

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

Amen Market, )  
Appellant, )  
 )  
v. )  
 )  
Retailer Operations Division, )  
Respondent. )  
\_\_\_\_\_ )

**Case Number: C0193671**

**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 imposed the withdrawal of the authorization of Amen Market (Appellant) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the application of Appellant to participate as an authorized SNAP retailer.

**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**

The FNS requires that stores be reauthorized on a set schedule. As part of this process, the owner was requested to complete a FNS-252-R reauthorization application for stores. A store visit was conducted June 16, 2016, by FNS-contracted personnel to ascertain Appellant’s continued eligibility to participate in the SNAP.

By letter dated August 30, 2016, the authorization of Appellant to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as enunciated in the

Federal regulations at 7 CFR § 278.1(b)(1). The letter informed ownership that Appellant failed to meet Criterion A because it does not offer for sale a variety of foods in sufficient quantities on a continuous basis since the store was found to carry too few items in the dairy and the meat, poultry and fish staple food categories. The letter also states that the firm fails to meet Criterion B, because the firm's staple food sales comprise 50 percent or less of annual gross retail sales. This determination was made based on information provided on Appellant's FNS- 252-R application dated March 22, 2016, and information obtained from the contractor store visit. A business must have more than 50 percent of its total gross retail sales in staple foods to be eligible under Criterion B.

Ownership requested an administrative review of the withdrawal action by letter dated September 5, 2016. The appeal was granted by letter dated September 15, 2016. The CEO provided additional information by letter dated October 4, 2016.

### **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 relevant evidence which 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 rules at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

A retail food store defined in 7 CFR § 271.2(1) 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) 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 stock keeping 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. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter."

7 CFR § 278.1(b)(1)(i) states, in part, "An establishment ... shall ... 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).”

Staple foods are defined in 7 CFR § 271.2 as “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)(ii) states in relevant part that: “In order to qualify under this criterion, 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. (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.”

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(l)(1) *Withdrawing authorization* 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) 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**

Ownership contends:

- The store visit was done just once on June 16, 2016.
- I will have some stocks low maybe for a day.
- I am a small business. I have to personally drive to get all I need.

- I believe it is unfair to take away from an individual like myself really struggling to survive just because of a one-time visit.
- We are a minority owned business.
- Most of the customers are from Ethiopia.
- We are able to communicate in the native language of our customers.
- We have always maintained our stock in accordance to the guidelines.
- If there were any shortages it was “minor oversight [sic],” that could be easily and immediately solved through a notice of corrective action.
- Disqualifying us would cause severe “Financial Hardship to us as a Minority Women Owned Business.”
- SNAP is designed to help those less fortunate. We value our participation as a Minority Women Owned Business in the local area.

### **ANALYSIS AND FINDINGS**

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. It is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances at the time Retailer Operations rendered its decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived.

The determination regarding whether Appellant is eligible to continue to participate as an authorized SNAP retailer includes consideration of whether or not the store is an eligible firm under paragraph 7 CFR § 278.1(b)(1) cited herein. The SNAP regulations at § 278.1(b)(1)(ii) are clear that under Criterion A, a firm shall “offer for sale ...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.” (*emphasis added*)

On the day of the FNS store review, Appellant was deficient in two staple food categories. Therefore, Retailer Operations determined that Appellant did not maintain sufficient stock of staple foods in sufficient quantities be available on a continuous basis in each of the four staple food categories to be eligible to accept SNAP benefits, and failed to meet Criterion A.

Under Criterion B, a business must have more than 50 percent of its total gross retail sales in staple foods. The store reauthorization application reported that 70 percent of its total gross retail sales were in staple foods. However, this estimate is not supported by the evidence under review. Appellant stocks a large number of accessory foods. As noted in the regulations, 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.

Appellant also stocks “other” ineligible items, not accounted for on its reauthorization application including: clothing, hair pieces, cookware, sandals, nail polish, cloth wraps, bags, scarfs, crockery, jewelry, and CDs. Thus, the evidence does not support the reauthorization

application's stated estimates of total gross retail sales. Retailer Operations determined that Appellant failed to meet Criterion B. Upon review, Appellant advanced no evidence to support that sales of staple foods for home consumption exceeded 50% of gross retail sales.

While Appellant suggests a notice of "Corrective Action" there is no such vehicle available to Retailer Operations. The authorization and subsequent reauthorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. The preponderance of the evidence supports that Appellant did not meet the requirements to be reauthorized as a retail food store. While the CEO claims to have always maintained the stock in accordance to the guideline set out through the USDA, FNS, SNAP, EBT program, this contention is not supported by the evidence under review.

Appellant appears to misconstrue its initial SNAP authorization as having bestowed upon it a right/entitlement to SNAP income and a corresponding perpetual and irreversible ownership/property interest in its SNAP authorization. It must be impressed upon Appellant that, SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, 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. Any rights or privileges resultant to a firm's SNAP authorization are subject to revocation along with that authorization via the sanctions for violations detailed in the Act and implementing regulations. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation and subsequently abides by the statute and implementing regulations. That a firm has profited or otherwise benefited from a SNAP authorization does not create a property interest which supersedes the statute or implementing regulations.

## **CONCLUSION**

Based on a review of all of the evidence in this matter, the initial decision by Retailer Operations to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) ownership shall not be eligible to re-apply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the withdrawal.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section § 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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 the Appellant's owners reside or are 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/S/

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MADELINE VIENS  
ADMINISTRATIVE REVIEW OFFICER

October 12, 2016  
DATE