



submit additional evidence to support his claim. Appellant responded to the Notice by waiving his opportunity to submit additional evidence.<sup>6</sup>

On June 17, 2010, RAM sent Appellant the IAD at issue in this case. In its IAD, RAM notified Appellant that according to information in the Official Record, Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). Generally, “minimum participation requirements” for 2004 or 2005 means that an applicant properly reported to the State of Alaska Department of Fish and Game (ADF&G) five or more charter fishing trips. Appellant did not claim to have operated in 2004 or 2005, and RAM noted there was no indication Appellant held an ADF&G Business Owner License to operate his business in 2004 or 2005.

RAM also acknowledged Appellant’s unavoidable circumstance claim, but explained the claim needed to be determined by OAA, provided Appellant filed an appeal with OAA to pursue his claim.<sup>7</sup> In the Principles of Law section and Analysis section of this Decision, I explain in more detail the meaning and significance of the unavoidable circumstance claim.

On August 11, 2010, OAA received Appellant’s timely appeal.<sup>8</sup> In his appeal, Appellant argues that an unavoidable circumstance occurred in 2004 and 2005 due to the limited availability of a U.S. Coast Guard certified class (Course) offered by the University of Alaska Southeast (University). Appellant needed to complete Course to obtain an Operator of Uninspected Passenger Vessel license (commonly referred to as a “6-Pack” license) so he could legally operate a charter vessel. Appellant explains he attempted to enroll and complete Course on multiple occasions during the qualifying period, but he was unable to do so successfully until 2007.<sup>9</sup>

On August 20, 2010, OAA issued an order acknowledging Appellant’s appeal and requesting that any additional documentation or information in support of his appeal be submitted to OAA.<sup>10</sup> On November 10, 2010, Contractor held a hearing for this appeal.<sup>11</sup> At the recorded hearing, Appellant and his spouse testified.<sup>12</sup> I have reviewed Appellant’s the entire case record, including the audio recording of the hearing, and I have determined that the record contains sufficient information on which to reach a decision. Accordingly, I close the record and issue this decision.<sup>13</sup>

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<sup>6</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated May 25, 2010 (received by RAM on May 27, 2010).

<sup>7</sup> Original File Tab, IAD dated June 17, 2010.

<sup>8</sup> Pleadings Tab, Appellant’s Letter of Appeal dated July 26, 2010 (received by OAA on Aug. 11, 2010).

<sup>9</sup> Pleadings Tab, Appellant’s Letter of Appeal dated July 26, 2010 (received by OAA on Aug. 11, 2010).

<sup>10</sup> Pleadings Tab, Initial Order dated Aug. 20, 2010.

<sup>11</sup> See 50 C.F.R. § 679.43(g)(3), (n)(1)(ii).

<sup>12</sup> Appellant’s Hearing Testimony dated Nov. 10, 2010.

<sup>13</sup> See 50 C.F.R. § 679.43(g)(2), (k).

## ISSUE

On appeal, Appellant does not dispute that he does not meet the minimum participation requirements for eligibility for a CHP under the basic requirements of the CHLAP regulations. It is also not disputed that Appellant does meet the minimum participation requirements for 2008.

In order for Appellant to prevail in this appeal, he must show by a preponderance of the evidence that he meets the requirements of the unavoidable circumstances provision of the CHLAP regulations. I thus will decide whether Appellant has shown he meets one of the threshold requirements for an unavoidable circumstance claim, namely, that he held the specific intent to operate his charter halibut business in 2004 or 2005.

If Appellant has not demonstrated that he held the specific intent to operate his charter halibut business in 2004 or 2005, Appellant cannot establish his eligibility for a CHP under the unavoidable circumstance provision, and therefore, I must uphold the IAD.

## FINDINGS OF FACT

1. In the fall of 2003, Appellant enrolled in Course so he could legally operate a charter vessel in 2004. In 2004, Appellant withdrew before completing Course following a death in the family.<sup>14</sup>
2. Throughout 2004, 2005, and 2006, Appellant unsuccessfully tried to take another course in his home community. His efforts are summarized below:

Date	Attempt	Result
Fall 2004	Appellant registered for Course offered near his home	Course cancelled due to low enrollment
Spring 2005	Appellant requested leave without pay to take Course offered in larger community	Employer rejected leave request
Spring 2005	Appellant requested Course to be held in the summer	University declined to offer Course in the summer
Summer 2006	Appellant expressed interest in Course offered in larger community	Course cancelled due to low enrollment

<sup>14</sup> Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 13, 2010; Appellant's Hearing Testimony dated Nov. 10, 2010. Appellant withdrew from his appeal the allegation that he experienced an unavoidable circumstance because he suffered a death in his family. Appeals Correspondence Tab, Email exchange between Contractor and Appellant on Nov. 1, 2010 and Nov. 2, 2010.

Winter 2007	Appellant requested leave to attend Course offered in larger community	Appellant's request for leave was approved, and Appellant completed Course <sup>15</sup>
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3. In 2004 and 2005, Appellant did not hold an Alaska Business Owner License.<sup>16</sup>
4. In 2004 and 2005, Appellant did not report any logbook fishing trips to ADF&G.<sup>17</sup>
5. Between 2002 and 2005, Appellant owned a twenty-two foot vessel, equipped for charter halibut fishing. In 2006, Appellant purchased a twenty-one foot vessel.<sup>18</sup>
6. In 2007, Appellant commenced his charter halibut fishing business, approximately two years following the end of the CHLAP qualifying period.<sup>19</sup>
7. In 2008, Appellant reported fifteen halibut logbook fishing trips to the Alaska Department of Fish and Game (ADF&G).<sup>20</sup>
8. In 2009, Appellant purchased another vessel.<sup>21</sup>

#### PRINCIPLES OF LAW

Under the regulations governing the CHLAP, NMFS is only authorized to issue a CHP to an individual or entity to which ADF&G issued an ADF&G Business Owner License. This license authorized the logbook fishing trips that were used to meet the minimum participation requirements to qualify for a CHP.<sup>22</sup>

Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005) and must have reported five or more halibut logbook fishing trips during the recent participation period (2008).<sup>23</sup>

If an applicant does not qualify for a CHP based on the criteria outlined above, he may still be eligible for a permit if he meets the requirements of the unavoidable

<sup>15</sup> Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 13, 2010; Appellant's Hearing Testimony dated Nov. 10, 2010.

<sup>16</sup> Appellant's Hearing Testimony dated Nov. 10, 2010.

<sup>17</sup> Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 27, 2010; Appellant's Hearing Testimony dated Nov. 10, 2010.

<sup>18</sup> Evidence Tab, Email from Appellant to Contractor dated Nov. 8, 2010.

<sup>19</sup> Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 13, 2010.

<sup>20</sup> Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 27, 2010.

<sup>21</sup> Evidence Tab, Email from Appellant to Contractor dated Nov. 8, 2010.

<sup>22</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>23</sup> 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B); 50 C.F.R. § 300.67(f)(6)-(7).

circumstance provision of the CHLAP regulations. Under the unavoidable circumstance provision as it applies to this case, an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005) may receive one or more CHPs if the applicant proves the following:

- he had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period, 2004 or 2005;
- his specific intent was thwarted by an actual circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable, and;
- he took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in 2004 or 2005.<sup>24</sup>

## ANALYSIS

Since Appellant does not dispute that he did not meet the minimum participation requirements to qualify for a CHP, I must determine whether the unavoidable circumstance provisions of the CHLAP regulations may provide a basis for Appellant to be eligible for a permit.<sup>25</sup> The unavoidable circumstance provision has a number of requirements. The provision first requires an applicant to demonstrate that he had a specific intent to operate a charter halibut fishing business in 2004 or 2005.

Although Appellant owned a boat and testified that the vessel was at least minimally equipped to use in a charter halibut fishing business, Appellant took no steps to prepare to operate such a business during 2004 or 2005. There is no evidence Appellant held an ADF&G Business Owner license in 2004 or 2005. There is no evidence that Appellant advertised a charter fishing business or took reservations from clients. As well, Appellant was not certified to legally operate a charter vessel during the qualifying period. Appellant registered to take Course in Fall 2003 in an effort to obtain the necessary certification for charter fishing in 2004, but he voluntarily withdrew before completing Course. Appellant made three other attempts to take Course during the qualifying period, but he was unsuccessful. While Appellant has demonstrated difficulty in obtaining the training needed to qualify for his license, this difficulty was not fatal to his desire to operate a charter halibut business. Appellant could have hired a licensed captain to operate his vessel. However, there is no evidence that Appellant attempted to obtain the services of a licensed captain during the qualifying years of 2004 and 2005. Given the totality of the circumstances and based on the record before me, I conclude that Appellant lacked the specific intent to operate a charter halibut fishing business in at least one year of the qualifying period, 2004 or 2005. Since Appellant

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<sup>24</sup> See 50 C.F.R. § 300.67(g)(2)(i)-(iv).

<sup>25</sup> See 50 C.F.R. § 300.67(g)(2).

cannot prove that he specifically intended to operate his charter halibut business in 2004 or 2005, he cannot establish an unavoidable circumstances claim.

In reaching my decision, I have carefully reviewed Appellant's appeal as well as the entire record. I recognize Appellant suffered a death in the family prior to withdrawing from Course in early 2004 and was unable to attend a course near his home in 2004 or 2005. I have read his statements about his investments into building an operation and his desire to stay in the charter business. I also read Appellant's concerns about the cost of taking a course in another community. However, the fact remains that he chose a course of action that compromised his ability to operate a charter fishing business in both 2004 and 2005. Without specific intent, Appellant cannot qualify for a permit under the unavoidable circumstances provisions.

I also note that Appellant did not take all reasonable steps to overcome the obstacles for starting his charter halibut business. As noted previously, holding a captain's license was not necessary to start Appellant's business. Appellant has not shown, as mentioned above, that in 2004 or 2005, his business was licensed, he hired a captain, obtained a logbook, advertised, or attempted to get clients. Alternatively, Appellant has not shown he exhausted all resources for completing Course prior to or during 2004 or 2005, including taking the course in another community and internet-based or other options. Under the totality of the circumstances, Appellant did not take all reasonable steps to overcome the circumstance that prevented him from operating his charter halibut fishing business in 2004 and 2005.

#### CONCLUSIONS OF LAW

Appellant is not eligible for a CHP because he did not meet the minimum participation requirements in 2004 or 2005.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not have the specific intent to operate a charter halibut business in 2004 or 2005.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not take all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut business in 2004 or 2005.

The IAD is consistent with the CHLAP regulations.

ORDER

The IAD dated June 17, 2010 is upheld. This decision takes effect thirty days from the date issued, September 6, 2011, and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k), (o).

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 Standard Time, on the tenth day after the date of this Decision, August 15, 2011. 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.

  
Eileen G. Jones  
Chief Administrative Judge

Date Issued: August 4, 2011