

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

**La Pinata Bakery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0268942**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of La Pinata Bakery (“Appellant”) to participate as a 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 the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied permission of Appellant to participate as a SNAP retailer.

**AUTHORITY**

7 U.S.C. § 2023 and 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 SUMMARY**

Appellant, La Pinata Bakery, submitted an application to participate as a SNAP retailer on February 3, 2023. On the application, Appellant reported that around 83 percent of its gross retail sales were from the sale of staple foods. The application also reported that the firm carried at least three different varieties of foods in only one of the four staple food categories, with a minimum depth of stock of three stocking units. The one staple food category that Appellant did carry three stocking units of three separate varieties was the Breads and/or Cereals category. On February 21, 2023, an FNS contractor conducted an onsite store visit to verify the firm’s reported

staple food stock.

In a letter dated March 22, 2023, the Retailer Operations Division informed Appellant that its SNAP application was denied for a period of six months pursuant to regulation, at 7 CFR § 278.1(k)(2). The letter stated it is the determination of FNS that Appellant's firm is a bakery that does not sell bread. The letter informed Appellant that a firm of this type is ineligible to participate as a retail food store, in accordance with Section 278.1(b) (1)(iv) of the SNAP regulations. This determination was based on information provided either on the authorization application and/or information obtained from a visit to Appellant's store on February 21, 2023.

In an email dated March 23, 2023, Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the denial of a firm's SNAP authorization, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and is promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) states, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

(i) The firm's continued participation in the program will not further the purposes of the program;

(ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;

(iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b) (1) (i) of this section...for the time period specified in paragraph (k) (2) of this section.

7 CFR § 278.1(k)(2) states, in 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.... 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.

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 qualifying staple food items on a continuous basis, evidenced by having 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, including at least one variety of 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...

7 CFR § 271.2 defines staple food as:

...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. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes,

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

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, in part:

An establishment...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...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 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 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 *[two]*\* 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. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...

(B) Offer for sale perishable staple food items in at least *[two]*\* staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or

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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, 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) 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(b)(6) states:

*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. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the

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application process as described in paragraph (a) of this section.

### APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions for administrative review by correspondence submitted on March 23, 2023, in relevant part:

- Retailer Operation Division's determination was partly done by only reviewing pictures taken of advertising from the exterior of the retailer, including decorative display cakes, also commonly known as inedible "dummy cakes," and by incorrectly labeling Mexican brioche "*Conchas*" as donuts, also derived from exterior advertising.
- The determination did not consider the "Mexican bread" varieties and diversity for sale that day and every day, that although are not traditional "American" breads and buns, they nonetheless check of multiple times the requirements for staple foods as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations.
- These different breads and buns consist of the primary ingredient: wheat flour, whole flour, and in some instances corn meal. The different varieties were documented in pictures collected on February 21, 2023, by the contractor.
- Some of these Mexican bread varieties include "*Mantecadas*," Mexican muffins made from the primary ingredients of cornmeal and wheat flour. Other Mexican breads include French bread, known in Spanish as "*Pan Frances*" or "*Bolillos*", the main ingredient for this is whole flour. Additionally, buns and rolls are sold in the form of Mexican "*Empanadas*," the main ingredient is whole flour. "*Marinas*" and "*Nubes*" or Mexican buns with sesame seeds, with whole flour as a main ingredient, are also sold. Biscuits are sold in the form of Mexican "*Bisquets*," whose main ingredient consists of whole flour.
- Conclusively, this bakery derives its primary sales from Mexican breads, buns, and rolls. These ethnic foods are not accessory foods, they are primary staples for Latino and Mexican American families in the community. They are also staple foods whose primary ingredient is wheat flour, whole flour, and in some instances corn meal. These breads, buns, and rolls were sold in multiple lots for consumption the day of February 21, 2023, and were documented with pictures.

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

### ANALYSIS AND FINDINGS

Although Appellant was denied authorization for not selling bread, a review of the Retailer Operations Division's case file supports Appellant's contention that it sells bread. Accordingly, it is unnecessary to address Appellant's contentions in this matter. However, there is insufficient

information to determine if Appellant is eligible for authorization. In order to be eligible for authorization, Appellant must qualify under Criterion A or B.

### **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of La Pinata Bakery to participate as an authorized SNAP retailer is modified. The six-month waiting period to reapply as an authorized SNAP retailer is waived; La Pinata Bakery may reapply immediately.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

DAVID SHIVELY  
ADMINISTRATIVE REVIEW OFFICER

April 27, 2023