

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

**Save & Fast Express,**

**Appellant,**

**v.**

**-**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0205801**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Save & Fast Express (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on January 9, 2018.

**AUTHORITY**

7 U.S.C. § 2023 and the 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 January 9, 2018, Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on evidence obtained during a store visit on December 29, 2017, as well as information provided on the firm’s retailer application.

Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter stated the Appellant failed to meet the requirements of Criterion A because you carry too few items in the

dairy products category and the meat, poultry or fish category. Also, the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total gross retail sales.

As the firm failed to meet either eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2).

In a letter dated January 18, 2018, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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**

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, "An establishment . . . 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 § 271.2 defines staple food, in part, as "those 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."

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations states, in part, "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 a least three staple food categories."

7 CFR § 278.1(b)(1)(ii)(B) of the SNAP regulations define perishable foods as “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) of the SNAP regulations define variety as “. . . different types of foods, such as apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, port, eggs and tuna in the meat, poultry or fish category...”

7 CFR § 278.1(k) reads, in part, “FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or (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.”

### **APPELLANT’S CONTENTIONS**

The Appellant made the following summarized contentions in its response to the denial letter and its request for administrative review, in relevant part:

1. When I originally filled out my application to accept food stamps, I was still getting inventory in my store and changing the look of the store so that I could stock foods that would be available to my customers for purchase with EBT.
2. My application should be changed to reflect that 60% of my total retail sales come from the four food categories. Other foods constitute 10% of my sales and the remaining 30% is in the form of non-foods or food that is not at the time the customer pays for it.
3. Now my store has the required inventory so that I can become a retailer who accepts EBT benefits. Please update your records and allow me to participate as an authorized retailer in SNAP.

The preceding may represent only a brief 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.

### **ANALYSIS AND FINDINGS**

In regards to Appellant’s contentions it is important to clarify that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. It is not the purpose of this review to consider what subsequent actions may have been taken so that a store may begin to comply with program requirements. Section 278.1(b)(ii)(A) of the SNAP regulations state in part “. . .firms 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.” [Emphasis Added]

A review of the firm visit documentation indicates that the firm was deficient in the dairy products category and the meat, poultry or fish category, carrying one product in each category. Therefore, Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the firm did not offer “qualifying staple foods on a continuous basis in each of the four staple food categories.” Appellant did not provide any documentation to demonstrate that it normally carried the required number of qualifying staple food items in each of the four staple food categories therefore; Appellant’s contention does not provide any valid basis for dismissing or mitigating the adverse action imposed.

Appellant reported on its retailer application that 10 percent of its projected total annual gross retail sales were from the sale of staple foods. Appellant’s application, the photographs and firm inventory provided from the firm visit, confirm that Appellant did not derive more than 50 percent of its projected total annual gross retail sales from the sale of staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The regulations also provide a definition of “*Ineligible firms*” as “firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation.

7 CFR § 278.1(k)(2) states, 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.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

## **CONCLUSION**

Based on the discussion herein, the determination by Retailer Operations Division to deny the application of Save & Fast Express to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective January 9, 2018.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 1977, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you reside or are 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), 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.

Monique Brooks  
Administrative Review Officer

April 19, 2018