

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

**LTK Seafood LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0212839**

**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 withdrew the authorization of LTK Seafood LLC (“Appellant”) from participation 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 the withdrawal.

**ISSUE**

The purpose of this review is to determine whether 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 withdrew the authorization of LTK Seafood LLC to participate in SNAP.

**AUTHORITY**

7 U.S.C. § 2023 and 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**

The Appellant firm, LTK Seafood LLC, was originally authorized to participate as a retailer in SNAP on October 22, 2012. In accordance with regulation, each SNAP-authorized firm is

required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

On March 10, 2018, the Appellant firm submitted the required reauthorization application, FNS-252-R, Supplemental Nutrition Assistance Program Reauthorization Application for Stores. On this document, the Appellant reported that less than 1 percent of its gross retail sales were from the sale of staple foods and that over 99 percent of total gross retail sales were in the sale of hot foods. The application also reported that the firm carried no dairy or fruit or vegetable products, and insufficient stocking units of breads or cereals. The only staple food category in which the firm reported to meet eligibility requirements was meat, poultry, or fish. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on July 11, 2018, to verify the firm's reported staple food stock.

Based upon the information self-reported by the Appellant on the reauthorization application and the store visit report and photos, the Retailer Operations Division concluded that LTK Seafood LLC was primarily a restaurant rather than a grocery establishment. In a letter dated August 31, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because 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.

In a letter postmarked September 13, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision to withdraw the firm's SNAP authorization. The request was considered timely and was therefore granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the Appellant has the burden of providing relevant evidence that 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 untrue.

### **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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may 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 specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) 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:

(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...

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

---

\* 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>.

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)(ii) states, in part:

In order to qualify 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 with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least *[two]*\* staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...
- (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,*

---

\* 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>.

*cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items...such as...cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.]\**

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

In order to qualify under [Criterion B] firms must have more than 50 percent of their 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, such as rental fees, professional fees, and entertainment/sports/games income...

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 retail 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.]

## APPELLANT'S CONTENTIONS

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

- The firm previously sold raw seafood, which was displayed in appropriate frozen displays, but because of significant thefts, the firm moved the raw seafood to freezers only accessible by employees in order to prevent thefts;
- More than 50 percent of the firm's annual sales are from fresh and frozen seafood;

---

\* 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>.

- Only during crawfish season, which is about six months each year, is boiled seafood (crawfish and crab) sold;
- Even with the sale of boiled seafood, cooked food sales do not exceed the sale of fresh and frozen foods during crawfish season or annually;
- Additional displays have been purchased and set up with required inventory to meet eligibility requirements; and
- The Appellant seeks re-inspection of the store.

To support these contentions, the Appellant provided 20 undated photographs of the store, presumably showing current inventory.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency 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 store visit and at the time the Retailer Operations Division rendered its decision.

On the SNAP reauthorization application, Appellant reported that over 99 percent of the firm's total retail sales were in the sale of hot foods. The contractor's store visit report, photos, and sketch appear to confirm that a significant portion of the firm's business is in the sale of hot foods. The store visit report provides that the firm has a large kitchen area and/or food preparation area with heating sources. Most of the signage in the store provides pricing for cooked foods, with just shrimp and crawfish having pricing for sale raw.

However, the Appellant contends that cooked food sales are seasonal, taking place only six months out of the year, and that even counting these sales, more than 50 percent of the firm's annual sales are from fresh and frozen seafood.

Under SNAP regulations, firms that have more than 50 percent of their total gross retail sales in heated or prepared foods are considered restaurants and are ineligible for SNAP authorization. However, the Appellant submitted no sales documentation to support the contention that sales of fresh or frozen foods were more than 50 percent of the firm's annual sales, or that they were higher than self-reported on the reauthorization application. The only evidence submitted by the Appellant were photos of the store, showing current inventory.

However, photographs of current inventory do not provide the necessary information or data about the percentage of sales that are in hot food or staple food. The Appellant's self-reported sales figures on the reauthorization application provide that over 99 percent of the firm's sales are in the sale of hot foods. This was the only information available to the Retailer Operations Division regarding the firm's sales when the withdrawal determination was made, and it remains the only information available under this review.

## **Request for another Store Visit**

The Appellant contends that its raw seafood inventory had been moved to freezers only accessible by employees because food had been stolen when appropriately displayed for customers. After the withdrawal determination, the firm purchased and set up new inventory displays, submitted photographs of this inventory in support of its administrative review request, and now seeks re-inspection of the store.

Unfortunately, this review has no authority to require that the Retailer Operations Division perform another store visit after a firm has been properly withdrawn from Program participation. In fact, SNAP regulations, at 7 CFR § 278.1(l)(1) and (k)(2), are clear that any firm which has been denied authorization or has had its authorization withdrawn for failing to meet minimum eligibility standards shall not be eligible to submit a new application for authorization for at least six months. This review has no authority to modify this process.

## **CONCLUSION**

Given that the Appellant did not provide any sales documentation as evidence to contradict the sales figures self-reported on the reauthorization application, the preponderance of the evidence supports the Retailer Operations Division's determination that the firm is a restaurant under SNAP regulations. Therefore, it is the determination of this review that the Appellant is ineligible for SNAP as a restaurant, and therefore does not meet eligibility requirements under Criterion A or B in accordance with 7 CFR § 278.1(b)(1)(iv).

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of LTK Seafood LLC to participate as a retailer in SNAP is sustained. Pursuant to the Food and Nutrition Act of 2008, as amended, 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 the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of LTK Seafood LLC shall become effective 30 days after receipt of this decision.

## **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.

MICHELLE WATERS  
Administrative Review Officer

December 12, 2018