

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

Crawfish Corner,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198704

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 the initial decision by the Retailer Operations Division (Retailer Operations) to deny the application of Crawfish Corner (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 271.2, 7 CFR § 278.1(b)(1)(iv), and 7 CFR § 278.1(b)(1) of the SNAP regulations, when it denied the authorization of Appellant as a 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

By letter dated March 6, 2017, Retailer Operations informed Appellant that its application to participate as an authorized retailer in the SNAP was denied in accordance with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations defining a retail food store and the eligibility requirements for SNAP retailers. The owner appealed Retailer Operations’ decision and requested administrative review of the denial by an undated letter postmarked March 16, 2017. The appeal was granted by letter dated March 21, 2017.

CONTROLLING LAW AND REGULATIONS

The controlling statute 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 establishment to participate in the SNAP may be denied if it meets the definition of an ineligible firm.

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, 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...”

7 CFR § 271.2 defines staple food, in relevant part, as

“Food items intended for home preparation and consumption in each of the following staple food categories: . . . 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)(i)(A) imparts specific program requirements for retail food store participation, which reads, in part,

“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 ... 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).”

7 CFR § 278.1(b)(1)(ii) Application of Criterion A states in part:

“In order to qualify under this criterion, firms 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 three different varieties of food items in each of the four staple food categories.....(B) Offer for sale perishable staple food items in at least two 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; and (C) Offer a variety of staple foods which means different types of foods, 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 be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.”

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(b)(1)(iv) Ineligible firms reads in relevant part:

“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(k) Denying authorization, reads, in 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; or (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.”

APPELLANT’S CONTENTIONS

In a written request for review, the owner made the following contentions:

- My place is not a restaurant. No one eats at my establishment.
- My establishment sells crawfish live and boiled and other items.
- After boiling they are placed in a holding tank for cooling. After cooling they are sold.
- People buy this product to add to gumbo, pastas, stews, etc.
- The boiling is done to save them having to do it.
- Every establishment like mine is allowed to accept SNAP. I visited them before I opened my business.
- I made the investment with the understanding that I would be able to take SNAP.
- I went off on what I know everyone is doing here.
- This puts me at an unfair disadvantage and is discrimination.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means the 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.

ANALYSIS AND FINDINGS

The preceding may represent only a brief 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. The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. The purpose of this review is to either validate or to invalidate the earlier decision of Retailer Operations and it is limited to what circumstances existed at the time of the denial action.

The regulations are clear that a retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes. The record confirms that Retailer Operations requested additional information from the owner by letters dated February 17 and February 27, 2017.

By definition in the regulations a restaurant does not mean an eat-in establishment. The regulatory citation of ineligible firm relates how a restaurant is determined. Per 7 CFR § 278.1(b)(1)(iv) 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.

It must be impressed upon Appellant that SNAP authorization is an administratively-granted privilege subject to the terms and conditions for eligibility and participation detailed in the Act and the regulations. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation and subsequently abides by the statute and implementing regulations. This review is limited to the case at hand. Therefore, no decision will be rendered regarding other crawfish businesses. It is noted that the owner might have best sought information regarding SNAP eligibility for this type of business by contacting FNS directly.

Based on the preponderance of evidence under review, this business sells primarily hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation. As such, the evidence under review supports that at the time of the denial decision, Appellant presented as an establishment that met the definition of an ineligible firm. As such, Appellant shall not qualify for SNAP authorization under Criterion A or B.

CONCLUSION

Based on the discussion herein, the determination by Retailer Operations to deny the application of Appellant to participate as a SNAP authorized retailer is sustained. Appellant shall not be

eligible to submit a new application for consideration for SNAP authorization for a period of six months from the effective date of denial.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. §2023) 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 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

April 18, 2017