

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

In re Application of)
) Appeal No. 10-0019
)
 [REDACTED]) ORDER DENYING
) MOTION for
) RECONSIDERATION
 Appellant)

On November 15, 2011, the National Appeals Office (NAO), a division within the National Marine Fisheries Service (NMFS), closed the evidentiary record and issued a Decision in this appeal. On November 28, 2011, [REDACTED] doing business as (dba) [REDACTED] (collectively referred to herein as Appellant) submitted a timely motion for reconsideration of the Decision.

A motion for reconsideration is not a new layer of appeal or an opportunity to present arguments or evidence that were available prior to the date the record closed. A motion for reconsideration must state material issues of law or fact the appellant believes were misunderstood or overlooked in the decision. In support of a motion for reconsideration, an appellant must include argument, or points and authorities in support thereof.¹

In Appellant's motion, Appellant asserts three arguments.

One, Appellant did not renew his State of Alaska Department of Fish and Game (ADF&G) Guide License in February because the season did not start until May. Appellant indicates in his motion that persons are able to get a license up until the day before their first charter. Appellant indicated that his wife's illness occurred too early in the year for him to know definitively that he would not be participating in the 2008 season. Appellant also indicated that it was common practice for persons to wait until the season started to get their license.

Two, NAO erred in the Decision by finding that Appellant had no plans of fishing in 2008 because he did not renew his insurance. Appellant claims it was a misstatement on his part. Appellant's wife became ill in February; however, he did not need to renew his license until May. Appellant was insured at the time of his wife's illness and also renewed his policy in May 2008 once it expired.

Three, Appellant offers new evidence of his advertisements for the 2008 season. Appellant indicated that he did speak to clients who were interested in taking the trips and also provided billing records from the internet service provider he used.

¹ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>

he advertised his charter fishing business or took reservations from clients.

Although Appellant owned Vessel in 2008, that fact alone does not meet Appellant's burden to show specific intent. During the hearing, Appellant testified that charter fishing was a side business, mainly supported by his kayaking business. However, in 2007, Appellant sold the kayaking business. This act further reduced Appellant's chances of resuming charter fishing. 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. Appellant did not have the essential elements of a charter fishing business in place, and did not take substantial or meaningful steps toward operating such a business in 2008. Since Appellant cannot prove he specifically intended to operate his charter halibut business in 2008, he cannot establish an unavoidable circumstances claim.

In reaching my Decision, I have carefully considered Appellant's circumstances. I acknowledge the challenges Appellant and his wife faced in the last few years. I also understand Appellant's *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.²

I empathize with Appellant's circumstances. However, the evidence does not meet his burden of proving he held the specific intent.

In making a decision on Appellant's Motion for Reconsideration I very carefully considered the arguments he raised in the Motion. As stated, his first argument is that he did not need his licenses until later in the season. I understand that, but it does not change the fact that he did not have them in the winter of 2008 or later in the year. While not a determinative fact in and of itself, nevertheless, not being licensed is one of multiple factors weighing against the outcome Appellant desires.

In his second argument, as summarized above, Appellant attached paperwork to his motion which should have been available at the time of the hearings. A Motion for Reconsideration is not a "second bite from the apple." The fact that Appellant did not present evidence does not show error in the Findings of Fact. I also note that even if I were to consider the evidence concerning the renewal of the insurance policy, Appellant did not submit proof of payment. In any event, even if I assume Appellant had insurance on his boat in the summer of 2008, that is just one piece of evidence in Appellant's favor. It also would not weigh very strongly in Appellant's favor, since the type of insurance Appellant carried on the boat was for only twenty-one commercial days; private pleasure purposes, the days were not limited.

² Decision dated November 15, 2011 (emphasis added).

As for Appellant's third argument, that he does have proof he advertised his charter halibut business for the 2008 season, again, this evidence needs to be presented at the hearing stage and there is no evidence it could not have been presented then. I therefore do not consider that evidence in evaluating Appellant's current Motion. If I did consider it, however, it would not persuade me the Decision contained a material error of law. The receipt for internet service does not show that in 2008 Appellant advertised a charter halibut business. It contains dates, charges and includes a statement that it was for a Web account. There are also four pages of what may have appeared on a website. Within those pages the only part that could be reasonably construed to advertise charters is: "**CHARTERS:** [Our business] can arrange custom charter drop-offs to watch whales at Pt. Adolphus, Inian Islands, Elfin Cove or other locations....We also can arrange sightseeing, photography, fishing and whale watching tours. Contact us for prices and availability."

While this may be some evidence of advertising, there is no indication these were for charter halibut trips. Further, the focus of the four pages is on kayaking. At best, this evidence in a very minor way supports Appellant's claim, but is not sufficient to meet his burden of proof.

In reaching my conclusion, I am cognizant of the fact that one could form the specific intent in years prior to 2008, for example, in 2004, 2005, 2006 or 2007. However, Appellant's own testimony was that his plans were indefinite in the winter of 2008. He also had not run the charter business since 2005, although, of course, due to his wife's serious illness. It stretches the imagination too far to find that based on activity in 2005, one specifically intended to run a business in the summer of 2008. This is particularly true since much, if not all, indicia for establishing specific intent stems from events in the Fall and Winter of 2007 and Winter and Spring of 2008.

I am also cognizant of the argument that "but for" Appellant's wife's [REDACTED] recurring in the winter of 2008, he would have formed the specific intent or that the tragedy of the recurrence prevented him from fully developing the specific intent. As a matter of equity, that argument is appealing. However, the regulation before me is not an equitable provision. Further, that argument does not prove the requirement outlined in the regulation. The CHP regulation, in pertinent part, requires: "The applicant *had* a specific intent to operate a charter halibut fishing business in the recent participation period."³ The language is not ambiguous and therefore I am required to apply its plain meaning. The applicant must have had the specific intent. The language does not permit an interpretation that an appellant was unable to form the specific intent because a tragedy interfered with his ability to do so. Taken to its logical extreme, under a but for analysis, someone who had visited Alaska ten years ago could argue but for the fact that he had a job in Florida he could not pursue his dream of operating a charter halibut business.

³ 50 C.F.R. § 300.67(g)(1)(ii)(emphasis added).

