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

Wilson's Grille,	
Appellant,	
v.	**Case Number: C0209721**
Retailer Operations Division,	
Respondent.	

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 denied the application of Wilson's Grille (hereinafter "Appellant") to participate 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 denial.

ISSUE

The issue accepted for review is whether or not 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 denied the retailer application of Wilson's Grille.

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

In a letter dated May 23, 2018, the Retailer Operations Division denied the Appellant's application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a store visit on March 25, 2018, as well as information provided on the firm's application and evidence submitted by the Appellant.

The Retailer Operations Division determined that the firm was primarily a restaurant because more than 50 percent of its gross sales came from the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

As a result of being found ineligible for participation in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked May 29, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 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)(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...

[*] 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.

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 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)(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 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 and 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.**.. [Emphasis added.]

APPELLANT'S CONTENTIONS

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

- The store is located in an area that really needs SNAP services.

[*] 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.

- There have been many letters sent by FNS and an inspector has been to the store. However, inconsistent information has been related.
- The firm has more than 50 percent of its sales in the sale of eligible foods. When the firm first submitted an application, it was selling more prepared foods, but now that the store has been open for some time, the mix has changed.
- East Cleveland is in desperate need of the Appellant's services and the Appellant respectfully requests that SNAP authorization be granted so that the Appellant can further serve the community.

In support of its request for review, the Appellant submitted a customer sales history for 2018; three inventory invoices from wholesale vendor Economy Produce & Vegetable Co., Inc.; and three inventory receipts from Harb Produce Stands.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final 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 contractor's store visit and at the time the Retailer Operations Division rendered its decision. After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and documentation submitted by the Appellant, it is the determination of this review that the Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

As the Appellant has rightly noted, there has been a great deal of correspondence between the Retailer Operations Division and the Appellant. Along with the firm's original application, dated December 26, 2017, the Appellant submitted a second application dated March 2, 2018. Both of these applications were filed online. The Appellant also appears to have submitted at least two, possibly three, partial or full hand-written applications in January, February and May 2018. Along with these various SNAP applications, the Appellant submitted eight inventory invoices from Economy Produce & Vegetable Co., Inc.; a one-page customer sales history from February to April 2018; and a two-page document detailing gross sales for the period March 9, 2018, through April 30, 2018.

Much of the confusion in this case is a result of the Appellant's contradictory information provided in the various SNAP application documents. When the Appellant originally applied for SNAP participation in December 2017, it claimed that 50 percent of its total sales came from the sale of hot food. As noted earlier, and detailed in 7 CFR § 278.1(b)(1)(iv), a firm that has more than 50 percent of its total gross sales in hot and/or cold prepared foods is considered a restaurant and is not eligible for SNAP participation.

Because the Appellant originally claimed that 50 percent of its sales were from hot foods, the Retailer Operations Division sought to obtain further information from the Appellant. It sent several letters to the Appellant and also sent a contractor to visit the store in an effort to determine whether the firm was a retail food store or a restaurant.

On one of the handwritten applications, the Appellant estimated that it had total annual sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 84 percent was estimated to come from hot foods and cold prepared foods. On another hand-written application, the Appellant stated that it had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales, of which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 75.7 percent were in the sale of hot and cold prepared foods. On yet another application, dated March 2, 2018, the Appellant claimed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales, but 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in hot foods or cold prepared foods.

After receiving so many contradictory pieces of information, the Retailer Operations Division determined that a store visit was necessary to help clear up the confusion. This store visit, which occurred on March 25, 2018, revealed that the store sold very few staple foods. From all indications from the contractor's report, the store is actually a restaurant specializing in hot tamales, fish, and other prepared meals. It appears that the firm added a couple of small shelving units of canned and boxed goods with the hope of becoming authorized in SNAP. These staple foods appear to be a very small portion of the firm's overall business. The chief objective of the store seems to be the sale of prepared meals. Additionally, all online advertising for the store strongly suggests that it is a restaurant rather than a grocery establishment.

Unfortunately, none of the Appellant's documentation persuades this review to believe that the firm is anything other than a restaurant. None of the evidence, specifically the sales summaries, identifies prepared food sales vs. staple or accessory food sales. Further, the firm's inventory invoices offer no insight as to whether the food purchased by the firm was sold as-is or was used in the preparation of meals.

In its final communication with the administrative review officer, the Appellant claimed that over 50 percent of its sales were in the sale of staple foods. Based on the results of the store visit, this claim is not believable. Additionally, the Appellant offered no evidence to support this assertion.

It is the finding of this review that the two hand-written applications described above, are likely the most accurate pieces of information provided by the Appellant. These show hot and cold prepared food sales as either 84 percent or 75.7 percent of the firm's total sales. Accordingly, this review finds that the firm is a restaurant and is not eligible for SNAP participation.

Hardship to SNAP Households

The Appellant argues that the store is located in an area of Cleveland that really needs a store that is authorized to accept SNAP. The Appellant claims that the community is in desperate need of the Appellant's services and requests that SNAP authorization be granted so that the Appellant can further serve the community.

Unfortunately, these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Wilson's Grille to participate as a retailer in SNAP is sustained.

In accordance with 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 May 23, 2018, which is the effective date of the denial.

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.

JON YORGASON July 11, 2018
Administrative Review Officer