

halibut fishing trips of referred clients in [REDACTED] logbook, but the operator recorded the rest of the referrals in his own logbook. [REDACTED] resumed his fishing operations in 2009 and has been continuously operating since that time.

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>).

Despite the fact that [REDACTED] had been operating a charter halibut fishing business continuously since 2004, except from the time when his engine died in 2007 until the 2009 fishing season, and despite the fact that [REDACTED] had paying clients secured for the 2008 season, the NAO concluded that [REDACTED] lacked the specific intent to operate such a business in 2008. That conclusion implies that, even if he had his boat, he would not have fished. I disagree and believe NAO continues to misconstrue what it means to have “a specific intent to operate a charter halibut fishing business.” 50 C.F.R. § 300.67(g)(1)(i).

As explained above, the purpose of that particular requirement is simply to distinguish someone who specifically intends to operate a charter halibut business from someone with a more generalized interest in doing so. The NAO has raised the bar for proving that element of the unavoidable circumstance exception too high, finding he lacked the requisite intent because there were a handful of options [REDACTED] might have pursued to qualify for a permit (e.g., leasing out another vessel, securing one more qualifying trip from another captain, immediately operating his new vessel in August 2008, etc.). As discussed below, these choices concern whether [REDACTED] took all reasonable steps to overcome the circumstance, not his state of mind.

[REDACTED] easily satisfies the next requirement of the unavoidable circumstance exception. The loss of his engine was unavoidable, unique, and unforeseeable. Further, [REDACTED] had at least 14 clients lined up for the 2008 season which he referred to another captain, see Findings of Fact 5 and 6, NAO Decision on Reconsideration at 4. Therefore, but for the loss of his engine, he would have satisfied the recent participation requirement.

The tougher issue here is whether [REDACTED] “took all reasonable steps to overcome the circumstance that prevented [him] from operating a charter halibut fishing business in the recent participation period.” 50 C.F.R. § 300.67(g)(1)(iv). When determining what is reasonable, one must necessarily consider the applicant’s particular circumstances. The NAO findings on this matter² can be divided into conduct occurring before and after the arrival of his new vessel.

² Although the NAO viewed these findings as relevant to [REDACTED] state of mind and whether he specifically intended to operate a charter halibut fishing business in 2008, the better approach is to consider them in terms of the reasonableness of [REDACTED] conduct in overcoming his circumstance of a non-functioning vessel.

Before the vessel arrived, the NAO states that Appellant did not make an effort to lease a charter vessel for the 2008 season or make a better arrangement with the captain to whom he had referred his clients to ensure that he received credit for all of those trips. There is, however, no requirement in the regulations that an applicant do these things and there simply is no basis for finding that any reasonable charter business operator in [REDACTED] would have acted otherwise. The fact that the other captain recorded four trips in [REDACTED] logbook is not dispositive; he could have also recorded none in which case that question would not even be up for discussion.

Further, the record shows that, around the end of the 2007 fishing season, [REDACTED] knew that he would be receiving a new vessel *gratis*. Finding of Fact 4, Decision on Reconsideration at 4. At that point, I believe it was reasonable for [REDACTED] to choose to wait for its delivery rather than come up with some alternative means to take clients charter fishing, such as leasing another vessel which also may have required delivery to [REDACTED] and could have required substantial time. I therefore conclude that [REDACTED] failure to lease another vessel in this instance was not unreasonable.

After the new vessel arrived, [REDACTED] took a few non-paying clients out fishing on the new vessel rather than immediately resuming his charter halibut fishing business. [REDACTED] has offered a variety of reasons why that was reasonable, including insufficient resources to insure the vessel for charter operations, his interest in becoming more familiar with the vessel, and the lateness in the fishing season. While his arguments in the record appear disjointed, I cannot conclude that [REDACTED] acted unreasonably or failed to take all reasonable steps to overcome the circumstance. It is undisputed that the vessel was delivered late in the fishing season and represented a substantial increase in size and quality. That he chose to familiarize himself and become more proficient with it before taking out paying clients is difficult to second guess in this context and, on its face, is not per se unreasonable

Accordingly, I conclude that the NAO's decision should be reversed. [REDACTED] meets the requirements of the unavoidable circumstance regulation with respect to his lack of participation in the recent period. See 50 C.F.R. § 300.67(g)(1)(i) - (iv). With twenty-two bottomfish logbook fishing trips in 2005, [REDACTED] meets the participation requirement in the qualifying period for a transferable permit. 50 C.F.R. § 300.67(g)(1)(v). With six recorded anglers on at least one trip in 2004 or 2005, Appellant meets the requirements for an angler endorsement of six on this permit. I therefore direct RAM to issue Appellant a transferable charter halibut permit with an angler endorsement of six.


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

6/13/12
Date