contractor's written record of the store visit, the firm carried an insufficient variety of dairy foods on the day of the visit.

On October 3, 2017, the Retailer Operations Division sent the Appellant two letters. The first informed the Appellant that the store was deficient in the dairy category on the day of the contractor's visit. The Appellant was given an opportunity to provide proof, such as invoices or receipts, that it normally carried a sufficient variety of dairy products. The letter stated that the invoices or receipts must be dated prior to the date of the store visit. The Appellant was given 10 calendar days to provide a response.

The second letter explained that the Appellant's original application appeared to have been filled out incorrectly. The application indicated that 35 percent of the firm's total sales were in the sale of staple foods, while 65 percent were in other foods, such as snack foods, soft drinks, and condiments. The application did not indicate that the firm sold any hot food or nonfood items. Upon reviewing the contractor's store visit report and photographs, the Retailer Operations Division determined that there were both hot foods and nonfoods available in the store, so it sent the application back to the Appellant and asked it to correct the improperly reported sales percentages.

On October 11, 2017, the Retailer Operations Division received a response from the Appellant. The response included the application, but none of the percentages had been changed. The Appellant also submitted one receipt dated October 5, 2017, showing the purchase of milk, cheese, yogurt, and margarine.

In a letter dated October 12, 2017 and sent on October 13, 2107, 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 stated that the firm 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. As noted earlier, the Appellant reported on its application that only 35 percent of its sales were from the sale of staple foods.

After the Retailer Operations Division sent the denial letter, it received two additional responses from the Appellant, one on October 17, 2017 and the other on October 19, 2017. In the October 17 response, the Appellant updated the sales percentages to reflect 40 percent staple foods, 30 percent accessory foods, and 30 percent hot foods and nonfoods.

In the October 19 response, the Appellant updated the percentages again, this time showing 50 percent staple foods, 40 percent accessory foods and just 10 percent hot foods and nonfoods. This response also included seven inventory receipts, all from October 2017 which indicated the

purchase of meat, seafood, and fresh produce. Also included in the October 19 response was a handwritten letter from the Appellant stating that the earlier claim of 30 percent hot foods was incorrect and that the correct number is actually 10 percent. The Appellant also requested that the Retailer Operations Division review the application again.

There is no indication in the case record that the Retailer Operations Division modified its October 13 denial decision in any way as a result of the October 17 and October 19 responses.

As a result of being found ineligible for participation under both Criteria A and B, the Appellant was informed that its SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked October 19, 2017, 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) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

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, **on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including 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... [Emphasis added.]

7 CFR § 271.2 defines *staple food*, in part, as:

... food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment ... shall ... 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 ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories.... [Emphasis added.]*
- (B) Offer for sale perishable staple food items in at least two staple food items. 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...shall not each be considered as more than one staple food variety for the purpose of determining variety...*

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.... [Emphasis added.]

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.

APPELLANT'S CONTENTIONS

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

- Appellant claims that its application was denied because it had stated that 30 percent of the food in the store was fried. In reality, only 10 percent is fried fish. The rest of the food is fresh products like meat, chicken, shrimp, and fish, and grocery products like milk, cheese, butter, and yogurt.
- The store is in need of SNAP authorization for its customers.

In support of its contentions the Appellant provided seven inventory purchase receipts “to prove that [it sells] mostly fresh products.”

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a final agency 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 August 25, 2017, 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. The application also estimated that 35 percent of the firm’s gross retail sales were in the sale of staple foods, while 65 percent of its sales were in other foods, such as snack foods, soft drinks, and condiments. As noted earlier, the Appellant made subsequent corrections to the application, indicating that staple foods constituted 40 percent, and later 50 percent of its gross sales.

After reviewing the contractor's store visit photographs and report 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 or B.

As best as can be determined by this review, the only dairy products in the store on the day of the contractor's visit were cheese and sour cream. The Appellant submitted inventory purchase receipts to the Retailer Operations Division and as part of its request for administrative review. However, every receipt submitted is dated in the month of October, which is after the contractor made its visit to the store. In the October 3, 2017 letters from the Retailer Operations Division to the Appellant, it was clearly made known that any inventory evidence had to be dated *prior to* the store visit. With all the evidence being dated after the store visit, it gives a clear indication that the firm did not carry "on a continuous basis ... on any given day of operation" at least three different varieties of food items in each of the four staple food categories, as required by regulation. As such, the firm is not eligible for SNAP participation under Criterion A.

The firm is also not eligible under Criterion B. By its own admission, the sale of staple foods does not exceed 50 percent of the firm's total sales. The Appellant has not, at any time, indicated that *more than 50 percent* of its gross retail sales come from the sale of staple foods. Originally, it claimed 35 percent staple food sales, and that was the only known percentage at the time the Retailer Operations Division made its denial decision. Later, the Appellant claimed 40 percent, and then finally 50 percent. However, the regulation is clear that in order to be eligible for SNAP under Criterion B, more than 50 percent of a firm's sales must be from the sale of staple foods. The Appellant has also offered no evidence, such as accounting records, to prove that the staple food percentage is greater than 50 percent.

It should be noted that the Retailer Operations Division's denial decision was not based on the percentage of hot foods, as the Appellant implies, but rather on the firm's lack of staple foods with respect to Criteria A and B.

Hardship to SNAP Households

The Appellant argues that it needs to be SNAP authorized for the sake of its customers. This contention implies that if the firm is not authorized to accept SNAP benefits, households that use such benefits would experience hardship.

With regard to this contention, this review can neither confirm nor deny that households would experience some degree of hardship or inconvenience if Pescaderia Mar De Cortez is not authorized to accept SNAP. However, 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.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Pescaderia Mar De Cortez, does not meet eligibility requirements under Criterion A or B pursuant to 7 CFR § 278.1(b)(1). The contentions and evidence presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. Additionally, the store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Pescaderia Mar De Cortez 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 October 13, 2017, 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

November 28, 2017