

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

Wiso’s Crabs & Seafood,

Appellant,

v.

Case Number: C0237130

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 there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Wiso’s Crabs & Seafood (hereinafter “Wiso’s Crabs & Seafood” or “Appellant”) 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 of the Code of Federal Regulations (CFR) part 278, in its administration of the SNAP when it withdrew the authorization of the Appellant to participate in the SNAP as an authorized retailer.

AUTHORITY

7 USC § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 submitted a reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* which was signed on October 11, 2019. The information provided to the Retailer Operations Division reports that 1 percent of the firm’s gross retail sales were in staple foods, 3 percent were in accessory foods, 1 percent were in non-foods, and 95 percent were in hot and cold prepared foods. On July 25, 2020, an on-site store visit was conducted by an FNS contractor in an effort to evaluate the firm’s conditions and inventory. The store visit observations indicate that the Appellant firm is primarily a restaurant

because more than 50 percent of its total gross retail sales are from “heated foods” and/or “prepared foods.” “Heated foods” are foods cooked or heated by the retailer before or after purchase. “Prepared foods” are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout.

In a letter dated September 22, 2020, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations and is therefore, ineligible to participate in the SNAP as an authorized retailer. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

In a letter postmarked September 29, 2020, the Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The request for review was granted by letter dated October 13, 2020, and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 271.2 reads, in part: Staple food means 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 . . . 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 . . . 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(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:

- (A) The firm's continued participation in the program will not further the purposes of the program;
- (B) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (C) 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)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

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 § 278.1(b)(1)(i) states, in part:

An establishment...shall...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 § 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.

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 following represents a brief summary of the Appellant’s contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

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

- The Appellant disagrees with the determination made from the July 25, 2020 store visit that the firm is a restaurant. The Appellant requests reconsideration of the SNAP authorization withdrawal determination.
- The firm is not a restaurant as less than 50 percent of its total gross retail sales are from “heated foods” and/or “prepared foods.”
- Most of the Appellant’s sales are from live and frozen seafood and other staple foods that customers take home to prepare themselves.
- Because of the COVID-19 pandemic, some of the items the firm normally carries may have been sold out at the time of the store visit as was the case in many retail and grocery stores across the nation.

In support of its contentions, the Appellant submitted a listing of staple foods and cash register z-tapes for April 19 – April 26, 2020, May 10 – May 17, 2020, May 24 – 31, 2020, August 16 – August 23, 2020, and one containing no date (Note: As no date was provided, this z-tape was not analyzed by FNS).

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations as amended; those requirements of law cannot be waived.

The Appellant has provided several contentions including a claim that less than 50 percent of its total gross retail sales are from “heated foods” and/or “prepared foods.” Most of the Appellant’s sales are from live and frozen seafood and other staple foods that customers take home to prepare themselves.

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 clarified 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.

The firm’s SNAP authorization was withdrawn because it was determined the business 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. This decision was based on information on the reauthorization application submitted by the owner, an onsite visit by FNS-contracted staff, analysis by the Retailer Operations Division, and analysis of the information provided in support of the request for administrative review. The evidence under review supports that the firm did not meet SNAP eligibility criteria to be an authorized retail food store when it was withdrawn. In accordance with the regulations, 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.

There is no evidence in the inspection report and photographs of the July 25, 2020 store visit, nor in the information provided by the Appellant, that indicates that Wiso’s Crabs & Seafood is not primarily a restaurant. The Appellant’s SNAP reauthorization application provided to the Retailer Operations Division states that 1 percent of the firm’s gross retail sales were in staple foods, 3 percent were in accessory foods, 1 percent were in non-foods, and 95 percent were in hot and cold prepared foods. An analysis of the cash register z-tapes provided by the Appellant also indicates that more than 50 percent of the firm’s total gross retail sales are from heated foods and/or prepared foods. The menu display boards and signage located in the store show that the store sells a variety of hot foods and/or cold prepared foods (dinner platters, lunch specials, fried seafood, steamed seafood, chicken wings, chicken fingers, etc.). The store also has a kitchen area and several tables with chairs for customers to utilize while eating in-store cooked/hot and cold prepared foods. Therefore, by definition the Appellant is an ineligible firm.

There is sufficient evidence to support the Retailer Operations Division’s determination to withdraw the authorization of Wiso’s Crabs & Seafood to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.1 (b)(1)(iv).

CONCLUSION

After review of all the documentation in the record, the decision by the Retailer Operations Division to withdraw the authorization of Wiso's Crabs & Seafood to participate in the SNAP as a retail food store is sustained. The preponderance of the evidence supports that the Appellant is an ineligible firm as per the definition cited herein. Ineligible firms 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. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the withdrawal of Wiso's Crabs & Seafood shall become effective 30 days after receipt of this letter.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

December 9, 2020