

believed that she was now [REDACTED] free. However, in February 2008, [REDACTED] suffered a spontaneous, traumatic [REDACTED] fracture and was medivaced to an Anchorage hospital where the doctors determined that the [REDACTED]. She underwent additional surgery and her doctor informed [REDACTED] that he did not expect her to survive the procedure. She managed to do so.

While his wife was recuperating, [REDACTED] remained by her side. This lasted through the end of July 2008. As a result, [REDACTED] did not report any halibut fishing trips during 2008 and thus does not meet the recent participation requirement. See 50 C.F.R. § 300.67(b)(1)(ii)(B) (requirement that one must have reported five halibut logbook fishing trips during 2008). [REDACTED] has, however, invoked the unavoidable circumstance exception to that recent participation requirement.

To qualify for the unavoidable circumstance exception to the recent participation requirement, an applicant must show:

- (i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period;
- (ii) The applicant's specific intent was thwarted by a circumstance that was:
 - (A) Unavoidable;
 - (B) Unique to the owner of the charter halibut fishing business; and
 - (C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;
- (iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and
- (iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period.

50 C.F.R. § 300.67(g)(1).

With regard to the “specific intent” requirement, this office has explained:

The term “specific intent” refers to a “mental purpose to accomplish a specific act” and is commonly used, in the legal sense, in the context of elements of crime, such as fraud which requires that one have the specific intent to deceive. See Black’s Law Dictionary 1399 (6th ed. 1990). In other words, a requirement that the actor had the specific intent to do something means that the “the actor intend the actual consequences of his conduct.” Pierre v. Gonzales, 502 F.3d 109, 118 (2nd Cir. 2007). In the context of the National Marine Fisheries Service’s regulations for the Charter Halibut Limited Access Program, the use of “specific intent” simply requires that one demonstrate that he

has the intent or mental purpose specifically to operate a charter halibut fishing business during the qualifying (or recent participation) period, as opposed to some generalized interest in fishing, a specific interest in commercial fishing, or a specific interest only in charter salmon fishing.

In re Application of [REDACTED] Appeal No. 10-0085 (April 18, 2012) (to be published soon on the Internet at <http://www.nmfs.noaa.gov/mb/appeals/2012decisionsbyissuancedate.htm>).

With regard to the requirement that the specific intent be thwarted, this office has explained that it establishes “a test under which the applicant must demonstrate that, but for the unavoidable circumstance, the applicant would have met the minimum requirements to obtain a permit, i.e., they would have conducted at least five halibut logbook fishing trips in 2008.” *In re Application of* [REDACTED] Appeal No. 10-0047 (March 20, 2012) (to be published soon on the Internet at <http://www.nmfs.noaa.gov/mb/appeals/2012decisionsbyissuancedate.htm>).

In this case, [REDACTED] divided his residence between [REDACTED], owned a boat, insured the boat, and maintained a website that advertised his business. He had been operating his business since the mid-1990’s and had the mental purpose to do so indefinitely and likely would have accomplished that, including specifically for 2008, if the circumstances surrounding his wife’s [REDACTED] had been more forgiving. He thus easily satisfies the requirement that he had to have “had a specific intent to operate a charter halibut fishing business in the recent participation period.” 50 C.F.R. § 300.67(g)(1)(i).

He has also shown that, but for his wife’s [REDACTED] he would have conducted at least five halibut logbook fishing trips in 2008. He made seven trips in 2005 and operated the business every year his wife’s [REDACTED] permitted him to do so. As a small operator, he did not reach that level every year, but having done so in 2005, the qualifying year, and having maintained the same level of commitment each year (same boat and same approach to securing clients), it would be improper speculation to find he would not have met the minimum number of trips in 2008 had he been able to fish then. Finally, [REDACTED] was unavoidable, unique, and unforeseen and reasonably unforeseeable. [REDACTED] took all reasonable steps by following their doctor’s advice and having [REDACTED] undergo surgery.

The NAO concluded that [REDACTED] failed to show that he “had a specific intent to operate a charter halibut fishing business” in 2008, asserting that at “best, Appellant has shown he had the general desire or perhaps even the general intent to charter halibut in the summer of 2008.” NAO Order on Reconsideration at 2. As shown above, however, [REDACTED] is not a person with some passing or general interest in charter halibut fishing. For many years, he has invested time, money, and substantial energy to running a small business out of [REDACTED] AK. There is no evidence that his interest or specific intent in continuing that same business ever diminished. The only impediment has been his wife’s [REDACTED] which is the subject of the unavoidable circumstance claim.

NAO based its finding that ██████ lacked specific intent on an exchange between ██████ and the hearing officer during the second hearing when the hearing officer was questioning ██████ about his state of mind in early 2008. It is clear, however, from the recording of that hearing that while the hearing officer was trying to assess the specific intent issue, ██████ did not understand the import of the questioning or ██████ own answers. Indeed, if you assume that his statement that his plans to run his business out of ██████ were on hold indefinitely reflected his state of mind or specific intent for the 2008 fishing season, there would be a clear inconsistency in the record. In the first hearing (beginning at 13:50), ██████ stated that following his wife's ██████ surgery, they believed that his wife was ██████ free and "the plan was to come to ██████ and operate the business as normal." He then explains that since he had sold the kayak business by that point in time, he intended to run the charter halibut business.

In this case, the NAO relied only on the statement in the second hearing, ignored the first, and did not explain its reason for doing so. There is, however, no basis for considering a record so narrowly. Rather, it is incumbent on this agency to consider the record as a whole. Given that ██████ had been operating since the mid-1990s, planned to operate every year for a very long time, acknowledged that his wife's ██████ diagnosis dramatically changed those plans, but absent those circumstances, his state of mind would have remained the same as it had every year since they began their business, it is evident that ██████ had the specific intent to operate his charter halibut business in 2008.

The NAO also notes that ██████ sought to introduce evidence in his motion for reconsideration and states that it cannot accept such evidence under its own, internal procedures for handling motions for reconsideration and, even if it accepted the evidence, it would not change the result. There are two problems with this determination.

First, the appeals process within the National Marine Fisheries Service (NMFS) is intended to be informal and designed to determine whether NMFS erred or, as in this case, whether the applicant is entitled to a permit in the first instance. Refusing to admit evidence while the matter is still before the agency imposes procedural hurdles that have little intrinsic value compared to the high value of ensuring those who are rightfully entitled to a fishing permit obtain one. Before an agency issues a final decision, it has discretion to consider new, cumulative, or overlooked information.

Second, in the context of an unavoidable circumstances claim, the NAO's decision is the first instance when the appellant has the opportunity to see in writing the reasons NMFS denied the permit application. It is at that point that the appellant may appreciate what evidence is required or important to prevail on the merits. It is thus contrary to the purposes of NMFS's appeal process to refuse to admit evidence when the appellant, at no prior time, was able to understand clearly the bases for his permit denial. Here, this was a procedural error since the evidence the NAO declined to consider simply reinforces what is otherwise plain from the record – that ██████ satisfies the unavoidable circumstance exception to the recent participation requirement.¹

¹ The NAO questions certain evidence pertaining to ██████ Internet advertising, which says his business can arrange for "fishing" tours, and states that it is merely "some evidence of advertising, there is no indication these were for charter halibut trips." NAO Order on Reconsideration at 4. There is no requirement that he advertise exclusively for one type of trip. He offered fishing tours. In the past, through this type of advertising or from other means, he

Next, the NAO states that it is “cognizant of the fact that one could form the specific intent in years prior to 2008, for example, in 2004, 2005, 2006 or 2007.” NAO Order on Reconsideration at 4. The NAO then asserts that 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.” *Id.* However, as previously explained, [REDACTED] specific intent was consistent every year since he began running his business in the mid-1990’s, namely, to run his multi-service business out of [REDACTED] including charter halibut fishing, until he sold the kayak part of the business, and then it was to run charter fishing trips, including halibut charter fishing trips. The evidence shows that the only thing that interrupted his ability to carry out that plan was his wife’s [REDACTED].

Finally, the NAO asserts:

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. . . . Taken to its logical extreme, under a but for analysis, someone who had visited Alaska ten years ago could argue that but for the fact that he had a job in Florida he could not pursue his dream of operating a charter halibut business.

NAO Order on Reconsideration at 4.

This office has previously explained that the test for determining whether one’s specific intent has been thwarted is: “but for the unavoidable circumstance, the applicant would have met the minimum requirements to obtain a permit, i.e., they would have conducted at least five halibut logbook fishing trips in 2008.” *See* above at p. 3. Yet, the NAO apparently disagrees with that formulation, maintaining that the regulations require something else.

Moreover, the example involving a person in Florida that NAO uses to illustrate an imagined problem with that test ignores the other requirements of the regulations and of the unavoidable circumstance exception itself. First, at a minimum, one must have actively participated in either the qualifying or the recent period. Therefore, simply visiting Alaska would not be enough. Second, even if someone qualified in 2004 or 2005 and then permanently moved to Florida could somehow show that he or she had the specific intent to operate a charter halibut fishing business in 2008, I doubt any job in Florida could be deemed unique or unavoidable, or accepting that job could be viewed as unforeseeably preventing him for operating his fishing business in Alaska. I also doubt that such an individual would be able to show that he or she took all reasonable steps to overcome the alleged circumstance. In short, the NAO’s example is inapposite.

provided charter halibut fishing trips. He has no idea if he received that business from the Internet or by word-of-mouth. It is, however, irrelevant.

For the foregoing reasons, the decision of the NAO is reversed and RAM is instructed to issue [REDACTED] a Charter Halibut Limited Access Program non-transferable permit with an angler endorsement of four.

[REDACTED]

6/11/12

for

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

Date