

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Tiffany’s Bakery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203136

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the Retailer Operations Division’s decision to withdraw the authorization of Tiffany’s Bakery (Tiffany’s Bakery or Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it withdrew the authorization of Tiffany’s Bakery to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 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

The record shows that Appellant submitted an application for reauthorization on April 3, 2017. By letter dated July 11, 2017, the Retailer Operations Division withdrew the authorization of Tiffany’s Bakery because it was a bakery that did not sell bread. Appellant requested an administrative review of this action and it was granted. Appellant submitted documentation of

its bread sales and as a result the Retailer Operations Division rescinded its withdrawal action on August 22, 2017, and continued to process Appellant's application for reauthorization.

By letter dated August 29, 2017, the Retailer Operations Division informed ownership that the authorization of Tiffany's Bakery to participate as an authorized retailer in SNAP was withdrawn because Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the September 12, 2017, FNS store visit, the Retailer Operations Division determined that Tiffany's Bakery failed to meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category, fruit and vegetables staple food category, and the meat, poultry or fish staple food category. The Retailer Operations Division also determined that the firm failed to meet Criterion B because staple food sales comprised less than 50 percent of its total gross retail sales.

In a letter postmarked October 4, 2017, ownership appealed the 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, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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 and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states, *inter alia* that *Retail Food Store* means: "An establishment . . . that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) . . . Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores . . ."

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. . . . Accessory food items including, but not

limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm . . .”

7 CFR § 278.1(b)(1)(i) imparts specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) 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.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “. . . 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 . . . ”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “. . . have more than 50 percent of . . . 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 . . .”

7 CFR § 278.1(k)(2) reads, 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.”

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its October 4, 2017, administrative review request, in relevant part:

- Many of Appellant’s customers depend on SNAP.
- Appellant believes it is entitled to an exception because there is no other retail store in a radius of several miles.

- Appellant would be at a significant disadvantage if it is determined ineligible because two of its nearest competitors continue to accept SNAP even though they do not meet the 50% staple food requirement.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

The record reflects that ownership submitted an application for reauthorization to participate as a SNAP retailer on April 3, 2017, wherein it estimated that staple foods accounted for 2% of total gross retail sales. However, based on the store visit report and documentation submitted to the Retailer Operations Division, it is clear that the store derived more than 50 percent of its annual sales from the sale of staple foods, as currently defined, to meet Criterion B. It is important to note that the definition of staple food will change effective January 17, 2018. However, at the time of the Retailer Operations Division's determination, the majority of the food items in stock at Appellant were considered staple food items.

Accordingly, it is unnecessary to address Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the authorization of Tiffany's Bakery to participate as an authorized SNAP retailer is reversed. The application must be approved if the firm is otherwise eligible for program authorization under all other applicable provisions and requirements for program participation.

RIGHTS AND REMEDIES

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.

Mary Kate Karagiorgos
Administrative Review Officer

December 7, 2017