

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

My Family Pharmacy,)	
)	
Appellant,)	
)	
v.)	Case Number: C0193239
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division to deny the application of My Family Pharmacy (hereinafter, “Appellant” and/or “My Family Pharmacy”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR §§ 271.2 and 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of My Family Pharmacy to participate in the SNAP as an authorized retailer via letter dated August 2, 2016.

CASE CHRONOLOGY

In a letter dated August 2, 2016, the Retailer Operations Division informed Appellant that the application of My Family Pharmacy to participate as an authorized retailer in SNAP was being denied because it did not meet the definition of a retail food store referenced in 7 CFR §271.2 and 7 CFR § 278.1(b)(1).

This determination was made as a result of a review of the electronic form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* initially submitted on May 23, 2016. Via letter received in the office of the Chief of the Administrative Review Branch on August 16, 2016, an administrative review of this action was requested, appealing the Retailer Operations Division’ decision. The appeal was granted.

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.

CONTROLLING LAW AND REGULATIONS

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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(b)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 indicates *“Retail food store means (1) an establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area...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 § 278.1(b)(1) reads, in relevant part, *“The nature and extent of the food business conducted by the applicant – (i) Retail food store. (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 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).”* [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) of the SNAP regulations and internal agency directives define *“Continuous Basis”* as *“An eligible store must offer for sale the required variety of food items on any given day of operation.”* [Emphasis Added]

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.1(k)(2) reads, in part, “FNS shall deny the application of any firm if it determines that 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 . . . for a minimum period of six months from the effective date of the denial.”

APPLICATION SUMMARY

The administrative record includes form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* dated May 23, 2016 which indicates that My Family Pharmacy is selling a variety of staple food products in each of the four (4) staple food groups; stocking fresh, frozen or refrigerated foods in at least two (2) of those categories. The material also indicates that My Family Pharmacy sells other foods such as snack foods, soft drinks, or condiments. 7 USC 2018 (b)(7)(e) The materials indicate My Family Pharmacy does not sell any non-food, or hot foods whatsoever.

APPELLANT’S CONTENTIONS

In the request for administrative review letter dated August 12, 2016, Appellant through one (1) of its owners, 7 U.S.C. 2018 (b)(6) & (b)(7)(c), requests a review of the determination indicating that My Family Pharmacy is a convenience store that includes space for selling food items located outside the pharmacy area. Two (2) photographs are provided for consideration.

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Appellant has stated that My Family Pharmacy is a convenience store, and provided two (2) photographs of a shelving area depicting a limited stock of food inventory, some of which is considered staple foods. However, on review, it is clear from the official photographs provided as a result of a contracted store visit, which was conducted on June 16, 2016 under the authority of 7 U.S.C. 2018 (b)(6) & (b)(7)(c), self-identified as a “worker”, that My Family Pharmacy is a pharmacy and/or drugstore.

Criteria A:

The store visit materials include a general report indicating that My Family Pharmacy is located in an urban residential area in a mixed use building, occupying approximately 560 square feet of space. The materials include an inventory sheet reporting very limited staple food stock to include:

- no dairy products;

- four (4) units of fruits/vegetables;
- between six (6) and 20 units of bread and cereals consisting of pasta and snacks; and,
- between six (6) and 20 cans of potted meat in the meat, poultry and seafood staple food category.

The report also indicates that My Family Pharmacy includes non-food stock consisting of health and beauty products, vitamins, and pharmaceuticals. Official photographs that accompany the report affirm the report materials.

As part of the request for review Appellant's owner, 7 U.S.C. 2018 (b)(6) & (b)(7)(c), provided two (2) photographs of a small shelving area reported to represent food stock at My Family Pharmacy. The photographs are very similar to ones provided as part of the contracted store visit report, with slightly increased stock volume. The increased stock of staple foods in Appellant provided photographs do not provide a basis for mitigating or reversing the Retailer Operations Division decision. Therefore, on review it is affirmed that the inventory at My Family was lacking the required three (3) varieties in each of the four (4) staple food groups; and lacking the required fresh, frozen or refrigerated foods in at least two (2) of those categories.

Criteria B:

The May 23, 2016 SNAP Retailer application provided for consideration under the reported signature of 7 U.S.C. 2018 (b)(6) & (b)(7)(c), 7 USC 2018 (b)(7)(e). The application further indicates that My Family Pharmacy derives 30 percent of its total retail sales from the sale of "other" foods such as snack foods, soft drinks, or condiments and that no percent of the retail sales derives from non-food products or services.

The administrative record indicates that Retailer Operations Division estimated that 25 percent of My Family Pharmacy's total retail sales would derive from staple food sales; 30 percent would derive from "other" food sales; and 45 percent would derive from the sale of non-foods and services such as the pharmaceutical products, health and beauty products, identified in the contracted store visit report. Although Retailer Operations Division did not provide the reasoning behind its percentage estimations it is clear from the store visit materials that it would be highly improbable that My Family Pharmacy would derive more than 50 percent of its total retail sales from the sale of staple food products. Therefore, the Retailer Operations Division decision that My Family Pharmacy does not meet the eligibility conditions of criterion B is affirmed.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of My Family Pharmacy to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) My Family Pharmacy is ineligible to participate as a SNAP authorized retailer "for a minimum period of six months from the effective date of the denial", which is six (6) months from the date of the denial letter, August 2, 2016.

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 Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/s/

NANCY BACA-STEPAN
ADMINISTRATIVE REVIEW OFFICER

October 7, 2016

DATE