Marisol Bakery Llc, v.

Case Number: C0188934

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 decision to deny the application of Marisol Bakery Llc (hereinafter “Marisol Bakery”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division (hereinafter “ROD”) of FNS.

ISSUE

The issue accepted for review is whether ROD took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Marisol Bakery to participate in the SNAP on February 18, 2016.

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 February 18, 2016, ROD informed the Appellant that her firm’s application to participate as an authorized retailer in the SNAP was denied. The denial determination was based on ROD’s conclusion that Marisol Bakery’s primary nature of business was that of a sandwich shop/restaurant, and that since more than 50 percent of the firm’s total gross retail sales were likely comprised of hot and/or cold prepared, ready-to-eat foods intended for immediate consumption, it was not eligible for authorization as a SNAP retailer, in accordance with 7 CFR § 271.2 and § 278.1(b)(1) of
the SNAP regulations. ROD’s denial action was based on information provided on the firm’s “SNAP Application for Stores”, received in full by ROD on February 18, 2016, information regarding sales tax information, retail food facility license, and vendor invoices provided for Marisol Bakery, as well as information obtained by an FNS contractor during a visit to the store on January 8, 2016.

In a letter postmarked February 27, 2016, the Appellant requested an administrative review of this action. The request 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**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) 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 § 278.1(b)(1)(i) relays 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 § 278.1(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 § 278.1(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 § 271.2 defines a retail food store, in relevant part, as “An establishment … that sells food for home preparation and consumption (emphasis added) 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) as set for the § 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 stock-keeping 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. 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 carryout purposes or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores …” (emphasis added).

7 CFR § 278.1(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) states, inter alia:

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 …

AND

…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 part, “FNS shall deny the application of any firm if it determines that 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 … for a minimum period of six months from the effective date of the denial.”

**APPELLANT’S CONTENTIONS**

In the written request for administrative review as well as in subsequent information provided for Marisol Bakery, the Appellant provided information in which it was argued that:

- FNS’ determination that Marisol Bakery is a restaurant is inaccurate as the sales of hot and cold freshly prepared foods that are ready to eat do not exceed 50% of the firm’s total gross retail sales;
The Appellant made an error in completing the SNAP application for Marisol Bakery;

A revised SNAP Application provided for Marisol Bakery indicates that 75 percent of the firm’s total gross retail sales are in “staple food” sales; 25 percent of the firm’s total gross retail sales are in “other food” sales; and 0 percent of the firm’s total gross retail sales are in “hot food and non-food” sales;

To validate that more than 50 percent of Marisol Bakery’s total gross retail sales are in staple food sales, the Appellant submitted a proposed menu, a list of staple foods for sale, bank statements, vendor invoices for foods purchased, and photographs of the staple foods that are currently for sale at the subject firm;

The Appellant mistakenly answered “No” to the question on the SNAP application regarding whether or not Marisol Bakery is a specialty food store that primarily sells one food type such as meat/poultry/seafood, bread, or fruits/vegetables;

The Appellant should have answered this question as “Yes, Marisol Bakery is a bakery”; and

With these aforementioned changes implemented, the Appellant estimates that more than 50 percent of Marisol Bakery’s total gross retail sales are derived from staple food sales.

With regards to the Appellant’s contentions, it is important at this point to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. In order for a retail food store to qualify for participation in the SNAP, it must meet either Criterion A or B as outlined in 7 CFR § 278.l(b)(1) of the SNAP regulations. 7 CFR § 278.l(b)(1)(ii) 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)(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…”.

However, the Retailer Operations Division determined that Marisol Bakery was ineligible to participate in the SNAP in accordance with 7 CFR § 278.1(b)(1) and § 278.1(k)(2), as the firm is primarily a sandwich shop/restaurant selling bakery items. 7 CFR § 278.1(b)(1)(iv) is clear in that restaurants and/or carry-out operations do not qualify for participation in the SNAP irrespective of whether a firm qualifies for Criterion A and/or B of the SNAP eligibility requirements. 7 CFR § 278.1(b)(1)(iv) stipulates that “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 carry-out”. 7 USC 2018 (b)(7)(e).
documentation provided by the contracted Reviewer who conducted the store visit of Marisol Bakery on January 8, 2016. The information originally submitted by the Appellant on Marisol Bakery’s SNAP Application for Stores indicates that 55 percent of the firm’s total gross retail sales are in “staple food” sales; 35 percent are in “other food” sales; and 10 percent are in “hot food and non-food” sales. However, the Appellant contends that she made an error in completing the SNAP application for Marisol Bakery. As such, the Appellant provided the Administrative Review Officer (ARO) with a revised SNAP Application for Marisol Bakery which indicates that 75 percent of the firm’s total gross retail sales are in “staple food” sales; 25 percent are in “other food” sales; and 0 percent are in “hot food and non-food” sales.

Despite listing such percentages, the report summarizing the contracted Reviewer’s January 8, 2016 visit to Marisol Bakery, along with accompanying photographs and sketch of the store’s interior, reflects that more than 50 percent of the firm’s total gross retail sales are in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carryout purposes or on-premises consumption and require no additional preparation. The Appellant indicated to the ARO that she mistakenly answered “No” to the question on the SNAP application regarding whether or not Marisol Bakery is a specialty food store that primarily sells one food type such as meat/poultry/seafood, bread, or fruits/vegetables. The Appellant indicated that she should have answered this question as “Yes, Marisol Bakery is a bakery”. However, the contracted Reviewer noted during the store visit that Marisol Bakery had a rather large kitchen with a food preparation area, a meat/cheese slicer, a sandwich preparation counter, etc. that occupied a good portion of the total square footage of the store. There was a menu board/sign posted in Marisol Bakery which was noted to have advertised the availability of various hot and/or cold prepared foods intended for immediate consumption (i.e., not intended for home preparation and consumption) such as:

- **Sandwiches:** Ham, Turkey, Chicken, Salami, Steak, Perni, Pastrami, Ground Beef with Cheese, Lettuce and Tomato; **Cuban Sandwich:** Perni and Ham with Cheese, Lettuce, and Tomato; **Tripleta:** Perni, Turkey, Pastrami with Cheese, Lettuce, and Tomato;
- **Pastries:** Cheesecakes; Flans; Cheese Pastries; Cupcakes; Cookies; Flan cake; Flancocho; 3 Leche; Arroz Con Dulce; **Specialty Drinks:** Batida De Frute; Natural Juice/Shakes; Coffee; Hot Chocolate; Tea; **Breakfast:** Oatmeal (Abena); and Parina. The contracted Reviewer’s sketch of Marisol Bakery and notes taken, as well as pictures taken during the store visit reflect that customers place orders at a counter for these hot/cooked and cold prepared foods intended for immediate consumption.

At the time of the store visit, Marisol Bakery was also observed to have stocked some items that could have been considered staple foods such as milk, deli cheese, butter/margarine, 100% juice (4 units in stock at the time of the store visit), fresh mangoes (4 units in stock at the time of the store visit), fresh bananas, fresh lettuce (2 units/heads in stock at the time of the store visit), fresh tomatoes, bread/rolls, cakes/pastry/donuts, snack foods (cookies, potato chips, etc.), deli meats, and eggs. However, these items were stocked in such limited quantities of each item that there was no possible way that sales of such items, even if they were clearly available for public purchase and not utilized in the preparation of the various hot and/or cold prepared ready-to-eat food items advertised within the store, could have remotely comprised more than a small percentage of Marisol Bakery’s total gross retail sales. To validate that more than 50 percent of Marisol Bakery’s total gross retail sales are in staple food sales, the Appellant submitted to FNS a proposed menu, a list of staple foods for sale, bank
statements, vendor invoices for foods purchased, and photographs of the staple foods that are for sale at the subject firm. With regards to the proposed menu and list of staple foods for sale at Marisol Bakery, it is important at this point to once again clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. Therefore, the proposed menu and list of foods that the Appellant claims are now for sale at Marisol Bakery do not validate that more than 50 percent of Marisol Bakery’s total gross retail foods were in staple food sales at the time that the store visit was conducted. Regarding the bank statements, the Appellant provided FNS with statements for the months of December 2015, January 2016, February 2016, and March 2016. However, each of the bank statements indicated that 100 percent of Marisol Bakery’s total gross retail sales are taxable. As such, the bank statements indicate that the firm does not meet Criterion B for SNAP participation eligibility as less than 50 percent of the firm’s total gross retail sales are in staple food sales.

The Appellant provided the ARO with five photos which she contends depict the store’s staple food inventory as of the February 27, 2016 request for administrative review. Upon review of the photos, the ARO noted that it appeared that no additional staple foods had been added to Marisol Bakery’s staple food stock. However, even if the Appellant’s photos indicated that additional staple foods had been added to the firm’s food stock, the photos cannot be used as evidence/verification that Marisol Bakery meets the requirements for SNAP authorization approval as a retail food store as these photos were taken after the store visit date of January 8, 2016. A thorough review of the pictures taken during the store visit also indicated that approximately 10 to 15 percent of the food items that were stocked at Marisol Bakery were accessory food items such as carbonated drinks, flavored drinks, sport drinks, bottled water, etc. Per 7 CFR § 271.2, 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.

The Appellant provided ROD with copies of six invoices/receipts for the purchase of staple foods in order to validate that Marisol Bakery met the requirements for SNAP authorization approval under Criterion A at the time of the store visit. One of the invoices did not have a date included on it. One of the invoices was dated after the store visit date of January 8, 2016. As such, both invoices cannot be considered towards verifying that Marisol Bakery met the SNAP eligibility requirements under Criterion A at the time of the store visit as they were not dated prior to the store visit date. The remaining four invoices were dated prior to the store visit date and indicated that the Appellant had purchased two staple foods in bulk from the “Meat/Poultry/Fish” staple food category (deli meats and canned tuna). However, per the information provided by the contracted Reviewer at the time of the store visit and in the photos provided by the Appellant in her request for administrative review, there was no signage in Marisol Bakery or prices listed for the sale of deli meats/cheeses by the pound or for the purchase of canned tuna. Therefore, it appears that these food items are used in the production of sandwiches as opposed to being sold individually to customers. In addition, deli meats were in stock at the time of the store visit and, therefore, do not reflect the purchase of a different/additional staple food from the “Meat/Poultry/Fish” staple food category. As
such, the Appellant failed to verify that Marisol Bakery had all of the staple foods in stock on the store visit date to qualify the store for participation in the SNAP under Criterion A.

Upon ROD’s request, the Appellant provided FNS with a food service/food facility license for Marisol Bakery. ROD subsequently telephoned the Department of Health, New Britain, Connecticut Health Inspector in order to clarify the type of food service license that was issued to the subject firm. The Health Inspector verified to ROD that Marisol Bakery is a sandwich shop/bakery that sells more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption. Therefore, based on the store visit observations of January 8, 2016, the sales tax information, the vendor invoices, and the store photos provided, and the applicant’s Retail Food Facility License, ROB determined that Marisol Bakery is primarily a sandwich shop/restaurant selling bakery items. In accordance with 7 CFR § 278.1(b)(1)(iv) “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”. The evidence, therefore, preponderates in favor of a conclusion that Marisol Bakery was not eligible for approval to participate in the SNAP at the time that the Retailer Operations Division made its denial action.

CONCLUSION

Based on a review of the case documentation and the discussion above, the initial decision by the Retailer Operations Division to deny the application of Marisol Bakery LLC to participate in the SNAP for a period of six months, effective February 18, 2016, is sustained.

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 (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.

January 30, 2017

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER