

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

One Stop Seafood Shop LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203036

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division, to deny the FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of One Stop Seafood Shop LLC (hereinafter, “Appellant” and/or “One Stop Seafood Shop LLC”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of One Stop Seafood Shop LLC to participate in the SNAP via letter dated September 22, 2017 because it was determined that One Stop Seafood Shop LLC did not meet the definition and requirements of a retail food store, finding instead that Appellant operates as primarily a restaurant.

AUTHORITY

7 U.S.C. § 2023 and its 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 22, 2017, the Retailer Operations Division informed Appellant that the application of One Stop Seafood Shop LLC to participate as an authorized retailer in SNAP was being denied because it did not meet the definition of a retail food store as enunciated in the Federal regulations at 7 CFR § 271.2 and CFR § 278.1(b)(1). This determination was made as a result of a review of the application documented to have been received by FNS on July 13, 2017, and a store visit conducted by FNS contracted personnel on August 29, 2017.

Via letter postmarked September 26, 2017 and received in the office of the Chief of the Administrative Review Branch on September 28, 2017, Appellant, through its owner of record, requested an administrative review of this action, appealing the Retailer Operations Division's decision. 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part § 278.1(k)(2) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet the definition of an eligible firm.

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, 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) 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 stock-keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set for in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

7 CFR § 271.2 defines *Staple food* as “those food items intended for home preparation and consumption.”

7 CFR § 278.1(b)(1)(iv) defines Ineligible firms as “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program [SNAP] shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to...**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**... This includes firms that primarily sell prepared foods that are consumed on the premises **or sold for carryout**...” [Emphasis Added]

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, “An establishment ... shall ... 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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) states in relevant part, that in order for a retail store to qualify for authorization 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. (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, cheese, butter and yogurt in the dairy category.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... 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 ...”

7 CFR § 278.1 (k) reads, in 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 (k)(2), reads, in relevant part: “FNS shall deny the application of any firm if it determines that 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

7 CFR § 278.1 (k)(5) reads, in part, “FNS shall deny the application of any firm if it determines that: The firm’s participation in the program will not further the purposes of the program.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “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

In the request for administrative review Appellant’s owner has stated that Appellant is licensed as a seafood market, not a restaurant, estimating that the sales of garlic crabs represent only 20 percent of the total retail sales. Ownership declares that there are six (6) types of fish and three (3) sizes of shrimp sold. Appended to the request for appeal there were five (5) receipts reported to represent the purchase of bulk seafood.

In additional materials submitted on October 27, 2017 Appellant provided an explanation that his response on line 16 of the July 13, 2017 application was incorrect due to a misunderstanding; indicating that Appellant does not have more than 50 percent of its total retail sales in “hot and/or cold freshly prepared foods that are ready-to-eat”. Appended to the explanation were point-of-sale (POS) documents for the months of July through October together with State tax filing receipts for the same months. The new information was provided to the Retailer Operations Division for consideration relative to the denial action.

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

The record reflects that Retailer Operations Division considered the nature and scope of One Stop Seafood Shop LLC to determine whether it qualifies as a retail food store as per Sections §§ 278.1 (b)(1) and 271.2 of the SNAP regulations. Retailer Operations Division denied Appellant for SNAP authorization because the business does not meet the definition of a retail food store.

In the letter of determination dated September 22, 2017 Retailer Operations Division indicated that One Stop Seafood Shop LLC was determined to be operating as “primarily a restaurant”.

The administrative record indicates that the Retailer Operations Division based their decision on consideration of 1) the information made available from the application submitted on July 13, 2017; 2) information gained from the contracted store visit inspection completed on August 29, 2017; 3) information found on Appellant's Facebook Homepage advertising "live crabs" and containing several photos of prepared, ready-to-eat meals (trays) in take-out containers; and, 4) information and materials provided by Appellant for administrative review dated October 27, 2017.

The contracted store visit inspection indicates Appellant reported operating in a 400 square foot retail space; during the hours of 11AM to 7PM on Tuesday through Saturday weekly, and to be closed on Sunday and Monday. Appellant's estimated total retail sales **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

One Stope Seafood Shop LLC is identified as operating with one checkout system for which the certified photographs show a computer monitor screen delineating the items offered for sale; and on point-of-sale device. The most expensive items identified by Appellant's owner who is documented to have authorized the store visit are a shrimp tray @ \$9.99; crab trays @ \$13.99; combo trays @ \$17.99; and snow crab trays @ \$15.99.

One Stop Seafood Shop LLC was identified to sell items in only two (2) of the four (4) staple food categories; fish and breads and cereals. The store visit materials indicate that Appellant's owner reported to the store inspector that he kept sausage, potatoes, corn on the cob, and eggs, cooked in small quantities to supply the "trays" advertised for sale.

Business License Information:

In the request for administrative review Appellant's ownership indicates that Appellant is licensed as a Seafood Market, not as a restaurant. On review it is affirmed that the City of Folkston Tax Certificate dated June 20, 2017, for One Stop Seafood Shop LLC at the address of record grants the "Certificate for carrying on the business of Retail Seafood Market." Although Appellant's contention is affirmed with the license provided it is noted that each geographic area identifies the types of licenses for their jurisdiction in different ways; therefore, that the license is for a "Retail Seafood Market" does not necessarily evidence that Appellant is not selling prepared ready-to-eat foods from the "Retail Seafood Market".

Further, certified photograph from the contracted store visit #15 (below) shows a food display unit with post-it-notes showing prices for potatoes, corn, and sausage – sold individually as well as in "trays".



Food Sales Percentages:

The questions and answers from the Application that specifically relate to the contentions provided by Appellant include:

Question 16: *“Does the sale of hot and/or cold freshly prepared foods that are ready-to-eat exceed 50% of your total sales?”*

Response *“Yes”*

16 Does the sale of hot and/or cold freshly prepared foods that are ready-to-eat exceed 50% of your total sales? Yes No

Question 18: *“Do you stock at least three different items in each of these food categories?”*

- Responses: Breads/Grains – No
- Dairy – No
- Fruits/Vegetables – Yes
- Meat/Poultry/Fish - Yes

Question 18a: *“What percent of our total retail sales comes from these [staple] food categories?”*

Response: *“75%”*.

18 Do you stock at least three different items in each of these food categories? Include fresh, frozen, canned, packaged. See instructions for more information.

Breads/Grains	(Examples: bread, cereal, pasta, rice, flour, etc.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Dairy	(Examples: milk, butter, cheese, yogurt, infant formula, etc.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Fruits/Vegetables	(Examples: frozen corn, dried beans, applesauce, canned peas, bananas, 100% juice, etc.)	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Meat/Poultry/Fish	(Examples: canned meats and fish, ground beef, deli meats, bacon, frozen chicken, eggs, etc.)	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

18a What percent of your total retail sales comes from these food categories? %

18b Do you stock fresh, frozen or refrigerated foods in at least two of these categories? Yes No

Question 19: *“Do you sell “other” foods, such as snack foods, soft drinks, or condiments”*

Response: *“Yes”*

Question 19a: “If yes, what percent of your total retail sales comes from these items?”
Response: “25%”.

19 Do you sell "other" foods, such as snack foods, soft drinks, or condiments? Yes No
19a If Yes, what percent of your total retail sales comes from these items? %

Question 20: “Do you sell non-food items or food that is hot at the time the customer pays for it?”

Response: “No”

20 Do you sell non-food items or food that is hot at the time the customer pays for it? Yes No
20a If Yes, check the items you carry: tobacco products alcohol lottery gasoline hot food other
20b If Yes, what percent of your total retail sales comes from these non-food and hot food items? %
The sum of the three percentage figures above (18a, 19a, and 20b) must equal 100%

As previously indicated Appellant’s owner has stated that he misunderstood Question #16 and has changed his answer from “yes” to “no” stating that prepared garlic crab represents only approximately 20% of the total retail sales.

The POS and tax materials provided by Appellant were reviewed to determine if, as stated by Appellant’s ownership, unprepared foods accounted for more than 50 percent of the total retail sales as recorded within the materials.

The Retailer Operations Division has documented that the materials presented by Appellant served to solidify the determination that One Stop Seafood Shop LLC is operating as primarily a restaurant offering ready-to-eat cooked foods.

A summary of the point-of-sale (POS) and tax materials provided by Appellant is presented in the table below:

*Considerations:

- The Retailer Operations Division documented that GA sales tax is seven (7) percent, and is charged only on cooked/prepared foods
- All sales tax materials are dated with a submission date of October 25, 2017.
- The itemized sales presented on the POS documents indicate that some of the items are sold “cold” however these items are noted to be included in the advertised “trays” which include the seafood of choice, an egg, corn on the cob, and a potato. The only clearly identifiable uncooked seafood itemized is “live crabs”.

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The materials as provided do not support Appellant’s contentions that over 50 percent of the total retail sales at Appellant derive from the sale of “raw” seafood.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of One Stop Seafood Shop LLC to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) One Stop Seafood Shop LLC is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the letter of determination, September 22, 2017.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section §279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant’s owner resides or is 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, 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.

NANCY BACA-STEPAN
Administrative Review Officer

November 8, 2017