

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

New Crab Palace II,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0260293

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the Retailer Operations Division's decision to deny the application of New Crab Palace II (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the 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

On June 16, 2022, the Appellant firm submitted an authorization application in which it indicated that its total retail sales for tax year 2021 were \$2,404,573.00. Appellant reported that 0 percent of its sales were in the sale of hot foods. Appellant further reported that 95 percent of its sales were the sale of staple foods.

On July 14, 2022, a contractor conducted a store inspection as a routine part of the authorization process. Upon receiving the store visit report and photographs back from the contractor, FNS suspected that the reported sales percentages were inaccurate. The contractor's photographs showed that the firm sold some cold seafood by the pound. However, there was also a sign

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indicating that the firm offered free steaming indicating that some of the firm's sales were in the sale of foods that were heated on site either before or after the sale.

SNAP regulations address the types of stores that are considered restaurants for purposes of determining program eligibility. The regulation at 7 CFR § 278.1(b)(1)(iv) states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation under eligibility Criterion A or B. This includes any foods cooked or heated onsite by the retailer before or after purchase.

In a letter dated July 29, 2022, the Retailer Operations Division requested additional documentation from Appellant to clarify the firm's staple food sales and the sale of food that is heated after purchase. Specifically, Appellant was asked to provide end-of-day sales summary reports that are electronically generated by the firm's cash register system, such as Z-tapes, to verify actual retail sales for the week of July 11th-18th. This letter also requested that Appellant provide verification of its total gross retail sales for the most recent one-year period in the form of the State Sales and Use tax records. In response to this request, Appellant, through counsel, submitted the "Daily Z" report for each day of the requested period. Appellant also provided a New Jersey Division of Taxation Sales and Use Tax Quarter Return Confirmation ST-50 for each quarter in 2022.

The Retailer Operations Division determined that the percentage of hot foods sales reported on the Daily Z reports and tax reports show differed greatly. To clarify this inconsistency, on September 21, 2022, the Retailer Operations Division requested invoices from its suppliers and distributors for the month of June.

After reviewing and evaluating the firm's additional sales data, its taxed sales vs. non-taxed sales, its inventory purchases, and information from the store visit, the Retailer Operations Division determined that the firm was operating primarily as a restaurant and thus, was ineligible for SNAP authorization. In a letter dated October 21, 2022, the Retailer Operations Division denied the application of New Crab Palace II to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations.

In a letter e-mailed on October 28, 2022, Appellant, through counsel, appealed the 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, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That 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 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). Part 278.1(k) 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 § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, which reads, in part:

Firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 CFR § 278.1(k)(2) reads, in relevant 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.

7 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.

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

. . . Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. **In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B...** [Emphasis added.]

ANALYSIS AND FINDINGS

A review of the evidence in this case does not support the Retailer Operations Division's determination that Appellant is a restaurant. Accordingly, the Retailer Operations Division's determination is reversed. It is therefore unnecessary to list or address Appellant's contentions in this matter.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Retailer Operation Division. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

CONCLUSION

Based on a review of all the evidence, the Retailer Operations Division's decision to deny the SNAP application of New Crab Palace II based on it being a restaurant is reversed. The Retailer Operations Division shall continue to process the firm's application for authorization.

RELEASE OF INFORMATION

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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

December 15, 2022