

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

In re Application of)
)
) Appeal No. 10-0007
)
) DECISION
)
 Appellant)

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, Maryland 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 OAA. The undersigned is the administrative judge assigned to review and decide this matter.¹

This appeal comes before NAO based on a timely appeal filed by [REDACTED] doing business as (dba) [REDACTED] (Appellant). On June 24, 2010, NAO received Appellant's appeal of the Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM). In the IAD, dated May 27, 2010, RAM denied Appellant's application for a Charter Halibut Permits (CHP), under the Charter Halibut Limited Access Program (CHLAP) regulations.

The application referred to in the IAD was filed by Appellant on March 18, 2010.² On the application, Appellant indicated he took four logbook fishing trips in 2004 and twenty-two logbook fishing trips in 2005 on the [REDACTED] (Vessel I).³ Appellant selected the 2005 season for his qualifying period. Appellant listed no trips for the 2008 season and checked unavoidable circumstances as the reason.⁴ Appellant stated in an attached letter that he did not participate in the 2008 season because he had to replace Vessel I unexpectedly with [REDACTED] (Vessel II).⁵ Appellant also added that due to the new purchase, to gain more business, Appellant took logbook trips however he did

¹ 50 C.F.R. § 679.43; I was assigned this appeal after the completion of the contract for a former contractor of OAA.

² File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

³ File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

⁴ File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

⁵ Original File Tab, Letter from Appellants dated February 25, 2010.

not record them because they were complimentary.⁶ Appellant attached several notarized letters from customers who confirmed Appellant's explanation.

After reviewing Appellant's application, on April 26, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁷ The Notice provided Appellant thirty days to provide additional information in support of his application.⁸ In response, Appellant submitted additional letters from his customers.

On May 27, 2010, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's application for a CHP. RAM reasoned that the Official Record, which RAM uses to determine applicants eligibility, showed Appellants had not met the minimum recent participation period requirement of reporting five or more halibut logbook fishing trips during 2008.⁹ RAM also stated that Appellants must file an appeal with OAA to resolve his claim of unavoidable circumstances.¹⁰

On June 24, 2010, Appellant timely appealed the IAD to OAA.¹¹ With the appeal, Appellant renews his claim that he was unable to operate Vessel I and Vessel II during the 2008 season due to unavoidable circumstances.¹² Appellant further explains that trips he took in 2008 but did not report were done in exchange for advertisement of his business.¹³ On July 29, 2010, OAA acknowledged receipt of the Appellant's appeal.¹⁴

On February 10, 2011, a Contractor with OAA convened an oral hearing. At the hearing, Appellant testified that Vessel I overheated and burned his hired captain in the summer of 2007.¹⁵ Appellant testified that he did take Vessel I to a mechanic to repair the overheated engine; however, he was told it would cost ██████████ to repair.¹⁶ Instead, Appellant chose to sell Vessel I.¹⁷ After selling Vessel I, Appellant testified that he entered into a referral agreement with ██████████ (Captain).¹⁸ Captain logged a total of four halibut logbook fishing trips in Appellant's logbook.¹⁹ After which, Captain began logging the charter trips he captained in his own logbook.²⁰ In July 2007, Appellant's client ██████████ (Client) volunteered to purchase Vessel II for Appellant. Vessel II was not purchased until July 2008 and was delivered mid-August 2008. Upon delivery of Vessel II, Appellant did not resume providing charter fishing trips for direct payment business due to his unfamiliarity with Vessel II and his lack of money to insure it as

⁶ Original File Tab, Letter from Appellants dated February 25, 2010.

⁷ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated April 26, 2010.

⁸ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated April 26, 2010.

⁹ Original File Tab, IAD page 2.

¹⁰ Original File Tab, IAD page 3.

¹¹ Pleadings File Tab, Appellant's appeal letter received on June 24, 2010.

¹² Pleadings File Tab, Appellant's appeal letter received on June 24, 2010.

¹³ Pleadings File Tab, Appellant's appeal letter received on June 24, 2010.

¹⁴ Appeals Correspondence Tab, NAO letter dated July 29, 2010.

¹⁵ Testimony of Appellant at Oral Hearing (February 10, 2011).

¹⁶ Testimony of Appellant at Oral Hearing (February 10, 2011).

¹⁷ Testimony of Appellant at Oral Hearing (February 10, 2011).

¹⁸ Testimony of Appellant at Oral Hearing (February 10, 2011).

¹⁹ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁰ Testimony of Appellant at Oral Hearing (February 10, 2011).

well.²¹ Instead, Appellant testified he took clients out on leisure trips to “break in” Vessel II and did not record or report these trips.²² Appellant testified he failed to report the trips because he had not charged for them.²³ At the conclusion of the hearing, Contractor closed the record.

ISSUES

Appellant concedes he does not meet the minimum participation requirements for eligibility for a CHP. Appellant met the minimum participation requirements for 2005, but he did not meet the minimum participation requirements for 2008. Thus, the only issue on appeal is Appellant’s unavoidable circumstance claim.

In order for Appellant to prevail in this appeal, he must show by a preponderance of the evidence that he meets the criterion of an unavoidable circumstances claim, beginning with holding the specific intent to operate his charter halibut business in 2008 and that an unavoidable circumstance thwarted his intent to operate a charter halibut business.

If Appellant has not demonstrated that he held the specific intent to operate his charter halibut business in 2008 and that his operations were thwarted by the unavoidable circumstances, 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 2005, Appellant reported twenty-two bottomfish logbook fishing trips to the State of Alaska Department of Fish and Game (ADF&G) taken by Vessel I.²⁴
2. In the summer of 2007, Vessel I’s engine overheated. Appellant received an estimate that it would take [REDACTED] to repair.²⁵
3. Appellant decided against repairing Vessel I and sold it.²⁶
4. Following the 2007 season, a client (Client) offered to purchase a vessel for Appellant to use in his charter business.²⁷ Vessel II was not purchased until July 21, 2008.²⁸

²¹ Testimony of Appellant at Oral Hearing (February 10, 2011).

²² Testimony of Appellant at Oral Hearing (February 10, 2011).

²³ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁴ Official Charter Halibut Record [50 C.F.R. 300.67(f)(5): *Official Charter Halibut Record* means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits].

²⁵ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁶ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁷ Testimony of Appellant at Oral Hearing (February 10, 2011).

5. In early 2008, Appellant referred clients to Captain who reported four halibut logbook fishing trips to ADF&G in Appellant's logbook.²⁹ Appellant and Captain described their arrangement as a "gentlemen's agreement."³⁰
6. After the four trips, Captain began recording the remainder of the logbook fishing trips in his own ADF&G issued logbook, although Captain took about ten charter trips that were referred by Appellant.³¹
7. Vessel II was delivered from Oregon to [REDACTED] Alaska in mid-August 2008.³²
8. Appellant did not immediately use Vessel II to carry clients because he needed to familiarize himself with its handling characteristics and its electronics (fish-finding equipment and aids to navigation) before doing so.³³ Appellant also alleges he did not have the funds to insure Vessel.³⁴ When he received Vessel II in mid-August, Appellant thought it was too late to take out paying charter clients.³⁵
9. To break-in Vessel II, Appellant took several trips with friends to catch halibut.³⁶ However, Appellant decided not to report those trips to ADF&G because Appellant believed he did not receive compensation for the trips.
10. In 2008, Appellant reported no additional halibut logbook fishing trips to ADF&G on Vessel II.³⁷
11. In 2009, Appellant fully resumed charter fishing.³⁸

PRINCIPLES OF LAW

In general, NMFS is only authorized to issue a CHP to an individual or entity that has been issued an ADF&G Business Owner License. These licenses can include business registration, sport fishing business owner license, sport fish business license, or ADF&G

²⁸ Testimony of Appellant and Client at Oral Hearing (February 10, 2011).

²⁹ Testimony of Appellant and Captain at Oral Hearing (February 10, 2011); Appeals Correspondence Tab, attachment to email dated October 14, 2011; Evidence Tab, Captain's letter dated September 9, 2010; Original File Tab, Print Summary, created January 26, 2010.

³⁰ Testimony of Appellant and Captain at Oral Hearing (February 10, 2011);

³¹ Testimony of Captain at Oral Hearing (February 10, 2011).

³² Testimony of Appellant at Oral Hearing (February 10, 2011).

³³ Testimony of Appellant at Oral Hearing (February 10, 2011).

³⁴ Testimony of Appellant at Oral Hearing (February 10, 2011).

³⁵ Testimony of Appellant at Oral Hearing (two times during Client's testimony and another client's testimony) (February 10, 2011).

³⁶ Letters dated February 19, 2010, and February 25, 2010, and March 3, 2010.

³⁷ Testimony of Appellant at Oral Hearing (February 10, 2011).

³⁸ Testimony of Appellant at Oral Hearing (February 10, 2011).

business license. With this license one is then authorized to take qualifying logbook fishing trips.³⁹

To establish one's history of bottomfish logbook fishing trips, one must record qualifying trips in a state-issued logbook. ADF&G issues logbooks to those who hold an ADF&G Business Owner License.⁴⁰

To be eligible for a permit, an applicant must also have reported a minimum of five bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the 2008 recent participation period.⁴¹ A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.⁴²

A "halibut logbook fishing trip" means a logbook fishing trip in the recent participation period that was reported to ADF&G in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.⁴³

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.⁴⁴

ANALYSIS

In analyzing this case, I considered the entire record, including hearing testimony and documents submitted by Appellant in support of his appeal. Since Appellant does not dispute the substantive basis for the denial of his Application articulated in the IAD, i.e., that he did not have sufficient logbook trips in 2008 to qualify for a CHP, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The criterion I consider is whether Appellant held the specific intent to operate a charter halibut business in 2008 and whether his not operating his business fully in 2008 was thwarted by an unavoidable circumstance.

Although Appellant did come into possession of Vessel II in 2008 and did attempt to contract out his clients prior to August 2008, his subsequent actions after receiving

³⁹ See 50 C.F.R. § 300.67(b)(1)(ii) and (3).

⁴⁰ 50 C.F.R. § 300.67(b)(1)(ii).

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

⁴² 50 C.F.R. § 300.67(f)(4).

⁴³ 50 C.F.R. § 300.67(f)(3).

⁴⁴ 50 C.F.R. § 300.67(f)(5).

Vessel II are contrary to the someone who holds the specific intent to operate a charter fishing business. Vessel II was purchased for Appellant in July of 2008 and delivered to his place of business by mid-August. Appellant testified that upon delivery he had no money to insure Vessel II. For reasons unknown, Appellant did not attempt to raise money to insure Vessel II so that he could resume his business. Appellant's testimony is also contradictory. On one hand, he stated at the hearing that he did not have enough money for a logbook and insurance to run charters once Vessel II arrived, on the other hand, he stated that he felt once Vessel II arrived it was too late to charter. He also had a 2008 logbook. I notice, also, despite Appellant's alleged limited finances, he did fuel and operate Vessel II in August and October 2008 (still within the official halibut fishing season).⁴⁵ I also find Appellant's statement that he gave complimentary trips in 2008 contradicted by his statement that he provided trips in 2008 in exchange for advertising.⁴⁶

Moreover, Appellant testified that he also did not schedule any trips because he was unfamiliar with his new vessel. Even if this was the case, Appellant was still able to take out Vessel II for chartering, albeit without directly being paid for the service. Taking several weeks to familiarize with Vessel II appears to have been long enough since his vessel was in the water and persons on his boat were fishing. Instead of running his charter business fully, Appellant referred his clients to other businesses or took them out for free. Appellant also did not record or report to ADF&G what he refers to as free trips. Appellant stated it was because the trips were done for free; however, Appellant presented no evidence that he consulted with ADF&G about whether such trips could be reported on his behalf. Moreover, at least some of those trips were based on a bartering relationship, and therefore, were based on an exchange of value.

The record also does not show that Appellant made an effort to lease a charter vessel for the 2007 or 2008 summer season until Vessel II arrived. Additionally, the record does not show Appellant made appropriate arrangements with Captain to ensure that Appellant was credited with more logbook trips. That is, the record does not show evidence that Appellant attempted to extend their "gentlemen's agreement" so that Appellant would be credited with another halibut charter logbook trip.

After taking into consideration the totality of the circumstances, based on the record before me I find Appellant did not hold the specific intent to operate a charter halibut fishing business in 2008. Since Appellant cannot prove that he specifically intended to operate his charter halibut business in 2008, he cannot establish an unavoidable circumstances claim.

What caused Appellant to not report at least five halibut logbook fishing trips in 2008 was not the break-down of Vessel I in 2007, but rather Appellant's delay in not making arrangements to be able to report at least five halibut logbook fishing trips. In fact, Appellant only had to report one more halibut logbook fishing trip in order to meet minimum requirements for a CHP. Appellant had several options, none of which he

⁴⁵ Original File Tab, letter dated March 3, 2010 attached to Appellant's Application.

⁴⁶ Pleadings Tab, Appellant's letter dated June 24, 2010.

exercised, including repairing Vessel I (including making sure it would be safe); leasing or purchasing a vessel before or at the beginning of the summer of 2008; reporting the trips he provided free-of-charge; having adequate safeguards in place or an arrangement with Captain by which logbook trips Appellant could legally receive credit for were in fact credited to him, and; taking and reporting at least one (since he had four already) logbook fishing trips between August and December 2008, even if that required hiring an experienced captain to take that trip. In short, the circumstance of the breakdown of Vessel I did not thwart Appellant's ability to operate a charter halibut business in 2008. Rather, because of Appellant's choices or inaction, he did not report the minimum of five halibut logbook fishing trips for 2008.

In reaching my Decision, I have carefully considered Appellant's circumstances. I acknowledge the challenges Appellant faced in the last few years. I also understand his general desire to reenter the charter halibut industry. Yet, unfortunately under the evidence presented, Appellant does not qualify for a permit under the CHLAP regulations.

CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the basic requirements because he did not meet the minimum participation requirements in 2008.

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 2008.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because his ability to operate his charter halibut business fully in 2008 was not thwarted by an unavoidable circumstance.

The IAD is consistent with the CHLAP regulations.

ORDER

The IAD dated May 27, 2010 is upheld. This decision takes effect thirty days from the date issued, December 23, 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 reverse, remand, or modify 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 December 5, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in

