

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

In re Application of)
)
) Appeal No. 10-0119
)
Appellant.)
_____)

**REGIONAL ADMINISTRATOR'S ORDER REVERSING AND REMANDING
DECISION OF THE NATIONAL APPEALS OFFICE**

On December 14, 2011, I issued an order staying this appeal to allow additional time for review. On January 10, 2012, I issued a second order staying the appeal. I have completed my review of the record and conclude that the record is incomplete to determine whether Appellant [REDACTED] (hereafter [REDACTED] Lodge") should have been awarded the halibut logbook fishing trips associated with the 2008 Alaska Department of Fish & Game Sport Fish (ADF&G) Business Owner/Guide License No. [REDACTED]. Accordingly, I remand this appeal to the National Appeals Office (NAO) to make findings on that issue. Further, since the [REDACTED] Lodge also raised an unavoidable circumstance claim, the NAO should make findings on that claim as well.

The principal issue before me is whether the [REDACTED] Lodge rightfully holds the 2008 ADF&G Business Owner/Guide License No. [REDACTED] and therefore is entitled to the halibut logbook fishing trips associated with that license. Ambiguity arises because the information the applicant entered in the application for the license, which was automatically transferred into the license itself, refers to two unrelated entities and the license can be held by only one of them. Specifically, the business name on the application and license is the [REDACTED],¹ but the Alaska Commerce Business License² number on the application and permit [REDACTED] that is listed directly under that name is for an entirely different business, [REDACTED]. See Attachment A to this Order.

¹ The record refers both to the [REDACTED] and it indicates that they are the same entity, i.e., the official name of the company is the [REDACTED] and it also does business as the [REDACTED]. Since the [REDACTED] is listed on the license and logbooks, I use that name where I refer to those documents.

² The State of Alaska Business License Number requested in Section B of the Application refers to the entity's business license issued by the Alaska Department of Commerce, Community, and Economic Development. To distinguish that license from the ADF&G business license, I refer to it as the Alaska Commerce Business License.

The actual applicant, [REDACTED] (owner of [REDACTED]), applied for and received a combined owner/guide license. Thus, on one hand, [REDACTED] may have intended to apply for an owner's license for the [REDACTED] and a guide's license for himself. The problem with that interpretation is that it cannot be done on a single application; he should have filed two separate applications (a business owner's license for the [REDACTED] and a guide's license for himself). The other option is that [REDACTED] may have intended to apply for a combined owner/guide license based on his own business, [REDACTED]. The problem with that interpretation is that it makes no sense that he listed the [REDACTED] as the business owner. Further, the actual logbooks also list the [REDACTED] as the business owner, making no mention of [REDACTED] or his own business, [REDACTED].

The NAO concluded that the proper holder of the ADF&G sport fish business owner license was [REDACTED], relying mostly on the fact that [REDACTED] was the applicant and, in Section A, provided his own information, i.e., his name and address. The problem is that the name of the applicant is essentially irrelevant to determining who holds the ADF&G Sport Fish Business Owner License. Virtually anyone can apply on behalf of a business. Further, the record contains no explanation as to why, if the business owner should have been [REDACTED], that entity is not listed on the application or on the actual logbooks. By contrast, the [REDACTED] produced information indicating that it employed [REDACTED] for the entire 2008 season as a guide for its business, undercutting the conclusion that [REDACTED] holds the ADF&G business license.

Ultimately, there remain several relevant questions that are not answered in the record which may conclusively clarify the ambiguity. First, in Section B of the application, the applicant is required to provide information about the entity that insures the business owner. Here, the license indicates that the business is insured by [REDACTED] under Policy No. [REDACTED]. On remand, the NAO should inquire who held that policy and paid the premiums for it.

Second, as noted above, the record indicates that [REDACTED] was an employee for the [REDACTED] for the entire 2008 fishing season. The record, however, is unclear as to whether [REDACTED] operated at all that year. Did [REDACTED] solicit a single client for his service and, if so, did he operate his own vessel(s)? On remand, the NAO should give the [REDACTED] an opportunity to present evidence on that question. If [REDACTED] did not take a single client fishing as a separate business, it would be nonsensical to conclude that it held the license and should be awarded all the logbook fishing trips recorded with logbooks under the name [REDACTED].

Third, according to the application, the ADF&G license fee was paid for with a credit card. The [REDACTED] should be permitted the opportunity to present evidence whether such fee was paid for with [REDACTED] personal card and, if so,

whether the [REDACTED] reimbursed him for the license fee, or whether the [REDACTED] credit card was used for the fee.

Finally, these questions are not intended to limit the NAO's inquiry. Rather, they are a few questions whose answers seem relevant but are absent from the record. To determine whether the ADF&G Sport Fish Business Owner License belongs to [REDACTED] the NAO may wish to raise additional questions.

The other issue in this appeal is [REDACTED] unavoidable circumstance claim. [REDACTED] raised that claim, but it is not addressed in the NAO's decision. I therefore remand the case for the NAO to make findings on that claim. I note that, in one place, [REDACTED] states: "The only reason we did not operate a charger business in 2004 or 2005, was simply because we had never been to Kodiak." Letter from [REDACTED] to NMFS of 02/05/2010 at p. 2. This statement, taken alone, is insufficient to establish a cognizable unavoidable circumstance claim. [REDACTED] should carefully review the National Marine Fisheries Service's regulations at 50 C.F.R. § 300.67(g)(1)³ and the NAO should allow [REDACTED] an opportunity to submit evidence on the claim. The NAO can then decide what procedures to follow, including whether to hold a hearing, if requested, to determine whether [REDACTED] satisfies the conditions necessary to make a successful unavoidable circumstance claim.

For the foregoing reasons, this appeal is remanded to the NAO to make findings consistent with this decision.

IT IS SO ORDERED

Date: 1/25/12

ja

[REDACTED]
James W. Balsiger, Ph.D.
Regional Administrator

³ They may be found on NMFS's website at: <http://www.fakr.noaa.gov/frules/75fr554.pdf>.

ATTACHMENT A



2008 SPORT FISH BUSINESS OWNER/GUIDE LICENSE

Alaska Department of Fish and Game / Division of Sport Fish - RTS
333 Raspberry Road, Anchorage, Alaska 99518-1599
Telephone: (907) 267-2369 or (907) 267-2390
http://www.sf.adfg.state.ak.us/statewide/Guides/guide.cfm

License #



LICENSE MUST BE STAMPED TO BE VALID

CHECK ONE DEPARTMENT USE ONLY
Fee for Guide License only: \$ 50.00
Fee for Business Owner License only: \$100.00
Fee for combined Sport Fish Business Owner/Guide License: \$100.00
METHOD OF PAYMENT: MAKE CHECKS PAYABLE TO: STATE OF ALASKA
Check Cash Credit Card Money Order
These fees are nonrefundable.

SEE REVERSE FOR INSTRUCTIONS

SECTION A. TO BE FILLED OUT BY ALL APPLICANTS.

Name:
Physical Address: USA
Mailing Address (if different): USA
Telephone Number: In-season Telephone Number:
e-mail address if available:

SECTION B. TO BE FILLED OUT BY THE BUSINESS OWNER OR THEIR AGENT.

BUSINESS INFORMATION:
Name of Business:
State of Alaska Business License Number: Expiration Date: 12/31/2008
INSURANCE: A sport fish business owner must maintain a general liability insurance or marine protection and indemnity policy providing coverage of at least \$100,000 for each incident, and \$300,000 for all incidents in a year. See explanation on back.
Name of Insurance Company:
Policy/Binder #: Effective Dates: From: 01/01/2008 To: 01/01/2009

SECTION C. TO BE FILLED OUT BY THE GUIDE OR THEIR AGENT.

Are you a citizen of the United States, Canada, Mexico or a resident alien? Yes No
Current First Aid card: Certifying agency: Exp. Date: 02/12/2010
2010 Alaska Sport Fishing License #:
U.S. COAST GUARD OPERATOR'S LICENSE: (See explanation on back)
Do you plan to operate a motorized vessel in Navigable Waters? Yes No If yes, complete the next line.
U. S. Coast Guard Operator's License #: Expiration Date: 11/20/2011

SIGNATURE OF BUSINESS OWNER/AGENT or GUIDE:
I certify, under penalty of perjury, that all of the information on this application is true and correct.
Applicant or Agent Date: 04/30/2008

A valid license application, signed and stamped by an ADF & G employee must be in your possession before guiding activities begin.