

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

U5 Foods,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219149

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly decided to withdraw the authorization of U5 Foods (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took action consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

FNS regulations require that stores be reauthorized on a set schedule. The owner completed a reauthorization application. FNS-contracted personnel conducted an onsite store visit on May 31, 2019, to ascertain Appellant's continued eligibility to participate in the SNAP. By letter dated June 11, 2019, the authorization of Appellant to participate as a retail food store in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as

enunciated in the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owner that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in each of four staple food categories, including perishable foods in at least two of those categories. Appellant lacked dairy staple food varieties and stocking units.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Retailer Operations also reviewed Appellant's eligibility under the need for access provision. Appellant was found not to meet the established criteria.

Counsel requested administrative review by letter dated June 20, 2019. The retailer submitted a letter of representation dated July 12, 2019. As the firm had been withdrawn by the system, upon receipt of the review request by administrative review, Retailer Operations reinstated the store on July 12, 2019, pending the appeal decision. The appeal was granted by letter dated July 16, 2019. The acknowledgement letter noted that counsel was welcome to submit additional information or evidence to support the appeal request. No additional information was provided.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states 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, qualifying staple food items on a continuous basis, evidenced by having no fewer than seven 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 three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated

on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 278.1(b)(1)(i) imparts program requirements for retail food store participation, which states: “(A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that 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 foods as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 271.2 states: “Staple food, means those 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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.”

7 CFR § 278.1(b)(1)(ii) provides that in order for a retail store to qualify for authorization 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 seven 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 three 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(iii) provides that in order for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw

meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(b)(6) regarding access states: “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.”

7 CFR § 278.1(b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads: “FNS shall 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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision whether listed or not.

- U5 Foods’ believes it is in compliance with the regulations governing participation in the SNAP program and therefore requests that the USDA review its denial and provide an opportunity to be heard on the matter prior to making any final decision.

ANALYSIS AND FINDINGS

The authorization of a store to participate in the SNAP must be in accord with the Act and the applicable regulations; those requirements cannot be waived. The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. This review is to validate or to invalidate the decision made by Retailer Operations, and it is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision.

Retailer Operations determined that Appellant did not maintain sufficient stocking units or varieties on a continuous basis in the dairy staple food category to be eligible for reauthorization. This is supported by the onsite photographs and the overall record at the time the decision was rendered. Counsel offered no evidence on appeal to support that Appellant met the eligibility for Criterion A at the time the determination was rendered. Thus, the record does not support that Appellant was in compliance with the regulatory eligibility requirements.

Under Criterion B a business must have more than 50 percent of its total gross retail sales in staple foods. Retailer Operations determined that Appellant failed to meet Criterion B. This was based on the sales data provided by the owner on the reauthorization application, and the store visit information. No evidence was provided by the owner that Appellant met this eligibility criterion for reauthorization at the time the withdrawal decision was made.

Retailer Operations considered whether the firm is located in an area with limited access to food when it failed to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii), and determined that Appellant did not qualify for marginal eligibility.

Therefore, the preponderance of evidence supports that the firm failed to meet Criterion A or Criterion B at the time the determination was rendered. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. The firm does not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations. In accordance with 7 CFR § 278.1(k)(2), the owner will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the withdrawal. The effective date is 30 days after receipt of this decision.

General questions regarding the application process can be handled by contacting 877-823-4369. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Jennifer Noury at (617) 565-1634.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to the applicable right to judicial review of this decision. Please note that 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 Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

August 20, 2019