

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

**Paris P Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0228304**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Paris P Inc (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store on March 17, 2020.

**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 17, 2020, the Office of Retailer Operations and Compliance informed Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 271.2 and 278.1(b)(1). This action was based on observations during an onsite store visit on January 20, 2020, as well as information provided on the firm’s reauthorization application dated October 25, 2019. Appellant was also 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).

By letter dated March 20, 2020, Appellant appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

### **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(b)(1) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet the definition of an eligible firm.

7 CFR § 271.2 states that 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 qualifying staple food items on a continuous basis, evidenced by having no fewer than seven 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 three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. 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 under § 278.1(b)(1) of this chapter.”

7 CFR § 278.1(b)(1)(iv) states that “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of 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, 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 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “FNS shall 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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

### **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:

- An authorized representative visited the store on January 20, 2020, and stated that the store did not have enough stock to continue accepting SNAP. Please note that the store has no taxable items and that all items for sale are nontaxable; and,
- The store sells sweets such as cakes, ice creams, beverages, cookies, and more. Reconsideration is requested.

Appellant submitted the 2019 sales tax return and page one of the store’s 2018 Form 1120S US Income Tax Return for an S Corporation in support of these contentions.

### **ANALYSIS AND FINDINGS**

With regards to Appellant’s contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Office of Retailer Operations and Compliance, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider any actions ownership may take to qualify for continued participation in the SNAP subsequent to that decision. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived.

Appellant's SNAP retailer reauthorization application dated October 25, 2019, shows that staple foods amounted to two percent of gross annual sales and that accessory foods amounted to 10 percent while cold food sales amounted to 88 percent. The application further stated that the Appellant firm sold no ineligible items and that the firm stocked more than 10 varieties in the bread or cereals staple food category and two varieties in the dairy category with no varieties in either the meat, poultry, or fish category or the fruit or vegetables category.

Effective January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility. Under the old regulations, many stores, including many bakeries, were deemed eligible for SNAP despite having only a very small number of staple food items in stock. Congress determined that such stores did not further the purposes of the program and introduced the strengthened eligibility requirements in the 2014 Farm Bill. One of the changes that directly affects the Appellant firm is a more detailed definition of the term "accessory food." Previously, the definition of accessory food was, "...food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices..." Under the old rule, FNS considered a staple food to be any eligible food item that was not specifically listed as an accessory food. In the new rule (again, effective January 17, 2018), the definition of accessory food has been greatly expanded to reflect those foods that are generally considered snack foods or desserts as well as other food items that complement or supplement meals. Accessory foods now consist of the items mentioned earlier in this paragraph plus additional items such as doughnuts, cupcakes, cookies, muffins, pastries, sweet rolls, pies, cakes, etc. A full listing may be found on the FNS SNAP retailer web site. While these items are eligible for purchase with SNAP benefits at authorized stores, they are not considered staple foods for the purpose of determining SNAP eligibility.

In the case of the Appellant firm, a store visit was conducted by an FNS contracted reviewer on January 20, 2020. According to the contractor's written record, the firm had no staple food inventory in any of the four staple food categories (dairy; bread or cereals; fruit or vegetables; or the meat, poultry, or fish categories). The report and photographs from the store visit confirm the business is a bakery that does not sell bread and is set-up primarily to sell accessory foods and cold prepared foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Pursuant to 7 CFR § 271.2 and 278.1(b)(1) of the SNAP regulations, such a business does not meet the definition and requirements of a retail food store and is not eligible for SNAP participation. A firm that operates primarily as a bakery that does not sell bread is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B. Ownership reported on its SNAP retailer reauthorization application that the sale of cold prepared foods that are ready-to-eat accounted for more than 50 percent of total retail sales and that the firm does not stock either fruit or vegetables or meat, poultry, or fish products thus further supporting that the business does not qualify as a retail food store for purposes of SNAP participation.

When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when it signed the online reauthorization application to continue operating as a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer

Operations and Compliance, and that it is limited to what circumstances existed at the time of the withdrawal action by the Office of Retailer Operations and Compliance. Based on the evidence, the Appellant firm does not meet the definition and requirements of a retail food store as set forth in SNAP regulations at 7 CFR § 271.2 and 278.1(b)(1).

### **CONCLUSION**

Based on a review of all of the evidence in this matter, the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to participate as a retailer in SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

### **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

May 7, 2020