

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

Far East University Market,)	
)	
Appellant,)	
)	
v.)	Case Number: C0191218
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

FINAL AGENCY DETERMINATION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence that the Retailer Operations Division properly denied the application of Far East University Market 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 Far East University Market.

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

Far East University Market submitted an application to participate in SNAP as a retailer on April 5, 2016. On May 31, 2016, the Appellant submitted all of the required documentation necessary to complete the application.

On June 20, 2016, a store visit was conducted by an FNS contractor to determine whether or not the firm met eligibility requirements to be authorized in SNAP. After reviewing the store visit report, the Retailer Operations Division determined that the firm did not carry a

sufficient variety of staple foods in the dairy category or in the fruits/vegetables category. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a variety of foods in each of the four staple food categories pursuant to 7 CFR § 278.1(b)(1).

In a letter dated June 23, 2016, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in each of the four staple food categories as required under Criterion A. Specifically, the letter stated that the Appellant failed to stock an ample variety of staple foods in the dairy and fruits/vegetables categories.

The Retailer Operations Division also informed the firm that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods. The Appellant previously disclosed on its SNAP application that 45 percent of the firm's sales were derived from the sale of staple foods.

In a letter postmarked June 30, 2016, the Appellant requested an administrative review of the Retailer Operations Division's decision to deny the firm's SNAP application. The appeal was considered timely and was therefore granted.

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 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) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

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, **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 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... [Emphasis added.]

7 CFR § 271.2 defines *staple food*, in part, 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)(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).

7 CFR § 278.1(b)(1)(ii) states, in part:

In order to qualify under [Criterion A] firms shall:

- (A) Offer for sale ... qualifying staple food items on a continuous basis ... 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]*
- (B) Offer for sale perishable staple food items in at least two staple food items. 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...shall not each be considered as more than one staple food variety for the purpose of determining variety...*

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.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its administrative review request, in relevant part:

- On the application, staple food sales were listed at 45 percent of the firm's total sales, but this is not accurate. It is actually closer to 60 percent, which will be clear upon a second store visit.
- On the day before the inspection, the air conditioning unit failed and as a result, the firm was forced to dispose of several food items impacted by the heat. So the inspection did not show a true reflection of the firm's inventory.
- The store has existed in the same location for almost five years. The previous owner was authorized to accept SNAP benefits. The new owner has kept the same inventory while adding some other staple foods.
- Many customers want to use their SNAP benefits at the store.
- Appellant requests a second store inspection, and would be willing, if necessary, to submit a new application so that the store can participate in SNAP.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

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 store visit and at the time the Retailer Operations Division rendered its decision.

On April 5, 2016, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of staple foods in three of the four staple food categories. The application indicated that the firm did not stock at least three different items in the fruits/vegetables category. The application also indicated that 45 percent of its gross retail

sales were in the sale of staple foods, with 50 percent in the sale of “other” foods such as snack foods, soft drinks, and condiments, and 5 percent in non-foods, such as tobacco products and hot food.

On June 20, 2016, an FNS contractor conducted a store visit at the firm to verify the information contained in the Appellant’s application. Based on the store visit results, the Retailer Operations Division determined that the firm’s SNAP application was not accurate. According to the contractor’s written record of the store visit the Appellant firm did not carry a sufficient variety of staple foods in either the dairy category or the fruits/vegetables category. The Retailer Operations Division indicated that it reviewed the photographs taken by the contractor and confirmed that the store was lacking in dairy products and fruits and vegetables. According to the report, the only dairy product carried by the firm was ice cream, and the only available items in the fruits/vegetable category were legumes, such as beans and peas, and canned jackfruit.

This review conducted additional analysis of the contractor’s report and photographs and discovered that the firm was not actually lacking in the fruits/vegetables category. In addition to canned jackfruit and legumes (dried and canned), the photos show canned cucumbers, dried mangoes, dried seaweed and pickled scallions. The photos also show that the Retailer Operations Division overlooked soy milk, which FNS considers part of the dairy category.

With this new information, it is the determination of this review that the Appellant firm carried a sufficient variety of staple foods in the fruits/vegetables category, but remained short of the required three items in the dairy category. In order to qualify under Criterion A, the firm must carry more in the dairy category than just ice cream and milk.

As noted earlier, in order to be eligible to participate under Criterion A, a firm must offer for sale at least three varieties of foods in each of the four staple food categories. In this case, the store visit photos indicated that the Appellant firm stocked a sufficient variety in three categories (breads/grains, fruits/vegetables, meat/poultry/fish), but was insufficient in the remaining category (dairy).

Criterion B

The Appellant has argued that even though it claimed that its staple food sales were 45 percent of its total sales, the actual percentage of staple foods is closer to 60 percent, which would be clear upon a second store visit.

As noted earlier, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time the Retailer Operations Division rendered its decision. Such facts include the Appellant’s claim on its application that staple foods constituted 45 percent of the firm’s total sales.

Further, the Appellant has offered no evidence to support its new claim of 60 percent staple foods. It has provided no receipts or sales records to show that the firm would be eligible for participation under Criterion B. An assertion alone is not adequate evidence and does not provide a valid basis for reversing the Retailer Operations Division’s decision. Additionally, a second store visit subsequent to a denial determination cannot be entertained in this case, as it would skew the facts as they existed at the time the original denial decision was made.

Broken Air Conditioning Unit

The Appellant has argued that on the day before the contractor's store visit, the store's air conditioning unit failed and as a result, the firm was forced to dispose of several food items that were impacted by the heat. The Appellant argues that the inspection did not give a true reflection of the firm's inventory.

Unfortunately, the Appellant has offered no evidence that the air conditioning unit was disabled. Furthermore, the store visit record does not show any obvious signs of recent excess heat and the contractor made no remarks to that effect. The photos do not show any empty shelving units, which would have likely been the case if the firm had actually been forced to dispose of some food items. Additionally, the one staple food category in which the firm was deficient, dairy, would most likely be stocked in coolers and freezers that would be unaffected by a temporarily broken air conditioning unit.

Therefore, the assertion by the Appellant that a deficient air conditioning unit impacted the firm's inventory does not provide a valid basis for reversing the Retailer Operations Division's decision.

Prior Owners Were Authorized

The Appellant has argued that the previous store owners at the same location were authorized to accept SNAP benefits. While it may be true that prior ownership was once authorized to accept SNAP, a location's previous authorization does not provide a valid basis for reversing the Retailer Operations Division's decision, as it has no bearing on whether or not the firm as presently constituted meets eligibility criteria as established in 7 CFR § 278.1(b)(1).

Inconvenience to SNAP Households

The Appellant contends that many SNAP households want to use their benefits at the store.

In regard to this contention, this review can neither confirm nor refute such an argument, as the Appellant has offered no evidence to substantiate the claim. However, this contention has no bearing on the Appellant's eligibility for SNAP authorization. A store may only accept SNAP benefits if it meets the required criteria for authorization.

CONCLUSION

The contentions presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. The store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details. While the Retailer Operations Division failed to properly identify all food items seen in the contractor's photographs, the Appellant still fell short of program eligibility in accordance with 7 CFR § 278.1(b)(1).

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Far East University Market 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 June 23, 2016, 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 (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/

JON YORGASON
ADMINISTRATIVE REVIEW OFFICER

November 9, 2016

DATE