

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0060

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On September 17, 2010, a legal representative (Representative) for [REDACTED] (Appellant) timely filed an appeal with the Office of Administrative Appeals, challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated July 21, 2010.¹ In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP), which conditions issuance of a permit on, among other factors, meeting participation requirements in 2004 or 2005, and in 2008.²

In the IAD, RAM determined Appellant did not meet the minimum participation requirements in the qualifying period, 2004 or 2005, because he did not report a minimum of five bottomfish logbook fishing trips in either year. RAM also determined that, for the recent participation period of 2008, Appellant had met the minimum

¹ Case File, Pleadings Tab, Appellant's appeal submissions, Original File Tab, IAD dated July 21, 2010.

² The CHLAP regulations are codified at 50 C.F.R. § 300.67. Unless otherwise noted, citations to the CHLAP regulations are to the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR.

participation requirements. Since the minimum participation requirements in both periods of participation were not met, RAM denied Appellant's CHP application. RAM noted Appellant's claim that an unavoidable circumstance in 2004 or 2005 that thwarted his participation in the charter halibut fishing business and advised Appellant that such claims had to be resolved by OAA.³

In his appeal, Appellant argues that he planned to purchase an Alaska charter fishing lodge, ██████████ (Lodge), but the initial agreement to purchase the property did not materialize in 2005. Appellant then pursued the purchase of another Alaska property on which he constructed a new lodge, and, thereafter, began operating a charter fishing business. Appellant asserts that he would have been able to operate a charter fishing business during the qualifying period had the plans to purchase Lodge in 2005 not fallen apart.⁴

I reviewed Appellant's appeal and the case record and determined that an oral hearing would best resolve the issues of adjudicative fact presented in this case.⁵ Accordingly, I ordered a hearing on May 18, 2011, and provided Appellant with at least thirty days advance notice of the date, place, and time of the oral hearing and of the issues to be determined at the hearing.⁶ Following the hearing, I left the record open to allow post-hearing submissions, postmarked no later than June 6, 2011, by Representative, who timely submitted post-hearing documents that I accepted into the case record. I subsequently closed the record after determining that the record contained sufficient information on which to reach final judgment. This decision follows.⁷

ISSUES

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B). If Appellant does not meet the minimum participation requirements, specifically participation in 2005 and in 2008, then I must determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(2), would enable Appellant to receive a CHP in lieu of meeting the participation requirement for the 2005 qualifying period.

³ Case File, Original File Tab, IAD dated July 21, 2010.

⁴ Case File, Pleadings Tab, Appellant's appeal submissions.

⁵ 50 C.F.R. §§ 679.43(g)(3)(i) 679.43(h)(2), and 679.43(n)(1).

⁶ Case File, Appeals Correspondence Tab, Notice of Scheduled Hearing; 50 C.F.R. § 679.43(n)(1)-(2).

⁷ 50 C.F.R. §§ 679.43(n)(8) and (k).

FINDINGS OF FACT

1. Appellant began to have discussions with his business partner (Business Partner) in 2003 to purchase a fishing lodge in Alaska.⁸
2. In 2004 and 2005, Appellant did not report any bottomfish logbook fishing trips to Alaska Department of Fish and Game (ADF&G).⁹
3. In May 2005, Appellant contacted Lodge's owner (Owner) and, soon thereafter, began discussions with Owner about purchasing Lodge.¹⁰
4. In July 2005, Appellant and his family spent time at Lodge, learning various aspects of the operation.¹¹
5. Appellant believed an oral agreement had been reached with Owner to purchase Lodge; however, Appellant agreed it was best for Owner to complete the 2005 charter fishing season before entering into a written agreement to purchase Lodge and before taking over operation of Lodge at the end of 2005.¹²
6. Appellant engaged in advertising efforts to promote Lodge for the 2006 fishing season.¹³
7. In September 2005, Owner expressed to Appellant reservations about selling Lodge. Shortly thereafter, Owner advised Appellant that he wanted to receive the full "asking price" for Lodge, as opposed to the lesser amount previously agreed to. After discussion, Appellant and Business Partner chose to withdraw from further negotiations to purchase Lodge.¹⁴
8. In early 2006, Appellant located another property that he eventually purchased with Business Partner and a third individual, on which was constructed Appellant's lodge.¹⁵
9. Appellant obtained an Alaska business license, effective in 2006.¹⁶

⁸ Appellant and Business Partner's hearing testimony.

⁹ Case File, Internal Correspondence Tab, Appellant's logbook data for 2008; Appellant's hearing testimony.

¹⁰ Appellant's hearing testimony.

¹¹ Appellant's hearing testimony.

¹² Appellant's hearing testimony.

¹³ Appellant's hearing testimony.

¹⁴ Appellant's and Business Partner's hearing testimony.

¹⁵ Appellant's hearing testimony.

10. Construction of Appellant's lodge was completed in September 2006, at which time Appellant began "hosting people."¹⁷

11. In 2008, Appellant reported 59 halibut logbook fishing trips to ADF&G.¹⁸

12. On March 22, 2010, Appellant submitted to RAM a signed completed *Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A* (Application). Application identifies that Appellant did not operate in 2004 or 2005, but did operate in 2008. In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2004 or 2005.¹⁹

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements.²⁰ Minimum participation requirements to qualify for a non-transferable CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008 (for transferable permits the minimum number of trips that had to be reported in each period is fifteen).²¹

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 permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the

¹⁶ Case File, Pleadings Tab, Appellant's Post-Hearing submissions; Appellant's hearing testimony.

¹⁷ Case File, Pleadings Tab, Appellant's Post-Hearing submissions; Appellant's hearing testimony.

¹⁸ Case File, Internal Correspondence Tab, Appellant's logbook data for 2008.

¹⁹ Case File, Original File Tab, CHP application dated March 22, 2010.

²⁰ 50 C.F.R. § 300.67(b)(1)(ii).

²¹ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

applicant from operating a charter halibut fishing business in at least one year of the qualifying period.²²

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.²³

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.²⁴ My review of the record reveals Appellant does not meet such minimum participation requirements.

In 2004 and 2005, Appellant did not report any bottomfish logbook fishing trips. Thus, Appellant fell short of the minimum requirement to report at least five bottomfish logbook fishing trips as specified in the CHLAP regulations.²⁵ In 2008, Appellant reported 59 halibut logbook fishing trips to ADF&G, exceeding the five-trip minimum specified in the CHLAP regulations.²⁶ Since Appellant did not meet the minimum participation requirements in both periods (2004 or 2005, and 2008) to qualify for a CHP, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provision of the CHLAP regulations enable Appellant to receive a CHP in lieu of his insufficient participation in 2004 or 2005.

The CHLAP regulations provide, specific to the issue at hand, that 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 permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²² 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²³ 50 C.F.R. § 300.67(f)(5).

²⁴ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

²⁵ Case File, Internal Correspondence Tab, Appellant's logbook data for 2004; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); Appellant's hearing testimony.

²⁶ Case File, Internal Correspondence Tab, Appellant's logbook data for 2008; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

The first element, found at 50 C.F.R. § 300.67(g)(2)(i), requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period, that is 2004 or 2005. In this case, the qualifying year at issue is 2005.²⁷ Appellant asserts an unavoidable circumstance occurred in 2005— namely, the fact that his plans to purchase Lodge and begin operating a charter fishing business in 2005 did not materialize— that thwarted his specific intent to operate a charter halibut fishing business in 2005.²⁸ However, my review of the case record, including the Appellant’s sworn hearing testimony, leads me to conclude that Appellant did not possess a specific intent to operate a charter fishing business in 2005.

Specifically, the facts of this case show that Appellant began to have discussions with Business Partner in 2003 to purchase a fishing lodge in Alaska. After becoming aware of the fact that Lodge was listed for sale, Appellant contacted Owner in May 2005 and soon thereafter began discussions with Owner about purchasing Lodge. In July 2005, Appellant and his family spent time at Lodge, learning various aspects of the operation. Appellant believed an oral agreement had been reached with Owner to purchase Lodge; however, Appellant agreed it was best for Owner to complete the 2005 charter fishing season before entering into a written agreement to purchase Lodge and before taking over operation of Lodge at the end of 2005. Consequently, Appellant embarked on advertising efforts to promote Lodge for the 2006 fishing season. However, in September 2005, Owner expressed to Appellant reservations about selling Lodge and, later, advised Appellant that Owner wanted to receive the full “asking price” for Lodge (rather than the lesser amount that had been verbally agreed to). Appellant discussed the situation with Business Partner and they decided to withdraw from further negotiations to purchase Lodge.²⁹

Soon thereafter, in early 2006, Appellant located another property that he eventually purchased with Business Partner and a third individual, on which was constructed Appellant’s lodge. Appellant obtained an Alaska business license, effective in 2006. Construction was completed in September 2006, at which time Appellant began “hosting people.”³⁰ Appellant also had a vessel constructed in 2006 for the fishing operation.³¹

Based on this record, I am convinced that Appellant did not specifically intend to operate a charter halibut fishing business in 2005. While Appellant and his family devoted some of their time to learning about the daily operation of Lodge in anticipation

²⁷ Case File, Pleadings Tab, Appellant’s appeal submissions; Appellant’s hearing testimony.

²⁸ Case File, Pleadings Tab, Appellant’s appeal submissions; Appellant’s hearing testimony.

²⁹ Appellant’s and Business Partner’s hearing testimony.

³⁰ Case File, Pleadings Tab, Appellant’s Post-Hearing submissions; Appellant’s hearing testimony.

³¹ Appellant’s hearing testimony.

of purchasing Lodge, Appellant did not intend to take over Lodge until the end of 2005. It is undisputed that Appellant agreed it was best to allow Owner to finish the 2005 fishing season. Further, Appellant did not obtain an Alaska business license until 2006 and the vessel used in Appellant's operation was not constructed until 2006. Thus, I am not persuaded that Appellant possessed a specific intent to operate a charter halibut fishing business in 2005. Since resolution of this issue is dispositive, I need not address the remaining elements of 50 C.F.R. § 300.67(g)(2).

CONCLUSIONS OF LAW

Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B) since Appellant did not meet the minimum participation requirement for the qualifying period (2004 or 2005).

The unavoidable circumstance provisions of the CHLAP regulations do not enable Appellant to receive a CHP in lieu of such participation since Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2).

ORDER

The IAD dated July 21, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 19, 2011³², 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) and (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 Time, on the tenth working day after the date of this Decision, August 1, 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 in support of the motion.

[REDACTED]

Christine D. Coughlin
Administrative Judge

³² 50 C.F.R. § 679.43(k) and (o).

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Appeal No. 10-0060

Date Issued: July 20, 2011