

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

La Seafood Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224044

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of La Seafood Market (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on October 4, 2019.

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 October 4, 2019, Retailer Operations Division denied Appellant’s authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on July 13, 2019, as well as information provided on the firm’s retailer application.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The denial letter stated, in relevant part:

“It is the determination of FNS that your firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase. "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR 278.1(b)(1)(iv), provides that restaurants are not eligible to participate in SNAP, except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

As the firm failed to meet eligibility requirements for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in 7 CFR § 278.1(k)(2).

In a letter dated October 15, 2019, Appellant, through counsel, appealed the Retailer Operations Division’s decision and requested an administrative review of this action. 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

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) reads, in relevant 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(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”

7 CFR § 271.2, states, in part: “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.” [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

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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.

FREEDOM OF INFORMATION ACT (FOIA) REQUEST

Appellant, through counsel, submitted a FOIA request in email correspondence dated December 16, 2019. The request was processed on December 17, 2019, and counsel was provided with the requested documentation on January 16, 2020. In a letter dated January 21, 2020, counsel was informed that all supporting documentation in his clients review was to be submitted no later than February 11, 2020.

APPELLANT’S CONTENTIONS

In response to the Retailer Operations Division denial letter and in the request for administrative review, Appellant, through counsel, has stated as its position in the matter the following:

1. Per the Appellant’s application their sales are predominantly staple food items accounting for 82% of the store’s total sales.
2. It is Appellant’s position that FNS erroneously denied their application as the Appellant’s store is not a restaurant and the Department’s decision to the contrary was made arbitrarily.
3. The appearance of the store does not give the impression that the store is a restaurant, nor a vaguely defined business type the Department refers to as a carry-out restaurant.

4. As the Department did not find that the store failed to meet Criterion A or B, it is important for this review to bear in mind that the store appears from the records to be well within Criterion B and the Clover Sales report show roughly 75 percent of the store's sales to be of raw or frozen seafood.

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

In regards to Appellant's contentions, a review of Appellant's stock shows that it was not eligible for Criterion A because it was deficient in the breads or cereals staple food category and in the dairy staple food category. The record reflects that it submitted a SNAP application indicating that its staple foods comprised of 82 percent of its total retail sales and hot/cold prepared foods consisted of nine (9) percent of its total retail sales. Retailer Operations Division conducted an analysis of the documentation provided by Appellant and based on that review determined that Appellant's staple food sales comprised of 20 percent of its total retail sales and the hot/cold prepared foods comprised 79 percent of its total retail sales.

Appellant submitted seven days of register receipts and summary receipts. The register tapes were from two different systems where by staple sales were allegedly listed on the newer system with itemized reporting and the hot foods were allegedly listed on the older system which was not itemized. It was concluded that the new register tapes were for food items purchased raw and then potentially cooked and the second system listed food items that were initially hot or prepared. An internet search of the firm reveals the following statement from the retailer "Fresh seafood in town! Sell raw seafood by pound, cooking is optional at NO CHARGE! FREE EGG ROLL, or FREE DRINK FOR ORDERS 25 and up." It was determined that the receipts provided by Appellant cannot be utilized to analyze the function of the store as cooking is a free service and it is unable to verify how food leaves the premises. It is noted that food items cooked before or after purchase with SNAP benefits are ineligible.

Additionally, the store visit reports and photographs show that the firm has very minimal amounts of raw seafood on display considering its claim that 82 percent of its sales are from raw seafood. There is an excessive amount of frozen fish in the stores frozen storage area that is not consistent with its claim of fresh seafood and may be kept frozen for hot food orders. There is raw fish for purchase however it does not look truly fresh and is likely the frozen seafood defrosted and stored in the display case until a customer requests to have it cooked. There were also a number of condiment cups pre made with several different dipping sauces for purchases or to be provided with meals. More importantly, the Appellant claims to sell items by the pound however, no weight scales were present in the store during the store visit in which to weigh items purchased raw by the pound. Appellant has a sizable kitchen area with three fryers, a large stove, a wok, foil and Styrofoam containers for takeout, drink holders, a wide variety of side items for preparation and to accompany main entrees. The firm presents itself to the public primarily as a seafood take out restaurant.

It is the determination of this review that the Retailer Operations Division correctly determined Appellant is not a retail food store as defined in §271.2 and operates as a restaurant, therefore, not eligible for authorization in the SNAP in accordance with §278.1(b)(1)(iv) of the SNAP regulations.

CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of La Seafood Market to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective October 4, 2019.

It is important to reiterate that the denial letter states ***“if your business model remains the same and you reapply, your application may be denied for the same reasons it was denied this time.”***

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

March 25, 2020