

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

**Panaderia Nuevo Leon,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0228803**

**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 Office of Retailer Operations and Compliance to deny the application of Panaderia Nuevo Leon (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated April 3, 2020.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its 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**

On February 26, 2013, the Office of Retailer Operations and Compliance sent a letter to Appellant indicating that the documentation in its possession indicated that the firm operated as a restaurant and requested additional information that would support Appellant’s contention that it is not a restaurant.

Appellant replied to the Office of Retailer Operations and Compliance in a subsequent letter.

In a letter dated April 3, 2020, the Office of Retailer Operations and Compliance denied the application of Appellant to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the denial letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided in Appellant's application and the contractor's store visit report dated February 25, 2020. As the firm failed to meet the eligibility criteria 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 Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated April 13, 2020, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this action. The appeal was granted.

### **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 § 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

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. . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

The definition of retail food store at 7 CFR § 271.2 states, in part:

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 additional preparation, are not eligible for SNAP participation as retail food stores.

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**

Appellant's responses regarding this matter are essentially as follows:

- Appellant was previously SNAP authorized. Appellant has operated since 1992.
- Hot foods represent 30% of Appellant's sales and are only available until 1pm. The other 70% of its sales come from baked goods. Appellant also has other foodstuffs available for purchase.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

### **ANALYSIS AND FINDINGS**

Appellant contends that the firm is not a restaurant, but a retail bakery. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

Even making an allowance for Appellant's bread sales and sales of other foodstuffs, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. It does not matter whether the prepared foods were served hot or cold. The evidence in the inspection report and photographs of the February 25, 2020 store visit, as well as the information provided by Appellant, supports that Appellant is primarily a bakery/Mexican patisserie/restaurant. Appellant's application states that the majority of its sales are from prepared foods.

Appellant stated that it was previously authorized. This administrative review is limited solely to those circumstances concerning Appellant's eligibility at the time of its application. Regulations regarding the definition of restaurant have been updated since Appellant last went through the authorization process. More information can be found on the FNS website at:

<https://www.fns.usda.gov/snap/retailer/eligible>

Therefore, the firm's contention that it was previously authorized cannot be used to reverse the decision of the Office of Retailer Operations and Compliance.

## **Summary**

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Office of Retailer Operations and Compliance. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

## **CONCLUSION**

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the application of Panaderia Nuevo Leon 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 Appellant desires a judicial review, 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.

RICH PROULX  
Administrative Review Officer

May 26, 2020