

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

**Halo Food Service LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203988**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division, to deny the FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Halo Food Service LLC (hereinafter, “Appellant” and/or “Halo Food Service LLC”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

**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 Halo Food Service LLC to participate in the SNAP via letter dated October 27, 2017 because it was determined that Halo Food Service LLC did not meet the definition and requirements of a retail food store, finding instead that Appellant operates as primarily a carry-out 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 October 27, 2017, the Retailer Operations Division informed Appellant that the application of Halo Food Service LLC 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 received by FNS on September 15, 2017, and a store visit conducted by FNS contracted personnel on September 26, 2017.

Via letter postmarked November 3, 2017 and received in the office of the Chief of the Administrative Review Branch on November 7, 2017, Appellant, through counsel, 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”)<sup>1</sup>, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

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 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 counsel, indicates that the owner believes more items leave his establishment cold or frozen than his receipts would indicate; and, that he is working to implement a cash register system that will track sales more completely.

Attached to electronic mail dated November 22, 2017 Appellant, through counsel, provided a letter identifying sales at Appellant to include Grocery 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and Food 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

(5 U.S.C. § 552 (b)(6) & (b)(7)(C)) from receipts provided for August 1, 2017 through September 11, 2017; a copy of a notarized letter of representation; and a 368 page document that includes approximately 200 sales receipts and several blank pages with dates ranging from August 1, 2017 through September 11, 2017.

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 Halo Food Service LLC 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 October 27, 2017 Retailer Operations Division indicated that Halo Food Service LLC was determined to be operating as "primarily a restaurant".

The administrative record indicates that the Retailer Operations Division based their decision on consideration of: 1) the information made available from the application submitted on September 15, 2017 including business licenses; 2) information gained from the contracted store visit inspection completed on September 26, 2017; 3) sales receipts as provided by Appellant in response to the initial request for information; and, 4) information and materials provided by Appellant for administrative review dated October 27, 2017.

The contracted store visit inspection indicates Appellant reported operating in a 300 square foot retail space; during the hours of 11AM to 10PM, seven (7) days per week. Appellant's estimated total annual retail sales (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) per year in the September 15, 2017 Application

Halo Food Service LLC is identified as operating with one (1) checkout system that is located , along with the majority of the items for sale, in a Plexiglas enclosed work area. The store visit materials identify product available in each of the four (4) staple food categories with only the fish, chicken, beans and pasta noted to be available in quantities of 20 plus. An extensive menu of "You Buy We Fry" foods advertises fish/seafood (e.g. shrimp, oysters, catfish, tilapia, ocean perch, whiting, scallops, etc.; chicken, daily specials (e.g. Monday "3 pc Wind Ding, 2 pc Fish, 6 LG Shrimp with French Fries priced @ \$8.99), sandwiches and dinners; a la-carte fish and seafood, sides (e.g. Chili Cheese Fries, French Fries, Coleslaw, Potato Salad, Fried Okra, Onion Rings, etc.) , salads (e.g. Greek, Grilled Chicken, Lobster, Shrimp), family combos (e.g. "25 pc Lg Shrimp, 10 pc Whole Wings, 8 pc Fish, 1

Lg Fries, 1 2Liter Pop priced @ \$29.99); desserts (e.g. Red Velvet, 7-up, Chocolate, Banana Pudding, Peach Cobbler, Cheesecake); and drinks. The menu prominently indicates that “We Accept EBT.”

### **Business License Information:**

In response to request for information supporting the September 15, 2017 Application Appellant provided business licenses including:

- 1) City of Detroit, Certificate of Compliance, Property Maintenance Enforcement Branch, issued to the owner of record for the operation of a “Carry Out Restaurant” at the address of record with an expiration date of April 6, 2019.
- 2) State of Michigan Retail Food Establishment license issued on May 19, 2017 to Motown Fish & Seafood identifying the owner of record as the responsible party, expiring on April 30, 2018.
- 3) City of Detroit, Certificate of License, issued to Appellant at the address of record with an expiration date of April 30, 2018. The license identifies the licensee as “1.00 Restaurant – Carry Out (No Seats)”

### **Food Sales Percentages:**

The questions and answers from the Application that specifically relate to the issue in review are:

Question 16: “*Does the sale of hot and/or cold freshly prepared foods that are ready-to-eat exceed 50% of your total sales?*”

Response “No”

Question 18: “*Do you stock at least three different items in each of these food categories?*”

Responses:   Breads/Grains – Yes  
                  Dairy –  
                  Yes  
                  Fruits/Ve  
                  getables –  
                  Yes  
                  Meat/Pou  
                  ltry/Fish -  
                  Yes

Question 18a: “*What percent of our total retail sales comes from these [staple] food categories?*”

Response: “60%”.

Question 19: “Do you sell “other” foods, such as snack foods, soft drinks, or condiments” Response: “Yes”

Question 19a: “If yes, what percent of your total retail sales comes from these items?”

Response: “40%”.

Question 20: “Do you sell non-food items or food that is hot at the time the customer pays for it?”

Response: “No”

Appellant provided receipts dated August 1, 2017 through September 11, 2017 itemizing “Food” and “Grocery” sales for the business he reports to have opened on July 8, 2017. The documents itemize sales in two (2) categories:

- Food = cold sandwiches, wings, large shrimp, etc.
- Grocery = milk, bread, soup, egg, cereal, soda, seasoning, ramen noodles, bread hot sauce water, spaghetti sauce, macaroni and cheese, etc.

The documents dated August 1, 2017 through August 5, 2017 identify sales tax of .06 without regard to the total of the itemized grocery or food items. Beginning August 6, 2017 the documents identify varying amounts of sales tax charged when the itemized sales are for “Food”. The receipts include a space for the entry of “frying fee” however no amounts were noted in any of the documents provided.

As indicated the request for review materials provide that the owner believes more items leave his establishment cold or frozen than his receipts would indicate. The letter states that Appellant’s ownership is reporting to be working on installing a revised cash register system to more clearly indicate food items leaving Appellant uncooked rather than cooked after purchase.

The Retailer Operations Division documents evaluating the receipts provided and identifying staple foods (bread, milk, eggs, potatoes, apples, spaghetti sauce, spaghetti) sales from those itemized as “Grocery” totaling 29 percent; accessory items such as seasoning, condiments (ketchup etc.) and soda accounting for two (2) percent; and the items identified as “Food” representing 69 percent.

The November 22, 2017 letter from counsel, on behalf of Appellant, identifies 35 percent of the total as “Grocery” and 65 percent as “Food”. The distinction in percentages is identified to result from the distinct categorization of accessory foods by the Retailer Operations Division to account for regulations which indicate that accessory foods are not considered staple foods for the purposes of establishing eligibility.

Notwithstanding the differences in percentages both Appellant’s numbers and the Retailer Operations reveal that more than 50 percent of Appellant’s revenue is derived from “Food” which cannot be verified as sold unprepared/cold/frozen or

hot/cooked. The materials as provided do not support Appellant's belief that more than 50 percent of the total retail sales at Appellant derive from the sale of unprepared/cold/frozen food. Appellant's expressed intention to implement a more comprehensive cash register system cannot be considered a basis to mitigate or reverse the Retailer Operations Division determination.

## **CONCLUSION**

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Halo Food Service LLC to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) Halo Food Service LLC 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, October 27, 2017.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section §279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is 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, 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

December 15, 2017