

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

Usa Fine Foods,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0241429

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to sustain the Retailer Operations Division's (hereinafter Retailer Operations) decision to deny the application of the Usa Fine Foods, (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) § 271.2 and § 278.1(b)(1), in its administration of SNAP, when it denied the application of Appellant 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

Retailer Operations received Appellant's application, dated September 18, 2020, to be an authorized SNAP retailer. The SNAP application identified the firm as a delivery route that sold 100% staple foods consisting of meats, poultry, and seafood. Through supporting documents provided by Appellant's owner, Retailer Operations determined that Appellant did not meet the definition of a retail food store under 7 CFR 271.2 and 278.1(b)(1) as it was an ineligible wholesale distributor. Therefore, the firm's application was denied in a letter dated November 16, 2020.

By letter dated November 19, 2020, Appellant's owner requested administrative review of Retailer Operations' denial determination. The request for administrative review was granted by letter dated December 17, 2020.

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 that a reasonable mind, considering the record, 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. § 2018), and 7 CFR § 278. 7 CFR § 278.1(k) establishes the authority upon which FNS shall withdraw or deny the authorization of any firm if it fails to meet SNAP eligibility criteria.

7 CFR § 278.1(b)(1)(i)(A) reads, in part: An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2, including perishable foods in at least three of the categories (Criterion A); or have more than 50% of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(c) reads, in part: Wholesalers. A wholesale food concern may be authorized to accept coupons only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet:

- (1) For one or more specified authorized drug addict or alcoholic treatment programs,
- (2) For one or more specified authorized group living arrangements,
- (3) For one or more specified authorized shelters for battered women and children,
- (4) For one or more specified authorized nonprofit cooperative food-purchasing ventures,
- (5) For one or more specified authorized public or private nonprofit homeless meal providers, or
- (6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons.

No firm may be authorized to accept and redeem coupons concurrently as both a retail food store and a wholesale food concern. Authorizations of wholesale food concerns granted prior to January 28, 1982, shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the Program after that date must reapply for authorization in accordance with the provisions of this paragraph.

7 CFR § 278.1(h) stipulates that FNS may limit the authorization of house-to-house trade routes to those trade routes whose services are required by participating households in such areas to obtain food. In deciding whether such routes are required in certain areas, the regulations call for FNS to consider the volume of food business the trade route does and the availability of alternate sources of comparable food.

7 CFR § 278.1(k) reads, in part: FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section. (2) Any firm that has been denied authorization on these bases shall not be eligible to submit a new authorization for authorization in the Program for a minimum period of six months from the effective date of the denial.

In addition to the above regulatory guidance, FNS issued new guidelines regarding delivery routes in November 2018. Under these guidelines, firms that hire contractors are operating as a wholesale distributor, not a retailer, and are not considered eligible for authorization.

APPELLANT'S CONTENTIONS

All contentions, as presented, have been considered in making this decision, even those that may not be listed.

- I was denied SNAP because I was told I was only a Wholesale Store when I specifically said I was also a retail store.
- I delivered all paperwork requested which was over and beyond. Why was I denied when I gave all proof to be an established business and I was totally truthful?

ANALYSIS AND FINDINGS

Independent Contractors as Drivers

Retailer Operations reviewed documents received from Appellant's owner and determined that Appellant was a wholesale distributor with an independent contractor as a driver. This information was confirmed by Appellant's owner in email messages and correspondence during the application process. The record indicates that Appellant is a wholesaler distributor, with an independent contracted driver.

Under SNAP Regulations at § 278.1(c), a wholesale entity may only be authorized in SNAP under very limited circumstances in which the wholesale entity facilitates the redemption of SNAP benefits for specific types of entities otherwise eligible to participate in the Program. In this case, Appellant does not serve this function. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Appellant does operate as a wholesale distributor **as defined by FNS** in that it has a contractor, not employees, who make the food deliveries.

Although Appellant's owner, local governments, or other entities may consider Appellant to be a retailer, under procedures established by FNS in November 2018, firms that use contractors as

delivery drivers are considered by FNS to be operating as a wholesale distributor, not a retailer, and are no longer considered eligible for SNAP authorization. Such firms shall be denied under 7 CFR. § 278.1(k)(1) or withdrawn under 7 CFR § 278.1(l)(1)(ii).

CONCLUSION

Based on a review of all the evidence in this matter, the determination by Retailer Operations to deny Appellant's application to participate in SNAP as a retail food store is sustained. The preponderance of the evidence supports that Retailer Operations properly determined that Appellant does not meet the definition and requirements of a retail food store as set forth in SNAP Regulations at § 271.2 and § 278.1(b)(1).

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of 6 months from November 16, 2020, the effective date of the denial. As such, the 6-month denial period has passed and a new application for SNAP authorization may be submitted at any time. However, if Appellant reapplies and its business model remains the same, the application may be denied for the same reasons it was denied.

Questions regarding the application process can be answered by visiting the USDA, FNS, SNAP Retailer website at <https://www.fns.usda.gov/snap/retailer> or by calling the SNAP Retailer Service Center at 877-823-4369. Operational questions may be directed to Debbie Crosby at Debbie.Crosby@usda.gov or 207-232-3544.

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 to the SNAP Regulations at § 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 Appellant's owner resides or is 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

August 24, 2021