

NATIONAL MARINE FISHERIES SERVICE - ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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) Appeal No. 10-0037
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) DECISION
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) Appellant)
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STATEMENT OF THE CASE

On August 17, 2010, [REDACTED] filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on July 16, 2010. RAM denied [REDACTED] application for a charter halibut permit under the Charter Halibut Limited Access Program.¹

RAM is the administrative unit within the Alaska Region of the National Marine Fisheries Service (NMFS) that implements the Region's limited access programs. RAM determined that [REDACTED] was not qualified to receive a permit because he had not reported five or more logbook fishing trips during the charter halibut recent participation period (2008) as required by 50 C.F.R. § 300.67(b)(1)(ii)(B). [REDACTED] appealed the determination.

In his appeal, [REDACTED] claimed that an unavoidable circumstance thwarted his intent to operate his own charter halibut fishing business in 2008. That claim must be adjudicated by the Office of Administrative Appeals (OAA) and may not be decided by RAM.²

On August 26, 2010, OAA advised [REDACTED] that his appeal had been received and that it had been accepted as timely. Additionally, OAA informed him that his appeal had been assigned to the undersigned administrative judge.

Because of [REDACTED] travel plans I decided that, pursuant to 50 C.F.R. § 679.43(m)(1), a written hearing was the best way to resolve the appeal. To that end, following a prehearing conference with [REDACTED] on August 27, 2010, I issued an order scheduling a written hearing, with a deadline of October 4, 2010, for [REDACTED] to respond. On September 27, 2010, the OAA received [REDACTED] written materials. On October 4, 2010, having determined that the

¹ The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67, available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 300.67(g) ("Unavoidable circumstance claims must be made pursuant to paragraph (h) (6) of this section . . ."); 50 C.F.R. § 300.67(h)(6) ("An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to paragraph (h)(6); 50 C.F.R. § 300.67(h)(6) of this title."); see Final Rule, 75 Fed. Reg. 554, 597 (Jan. 5, 2010), Change 19.

record contained sufficient information to render a decision, I closed the record. This decision follows.

ISSUE

Does [REDACTED] satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishing business in 2008?

FACTUAL BACKGROUND³

[REDACTED] operated an active charter halibut fishing business for a number of years, including the qualifying years (2004, 2005). However, in the recent participation period (2008), he did not operate his own business. His explanation was that “in 2008, [he] captained a boat for [REDACTED] (sic) in Sitka, Alaska.” He further stated that in 2009 “[he] went back to chartering and [his] own business again.”

[REDACTED] service to [REDACTED] was affirmed by a September 25, 2010, letter from [REDACTED] the manager of [REDACTED] [REDACTED] stated:

This letter is to certify and verify that [REDACTED] did operate and captain charter vessels for [REDACTED] . . . the following dates:

2006 – 20 days captain guided fishing charters
2007 – 20 days captain guided fishing charters
2008 – 100 days captain guided fishing and non fishing charters.

ANALYSIS

To qualify for a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License. Once issued, the license authorized logbook fishing trips that met the minimum participation requirements for a permit.⁴ The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in either 2004 or 2005,⁵ and a recent participation period, which is the sport fishing season for halibut in 2008.⁶

³ Unless I note otherwise, I have based these facts on [REDACTED] letters to RAM (March 24, 2010), and [REDACTED] [REDACTED] letters to OAA (received on August 17, 2010, and September 27, 2010). I find the statements in those documents credible.

⁴ 50 C.F.R. § 300.67(b)(1)(ii).

⁵ 50 C.F.R. § 300.67(c)(6) (“*Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005”).

⁶ 50 C.F.R. § 300.67(c)(7) (“*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”).

There are both non-transferable permits and transferable permits available, both of which have distinct regulatory requirements for eligibility.

To receive a non-transferable charter halibut permit, the ADF&G license holder must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),⁷ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).⁸

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen logbook fishing trips with the same vessel in the qualifying period (2004, 2005)⁹ and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).¹⁰

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in either (but not both) participation period.¹¹ If an applicant meets a minimum participation trip level in the qualifying period (2004/2005), but not in the recent participation period, the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008),¹² and if the applicant satisfied the requirements of the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004, 2005), the applicant may still qualify for a permit if the applicant can meet the requirements of the unavoidable circumstance regulation.

The unavoidable circumstance regulation. The unavoidable circumstance regulation that applies to applicants who participated in the qualifying period but not in the recent participation period, 50 C.F.R. § 300.67(g), provides:

(1) *Recent participation period.* An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, may receive one or more permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period;

⁷ 50 C.F.R. § 300.67(b)(1)(ii)(A).

⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

⁹ 50 C.F.R. § 300.67(d)(1)(i).

¹⁰ 50 C.F.R. § 300.67(d)(1)(ii).

¹¹ 50 C.F.R. § 300.67(g).

¹² 50 C.F.R. § 300.67(g)(1).

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the recent participation period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e) and (f) of this section.

An applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though he or she participated in 2008.

50 C.F.R. § 300.67(g)(1)(i): Did [REDACTED] have a specific intent to operate a charter halibut fishing business in the recent participation period? No.

If an applicant did not hold a specific intent to operate a charter halibut business in a specific year, the applicant cannot meet the remaining requirements of the unavoidable circumstance regulation. That is, if an applicant did not have a specific intent to participate, the applicant cannot show that a circumstance with particular characteristics – unavoidable, unique, unforeseen and reasonably unforeseeable – thwarted the applicant's specific intent.

[REDACTED] [REDACTED] has not demonstrated the requisite intent to operate a charter halibut fishing business in the 2008 season. He did not submit evidence that he had booked any clients for the 2008 season. He did not provide any evidence of advertising or other attempts to book clients for his own business. The record is silent as to whether he even held the requisite ADF&G sport fishing business and guide licenses. Instead, he asserts that he provided captain services for [REDACTED] [REDACTED]

Under these circumstances, I conclude that [REDACTED] did not form a specific intent to operate a charter halibut fishing business in the 2008 season.

I therefore conclude that [REDACTED] [REDACTED] does not meet the other requirements of the unavoidable circumstance regulation. If he did not have a specific intent, he cannot show that his specific

intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable.

As a result, [REDACTED] does not satisfy the requirements in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to his lack of participation in the charter halibut fishing business in 2008, and does not meet the minimum qualifications for a charter halibut permit

FINDINGS OF FACT

1. [REDACTED] made no reports of halibut logbook fishing trips under his own ADF&G license during the recent participation period (2008).
2. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008.

CONCLUSIONS OF LAW

1. An applicant must satisfy all the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in 2008 in order for NMFS to treat the applicant as though the applicant participated in the fishery in 2008.
2. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008 within the meaning of 50 C.F.R. § 300.67(g)(1).
3. [REDACTED] does not satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008.
4. [REDACTED] does not satisfy the minimum qualifications for a charter halibut permit.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on January 19, 2011, unless by that date the Regional Administrator orders review of the Decision.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, December 30, 2010. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

[Redacted]

Philip J. Smith
Administrative Judge

Reviewed and Approved:

[Redacted]

EJ

Eileen Jones
Chief Administrative Judge