

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

Alejandro's Bakery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0231820

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 FNS' Retailer Operations Division (hereinafter Retailer Operations) to impose a six-month disqualification against Alejandro's Bakery (hereinafter Appellant) from participating as a retail food store 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) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

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 regulations require that firms be reauthorized on a set schedule. As part of this process, ownership was requested to complete a SNAP reauthorization application. An FNS-contractor conducted an onsite visit December 14, 2019, to ascertain Appellant's continued eligibility to participate in SNAP. The contractor took photographs of Appellant and its inventory, spoke with Appellant's personnel, and completed a written report detailing the observations during this visit.

By letter dated May 26, 2020, the authorization of Appellant to participate in SNAP was withdrawn because Appellant is primarily a restaurant with more than 50% of total gross retail sales from heated foods and/or prepared foods.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.

By letter dated June 17, 2020, Appellant appealed Retailer Operations' determination and requested administrative review of the withdrawal action. The appeal was granted by letter dated July 1, 2020, and implementation of the withdrawal was held in abeyance pending the completion of this review. On July 20, 2020, Appellant emailed a revised SNAP reauthorization application (Form FNS-252-R) with updated Total Retail Sales for calendar year 2019.

STANDARD OF REVIEW

In appeals of 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP Regulations at 7 CFR § 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 defines Retail Food Store, in part, as: An establishment 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 50% 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

* 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>.

have more than 50% 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 a retail food store.

7 CFR § 271.2 defines Staple Food, in part, as: Those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

7 CFR § 278.1(b)(1)(i) reads, in part: An establishment 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% of the total gross retail sales of the establishment in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) reads, in part: In order to qualify under [Criterion A] firms shall:

- (A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, 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 and at least one variety of perishable foods in at least [two]* staple food categories. Documentation to determine if a firm stocks a

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sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit;

- (B) Offer for sale perishable staple food items in at least [two]* staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and
- (C) [Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items such as cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.]*

7 CFR § 278.1(b)(1)(iii) reads, in part: In order to qualify under Criterion B, firms must have more than 50% of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income.

7 CFR § 278.1 (b)(1)(iv) reads, in part: Ineligible Firms are 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. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from Program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, 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

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Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 CFR § 278.1(k)(2) reads, in part: Firms withdrawn for failure to meet Program eligibility criteria “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 withdrawal.

CFR § 278.1(l)(1) reads, in part: 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), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or 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, for the time period specified in paragraph (k)(2) of this section.

APPELLANT’S CONTENTIONS

Appellant stated the following 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:

- Alejandro’s Bakery requests reinstatement. It has been a SNAP retailer since 2009 and has administered the Program according to all guidelines.
- We have reviewed our 2019 sales and report that 49% of total sales for the calendar year consists of Hot Foods and Cold Foods Prepared on Site. Additionally, we have just closed out and reconciled the five month period ending May 31, 2020, and 48% of total sales during this period consists of Hot Foods and Cold Foods Prepared on Site. We recognize that Criterion A is our only viable option at this time. We maintain the required staple food inventory and will continue to do so throughout this process.

In support of these contentions, Appellant submitted a revised FNS-252-R, dated July 20, 2020, with updated Total Retail Sales for Tax Year 2019.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. 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.

The onsite visit report supports by a preponderance of the evidence that Appellant is a restaurant and as such is an ineligible firm. The firm has a large kitchen, an extensive hot and cold prepared food menu, and customer seating for onsite consumption. The case record supports that more than 50% of Appellant's total sales are in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumptions and require no additional preparation. Appellant's ownership self-reported on its October 24, 2019, reauthorization application that 52% of its total sales are in hot foods and cold foods prepared on site.

On review, Appellant's ownership emailed a revised reauthorization application dated July 20, 2020, with updated Retail Sales Totals for Calendar Year 2019. No additional evidence was submitted to support the revised sale of staple foods compared to hot and/or cold prepared foods and heated foods. Appellant has the burden to provide sufficient evidence within the timeframe granted, to support its contention that it is a retail food store rather than a restaurant. This burden has not been met. The preponderance of the evidence supports this is an ineligible firm.

This review is of the present business to ascertain if it meets the regulations for reauthorization. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. When a firm is at least once granted authorization to participate in SNAP, this not an unencumbered right or entitlement, and it does not extend in perpetuity. USDA has the obligation to safeguard the public's trust and financial interests. The agency labors to do so by diligently operating the Program in accord with the statute enacted by Congress and the regulations promulgated to implement the provisions thereof.

Entities that have more than 50% 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 7 CFR § 278.1(b)(1). 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.

CONCLUSION

The purpose of this review is to validate or to invalidate Retailer Operations' determination and is limited to consideration of the relevant facts and circumstances at the time the determination was rendered. Based upon a review of all of the evidence in this matter, the determination by Retailer Operations to withdraw the authorization of Appellant because it does not meet the requirements of a retail food store, as set forth in 7 CFR § 278.1(b)(1), is sustained. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 must be filed in the U.S. District Court for the district in which Appellant's owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. This Complaint, naming the United States as the defendant, must be filed within 30 days of receipt of this Decision. The judicial filing timeframe is mandated by 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

June 14, 2021