

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Champion Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205144

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Champion Seafood (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1) and Section 271.2, in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

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

An onsite firm visit was conducted August 21, 2017, by FNS-contracted personnel to ascertain Appellant’s continued eligibility to participate in the SNAP. By letter dated August 16, 2017 Retailer Operations requested documentation to assess the eligibility of the firm. The record supports that by September 15, 2017, the owners had not responded to the request for additional

documentation; therefore, Retailer Operations withdrew the firm. The owners requested administrative review September 22, 2017, and provided materials for consideration indicating the response provided to the August 16, 2017 letter must have gotten lost in the mail. Review was granted by letter dated September 27, 2017, and the additional information was provided to Retailer Operations. Retailer Operations indicated it would rescind its withdrawal action, consider the materials provided, and continue its evaluation of the eligibility of Appellant to participate as an authorized SNAP retailer. Administrative Review closed the case as moot by letter dated December 5, 2017.

Retailer Operations issued a letter dated December 6, 2017, that the authorization of Appellant to participate in the SNAP was withdrawn because the business did not meet the eligibility criteria as enunciated in the Federal regulations at 7 CFR § 278.1(b)(1) and 7 CFR § 271.2. The letter informed the owners that Appellant is primarily a restaurant, and that 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 the firm.

The owners requested administrative review of the withdrawal action by letter dated December 14, 2017. The appeal was granted by letter dated December 22, 2017. This letter stated additional information was to be postmarked by January 17, 2018. No additional information was provided to date.

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 which 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 Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008. It should be noted that subsequent to the time of this decision the SNAP regulations have changed. The regulations in effect at the time of the decision are cited here.

A retail food store defined in 7 CFR § 271.2(1) 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) 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 stock-keeping 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. 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 under § 278.1(b)(1) of this chapter.”

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).”

Staple foods are defined in 7 CFR § 271.2 as “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 §278.1(b)(1)(iv) addresses *Ineligible firms*, and states in part, “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 retailer 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. 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 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 (b)(1)(iii) provides in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... 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 ...”

7 CFR § 278.1(l)(1) *Withdrawing authorization* 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) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

- We are doing our best to provide the information and paying close attention to recent enhancement in standards.
- From the information obtained on August 21, 2017, the pictures can justify that we do serve half of our building as retail store including home preparation/consumable items and staple food and other half as a carryout. During the visit our shelf was in the process of stocking up which may have undermined our eligibility.
- Currently our store is fully stocked meeting one of two eligibility requirements.
- Keep in mind the downtime of 2-3 days of restocking as we care for the quality of the foods.
- We will provide details of our inventory attached with pictures within a few days upon receipt of this letter.
- We do believe our retail sales make up at least 50% of our total on an annual basis except due to the poor economy over the years our sales have significantly decreased as it is hard to see a constant monthly sale of more than 50% in retail although for the most part that is the case.
- Our food stamp receipts serve as a validation of our retail purchases. We will keep close proof our receipts for any sales purchase.
- With due diligence of time, we will have additional documents that could have bearing on this determination mailed over as soon as we can.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances at the time Retailer Operations rendered its 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 determination regarding whether Appellant is eligible to continue to participate as an authorized SNAP retailer includes consideration of whether or not the firm met eligibility criteria under the applicable regulations at the time of the decision.

Retailer Operations reviewed the additional information provided after the previous withdrawal action, and determined the firm did not have adequate sales records, purchase records, counting of stock keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. The firm was determined to be primarily a restaurant and withdrawn.

From the photographs in the record, the firm appears to be a restaurant rather than a retail food store. As noted, the owners referred to an attached inventory and pictures to be provided within a few days. The record shows no attached inventory and no photos were advanced for this review. No additional information on this matter has been received by the postmark due date of January 17, 2018. The owners advanced no evidence that the sales makeup at least “50% of our total annual basis.” The record supports by a preponderance of the evidence that the firm is not a retail food store but an ineligible firm that did not meet the applicable regulatory eligibility criteria to be an authorized retail food store.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant to participate as a retail food store in the SNAP is sustained. Restaurants are not eligible to participate in SNAP except in certain states.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant’s owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction.

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

February 6, 2018