

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

Emperor Food,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200975

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew Emperor Food as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Emperor Food.

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

The Appellant firm, Emperor Food, was originally authorized to participate as a retailer in SNAP on November 28, 2006. In accordance with regulation each SNAP-authorized firm is required to undergo a periodic reauthorization process approximately every five years to determine whether or not the firm still meets eligibility requirements.

On November 5, 2016, the Appellant firm submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document the Appellant reported that 95 percent of its gross retail sales were from the sale of staple foods, while 5 percent were from “other” food items, such as snack foods, soft drinks, and condiments. The reauthorization application stated that the firm did not carry any nonfood items. The application also reported that the firm carried at least three different items in three of the four staple food categories:

- Dairy
- Breads/grains
- Meat/poultry/fish.

The application indicated that the firm did not carry fruits and vegetables.

As part of the firm’s reauthorization process, an onsite store visit was conducted by an FNS contractor to verify the firm’s reported staple food stock and other eligibility requirements. This store visit took place on January 9, 2017.

After reviewing the store visit report and photographs and comparing them to the Appellant’s reauthorization application, the Retailer Operations Division began to deliberate about the firm’s co-located wholesale business. The contractor’s photographs and report seemed to indicate a larger percentage of wholesale sales than retail sales, which could make the firm ineligible for SNAP participation according to SNAP regulations at 7 CFR 278.1(b)(1)(vi).

In an effort to gain a more complete picture of the firm’s wholesale activities, the Retailer Operations Division sent the Appellant a letter dated January 17, 2017. In this letter, the firm was asked to report its total retail sales and wholesale sales and to provide a copy of the firm’s Federal tax return and business licenses. The letter also asked the Appellant to provide a few details about how the wholesale operation was separated from the retail side of the business.

In response to this letter, the Appellant provided the requested documentation as well as answers to the wholesale and retail questions, including an assertion that the firm’s retail sales for 2015 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

After reviewing the Appellant’s response and documentation, the Retailer Operations Division sent the Appellant a withdrawal letter dated June 15, 2017. This letter informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the definition and requirements of a retail food store in accordance with regulations at 7 CFR § 271.2 and § 278.1(b)(1). Specifically, the letter stated that the Appellant firm was primarily a wholesale entity and did not meet the necessary criteria to be authorized as a co-located wholesale/retail firm.

In a letter postmarked June 22, 2017, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) 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; **or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.** [Emphasis added.]*

7 CFR § 278.1(k)(2) reads

FNS shall deny the application of any firm if it determines that:

- (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; **or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) 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. [Emphasis added.]*

7 CFR § 271.2 defines a *retail food store* 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, 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 stockkeeping 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...

7 CFR § 271.2 defines *staple food*, in part, 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)(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).

7 CFR § 278.1(b)(1)(v) states:

Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

7 CFR § 278.1(c) states, in relevant part:

A wholesale food concern may be authorized to accept [SNAP benefits] only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet:

- (1) For one or more specified authorized drug addict or alcoholic treatment programs,*
- (2) For one or more specified authorized group living arrangements,*
- (3) For one or more specified authorized shelters for battered women and children,*
- (4) For one or more specified authorized nonprofit cooperative food-purchasing ventures,*
- (5) For one or more specified authorized public or private nonprofit homeless meal providers, or*
- (6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons.*

7 CFR § 278.1(b)(1)(vi) states:

No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem SNAP benefits unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

- (1) The firm's marketing structure; as may be determined by factors such as, but not limited to:*
 - (i) A retail business license;*
 - (ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and*
- (2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:*
 - (i) The layout of the retail sales space;*
 - (ii) The use of retail advertisements;*
 - (iii) The posting of retail prices;*
 - (iv) Offering specials to attract retail customers;*
 - (v) Hours of operation for retail business;*
 - (vi) Parking area for retail customers; and*

(B) It has total annual retail food sales of at least \$250,000; or

(C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to SNAP households. Hardship would occur in any one of the following circumstances:

- (1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food;*
- (2) Special ethnic foods would not otherwise be available to recipients; or*

(3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

APPELLANT'S CONTENTIONS

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

- Appellant acknowledges that the firm is both a wholesale and retail firm, but contends that it meets all the criteria to be authorized as a co-located firm.
- The firm meets both Criterion A and B of SNAP eligibility as found in 7 CFR § 278.1(b)(1)(i), (ii), and (iii).
- The firm is a legitimate retail food outlet according to 7 CFR § 278.1(b)(1)(vi)(A).
- The Appellant contends that not authorizing the firm would cause hardship to SNAP households (see 7 CFR § 278.1(b)(1)(vi)(C)).
- The Appellant argues that hardship to SNAP households exists because the firm sells unique items that are difficult to find, even in a Hispanic area. It also offers food at unusually low prices.
- The firm is located in a low-income area with elderly residents. Many of these customers receive just a small amount of SNAP benefits because they do not have dependents. Many customers neither drive nor own a car, and their only way to commute is on foot. Having this store so close to their homes represents a great help to them.
- The firm has been participating in SNAP for many years and provides excellent service to the community.

In support of its contentions the Appellant provided a CD containing 56 color photographs and a copy of the firm's retail business license. The photographs, taken by the Appellant on June 21, 2017, depict the firm's inventory as well as the interior and exterior of the business. The documents were provided in an effort to demonstrate why the firm meets SNAP eligibility criteria.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its withdrawal decision.

Eligibility under Criterion B

After a thorough review of all evidence in this case, including the January 9, 2017 store visit by an FNS contractor, it is the determination of this review that the firm meets eligibility for SNAP participation under Criterion B, as outlined in 7 CFR 278.1(b)(1)(i) and (iii). On the day of the store visit, the firm was clearly lacking in dairy products as well as breads and grains. Thus, it was not eligible for participation under Criterion A. However, it was also clear that more than 50 percent of the firm's total retail sales came from the sale of staple foods. Accordingly, there is no question that had this firm been a retail store only, it would be eligible for SNAP participation under Criterion B.

Co-Located Wholesale/Retail Operations

Because the firm conducts wholesale business in addition to retail sales, its eligibility for SNAP participation must be established in accordance with regulations at 7 CFR § 278.1(b)(1)(vi), which addresses co-located wholesale/retail firms.

It should first be explained here that wholesale firms are generally not eligible for SNAP participation unless they serve a very specific clientele and FNS determines that there is a need for such a wholesale entity in the area. The narrow list of customers whom wholesale firms can serve includes authorized drug and alcohol treatment programs, battered women's shelters, and homeless meal providers. A complete list can be found at 7 CFR § 278.1(c). It is noted that Emperor Food has not previously been authorized by FNS as an approved wholesale food concern. Thus, its only option for SNAP authorization is as a co-located wholesale/retail entity.

According to 7 CFR § 278.1(b)(1)(vi), a co-located firm that has 50 percent or less of its total sales in retail food sales may not be authorized for SNAP participation unless it meets the following criteria:

- A) It is a legitimate retail food outlet; and
- B) It has total annual retail food sales of at least \$250,000; or
- C) It is a legitimate retail food outlet, but does not have annual retail sales of at least \$250,000, and not authorizing the firm would cause hardship to SNAP households.

According to this regulation, hardship in this instance would occur in any one of the following circumstances:

- 1) Program recipients would have difficulty in finding authorized firms to accept their SNAP benefits for eligible food;
- 2) Special ethnic foods would not otherwise be available to recipients; or
- 3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

Legitimate Retail Food Store – Meets Criteria

According to information provided by the Appellant and based on a review of the contractor's store visit report, this review finds that the Appellant firm is, more likely than not, a legitimate retail food outlet. It has, among other things, a retail business license and retail prices posted in the store.

Annual Retail Food Sales – Does Not Meet Criteria

According to the Appellant, and based on its 2015 Federal tax returns, the firm's gross sales **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The tax records do not identify which portion of that amount was wholesale and which portion was retail. However, in response to the January 17, 2017, letter from the Retailer Operations Division, described on page 2 of this document, the Appellant indicated that retail sales accounted **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, while wholesale sales were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This means that just **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** percent of the firm's sales were retail food sales. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Hardship to SNAP Households

The only way that Emperor Food can meet eligibility criteria is if hardship to SNAP households would occur if the firm were not authorized. To that end, it is the finding of this review that hardship does not exist in this case. This finding is based on the following:

1) Program recipients would not have difficulty in finding authorized firms to accept their SNAP benefits for eligible food.

According to agency records, there are 28 similar or larger SNAP-authorized retail stores located within a two-mile radius of the Appellant firm, including seven – all supermarkets or superstores – within a radius of 1.07 miles. All seven of these firms have substantially larger inventory than Emperor Food and all have much greater variety. Therefore, this review finds that program recipients would not have difficulty in finding another authorized firm to accept their SNAP benefits.

2) No evidence that special ethnic foods would not otherwise be available to recipients

The Appellant has argued that Emperor Food sells unique ethnic items that are difficult to find, even in an area with a large Hispanic population. In its request for administrative review, the Appellant listed seven items that are supposedly unique to Emperor Food:

- Deditos de queso (cheese sticks)
- Deditos de guayaba y queso (guava fingers with cheese)
- Pan de Bono (Colombian bread): frozen as opposed to already baked, which allows customers to bake at home
- Croquetas jamon party (ham croquettes): Ready for frying at home, as opposed to buying at bakeries, where they are already fried.
- Frituras de Malanga (fried Malanga)
- Frituras de Bacalao (dried cod fish)

- Frituras de Maiz (fried corn)

The review does not find the foods listed above to be so unique or necessary as to present a hardship to participating households if they are unable to purchase them at Emperor Food with SNAP benefits. Five of the seven nearby supermarkets and superstores cater specifically to the local Hispanic population, and it is very likely that similar or identical food items would be found in those competing stores. The Appellant has offered no evidence whatsoever that the nearby supermarkets do not carry such products. Accordingly, the Appellant does not meet this hardship criterion.

3) Recipients would not be deprived of an opportunity to take advantage of unusually low prices.

The Appellant contends that Emperor Food is a family owned and operated business. It claims that because of this type of ownership, it has low overhead expenses. According to the Appellant, this allows the company to pass the savings onto the customer.

Unfortunately, the Appellant has offered no evidence to suggest that the firm offers unusually low prices. Simply claiming that low overhead results in lower prices is not sufficient to demonstrate that households would experience hardship if they were unable to use their SNAP benefits at Emperor Food. In fact, it is very likely that nearby supermarkets and superstores mark down their prices just as low, if not lower than Emperor Food.

The Appellant has further contended that the store is located in a low-income area with elderly residents, many of whom do not drive or own vehicles. The Appellant argues that having a store so close to their homes represents a great help to such households.

With respect to all of the Appellant's claims regarding hardship, it is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified or has its authorization withdrawn and households are forced to use their SNAP benefits elsewhere. However, in accordance with the regulations cited above, hardship exists only in the circumstances listed, and the Appellant has not shown that it meets such criteria. Therefore, pursuant to 7 CFR § 278.6(b)(1)(vi)(C), a SNAP authorization based on hardship cannot be granted in this case.

Previous Owner Authorized

The Appellant has argued that the firm has been participating in SNAP for many years and provides excellent service to the community.

While this statement may be true, it does not provide a valid basis for reversing the Retailer Operations Division's decision, as it has no bearing on whether or not the firm, as presently constituted, meets eligibility criteria as established in 7 CFR § 278.1(b)(1).

CONCLUSION

It is the conclusion of this review that the Appellant firm, a co-located wholesale/retail firm, does not meet established eligibility criteria for such stores as outlined in 7 CFR § 278.1(b)(1)(vi). The evidence shows that while the firm may be a legitimate retail food outlet, less than 50 percent of its total sales come from retail food sales and it has less than \$250,000 in annual retail sales. Additionally, the Appellant's explanations and evidence regarding hardship are insufficient to persuade this review that SNAP households would experience hardship as a result of the firm's withdrawal from SNAP participation.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Emperor Food to participate as a retailer in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal.

In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Emperor Food shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

December 14, 2017