

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Valley Seafood Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214741

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Valley Seafood Inc. (“Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of the withdrawal.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Valley Seafood Inc. to participate in SNAP.

AUTHORITY

7 U.S.C. § 2023 and 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 firm, Valley Seafood Inc., was originally authorized to participate as a retailer in SNAP on April 5, 1979. In accordance with regulation, each SNAP-authorized firm is required

to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

On October 11, 2018, the Appellant firm submitted the required reauthorization application, FNS-252-R, Supplemental Nutrition Assistance Program Reauthorization Application for Stores. On this document, the Appellant reported that less than 1 percent of its gross retail sales were from the sale of staple foods and that over 99 percent of total gross retail sales were in the sale of hot foods or cold prepared foods. The application also reported that the firm carried no breads and/or cereals, dairy products, or vegetables and/or fruits. The only staple food category in which the firm reported to meet eligibility requirements was meat, poultry, or fish. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on November 7, 2018, to verify the firm's reported staple food stock.

Based upon the information self-reported by the Appellant on the reauthorization application and the store visit report and photos, the Retailer Operations Division concluded that Valley Seafood Inc. was primarily a restaurant rather than a grocery establishment. In a letter dated November 28, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because the firm did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations.

In a letter postmarked December 6, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision to withdraw the firm's SNAP authorization. The request was considered timely and was therefore granted.

STANDARD OF REVIEW

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the Appellant has the burden of providing relevant evidence that 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 untrue.

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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may 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 specification 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...for the time period specified in paragraph (k)(2) of this section.

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

FNS shall deny the application of any firm if it determines that:

(2) The firm has failed to meet the eligibility requirements 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.

7 CFR § 271.2 defines a retail food 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]** 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]** 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter...

7 CFR § 271.2 defines staple food as:

...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

* 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>.

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.

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment...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...including perishable foods in at least *[two]** of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) states, in part:

In order to qualify under [Criterion A] firms shall:

- (A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than *[three]** 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 and at least one variety of perishable foods in at least *[two]** staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...
- (B) Offer for sale perishable staple food items in at least *[two]** staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and
- (C) *[Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be*

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*interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items...such as...cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.]**

7 CFR § 278.1(b)(1)(iii) states, in part:

In order to qualify under [Criterion B] firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income...

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

...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 retail 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... [Emphasis added.]

APPELLANT'S CONTENTIONS

In the request for administrative review, the Appellant contended the application was filled out in error. The Appellant also submitted an 11-page report breaking down sales from December 1, 2017, through December 5, 2018, into the following categories: Beverage, Beverage Ntx, Clams, Cooler Ntx, Cooler Txbl, Dinner Combos, Dry Goods, Freezer N/Tax, Fresh Fish, Fried Seafood, Gift Cert Sold, Lobster, Sand Combos, Shrimp, Snacks, and Specialty Tools. Within each of these categories, some items were indicated as "Food Stamp," meaning SNAP-eligible, while others were designated as not being SNAP eligible.

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The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time the Retailer Operations Division rendered its decision.

It should be noted that 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, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50 percent of a firm's sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule amended existing regulations by clarifying that any foods cooked or heated on-site by the retailer **before or after** purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50 percent threshold. This portion of the rule was implemented by FNS on October 16, 2017.

On the SNAP reauthorization application, Appellant reported that over 99 percent of the firm's total retail sales were in the sale of hot foods or cold prepared foods, indicating the firm is ineligible as a restaurant under SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv). The contractor's store visit report, photos, and sketch confirm that a significant portion of the firm's business is in the sale of these foods. The store visit photos show that the firm has a large kitchen area and/or food preparation area with heating sources. Additionally, much of the signage in the store provides pricing for cooked foods.

The Appellant contends that the SNAP application was completed in error, and submitted an 11-page sales report breaking down sales from December 1, 2017, through December 5, 2018, into the following categories: Beverage, Beverage Ntx, Clams, Cooler Ntx, Cooler Txbl, Dinner Combos, Dry Goods, Freezer N/Tax, Fresh Fish, Fried Seafood, Gift Cert Sold, Lobster, Sand Combos, Shrimp, Snacks, and Specialty Tools. Within each category, some items were indicated as "Food Stamp," meaning SNAP-eligible, while others were designated as not being SNAP eligible.

However, Appellant's report does not appear to be complete, or to correctly categorize items for sale. For example, store visit photos show that the firm sells cooked items which do not appear on the report, such as calamari strips, clam strips, battered mushrooms, mozzarella sticks, chicken nuggets, and steamed clams. Also, items such as breaded oysters and devil crab are listed as SNAP-eligible on the report, but at the same time are shown on store signage as being sold cooked. Given the inconsistency of the report as compared to the store visit information, the report is not reliable or sufficient as evidence that rebuts the self-reported sales figures on the

reauthorization application, which was certified and signed by the Appellant owner as truthful and complete. The Appellant provided no other evidence in support of the case.

CONCLUSION

Given the inconsistency of the Appellant's sales documentation as compared to the reauthorization application and the store visit report and photos, the preponderance of the evidence supports the Retailer Operations Division's determination that the firm is a restaurant under SNAP regulations. Therefore, it is the determination of this review that the Appellant is a restaurant, as provided under SNAP regulations, and therefore does not meet eligibility requirements under Criterion A or B in accordance with 7 CFR § 278.1(b)(1)(iv).

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Valley Seafood Inc. to participate as a retailer in SNAP is sustained. Pursuant to the Food and Nutrition Act of 2008, as amended, 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Valley Seafood Inc. shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

May 2, 2019