

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

Doos Seafood & Deli,)	
)	
Appellant,)	
)	
v.)	Case Number: C0193228
)	
Retailer Operations Division)	
)	
Respondent.)	
_____)	

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Doos Seafood & Deli to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(k)(1), (2) and (5) in its administration of the SNAP when it denied the application of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and the 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 applied to participate in the SNAP as an authorized retailer on August 9, 2016. In a letter dated August 19, 2016, the Retailer Operations Division informed the Appellant that it was ineligible for SNAP as it did not meet the definition and requirements of a retail food store as provided in 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. The letter also informed the Appellant that it could not submit a new

application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter dated August 24, 2016, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's denial of SNAP authorization. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(k) establishes the authority upon which FNS may deny an application from a retail food store or wholesale food concern.

7 CFR § 271.2, states, in part, that:

*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 under § 278.1(b)(1) of this chapter. [Emphasis added.]*

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

*Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation... 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.** [Emphasis added.]*

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

An establishment ... shall normally be considered to have food business of a nature and extent that 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 as defined in §271.2 ... including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales ... in staple foods (Criterion B.)

7 CFR § 271.2, defines *Staple food*, in relevant part, as:

*... Those food items **intended for home preparation** and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. [Emphasis added.]*

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

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

- (A) Offer for sale ... qualifying staple food items on a continuous basis ... on any given day of operation, **no fewer than three different varieties of food items in each of the four staple food categories....** [Emphasis added]*
- (B) Offer for sale perishable staple food items in at least two staple food items. 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 be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.... Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, 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 [Emphasis added.]*

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. [Emphasis added.]

APPELLANT'S CONTENTIONS

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

- Based upon the firm's sales records, it is clear that its sales of hot and/or cold ready-to-eat foods that are intended for immediate consumption do not comprise more than 50% of its total sales.
- As is clear from photographs submitted by the Appellant, Doos Seafood & Deli offers for sale sufficient grocery items to qualify for SNAP authorization.
- The community perceives the firm to be a grocery market.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Appellant's Application

The Appellant applied for SNAP authorization on August 9, 2016. In its FNS-252E, *Supplemental Nutrition Assistance Program Application for Stores*, dated July 27, 2016, the Appellant stated that 50 percent of its gross retail sales came from the sale of staple foods, 10 percent came from the sale of "other" foods such as snack foods, soft drinks, or condiments, and 40 percent came from hot foods.

Store Visit

A store visit was conducted by an FNS contractor on August 13, 2016 to document the firm's operations and food inventory to be used in determining its eligibility for authorization as a SNAP retailer. The administrative record documents that the Retailer Operations Division determined that the Appellant firm was an ineligible restaurant, as defined by 7 CFR § 278.1(b)(1)(iv), primarily based on the results of the store visit which documented that:

- The large signage outside of the firm advertises various "Louisiana Style Spicy & Juicy" hot food items.
- Inside the firm, there is a large menu board next to the serving counter advertising a multitude of meal deals, including po'boy sandwiches priced from \$9.99 to \$12.99; half po'boy box meals ranging from \$5.99 to \$7.99; fried rice menu items ranging from \$5.99 to \$7.99; fried seafood platters that come with French fries, salad and a drink ranging from \$ 10.99 to \$12.99; wings with or without fried rice [3 piece, 10 piece, 30 piece] priced from \$4.99 to \$24.99; a side items menu listing

- French fries, salads, hush puppies, boiled potatoes, corn, egg rolls and broccoli.
- A menu board on the wall behind the serving counter advertises boiled seafood box specials.
- Flyers posted on the display cases advertise crawfish platters with corn & a potato for \$ 8.99; snow crab plate with corn, potato, broccoli, and seafood box special with 2 crab legs, 10 shrimp, corn, and a potato for \$14.99.
- The area for staple food sales includes a small display case with fish sold by the pound. A small corner of the firm has been set up since the last store visit with signs labeled “Cajun Grocery” and “Fresh Seafood.” The amount of staple food in this area is unlikely to generate more in gross retail sales than the restaurant area of the firm.

Documents Submitted by the Appellant

As evidence that the firm is not a restaurant, the Appellant provided copies of its Georgia and City of Lilburn licenses indicating that the firm is a seafood market. Regarding this contention, a firm can have aspects of both a seafood market and a restaurant and its state and local licensing may reflect this. It should also be noted that in a prior application, the Appellant also submitted other licenses which indicated the firm is a “limited-service restaurant.” It is not in dispute that Doos Seafood & Deli sells both SNAP ineligible foods (hot and/or cold ready-to-eat prepared food) and staple foods that could be eligible for purchase with SNAP benefits if the firm was authorized. In this case, the Retailer Operations Division determined that the firm is primarily a restaurant and is therefore an ineligible firm as defined by 7 CFR § 278.1(b)(1)(iv).

The Appellant also submitted copies of its Georgia *Sales and Use Returns* filings and its purported internal sales reports as evidence that the majority of its gross retail sales were in staple foods. However, the Retailer Operations Division concluded that the data from these records was inconclusive to support the firm’s SNAP eligibility as the store visit photographs show a much more limited amount of staple food for sale than what would be necessary to support the figures shown in the firm’s filings and sales records. In addition, the photographs submitted by the Appellant do not differ significantly from the store visit photographs and therefore do not add any probative value to the case.

The Appellant provided copies of purported customer surveys indicating that its customers think of the firm as a grocery store. Regarding this contention, it should be noted that FNS’s determination is based on the SNAP regulations and internal agency policy and not on subjective customer opinions. The Retailer Operations Division determined that the firm markets itself as a primarily a take-out restaurant. The firm’s website states that Doos Seafood & Deli was created as a “true family style, high quality Cajun food **restaurant** with **home-cooked** Cajun seafood in a location that no one thought would succeed. Friends, family and business men pleaded with 7 U.S.C. 2018 (b)(6) & (b)(7)(c), not to open the first Doos Seafood & Deli location so they wouldn’t lose their life savings in a bad **restaurant** investment. Whether it is for **lunch, dinner, a special occasion or just to get a quick bite to eat**, we have something perfect for you. [Emphasis added.]

Summary

A review of the entire case record indicates that it is more likely true, than not true, that the Appellant has more than 50 percent of its total gross sales in hot and/or cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that “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.” By definition these types of firms are considered restaurants and are ineligible for SNAP authorization. Therefore, a preponderance of the evidence indicates that the Retailer Operations Division correctly denied the Appellant’s application for the SNAP.

Eligibility to Submit New Application

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.”

In addition, 7 CFR § 278.1(k)(2) states, in part, that “any firm that has been denied authorization . . . 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.” Based on the law and SNAP regulations, there is no agency discretion to allow a firm to submit a new application less than six months from when a firm is denied for not meeting the eligibility requirements for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of the Appellant, Doos Seafood & Deli, is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from August 19, 2016, the effective date of the denial.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

/S/
RONALD C. GWINN
ADMINISTRATIVE REVIEW OFFICER

October 18, 2016
DATE