

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

Marathon #9,)	
)	
Appellant,)	
)	
v.)	Case Number: C0193605
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

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 Marathon #9 (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 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 August 14, 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 July 28, 2016, Retailer Operations Division informed Appellant that its inventory of staple foods was marginal, and requested invoices and receipts dated prior to the store visit to establish that Appellant normally carried at least three different types of items in the dairy products category. Appellant was informed that it had 10 days, from receipt of the letter, to provide the requested documentation. Appellant failed to provide Retailer Operations Division the requested invoices and receipts to verify that the firm normally carried a sufficient amount of

staple foods in the dairy products category. In a letter dated August 14, 2016, 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 July 27, 2016, the lack of additional requested documentation, as well as information provided on the firm's retailer application.

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 category. Also, the 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).

In a letter dated August 24, 2016, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) 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 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 define variety 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: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or (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. 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 response to the denial letter and its request for administrative review, in relevant part:

- I never got a letter requesting receipts for dairy products. The UPS tracking number showed the letter was received by someone I don’t know moreover, the letter was sent to Macon, GA.
- If I knew of this issue earlier, I would have done my best to resolve it on time. If you can extend this case a little while and give us more time, I will do my best to resolve it as soon as possible.

Appellant did not provide any additional documentation with its review request. The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

In regards to Appellant’s contentions it is important to clarify that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. It is not the purpose of this review to consider what subsequent actions may have been taken so that a store may begin to comply with program requirements. Section 278.1(b)(ii)(A) of the SNAP regulations state in part “. . .firms shall 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.”

A review of the firm visit documentation confirms that the firm was deficient in the dairy products category. In this case, Appellant was provided with an opportunity to provide receipts and invoices to demonstrate that it carried a sufficient variety of staple food items in the dairy products category. Appellant failed to provide the requested documentation therefore, Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the firm did not offer “qualifying staple foods on a continuous basis in each of the four staple food categories.”

Although Appellant contends that it never received the proof of inventory letter as it was delivered to Macon, GA and not the firms store address, Appellant was given every opportunity, during its review request, to provide any documentation it may have had as evidence that it normally carried at least three different types of items in the dairy products category. Since no additional documentation was provided by Appellant during this review, Appellant’s contentions do not provide any valid basis for dismissing or mitigating the adverse action imposed.

Appellant reported on its retailer application that 10 percent of its projected total annual gross retail sales were from the sale of staple foods. Appellant’s application, the photographs and firm inventory provided from the firm visit, confirm that Appellant did not derive more than 50 percent of its projected total annual gross retail sales from the sale of staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The regulations also provide a definition of “*Ineligible firms*” as “firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation.

7 CFR § 278.1(k)(2) 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 aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the application of Marathon #9 to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective August 14, 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/

MONIQUE BROOKS
ADMINISTRATIVE REVIEW OFFICER

November 9, 2016

DATE