

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

Baba Ghannouj,

Appellant,

v.

Case Number: C0212816

Retailer Operations Division,

Respondent.

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 deny the application of Baba Ghannouj (Appellant or Baba Ghannouj) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated May 16, 2018.

AUTHORITY

7 USC § 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

In a letter dated August 28, 2018, the Retailer Operations Division denied the application of Baba Ghannouj to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and

requiring no additional preparation, comprise more than 50% of the firm's total sales. Restaurants are not eligible to participate in SNAP except in certain states that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter dated September 3, 2018, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) Ineligible firms, which reads, in part:

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 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores ...”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part,

A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its September 3 2018, administrative review request, in relevant part:

- Appellant is the third owner of the facility and it did not change anything about the business.
- Appellant has submitted documents and numbers proving that the convenience part of the store make more sales than the hot food section.
- Customers continuously ask for the SNAP.
- The convenience store caters the demand of Mediterranean goods and to the elderly, the homeless, and the disabled.

Appellant provided the following documents:

- A Sales summary from April 2018 through June 2018,
- Mass Tax Connect returns for April 2018, May 2018, and June 2018; and
- Twelve pages of invoices.

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

ANALYSIS AND FINDINGS

According to 7 CFR § 271.2 and 278.1(b)(1)(iv), firms are considered restaurants if they have more than 50 percent of total gross sales from heated foods and/or prepared foods. 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. Restaurants are ineligible for SNAP authorization.

On review, Appellant provided a sales summary document for April thru June 2018. The document provided was self-reported and did not include information to support how these figures were derived. During the application process, Appellant provided a similar document. The Retailer Operations Division requested information to support the figures provided. Appellant's accountant responded that it would be impossible for them to provide all of the daily

reports to support these figures and only provided three Z tape daily reports. The three that were provided showed that more than 50% of Appellant's gross sales were from prepared food items.

Upon review, Appellant provided additional Z tape daily reports. However, the Z tape daily reports do not cover a complete time period and appear to be handpicked. Appellant also submitted 12 pages of invoices. However, the invoices appeared to be for food that is also sold hot and/or prepared. Thus, the invoices were not sufficient evidence.

This review is limited to consideration of the circumstances at the time of the denial action by the Retailer Operations Division. There is no evidence in the inspection report and photographs of the July 10, 2018, store visit, nor in the information provided by Appellant, that indicates that Appellant is anything other than primarily a restaurant. There is a menu posted as well as tables and chairs. There is a menu posted on the internet with extensive hot and prepared food items. The store visit photographs show that the firm does sell staple food and accessory items for sale, but Appellant has not submitted sufficient documentation to show that these items constitute more than 50 percent of its total sales for eligibility under Criterion B.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Baba Ghannouj to participate as an authorized SNAP retailer is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 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 the Appellant's owners resides 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, 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.

Mary Kate Karagiorgos
Administrative Review Officer

February 6, 2019