

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

Mediterranean Oasis Inc.,

Appellant,

v.

Case Number: C0216744

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Mediterranean Oasis Inc. (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the SNAP, when it denied the application of Appellant to participate in SNAP by letter dated March 25, 2019

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 March 25, 2019, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant firm was primarily a restaurant and as such failed to meet the definition of an eligible firm. This denial action was based on observations during an onsite store visit on March 11, 2019, as well as information provided on and in support of the firm’s

retailer application dated March 1, 2019. Specifically, the March 25, 2019, letter from the Retailer Operations Division to Appellant states the following, 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."

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 § 278.1(k)(2). Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

By letter postmarked April 1, 2019, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence postmarked April 18, 2019, was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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 argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.

APPELLANT'S CONTENTIONS

The following may represent a 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:

- The owner opened a 6,000 SF space in 2018 with 5,300 SF as a grocery, butcher shop, and bread bakery, and 700 SF for a corner kitchen serving hot food;
- There may have been an error with regards to the sales numbers on the application. The current business model generates about 20 percent hot food sales, about 10-15 percent taxable sales (nonfood items), and about 65-70 percent non-taxable food items. The sales reports for the last three months are included showing that non-taxable food items are the majority of sales and exceed 50 percent. This model meets current requirements as set forth in SNAP regulations at sections 271.2 and 278.1(b)(1);
- Invoices are provided for the last three months to demonstrate the breadth of inventory and the wide range of non-taxable foods carried. These invoices are not comprehensive of everything carried in store inventory, but they represent approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of inventory stocked over the last three months and give a better idea of products carried in the 5,300 SF grocery space; and,
- As stated in section 278(b)(1)(vi)(C), not authorizing the firm would cause hardship to SNAP households as special ethnic foods and staple foods would not be available for the large Middle Eastern and Muslim community. This is one of the sole firms stocking Halal meats and there is no other firm within a reasonable travel distance. Many customers have said that before the store opened, they had to travel more than 25 miles using public transportation to purchase meats. The firm also stocks ethnic vegetables, ethnic staple cereals, and ethnic dairy products that are not available at other firms within a reasonable travel distance. NOTE: the regulatory citation should be 278.1(b)(1)(vi)(C).

Appellant submitted register tapes for January, February, and March 2019 as well as 29 pages of invoices dated from December 2018 through April 2019 in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, 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, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation 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.” As previously noted in the Controlling Law section, 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 SNAP regulations.

The FNS store visit conducted on March 11, 2019, confirms the firm offers a wide variety of hot and/or cold prepared foods that may be are consumed on the premises in the large dining area or sold for carryout, and require no additional preparation. The many store visit photos show the firm has a large commercial kitchen/food prep area as well as menus advertising a wide range of hot and/or cold prepared foods that include sandwiches, hot platters, cold salads, and hot sides in addition to a catering menu. The photos also show a large empty meat display case and many empty reach-in coolers. The store visit report shows that the quantity and variety of staple food items offered for sale is limited with the firm not stocking any fresh meats or produce and includes a notation that the firm is not stocking fresh meat until it is EBT approved and that the bread noted in the store inventory was bread sticks.

Appellant contends there may have been an error with regards to the sales numbers on the application. The current business model generates about 20 percent hot food sales, about 10-15 percent taxable sales (nonfood items), and about 65-70 percent non-taxable food items. The sales reports for the last three months are included showing that non-taxable food items are the majority of sales and exceed 50 percent. This model meets current requirements as set forth in SNAP regulations at sections 271.2 and 278.1(b)(1).

Regarding Appellant’s submitted documents and contentions, the monthly reports do not differentiate between hot food sales, prepared food sales, staple food sales, etc. The Appellant did provide invoices, but since the firm operates three distinct businesses under one roof (restaurant, retail grocery, and caterer), there is no way to identify what staple food items were purchased for which business. The firm’s social media presence also supports that it is primarily a restaurant. SNAP regulations cited by Appellant at 7 CFR section 278.1(b)(1)(vi)(C) pertain only to the SNAP authorization of co-located wholesale food concerns and therefore would not be applicable to the Appellant firm’s situation.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of

heated and/or cold prepared foods, including foods cooked or heated after purchase. There is no doubt that staple food items may be available to customers. However, Appellant's SNAP retailer authorization application dated March 1, 2019, states that the majority of its sales are from hot and/or cold prepared foods. Specifically, the application shows total 2018 gross retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with hot and/or cold prepared food sales accounting for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 51.5 percent of the firm's total gross retail sales. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. A review of the store visit documentation including a staple food inventory, store layout, and how the firm presents itself further supports the USDA determination that the firm is primarily a restaurant selling hot and/or cold prepared foods.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

July 3, 2019