

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0092

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 is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter.¹

On October 2, 2010, [REDACTED] doing business as (dba) [REDACTED] (collectively referred to herein as Appellant) timely filed an appeal with OAA. In his appeal, Appellant challenges a NMFS Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated September 8, 2010.² In the IAD, RAM notified Appellant that it denied his application for a Charter Halibut Permit (CHP or permit) pursuant to the regulations governing the Charter Halibut Limited Access Program (CHLAP).³

Appellant applied for a CHP on April 5, 2010.⁴ RAM notified Appellant that it had received his application in a Notice of Opportunity to Submit Evidence (Notice) dated May 3, 2010.⁵ RAM noted that Appellant claimed eligibility for a CHP based on a claim of unavoidable circumstance and informed Appellant that he could submit additional

¹ See 50 C.F.R. § 679.43.

² Pleadings Tab, Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010); Original File Tab, IAD dated Sept. 8, 2010.

³ 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.

⁴ Original File Tab, Application of Charter Halibut Permit(s) for IPHS Regulatory Areas 2C and 3A dated April 5, 2010 (received by RAM on April 5, 2010). Appellant resubmitted his application with additional logbook information on April 26, 2010. In this decision, "application" encompasses Appellant's original and resubmitted application.

⁵ Original File Tab, Notice of Opportunity to Submit Evidence dated May 3, 2010.

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

On September 8, 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 met the participation requirements for 2008. However, RAM also stated that 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 that Appellant held an ADF&G Business Owner License to operate his business in 2004 or 2005.

Though Appellant’s brother (Brother) attempted to give Appellant the rights of his logbooks for 2004 and 2005, RAM explained that the regulations do not authorize it to credit trips in this manner to anyone other than the person to whom ADF&G issued the license that authorized the logbook fishing trips.⁷ RAM also acknowledged Appellant’s unavoidable circumstance claim, but it explained that the claim needed to be adjudicated by OAA, provided Appellant filed an appeal with OAA to pursue his claim.⁸ 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 November 8, 2010, OAA received Appellant’s timely appeal.⁹ In his appeal, Appellant explains that in 2000, he moved from Alaska to another state in an unsuccessful attempt to maintain his marriage. Appellant remained there for a number of years while trying to reconcile with his wife. After his divorce, Appellant restarted his business.¹⁰ I construe Appellant’s appeal as a request for a permit based on the unavoidable circumstance provision of the CHLAP regulations, as more fully addressed in the Analysis section of this Decision.

On November 29, 2010, NAO sent Appellant a letter acknowledging his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by December 20, 2010.¹¹ The record does not show that Appellant responded with additional evidence or information provided to NAO.

I have reviewed Appellant’s appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I

⁶ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated May 30, 2010 (received by RAM on June 1, 2010).

⁷ If a person is applying as a successor-in-interest to the person who ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met CHLAP participation requirements, NMFS will require documentation that the applicant is applying on behalf of a deceased individual or as a successor-in-interest to an entity that has been dissolved. See 50 C.F.R. § 300.67(b)(iii).

⁸ Original File Tab, IAD dated Sept. 8, 2010.

⁹ Pleadings Tab, Appellant’s Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

¹⁰ Pleadings Tab, Appellant’s Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

¹¹ Appeals Correspondence Tab, NAO’s letter to Appellant dated Nov. 29, 2010.

close the record and issue this decision without ordering a hearing.¹² This decision follows.

ISSUES

On appeal, Appellant does not dispute that he does not meet the minimum participation requirements for eligibility for a CHP. 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. Appellant has participated in the Alaska fishing industry since 1986.¹³
2. In 1997, Appellant started his charter fishing business.¹⁴
3. In 2000, Appellant moved from Alaska to another state in an unsuccessful effort to save his marriage.¹⁵
4. By 2001, Appellant had stopped operating his charter halibut fishing business.¹⁶
5. In 2004 and 2005, Brother used Appellant's vessel (Vessel) to complete bottomfish logbook fishing trips on behalf of Brother's business as authorized by Brother's Business Owner's License.¹⁷

¹² See 50 C.F.R. § 679.43(g)(2), (k).

¹³ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated April 5, 2010 (received by RAM on April 5, 2010).

¹⁴ Pleadings Tab, Statement attached to Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

¹⁵ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated April 5, 2010 (received by RAM on April 5, 2010); Pleadings Tab, Statement attached to Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

¹⁶ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated April 5, 2010 (received by RAM on April 5, 2010); Pleadings Tab, Statement attached to Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

6. Brother reported his business's 2004 and 2005 bottomfish logbook fishing trips to ADF&G.¹⁸
7. In 2004 and 2005, Appellant did not hold an Alaska Business Owner License.¹⁹
8. In 2004 and 2005, Appellant did not report any logbook fishing trips to ADF&G.²⁰
9. In 2004 and 2005, Appellant was occupied with caring for his family, and did not operate a charter halibut fishing business.²¹
10. In 2007, Appellant applied for a Business Owner License for his fishing business.²²
11. In 2008, Appellant timely reported ten halibut logbook fishing trips to ADF&G.²³

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the 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.²⁴

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).²⁵

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 circumstance provision of the CHLAP regulations. Under the unavoidable circumstance provision as they apply 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:

¹⁷ Original File Tab, Brother's letter (received by RAM on April 5, 2010); Original File Tab, Brother's Print Summary created on January 26, 2010.

¹⁸ Original File Tab, Brother's letter (received by RAM on April 5, 2010); Original File Tab, Brother's Print Summary created on January 26, 2010.

¹⁹ Original File Tab, Print Summary created on January 26, 2010.

²⁰ Original File Tab, Print Summary created on January 26, 2010.

²¹ Pleadings Tab, Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

²² Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated April 5, 2010 (received by RAM on April 5, 2010).

²³ Original File Tab, Print Summary created on Jan. 26, 2010.

²⁴ 50 C.F.R. § 300.67(b)(1)(ii).

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

- he had a specific intent to operate a charter halibut fishing business in 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 2005.²⁶

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.²⁷ 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 had a charter fishing business beginning in 1997,²⁸ Appellant moved from Alaska to another state in 2000. By 2001, Appellant had removed himself from the charter business while he took care of personal family issues. There is no evidence that Appellant held an ADF&G Business Owner license in 2004 or 2005. In fact, Appellant did not apply for a business license until 2007. Without completing the initial step of obtaining a business license, Appellant would not be able to complete authorized logbook fishing trips as required by the regulations. It is true the evidence shows that during Appellant's years of absence from the charter halibut fishing industry, Brother used Vessel to complete authorized bottomfish logbook fishing trips. However, those trips were taken for Brother's business as authorized under Brother's Business Owner's License. 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. In other words, since Appellant 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 removed himself from the fishing industry for a number of years in an unsuccessful attempt to save his marriage and then to be primary caregiver to his children. I have read his statements about his feelings about the fishery and his desire to stay in the charter business. However, the fact remains that he chose

²⁶ See 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²⁷ See 50 C.F.R. § 300.67(g)(2).

²⁸ Pleadings Tab, Statement attached to Appellant's Letter of Appeal dated Oct. 2, 2010 (received by OAA on Nov. 8, 2010).

a course of action that compromised his ability to operate a charter fishing business in both 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.

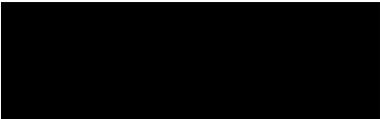
Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not have the specific intent to operate a charter halibut business in 2004 or 2005.

The IAD is consistent with the CHLAP regulations.

ORDER

The IAD dated September 8, 2010 is upheld. This decision takes effect thirty days from the date issued, August 29, 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 8, 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: July 29, 2011