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

Final Kourse Bakery,	
Appellant,	
v.	**Case Number: C0204961**
Retailer Operations Division,	
Respondent.	

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Final Kourse Bakery (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office."

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(1) and (2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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."

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.

CASE CHRONOLOGY

The record reflects that on November 11, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). signed as President an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on November 20, 2017. Appellant was subsequently advised in a letter dated November 27, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(2). On December 4, 2017, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 271.2 states, in part:

> 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.
>
> 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 foods that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar. Accessory food items shall not be considered staple foods for the purposes of determining the eligibility of any firm.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

> Application of Criterion A. In order to qualify under this criterion, firms shall: 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 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.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

> Application of Criterion B: In order to qualify under this criterion, 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.

7 C.F.R. § 278.1(b)(1)(iv) states:

> …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 consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

> FNS shall deny the application of any firm if it determines that:
> 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 The firm has failed to meet the eligibility requirements…under Criterion A or Criterion B….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 its written request for review dated December 4, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The firm offers qualifying staple food items on a continuous basis; the firm offers packaged cakes, cookies, birthday cakes and fresh bread. Appellant notes that soft drinks, candy, cookies, snack crackers, ice cream, seafood, steak and bakery cakes are eligible food items.
2. The firm does not offer for sale anything more than what the big national brand bakeries offer. There is no difference in products being offered for sale and the environment in which they are being sold.
3. Appellant would like to amend question #16 on its SNAP application from "yes" to "no," as the firm does not sell any hot and/or cold freshly prepared foods that exceed 50% of total sales.
4. Appellant notes that customers are not allowed to consume food purchases inside the store. Dining chairs and tables are decorative only. There is no public restroom. The firm has a small food preparation area that exclusively provides carry-out service.
5. At the time of the store visit, one of the busiest of the year for the firm, the racks and shelves were a bit empty.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on November 20, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operated primarily as a carryout/restaurant. Additionally, the firm's inventory consisted primarily of accessory food items and as such is not a retail food business within the meaning of the SNAP regulations. As noted above, a firm that operates primarily as carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 CFR § 278.1(d)(3) and must meet a number of additional requirements. Further, the documentation indicated that the firm had ample varieties of staple food stock in none of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further confirmed that the firm's staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Accessory foods, and prepared hot or cold food, cannot count toward a firm's sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP.

In regard to contention 1 above, as noted, staple foods do not include prepared foods or accessory foods. Prepared foods include foods heated and/or cooked by the retailer before or after sale, as well as cold prepared foods. Moreover, items such as cakes, pastries, doughnuts, brownies, cupcakes, sweet rolls, pies, scones, muffins, etc., are also considered accessory food items. While these are **eligible** food items, they cannot count toward a firm's sales of **staple** foods; Appellant's inventory on the day of the store visit was comprised primarily of eligible but not staple food items.

Regarding contention 2 above, any firm, regardless of size, whose sales are comprised primarily of prepared foods and/or accessory food items, is ineligible to participate in the SNAP.

With regard to contention 3 above, Appellant's food inventory on the day of the store visit was comprised primarily of accessory food items and/or prepared food items, which, as noted, are not considered staple food items and as such do not count toward a firm's eligibility to participate in the SNAP.

In regard to contention 4 above, carry-out only firms are considered restaurants for the purposes of the SNAP; also as noted, Appellant's inventory was almost exclusively accessory food items and/or prepared foods.

Regarding contention 5 above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit; however, there is no provision in the statute or regulations which allows such

considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(k)(1) and (2) clearly provides that FNS shall deny the application of any firm if it determines that 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 the firm has failed to meet the eligibility requirements…under Criterion A and B.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained. Appellant may reapply to accept SNAP benefits up to 10 days prior to the end of the six-month period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY   March 5, 2018
Administrative Review Officer