

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

Tampico Market, Inc,

Appellant,

v.

Case Number: C0197605

Retailer Operations Division,

Respondent.

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 permanently deny the application of Tampico Market, Inc. (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(k)(3)(i), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it permanently denied the application of Appellant to participate in SNAP on January 31, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

On December 1, 2016, the Retailer Operations Division sent Appellant an email requesting additional information regarding its application to become a

SNAP retailer. Appellant provided additional information to the Retailer Operations Division. In a letter dated January 31, 2017, the Retailer Operations Division permanently denied the application of Appellant to participate as an authorized retailer in SNAP in accordance with 7 CFR § 278.1(b)(3)(i) and 7 CFR § 278.1(k).

In concluding that Appellant should be permanently denied authorization, the Retailer Operations Division determined that Appellant's owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was convicted of several offenses including: possession of a firearm on September 24, 2004; solicitation on July 14, 2005; assault with a deadly weapon on November 1, 2005; and, second degree burglary in or around 2007.

On February 3, 2017, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(3)(i) establishes the authority upon which the application of any firm to participate in the SNAP may be denied because "records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers."

7 CFR § 278.1(b)(3) states:

FNS shall deny the application of any firm from participation in the program for a period of time as specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows: Conviction or civil judgment against the owners, officers or managers of the firm for: (A) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public or private agreement or transaction; (B)

Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or (C) Violation of Federal, State and/or local consumer protection laws or other laws relating to alcohol, tobacco, firearms, controlled substances, and/or gaming licenses.

7 CFR § 278.1(k)(3)(i) states:

Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- It is unfair to deny Appellant based on mistakes that occurred 12 years ago; and,
- The owner has made many positive changes in his life since the felony convictions, including running his own business and becoming a father.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends it is unfair to be denied authorization based on mistakes that occurred 12 years ago. As previously mentioned, 7 CFR § 278.1(b)(3) is specific in its requirement that FNS shall deny the authorization of any firm from participation in the program based on various specific convictions of the owner. Appellant's SNAP application indicates that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is owner of the firm and was convicted of several of these offenses. Therefore, Appellant's contention is not a basis for dismissing the Retailer Operations Division's denial action.

Neither the Food and Nutrition Act of 2008 nor the accompanying regulations cite any cite any number of convictions or degrees of seriousness pertaining to drug-related criminal convictions. Convictions related to business integrity are always considered to be most serious. This is reflected in 7 CFR § 278.1(k)(3)(i) which reads:

Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently.

There is no agency discretion in the matter of what sanction is to be imposed when a criminal conviction related to business integrity is involved.

Similarly, there is no provision in SNAP regulations for reducing an administrative penalty on the basis of an owner's accomplishments or clean record following a criminal conviction. While such achievements may be laudable, if the matter violates the provisions of 7 CFR § 278.1(b)(3), as is the case here, denial of authorization is required.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Tampico Market, Inc. to participate as an authorized retailer in SNAP is sustained. Denial of a firm's authorization to participate in the SNAP under the provisions of 7 CFR § 278.1(b)(3)(i) is permanent.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

RICH PROULX
Administrative Review Officer

December 5, 2017