

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

Pizza House LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0259725

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Pizza House LLC (hereinafter “Appellant”) to participate as an authorized 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, in its administration of SNAP when it denied the retailer application of Pizza House LLC.

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 SUMMARY

In a letter dated October 13, 2022, and delivered to the firm on October 17, 2022, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on information submitted by the firm on its application dated August 16, 2022, as well as information obtained by FNS during a contactor’s store visit on October 6, 2022.

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 prepared foods consumed on the premises or 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. Cold prepared foods, such as freshly-made sandwiches and salads, or foods heated after purchase may be eligible for purchase with SNAP benefits in authorized stores, but are not counted as staple foods for purposes of determining program eligibility, and the sales of such must be counted toward the restaurant threshold.

Based on the firm's reported sales information as well as the contractor's visual inspection of the store, the Retailer Operations Division determined that the firm was primarily a restaurant rather than a retail food store because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found ineligible for participation in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an e-mail dated October 21, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) reads, in relevant 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. **Entities that have more than 50 percent of their total gross retail sales in: Food cook 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....** [Emphasis added.]

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, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to,

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 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>.

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)(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.]

APPELLANT'S CONTENTIONS

The Appellant made the following contentions in its request for administrative review, summarized in relevant part:

- FNS's denial determination is not right because the store sells most of its food raw. The firm's customers like to buy fresh food, and then some of them ask the store to cook the food for them.
- The firm was starting to sell fresh seafood raw or steamed for the same cooking fee.

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- The Appellant was honest when it sent in its sales report.
- The Appellant is a new business and is the only store serving the area with fresh seasoning and raw meat.
- Seventy percent or more of the firm's sales are raw fish and chicken. Seventy-five percent of those sales ask the firm to cook the meat, and 25 percent take the meat raw. The firm also sells groceries to its customers.
- Appellant asks for help to grow its business and serve its community. Appellant agrees with any punishments if FNS finds out that the store is using SNAP illegally in any way.
- Appellant needs SNAP authorization only for raw fish, chicken, and seafood, as well as the grocery items.

In support of its contentions, the Appellant submitted three photographs showing a small number of fresh grocery items, including eggs, cheese, hot dogs, salads, and a small number of commercially packaged cold or frozen pizzas and gyro sandwiches.

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

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time the Retailer Operations Division rendered its decision.

On October 6, 2022, an FNS contractor conducted a store inspection at the Appellant store. The contractor's report indicated the presence of a variety of staple food items that would normally qualify a store for SNAP authorization under Criterion A of the SNAP eligibility requirements (see p. 4, above). However, the store report and photographs also indicated a heavy emphasis on hot and cold prepared foods, primarily pizza. Posted prominently in several places were large menu boards advertising a variety of prepared food items that appeared to be intended for immediate consumption or carryout, including freshly made pizza, chicken wings and tenders, fish dinners, homemade pasta, sandwiches, salads, and desserts. Also available were a variety of sides, including French fries, coleslaw, onion rings, etc. Signage both inside and outside the store strongly suggested the business was a restaurant, and the store contained a large commercial kitchen with fryers, ovens, and food preparation areas.

While in the store, the store owner showed the inspector a picture of an advertisement that he apparently intended to post somewhere in the store. The sign read, "You buy it, we fry it or bake it." Below this phrase was a listing of cooking fees: \$1.00 fee for purchases between \$1.00 and \$30.00; \$2.00 for purchases between \$31.00 and \$50.00; and \$3.00 for purchases \$51.00 and larger.

Based on a review of the inspector's report and photographs, this review could find no signage or other evidence that raw meat, poultry, or seafood was available for purchase by the pound, and

no equipment could be seen that would customarily be part of a store that sold raw inventory, such as a scale for weighing meat items, or paper used for wrapping raw poultry or seafood.

Prior to the store visit, and based on information found in the Appellant's SNAP application, the Retailer Operations Division suspected that the firm might be a restaurant rather than an eligible food store, and requested sales information from the Appellant for a one-week period. The purpose of this request was to ascertain the firm's actual sales by category.

In response to this request, the Appellant submitted a breakdown of its retail sales for the period of September 2, 2022, to September 8, 2022. The Appellant's report showed that the firm sold \$0.00 in staple foods for the week, while 74 percent of its sales were in the sale of hot or heated foods, and 13.7 percent were in the sale of cold foods prepared on-site. The remaining sales were accessory foods, such as beverages or snacks (3.9 percent); food-heating charges (8.2 percent) and nonfoods (0.2 percent).

Based on this data, the firm's sale of hot or cold prepared food items far exceeded 50 percent of its total sales. Thus, the firm's SNAP application was denied.

In its request for administrative review, the Appellant now claims that 70 percent or more of its total sales are in the sale of raw fish and chicken. It further claims that 75 percent of those sales include a request for the firm to cook the meat, while 25 percent take the meat home raw. The Appellant further argues that it needs SNAP authorization only for raw fish, chicken, and seafood, as well as its grocery items.

With regard to these contentions, it is noted that the Appellant has not offered any additional relevant evidence to substantiate its new sales claims, and has offered no evidence to show that its reported sales from the week of September 2 were inaccurate. Additionally, the Appellant should be reminded that any sales of food heated onsite by the store before or after purchase must be counted toward the restaurant threshold.

Using every reasonable indicator, including sales data and a visual inspection of the store, this review finds that the Appellant's primary business model is the sale of prepared foods intended for immediate consumption or carryout.

A firm cannot be authorized as a SNAP retailer if more than 50 percent of its gross retail sales come from the sale of hot and/or cold prepared food not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout. In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling information which would show that the Retailer Operations Division's determination was incorrect. In this case, the Appellant's contentions and evidence do not meet this standard. Thus, this review finds that the firm is operating primarily as a restaurant as defined in 7 CFR § 278.1(b)(1)(iv) and is not eligible for SNAP authorization.

CONCLUSION

Based on a preponderance of the evidence, it is the determination of this review that the Appellant firm is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Pizza House LLC to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in SNAP for a minimum period of six months from October 17, 2022, which is the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 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.

JON YORGASON
Administrative Review Officer

November 30, 2022