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

Paul's Fish Market,	)	
Appellant,	)	
	)	
	)	**Case Number: C0194132**
v.	)	
	)	
	)	
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 a finding that the initial decision by the Retailer Operations Division (Retailer Operations) to deny the application of Paul's Fish Market (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retail food store by letter dated September 8, 2016.

CASE CHRONOLOGY

The record shows that by letter dated March 20, 2015, Retailer Operations withdrew Appellant's previous authorization to participate as a retail food store in SNAP. This withdrawal was based on information obtained during an onsite visit conducted on February 10, 2015, as well as information provided on Appellant's reauthorization application. On March 27, 2015, Appellant appealed Retailer Operations' decision and requested an administrative review of the withdrawal action. By letter dated May 4, 2015, administrative review sustained the withdrawal determination. Appellant could not reapply for a period of six months.

Appellant submitted a new application for authorization as a SNAP retail food store. A FNS onsite contracted visit was conducted June 21, 2016. Retailer Operations, by letter dated July 5, 2016, requested that Appellant submit copies of its quarterly tax filings with the State Tax Revenue agency for the past three months, and documentation in support of the information reported to the

state authorities. Appellant provided Retailer Operations its quarterly Sales & Use tax report for the period ending June 2016.

Based on the application, the additional information, and the onsite visit, Retailer Operations determined that Appellant is primarily a restaurant. Retailer Operations determined that hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at Appellant. The denial letter states that Appellant 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. Therefore, Appellant is ineligible to participate in SNAP as an authorized retailer.

Appellant was informed that in accordance with Section 278.1(k)(2) of the SNAP regulations a new application to participate in the SNAP as a retail food store could not be submitted for a period of six months from the date of the denial.

The owner appealed Retailer Operations' decision by letter dated September 19, 2016, and requested administrative review of this action. The appeal was granted by letter dated September 28, 2016.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

7 USC § 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."

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). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: "An establishment … that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)…or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)…Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores…"

7 CFR § 271.2 defines a staple food, in relevant part, as "Food items intended for home preparation and consumption in each of the following staple food categories: . . . Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm . . ."

7 CFR § 278.1(b)(1)(i) imparts specific program requirements for retail food store participation, which reads, in part, "An establishment … shall … effectuate the purposes of the program if it … 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.l (b)(1)(ii)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must "Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) 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."

7 CFR § 278.l (b)(1)(ii)(C) clarifies "variety of staple foods" as meaning, in relevant part, "… 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 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 …"

7 CFR § 278.l (b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must "… have more than 50 percent of … 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 …"

7 CFR § 278.1(b)(1)(iv) *Ineligible firms* reads, in relevant 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) *Denying authorization*, reads, in part, "FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or (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 USC 2018 (b)(7)(e).

APPELLANT'S CONTENTIONS

In the written request for review the owner contended:

- Paul's Fish Market is primarily a seafood market that sells raw seafood.
- Enclosed is a list and prices of raw seafood that we sell.
- Many people cannot afford to buy raw seafood without an EBT card.
- The representative did not see all the seafood on display at the time of her visit.
- She did not realize on our daily menu that we sell cooked and uncooked seafood.
- If we are able to accept EBT cards our sale on raw food would be much higher than on cooked food.

The owner provided two pages of seafood items with prices. The first page has no per pound prices and on the top is noted in handwriting "Raw." The second page shows 'Raw" on top and lists crab legs, scallops and shrimp pound pricing and handwritten prices for live crabs and oysters by the pint and bushel.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances 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 regulations are clear that a retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stock-keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry, including tax records. In determining eligibility, such information may be requested for verification purposes.

Retailer Operations determined the firm does 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 therefore is ineligible to participate in SNAP as an authorized retailer. Retailer Operations determined that Appellant is primarily a restaurant. Hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at Appellant. Restaurants are not eligible to participate in SNAP except in certain states that operate special restaurant programs.

The tax evidence advanced by Appellant clearly supports that Appellant's sales are primarily taxed, and more than 50% of the reported sales are not untaxed staple foods. Rather hot and cold prepared foods intended for immediate consumption are the majority of the retail sales at Appellant as confirmed by Appellant's own tax submission. As such, the evidence under review supports that at the time of the denial decision, Appellant presented primarily as a restaurant that met the definition of an ineligible firm. As such, Appellant shall not qualify for SNAP authorization under Criterion A or B.

Appellant has a small display to sell bread, bananas, and a few canned items, as it indicated it would initiate after its withdrawal in 2015. This however does not render Appellant to meet the eligibility criteria as cited herein for a retail food store. Further, under the establishment policy, Appellant is assessed for eligibility as a whole. The photographs under review support that this is an ineligible firm as defined in the regulations. The preponderance of the evidence supports that Appellant is primarily a restaurant and as such is an ineligible firm.

CONCLUSION

The denial action is reviewed based on the evidence in the record at the time of the denial. After review of all the pertinent documentation, and based on the discussion herein, the initial decision by Retailer Operations to deny the application of Appellant to participate in the SNAP as a retail food store is sustained. Thus, per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store for a minimum period of six months from the effective date of the denial.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section § 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is 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 an unwarranted invasion of privacy.

/S/

_____	October 25, 2016
MADELINE VIENS	DATE
ADMINISTRATIVE REVIEW OFFICER	