

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

Pizza Hut #27068,

Appellant,

v.

Case Number: C0208850

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Pizza Hut #27068 to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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

The Appellant applied to participate in the SNAP as an authorized retailer on April 5, 2018. In a letter dated April 19, 2018, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm’s application was denied. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked April 26, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review 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, might 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant 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(b)(1)(iv) states, in part:

Ineligible firms. 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 ... 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. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations [Emphasis added.]

7 CFR § 271.2, states, in part:

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. Establishments that

include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

7 CFR § 271.2 defines staple food, in part, as:

... those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... **Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter.** Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... 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.

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The firm's take and bake pizza includes all four (4) of the staple food groups. This is similar to prepared cold sandwiches and salads which are currently considered eligible foods.
- The fact that other firms are allowed to sell "take and bake" pizza under the SNAP but restaurants in Texas are not allowed to participate in SNAP is blatantly unfair.
- Our company has more locations than any grocery store or "take and bake" pizza which would allow easier access to the SNAP and drive down food prices.
- There is a need for an exception to the 50 percent rule.

The preceding may represent only a brief summary of the 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 central issue in this case is whether Pizza Hut #27068 is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Pizza Hut #27068 does not qualify for the SNAP as it is primarily a dine-in/carryout restaurant.

The case record documents that in reaching a denial decision, the Retailer Operations Division relied upon information submitted by the Appellant in its application dated April 5, 2018. The Appellant's application documents that the firm's hot food sales comprised approximately 94 percent of its annual gross retail sales.

The Appellant states that the firm's take and bake pizza includes all four (4) of the staple food groups. Regarding the Appellant's contention, multiple ingredient food items such as cold pizza that requires additional home preparation are counted under only one food group depending upon the main ingredient. This is found in the definition of staple foods in 7 CFR § 271.2. However, in order to be eligible for the SNAP, "take and bake" pizza firms must not have hot food sales (or sales of prepared food not intended for home preparation and consumption) that exceed 50 percent of their total gross retail sales. The Appellant may consider this "unfair" but the regulations clearly distinguish the conditions of eligibility for what actually constitutes two different business models. In addition, whether or not there are more Pizza Hut locations than locations of grocery stores and other SNAP eligible firms is not relevant.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part "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." [Emphasis added.]

The Appellant requests an exception to 7 CFR § 278.1(b)(1)(iv). However, the only exception to 7 CFR § 278.1(b)(1)(iv) is for states that choose to operate a restaurant meals program for the elderly, disabled and homeless under 7 CFR § 278.1(d). The State of Texas does not operate such a program.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in hot and cold prepared food not intended for home preparation and consumption. In fact, the Appellant's application documents that the firm's hot food sales constitute approximately 94 percent of its annual total gross retail sales. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Pizza Hut #27068 is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

July 5, 2018