

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

Tulumba Mama,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204176

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Tulumba Mama (hereinafter “Appellant”) was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the ROD Office (Retailer Operations Division, Retailer Operations Branch, hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(1) and (2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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.”

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CASE CHRONOLOGY

The record reflects that on 11/1/2017, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as Owner an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on October 18, 2017. Appellant was subsequently advised in a letter dated October 30, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). On November 6, 2017, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 271.2 states, *inter alia*:

Retail Food Store means: 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, 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...

And

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 the eligibility of any firm.
stores...

7 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site

visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, *inter alia*:

Application of Criterion A. In order to qualify under this criterion, 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 three different varieties of food items in each of the four staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, *inter alia*:

Application of Criterion B: In order to qualify under this criterion, 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.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, *inter alia*:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states:

Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of 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. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.

7 C.F.R. § 278.1(k)(1) and (2) state, *inter alia*:

FNS shall deny the application of any firm if it determines that:
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 The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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

In its written request for review dated November 6, 2017, Appellant provided information in which it was argued that:

1. Appellant believes a mistake was made in determining the firm ineligible to participate in the SNAP.
2. The firm sells varieties of fresh bread, dairy products such as milk, cheese and sour cream and also carries large varieties of natural juices.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on October 18, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operates primarily as a bakery selling pastries, cakes, other prepared dessert items, beverages and candy. As noted above, a firm that sells primarily accessory food items is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B. Moreover, a firm selling primarily prepared food items is likewise not eligible to participate in the SNAP. Further, the documentation indicated that the firm did not stock ample varieties of staple food stock in two of the four required staple food categories, thus additionally failing to qualify under Criterion A. The visit further confirmed that the firm's staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Prepared hot or cold food, as well as accessory food items such as cakes, cookies, pastries, other dessert items, candy and beverages, cannot count toward a firm's sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a firm selling primarily accessory food items and/or prepared food items, is not eligible to participate in the SNAP.

In regard to contention 1 above, this review has examined the relevant documentation in the record relating to the ROD Office's determination, along with the information provided by Appellant, and no mistake has been found in the decision and, as such, the denial is herein affirmed as correct and appropriate, as noted in the foregoing.

With regard to contention 2 above, the store visit documentation referenced above reflected the presence of bread items and also fruit/vegetable items as staple foods; however, no dairy items or meat/poultry/fish items offered to retail customers were in inventory on the day of the store visit. Appellant has provided no information, evidence or documentation demonstrating that the firm qualified to participate in the SNAP at the time of the store visit.

To the extent Appellant may imply that inventory has been added since the store visit, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visit and the resulting decision by the SNAP Office.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period (to reapply to participate in the SNAP) following the denial stipulated by the Food and Nutrition Act of 2008 (Sec. 9(d)), and the regulations at § 278.1(k)(2), will elapse on May 1, 2018.

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 a judicial review is desired, 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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

December 29, 2017