

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

**European Baking,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0220075**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of European Baking to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for SNAP authorization for a period of six (6) months.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of European Baking.

**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**

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on December 9, 2018. The Appellant’s reauthorization application reported that the store met and exceeded the required varieties and amounts of staple food in only one (1) of the four (4) required staple food categories. Therefore, the firm appeared to not meet Criterion A based on the information provided in the reauthorization application.

For Criterion B, the Appellant reported that **100 percent** of the firm’s gross retail sales were in staple foods. However, an FNS contractor conducted a store visit on July 5, 2019 to document

the firm's food inventory for the purpose of determining the continued eligibility of European Baking to participate in the SNAP. The store visit report and photographs showed that the firm was exclusively selling **accessory** food items primarily in the form of cakes, pastries, muffins, cookies, and other food items listed on the SNAP Accessory Foods List dated March 5, 2018 at <https://fns-prod.azureedge.net/sites/default/files/resource-files/Accessory-Foods-List.pdf>. Accessory foods may be purchased with SNAP benefits, but they are not used in determining SNAP eligibility.

As a result, the Retailer Operations Division informed the Appellant by letter dated July 30, 2019 that the authorization of European Baking to participate in the SNAP was withdrawn because the firm is a bakery that does not sell bread and therefore is ineligible under Federal regulations at 7 CFR § 278.1(b)(1)(iv).

In a letter postmarked August 2, 2019, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

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

### **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) provides the authority upon which FNS shall withdraw the SNAP authorization of any firm if it fails to maintain established eligibility criteria.

7 CFR § 278.1(l)(1) reads, in part:

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 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 § 271.2 defines a retail food store, in part, as:

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 [three\*] 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 [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:

... those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

An establishment...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

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>

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)(ii) states in part:

In order to qualify under [Criterion A] 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 with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least [two\*] staple food categories.

Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...

(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 to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items...such as...cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.]

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

In order to qualify under [Criterion B] firms must have more than 50 percent of their 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, such as rental fees, professional fees, and entertainment/sports/games income ....

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>

7 CFR §278.1 (b)(1)(iv) defines ineligible firms, in part as:

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. 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** .... [Emphasis added.]

7 CFR § 278.1(k)(2) states, in 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.

### APPELLANT'S CONTENTIONS

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

- The firm has been selling the same items for the past 20 years and is shocked that its authorization is being withdrawn for not selling bread.
- The store visit contractor came to the store at 8:00 am on the day of the store visit and asked to take photographs of the bakery. The contractor did not ask any questions about what the bakery was selling and asked no specific questions about bread. The store regularly has bread available after 9:30 am.

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 Appellant states that it now carries the same food that it did when it was previously authorized in 2003 and reauthorized in 2014. However, unlike the current case, the store visit in 2014 documented that the firm sold bread in addition to other baked goods. A preponderance of the evidence supports the determination of the Retailer Operations Division that the firm is primarily a bakery that does not sell bread and is therefore ineligible under 7 CFR §278.1 (b)(1)(iv).

The Appellant claims that the store visit contractor arrived at 8:00 am on the day of the store visit to take pictures and did not ask any questions about what the bakery was selling. However, a

review of the store visit report shows that the contractor actually arrived at 9:03 am on the day of the store visit. The store visit report documents that the contractor did ask questions about the store operations during the visit and received responses from both the store owner and store employees. The store photographs show no bread in the store or any evidence that bread was being prepared for availability at 9:30 am. The store flyers, and interior and exterior signage did not advertise bread for sale although it did advertise cakes for all occasions in Spanish (weddings, quinceañeras, christenings, birthdays and sponge cakes) pastries and coffee. There also did not appear to be any space for adding bread as the display cases and trays were mostly filled with cakes, pastries, cookies and muffins.

It should be noted that even if the firm did sell some bread, it would likely still be ineligible for the SNAP. The store is clearly not eligible under Criterion A and Criterion B. Under new regulations that went into effect on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of three (3) stocking units for each qualifying staple food variety. There also must be at least one (1) variety of perishable foods in at least two (2) staple food categories.

Under Criterion B, a firm's staple foods sales must comprise more than 50 percent of its gross retail sales. The Appellant incorrectly indicated in its reauthorization application that 100 percent of its gross retail sales were in staple foods. In a memorandum dated January 10, 2018, FNS clarified that accessory foods included snacks, desserts, and foods that complement or supplement meals. The accessory food list published on the FNS public website includes, in part:

- Doughnuts, brownies, cupcakes, cookies, snack cakes, muffins, pastries, sweet rolls, pies, cakes, pudding, churros, scones, gelatin desserts, and any packaged mixes intended to create any of the aforementioned products
- Soda pop, sports or energy drinks, iced tea, fruit punch, mixers for alcoholic beverages, water, and all other carbonated or uncarbonated beverages(except milk, plant-based milk alternatives, and 100% fruit or vegetable juice)

The January 10, 2018 memorandum and the updated accessory food list may be viewed at <https://www.fns.usda.gov/snap/retailer-eligibility-accessory-foods-store-eligibility-determinations>.

### **Basis of Determination**

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division's action. Whether or not the store has since stocked up on staple foods is not relevant to this review. The store may reapply for the SNAP six (6) months from the effective date of its withdrawal and any updated food inventory will be taken into consideration at that time.

## **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of European Baking is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six (6) months from the effective date of the withdrawal.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right 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 you 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, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

October 24, 2019