

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

Naked Fit Foods LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202410

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Naked Fit Foods LLC (hereinafter “Appellant”) was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the ROD Office (Retailer Operations Division, Retailer Operations Branch, hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(1) and (2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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.”

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.

CASE CHRONOLOGY

The record reflects that on June 14, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed as CEO an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on July 22, 2017. Appellant was subsequently advised in a letter dated August 10, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). On August 24, 2017, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 271.2 states, *inter alia*:

Retail Food Store means: 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

And

Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments and spices shall not be considered staple foods for the purpose of determining the eligibility of any firm.
stores...

7 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site

visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, *inter alia*:

Application of Criterion A. In order to qualify under this criterion, firms shall: 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.

7 C.F.R. § 278.1(b)(1)(iii) states, *inter alia*:

Application of Criterion B: In order to qualify under this criterion, 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 C.F.R. § 278.1(b)(1)(ii)(C) states, *inter alia*:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, *inter alia*:

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...

And

...firms that are considered to be restaurants, that is, 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(k)(1) and (2) state, *inter alia*:

FNS shall deny the application of any firm if it determines that:
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; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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

APPELLANT'S CONTENTIONS

In its written request for review dated August 24, 2017, Appellant provided information in which it was argued that:

1. 100% of the firm's sales include staple food items (breads, fruits, vegetables, meat, fish, poultry or dairy products).
2. All meals require additional preparation by the customer and are not classified as "ready-to-eat."
3. Meals may not be consumed on premises.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on July 22, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operates primarily as a carryout/restaurant. As noted above, a firm that operates primarily as prepared food carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 CFR § 278.1(d)(3) and must meet a number of additional requirements. Further, the documentation indicated that the firm had ample varieties of staple food stock in none of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further confirmed that the firm's staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Prepared hot or cold food cannot count toward a firm's sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP.

In regard to contention 1 above, as noted in the foregoing, hot and/or cold prepared foods are not considered staple food items for the purposes of the SNAP. The record reflects that 100% of the firm's sales involve prepared food items for carryout/delivery.

Regarding contention 2 above, the ROD Offices documents a telephone conversation with the Appellant firm on August 10, 2017 in which a store Owner stated that the firm delivers freshly prepared ready-to-eat meals to customers who pay for same online. The record contains a business license reflecting that the firm is a catering operation, which is a business model that sells prepared, ready-to-eat meals. The record moreover contains a price list of its various meal

plans and reflects that tax is charged on each, a further indication that the food is prepared and ready-to-eat. The firm's advertisements indicate that none of the prepared food is delivered frozen and that it may be warmed/heated prior to consumption, although all food provided is fully cooked or otherwise ready-to-eat. It is clear that the meals provided by Appellant are not intended for home preparation but are in fact prepared by the Appellant firm and delivered in the form of meals ready-to-eat. That a customer may prefer to heat said meals does not constitute home preparation; any fully cooked food may be consumed as is or re-heated.

With regard to contention 3 above, the regulations relevant to prepared food operations stipulate that firms that operate as restaurants or carryouts that have more than 50% of gross sales in hot or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and *require* no additional preparation, are not eligible to participate in the SNAP. The only foods offered by Appellant are prepared food entrees in five and 20-day plans.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period (to reapply to participate in the SNAP) following the denial stipulated by the Food and Nutrition Act of 2008 (Sec. 9(d)), § 278.1(k)(2) will elapse on February 21, 2018.

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

November 9, 2017