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

Bab El Salam Restaurant LLC,	)	
	)	
Appellant	)	
	)	
v.	)	**Case Number: C0194315**
	)	
ROD Office,	)	
	)	
Respondent	)	
_____	)	

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Bab El Salam Restaurant LLC (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the ROD Office (Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office").

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(1) and (2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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."

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CASE CHRONOLOGY

The record reflects that on July 30, 2016, 7 U.S.C. 2018 (b)(6) & (b)(7)(c) signed as Member an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on August 30, 2016. Two letters were sent to the Appellant requesting additional information that the ROD Office viewed as critical to determining the firm's eligibility to participate in the SNAP. Appellant provided information in response to those letters. Appellant was subsequently advised in a letter dated September 22, 2016 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1)(iv) and § 278.1(k). On September 28, 2016, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, *inter alia*:

> *Retail Food Store* means: 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)…or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)…Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores…
>
> And
>
> Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments and spices shall not be considered staple foods for the purpose of determining the eligibility of any firm.
> stores…

7 C.F.R. § 278.1(a) states:

> FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

> Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, *inter alia*:

> Application of Criterion A. In order to qualify under this criterion, firms shall: 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.

7 C.F.R. § 278.1(b)(1)(iii) states, *inter alia*:

> Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent 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 C.F.R. § 278.1(b)(1)(ii)(C) states, *inter alia*:

> …Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, *inter alia*:

> 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...
>
> And
>
> …firms that are considered to be restaurants, that is, firms that have more than 50 percent 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(k)(1) and (2) state, *inter alia*:

> FNS shall deny the application of any firm if it determines that:
> 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; or The firm has failed

> to meet the eligibility requirements…under Criterion A or Criterion B….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

Additionally, in interpretation of the regulations, relevant policy provides, *inter alia*, that:

> Prepared, ready-to-eat foods cannot be counted as staple foods in determining if a store is eligible to participate in the SNAP…These are typically freshly made prepared foods, such as sandwiches and salads, which are ready-to-eat. They are usually prepared and/or found in the deli section of stores, but could be in other places such as salad bars or in the fresh vegetable section of the store.

APPELLANT'S CONTENTIONS

In its written request for review dated September 28, 2016 Appellant provided information in which it was argued that:

1. Appellant provides a listing of the firm's inventory to demonstrate the cost of providing Halal food; the grocery store comprises two-thirds of the store's overall space and contains over $15,000 in inventory. Appellant provides product purchase receipts/invoices of additional food added to the grocery store inventory. Appellant also provides a copy of register tapes which record all sales from the store opening on July 14, 2016 to the date of the submitted documents (received by the ROD Office on September 15, 2016). The firm also has a small restaurant that seats 48 and offers a complete Eastern Mediterranean menu (copy provided). Since opening, the restaurant has brought in the majority of business, but the grocery is picking up and will soon match or surpass restaurant sales. The restaurant is run on a separate register and sales are kept separate. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c) in which it is contended that Appellant's firm is a grocery store filled with healthy, real food choices that are reasonably priced, that it is an authentic grocery store and offers large quantities of fresh food for customers to purchase to take home to prepare. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c) and observes that the denial of the Appellant firm's application to participate in the SNAP is based upon restaurant sales exceeding 50% of gross sales and notes that this is unsurprising as local customers will first check out a firm's prepared food items, implying that customers will later patronize the grocery store part of the business. 7 U.S.C. 2018 (b)(6) & (b)(7)(c) also contends that customers seeking Mediterranean packaged foods are just beginning to have knowledge about the Appellant firm, as many Muslim families are arriving in the area and it is critical that they have a Halal grocery store available. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c) stating that members of his parish diligently patronize Appellant's grocery store/restaurant and enjoy the unique variety of ethnic foods and items offered in the store.
2. The restaurant serves Halal food and markets its services toward the Muslim community. Appellant provides a description of what constitutes Halal food.

Appellant's business is important since more and more Arab and Muslim refugees in displacement are being relocated to the area. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c), printed on Kalamazoo Islamic School letterhead, in which it is contended that there are not many places in the entire West Michigan area to buy Halal food. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c) and notes that most, if not all of these households depend on SNAP benefits, and also require Halal foods; thus the denial of the firm's SNAP authorization works a hardship upon these households. 7 U.S.C. 2018 (b)(6) & (b)(7)(c), moreover, notes that while there may be good reason for the 50% rule, albeit arbitrary, the agency should understand that its primary mission of supporting wholesome food and good nutrition is being undermined in this case.

3. Appellant provides a letter from 7 U.S.C. 2018 (b)(6) & (b)(7)(c) in which it is contended that while the Appellant firm was denied there are several gas stations/convenience stores authorized to participate in the SNAP in the area selling over-priced candy bars, chips pop and pizza, which are unhealthy products by anyone's standards.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on August 30, 2014. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operates both as a grocery and as a carryout/restaurant. As noted above, a firm that operates primarily as carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 C.F.R. § 278.1(d)(3) and must meet a number of additional requirements. The visit provided evidence that the firm's staple food sales could well have been less than 50 percent of its gross retail sales, rendering it ineligible for authorization, as firms with 50% or more of gross sales in prepared, ready-to-eat food not intended for home consumption are ineligible to participate in the SNAP. Prepared hot or cold food cannot count toward a firm's sales of staple food items. Regardless of Criterion A or B considerations (see 7 C.F.R. § 278.1(b)(1)), a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP.

With regard to contention 1 above, as noted, a firm's inventory of staple foods, regardless of dollar value, cannot convert a categorically ineligible firm into an eligible one. Thus the inventory listing and product purchase receipts do not demonstrate SNAP eligibility. Register tapes provided by Appellant were laboriously and painstakingly tabulated by the ROD Office and categorized into, generally, prepared foods and non-taxed grocery items (staple food items). A sampling of these tabulations was likewise carefully examined by the review officer and the percentages of prepared foods versus staple contained therein met or exceeded those found by the ROD Office. Generally, during August and the first 12 days of September 2016, the percentage of gross sales comprised of prepared foods was at least 75%, clearly reflecting that the firm operated primarily as a restaurant at that

time. Appellant acknowledges that the restaurant has brought in the majority of business, but that the grocery store business is increasing. However, an ineligible firm cannot be authorized to participate in the SNAP regardless of the potential for eligibility that might be purported to exist at some point in the future.

In regard to contention 2 above, Appellant may imply that a failure to authorize the firm to participate in the SNAP would work a hardship upon SNAP households, would deprive a benefit to Appellant derived from a SNAP authorization, would deprive service to SNAP customers (other than the firm's failure to meet eligibility requirements) and/or to the community, or would work a hardship upon same implied by a lack of such benefit or service; however, such cannot constitute grounds for reversing the denial decision in the present case. There are no provisions in the Act, regulations or agency policy allowing hardship to applicants and/or to SNAP customers as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and, accordingly, such provisions do not apply in this case. Likewise, there are no provisions in the statute, regulations or agency policy allowing or prescribing consideration of the religious attributes, or lack thereof, of an applicant firm in determining that firm's eligibility to participate in the SNAP.

While Appellant may contend that the "50% rule" is arbitrary, it is worth noting that it is based on straightforward reasoning which holds that the SNAP does not authorize restaurants but instead authorizes grocery stores, and that if a firm is more of a restaurant than a grocery store (over 50% of sales are prepared foods not for home preparation and consumption), then the firm is not eligible. On the contrary, to authorize a firm whose restaurant sales comprise over 50% of gross sales, given the agency's stated goals and mission, would in fact be arbitrary. As noted above, while it is possible that the firm will qualify to participate in the SNAP at some point in the future, that possibility does not and cannot overbear its current ineligibility as reflected by the record.

Regarding contention 3 above, the Appellant firm was denied on the basis of sales information/documentation that indicated the firm operated primarily as a restaurant; with the single exception noted above, restaurants are categorically ineligible to participate in the SNAP regardless of what staple food items they may offer for sale in the store in addition to prepared food entrees; thus, the staple food inventory of an otherwise categorically ineligible firm is irrelevant. That there are other firms in the area that are moderately or even minimally eligible likewise has no bearing on the present case. There is no sliding scale of SNAP eligibility by which some stores are more eligible to participate and some less; the goal and intent of all approval/denial-of-authorization-to-participate decisions is simply to approve any/all eligible stores and deny any/all ineligible stores. Put another way, even if a firm that operates primarily as a restaurant has staple food inventory superior to other local stores, that firm is no less ineligible to participate in the SNAP than a convenience store selling only chips, soda and candy bars, though it is unlikely that such a store would have prepared food sales that exceeded its staple food sales. Additionally, there are no SNAP restrictions on selling unhealthy foods; eligibility requirements are based on regulations that focus primarily on a firm's variety and sales of staple foods. Even super stores and supermarkets carry a multitude

of food items many would consider patently unhealthy, but these firms are clearly SNAP-eligible under the statute, regulations and agency policy.

Lastly, while the agency works to ensure consistency in eligibility determinations, each firm's eligibility to participate in the SNAP is determined individually in light of pertinent statutes, regulations and agency policy; thus one firm's eligibility does not materially affect that of another firm. Moreover, while a firm may be correctly found eligible at the time of authorization, it is not uncommon that a firm may alter inventory and other operational characteristics to such an extent that it no longer qualifies yet remains authorized in the program until the agency re-determines eligibility. The converse is also true; a store that is currently ineligible could well become eligible at some point in the future. Accordingly, firms are periodically revisited/re-evaluated to determine continued eligibility and if found to no longer qualify are withdrawn from the SNAP; likewise, firms found ineligible may reapply at a later date (at least six months after having been found ineligible, however).

IV

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period (to reapply to participate in the SNAP) following the denial stipulated by the Food and Nutrition Act of 2008 (Sec. 9(d)), § 278.1(k)(2), and interpreted by agency policy as applying in the present case, will elapse on March 22, 2016. Appellant may reapply up to 10 days prior to the end of the six-month period.

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 owner resides, is 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 thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/S/

October 26, 2016

DANIEL S. LAY
REVIEW OFFICER

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