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

Hwy 32 Seafood & Grill,

Appellant,

v.

Case Number: C0217566

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 Hwy 32 Seafood & Grill (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 retailer application of Hwy 32 Seafood & Grill.

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 April 15, 2019, and sent to the firm on April 16, 2019, 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 visit to the store on April 10, 2019, as well as information provided on the firm's application dated March 12, 2019. The Retailer Operations Division determined that the firm was primarily a restaurant because more than 50 percent of its gross sales were estimated to come from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. 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(k)(2).

In a letter postmarked April 25, 2019, 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 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 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. **Entities that have more than 50 percent of their total gross retail sales in: Food cook or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for**

[*] 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.

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.... [Emphasis added.]

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]*[*] 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 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.]

[*] 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.

APPELLANT'S CONTENTIONS

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

- Appellant believes the firm's SNAP application was wrongfully and unlawfully denied.
- The denial was predicated upon an inconclusive fact that more than 50 percent of the firm's gross sales come from heated or prepared foods.
- Appellant will unequivocally demonstrate that there is no way FNS could reach this conclusion.
- Although the firm does plan to serve some prepared foods, at no time has the Appellant filed an application with the local health department regarding the serving of cooked or hot foods.
- The firm has never been charged with or fined for cooking food at its location or anywhere else.
- The FNS contractor who conducted the inspection took photos of the store, including coolers and refrigerators, but she never opened the coolers to see what was inside. None of the photos show any sign of cooked or hot food. The photos might show signs of construction at the store.
- Appellant believes that the denial action was in error and was due to inaccurate information provided by the store visit contractor or misinterpretation of the types of food sold by the Appellant.
- Not only will the contractor's photos show no signs of cooking or preparing hot foods, but it will show items such as potato chips, bread, soda, and canned goods. The photos also would have shown a large variety of fresh and frozen seafood if she would have opened the coolers and freezers. There is a fresh seafood display set up daily, but due to construction the foods are currently kept inside coolers.
- As of the date of the store visit, 100 percent of the firm's sales come from cold, frozen or shelved items and remains that way. It is projected that more than 50 percent of the firm's gross sales will come from fresh and frozen seafood and shelved items that are deemed SNAP-eligible.
- The store is located in a small poverty-stricken town whose residents rely on SNAP. The Appellant firm cannot exist without SNAP authorization.

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

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts 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 Appellant's SNAP application as well as the contractor's store visit report and photographs, and after considering the contentions submitted by the Appellant in its request for review, it is the determination of this review that the Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

When the Appellant applied for SNAP participation on March 12, 2019, it indicated that it had or would be applying for a restaurant license for the store. The Appellant also provided sales estimates for a one-year period, including gross sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant estimated that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would come from the sale of hot foods and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from cold prepared foods. This means that 92.3 percent of the firm's gross sales were estimated by the Appellant to be from the sale of hot and/or cold prepared foods. The remaining 7.7 percent consisted of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in accessory foods, such as soda, chips, etc., and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from staple foods. It must be noted that the Appellant has not provided any documentation or evidence to prove that its original sales estimates were inaccurate or that the firm's hot and/or cold prepared food sales are less than 50 percent of its total sales.

SNAP regulations at 7 CFR § 271.2 and § 278.1(b)(1)(iv) state that any firm which has more than 50 percent of its total gross sales in hot and/or cold prepared foods is considered a restaurant and is not eligible for SNAP participation under eligibility Criterion A or B. The 50 percent sales threshold includes food items heated before or after the point of sale. The contractor's store visit, which took place on April 10, 2019, does not dissuade this review from concluding that the firm is primarily a restaurant. On the day of the contractor's visit, the firm did not have any dairy items in the store and had only one variety of food in the breads/cereals staple food category, which means the firm cannot be authorized under Criterion A. And although still under construction, the contractor's photos show a large kitchen area, where it is presumed that meals will be prepared for immediate consumption or take-out. This strongly suggests that prepared meals will likely be the emphasis of the business. The firm is also not eligible under Criterion B because the firm's staple food sales do not exceed 50 percent of its total sales. According to the Appellant's SNAP application, just 2.5 percent of all sales are estimated to be staple food sales (see 7 CFR § 278.1(b)(1) for a full description of program eligibility under Criteria A and B).

Based on the Appellant's own sales estimates, the firm is primarily a restaurant, and thus, is not eligible for SNAP participation. Neither the store visit report nor the Appellant's contentions persuade this review to conclude otherwise.

Hardship to SNAP Households and Appellant

The Appellant contends that the store is located in a small, poverty-stricken town whose residents rely on SNAP, and argues that the store cannot exist without SNAP authorization.

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 meets the minimum eligibility criteria for authorization.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm 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 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 Hwy 32 Seafood & Grill 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 April 16, 2019, 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 June 5, 2019
Administrative Review Officer