

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

**Bait To Plate Fish Market,**

**Appellant,**

**v.**

**Case Number: C0233849**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Bait To Plate Fish Market to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the Retailer Operation Division's denial decision is modified to allow the firm to reapply for SNAP authorization at any time.

**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, when it denied the application of the Appellant to participate as an authorized SNAP retailer.

**AUTHORITY**

7 U.S.C. § 2023 and its 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 Appellant firm applied for SNAP authorization in an application dated July 26, 2020. In a letter dated August 3, 2020, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods, hot and/or cold prepared foods. Therefore, the firm's application was denied. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a six-month period from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2). The denial letter was delivered to the Appellant on August 4, 2020 as documented by a UPS delivery notice in the case record.

In a letter postmarked August 12, 2020, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

### 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.

### 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) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that: (1) 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 ....

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

**Ineligible firms.** 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 ... **firms that are considered to be restaurants**, that is, firms that **have more than 50 percent 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 Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout .... [Emphasis added.]

7 CFR § 271.2, states, in part:

Entities that have more than 50 percent 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 retail food stores. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... 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 in its request for administrative review, in relevant part:

- The owner made a mistake on the application by including some staple food items as cold prepared food. The corrected percentages are as follows:
  - Staple foods – 68 percent
  - Accessory foods – 20 percent
  - Non-food items – 10 percent
  - Hot foods – 1 percent
  - Cold foods prepared on site – 1 percent
- The firm no longer offers dine-in service but is take out only.
- The firm has been in the process of transitioning to small grocery store status.
- The firm has three (3) stainless steel trays (18 feet length and 5 feet width). Two (2) of these display trays are for seafood and one (1) tray if for vegetables.
- Underneath these trays, are three (3) bays and a separate tank of live seafood including lobsters, crabs, and fish. There are also racks of dry and canned food.
- The firm wants a store visit in order to verify its eligibility.

The preceding may represent only a brief summary of the Appellant's 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.

### ANALYSIS AND FINDINGS

The central issue in this case is whether Bait To Plate Fish Market is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part "firms that have more than 50 percent 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. [Emphasis added.]

A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Bait To Plate Fish Market does not qualify for the SNAP as it is primarily a SNAP ineligible restaurant as that term is defined under the above cited regulation. The Retailer Operations Division determined through the application provided by the Appellant that the firm self-reported 35 percent of its gross retail sales in hot food and 40 percent in cold foods prepared onsite for immediate consumption or carryout. These two (2) figures combined total to 75 percent and therefore exceed the 50 percent threshold referenced in 7 CFR § 278.1(b)(1)(iv). As a result, the firm is considered to be a "restaurant" as that term is defined under SNAP regulations.

Other documents in the case record support that the firm is a restaurant. A City of Boston Business Certificate (expiration date of July 28, 2021) states that the firm is a Restaurant/Retail Sea Food Market. Also, a 2020 Health Permit issued by the Boston Inspectional Services Department describes the firm as Retail Food with Take Out.

The Appellant contends that it inadvertently misstated its staple food sales in its SNAP application. However, the Appellant provided no sales documents to support its claim that 68 percent of its gross retail sales are in staple food. The burden of proof is on the Appellant to provide sufficient documentation in order to reverse the Retailer Operations Division decision. The Appellant has not done so in this case.

### **Store Visit Report**

The Retailer Operations Division did not order a new store visit after receiving the Appellant's application dated July 26, 2020. However, the case record documents that in reaching a denial decision, the Retailer Operations Division considered information obtained during a prior store visit conducted on April 2, 2019. Through this earlier store visit report and photographs, the Retailer Operations Division determined that the firm, more likely than not, had the majority of its gross retail sales in hot, heated and cold prepared food not intended for home preparation and consumption.

### **Summary**

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated, hot and cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

## **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Bait To Plate Fish Market was correct. However, because the Retailer Operations Division did not order a new store visit, the denial decision is **modified** to allow the Appellant

firm to reapply for SNAP at any time. **Please note that if the business model remains the same and you reapply, your application may be denied again for the same reasons.**

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

December 14, 2020