

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

Right On Time Ice Cream, LLC,

Appellant,

v.

Case Number: C0217129

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Right On Time Ice Cream, LLC (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 Right On Time Ice Cream, LLC.

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

In a letter dated March 28, 2019, and mailed to the firm on April 2, 2019, the Retailer Operations Division denied the Appellant’s SNAP application due to its failure to meet Program eligibility requirements. This denial action was based on observations made during a March 11, 2019, store visit by an FNS contractor as well as information provided on the firm’s February 20, 2019, SNAP application.

The Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail food store as set forth in SNAP regulations at 7 CFR § 271.2 and

§ 278.1(b)(1). The denial letter stated the firm was an ice cream vendor, selling only ice cream. In accordance with § 278.1(b)(1)(iv), such a firm is not eligible for SNAP participation.

In a letter postmarked April 13, 2019, 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) 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)(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 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...

* 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>.

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 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

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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 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, in relevant part:

- The store's SNAP application was denied last year for the same reason – selling only ice cream. Since that time, the Appellant owner took time to read all the rules, regulations, audits, policies, etc. that were available online. Since then, the store has been selling all the products listed according to regulations, including 100 percent apple juice, 100

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percent grape juice, oranges, apples, peanuts, Vienna sausages, canned tuna, ramen noodles, cereal, milk, and other items. The firm's customers buy a lot of these products.

- When the inspector conducted her visit, she was amazed at all of the products the Appellant sold. She took more than 20 pictures of the firm's inventory and property.
- There is another mobile ice cream vendor about 38 minutes from where the Appellant does business who sells similar products. That vendor was approved for EBT even though the Appellant sells more items than that other firm.
- Appellant does not understand why it received the same denial decision as last year after it made all the necessary adjustments.

In support of its contentions, the Appellant submitted 12 photographs of the firm's inventory and equipment.

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 in this document.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the March 28, 2019, denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state: "...Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread..." This is one of the regulations the Retailer Operations Division cited as a basis for its denial determination.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions submitted by the Appellant, it is the determination of this review that the agency's denial letter is not entirely accurate, particularly the sentence which states that the firm "is an ice cream vendor, selling only ice cream." The contractor's photographs clearly show that the firm carries a small number of staple food items, including fresh oranges, 100 percent fruit juice, canned tuna, canned Vienna sausage, etc. As such, the firm cannot be considered a firm "selling only accessory foods," or an ice cream vendor "selling solely ice cream." Accordingly, Section 278.1(b)(1)(iv) is not applicable in this case.

However, despite an incorrect regulation citation in the denial letter, the firm remains ineligible for SNAP participation and denial of the firm's application is still appropriate. Right On Time Ice Cream, LLC, which is a mobile ice cream truck, must meet minimum program eligibility requirements just like any other store that wishes to participate in SNAP. These eligibility requirements are outlined in regulations at 7 CFR § 278.1(b)(1), particularly in paragraphs (i), (ii), and (iii). These paragraphs explain that a retail firm is eligible for SNAP authorization if it meets one of the following two criteria: The firm offers for sale on a continuous basis a variety

of foods in required minimum quantities in each of the four staple food categories (Criterion A); or its staple food sales comprise more than 50 percent of its total retail sales (Criterion B). In this case, the Appellant does not meet the requirements of either Criterion A or B.

As for Criterion A, the Appellant firm does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP participation. Specifically, the firm is deficient in the dairy, meat/poultry/fish, and bread/cereals categories. According to the agency's record, the only dairy variety in sufficient quantities in the store on the day of the contractor's visit was milk. In the meat/poultry/fish category, the only varieties in sufficient quantities were chicken (Vienna sausage) and tuna. In the bread/cereals category, the only varieties in sufficient quantities were pasta noodles and corn-based cereal. 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 stock of three stocking units for each variety. In this case, the firm had insufficient varieties or depth of stock in three of the four staple food categories and thus, cannot be authorized under Criterion A.

The Appellant firm is also not eligible for participation under Criterion B because staple food sales do not constitute more than 50 percent of its gross retail sales. According to the Appellant's SNAP application, less than 3 percent of its total sales come from the sale of staple foods.

Because deficiencies in Criterion A and Criterion B clearly exist at the Appellant store, it is the finding of this review that the SNAP application must be denied in accordance with regulations at 7 CFR § 278.1(b)(1) and (k)(2).

As for the Appellant's contention that a similar mobile ice cream vendor nearby is authorized to accept SNAP benefits, this review can offer no opinion regarding the authorization of any other firms. The scope of this review is limited to the Appellant store only and whether or not the Appellant store meets minimum program requirements.

Need for Access

Regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B if it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Right On Time Ice Cream, LLC, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm did not qualify for SNAP authorization under this provision. After an analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Right On Time Ice Cream, LLC, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Right On Time Ice Cream, LLC to participate as a retailer in SNAP is sustained, though modified to reflect the proper denial reason.

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 April 2, 2019, 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

May 29, 2019