

Active Duty Military Service hardship claim requires proof the applicant was ordered to report for active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period; and the applicant had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service. RAM advised Applicant he had until August 30, 2010, to submit any additional evidence in support of his claim. On August 30, 2010, Appellant responded to the Notice.⁵ Appellant included in his response a letter from a ██████████ Commander stating Appellant has been a full-time employee of the Alaska Air National Guard since December 2001.

On November 15, 2010, RAM sent Appellant the IAD which is the subject of this appeal.⁶ In the IAD, RAM denied Appellant a CHP. RAM explained Appellant was not the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the Business Owner License that authorized taking logbook fishing trips. RAM also indicated that although Appellant did properly report to ADF&G six halibut logbook fishing trips in 2008, he did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by January 14, 2011.

On January 14, 2011, Appellant timely filed his appeal of the IAD with OAA.⁷ On April 21, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.⁸ On October 6, 2011, NAO sent Appellant an Order Scheduling a Hearing with a scheduled hearing date of October 13, 2011.⁹ On October 13, 2010, Appellant testified during his scheduled hearing that he started his charter halibut business in 2001, when he purchased a boat, that in 2004 and 2005, he had an Alaska State Business License, but that he did not obtain an ADF&G Business Owner License until 2006, that he has had a Captain's License since 2007, and that he purchased business property in 1989, with the intent to operate a lodge and fishing business during his retirement.¹⁰

I have determined that the information in the record is sufficient to render a decision.¹¹ I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

⁵ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence, signed August 30, 2010, received August 30, 2010.

⁶ Original File Tab, IAD, dated November 15, 2010.

⁷ Pleadings Tab, letter dated January 13, 2011, and received January 14, 2011.

⁸ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁹ Pleadings Tab, Order Scheduling Hearing, signed October 6, 2011.

¹⁰ Audio recording of October 13, 2011, scheduled hearing.

¹¹ 50 C.F.R. § 679.43(g) (2).

ISSUES

1. Was Appellant ordered to report to active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period?
2. If the answer to Question 1 is “yes”, then I will decide whether Appellant proved by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business before or during 2004 or 2005;
3. If the answer to Question 2 is “no,” I must conclude Appellant is not eligible for a CHP under the military unavoidable circumstance provisions and, therefore, uphold the IAD.

FINDINGS OF FACT

1. In 2001, Appellant purchased a boat capable of being used in a charter vessel business.¹²
2. Appellant did not acquire a ADF&G Business Owner License until 2006.¹³
3. Appellant did not acquire a Captains License prior to 2007.¹⁴
4. Appellant purchased business property in 1989, with the intent to operate a lodge and fishing business during his retirement.¹⁵
5. Appellant did not book clients or operate a charter vessel business in 2004 or 2005, or any prior year.¹⁶
6. Appellant was ordered to report for active duty with the Department of The ██████████ from February 11, 2005 to March 14, 2005, and from October 27, 2005 to November 9, 2005.¹⁷

¹² Audio recording of October 13, 2011, scheduled hearing.

¹³ Audio recording of October 13, 2011, scheduled hearing.

¹⁴ Audio recording of October 13, 2011, scheduled hearing.

¹⁵ Audio recording of October 13, 2011, scheduled hearing.

¹⁶ Audio recording of October 13, 2011, scheduled hearing.

¹⁷ Original File Tab, Department of the Air Force Special Orders, received April 2, 2010.

PRINCIPLES OF LAW

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).¹⁸

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.¹⁹

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. Further, the participation must have occurred in the International Pacific Halibut Commission (IPHC) regulatory area (either 2C or 3A) for which the applicant seeks the permit. These threshold criteria may be referred to as the participation requirements.²⁰

An applicant for a charter halibut permit that meets the participation requirement in 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 the following:

1. The applicant was ordered to report for active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period; and
2. The applicant had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service.²¹

ANALYSIS

In analyzing this case, I considered the entire record, including statements made during a scheduled hearing and the documents submitted by Appellant in support of his appeal. 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 2004 or 2005. I will first address whether Appellant was ordered to report to active duty

¹⁸ 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

¹⁹ 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556 (2010).

²⁰ 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555 (2010).

²¹ 50 C.F.R. § 300.67(g)(3).

military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period. I will next address whether Appellant held the specific intent to operate a charter halibut fishing business before or during 2004 or 2005.

Appellant submitted evidence that he was ordered to report for active duty with the U.S. Department of the ██████████ from February 11, 2005 to March 14, 2005, and from October 27, 2005 to November 9, 2005. Given the above, it is reasonable to conclude Appellant was ordered to report to active duty military service as a member of a branch of the U.S. military, during the qualifying period.

The next criterion I consider is whether Appellant held the specific intent to operate a charter halibut business prior to or during the 2004 or 2005 qualifying period. In 1989, Appellant purchased business property with the intent to operate a lodge and fishing business during his retirement. In 2001, Appellant purchased a boat capable of being used in a charter vessel business. It is not reasonable to conclude that these events alone constitute a specific intent to operate a charter halibut fishing business before or during 2004 or 2005. Appellant did not possess an ADF&G Business Owner License prior to or during 2004 or 2005, nor did he operate a charter vessel business during that time period. Appellant also did not book reservations for charter vessel trips during or prior to 2004 or 2005. Finally, Appellant did not obtain a Captains License until 2007. Given the above, it is reasonable to conclude Appellant did not make a definite commitment to operate a charter halibut fishing business prior to or during the qualifying period. Appellant did not have the essential elements of a charter business in place, or a realistic plan to have all the essential elements of a charter business in place prior to or during 2004 or 2005, and Appellant did not take substantial steps towards operating a charter halibut fishing business before or during the qualifying period. Based on the evidence, it is speculative to conclude Appellant specifically intended to operate a charter halibut fishing business before or during the qualifying period.

Given the totality of the evidence and facts, it is not reasonable to conclude that Appellant held a specific intent to operate a charter halibut business before or during 2004 or 2005. Appellant failed to prove by a preponderance of the evidence that he held a specific intent to operate a charter halibut fishing business before or during 2004 or 2005.

CONCLUSIONS OF LAW

RAM correctly denied Appellant's application for a CHP. 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) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005.

Appellant did not specifically intend to operate a charter halibut business before or during 2004 or 2005.

ORDER

The IAD dated November 15, 2010, is upheld. This decision takes effect thirty days from the date issued, November 28, 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 reverses, modifies, or remands 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 November 7, 2011, the tenth day after the date of this Decision.

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.

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Steven Goodman
Administrative Judge

Date Issued: October 28, 2011