

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

**Catfish & More, Inc.,**

**Appellant,**

**v.**

**Case Number: C0202667**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the decision by the Retailer Operations Division to deny the authorization of Catfish & More, Inc. (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is 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 SNAP, when it denied the application of Appellant to participate in SNAP by letter dated August 10, 2017.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 10, 2017, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail

food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant business was primarily a restaurant and as such failed to meet the definition of an eligible firm. This denial action was based on observations during an onsite store visit on July 21, 2017, as well as information provided on and in support of the firm's retailer application. Specifically, the August 10, 2017, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“It is the determination of the Food and Nutrition Service that your firm is primarily a restaurant. 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 total sales at your firm. 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. Your Store is not located in a state with a restaurant program.”

Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request postmarked September 5, 2017. The appeal was granted. Subsequent correspondence postmarked October 13, 2017, was received from Appellant.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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 untrue.

## **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, *inter alia* that *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 under § 278.1(b)(1) of this chapter.”

7 CFR § 271.2 defines staple food, in part, as “those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. 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 eligibility of any firm.”

7 CFR § 271.2 define staple food, in relevant part, as “those food items intended for home preparation and consumption . . .”

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.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which states, in part, that, “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 to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible 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 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 . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.* (Emphasis added.) Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.”

Separate businesses that operate under one roof are considered to be a single entity when they share key aspects such as: management structure, logistics, bank accounts, employees, and inventory. The different businesses cannot be evaluated separately; they are one establishment and the entire nature and scope of the businesses must be taken into account when evaluating it for program eligibility, even if different EINs and business licenses are involved. An example of this type of situation is an eat-in restaurant that also operates a carry-out component under one roof.

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**

In the request for administrative review and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- The business was recently denied for being primarily a restaurant with hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and requiring no additional preparation comprising more than 50 percent of sales. While the business is in part a restaurant, this does not reflect the entire nature of the business. The business contains a fresh market selling unprepared fresh fish and poultry intended for purchase by those who wish to prepare, cook, and consume foods outside of the business. The SNAP retailer authorization was intended for use in the fresh market part of the business only and not for any hot and/or cold prepared foods;
- Currently, sales from the fresh market exceed 50 percent of gross sales and are projected to increase due to the demographics of the immediate vicinity that encompasses an excessive amount of low-income families. Without SNAP, many families are unable to purchase fresh fish and poultry in an already underserved community. The business is the only establishment that provides these products within a five mile radius;
- Furthermore, other establishments with nearly identical floor plans/layouts such as three businesses in Chicago and one in Oak Park have been approved to participate in SNAP; and,
- The owner requests reconsideration of the nature of the establishment and enable it to participate in SNAP that is crucial to its patrons.

Appellant submitted a cover letter with five black and white photographs supporting its prior observation of similar restaurants providing the same services that are able to accept SNAP benefits in support of these contentions.

The preceding may represent a summary of 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 authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the decision.

Appellant contends that although part of the business is a restaurant, the business also contains a fresh market selling unprepared fresh fish and poultry intended for purchase by those who wish to prepare, cook, and consume foods outside of the business. Store ownership only wanted SNAP retailer authorization for the fresh market part of the business. Regarding this contention, separate businesses operating under the same roof that share key aspects such as: management structure, logistics, bank accounts, employees, and inventory must be evaluated as one establishment. Accordingly, the Retailer Operations Division evaluated the business as a whole using the documentation provided by Appellant in support of its SNAP application to determine if the business was a restaurant as defined by SNAP regulations at 7 CFR § 278.1(b)(1)(iv).

A review of the documentation used by the Retailer Operations Division in conducting this evaluation was found to be insufficient to support the denial decision.

## **CONCLUSION**

After review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is reversed. This decision does not preclude the Retailer Operations Division from asking for additional documentation to properly assess the current eligibility of the business.

## **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 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.

ROBERT T. DEEGAN  
Administrative Review Officer

December 7, 2017