

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

Buddy's Quick Stop & Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0220143

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Retailer Operations Division's decision (Retailer Operations) to deny the application of Buddy's Quick Stop & Seafood (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was proper.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retailer.

AUTHORITY

7 USC § 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 received an electronic SNAP application from Appellant to be authorized as a retailer dated April 25, 2019. By email, the owner was noticed that: "IMPORTANT! The retailer application form was changed on April 26th, 2019. Any in-progress applications not submitted by 5:00 PM EDT on April 26th, 2019 were deleted. Please start a new application. We are sorry for the inconvenience." The application status notification states that the initial application could not be

completed. The April 25, 2019 “Mail With Documents” notice outlines what the retailer needed to provide to FNS to complete his application.

By letter dated May 2, 2019, Retailer Operations requested additional information. The owner sent a letter dated May 9, 2019, and another letter dated June 3, 2019. Once the initial application was not completed, a new application number was assigned. The change in FNS number was not related to the previous store owner. The information from the owner’s initial application submission was copied to a new application FNS number for the current owner.

By letter dated July 26, 2019, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. The determination was based on information provided on the authorization application and information obtained from a visit to the firm on June 21, 2019.

Retailer Operations found that Appellant did not meet the eligibility requirements as set forth in Sections 278.1(b)(1) and 271.2 of the SNAP regulations. In accordance with Section 278.1(k)(2) of the regulations, the owner was also informed that the firm could not submit a new application to participate in the SNAP for a period of six months from the effective date of the denial, and if the business model remains the same, a new application may be denied for the same reasons for the initial denial.

By letter dated July 29, 2019, postmarked July 30, 2019, the owner requested review of the determination. The request for review was acknowledged by letter dated August 20, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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). Section 278.1(b)(1) 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 § 271.2 states that Retail Food Store means: “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 seven 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 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 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 271.2 states: “Staple food, means 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.”

7 CFR § 271.2 states: “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: “(A) An establishment shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 seven 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 three staple food categories. Documentation to determine if a firm stocks a 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii) states: “(B) Offer for sale perishable staple food items in at least three 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.”

7 CFR § 278.1(b)(1)(ii) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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) provides that for firms to qualify for authorization under Criterion B: “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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1 (b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the 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 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.”

7 CFR § 278.1(k)(2) states: “FNS shall deny the application of any firm if it determines that 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 § 278.1(k) states: “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.”

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision, even those not listed.

- I originally filed my application on April 25, 2019 with a number and submitted all my information for review. I am not sure when the current application number was filed.
- Then on/about June 18, 2019, your office emailed me with a different application number stating that all info was received. I think that this was a previous application submitted by the previous owner.
- I purchased this business on April 10, 2019, see attached. The information that I provided was on April 25, 2019. Also, my application had estimated sales for 2019. The sales figures for 2018 were given to me and I did not have a full breakdown of all sales “prepared foods” or “heated food” or ”cold foods’ sales.
- I understand from your letter that the application was denied because you believe my firm is a restaurant. My business is not a restaurant.
- My business is a Quick Stop that sales fresh seafood and some hot prepared seafood. I do not sell sandwiches, salads, etc. I sell fresh seafood and this was listed under COLD PREPARED FOODS. I listed this under the incorrect category.

The owner attached information, including among other items: his initial application, copies of several letters he sent to FNS, and notices sent by Retailer Operations to him, a copy of a liquor license, a tobacco permit, his social security card, a driver’s license, a bill of sale, and an application status notice.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts at the time of the

decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations as amended; those requirements of law cannot be waived.

The firm was denied because Retailer Operations determined the business did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. This decision was based on information on the application submitted by the owner, and analysis by Retailer Operations of the firm visit and information in the record. In accordance with the regulations, 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.

In its own application, the owner's sales estimates show that 73% of Appellant's total retail sales were in hot and/or cold prepared foods. Accessory foods, such as snacks and drinks, do not count towards eligibility; ownership estimated accessory foods represented 11% of total sales. Staple food sales were estimated to make up 1% of Appellant's total sales. Based on its own application submission the owner self-declared sales above the restaurant threshold. As such, Appellant was determined to be restaurant.

The record supports that Appellant is an ineligible firm as defined by the regulations. 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.

CONCLUSION

After review of all the documentation in the record, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP as a retail food store is sustained. The preponderance of the evidence supports that Appellant is an ineligible firm as per the definition cited herein. Ineligible firms shall not qualify for participation as retail food stores under Criterion A or B. The evidence under review supports that this firm primarily sells hot and/or cold prepared foods that are consumed on the premises or sold for carryout.

Should the owner reapply after the six month period, he will need to make available sales information that will be requested by Retailer Operations to support the application to be a retail food store. Please contact Wanda Terry at (803) 724-6496 with any operations questions. The effective date of this decision is 30 days after receipt.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023), and to the Regulations at 7 CFR § 279.7 with respect to applicable rights to 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 the Appellant's owner resides or is 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

September 18, 2019