

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

**Tropical Bakery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0231514**

**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 Tropical Bakery (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 Tropical Bakery.

**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 June 12, 2020, 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Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm’s failure to meet basic program eligibility requirements.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 store inspection on February 18, 2020, as well as information provided on the firm’s reauthorization application dated October 21, 2019.

The Retailer Operations Division determined that the firm did not meet eligibility requirements 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 June 16, 2020, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted and implementation of the withdrawal 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:

- After receipt of the withdrawal letter, Appellant requested a 10-day extension to address the agency's findings.
- The firm currently sells three types of fresh bread; a variety of deli items, such as sliced ham, cheese, salami, pastrami, etc.; pastries and cakes; cold submarine sandwiches; juices; and general cold drinks. The firm is looking into selling milk and eggs.
- The firm has not changed any of its staple food products since its admittance into the SNAP program.
- Being a small shop where almost everything is made fresh on location, the store occasionally runs out of an item by the end of the business day. Appellant can only assume that this is what happened when the inspection was conducted in February 2020. If it is a different issue, the Appellant would like to know so that it can rectify it immediately.

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**

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that Tropical Bakery does not carry sufficient staple food inventory necessary for continued SNAP authorization. In order for a firm to remain eligible for SNAP participation it must meet either Criterion A or Criterion B as described in regulations at 7 CFR § 271.2 and § 278.1(b)(1).

To be eligible under Criterion A, a store must offer for sale on a continuous basis 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. According to the agency's evidence, the

only staple food items in the store at the time of the inspection were bread, cheese, 100 percent fruit juice, and sliced deli meat. As such, the firm was deficient in every staple food category. Accordingly, the firm is not eligible for SNAP participation under Criterion A.

The vast majority of items sold in the store appear to be accessory foods, such as cookies, cakes, doughnuts, pastries, and other desserts as well as prepared sandwiches and hot breakfast items. None of these products are considered staple foods for the purpose of determining SNAP eligibility. Further, the firm reported on its reauthorization application that just 32 percent of its total sales were from the sale of staple foods. Because staple food sales constitute less than 50 percent of the firm's sales, it is also not eligible for SNAP participation under Criterion B.

The Appellant claims that it has not changed any of its staple food inventory since it was admitted into the SNAP program and states that it currently sells fresh bread, deli meat, cheese, pastries, cakes, cold sandwiches, juice, and other cold drinks. The Appellant further states that it is looking into selling milk and eggs. Based on these statements, it appears that the Appellant may not understand the difference between staple foods and accessory foods and does not understand what caused the firm to be ineligible for SNAP participation after several years of program authorization.

Effective January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility. The updated regulations state that in order for a firm to meet program eligibility under Criterion A, it must have a minimum depth of stock of three stocking units for each variety of staple food. This stocking unit provision did not exist previously. Under the old regulations, many stores, including many bakeries, were deemed eligible for SNAP despite having only a very small number of staple food items in stock. Congress determined that such stores did not further the purposes of the program and introduced the strengthened eligibility requirements in the 2014 Farm Bill.

Another change which directly affects Tropical Bakery is a more detailed definition of the term "accessory food." Before January 17, 2018, accessory foods were defined as "food items including...coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices." Under this former rule, FNS considered a staple food to be any eligible food item that was not specifically identified in this list. In the new rule, the definition of accessory food has been significantly expanded to reflect those foods that are generally considered snack foods or desserts as well as other foods that are intended to complement or supplement meals. Accessory foods now consist of the items mentioned earlier in this paragraph (coffee, tea, candy, etc.) plus additional items such as chips, ice cream, doughnuts, cupcakes, cookies, muffins, pastries, sweet rolls, pies, cakes, etc. [A full list can be found at [www.fns.usda.gov/snap/retailer/eligible](http://www.fns.usda.gov/snap/retailer/eligible).] These items are eligible for purchase with SNAP benefits at authorized stores, but are not considered staple foods for the purpose of determining SNAP eligibility. Similarly, cold prepared sandwiches are also eligible for purchase with SNAP benefits as long as they are not consumed on the premises, but they are not considered staple foods for the purpose of determining program eligibility.

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 7 CFR § 278.1(b)(1)(ii)(A), "on any given day of operation"), the firm did not carry

sufficient staple food inventory required for eligibility 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.

### **Need for Access**

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Tropical Bakery, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm is not located in an area with significantly limited access to food and thus, does not qualify for SNAP authorization under this provision. After evaluating all evidence, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

### **CONCLUSION**

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). Further, the contentions presented by the Appellant do not persuade this review that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Tropical Bakery 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 Tropical Bakery 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

August 10, 2020