

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

S & N Quick Stop LLC,

Appellant,

v.

Case Number: C0213892

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 S & N Quick Stop 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 S & N Quick Stop 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 October 25, 2018, the Retailer Operations Division denied the Appellant’s SNAP application because of its failure to meet basic Program eligibility requirements. This denial action was based on observations made during an October 23, 2018, contractor store visit as well as information provided on the firm’s October 8, 2018, SNAP application.

The Retailer Operations Division determined that the firm did not meet eligibility under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in required minimum quantities 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 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 application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked November 3, 2018, 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...

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

* 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>.

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 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:

* 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>.

* 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>.

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 does carry three stocking units in at least three varieties of foods in the dairy staple food category.
- During the first inspection, the Appellant was told that everything was okay and that it should receive its paperwork in about 14 days. Appellant then got an e-mail stating that something was wrong on the application and had 30 days to correct it. Appellant apparently submitted it on the 31st day and had to reapply.
- In the second inspection, the Appellant was out of some items that were needed for authorization.
- Since S & N Quick Stop LLC is a new store and has only been open for about two months, its vendors are not requiring the firm to make weekly purchases. The vendors are working with the Appellant owner by letting him order smaller quantities of food until he gets his business growing. In order to do this, the Appellant needs SNAP authorization because many customers have asked if the store accepts SNAP.
- The contractor visited the store on a week that the firm had not gotten a full order.
- The firm stocks different types of breads and cereals as well as a variety of dairy items, such as milk, eggs, cheese, infant milk, and soy milk. The store also stocks a variety of fruits and vegetables and luncheon meats. As the store expands, it will have additional meat and seafood items, including frozen meats.
- The store is the only convenience store with food items in the area and the nearest grocery store is three to five miles away.

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

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the October 25, 2018, 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 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 Appellant firm does not carry, on a continuous basis, sufficient staple food inventory in the dairy category to be eligible for SNAP participation.

According to the contractor's report, the firm had just one gallon of milk and one package of grated parmesan cheese during the October 23 visit. The contractor also marked down cheese-flavored dip as a cheese product, but since cheese is not the first ingredient, such items are not considered cheese for purposes of determining SNAP eligibility. These items would still be considered dairy foods, but would be categorized as milk, since milk is the first ingredient. Accordingly, this review finds that on the day of the store visit, the Appellant had sufficient stocking units of milk, but did not have a sufficient depth of stock in any other dairy variety. In order for a firm to be eligible under Criterion A, it must offer for sale no fewer than **three** different varieties of food in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety.

With regard to the Appellant's reference to an earlier store visit, this review discovered that the current SNAP application is the third one submitted by the Appellant since June 2018. The first application was submitted on June 7, 2018, but was withdrawn on July 24, 2018, due to the Appellant's failure to provide required business licenses and an application signature page.

The second application was submitted on July 31, 2018, and was withdrawn on September 29, 2018, again for failing to submit requested information. However, this review finds that the agency's withdrawal action on the second application was erroneous. The requested information was received by the agency at least five days before the withdrawal action was taken and appeared to have been received by FNS within the 30-day time limit. Despite this error in relation to requested documentation, the firm **was not** eligible for SNAP participation at that time because it did not meet eligibility requirements. This is known because a contractor store visit that was conducted on August 26, 2018, showed that the firm was deficient not only in the dairy staple food category (carrying only three units of milk and one unit of cheese), but also in the meat/poultry/fish category (carrying sufficient beef and chicken, but just one unit of eggs).

Therefore, this review finds that the earlier store visit in August has no bearing on the application denial that was based on the October store visit.

With only milk and one unit of cheese in the dairy category, the firm does not have a sufficient variety of dairy foods and is not eligible for SNAP authorization under Criterion A. 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 gross retail sales. According to the Appellant's most recent SNAP application, less than 6 percent of its total sales come from the sale of staple foods.

Because deficiencies in Criterion A and Criterion B plainly exist at the Appellant store, it is the finding of this review that the application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2).

New Store with Limited Inventory

The Appellant contends that S & N Quick Stop LLC is a new store, so its vendors are not requiring the firm to make weekly inventory purchases. According to the Appellant, its vendors are working with the Appellant owner by letting him order smaller quantities of food until he gets his business growing. But the Appellant argues that in order to grow its business, it needs to be SNAP authorized because so many customers have been asking for this service. The Appellant further contends that it does carry a variety of staple foods, including different types of breads and cereals as well as a variety of dairy items, such as milk, eggs, cheese, infant milk, and soy milk. Other staple food offerings include a variety of fruits and vegetables and luncheon meats. The Appellant claims that as the store expands, it will offer additional meat and seafood items, including frozen meats.

Unfortunately, these contentions do not provide a valid basis for this review to reverse the agency's denial determination. There are two reasons for this. First, the evidence does not support the Appellant's claims regarding the firm's staple food inventory, particularly in the dairy category. Two store visits – one in August and another in October – have clearly demonstrated that the firm is well short of the required inventory in this category. (It should also be noted that eggs are not a dairy product.) Additionally, the Appellant has not offered any evidence to support its inventory claims. Anecdotal arguments without supporting documentation do little to convince this review that the firm carries sufficient inventory. Second, SNAP authorization cannot occur until a firm fully conforms to minimum eligibility requirements. There are no provisions within the regulations that would allow for a firm to be authorized under the premise that inventory will increase as the business grows. If a firm does not meet minimum eligibility standards at the time of application, authorization cannot occur.

Need for Access

The Appellant contends that S & N Quick Stop LLC is the only convenience store with food items in the area and the nearest grocery store is three to five miles away.

When a firm fails to meet Criterion A or B, SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing the firm if it is located in an area with significantly limited access to food provided that it meets all other eligibility requirements. This Need for Access evaluation considers 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 firm furthers the purposes of the program.

As for S & N Quick Stop 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 a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, S & N Quick Stop 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 S & N Quick Stop LLC 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 25, 2018, 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

December 12, 2018