

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

Bakery Bread from Heaven II LLC,

Appellant,

v.

Case Number: C0209280

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Bakery Bread from Heaven II LLC (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Bakery Bread from Heaven II LLC.

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, Bakery Bread from Heaven II LLC, was originally authorized to participate as a retailer in SNAP on September 9, 2013. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements. On April 3, 2018, the firm submitted a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On its application, the Appellant indicated that its total retail sales for tax year 2016 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the

Appellant reported that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in the sale of hot foods and cold prepared foods.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) address the types of stores that are considered restaurants for purposes of determining eligibility. The regulation states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation. This includes any foods cooked or heated onsite by the retailer before or after purchase. It should be noted that hot foods are not eligible for purchase with SNAP benefits. Cold prepared foods, such as freshly-made sandwiches, may be eligible for purchase with SNAP benefits, but are not considered staple foods for purposes of determining Program eligibility.

On April 12, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory and to confirm the Appellant's sales estimates from its reauthorization application. After reviewing the store visit report and photographs, the Retailer Operations Division came to the belief that the firm was operating primarily as a restaurant. However, the agency decided that further evidence was necessary to definitively determine whether or not the firm met eligibility requirements.

In a letter dated April 25, 2018, the Retailer Operations Division requested verification of the firm's sales for the last three months, including tax records, sales receipts, and an accounting summary dividing sales into specific categories: hot or prepared foods, nonfoods, accessory foods, staple foods, and charges for food heating services. The letter also requested inventory records and verification of current ownership.

In response to this request the Appellant submitted the following documentation:

- 56 pages of inventory invoices, primarily from March 2018 and April 2018.
- 55 pages of tax records, including 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- An accounting spreadsheet showing total sales by payment method (e.g. cash, credit card, SNAP benefits) for the months of January, February, and March 2018. The spreadsheet shows total sales for the three-month period as 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP sales during that period totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A one-page summary of sales divided into the categories requested by the Retailer Operations Division. According to this summary, the firm's sales percentages for January, February, and March 2018 are as follows:
 - 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
 - 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- Copies of three business licenses and permits.

After reviewing the Appellant's reauthorization application and sales evidence and comparing them with the contractor's store visit report, the Retailer Operations Division concluded that the firm was operating primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated May 9, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter postmarked May 17, 2018, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may 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 specification 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...for the time period specified in paragraph (k)(2) of this section.

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

FNS shall deny the application of any firm if it determines that:

- (2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section.... 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.

7 CFR § 271.2 defines a *retail food store* as:

(1) 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 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 percent 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter...

7 CFR § 271.2 defines *staple food* as:

...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) states, in part:

An establishment...shall...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 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

* 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>.

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

...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 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 and 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...** [Emphasis added.]

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The withdrawal letter mistakenly accounts more than 50 percent of the firm's gross retail sales from the sale of heated foods and/or prepared foods. This is not correct. The packet of information sent to the Retailer Operations Division shows that 60 percent of the firm's sales come from the sale of staple foods.
- Staple foods at the store include a variety of breads (sweet bread and water bread), dairy (gallon of milk; small chocolate and vanilla milk; cheese; eggs; and butter) to-go deli meats (turkey, ham, pastrami, cooked salami, and hard salami); and fruits and vegetables (avocados, strawberries, lettuce, and tomatoes).
- Appellant is confident that a review of the case will illustrate the firm's full compliance under Criterion B.
- SNAP has been able to provide quality meals for many families that are under the poverty level and it is certainly needed in the area where the Appellant store is located.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

Based on a review of all evidence in this case, this review finds that it is more likely true than not true that the firm's the firm's hot and cold prepared food sales exceed 50 percent of its gross retail sales, thus making the firm a restaurant rather than a grocery establishment.

According to the contractor's store visit report and photographs, the firm had very few staple food items on display and available for purchase. These included bread, milk, eggs, 100 percent juice, and possibly deli meats and cheeses, although the evidence suggests that the meat and

cheese products were primarily for use in prepared sandwiches. The bulk of the items on display were not staple foods, but accessory foods, which cannot be considered when determining a store's eligibility under Criterion A or B. For example, the store visit photos show cakes, pies, sweet rolls and breads, cupcakes, pastries, and carbonated and uncarbonated drinks. None of these are staple foods.

Additional information about staple foods and accessory foods can be found on the FNS public website at www.fns.usda.gov/snap/my-store-eligible.

A large portion of the firm's business appears to be the sale of freshly-made sandwiches and other meal items. The store also has seating for roughly 40 customers who wish to dine on the premises. These are also indicators that the store is primarily a restaurant.

Based on the Appellant's documentation and its contentions in its request for review, it appears that the Appellant has a significant misunderstanding of what constitutes staple food items. For example, in the fruits and vegetables category, it claims to carry avocados, strawberries, lettuce, and tomatoes. However, none of these items appear to be sold separately. Rather they appear to be used in the making of prepared foods. Shredded lettuce and sliced tomatoes on a freshly-made sandwich do not count as staple foods for purposes of determining a firm's eligibility.

The Appellant's lack of comprehension regarding staple foods is particularly evident in its one-page summary of sales for the months of January, February, and March 2018. As noted earlier, the Appellant listed its sales percentages for those months as follows:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

As described above, the store visit photos show a large quantity of accessory foods available for purchase at the store, including cakes, pies, pastries, etc., and yet the Appellant indicated that it did not sell any accessory foods during that three-month period. This claim is almost certainly not true. Rather, it is probable that the Appellant was counting all of its accessory food items in the staple foods category. Further, because the Appellant seemed to consider foods such as shredded lettuce and sliced tomatoes as staple foods rather than parts of a sandwich, it is very likely that the Appellant was incorrectly considering cold, freshly-made sandwiches as staple foods as well. Accordingly, this review finds that the sales percentages listed by the Appellant are not accurate. Additionally, the visual evidence does not support the Appellant's claims.

Based on this analysis and in accordance with 7 CFR 278.1(b)(1)(iv) this review finds that the Appellant firm is operating primarily as a restaurant. The evidence strongly suggests that more than 50 percent of its total sales come from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As such, the firm is not eligible for participation under Criterion A or B of the SNAP regulations.

Additional information regarding hot and cold prepared foods can be found on the FNS public website at www.fns.usda.gov/snap-retail-merchants/retailer-eligibility-prepared-foods-and-heated-foods.

As for the firm's remaining evidence, such as tax documentation and inventory invoices, such documentation does not provide specific enough information to determine if the firm's staple food sales were sufficient to meet SNAP eligibility criteria. This evidence does show robust purchasing and sale of food items, but does not specifically indicate whether the food was prepared onsite by the retailer for the customers' immediate consumption or whether it was sold individually as staple foods.

CONCLUSION

The evidence presented by the Appellant is not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. The visual evidence from the contractor's store visit strongly suggests that Bakery Bread from Heaven II LLC has substantially overestimated its staple food sales. It is the determination of this review that the firm is primarily a restaurant and as such, is not eligible for SNAP participation under Criterion A or B. Therefore, the withdrawal decision is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Bakery Bread from Heaven II LLC shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

November 1, 2018