

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

**Panaderia Pasteleria Deli La Estrella,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0245635**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Panaderia Pasteleria Deli La Estrella to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply to participate in the SNAP for a period of six (6) months. This Final Agency Decision shall take effect 30 days after date of delivery.

**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 the SNAP, when it withdrew the authorization of Panaderia Pasteleria Deli La Estrella.

**AUTHORITY**

7 U.S.C. § 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**

In a letter dated March 31, 2021, the Retailer Operations Division informed the Appellant firm that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot or cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked April 5, 2021, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

### 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, might 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part ....

**Periodic reauthorization.** At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states in part, that:

(1) FNS shall 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 specifications of paragraph (b) ....

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

**Ineligible firms.** Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout .... [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, as:

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 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, including at least one variety of perishable foods in at least three 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 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 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.** Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

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.

### APPELLANT'S CONTENTIONS

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

- Panaderia Pasteleria Deli La Estrella was previously approved by FNS, because, as a bakery, the vast majority of our products are not "hot" or "prepared" foods. We only offer hot and prepared foods in the morning from 4 a.m. to 7 a.m. the rest of our sales are based on products that fall in accordance with the SNAP regulations.
- One of your representatives came in to inquire about our sales and perhaps there was some miscommunication between my employee and said representative. Most of my employees do not speak English and this representative did not speak Spanish, this was most likely the cause of the miscommunication that led to the revocation of SNAP authorization for the firm.
- Our small family owned business is run by an immigrant family that consists of myself and my mother and we do our best to hire locals, to be able to assist our community. We

purchased this business a few years ago after working ourselves in the food industry. We have really struggled this past year due to the COVID-19 Pandemic. This pandemic has truly made us rely on the SNAP program for our business coming from nearby families that are underserved and underrepresented. Our surrounding customers are for the most part low-income and a majority are seniors. The majority of our customers are likely SNAP beneficiaries, based on many of our sales.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## ANALYSIS AND FINDINGS

The central issue in this case is whether Panaderia Pasteleria Deli La Estrella is a SNAP ineligible restaurant **as that term is defined under 7 CFR § 278.1(b)(1)(iv)**. In reaching its decision to withdraw the firm's application, the Retailer Operations Division reviewed the reauthorization application and the store visit report. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Panaderia Pasteleria Deli La Estrella does not qualify for the SNAP as it is primarily a restaurant under 7 CFR § 278.1(b)(1)(iv).

### Reauthorization Process

As part of a routine reauthorization process, the Appellant submitted a reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" signed and dated November 17, 2020. The Appellant's reauthorization application stated that zero (0) percent of its 2019 actual gross retail sales were in staple foods. Instead, the Appellant firm owner reported that SNAP ineligible hot, heated, and/or cold prepared food accounted for **90 percent** of its gross retail sales.

The remaining ten (10) percent was reported by the owner to be in accessory food sales. Accessory food items may be purchased with SNAP benefits but are **not** used in determining SNAP eligibility. Accessory foods include items such as snack foods, candy, ice cream, potato chips, carbonated and non-carbonated beverages, condiments and spices.

Thus, on the face of the reauthorization application, the Appellant firm appeared to be an ineligible restaurant as defined at 7 CFR § 278.1(b)(1)(iv) which states, in part:

... 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 or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores ....

## **Store Visit Report**

On February 12, 2021, an FNS contractor conducted a store visit to assess the firm's continued eligibility for the SNAP. The store review consent form was signed by one of the owners. The store visit report and photographs documented that the firm had a kitchen and deli section with menu boards offering hot and cold prepared food items including burritos, tamales, tostilocos, and various prepared ready-to-eat meals consisting of an entrée (pizza, flatbread, baked potato, wraps, sandwiches, tortas, etc.) chips and a drink.

The store visit report and photographs also documents that the firm was selling baked goods, which included some staple foods like bread, buns and rolls; but mostly consisted of accessory foods such as cakes, pastries, donuts, and cookies. As noted above, these accessory food items may be purchased with SNAP benefits but are not used in determining store eligibility.

## **Prior Authorization**

The Appellant states that is has been authorized by FNS in the past. However, the fact that the store has been authorized in the past is not relevant to this review. SNAP authorized stores must undergo reauthorization on a periodic basis and eligibility is determined under existing regulations and circumstances at that time. Although the firm was authorized in 2016, there have been changes in SNAP regulations since 2016 which have impacted the definition of what is a retail food store and what is considered a restaurant.

## **Hardship Contentions**

The Appellant contends that the firm, employees and owners will suffer an economic hardship if Panaderia Pasteleria Deli La Estrella is not reauthorized for the SNAP. With regard to this contention, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible economic hardship to the firm. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

The Appellant contends that the involuntary withdrawal will also create a hardship for the SNAP community that relies upon the store. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be reauthorized for the SNAP on the basis of hardship to the SNAP community.

## **Summary**

Although the Appellant firm sells some staple foods such as milk and bread, a preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated, hot and cold prepared food as reported by the Appellant on its FNS-252-R. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "firms that have more than 50 percent of their total gross retail sales in heated, hot and/or cold prepared foods not intended for home preparation and consumption, shall

not qualify for participation as retail food stores.” By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

### **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Panaderia Pasteleria Deli La Estrella, is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six (6) months from the effective date of the withdrawal. However, please note that if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. 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 you 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 receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

August 18, 2021