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

Swagath Plaza / Spice Bazaar, **Appellant,** **v.** **Office of Retailer Operations and Compliance,** **Respondent.**	**Case Number: C0249812**

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 Office of Retailer Operations and Compliance, (Retailer Operations) properly denied the application of Swagath Plaza / Spice Bazaar (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took action consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 owners completed an application for SNAP authorization. Retailer Operations requested inventory documentation by letter dated September 2, 2021. This letter stated: "The invoices/receipts must be dated 21 calendar days prior to the date of this letter and may not be dated after the date of this letter." Another Retailer Operations' letter for information is in the record dated September 20, 2021. The retailer provided some information. By letter dated October 14, 2021, Retailer Operations denied the application of Appellant to participate as a

retail food store in the SNAP because the firm did not meet the eligibility criteria for stores as required by the regulations at 7 CFR § 278.1(b)(1).

Retailer Operations' letter informed the owners that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in the four staple food categories. The letter stated: "The receipts/invoices submitted were more than 30 days prior to the letter dated September 2, 2021. The receipts/invoices did not prove the store offered the required variety of foods in sufficient quantities on a continuous basis." The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed by Retailer Operations. Appellant was found not to meet the established criteria.

One owner requested administrative review by email dated October 25, 2021. The appeal was granted by letter dated October 28, 2021.

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 credible, relevant evidence that 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 the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states: "Staple food, means those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS."

7 CFR § 271.2 states: "Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on

packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm."

7 CFR § 278.1(b)(1)(i) states: "(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 three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B)."

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement." 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii) states: "(B) Offer for sale perishable staple food items in at least three 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."

7 CFR § 278.1(b)(1)(ii) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items such as cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.

7 CFR § 278.1(b)(1)(iii) provides that for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B."

7 CFR § 278.1(b)(6) deals with the need for access: "FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements."

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. 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

All contentions as stated, and submissions, have been considered in rendering this decision whether listed or not.

- We are a Super Market, and we should be able to eligible to Participate in SNAP.
- We are a supermarket and I have attached the weekly sales report along with a spreadsheet that classifies as staple food, accessory food, non-food etc. Its [sic] clear from the sales report and spreadsheet that we meet Criteria A and B. We carry more than three varieties of foods in the staple food categories as required.

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the 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 review of Appellant's food inventory revealed insufficient varieties and stocking units in multiple staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A, as currently implemented, require that a firm shall offer for sale and normally display in a public area, no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety on any given day of operation, and at least one variety of perishable foods in multiple staple food categories. Retailer Operations requested documentation from the owner via two separate letters. The September 2, 2021 letter was clear that "The invoices/receipts must be dated 21 calendar days prior to the date of this letter and may not be dated after the date of this letter."

The record supports that on October 7, 2021 Retailer Operations' staff spoke with the retailer regarding the documentation submitted and the need to focus on eligible staple foods. The

record supports that the retailer stated that both the restaurant and retail store are under the same corporation but that employees, cash registers, entrance, food items, and payroll are not shared between the businesses. Retailer Operations determined that the evidence did not support that Appellant met Criterion A when it rendered the determination.

Based on Appellant's application, Retailer Operations determined that the business was also ineligible for authorization under Criterion B, per 7 CFR § 278.1 (b)(1)(iii). The application estimated that Appellant's staple food sales were 30% of its total retail sales; this percentage is under the regulatory threshold to qualify under Criterion B. No evidence was provided by the owners that Appellant met Criterion B at the time of the denial.

On review the responding owner sent aggregated sales information that was annotated and dated from August 2-8, 2021. This is outside of the 21 days specified in the inventory letter. As such, this information does not support that Appellant met the Criterion A regulatory eligibility requirements. The sales information provided also does not address stocking units such that the number of stocking units can be determined, nor are food varieties within the staple food categories able to be determined from the submission.

Retailer Operations properly assessed the firm for need for access per the regulations at 7 CFR § 278.1(b)(6), and found that it did not qualify. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The preponderance of the evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial determination was rendered.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. The business did not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), the owners will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six (6) months from the effective date of the denial. General questions regarding the application process can be handled by contacting 877-823-4369, and by consulting the internet. Operational questions regarding the denial should be directed to the office that took the action to deny Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7, with respect to the applicable right to judicial review of this decision. 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 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 delivery of this Final Agency Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

M. Viens November 23, 2021
ADMINISTRATIVE REVIEW OFFICER