

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

**Daniah's International Market and Deli,**

**Appellant,**

**v.**

**Case Number: C0212261**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Daniah's International Market and Deli (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(n) 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 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 the FNS.

**CASE CHRONOLOGY**

FNS regulations require that firms be reauthorized on a set schedule. As part of this process, Appellant was requested to complete a reauthorization application. A FNS-contractor conducted an onsite visit June 15, 2018, to ascertain Appellant's continued eligibility to participate in SNAP. By letter dated August 1, 2018, Retailer Operations informed Appellant that the report of that visit, in conjunction with information reported on Appellant's application for reauthorization, indicates that Appellant has a significant prepared food operation and appears to operate primarily as a restaurant, in that a majority of total gross retail sales are hot food (heated by your firm before or after purchase) and/or cold prepared foods. Appellant was requested to

send additional information, within 10 days, in order to verify the eligibility of Appellant as an eligible retail food store. Appellant did not respond to that request.

By letter dated August 21, 2018, Retailer Operations informed Appellant that it was being withdrawn from SNAP, as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot and cold prepared food not intended for home preparation and consumption. The letter also informed Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

The record shows that on August 27, 2018, Appellant left a voice message with Retailer Operations, in reference to the Involuntary Withdrawal letter. Retailer Operations attempted to return this call, but received no answer.

One owner requested administrative review of the withdrawal action by letter dated August 27, 2018. The appeal was granted by letter dated September 7, 2018.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern. 7 CFR 278.1(n) states, in part ....

**Periodic reauthorization.** At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states in part, that:

- (1) FNS shall 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 specifications of paragraph (b) ....

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

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 .... [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, 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 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 three 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. [Emphasis added.]

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

... 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. [Emphasis added.]

## Regulatory Change

Due to a recent change in Federal regulations, foods heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

### **APPELLANT’S CONTENTIONS**

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

- I am struggling and barely making the payments for the expenses. My prepared food sales is between 5 to 15% at its best. I ask that you lift the restriction as soon as possible because of the diverse effect of your decision on the business and the community.
- I am the only store that provides Halal Food for the small Muslim community in Tacoma. The closest store after that is 25 miles away.

The responding owner provided a screenshot of his 2018 Business Licensing and Taxes (April 1, 2018 through June 30, 2018) to show his gross and exempt food sales.

The preceding may represent only a brief summary of the 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 central issue in this case is whether Daniah’s International Market and Deli is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the firm’s authorization, Retailer Operations Division reviewed the firm’s reauthorization application and the store visit report and photographs. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Daniah’s International Market and Deli does not qualify for SNAP as it is primarily a restaurant.

Appellant provided 2017 actual sales data in its reauthorization application. The Appellant’s sales data indicated that more than 50% of the firm’s gross retail sales were in hot and cold prepared food items not intended for home preparation and consumption. Because the hot and cold prepared food sales exceeded 50%, Retailer Operations properly determined that the firm is a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

The record shows that Retailer Operations requested Appellant to provide: “End-of-day sales summary reports that are electronically generated by your firm’s cash register system, such as Z-tapes, to verify three (3) representative months of actual retail sales at your firm. An overview

document (e.g., an Excel spreadsheet) that you create which totals the 3 months of end-of-day sales summary reports and breaks these actual retail sales down into the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services (if a food is both an accessory and a heated or prepared food, it should be counted as a heated or prepared food). Verification of total gross retail sales for the last 1 year period (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).”

The responding owner provided a screenshot of his 2018 Business Licensing and Taxes (April 1, 2018 through June 30, 2018) to show his gross and exempt food sales. The screenshot had handwritten notes that noted prepared food and other taxable item sales. Appellant provided no evidence to support the sale of staple foods as a percentage of total gross retail sales at Appellant as compared to cold or hot prepared foods and heated foods. Appellant has the burden to provide sufficient evidence within the timeframe granted, to support that it is a retail food store eligible to participate in the SNAP. This burden has not been met.

The case record documents that in reaching a withdrawal decision, Retailer Operations also considered information obtained during a June 15, 2018, store visit conducted by an FNS contractor to observe the nature and scope of the firm’s operation, stock and facilities. Through the store visit report and photographs, Retailer Operations determined that the firm likely has the majority of its gross retail sales in hot and cold prepared food not intended for home preparation and consumption and is therefore a SNAP ineligible restaurant.

Appellant contends that it is the only store within 25 miles that provides Halal Food for the small Muslim community in Tacoma. This contention unfortunately does not provide a valid basis to reverse the determination made by Retailer Operations. The authorization status of other local firms has no bearing on whether Appellant meets eligibility requirements as outlined in SNAP regulations. The central focus of this establishment is the sale of hot and/or cold prepared foods.

The Appellant contends that the decision to withdraw the firm’s SNAP authorization will have a diverse effect on the business and the community. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be authorized for the SNAP on the basis of possible economic hardship to either the ownership personally or the firm. To allow an ineligible restaurant to be reauthorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008

The Appellant also contends that the involuntary withdrawal will create a hardship for the SNAP community that relies upon the firm. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be reauthorized for the SNAP on the basis of hardship to the SNAP community.

## **CONCLUSION**

Based upon a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the application of Appellant, Daniah’s International Market and Deli, is sustained. The

withdrawal of the firm will not adversely impact any application the owners' may wish to submit in the future. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from the effective date of the withdrawal.. If you have operational questions about this matter, please contact Krimy Almodovar at (404) 562-1914.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to applicable rights to judicial review of this determination. Please note that if 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. 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.

Kim Dameron  
Administrative Review Officer

May 20, 2019