

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

La India Azteca Bakery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C022595

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of La India Azteca Bakery LLC to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for the SNAP for a period of six (6) months from the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of La India Azteca Bakery LLC.

AUTHORITY

7 U.S.C. § 2023 and the 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In a letter dated September 4, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot or cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked September 12, 2019, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for administrative review 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, might 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part

Periodic reauthorization. At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states in part, that:

- (1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.
 - (i) The firm's continued participation in the program will not further the purposes of the program;
 - (ii) The firm fails to meet the specifications of paragraph (b)

7 CFR § 278.1(b)(1)(iv) states, in part:

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, as:

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 seven 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 three 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 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 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. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

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

... 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.

Regulatory Change

Due to a recent change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

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

- La India Azteca Bakery has been SNAP authorized for 25 years and has always qualified under the staple food requirements of Criterion.
- The firm currently has 62 percent of its sales considered as hot foods and the owners are taking steps to increase staple food sales so that number can be greatly reduced.
- The firm makes and sells tortillas and bread for a community that is 90 percent Hispanic.
- The firm does not serve hot foods to eat at the establishment, everything is to go.
- A withdrawal from the SNAP would negatively impact the business, employees and customers. Some of the firm's SNAP customers don't have means to drive to another store and get their staple food.

The preceding may represent only a brief summary of the 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 central issue in this case is whether La India Azteca Bakery LLC is a SNAP ineligible restaurant **as that term is defined under 7 CFR § 278.1(b)(1)(iv)**. In reaching its decision to withdraw the firm's application, the Retailer Operations Division reviewed the reauthorization application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that La India Azteca Bakery LLC does not qualify for the SNAP as more than 50 percent of its gross retail sales are in hot food or heated food.

Reauthorization Application

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" on November 26, 2018. The Appellant's reauthorization application stated that 95.6 percent of its 2017 actual gross retail sales were in **hot foods** and that less than one (1) percent were in staple food items.

Store Visit Report and Sales Documents

On April 29, 2019, an FNS contractor conducted a store visit to assess the firm's continued eligibility for the SNAP. The store visit report and photographs support the determination of the Retailer Operations Division that the firm sells mostly hot foods as reported on the FNS-252-R submitted by the Appellant. The site visit photographs show that the firm has a large commercial kitchen and has hot foods on display, a menu on the wall, and a drive-through window.

The Retailer Operations Division also sent the Appellant a letter dated July 15, 2019, requesting among other items, three representative months of actual retail sales at the firm. In response, the owner provided sales data broken down into categories for the months of April, May and June

2019. The breakdown shows that the firm's heated, hot and/or cold prepared foods sales are exactly two-thirds (66 percent) of total retail sales.

The Appellant states that the firm does not have in-store dining like other nearby competitors. However, this contention is not relevant as 7 CFR § 278.1(b)(1)(iv) states that all restaurants are SNAP ineligible and does not make a distinction between dine-in or take-out restaurants.

Hardship Contentions

The Appellant contends that the firm, employees and owners will suffer an economic hardship if La India Azteca Bakery is not authorized for the SNAP. With regard to this contention, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible economic hardship to the firm. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

The Appellant contends that the involuntary withdrawal will also create a hardship for the SNAP community that relies upon the store. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible take-out restaurant to be reauthorized for the SNAP on the basis of hardship to the SNAP community.

Basis of Determination

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division's action. Whether or not the store is now increasing its percentage of staple food sales is not relevant to this review. The store may reapply for the SNAP six (6) months from the effective date of its withdrawal and any updated food inventory will be taken into consideration at that time.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated and/or hot food as confirmed by the Appellant's own reauthorization application. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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, shall not qualify for participation as retail food stores." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, La India Azteca Bakery LLC, is sustained. In accordance

with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six (6) months from the effective date of the withdrawal. However, please note that if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right 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 you reside or are 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

December 18, 2019