

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

**Healthy AF Nutrition LLC,**

**Appellant,**

**v.**

**Case Number: C0211755**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Healthy AF Nutrition LLC (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the application of Healthy AF Nutrition LLC.

**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 July 31, 2018, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a store visit on July 3, 2018, as well as information provided on the firm’s SNAP application.

The Retailer Operations Division determined that the firm was operating primarily as a restaurant because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation. As a result of being found ineligible for participation in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(b)(1) and (k)(2).

In a letter postmarked August 6, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

### STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) 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 § 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 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

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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>.

staple variety, including at least one variety of perishable foods in at least *[two]*<sup>\*</sup> 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 as:

...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) states, 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 foods...including perishable foods in at least *[two]*<sup>\*</sup> 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)(iv) states, in part:

...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**

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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>.

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

### **APPELLANT'S CONTENTIONS**

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

- Appellant just started out and is looking to meal prep healthy, plant-based meals specifically made from locally-grown produce.
- Appellant has been operating for a very short amount of time and would like to request more information on how the firm can become SNAP-authorized.
- Many of the firm's clients are low-income parents who want to eat healthy, but do not have the time or energy to put into cooking proper meals.
- The firm serves meals at farmers markets and has been allowed to accept SNAP for meals there. But it needs to branch out because farmers markets are mid-week and it is difficult to have busy customers stop by a farmers market to get meals with their SNAP benefits.
- The firm is located in a food insecure town according to the Economic Research Service of USDA.
- Appellant would love to learn more about how it can help with this food insecurity problem in town.
- The firm is working on incorporating "meal kits" into its meals that would help households eat healthier, but the households would do the cooking.
- Appellant wants to bring a change to its town, but has been dealing with roadblocks left and right. It would appreciate any help to find a way to bring a change to the town.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

### **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and documentation submitted by the Appellant, it is the determination of this review that the Appellant firm is currently acting primarily a restaurant (according to regulations cited

above) and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

According to the Appellant's SNAP application, it estimated that 80 percent of its sales are from the sale of cold, prepared foods. The contractor's visit to the store (which is actually the owner's home) appears to confirm this estimate. The photographs show very few staple foods and the contractor's notes indicate that the business is little more than a meal preparation service. The Appellant apparently takes orders (and payments) online through Friday and then obtains food from the local farmers market on Saturday. The Appellant then prepares meals for customers for pickup on Sunday – at least two days after payment has already been made.

It is noted that the firm's application indicates that the business is open year round, but the Appellant has offered no indication how its business would function during non-growing seasons or the portions of the year when farmers markets are not typically in operation.

Regulations at 7 CFR § 278.1(b)(1)(iv) are clear that firms that have more than 50 percent of their total gross sales in hot and/or cold prepared foods not intended for home preparation and consumption are considered restaurants and shall not qualify for participation as retail food stores under Criterion A or B. In this case, the Appellant's own sales estimates demonstrate that the firm does not meet eligibility requirements. Accordingly, Healthy AF Nutrition LLC is not eligible for SNAP participation.

It should further be noted that in accordance with 7 CFR § 278.2(e), SNAP benefits may not be accepted before delivery of the food except in the case of nonprofit cooperative food purchasing ventures. Healthy AF Nutrition LLC indicated on its application that it is not a nonprofit entity. USDA also does not currently permit online SNAP transactions, except for a very limited number of retailers and states that are participating in an Online Purchasing Pilot. Illinois is not one of the participating states. More information about the online pilot can be found at the following website: [www.fns.usda.gov/snap/online-purchasing-pilot](http://www.fns.usda.gov/snap/online-purchasing-pilot). It is the determination of this review that the Appellant's current business model does not conform to existing SNAP regulations.

### **Need for Access**

When a firm fails to meet Criterion A or B, SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing the firm if it is located in an area with significantly limited access to food provided that it meets all other eligibility requirements. However, this Need for Access evaluation is not conducted when the firm is considered to be a restaurant – that is, the firm has more than 50 percent of its total sales in the sale of hot and/or cold prepared foods. Therefore, authorization under the Need for Access provision is not appropriate in this case.

### **Request for Additional Information**

As to the Appellant's request for help and additional information on how the firm can become SNAP-authorized, this review can offer no suggestions or advice. The purpose of this review is solely to determine whether or not the Retailer Operations Division took appropriate action when it denied the firm's SNAP application. Any requests for information or assistance should be taken up with the Retailer Operations Division.

## **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm, as presently constituted, is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and documentation presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Healthy AF Nutrition LLC to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from July 31, 2018, which is the effective date of the denial.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

October 1, 2018