

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

Quick & Easy Market & Deli, )  
Appellant, )  
 )  
 )  
 v. )  
 )  
 )  
 )  
Retailer Operations Division, )  
Respondent. )

**Case Number: C0193672**

**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 to support a finding that the initial decision by the Retailer Operations Division (Retailer Operations) to deny the application of Quick & Easy Market & Deli (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retailer by letter dated August 30, 2016.

**CASE CHRONOLOGY**

Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied because Appellant did not meet the eligibility requirements as set forth in Section 278.1(b)(1) of the SNAP regulations. Based on an onsite FNS contracted store visit conducted August 22, 2016, Retailer Operations determined that Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in dairy staple food category. Retailer Operations sent a proof of inventory letter to the owner dated August 24, 2016. The record shows that Appellant faxed invoices to Retailer Operations showing the purchase of milk and cheese, however, the invoices dated August 29, 2016, are after the date of the store visit. Retailer Operations determined that Appellant did not meet Criterion A.

Retailer Operations also determined that the firm failed to meet Criterion B because its staple food sales comprise 50 percent or less of the total annual gross retail sales of the firm. This was based on the application information and the store visit report. Appellant was informed that in accordance

with Section 278.1(k)(2) of the SNAP regulations a new application for the firm to participate in the SNAP could not be submitted for a period of six months from the date of the denial.

The owner appealed Retailer Operations' decision by letter dated September 8, 2016, and requested administrative review of this action. The appeal was granted by letter dated September 15, 2016. This office received additional invoices from Appellant all from 7 U.S.C. 2018 (b)(6) & (b)(7)(c), for the months of August and September 2016. These invoices were forwarded to Retailer Operations for review on September 21, 2016. Retailer Operations reviewed these receipts and provided its assessment of them by email dated September 23, 2016.

By letter dated September 27, 2016, the owner provided a copy of the commercial lease agreement entered into on September 15, 2016, a register report for sales from September 15, 2016 to September 27, 2016 and invoices dated in September from 7 U.S.C. 2018 (b)(6) & (b)(7)(c),

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

7 USC § 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."

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). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: "An establishment ... 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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores..."

7 CFR § 271.2 defines a staple food, in relevant part, as "Food items intended for home preparation and consumption in each of the following staple food categories: . . . 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) imparts specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) 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.”

7 CFR § 278.1 (b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “... 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 . . .”

7 CFR § 278.1 (b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of . . . 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 . . .”

7 CFR § 278.1(k)(2) reads, in part, “FNS shall deny the application of any firm if it determines that 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 . . . for a minimum period of six months from the effective date of the denial.”

## **APPELLANT’S CONTENTIONS**

In the written request for review the owner contends:

- On the date of the store visit we informed the FNS contractor that our inventory was not complete as we were still over three weeks away from being open to the public.
- We planned to open September 1, 2016, but due to construction delays we had to move our opening date to September 15, 2016.
- We informed the inspector of this and that the food inventory was not yet complete.
- I did not have appropriate stock due to untimely delivery of vendors.

- We asked her to come back closer to the opening date. She said it would be okay and she would document that we were not open yet and would have more inventory.
- We would not have been able to order perishable inventory prior to August 22. They would all be spoiled before the opening.
- We now have sufficient inventory to meet Criterion A. We are attaching copies of those invoices.

Twenty photographs of stock were advanced as well as two September 2016 invoices. Appellant also advanced for review additional receipts from 7 U.S.C. 2018 (b)(6) & (b)(7)(c), dated in August and September 2016. Additional information was also provided by letter dated September 27, 2016 as indicated herein.

### ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. 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. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking on display in a public area, the variety of staples in each of the four staple food categories on a continuous basis.

The record reflects that ownership submitted an electronic application received August 1, 2016, to participate as a retailer in the SNAP. The owner estimated that staple foods accounted for 20% of the store's total gross retail sales. The accessory "other" food items showed an estimate of 50% of the firm's total gross retail sales. The owner estimated that 30% of total gross retail sales came from nonfoods with tobacco, lottery, alcohol, other, and the hot food check boxes marked.

A review of Appellant's food inventory was conducted by FNS contracted staff that revealed insufficient stock in the dairy staple food category, thus not meeting Criterion A per 7 CFR § 278.1 (b)(1)(ii)(A). The SNAP regulations at § 278.1(b)(1)(ii) are clear that under Criterion A, a firm shall "offer for sale ...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.**" Appellant was given the opportunity via the inventory letter to provide evidence to Retailer Operations that it stocked dairy products. Appellant did not submit a preponderance of evidence that it maintained sufficient variety of qualifying staple foods on a continuous basis to be eligible to accept SNAP benefits as required by the regulations cited.

Based on Appellant's application and the FNS contractor photographs, Retailer Operations determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). Staple food sales could not reasonably comprise more than 50% of the store's total annual gross retail sales. Appellant's own application estimates stated that staple foods accounted for 20% of its total gross retail sales.

The denial action is reviewed based on the evidence in the record at the time of the denial. Appellant's application stated the store would open August 10, 2016. The photos taken at the site show there are many accessory items in stock as well as alcohol and tobacco. The neon sign in front says "OPEN" and there is a large hanging sign clearly in view that says "NOW OPEN." The contractor noted: "Store manager reports that the store recently opened in the past few days and stocking is still underway. He says bread, milk, cheese, and eggs still need to be ordered. The hot foods bin/prep and drink dispense areas are also still under construction." Hot foods are not allowed for purchase with SNAP benefits and entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.

The record is clear that Appellant's application provided FNS with an opening date in August. Also, Appellant provided a business license dated May 1, 2016. If the remodeling and construction were taking longer than planned, Appellant should have notified FNS. Appellant could have requested a delay for the onsite review, or pulled its application so that it could reapply in proximity to its inventory completion.

While Appellant may not have been completely remodeled, the preponderance of the evidence in the record supports that the store was open to the public on the date of the FNS store visit. Daily newspapers are visible on the racks, and there were many goods in stock, including bakery items, a host of snacks, juices, alcohol, tobacco, lottery, automotive supplies, charcoal, meat jerky, canned fish and canned meat, soups, nuts, tomato sauce, canned corn, and other accessory foods. According to the record the manager said "the store recently opened in the past few days."

Therefore, based on a preponderance of the evidence, the determination by Retailer Operations that Appellant did not meet the requirements for participation in the SNAP at the time such determination was made is correct. While Appellant maintains that it now stocks items to meet Criterion A, the evidence under review is clear that Appellant did not have adequate foods to meet Criterion A at the time of denial.

Regarding the additional invoices advanced for review to support the stock of dairy products, these show the purchase of frozen foods from 7 U.S.C. 2018 (b)(6) & (b)(7)(c), dated 09/06/2016 for some ice cream novelties; however this was after the store visit. There is an additional receipt for sour cream dated 09/08/2016, after the store visit. The receipts dated in August 2016, prior to the store visit date, do not evidence the purchase of dairy products. The additional receipts provided September 27, 2016 are all dated in September. While these receipts are not applicable to the determination, they do not support that Appellant acquired an abundance of dairy products.

The preponderance of the evidence under review shows that Appellant was open at the time of the store inventory review. Appellant has not provided a preponderance of evidence that it stocked dairy products as required to meet the regulations at the time of the determination of denial. Nor is there evidence to support that it met Criterion B at the time it was denied authorization. Thus, it was properly denied.

## CONCLUSION

After review of all the pertinent documentation, and based on the discussion herein, the initial decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store for a minimum period of six months from the effective date of the denial.

## RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section § 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 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 (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 an unwarranted invasion of privacy.

/S/

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MADELINE VIENS  
ADMINISTRATIVE REVIEW OFFICER

October 11, 2016  
DATE