

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Al Namer Fish & Seafood Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0208711**

**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 to withdraw the authorization of Al Namer Fish & Seafood Inc. (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program. However, because there is no waiting period for submitting a new application for authorization under the particular basis for which the store was withdrawn, the firm may file a new application for participation in SNAP at any time subsequent to receipt of this correspondence.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2, § 278.1(a), § 278.1(b), § 278.1(m) and (n) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the application of Appellant to participate in SNAP via correspondence dated April 24, 2018.

**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**

The FNS requires that stores be reauthorized on a set schedule. Appellant submitted a reauthorization application dated February 9, 2018. A contractor store visit was conducted on February 16, 2018 and in correspondence dated February 22, 2018, Retailer Operations Division requested additional information from Appellant needed to complete the reauthorization process. The record reflects that Appellant failed to provide all of the requested documentation within the allotted timeframe and in correspondence dated April 24, 2018; Retailer Operations Division withdrew Appellant's authorization in the SNAP. The withdrawal letter stated "This determination is based on the following: A retail food store will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form and/or by allowing representatives of Food and Nutrition Service (FNS) to obtain this information during a store visit. In accordance with SNAP Regulations, 7 CFR 278.1(n), FNS may withdraw the authorization of any firm which fails to cooperate in the reauthorization process.

The record reflects that in a telephone conversation on April 25, 2018, Appellant informed Retailer Operations Division that he does not have the receipts and requested an extension. As the Agency's decision was issued, Appellant was informed that the time to request an extension had passed. Appellant was then asked how transactions were completed. Appellant stated that all items non-taxable items were sold fresh and that they do not charge a cooking fee for EBT.

The record also reflects that in email correspondence dated April 27, 2018, Appellant's counsel requested that the original register rolls provided by Appellant be forwarded to his office. The request was granted. In email correspondence dated May 4, 2018, Appellant, through counsel, requested an extension in which to respond to the determination letter dated April 24, 2018. Retailer Operations Division indicated that due to the point in which the reauthorization process that Appellant reached, an extension was not able to be granted.

In a letter dated May 4, 2018, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted the withdrawal has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions 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 not true.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 271.2 states “ 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including 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 by visual inspection...”

7 CFR § 278.1(a) states in relevant part: “Any firm desiring to participate or continue to be authorized in the program shall file an application as prescribed by FNS. Such an application shall contain information which will permit a determination to be made as to whether such an application qualifies, or continues to qualify, for authorization, under the provisions of the program. FNS may require that a retail food store or wholesale food concern be visited to confirm eligibility for program participation prior to such store or concern being authorized or reauthorized I the program. Required visits shall be conducted by an authorized employee of the Department...”

7 CFR § 278.1(b) states in relevant part: “An applicant shall provide sufficient data and information on the nature and scope of the firm’s business for FNS to determine whether the applicant’s participation will further the purposes of the program. ...Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program.”

7 CFR § 278.1(m) states in relevant part: “FNS may withdraw or deny the authorization of any firm which: (1) Refuses to accept correspondence from FNS; (2) Fails to respond to inquiries from FNS within a reasonable time: or (3) Cannot be located by FNS with reasonable effort.”

7 CFR § 278.1(n) states in relevant part: “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. Failure to cooperate in the reauthorization process will result in withdrawal of the firm’s approval to participate in the program.”

### **APPELLANT’S CONTENTIONS**

In email correspondence dated May 29, 2018, Appellant, through counsel, submitted an FOIA request for all hard copy and electronic records in FNS’s possession regarding Appellant’s withdrawal. The FOIA request was processed and counsel received all requested documentation via UPS on June 18, 2018.

In response to the Retailer Operations Division withdrawal action and in the request for administrative review, Appellant, through counsel, has stated as its position in the matter the following:

- The issue is whether the Appellant’s inability to produce the specific detailed receipts requested by the Department constitutes as their failure to cooperate.

- Whether the specific detailed receipts requested by the Department exceed the scope of 7 CFR § 278.1(b) which sets for the documents in which the Department may request to verify a retailer's authenticity.
- FNS has arbitrarily decided that the register receipts submitted by the Appellant are not sufficient and that instead, Appellant should have had the ability to see into the future and anticipate that they would be required to produce specific itemized register sales receipts which would require a specific type of register/point-of-sale device.
- The point-of-sale equipment utilized by the Appellant during the requested time period does not produce such specific itemized sales receipts. So in an effort to cooperate with the reauthorization process, Appellant submitted sales receipts for the requisite time period that they did possess, despite them not reflecting the exact information requested by FNS (as that would be impossible).

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

### **ANALYSIS AND FINDINGS**

With regards to Appellant's contentions, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. The SNAP regulations at §278.1(b) are clear that an applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program. The SNAP regulations at §278.1(m) state that FNS may withdraw the authorization for refusal to accept correspondence or to respond to inquiries. Finally §278.1(n) makes it clear that failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

When a firm does not qualify under Criterion A, it must be considered under Criterion B. To be eligible under Criterion B, a firm must have more than 50 percent of their total gross retail sales from items in one or more of the four staple food categories. The store's application is generally used to determine whether or not a firm is eligible for authorization/reauthorization under Criterion B. In some cases, information provided for Criterion B eligibility conflicts with other information submitted during the application process and it is questionable whether the firm's staple food sales actually exceed 50 percent of total gross retail sales. In this case, Appellant offers hot food and cold prepared food items therefore; FNS must ascertain that the majority of Appellant's sales from November 1, 2017 to January 31, 2018 were in staple foods and not in hot foods and cold prepared foods to properly determine its eligibility under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. The store was withdrawn under 7 CFR § 278.1(n) for failure to cooperate when the Retailer Operations Division requested specific documentation, in which to accurately determine Appellant's eligibility, and Appellant

did not respond timely. As a result of the store's failure to cooperate, Retailer Operations Division was unable to make a determination regarding Appellant's eligibility under the rules governing Criteria A and B.

Appellant provided Retailer Operations Division a manufactured printout listing amounts for heated or prepared foods, non-foods, accessory foods, staple foods and charges for food heating services during the review period of November 2017, December 2017, and January 2018. The record does not reflect that Appellant provided sufficient evidence to confirm the totals entered into this table and Appellant, through counsel, did not provide any documentation during this review that would allow for any type of accurate analysis of the stores staple food sales.

A review of the register receipts provided show a large portion of the transactions as taxable based on the coding list provided by Appellant however; as the receipts dates were shown as "00-00-2000" and are not considered proper dates, FNS cannot adequately determine Appellant's percentage of sales in staple foods to properly determine Appellant's eligibility under Criterion B.

### **CONCLUSION**

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the application of Al Namer Fish & Seafood Inc. to participate in SNAP was proper and, therefore, is sustained. However, there is no waiting period for submitting a new application for authorization that is associated with the particular basis for which the store was withdrawn. Therefore, the Appellant may file a new application for participation in SNAP at any time subsequent to receipt of this correspondence.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks  
Administrative Review Officer

September 12, 2018