

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

Garden Bar,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205177

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 decision by the Retailer Operations Division, to deny the July 17, 2017, FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Garden Bar (hereinafter, “Appellant” and/or “Garden Bar”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was proper.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Garden Bar to participate in the SNAP via letter dated December 5, 2017, because it was determined that Garden Bar did not meet the definition and requirements of a retail food store, finding instead that Appellant operates as primarily a restaurant.

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

In a letter dated December 5, 2017, the Retailer Operations Division informed Appellant that the application of Garden Bar to participate as an authorized retailer in SNAP was being denied because it did not meet the definition of a retail food store as enunciated in the Federal

regulations at 7 CFR § 271.2 and CFR § 278.1(b)(1). This determination was made as a result of a review of the application documented to have been initially received by FNS on July 17, 2017, and a store visit conducted by FNS contracted personnel on November 7, 2017.

Via letter dated December 10, 2017, received in the office of the Chief of the Administrative Review Branch on December 18, 2017, Appellant requested an administrative review of the action to deny authorization to participate as a SNAP Retailer. The appeal was granted.

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, 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 (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part § 278.1(k)(2) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet the definition of an eligible firm.

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 stock-keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set for in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

7 CFR § 271.2 defines *Staple food* as “those 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

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

be considered staple foods for the purpose of determining eligibility of any firm... 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.”

7 CFR § 278.1(b)(1)(iv) defines Ineligible firms as “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program [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... **firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption...** This includes firms that primarily sell prepared foods that are consumed on the premises **or sold for carryout**. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled and homeless populations, as set forth in paragraph (d) of this section.” [Emphasis Added]

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, 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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) states in relevant part, that in order for a retail store to qualify for authorization 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. (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.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... 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...”

7 CFR § 278.1 (k) reads, in part, “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...”

7 CFR § 278.1 (k)(2), reads, in relevant part: “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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

7 CFR § 278.1 (k)(5) reads, in part, “FNS shall deny the application of any firm if it determines that: The firm’s participation in the program will not further the purposes of the program.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval... may not, for at least 6 months, submit a new application to participate in the program.”

APPELLANT’S CONTENTIONS

In the request for administrative review Appellant, through its ownership, indicates that at the time of the contracted store visit not all of the SNAP eligible products were on display. A second visit is requested to affirm the changed situation.

In a letter dated January 19, 2018, Appellant, through its ownership provided two (2) photographs of staple food displays, declaring that Appellant stocks three (3) or more varieties of items from all four (4) of the staple food categories, totaling more than 36 food items at all times.

The preceding may represent only a brief summary of 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 record reflects that Retailer Operations Division considered the nature and scope of Garden Bar to determine whether it qualifies as a retail food store as per Sections §§ 278.1 (b)(1) and 271.2 of the SNAP regulations. Retailer Operations Division denied Appellant for SNAP authorization because the business does not meet the definition of a retail food store.

In the letter of determination dated December 5, 2017, Retailer Operations Division indicated that Garden Bar was determined to be operating as “primarily a restaurant”.

The administrative record indicates that the Retailer Operations Division based their decision on consideration of: the information made available from the application initially submitted on July 17, 2017, together with materials resulting from a store visit conducted on November 17, 2017, by a USDA contractor.

The July 17, 2017, Application reports Appellant estimated total retail sales as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per week, which calculates to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year. Appellant estimated that 90 percent of that revenue is estimated to be derived from staple foods in three (3) categories of dairy, fruits/vegetables, and meat/poultry/fish; and, that no breads/grains are available. The application declares that 10

percent of the annual retail revenue is estimated to be derived from “other” foods such as snack foods, soft drinks or condiments; and, indicates that no non-food items are available at Appellant. Question 16 of the Application asks, “Does the sale of hot and/or cold freshly prepared foods that are ready-to-eat exceed 50% of your total sales”; the response recorded is “Yes”.

The contracted store visit inspection of November 17, 2017 indicates Appellant reported operating in a 1200 square foot retail space; during the hours of 11AM to 7:30PM from Monday through Saturday; and, from 11AM to 5PM on Sunday. The store visit photographs reveal chairs and tables with seating for approximately 17 persons. Garden Bar is identified as operating with a commercial kitchen from which food items are sold across a counter equipped with one (1) cash register. The posted menus advertise items such as signature salads; create your own salad options; wraps; and, snacks including fruit salad, oatmeal bars, and energy truffles. The beverages identified include “boost powder” smoothies mixed with fruits and vegetables.

Review of the materials in the record reveal a restaurant (dine in and carry out). A Google review of the firm shows marketing and reviews for a restaurant, with menu items prepared for dine in and carry out.

Appellant’s request for a second store visit, because staple foods had not been completely arranged at the initial visit, cannot be honored. The two (2) photographs, and the declaration by ownership of January 19, 2018, do not sway the determination of the Retailer Operations Division as they show only slight modification to the front of the counter area where limited fruit (bananas, oranges, apples) and pre-packaged items are displayed. A retail food store by FNS definition is not solely based on a number of staple food items on display.

7 CFR § 278.1(b)(1)(iv) defines **Ineligible firms** as those “firms that have more than 50 percent of their total gross retail sales in **hot and/or cold prepared foods not intended for home preparation and consumption**”.[Emphasis added]

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Garden Bar to participate in the SNAP is sustained.

Therefore, in accordance with 7 CFR § 278.1(k)(2) Garden Bar is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the letter of determination, December 5, 2017.

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 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.

NANCY BACA-STEPAN
Administrative Review Officer

April 24, 2018