

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

European Foods #5411,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223916

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 Retailer Operations Division's decision to deny the application of European Foods #5411 (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was proper.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) in its administration of the SNAP, when it denied the application of the Appellant to participate in the SNAP as an authorized retailer.

AUTHORITY

7 USC § 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 FNS.

CASE CHRONOLOGY

FNS received a SNAP application from the Appellant which was signed on August 1, 2019. FNS-contracted staff conducted an onsite visit to the business on August 19, 2019. By letter dated September 19, 2019, the Retailer Operations Division informed the owner that the application of the Appellant to participate as a SNAP authorized retailer was denied. The Appellant did not meet the eligibility requirements as set forth in Sections 278.1(b)(1) and 271.2 of the SNAP regulations. In accordance with Section 278.1(k)(2) of the regulations, the owner was also informed that the firm could not submit a new application to participate in the SNAP for a period of six months from the effective date of the September 19, 2019 denial.

By letter postmarked September 30, 2019, the owner requested administrative review of the denial determination. The request for review was acknowledged by letter dated November 20, 2019.

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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

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, 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 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 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.”

7 CFR § 271.2 states: “Staple food, means 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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.

7 CFR § 271.2 states: “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) states: “(A) 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 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 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 and at least one variety of perishable foods in at least three 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii) states: “(B) Offer for sale perishable staple food items in at least three 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.”

7 CFR § 278.1(b)(1)(ii) states: “(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk,

soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides that for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1 (b)(1)(iv) states: “Ineligible firms: 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 and authorized firms 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. In addition, 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.”

7 CFR § 278.1(k)(2) states: “FNS shall deny the application of any firm if it determines that 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.”

7 CFR § 278.1(k) states: “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.”

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the request for administrative review, the Appellant stated the following summarized contentions, in relevant part:

- When the owner applied for participation in the SNAP as the store's new owner, which he/she was doing for the first time, he/she was not familiar with the SNAP regulations regarding the SNAP benefits in restaurants and the criteria of the percentage limit of the total gross retail sales from the restaurant that needs to be specified on the SNAP application.
- The previous owner of the Appellant had been accepting SNAP benefits successfully which proves that the business is more than a restaurant according to the regulations and the SNAP rules of the state.
- The denial was based on the ignorance of identifying valid and correction information that was provided on the SNAP application. The owner would like another chance to apply for participation in the SNAP shortly.
- It is extremely important for the business to be approved for SNAP participation as the store has many customers who use SNAP benefits for purchases and the owner does not want to lose these customers. Nowadays, more and more people use SNAP benefits. The owner is trying to provide the best service for the store's customers and to improve upon the development of the business by offering customers good service when it comes to payment methods.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts at the time of the 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.

With regard to the Appellant's contentions that when applying for participation in the SNAP, the owner was not familiar with the SNAP regulations regarding restaurant participation and did not provide valid and correct information on the SNAP application, the firm was denied authorization because it was determined that the business did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. This decision was based on information on the application submitted by the owner, an onsite visit by FNS-contracted staff, and analysis by the Retailer Operations Division. The evidence under review supports that the firm did not meet SNAP eligibility criteria to be an authorized retail food store when it was denied. In accordance with the regulations, 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.

The documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the inspection report and photographs of the August 19, 2019 store visit, nor in the information provided by the Appellant, that indicates that European Foods #5411 is not primarily a restaurant. The Appellant's application and sales data information provided to the Retailer Operations Division state that 60% of the firm's total gross sales are from hot and/or cold prepared foods. Therefore, by definition the Appellant is an ineligible firm.

The Appellant contends that the previous owner of the store had been accepting SNAP benefits successfully which proves that the business is more than a restaurant according to the regulations and the SNAP rules of the state. However, this administrative review is limited solely to those circumstances concerning the Appellant's eligibility and, therefore, the firm's contention regarding the firm's participation in the SNAP under a previous owner cannot be used to reverse the decision of the Retailer Operations Division.

There is sufficient evidence to support the Retailer Operations Division's determination to deny the authorization of European Foods #5411 to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. In accordance with the regulations, 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.

With regard to the Appellant's contentions that a SNAP authorization denial will impose a hardship on SNAP customers, unfortunately these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization. As stated previously, the Appellant firm was denied authorization because it was determined that the business did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations.

With regard to the Appellant's contentions that a SNAP authorization denial will impose a financial hardship on the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a firm is not authorized. However, there is no provision in the SNAP regulations to authorize a business due to possible economic hardship to the firm. Therefore, the Appellant's contention that it will incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the denial of the Appellant's authorization.

CONCLUSION

After review of all the documentation in the record, the decision by the Retailer Operations Division to deny the application of European Foods #5411 to participate in the SNAP as a retail food store is sustained. The Appellant shall not be eligible to submit a new application for SNAP authorization until six months after the effective date of the denial decision.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 13, 2020