

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

**Sea-Licious Seafood, Llc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number C0250167**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division (Retailer Operations) to deny the application of Sea-Licious Seafood, Llc. (“hereinafter Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

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

**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**

FNS received a SNAP application for Appellant which was signed on June 27, 2021. The information provided to Retailer Operations reports that 5% of Appellant’s gross retail sales were in staple foods, 10% in accessory foods, and 85% in hot and cold prepared foods.

In a letter dated October 25, 2021, Retailer Operations denied the application of Appellant to participate as a SNAP-authorized retailer because it does not meet the definition and requirements of a retail food store as set forth in 7 CFR § 271.2 and § 278.1(b)(1).

It was determined that Appellant is primarily a restaurant because more than 50% of its total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase. "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. In accordance with 7 CFR § 278.1(k)(2), Appellant's owner was informed that it was not eligible to reapply for SNAP for a period of 6 months from the effective date of the denial. However, if the business model remains the same and you reapply, the application may be denied for the same reasons it was denied this time.

By email dated November 4, 2021, Appellant's owner requested administrative review of the denial determination. The request for timely review was granted by letter dated November 12, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence, that the administrative action should be reversed. That means 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 untrue.

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, (7 U.S.C.) and implemented through Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part: Firms that are considered to be restaurants, that is, firms that have more than 50% 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

The definition of retail food store at 7 CFR § 271.2 states, in part: Entities that have more than 50% percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.

7 CFR § 278.1(k)(2) states, in part: A retail food store or wholesale food concern that has been denied for failing to meet the eligibility requirements for authorization shall not be eligible to submit a new application for authorization in the Program for a minimum period of 6 months from the effective date of the denial.

## APPELLANT'S CONTENTIONS

The following represents a brief summary of Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

- I am a seafood market that sells fresh and frozen seafood, and offer hot takeout and no dine in. I am licensed for both and pay a double fee.
- I submitted my current receipts from my store which indicated that my hot food sales were more than my fresh, frozen, and staple food sales for that week. This may be true for that week. Our hot food was not always more than our fresh and frozen sales but unfortunately with the climb in food, especially seafood, sales for the fresh and frozen being paid with cash has decreased.
- I get at least 3-5 calls a day asking if we accept food stamps because of the neighborhood our facility resides in. If our store was able to accept food stamps, we would see at least a minimum of 50% sale increase for our fresh and frozen seafood. I ask that you please reconsider the decision for my denial and allow our market to be able to help my neighborhood be able to purchase good quality fresh and frozen seafood.

## ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of Retailer Operations, and is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations as amended; those requirements of law cannot be waived.

On December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in SNAP," at 81 Federal Register 90675, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50% of a firm's sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule clarified that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50% threshold. This portion of the rule was implemented by FNS on October 16, 2017.

Appellant was denied authorization because it was determined that it did not meet the definition and requirements of a retail food store as set forth in 7 CFR § 271.2 and § 278.1(b)(1). This decision was based on the application and supporting documentation submitted by the owner and analysis by Retailer Operations. The evidence under review supports that the firm did not meet SNAP eligibility criteria to be an authorized retail food store when it was denied. In accordance with the regulations, firms that are considered to be restaurants, that is, firms that have more than 50% 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.

The documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the information provided by the owner that indicates Appellant is not primarily a restaurant. The Appellant's application with sales data information provided to Retailer Operations states that 85% of its total gross sales are from hot and/or cold prepared foods. Therefore, by definition, Appellant is an ineligible firm.

There is sufficient evidence to support Retailer Operations' determination to deny the authorization of Appellant to participate as an authorized retail food store because it did not meet the necessary criteria to be eligible for SNAP participation. Appellant does not operate as a retail food store within the definition of 7 CFR § 271.2 and is ineligible for SNAP authorization under 7 CFR § 278.1 (b)(1)(iv).

### **CONCLUSION**

Based on the analysis above, the determination by Retailer Operations to deny the application of Appellant to participate as a SNAP-authorized retail food store is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this Decision are set forth in 7 U.S.C. 2023 and 7 CFR § 279.7. 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to 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.

Kim Dameron  
Administrative Review Officer

February 4, 2022