

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

A Chefs Empire,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216142

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 A Chefs Empire (“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 application of A Chefs Empire to participate as a SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and 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 February 25, 2019, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on information provided on the SNAP authorization application, as well as information submitted as part of the application process, including federal tax returns for the business for the year 2018.

The denial letter stated that the firm was being denied under program regulations, at 7 CFR § 278.2(k)(1), on the basis that the firm is operating as a wholesale distributor, not as a retailer. As a result of being found ineligible for participation in SNAP, the Appellant's application was denied for a period of six months pursuant to SNAP regulations at 7 CFR § 278.1(b)(1) and (k)(2).

To note, this firm had previously been authorized, but failed to complete the required reauthorization process, and therefore was withdrawn from the program on September 24, 2018. The firm subsequently applied for SNAP authorization on November 29, 2018, and a store visit was conducted by an FNS contractor on February 6, 2019, to further assess the firm's eligibility for authorization.

In a letter postmarked March 6, 2019, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for review was granted.

STANDARD OF REVIEW

In an appeal of an 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 an appellant has the burden of providing relevant evidence that 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)(2) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

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

* 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>.

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....

7 CFR § 271.2 defines a wholesale food concern as:

An establishment which sells eligible food to retail food stores or to meal services for resale to households.

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

An establishment or house-to-house trade route 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 or route in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(v) states:

Wholesale food concerns. Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

7 CFR § 278.1(c) states:

Wholesalers. A wholesale food concern may be authorized to accept [SNAP benefits] only from a specified customer or customers if it meets the requirements and paragraphs (a) and (b) of this section, and FNS determined 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.

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No firm may be authorized to accept and redeem [SNAP benefits] concurrently as both a retail food store and a wholesale food concern.

7 CFR § 278.1(k)(2) states:

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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) 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;

APPELLANT'S CONTENTIONS

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

- Appellant owner was denied authorization because she had a contractor helping her temporarily during the time of her sister's passing;
- Appellant had plenty of inventory purchased, but was trying to sell it to prevent having to pay additional storage space, or the food going bad;
- At the time of Appellant's sister's passing, Appellant was in no condition to work, and this was a one-time temporary situation; and
- Appellant requests that the denial decision be reconsidered as the contractor is no longer working for the firm and Appellant is physically back at work.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time the Retailer Operations Division rendered its decision.

The record indicates that Appellant firm, a delivery route, was being operated by a contractor while the owner was unable to participate in the business due to a death in the family. The Retailer Operations Division reviewed documents received from the Appellant on February 14, 2019, which included federal tax returns for the business that indicated the Appellant had filed an IRS Form 1099 for a contracted employee. This information was confirmed with the owner by

email on the same day. Although it is unfortunate that the Appellant had extenuating circumstances that resulted in a temporary change of the firm's business model, the Retailer Operations Division properly determined that the Appellant firm operated as a wholesale distributor at the time of application, given that the firm is a delivery route and a contractor was conducting the retail operations.

Under SNAP regulations, at 7 CFR § 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, the Appellant firm does not serve this function. As such, the preponderance of the evidence supports the determination made by the Retailer Operations Division that the Appellant firm was ineligible for SNAP authorization given its wholesale operations.

Remedial Actions Taken

Appellant contends that the contractual relationship it maintained was temporary, the contractor is no longer working, and the owner is now working.

With regard to these contentions, it must be reiterated that this review is limited to the circumstances that formed the basis of the determination at the time of the Retailer Operations Division's decision. It is not the authority of this review to consider any subsequent remedial actions that may have been taken place, or that will take place, to conform to program requirements. Therefore, Appellant's contention that changes to operations have been made does not provide a valid basis for authorizing the firm at this time, given that the firm was ineligible when the denial determination was made.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to deny the application of A Chefs Empire to participate as a retailer in the SNAP is sustained. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store). In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of six months from 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 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.

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.

MICHELLE WATERS
Administrative Review Officer

June 6, 2019