

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

Wagner Star, LLC,

Appellant,

v.

Case Number: C0211509

Retailer Operations Division,

Respondent.

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 denied the application of Wagner Star, LLC (hereinafter “Appellant”) to participate as an authorized 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 denial.

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 denied the retailer application of Wagner Star, LLC.

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 July 11, 2018, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a June 21, 2018, store visit as well as information provided on the firm’s application.

The Retailer Operations Division determined that the firm did not meet eligibility under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer

for sale on a continuous basis a variety of foods in all four staple food categories. 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 does not qualify for SNAP 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 application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked July 19, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision. The request was granted. It is noted that on August 31, 2018, the Appellant submitted an additional letter of explanation along with 44 pages of inventory purchase invoices.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

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

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

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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 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

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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...

7 CFR § 278.1(k)(2) states, in part:

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 § 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

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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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant contends that there is sufficient evidence to reverse the denial decision. A reasonable mind, considering the record as a whole, would agree that it is more likely true than not true that Wagner Star, LLC meets the requirements to qualify as a retail food store.
- The firm is located in a small population center. As such there is small demand and small sales, which precludes maintaining larger inventories of perishable goods.
- The Appellant began operation under its current ownership on May 18, 2018, and applied for SNAP participation on May 22, 2018.
- The denial letter states that the determination was based on information provided on the firm's application as well as information obtained from a visit to the store on June 21, 2018. However, page 3 of the Appellant's application clearly indicates that the firm offers a minimum of three stocking units of three varieties of food in both the dairy and meat/poultry/fish categories. As such, it is unlikely that information provided on the application would support the determination that the firm did not carry sufficient inventory in either of the disputed categories.
- Wagner Star LLC makes frequent purchases of inventory from different suppliers. With regard to the dairy and meat/poultry/fish categories, the firm makes purchases from Wagner Super Foods and Cash-Wa Distributing.
- Appellant has provided 44 pages of inventory invoices dated between May 19, 2018, and June 18, 2018, demonstrating the purchase of dairy and meat items, including bologna, chicken, ham, pork chops, ribs, salami, cheese, milk, etc.
- When these items are viewed in concert with the fact that the previous owners were operating a retail food store and the new owners retained food stock from the earlier firm, it becomes clear that more likely than not, the firm continuously maintained the required variety of staple foods in both the dairy and meat/poultry/fish categories to qualify under Criterion A of the SNAP guidelines.

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 presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

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 the Appellant firm does not carry, on a continuous basis, sufficient staple food inventory in the dairy category to be eligible for SNAP participation.

According to the denial letter, the firm was lacking sufficient inventory in both the dairy and meat/poultry/fish staple food categories. The Retailer Operations Division determined that the only dairy items in the store on the day of the contractor's visit were milk and cheese. In the meat/poultry/fish category, the Retailer Operations Division determined that there were several units of beef jerky along with one carton of eggs, one package of bologna (first ingredient of chicken), and one package of sliced ham. In order for a firm to be eligible under Criterion A, it must offer 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 variety. In this instance, the Retailer Operations Division determined that Wagner Star, LLC carried only two varieties of dairy foods, and had a sufficient number of stocking units in only one variety in the meat/poultry/fish category.

Upon further review of the contractor's report and photographs, this review discovered that there was a substantial amount of meat/poultry/fish in the firm's refrigeration units in storage areas, including frozen corn dogs and various types of frozen chicken, including nuggets, strips, and breasts. Since these photos were provided to the Retailer Operations Division by the contractor, it is likely that these additional meat items were considered by the agency before denial action was taken. However, it appears that the Retailer Operations Division concluded that these items were not for individual sale, but were rather for use in the kitchen area of the store, where hot meals are prepared. Because hot foods are not eligible for purchase with SNAP benefits, the agency did not count these additional frozen meats as part of the firm's staple food stock.

As noted earlier, the Appellant has provided a large number of inventory invoices to show that the firm carried a sufficient supply of staple foods. In accordance with 7 CFR § 278.1(b)(1)(ii), FNS may consider only those invoices that are dated up to 21 calendar days prior to the date of the store visit. In this case, many of the firm's invoices – including those dated within that 21-day period – show the purchase of meat items, including chicken, pork chops, eggs, ribs, etc. From the invoices alone, this review cannot determine whether the meat items listed were sold frozen or were used in the kitchen area for hot meals. For the sake of argument, this review will assume that those items were sold cold and were not heated by the firm either before or after a customer's purchase. As such, it is the determination of this review that the Appellant has sufficient inventory in the meat/poultry/fish category.

As for the dairy category, the firm's inventory remains deficient. As noted earlier, the only dairy items found during the contractor's store visit were milk and cheese. The Appellant's inventory records also show milk and cheese, but no other dairy items could be found. According to SNAP regulations currently in effect, "**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... shall not each be considered as more**

than one staple food variety for the purpose of determining variety” (emphasis added; see 7 CFR § 278.1(b)(1)(ii)(C), on page 4 of this document).

So while the Appellant may have purchased sliced American cheese and grated parmesan cheese, these are both cheeses and count as only one variety in the dairy category. Likewise, chocolate milk, strawberry milk, and regular milk (e.g. 2%, whole, etc.) are all considered milk, which is only one variety. It should perhaps be noted that the invoices submitted by the Appellant list eggs as a dairy product. But these are not considered part of the dairy staple food category, but rather the meat/poultry/fish category.

After reviewing of all of the Appellant’s evidence, it is clear that the firm is still lacking in the dairy category. It carries just two varieties of dairy (milk and cheese), while the regulations require a minimum of three varieties in each staple food category with a minimum of three stocking units within each variety. There is no evidence that the firm carried other dairy foods, such as yogurt, sour cream, butter, etc.

With only milk and cheese in the dairy category, the firm is not eligible for SNAP authorization 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. According to the Appellant’s SNAP application, just 1 percent of the firm’s total sales come from the sale of staple foods. Considering the large number of snack foods and nonfood items available at the store, this review agrees that it is very unlikely that staple foods constitute more than 50 percent of its total sales.

Need for Access

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

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Wagner Star, LLC, does not meet eligibility requirements under Criterion A or B outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision made by the Retailer Operations Division should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Wagner Star, LLC to participate as a retailer in SNAP is sustained.

In accordance with 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 July 12, 2018, which is the effective date of the denial.

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.

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

September 13, 2018