

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

**Sharzad Petroleum Enterprises Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214377**

**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 withdrew the authorization of Sharzad Petroleum Enterprises Corp. (hereinafter “Appellant”) from participation as a 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 withdrawal.

**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 withdrew the authorization of Sharzad Petroleum Enterprises Corp.

**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 31, 2018, the Retailer Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm’s failure to meet basic program eligibility requirements. This withdrawal decision was based on observations made during a September 19, 2018, store visit as well as information provided on the firm’s reauthorization application dated October 10, 2018.

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

withdrawal letter stated that the Appellant failed to meet the requirements of Criterion A because in at least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. 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 did not qualify for authorization 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 authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked November 6, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted and implementation of the withdrawal action has been held in abeyance pending the outcome of this review.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

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

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\* 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:

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...

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\* 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>.

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 firm has met program requirements for over two years and has never run into an issue like this.
- It is highly possible that when the store visit was made, the firm was simply low on products. But rest assured, the store is actively stocked on a weekly basis with perishable staple foods as required by Criterion A. Due to high demand of these staple products, it was quite possible that when the inspector visited the store, its food delivery was in transit. As such, Appellant would like to request another store visit.
- As for the determination that the firm is not eligible for participation under the Need for Access provision, Appellant states that its store is centrally located and serves a community with limited access to food.
- The store meets all program eligibility requirements and has for the past two years. How has this suddenly changed?
- Is there any other form of determination aside from a map analysis that indicates low income/low access in the area? According to Google Earth, the nearest supermarket or grocery store is not within a one-mile radius of the store.

In support of its contentions, the Appellant submitted a copy of a Google Map of the area, with several grocery stores listed outside of a one-mile radius from the Appellant firm.

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 submitted, 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 October 31, 2018, withdrawal 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 visit to the store and at the time the Retailer Operations Division rendered its decision.

After reviewing the 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 sufficient staple food inventory to be eligible for SNAP participation. Specifically, the firm is deficient in the dairy category. As best as this review can determine, the only dairy variety in sufficient quantities in the store on the day of the contractor's visit was milk. 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 was deficient in two varieties of dairy.

The Appellant contends that when the store visit was made, it is possible that the firm was simply low on staple food products. The Appellant provides its assurance that the store is stocked on a weekly basis with staple foods as required by Criterion A. Accordingly, the Appellant requests that FNS make another store visit.

With regard to these contentions, the Appellant has unfortunately offered no evidence that the firm normally meets eligibility requirements under Criterion A. Anecdotal claims of program eligibility are insufficient to persuade this review that the withdrawal decision should be reversed. As to the Appellant's request for re-inspection of the store, such a request cannot be considered. Unannounced store visits are conducted with the intent of discovering conditions at a store on any given day of operation. A re-inspection after a determination of ineligibility could very possibly result in artificially-inflated inventory levels.

Based on the evidence in this case it is clear to this review that on the day of the store visit (or as stated in regulation, "on any given day of operation"), the firm did not carry sufficient dairy inventory as required for eligibility under Criterion A. In other words, the firm failed to meet stocking requirements in the four staple food categories on a continuous basis, and thus, cannot remain authorized 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 total sales. According to the Appellant's reauthorization application, less than 1 percent of the firm's total sales come from the sale of staple foods.

As to the Appellant's question of why the store had met all eligibility requirements for the past two years, but suddenly no longer did, it must be noted that effective January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility. The new rule states, among other things, that in order for a firm to meet program eligibility under Criterion A, it must have a minimum of three varieties of food items within each of the four staple food categories and a depth of stock of at least three stocking units for each variety. This stocking unit provision did not exist previously. Under the prior regulation, many stores were deemed eligible for SNAP despite stocking only a very small number of staple food items. Congress determined that such stores did not further the purposes of the program and introduced strengthened eligibility requirements in the 2014 Farm Bill.

Sharzad Petroleum Enterprises Corp. was authorized for SNAP participation as a convenience store on June 12, 2014, which is prior to the time these enhanced eligibility requirements took effect. However, as of January 17, 2018, all stores became subject to the new requirements. This information was made publicly available well in advance of the effective date. Based on this advance notice, the Appellant either was or should have been aware of the changes to the regulations. The Appellant's ignorance to this issue, whether feigned or genuine, is not a valid reason for this review to reverse the agency's withdrawal determination. It should be noted that by the time the contractor arrived at the Appellant store to conduct a store inspection, the enhanced eligibility standards had been in effect for almost nine months, which is ample time for a firm to make appropriate changes to its inventory to meet program requirements. Additional information about retailer eligibility requirements can be found on FNS's public website at [www.fns.usda.gov/snap/retailer/eligible](http://www.fns.usda.gov/snap/retailer/eligible).

### **Need for Access**

The Appellant has questioned the Retailer Operations Division's determination that the firm is not eligible for participation under the Need for Access provision. It claims that the store is centrally located and serves a community with limited access to food. The Appellant then asks, "Is there any other form of determination aside from a map analysis that indicates low-income and low-access census of my area?"

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 retailer, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

Among the methods used by FNS to conduct its Need for Access evaluation is a review of the Food Access Research Atlas on the USDA Economic Research Service (ERS) public website. The Atlas, which uses several different measures of accessibility, is a map of food access indicators for low-income census tracts. In this case, the Atlas determined that Sharzad Petroleum Enterprises Corp. was not located in a low-income, low access area. As such, it is not considered to be in an area with significantly limited access to food, and thus is not eligible for SNAP participation under the Need for Access provision. In light of the Appellant's submission of a map from Google Earth, it may be worth noting that there are at least four dozen SNAP-authorized retail firms within a one-mile radius of Sharzad Petroleum Enterprises Corp, including convenience stores, small and medium grocery stores, supermarkets, and superstores.

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 does not meet program eligibility requirements under Criterion A or B as outlined in regulations at

7 CFR § 278.1(b)(1). Additionally, the contentions presented by the Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Sharzad Petroleum Enterprises Corp. is sustained.

Pursuant to 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 the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the authorization withdrawal of Sharzad Petroleum Enterprises Corp. shall become effective 30 days after receipt of this decision.

### **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

June 3, 2019