

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

In Re Application of

[REDACTED]

Appellant

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Appeal No. 11-0019

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 OAA. 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.

[REDACTED] doing business as [REDACTED] (Appellant) filed an appeal with OAA because NMFS denied his application for a charter halibut permit (CHP or permit). Appellant applied for the permit on April 2, 2010 through NMFS's Restricted Access Management program (RAM).¹ On the application Appellant indicated he took enough charter halibut trips in 2004, 2005 and 2008 to qualify for a permit pursuant to the regulations for the Charter Halibut Limited Access Program (CHLAP). Appellant also indicated on his application that unavoidable circumstances prevented him from meeting the trip requirement for 2004 and 2005.

In a Notice of Opportunity to Submit Evidence (Notice) dated July 13, 2010, RAM notified Appellant of the agency's preliminary assessment of his application.² RAM indicated Appellant probably had a sufficient number of qualifying trips in 2008. However, RAM suggested Appellant did not have sufficient charter trips for 2004 or 2005 by noting Appellant's indication that unavoidable circumstances caused him to miss meeting the requirements for qualifying for a permit.

¹ Original file tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

² Original file tab, Notice of Opportunity to Submit Evidence dated July 13, 2010.

In response to the Notice, on August 9, 2010, Appellant submitted additional evidence, now part of the record before me, and requested that RAM make a decision on his application.³

On November 24, 2010, RAM issued its decision on the application in the form of an Initial Administrative Determination (IAD).⁴ In the IAD, RAM denied Appellant's application for a permit. RAM reasoned that Appellant did not meet the regulatory requirements for a CHP. Specifically, Appellant lacked participation as evidenced by at least five bottomfish logbook trips in 2004 or 2005. RAM acknowledged Appellant's forty-six qualifying trips made in 2008, but noted that the regulatory requirements mandate at least five qualifying trips not only in 2008 but also in either 2004 or 2005. RAM also advised Appellant that his claim for unavoidable circumstances could only be resolved through an appeal to OAA.

On January 25, 2011, Appellant filed an appeal with OAA.⁵ In his appeal Appellant claims that he met the participation requirements for a permit by taking more than five qualifying trips in 2004 and 2005. Appellant also requests that he be issued a permit based on the unavoidable circumstances provisions of the CHLAP regulations.⁶

On April 21, 2011, NAO sent Appellant a letter advising him of receipt of his appeal and providing Appellant with an opportunity to submit additional information. NAO did not receive additional information in response to NAO's April 21, 2011 letter. On May 31, 2011, NAO sent Appellant a Notice Scheduling Hearing. In advance of the hearing, Appellant transmitted additional evidence to NAO in the form of five letters from individuals writing in support of Appellant's appeal. That submission has been added to the record.⁷

On July 6, 2011, I held the hearing, during which Appellant provided sworn testimony. At the conclusion of the hearing I established August 1, 2011 as the deadline by which Appellant could submit additional documents in support of his appeal. Upon Appellant's request, I extended that deadline to August 23, 2011. On August 22, 2011, Appellant submitted an additional letter in support of his appeal.⁸ I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2). I therefore close the record and render this decision.

³ Original file tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed and dated by Appellant on August 9, 2010.

⁴ Original file tab, Initial Administrative Determination dated November 24, 2010.

⁵ Pleadings tab, Appellant's appeal dated January 19, 2011.

⁶ The specific requirements of those provisions are outlined in detail under the Principles of Law and Analysis sections of this Decision.

⁷ Evidence tab.

⁸ The letter was made part of the record. Evidence tab.

ISSUES

My function in reviewing this case is to decide whether Appellant is eligible for a permit.

To resolve that issue, I must answer the following:

1. Did Appellant show by a preponderance of the evidence that he timely reported to the state at least five bottomfish logbook fishing trips in his Saltwater Charter Logbook for 2004 or 2005.

If the answer to Question 1 is “no,” I must answer the following:

2. Did Appellant show by a preponderance of the evidence that he timely reported to the state at least five halibut logbook fishing trips in his Saltwater Charter Logbook for 2008.

If the answer to Question 2 is “yes,” I must answer the following:

3. Did Appellant show by a preponderance of the evidence that he qualifies for a permit under the exception to the general requirements for a permit because he meets the criteria for an “unavoidable circumstance” claim. That is, did Appellant prove that he had the specific intent to operate his charter halibut business in 2004 or 2005.

If the answer to Questions 3 is “no,” I must uphold the IAD and conclude that Appellant does not qualify for a permit under the unavoidable circumstances rule.

FINDINGS OF FACT

1. Beginning in 2004, Appellant talked to people about his hopes of starting a charter halibut business.⁹
2. Appellant did not have a State of Alaska business license in 2004 and 2005.¹⁰
3. Appellant did not report qualifying charter trips to ADF&G for himself for 2004 or 2005.
4. On behalf of a local lodge, Appellant reported over five charter trips in both 2004 and 2005 to ADF&G in a Logbook issued to the lodge.¹¹

⁹ Appellant's hearing testimony; Original tab and Evidence tab, letters from individuals submitted in support of Appellant's appeal.

¹⁰ Appellant's hearing testimony.

¹¹ Appellant's hearing testimony.

5. In 2004 and 2005, Appellant lacked sufficient capital to start a charter halibut business.¹²
6. In 2007, Appellant finalized his business plan.¹³
7. In 2007, Appellant created an LLC as his business form for a charter halibut fishing operation.¹⁴
8. Appellant did not have a Logbook issued to him or what ultimately became in 2007 his business name until the Spring of 2008.¹⁵
9. Appellant first advertised his charter fishing business in 2007 or 2008.¹⁶
10. Appellant first obtained a business license for his charter halibut fishing operation in 2007 or 2008.¹⁷
11. Appellant timely and properly reported forty-six halibut logbook fishing trips to ADF&G for 2008.¹⁸

PRINCIPLES OF LAW

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is an applicant's participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008.¹⁹

Proof of participating in the industry during the *qualifying period* consists of an applicant reporting at least five "bottomfish logbook fishing trips."²⁰

A "bottomfish logbook fishing trip" has specific regulatory criteria: It is timely reported to the Alaska Department of Fish and Game (ADF&G) in a Saltwater Charter Logbook (Logbook) and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²¹

¹² I infer this from Appellant's testimony that he needed a loan or loans to start his business and that he was denied loans because of insufficient savings and credit history.

¹³ Appellant's hearing testimony.

¹⁴ Appellant's hearing testimony.

¹⁵ Appellant's hearing testimony.

¹⁶ Appellant's hearing testimony.

¹⁷ Appellant's hearing testimony.

¹⁸ Original file tab, Print Summary created January 26, 2010.

¹⁹ See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.

²⁰ 50 C.F.R. § 600.67(b)(ii)(A).

²¹ See 50 C.F.R. § 300.67(f)(2)&(4).

Proof of participating in the industry during the *recent participation period* consists of an applicant reporting at least five “halibut logbook fishing trips.”²²

A “halibut logbook fishing trip” has specific regulatory criteria: It is one timely reported to the State of Alaska in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing.²³

In order to obtain a Logbook, one must hold an ADF&G Business Owner License (i.e., business registration, sport fish business owner license, sport fish business license, or ADF&G business license.)²⁴

A charter halibut permit will not be issued by NMFS unless, among other criteria, the participation requirements are met or the applicant meets the regulatory exception for not meeting the participation requirements. The regulatory exception is sometimes referred to as the “unavoidable circumstance” rule.²⁵

Under the regulatory exception, an applicant who meets the participation requirements in one but not both relevant periods (i.e., the qualifying period in 2004 or 2005 *or* the recent participation period in 2008), may nevertheless be eligible for a charter halibut permit if he or she can meet the requirements for an “unavoidable circumstance claim.”²⁶

To prevail on an unavoidable circumstance claim as it applies in this case, Appellant must prove by a preponderance of the evidence that:

(i) he had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period (2004 or 2005);

(ii) his intent was thwarted or prevented by an unavoidable, unique and reasonably unforeseeable circumstance that actually occurred, and;

(iii) he took all reasonable steps to overcome the unavoidable]circumstance.²⁷

²² 50 C.F.R. § 300.67(b)(ii)(B).

²³ See 50 C.F.R. § 300.67(f)(3) and (4).

²⁴ See 50 C.F.R. § 300.67(b)(1)(ii) & (b)(3).

²⁵ See 50 C.F.R. § 300.67(b)(1) and 300.67(g).

²⁶ See 50 C.F.R. § 300.67(g).

²⁷ 50 C.F.R. § 300.67(g)(2).

ANALYSIS

In deciding this appeal, I have carefully reviewed the entire case file, including the hearing audio and the additional materials submitted after Appellant's initial appeal letter of January 19, 2011. The first issue before me concerns Appellant's argument that he should be credited with trips he captained in 2004 and 2005 for a local lodge, as explained in more detail below.

Did Appellant show by a preponderance of the evidence that he timely reported to the state at least five bottomfish logbook fishing trips in his Saltwater Charter Logbook for 2004 or 2005?

One can only report trips to the State of Alaska if one is issued a Logbook. To obtain a Logbook, one must have a State of Alaska business license. Appellant did not have a State of Alaska business license in 2004 and 2005. Appellant did not have a 2004 or 2005 Logbook issued to him or what ultimately became in 2007 his business name. Since Appellant did not have a Logbook, he could not nor did he record and properly submit the Logbook pages as required by the CHLAP regulations.

In concluding that Appellant did not properly report at least five 2004 or 2005 trips to ADF&G for himself, I recognize that Appellant has argued on appeal that he should be credited with 65 trips from 2004 and 54 trips in 2005 that he took as a captain on behalf of a local lodge.²⁸ I have considered all of the evidence, including the multiple pages of Appellant's "Daily Fishing Report."²⁹ I believe that Appellant did properly report at least five qualifying trips in 2004 and 2005. However, I also believe that he did so, as he testified, using Logbooks issued to a local lodge. He did captain those trips but he did so for the local lodge, not as owner for his business.

Appellant's argument that he should be credited with the lodge's trips is not supported by the CHLAP regulations. Proof of participating in the industry during the qualifying period consists of an applicant reporting at least five "bottomfish logbook fishing trips."³⁰ A "bottomfish logbook fishing trip" has specific regulatory criteria: It is timely reported to ADF&G in a Logbook and includes certain information.³¹ The regulations do not just say that the trips were taken, but, as outlined above, have specific requirements about how and when those trips must be reported to ADF&G, most importantly in this case, that they must be reported in a state-issued Logbook. Since Appellant did not have a Logbook for himself in 2004 and 2005, he cannot and has not demonstrated that he adequately participated as a charter business owner in 2004 and 2005 as evidenced by complying with the Logbook reporting requirements. His personal Daily Fishing Reports are not a substitute for a state-issued Logbook.

²⁸ Appellant's hearing testimony; Appellant's appeal letter dated January 19, 2011.

²⁹ Original file tab.

³⁰ 50 C.F.R. § 600.67(b)(ii)(A).

³¹ See 50 C.F.R. § 300.67(f)(2)&(4).

Did Appellant show by a preponderance of the evidence that he timely reported to the state at least five halibut logbook fishing trips in his Saltwater Charter Logbook for 2008?

There is no dispute that in fact Appellant had more than five qualifying trips in 2008. The record shows Appellant timely and properly reported forty-six halibut logbook fishing trips for 2008. Because Appellant participated in the charter halibut fishing industry in 2008 (but not 2004 or 2005), he is eligible to pursue a claim under the unavoidable circumstances provision of the CHLAP regulations.³²

Did Appellant show by a preponderance of the evidence that he had the specific intent to operate his charter halibut business in 2004 or 2005?

One of the basic requirements for an unavoidable circumstance claim as it applies to this case is that Appellant held the specific intent to operate a charter halibut business in 2004 or 2005.³³ In Appellant's favor is the evidence that he talked to people about his idea of operating a charter business in 2004 and 2005. In the Spring of 2005 he began writing a business plan.³⁴ He also made various attempts to secure financing in the form of applying for loans through commercial banks and asking individuals for loans. He asked a few people to co-sign a loan with him.³⁵ These efforts were not successful.

On the other hand, is evidence that tends to show that Appellant's plan for a business was rather inchoate and lacked concrete steps showing the plan would come to fruition in the near future. During the chartering season in the summer of 2004 and 2005, Appellant worked for a local lodge captaining the lodge's vessel. The record does not have evidence to show that in the summers of 2004 or 2005, while Appellant was working for the lodge, he also could have operated his own charter fishing business. Appellant did not form his business into a corporation until 2007. He first advertised to take clients charter fishing in 2007 or 2008. Perhaps more significantly, Appellant did not obtain a business license until 2007 or 2008. Also in 2007 or 2008 Appellant finished his business plan. The record does not show that Appellant as a business took clients chartering until 2008.

I have carefully considered the evidence summarized above as well as the entire record. Given the totality of the circumstances, Appellant has not persuaded me he held a specific intent to operate a charter halibut business in 2004 or 2005. While I believe Appellant wanted to have a charter business in 2004 and 2005, that is not the same as specific intent to operate one in 2004 or 2005. In reality, Appellant was not available to operate his own business because he was engaged by a local lodge. Further, even if he was available to charter his own vessel, he had no clients lined up, no boat, no license, and no Logbook. The record also does not show he had all the

³² See 50 C.F.R. § 300.67(g).

³³ 50 C.F.R. § 300.67(g)(2).

³⁴ Appellant's hearing testimony.

³⁵ Appellant's hearing testimony.

requisite equipment and gear needed for chartering. Appellant also did not have the requisite capital available to start a business in 2004 or 2005.

In concluding that Appellant lacked the specific intent to operate a charter halibut business in 2004 or 2005, I have considered Appellant's testimony and letters in the record indicating that Appellant talked to people about his interest in starting a charter fishing business. I am also aware that Appellant thinks the inability to obtain a loan prevented him from furthering his plans. However, the lack of funds to start the business does not change the fact that Appellant took very few, if any, fruitful steps in 2004 or 2005 typical of operating a business. There was an unfinished business plan, there was no advertising, there were no reservations, no business entity, no business license, no logbook, and there was no loan or financing in place. There were thoughts, perhaps some saving of funds earned,³⁶ and attempts but lack of positive results on the financing end. Under the facts of this case, there is insufficient evidence to show specific intent to operate a charter halibut fishing operation in 2004 or 2005.

In reaching my decision, I have considered Appellant's background. Appellant states he moved to Alaska as a toddler, and has lived in a small town in Alaska most of his life. Appellant is concerned about the economic effects of changes to the fishing industry. Appellant supports sustainability efforts and works to meet regulatory requirements. Appellant mentions that as the child of a single parent, he took to hunting and fishing as a means to support his family. That skill provided a basis for him to start a charter halibut business. In short, Appellant says, he is a local business man interested in supporting his family and providing jobs. Appellant emphasizes that without a permit, his business is "drastically crippled in income."

While I have read Appellant's concerns with care, I nevertheless am bound by the CHLAP regulations. And, as stated previously, Appellant does not meet the eligibility requirements for a CHP under applicable regulations.

CONCLUSIONS OF LAW

Appellant did not have a 2004 or 2005 ADF&G Business Owners License.

Appellant did not have a 2004 or 2005 Logbook; Appellant did not prove by a preponderance of the evidence that he timely provided the state with his Saltwater Charter Logbook for 2004 or 2005.

Appellant timely provided the state with his Saltwater Charter Logbook for 2008 and the Logbook showed that he made forty-six qualifying trips.

Appellant did not prove by a preponderance of the evidence that he had the specific intent to operate his charter halibut business in 2004 or 2005.

³⁶ Appellant's hearing testimony.

Appellant does not qualify for a permit under the unavoidable circumstances rule.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated November 24, 2010 is upheld. This decision takes effect thirty days from the date issued, October 13, 2011,³⁷ 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) 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 day after the date of this Decision, September 23, 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.

████████████████████
—
Eileen G. Jones
Chief Administrative Judge

Date Issued: September 13, 2011

³⁷ 50 C.F.R. § 679.43(k) and (o).