

**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
NATIONAL MARINE FISHERIES SERVICE  
OFFICE OF THE REGIONAL ADMINISTRATOR**

**In Re Application of**

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Appellant.

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**Appeal No. 11-0009**

**DECISION ON REVIEW**

**REGIONAL ADMINISTRATOR'S DECISION ON REVIEW  
AFFIRMING THE NATIONAL APPEALS OFFICE DECISION**

I have reviewed the National Appeals Office (NAO) Decision (Decision) dated October 28, 2011, *In re Application of* ██████████, Appeal No. 11-0009. On November 27, 2011, I issued a stay of the Decision until January 6, 2011, pursuant to my authority under 50 C.F.R. § 679.43(o). I have carefully reviewed the record to determine 1) whether ██████████ (Appellant) proved that he had a specific intent to operate a charter halibut business during 2004 or 2005 (qualifying period), and 2) whether the Appellant's intent was thwarted by the National Guard Bureau of the U.S. Department of Air Force (Department of the Air Force) orders to enter active duty. For the reason discussed in the NAO Decision and below, I find that the Appellant did not prove that he had a specific intent to operate a charter halibut business during the qualifying period that was thwarted by the Department of the Air Force orders to enter active duty. Therefore, I affirm the NAO Decision.

The regulations implementing the Charter Halibut Limited Access Program contain a special provision for members of the military. Pursuant to 50 C.F.R. § 300.67(g)(3), an applicant who reported sufficient halibut logbook fishing trips in 2008 (recent participation period) and who demonstrates that obligations to report for military service thwarted his or her specific intent to operate a charter halibut fishing business during the qualifying period would be eligible to receive a charter halibut permit. These regulations implicitly require the administrative judge to make findings under section 300.67(g)(3)(ii) that the applicant held a specific intent to operate a charter halibut fishing business prior to or during the qualifying period and that, but for orders to enter active military duty, the applicant would have operated a charter halibut business during the qualifying period.

The regulations do not specify the type of evidence the applicant must provide to demonstrate that he or she had a specific intent to operate a charter halibut business prior to or during the qualifying period. Evidence of applicant intent to operate a charter halibut business may include, but is not limited to, the following: logbook entries illustrating participation in the charter fishery; possession of an Alaska Department of Fish and Game (ADF&G) Business Owner License; certification of coursework in preparation for U.S. Coast Guard licensing requirements; documentation providing proof of purchase of a vessel outfitted for charter halibut fishing; and documentation providing evidence that the applicant booked reservations for charter halibut fishing trips. Charter halibut logbook entries and an ADF&G Business Owner License dated prior to or during the qualifying period may alone support a finding that the applicant had a

specific intent to operate a charter halibut business, while evidence such as vessel ownership or training coursework may require additional evidence and documentation to support such a finding. The administrative judge must evaluate the totality of the circumstances to determine whether the evidence presented by the applicant is adequate to support a finding that the applicant held a specific intent to operate a charter halibut business prior to or during the qualifying period.

In the present appeal, the Appellant offered evidence that he purchased a boat capable of being used in the charter halibut business and that he purchased business property to be used for his charter halibut business during his retirement. Audio Recording of October 13, 2010, scheduled hearing. Although the purchase of a vessel and business property may in some cases indicate intent to operate a charter halibut business prior to or during the qualifying period, I do not arrive at that conclusion given the facts of the present case. The Appellant purchased the business property in 1989 and the vessel in 2001. Audio Recording of October 13, 2010, scheduled hearing. Other than his military service, which I address below, the Appellant did not provide an explanation as to why he waited until 2006 to obtain his ADF&G Business Owner License and until 2007 to obtain his Captains License. I agree with the NAO administrative judge that the Appellant did not provide sufficient evidence to support a finding that he intended to operate a charter halibut fishing business before or during the qualifying period.

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The Appellant received orders from the Department of the Air Force in 2001 to enter active duty and he remains in active duty status to this day. Even if the Appellant proved that he had a specific intent to operate a charter halibut business prior to or during the qualifying years, a charter halibut permit will be granted to the Appellant only if the military orders thwarted this intent. The record contains information that the Appellant was deployed for a few days in 2003, was not deployed in 2004, and was deployed from February 11 through March 14, 2005, and from October 27 and November 9, 2005. Original File Tab, Department of the Air Force Special Orders, received April 2, 2010. These deployment periods were relatively short and did not occur during the charter halibut fishing season. Accordingly, I cannot find that Appellant's history of deployment provides sufficient evidence that the Department of the Air Force orders thwarted the Appellant's intent to operate a charter halibut business prior to or during the qualifying period.

I realize that that the Appellant had obligations to the military beyond deployment. The Appellant presented evidence that his military position within the Department of the Air Force changed in 2004. Original File Tab, Letter from [REDACTED] to To Whom it May Concern, dated March 30, 2010, received April 2, 2010. The Appellant's new position required the Appellant to work twelve hour days, sometimes seven days a week, and placed significant constraints on his ability to participate in the charter halibut fishery. *Id.* The Appellant maintained this demanding work schedule for several years, and as of March 30, 2010, the Appellant held this same position. *Id.* However, the record also indicates that the Appellant chose to build a barn on his business property during his spare time in 2004 rather than take further steps towards operating a charter halibut business. Audio Recording of October 13, 2010, scheduled hearing. Further, the Appellant was able to obtain an ADF&G Business Owner License in 2006 despite his twelve hour per day work schedule and two deployments which occurred from February 8 through 18, 2006, and April 17 through June 1, 2006. Original File

Tab, Department of the Air Force Special Orders, received April 2, 2010; Audio Recording of October 13, 2010, scheduled hearing. Finally, the Appellant obtained his Captains License in 2007 notwithstanding his twelve hour work days and two extensive deployment periods that year. Original File Tab, Department of the Air Force Special Orders, received April 2, 2010; Audio Recording of October 13, 2010, scheduled hearing. Because the Appellant was able to take substantial steps towards operating a charter halibut business after the qualifying period despite greater demands placed on him by the Department of the Air Force, I cannot find that the Appellant's military obligations prior to and during the qualifying period thwarted his intent to operate a charter halibut business.

After careful review of the record, I conclude that the Agency must deny the Appellant's application for a charter halibut fishing permit. For the foregoing reasons, the NAO Decision is affirmed.

Date: 10 5 12

  
James W. Balsiger, Ph.D.  
Regional Administrator

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