

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

Sweet and Sweeter, Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203827

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Retailer Operations Division to deny the application of Sweet and Sweeter, Inc. (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division 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 October 18, 2017.

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 August 22, 2017, the Retailer Operations Division 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 was not a restaurant. Appellant replied to the Retailer Operations Division in a subsequent letter.

In a letter dated October 18, 2017, the Retailer Operations Division 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 hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carryout or on- premises consumption and requires no additional preparation, are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided Appellant's application. 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 October 30, 2017, Appellant appealed the Retailer Operations Division 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 insufficient 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 that prepared foods do not comprise the majority of Appellant's sales. Appellant provided a chart that states the majority of its sales from January to August 2017 were in bread and dairy items. These explanations may represent only a brief summary of Appellant's contentions.

ANALYSIS AND FINDINGS

A review of the ROD case file supported Appellant was a retail food store. Appellant's application and the store visit documentation indicate that the store derived more than 50 percent of its projected annual sales from the sale of staple foods, as currently defined, to meet Criterion B. Accordingly, it is unnecessary to address Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Sweet and Sweeter, Inc. to participate as an authorized SNAP retailer is reversed. The application must be approved if the firm is otherwise eligible for program authorization under all other applicable provisions and requirements for program participation.

RIGHTS AND REMEDIES

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

December 5, 2017