

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

**Zion Health Restaurant,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0236979**

**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 (hereinafter Retailer Operations) to deny the application of Zion Health Restaurant (hereinafter Appellant) to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of SNAP, when it denied the application of Appellant to participate in SNAP.

**AUTHORITY**

7 U.S.C. § 2023, and its 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**

By letter dated September 8, 2020, Retailer Operations denied Appellant's application to participate as an authorized SNAP retail food store because Appellant is not a retail food store as defined by SNAP regulations. Specifically, the denial letter states that firms that have more than 50% of their total gross sales in heated and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as a SNAP retail food store. 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. The letter states Appellant is primarily a

restaurant based on information provided in its application and/or information obtained from a store visit on August 26, 2020. SNAP Regulations at § 278.1(k)(2) require firms denied authorization for failure to meet Program eligibility criteria not be eligible to re-apply for SNAP participation for a minimum period of 6 months from the effective date of the denial.

By letter postmarked September 23, 2020, Appellant's ownership requested administrative review of the denial determination. The appeal request for review was granted by letter dated October 8, 2020. In an email dated October 9, 2020, Appellant's ownership submitted additional information in support of its request for administrative review.

## **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 sufficient to support a conclusion that the matter 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 7 CFR § 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% 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% of their total gross retail sales in 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.

The definition of accessory food items at 7 CFR § 271.2 states, in part: 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(k)(2) states, in part: A retail food store or wholesale concern denied approval to accept and redeem benefits because it does not meet criteria for approval, shall not be eligible to submit a new application for authorization in the Program for a minimum period of 6 months from the effective date of the denial.

### **APPELLANT'S CONTENTIONS**

In its request for administrative review and subsequent email, Appellant's ownership submitted the following summarized contentions, in relevant part:

- Based on the prediction from the application before the business opened, the prepared foods should be our main source of income. After we opened the restaurant, we approached new challenges. The data shows that the outcome of our prediction did not reach 40% from our overall income.
- Most of our customers are in the EBT program and we are not making much profit due to EBT.
- We ask for your kindness to reconsider our company getting the SNAP program for the community.

In support of these contentions, the Appellant submitted a 9-page sales report and 12 pages of invoices.

These contentions may represent only a brief summary; however, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically listed here.

### **ANALYSIS AND FINDINGS**

For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. There is no doubt that Appellant has SNAP-eligible food available for sale. The central issue is whether actual sales of prepared foods comprise more than 50% of the store's total gross retail sales.

With regard to Appellant's contentions, the invoices and sales report provided do not support that the majority of its sales, at the time of the denial, were primarily from the sale of non-prepared food. The sales report provided was for August 19, 2020 through September 19, 2020, and is for the period both prior to, and subsequent to, the denial determination. The administrative review is limited to the circumstances at the time of the denial determination. Appellant's application reports only 15% of its sales are in staple foods, 20% in accessory foods, 5% in non-food, and the majority of its sales are in hot and/or cold prepared foods at 60%. The evidence in the inspection report and photographs from the August 26, 2020, store visit confirms Appellant is primarily a restaurant. The photographs from the store visit show Appellant has a kitchen with an industrial refrigerator, deep fryers, stove, ovens, food serving equipment for a hot and cold food buffet, bulk ingredients used by Appellant and not for retail sale, multiple sets of tables and chairs for customer seating and on-site consumption, and outside signage and social media websites that identify Appellant as a restaurant, with reviews focused on hot, ready-to-eat

food. In sum, the evidence fails to demonstrate that Appellant's initial self-declaration on its application that it meets the definition of a restaurant is in error.

It should be noted that on December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in SNAP," at 81 Federal Register 90675 that impacted the eligibility of firms that sell heated or prepared foods. If more than 50% 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% threshold. This portion of the rule was implemented by FNS on October 16, 2017.

It is also important to note that 7 CFR § 271.2 stipulates that 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. In addition, 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.

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Retailer Operation. On the day of the store visit, the evidence supported that Appellant is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

Appellant is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although non-prepared, SNAP-eligible food may be available for sale, it is more likely true than untrue that the majority of Appellant's food is actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1), such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

Appellant contends most of its customers are in the EBT program and requests reconsideration to accept SNAP for the community. As Appellant is not eligible for authorization, this contention is insufficient to reverse the earlier determination.

There is sufficient evidence to support Retailer Operations' determination to deny the authorization of Appellant to participate as an authorized retailer in 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 SNAP Regulations at § 271.2 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.1(b)(1)(iv).

## CONCLUSION

Based on the analysis above, the determination by Retailer Operations to deny the application of Appellant to participate as a SNAP retail food store is sustained. In accordance with SNAP Regulations at § 278.1(k)(2), Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of 6 months from September 8, 2020, the effective date of the denial. As such, the 6-month denial period has passed and Appellant may submit a new application for SNAP authorization at any time. However, if your business model remains the same and you reapply, your application may be denied for the same reasons it was denied.

Questions regarding the application process can be answered by visiting the USDA, FNS, SNAP Retailer website at <https://www.fns.usda.gov/snap/retailer> or by calling the SNAP Retailer Service Center at 877-823-4369. Operational questions may be directed to Chandra Singleton at 312-533-7750 or [chandra.n.singleton@usda.gov](mailto:chandra.n.singleton@usda.gov).

## RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. 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 Appellant's owners 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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.

KIM DAMERON  
Administrative Review Officer

August 16, 2021