

██████████ testified in person. ██████████, ██████████, mother, and ██████████) ██████████, who operated a tourist booking business in 2004 and 2005, testified, both by telephone.

After the hearing, I left the record open for ██████████ to submit information from the Alaska Department of Fish & Game (ADFG) on halibut logbook fishing trips that ██████████ took in 2006. He submitted the ADF&G data, which showed eight trips.⁴ I also put into the record the information in NMFS's records on the number halibut logbook fishing trips that ██████████ took in 2007, which was eleven trips.⁵

I held a supplemental hearing on November 15, 2010, concerning the ADFG data. ██████████ testified that he did not have additional evidence to present and that he thought that these were likely the number of trips – eights trips, then eleven trips -- he would have taken in his first two years of halibut chartering, if his mother had not become seriously ill and required his assistance.

I have reviewed the record in its entirety and determine that the record is sufficient to reach a decision. I therefore close the record and issue this decision.

ISSUES

1. Does ██████████ satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the qualifying period (2004, 2005)?
2. Did ██████████ have a specific intent to operate a charter halibut fishing business in the qualifying period?
3. Was ██████████ specific intent to operate a charter halibut fishing business in the qualifying period thwarted by a circumstance that was unavoidable, unique to ██████████, unforeseen and reasonable unforeseeable?
4. Did the circumstance actually occur?
5. Did ██████████ take all reasonable steps to overcome the circumstance?
6. If ██████████ meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), should his permit be designated as transferable or non-transferable?
7. If ██████████ meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), what is proper the angler endorsement number on the permit?

⁴ Email from ██████████ to Office of Administrative Appeals (Sep. 28, 2010) with ADF&G logbook data from 2006.

⁵ Email from Mukhya Khalsa, Computer Specialist, NMFS, to Mary Alice McKeen (Nov. 15, 2010).

SUMMARY OF DECISION

██████████ showed, by a preponderance of evidence in the record, that he satisfies sections (i) through (iv) of the unavoidable circumstance regulation for applicants that did not participate in the qualifying period (2004, 2005), which is federal regulation 50 C.F.R. § 300.67(g)(2). ██████████ had a specific intent to participate in the qualifying period and was prepared to operate a charter halibut fishing season for the 2004 charter halibut season. His intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and unforeseeable, namely his mother ██████████ and he assisted in her care and treatment. This circumstance occurred and there were no reasonable steps he could have taken to overcome the circumstance and participate in the 2004 season.

Section (v) of the same regulation, 50 C.F.R. § 300.67(g)(2), states that ██████████ receives a non-transferable permit with an angler endorsement of four, unless he shows he likely would have participated in one year in the qualifying period with fifteen bottomfish logbook fishing trips and likely would have taken more than four anglers on a trip in 2004 or 2005. ██████████ did not show he would likely have taken fifteen bottomfish logbook fishing trips in 2004. ██████████ stated that four is the highest number of anglers he would have taken out in 2004. Therefore ██████████ qualifies for a non-transferable permit with an angler endorsement of four.

FACTUAL BACKGROUND

In 2004, ██████████ owned a boat, ██████████, that was equipped to participate in the charter halibut fishery.⁶ He investigated the licenses needed to operate a charter halibut business and the liability insurance that was advisable for him to obtain. He engaged in discussions with a long time friend, ██████████ about referrals of charter clients ██████████ could make to ██████████.

██████████ operated a business in Hoonah, called ██████████, which ██████████. Hoonah is a small community of approximately 800 people located in Southeast Alaska.⁷ ██████████ these ██████████⁸ If ██████████ business has been up and running, ██████████ testified that he thought he could have booked twenty-five to thirty halibut trips with ██████████ in 2004 and 2005.

⁶ Unless otherwise noted, I base these facts on testimony at the hearing on September 20, 2010. This testimony was consistent with the documentary evidence submitted by ██████████.

⁷ The certified population of Hoonah in 2009 was 764. Alaska Community Database Community Information Summaries, State of Alaska, Department of Community and Regional Affairs, http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_name=Hoonah, <<visited Nov. 15, 2010>>

⁸ Statement by ██████████ (received by RAM, Feb. 24, 2010).

[REDACTED] also had contacts with a business in Juneau, Alaska. [REDACTED] receive a trip to Alaska, which includes salmon and halibut. [REDACTED] Accounts Manager for the company, submitted a written statement that he discussed arranging for these charters with [REDACTED] in 2004 and 2005 and would booked 3 to 5 halibut trips with [REDACTED] in 2004 and 2005, if his business had been operational.⁹

[REDACTED]

[REDACTED] lives in Juneau, Alaska. He felt an obligation to be available by phone any time his mother needed to talk or needed help. He approved charges for expensive prescription drugs, when the pharmacy called. [REDACTED] For about a year period beginning in the spring of 2004, [REDACTED] went to [REDACTED] four or five times and stayed with his mother about a week each time.

In the latter half of 2005, [REDACTED] received an all clear letter. [REDACTED] started his charter business in 2006. Initially, he kept his day job with the State of Alaska as a [REDACTED] and took clients out in the evening, on weekends, on holidays and on days he took leave from his State job. [REDACTED] did receive referrals from [REDACTED] business in Hoonah and from [REDACTED] with the [REDACTED] company in Juneau. In 2006, [REDACTED] reported eight halibut logbook fishing trips.¹¹ In 2007, he reported eleven halibut logbook fishing trips.¹² In 2008, he left State employment to operate his charter business full time and reported twenty-three halibut logbook fishing trips.

⁹ Statement from [REDACTED] (Mar. 2, 2010).
[REDACTED]

¹¹ Email from [REDACTED] to Office of Administrative Appeals (Sep. 28, 2010) with ADF&G logbook data from 2006.

¹² Email from Mukhya Khalsa, Computer Specialist, NMFS, to Mary Alice McKeen (Nov. 15, 2010).

CHARTER HALIBUT LIMITED ACCESS PROGRAM

To receive a charter halibut permit under the Charter Halibut Limited Access Program, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹³ The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,¹⁴ and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁵ The regulation specifies two levels of minimum participation: one for a non-transferable permit and one for a transferable permit.

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),¹⁶ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).¹⁷

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in the qualifying period (2004, 2005)¹⁸ and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).¹⁹

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one, but not both, participation periods.²⁰ If an applicant meets a minimum participation trip level in the qualifying period (2004, 2005), but not the recent participation period (2008), the applicant may meet the requirements in the unavoidable circumstance regulation for the applicant's lack of participation in the recent period (2008).²¹ If the applicant meets 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 a minimum participation trip level in the recent participation period (2008), but not the qualifying period (2004, 2005), the applicant may meet the requirements of the unavoidable circumstance regulation for the applicant's lack of participation in the qualifying period (2004, 2005). If the applicant meets the unavoidable circumstance

¹³ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁴ 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.”).

¹⁵ 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.”).

¹⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A).

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

¹⁸ 50 C.F.R. § 300.67(d)(1)(i).

¹⁹ 50 C.F.R. § 300.67(d)(1)(ii).

²⁰ 50 C.F.R. § 300.67(g).

²¹ 50 C.F.R. § 300.67(g)(1).

regulation for the qualifying period, the applicant may be treated as though the applicant participated in the qualifying period.

██████████ meets the participation requirement in the recent period for a transferable charter halibut permit. Under his ADF&G Business Owners License, he reported twenty-three halibut logbook fishing trips in 2008. He did not report any logbook fishing trips in 2004 or 2005. Therefore, the only way that ██████████ can receive a transferable or non-transferable charter halibut permit is if he meets the requirements of the unavoidable circumstance regulation for the applicant that did not participate in the qualifying period.

UNAVOIDABLE CIRCUMSTANCE REGULATION

The unavoidable circumstance regulation for applicants who participated in the recent participation period, but not the qualifying period, 50 C.F.R. § 300.67(g)(2), provides:

(2) *Qualifying period.* An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves paragraphs (g)(2)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period;

(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 qualifying period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

An applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though he or she participated in the qualifying period. An applicant must prove any fact required for a permit, a type of permit or angler endorsement by a preponderance of evidence in the record.

ANALYSIS

1. Does [REDACTED] satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the qualifying period (2004, 2005)? Yes.

I analyze the requirements in sections (i) through (iv).

Section (i). Did [REDACTED] have a specific intent to operate a charter halibut fishing business in one year in the qualifying period? Yes.

In 2004, [REDACTED] had a vessel, the [REDACTED], that was equipped to participate in the charter halibut fishery. He had researched the legal requirements to begin a charter halibut fishing business and the advisable levels of insurance coverage. [REDACTED] had arranged two solid sources for referrals of charter clients: [REDACTED] in Hoonah and [REDACTED] with the [REDACTED] in Juneau. And when he did start halibut chartering, they did refer clients to him.

I find that [REDACTED] held a specific intent to participate in the charter halibut fishery in 2004.

Section (ii). Was [REDACTED] intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable? Yes.

The circumstance claimed by [REDACTED] is his mother's [REDACTED] in the spring of 2004 and his need to assist her and to be available on call to assist her. I find that this circumstance was unavoidable, unique to [REDACTED] unforeseen and reasonably unforeseeable. I further find that this circumstance thwarted [REDACTED] intent to participate in the charter halibut business. I find that [REDACTED] would have operated a charter business in 2004, if his mother's [REDACTED] had not intervened.

Section (iii). Did the circumstances that thwarted [REDACTED] intent to operate a charter halibut fishing business actually happen? Yes.

[REDACTED] illness occurred and [REDACTED] assisted his mother throughout the acute phase of her illness.

**Section (iv). Did [REDACTED] take all reasonable steps to overcome the circumstances?
Yes.**

[REDACTED] felt obligated to assist in the care of his mother. [REDACTED] concluded that he could not carry through with his plans to start a charter halibut fishing business, when his mother [REDACTED] and he needed to be on call to assist her. I find that there were no reasonable steps that he could have taken to overcome the circumstance in 2004 and to operate his charter halibut business. As soon as his mother's acute health crisis abated, and he was able to overcome the circumstance, [REDACTED] did that and he operated a charter business for salmon and halibut charters.

**2. Should [REDACTED] permit be designated as transferable or non-transferable?
Non-transferable.**

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), section (v) states that the applicant will receive a non-transferable permit, unless the applicant shows that he or she would likely have met the participation requirement for a transferable permit, which is fifteen (or more) trips in either 2004 or 2005 with the same vessel.²²

The record contains some evidence that [REDACTED] would have taken fifteen logbook fishing trips with the [REDACTED] in 2004. [REDACTED] offered testimony and a written statement that he would have booked twenty-five to thirty trips with [REDACTED] and [REDACTED] stated that he would have booked three to five trips.

The preponderance of evidence, however, is that [REDACTED] would not have taken fifteen logbook fishing trips in 2004. When he actually did start his business in 2006, he took eight halibut logbook fishing trips. In 2007, he took eleven halibut logbook fishing trips. In 2004, he would have likely started the business the way he did in 2006, namely keeping his job with the State and working his way into the charter business with evening, weekend and holiday trips.

I note that in 2006, for example, he took twenty-six total trips, but eighteen were salmon charter trips. Both [REDACTED] did refer to [REDACTED] taking clients out on salmon and halibut charters and it is possible that their estimates, although stated as halibut charters, actually referred to both types of charters.

Further, at the supplemental hearing, I gave [REDACTED] the opportunity to present additional argument or evidence on the likely number of logbook fishing trips that he would have taken in 2004, in light of the actual number of trips he took in 2006 and 2007. He testified that he did not

²² [REDACTED] is only seeking one permit. Therefore, the participation requirements for more than one permit in 50 C.F.R. § 300.67 (c) are not relevant to this appeal.

have any additional evidence and that the number of trips he took in 2006 and 2007 – eight trips, then eleven trips – was probably the number of trips he would likely have taken in his first two years of operating a charter business if his mother's illness had not prevented him from starting that in 2004. Since [REDACTED] did not show that he would likely have taken a minimum of fifteen halibut logbook fishing trips in 2004, I conclude that he should receive a non-transferable permit.

3. What is the proper angler endorsement on [REDACTED] permit? Four.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2)(iv), section (v) states that the angler endorsement on the applicant's permit will be four, unless the applicant proves that he or she would likely have taken a greater number of anglers on a trip in the qualifying period.

[REDACTED] testified that, if he had participated in the qualifying period, he would have done so with the [REDACTED], which carried only four passengers. He therefore accepted four as the proper angler endorsement number on his permit.

[REDACTED]'s qualifying trips occurred in International Pacific Halibut Commission [IPHC] regulatory area 2C. His permit will therefore be endorsed for area 2C.

FINDINGS OF FACT

1. [REDACTED] reported twenty-three halibut logbook fishing trips with the same vessel in 2008.
2. [REDACTED] held a specific intent to operate a charter halibut fishing business during 2004.
3. [REDACTED] intent was thwarted by a circumstance that was unavoidable, unique to him, unforeseen and reasonably unforeseeable, [REDACTED]
4. The unavoidable circumstance actually occurred.
5. There were no reasonable steps [REDACTED] could have taken in 2004 to overcome the circumstance and operate a charter halibut business.
6. [REDACTED] would have started a charter halibut fishing business in 2004, but for his mother's diagnosis with, and treatment for, advanced [REDACTED] in 2004 and 2005.
7. [REDACTED] would not likely have taken fifteen bottomfish logbook fishing trips in 2004 or 2005.

CONCLUSIONS OF LAW

1. [REDACTED] satisfied the requirements in sections (i) through (iv) of the unavoidable circumstances regulation, 50 C.F.R. 300.67(g)(2), with respect to his lack of participation in the qualifying period.
2. [REDACTED] meets a minimum participation requirement for a charter halibut permit in the recent participation period.
3. [REDACTED] qualifies for a non-transferable charter halibut permit, endorsed for four anglers, for use in IPHC regulatory area 2C.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a non-transferable charter halibut permit, endorsed for four anglers, for use in IPHC regulatory area 2C to [REDACTED]. This Decision is effective on December 20, 2010, 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 by this Office not later than 4:30 p.m., A.S.T., on November 29, 2010, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.

[REDACTED]

Mary Alice McKeen
Administrative Judge