

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

Showcase Meats & Seafood Co LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223454

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 Showcase Meats & Seafood Co LLC to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six (6) months from October 1, 2019, the effective date of the denial. However, if your business model remains the same and you reapply, your application may be denied again for the same reason.

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 a 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

Showcase Meats & Seafood Co LLC had previously been SNAP authorized as a retail delivery route from September 14, 2009 to August 19, 2019. In August 2019, as part of a routine reauthorization process, the Appellant was withdrawn from SNAP for failure to cooperate as the Retailer Operations Division determined that the Appellant did not provide complete or clear information in response to requests made during the reauthorization process. The effective date of the withdrawal was August 20, 2019. The Appellant did not request an administrative review of the involuntary withdrawal.

On September 12, 2019, the Appellant submitted a new application for participation in the SNAP. The new application identified the firm as a delivery route that sold 100 percent staple foods consisting of meat, poultry and seafood. Through supporting documents provided by the Appellant, the Retailer Operations Division determined that the firm did not meet the definition of a retail food store under 7 CFR 271.2 and 278.1(b)(1) as it was an ineligible wholesale distributor. Therefore, the firm's application was denied in a letter dated October 1, 2019. The letter informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked October 4, 2019, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for review was granted in a letter dated November 5, 2019 and the Appellant was informed it could submit any additional information in support of its request for review by November 26, 2019. However, the Appellant contacted the assigned administrative review officer by telephone on November 6, 2019 and stated that the owners wanted the review conducted immediately and waived the extension of time to submit additional supporting information. This was also confirmed by an e-mail dated November 6, 2019 from the Appellant.

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 withdraw or deny the authorization of any firm if it fails to meet SNAP eligibility criteria.

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

(k) Denying authorization. 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)(i)(A) states:

An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will 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 as defined in § 271.2 of this chapter, including perishable foods

in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(c) states:

Wholesalers. A wholesale food concern may be authorized to accept coupons only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet:

- (1) For one or more specified authorized drug addict or alcoholic treatment programs,
- (2) For one or more specified authorized group living arrangements,
- (3) For one or more specified authorized shelters for battered women and children,
- (4) For one or more specified authorized nonprofit cooperative food-purchasing ventures,
- (5) For one or more specified authorized public or private nonprofit homeless meal providers, or
- (6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons.

No firm may be authorized to accept and redeem coupons concurrently as both a retail food store and a wholesale food concern. Authorizations of wholesale food concerns granted prior to January 28, 1982 shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the program after that date must reapply for authorization in accordance with the provisions of this paragraph.

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 authorization for authorization in the program for a minimum period of six months from the effective date of the denial.

In addition to the above regulatory guidance, the agency issued new guidelines regarding delivery routes to the Retailer Operations Division in November 2018. Under these guidelines, firms that hire contractors are operating as a wholesale distributor, not a retailer, and are not considered eligible for authorization.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review and in a telephone conversation with the administrative review officer, in relevant part:

- The firm was previously authorized dating back to 2010 and has never operated as a wholesale distributor in its history. Instead, it operates as a house-to-house trade route.
- State and local licenses and other documents provided by the firm show that it is a retail business offering free delivery of food.
- The firm uses contracted sales people to deliver the food and they get paid a commission. The firm purchases food from wholesalers and then sells the food at retail prices to the contracted sales drivers. The contractors keep any profits from their sales to customers.

- Because of the denial decision, the firm has lost all its contractors and does not currently have any drivers.
- The firm is being hurt economically because of the denial decision.

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

Independent Contractors as Drivers

In reaching its decision to deny the firm's application, the Retailer Operations Division reviewed documents received from the Appellant which included the following:

- A completed delivery route form stating that the firm had no employees and instead utilized three (3) independent contractors as drivers. An owner wrote on the form that "they are independent contractors. We do not give paychecks. They are responsible for their own taxes."
- Three (3) signed subcontract agreements stating, in part, that the driver is an independent contractor and is in no way an employee or agent of the firm.

A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Showcase Meats & Seafood Co LLC does operate as a wholesale distributor **as defined by FNS** in that it has contractors, not employees, who make the food deliveries.

Showcase Meats & Seafood Co LLC reported that it had three (3) contract drivers and no employees associated with the firm. Although the Appellant firm owners, the State of Arizona, local governments or other entities may consider the firm to be a retailer, under procedures established by FNS in November 2018, firms that use contractors as delivery drivers are considered by FNS to be operating as a wholesale distributor, not a retailer and are no longer considered eligible for SNAP authorization. Such firms shall be denied under 7 CFR. § 278.1(k)(1) or withdrawn under 7 CFR § 278.1(l)(1)(ii).

It should also be noted that as part of the documents submitted to the Retailer Operations Division, the Appellant also provided a firm brochure labeled "Showcase Meats & Seafood Co. LLC – Wholesale & Retail Warehouse – 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Tucson, AZ 85705." This brochure indicates that the Appellant considered itself, at least in part, to be a wholesale warehouse. Nevertheless, the use of independent contractors as drivers is conclusive that, for SNAP authorization purposes, the firm is considered to be a wholesale distributor and cannot be authorized as a retail delivery route.

Basis of Determination

The Appellant states that all of its contractors have left due to the denial and it is willing to make changes in its business model to obtain SNAP authorization. With regard to this contention, it is

important to clarify for the record that the purpose of this review is to either validate or to invalidate the denial decision of the Retailer Operations Division. This review is **limited** to the circumstances that existed at the time of the site visit which forms the basis of the Retailer Operations Division's decision. The Appellant may reapply six (6) months from the effective date of the denial and any changes to its business model will be taken into consideration at that time.

Hardship to the Firm

The Appellant states that the firm is being hurt economically by the denial decision. With regard to this contention, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible economic hardship to either the owners personally or to the firm. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Showcase Meats & Seafood Co LLC is **sustained**. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six (6) months after October 1, 2019, the effective date of the denial decision. However, if the business model remains the same and you reapply, your application may be denied again for the same reason.

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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

November 14, 2019