

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

**Piedras Negras Tortilla,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0219302**

**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 Retailer Operations Division to withdraw the authorization of Piedras Negras Tortilla (hereafter Appellant), for a period of six-months, to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2, § 278.1(b)(1), § 278.1(l)(1)(iii) , and §278.1(k)(2) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the application of Appellant to participate in SNAP in a letter dated June 27, 2019.

**AUTHORITY**

7 U.S.C. § 2023 and the 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**

The FNS requires that stores be reauthorized on a set schedule. Appellant submitted an electronic reauthorization application dated December 16, 2018. In a letter dated June 27, 2019, Retailer Operations Division withdrew Appellant’s authorization to participate as a retailer in SNAP. This withdrawal was based on information obtained during a store visit on March 30, 2019, as well as information provided on the firm’s reauthorization application. Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated that it is the

determination of the Food and Nutrition Service that your firm is primarily a restaurant. Hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at your firm. 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.

As the firm failed to meet either eligibility criterion 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 at 7 CFR § 278.1(k)(2).

In a letter July 1, 2019, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions 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 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) 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 § 271.2 defines a retail 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 qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]<sup>1</sup> 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 [two]<sup>1</sup> 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

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<sup>1</sup> As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

recordkeeping methods that are customary of reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter ...”

7 CFR § 278.1(l)(1)(iii) states in relevant part: “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 requirement of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;”

7 CFR § 278.1(b)(1)(iv) states in relevant part: “...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 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...”

7 CFR § 278.1(k)(2) states in relevant part: “The firm has failed to meet the eligibility requirement for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section ...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 response to the Retailer Operations Division withdrawal letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. We provide a number of basic food staples to the Hispanic culture in the form of corn, flour and wheat tortillas.
2. Our wholesale food items qualify under CFR 278.1(b)(v) and (vi) as a wholesale food concern and/or co-located wholesale food concern.
3. The sale of these staple foods has been offered on a continuous basis for 30 plus years.
4. We sell “masa” dough for customers that make tamales and corn tortillas. It is a wholesale product that requires additional home preparation.
5. We offer perishable frozen/cold meat delicacy items.
6. Not authorizing the continued sale of these staple food products would cause an undue hardship to SNAP benefit recipients.
7. We have no waiters at our establishment.
8. The community is rural in nature and there is limited access to staple food products which would make the establishment eligible under 7 CFR 278.1(b)(6).

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or referenced herein.

### **ANALYSIS AND FINDINGS**

With regards to Appellant’s contentions, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale basic staple foods such as corn

and wheat tortillas, or “masa” dough; the central issue is whether actual sales of prepared foods comprise more than 50 percent of the firm’s total gross retail sales. Appellant reported, on its online reauthorization application, that the sale of hot and/or cold freshly prepared foods that are ready-to-eat is 77 percent of the firm’s total gross retail sales. Pursuant 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. Although there are a few unprepared items presented for customer purchase, the March 30, 2019, store visit documentation and photographs shows that the firm has a steam table with prepared food items for serving, advertising of hot prepared food items, a large kitchen prep area, and presents itself mainly as a take-out establishment.

With regard to Appellant’s contention that their wholesale food items qualify under CFR 278.1(b)(v) and (vi) as a wholesale food concern and/or co-located wholesale food concern, SNAP regulations at 7 CFR 278.1(b)(v) and (vi) state “(v) *Wholesale food concerns*. Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purpose of the program, provided such concerns meet the criteria specified in paragraph (c) of this section. (vi) *Co-located wholesale food concerns*. No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem SNAP benefits unless it meets the criteria applicable to all retail firms...” Appellant reported that staple foods was one (1) percent of its total gross retail sales. Store visit documentation also shows that the Appellant was deficient in three of the four staple food categories carrying no items in the dairy products category, missing one stocking unit in the bread or cereals category and missing one variety and three stocking units in the meats, poultry and fish category.

Internal agency policy further clarifies SNAP regulations and states “An establishment that includes separate businesses that operate under one roof and have commonalities such as: a single management structure, shared space, logistics, back accounts, employees, and inventory, is considered to be a single entity. The different businesses cannot be evaluated separately; they are one establishment and the entire nature and scope of the businesses must be taken into account when evaluating it for program eligibility...”

The authorization of a firm 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. 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 Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. On the day of the contractor visit, the evidence supported that the firm is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The establishment 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 firm may be available for sale fresh, it is more likely true than not true that the majority of foods in the establishment are actually sold prepared and/or hot and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a firm is considered a restaurant and is not eligible for SNAP participation as a retail food store.

Therefore, Appellant's firm does not qualify as a retail food store for purposes of SNAP participation.

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." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

### **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the application of Piedras Negras Tortilla to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective June 27, 2019.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you reside or are 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 (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

September 10, 2019