

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

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| Hernandez Tortilla Company, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case Number: C0194219 |
| |) | |
| Retailer Operations Division, |) | |
| |) | |
| Respondent. |) | |
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FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Hernandez Tortilla Company (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on September 6, 2016.

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 September 6, 2016, the Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on observations during a store visit on September 1, 2016 as well as information provided on the firm’s retailer application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. 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 the dairy products and the meats, poultry, or fish categories. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales.

As the firm failed to meet either eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2).

On September 21, 2016, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a clear preponderance of the evidence that the administrative action should be reversed. That 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(2) 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 § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part:

An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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 § 271.2 defines staple food, in part, as:

Those 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.

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations and internal agency directives define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations and internal agency directives define “variety”, in part, as:

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.

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm if it determines that . . . [t]he 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.

APPELLANT’S CONTENTIONS

Appellant’s contentions regarding this matter are essentially as follows:

- The business is new. The information on the application was based on four days of actual data;
- Since the inspection, Appellant has added another refrigerator, stocked a number of eligible products and increased its percentage of staple food sales to 54%. The store now has a variety of food in sufficient quantities on a continuous basis. Appellant provided 16 store photos; and,
- Appellant requests another chance because the store is located in an area where many people use SNAP.

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

ANALYSIS AND FINDINGS

Appellant contends that the business is new and the information on the application was based on four days of actual data. Appellant stated that since the inspection it has

added another refrigerator, stocked a number of eligible products and increased its percentage of staple food sales to 54%. Appellant argues that the store now has a variety of food in sufficient quantities on a continuous basis. Extenuating circumstances certainly may have contributed to the amount and composition of staple food inventory observed at the firm on the day of the store visit. Nevertheless, there is no provision in SNAP regulations which allows such conditions to establish a valid basis for reversing a denial determination. This review is limited to consideration of the circumstances at the time the ROD's decision was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to comply with requirements for SNAP authorization, including stocking the store sufficiently or increasing staple food sales to meet SNAP-authorization criteria.

A review of the store visit documentation indicates that the store was deficient in the dairy products and the meat, poultry, or fish categories on the day of the visit. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis."

An evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not derive more than 50 percent of its projected annual sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

With regards to Appellant's request for another chance because the store is located in an area where many people use SNAP, 7 CFR § 278.6(f)(1) of the SNAP regulations provides for civil money penalties in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, the regulations do not provide a similar provision for stores who are denied authorization for not meeting Criterion A or B. Even 7 CFR § 278.6(f)(1) only applies to firms that are "selling a substantial variety of staple food items."

7 CFR § 278.1(k) states, 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." There is no agency discretion to impose a sanction less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Hernandez Tortilla Company to participate as an authorized SNAP retailer is sustained. Appellant is ineligible to submit a new application for SNAP

