

The regulations state that NMFS will issue a charter halibut permit to a person who timely applies and who is the individual or non-individual entity to which the Alaska Department of Fish and Game (“ADF&G”) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements for both the qualifying period and the recent participation period.² ADF&G Business Owner License Applications for 2005 and 2008 required an applicant to record several pieces of information, including the name of the business owner, the name of the business, and the Alaska Occupational Business License Number for the business listed on the application. According to the record, Appellant applied for and obtained an ADF&G Business Owner License in 2005, listing himself as owner, [REDACTED] as the business, and [REDACTED] as the Alaska Occupational Business License Number.³ In 2008, Appellant applied for and obtained an ADF&G Business Owner License, listing himself as owner, [REDACTED] as the business, and [REDACTED] [sic] as the Alaska Occupational Business License Number.⁴ According to the Alaska Division of Corporations, Business and Professional Licensing, [REDACTED] was a sole proprietorship owned by Appellant, and [REDACTED] was a partnership owned by Appellant, [REDACTED].⁵ In order to determine whether Appellant is eligible for a charter halibut permit, the Decision correctly examined the question of whether Appellant established by a preponderance of the evidence that his businesses are the same business that was issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements for he qualifying period (2004 or 2005) and the recent participation period (2008).

Appellant argues that his businesses are the same business and submitted evidence explaining why [REDACTED] should be considered a sole proprietorship and why it was erroneously licensed as a partnership. Appellant acknowledges that the Alaska Occupational Business License issued to [REDACTED] in December 2006 shows that [REDACTED] was a partnership with four partners: Appellant, [REDACTED] (Appellant’s wife), [REDACTED].⁶ Appellant argues that although [REDACTED] was licensed as a partnership, no partnership was ever formed and that [REDACTED] was a sole proprietorship owned by Appellant in 2008.⁷ Appellant explains that while it was his and his wife’s intent to form a partnership with the [REDACTED] when the business license for [REDACTED] was initially obtained in December 2006, that business plan failed and the partnership between the [REDACTED] in [REDACTED] never formed.⁸ The [REDACTED] corroborate Appellant’s

² 50 CFR 300.67(b)(1).

³ Notice of Appeal, dated March 14, 2011, Exhibit 1.

⁴ Notice of Appeal, dated March 14, 2011, Exhibit 2. While the application lists [REDACTED] as the Alaska Occupational Business License Number for [REDACTED], the correct number is [REDACTED].

⁵ Original File Tab, Alaska Division of Corporations, Business and Professional Licensing, License Detail for Licenses [REDACTED] and [REDACTED].

⁶ Appellant’s Motion for Reconsideration, dated December 20, 2011, at 5-6.

⁷ Appellant’s Motion for Reconsideration, dated December 20, 2011, at 5-6; Appellant’s Motion for Reconsideration of Decision of Reconsideration, at 1-2.

⁸ Appellant’s Notice of Appeal, dated March 14, 2011, at 3; Motion for Reconsideration, dated December 20, 2011, at 5-7, also Exhibit 8.

explanation and state they were not partners with Appellant and his wife in [REDACTED].⁹ Appellant also submitted a copy of the 2008 Schedule C, Profit or Loss From Business (Sole Proprietorship) tax return filed for [REDACTED],¹⁰ along with a statement from Appellant's accountant, corroborating Appellant's claims that the [REDACTED] were not partners in [REDACTED] and that the business was a sole proprietorship in 2008.¹¹ Appellant also states that "At no time during 2008 did [Appellant] have partners in his fishing charter business"¹²

NAO and this office separately review RAM's interpretation *de novo*. Both NAO and this office apply a preponderance of evidence standard, i.e., an appellant must prove his or her case by a preponderance of the evidence. NAO concluded that Appellant did not prove by a preponderance of evidence that his businesses are the same business.¹³ The Decision finds that [REDACTED] is a partnership with a total of four business partners because Appellant listed four owners of [REDACTED] in his charter halibut permit application and [REDACTED] is a partnership according to the Alaska Division of Corporations, Business and Professional Licensing.¹⁴ The Decision acknowledges (1) the statement dated September 7, 2010, from [REDACTED], "which indicated [REDACTED] did not help Appellant operate [REDACTED] after its creation" and (2) Appellant's argument that because these individuals did not help Appellant operate [REDACTED] was a sole proprietorship and the logbook trips could be combined.¹⁵ In response to this, the Decision summarily concludes that [REDACTED] is not a sole proprietorship but is a new business entity in the form of a partnership.¹⁶ Because the businesses are not the same, the Decision finds that the "logbook histories of these businesses may not be combined to satisfy the minimum participation requirements for a permit."¹⁷

I have carefully reviewed the record for the Decision and considered Appellant's arguments and evidence. Based on my review, I have determined that Appellant has proven by a preponderance of evidence that [REDACTED] was a sole proprietorship owned by Appellant in 2008. Appellant has provided the agency with a reasonable explanation adequately supported by evidence and statements of parties to the events that [REDACTED] was not a partnership but was a sole proprietorship in 2008. [REDACTED], the purported partners in the business, refuted that a partnership existed between them and Appellant in [REDACTED]. Tax documents created contemporaneously with the 2008 fishing year support Appellant's statement that [REDACTED] was a sole proprietorship. At no point did Appellant's explanation

⁹ Statement from [REDACTED] on behalf of [REDACTED] dated September 7, 2010.

¹⁰ Appellant's Motion for Reconsideration, dated December 20, 2011, Exhibit 9.

¹¹ Letter from [REDACTED] C.P.A., dated September 13, 2012. [REDACTED] also states in her letter that [REDACTED] attempted to change the registered members of [REDACTED] when she last renewed the business license but was unable to do so online.

¹² Motion for Reconsideration, dated December 20, 2011, at 7.

¹³ Decision, at 6.

¹⁴ Decision, at 5.

¹⁵ Decision, at 5.

¹⁶ Decision, at 5.

¹⁷ Decision, at 5.

become contradictory – Appellant readily acknowledged that he and his wife identified ██████████ as a partnership on their original filing for an Alaska Occupational Business License and explained why they did so. Appellant and ██████████ then adequately explained why that partnership did not come to pass.

The Decision points to Appellant’s application for a charter halibut application as support for its conclusion that ██████████ was a partnership, stating that Appellant listed four owners of ██████████ on his application. The record contains two applications from Appellant, one dated February 7, 2010, which indicates Appellant is not a U.S. corporation, partnership, association or other business entity and lists no owners for either business. The other, dated February 24, 2010, indicates Appellant is a U.S. corporation, partnership, association or other business entity and lists Appellant as 100% owner and ██████████ and ██████████ as 0% owners. I do not find either application is compelling evidence that ██████████ had multiple owners or that the information on the applications contradicts Appellant’s evidence and explanation. The Decision did not explain why the evidence submitted by Appellant was not persuasive or why it failed to support Appellant’s contentions.

The Decision also relies heavily on the Alaska Occupational Business License for ██████████. While I agree that the information on file with the Alaska Division of Corporations, Business and Professional Licensing is important in determining business ownership and organizational form, it is not the only source of information on which the agency may rely. No provision in the Program regulations requires the agency to use only the information provided by the Alaska Division of Corporations, Business and Professional Licensing in determining business ownership or organizational form. The Decision does not explain why the Alaska Occupational Business License for ██████████ should be relied on to the exclusion of any other information. The burden was on Appellant to present a preponderance of evidence that refutes the information contained on the Alaska Occupational Business License for ██████████. Appellant presented ample evidence demonstrating the inaccuracy of the information. NAO and this office must consider and weigh that evidence and determine if Appellant has met his burden such that the State information should be set aside. For the reasons already articulated, I conclude Appellant satisfied that burden.

In addition to finding that ██████████ was a sole proprietorship owned by Appellant in 2008, I also find that Appellant’s businesses, ██████████ and ██████████, are the same business for purposes of the Program eligibility regulations. The only change in the business from the qualifying period to the recent participation period was a change in business name. The ownership structure and organizational form was same and the change in business name did not make Appellant’s businesses two different businesses.

Based on my review of the record and the explanation provided above, I find that Appellant’s businesses are the same business, thus making Appellant eligible to receive a charter halibut permit or permits. With this finding, I reverse the March 27, 2012 Decision of the NAO. I also remand this matter to NAO and direct NAO to work with

RAM as necessary in determining the number and type of charter halibut permits, with area and angler endorsements, to which the Appellant is entitled.

IT IS SO ORDERED

Date: 4/25/12

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for James W. Balsiger, Ph.D.
Regional Administrator
NOAA Fisheries, Alaska Region