

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0052

DECISION

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that are on file with the Office of Administrative Appeals (OAA), Alaska Region.

This appeal was filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant is appealing a decision of NMFS's Restricted Access Management Program (RAM). In an Initial Adverse Determination (IAD), RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

The underlying facts of this appeal begin with the summer of 2005. By that time Appellant had a boat suitable for charters.¹ Appellant's life partner [REDACTED] held the appropriate licensure to captain charter boats.² Appellant prepared for the upcoming chartering season.³ She purchased equipment used in chartering, such as bait, tackle, lures, rods and reels, radios, a fish finder, GPS unit, digital camera, riggers, chain, rubber boots, and life jackets.⁴

On April 1, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).⁵ Appellant selected 2005 as her "Applicant Selected Year," and also indicated she wanted to pursue a claim for "unavoidable circumstances." The two terms, "Applicant Selected Year" and "unavoidable circumstances" have particular meaning in the CHLAP and will be explained in more detail in the Principles of Law

¹ Original File Tab, [REDACTED] Explanation in Support of Unavoidable circumstances claim for 2005, Page 1.

² Original File Tab, [REDACTED] Explanation in Support of Unavoidable circumstances claim for 2005, Page 1.

³ Original File Tab, [REDACTED] Explanation in Support of Unavoidable circumstances claim for 2005, Page 1.

⁴ Appellant's Hearing Testimony.

⁵ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

section and Analysis section of this decision. Also on the application, Appellant indicated her business operated charters using the [REDACTED] (Vessel).⁶

In response to Appellant's application, on April 28, 2011, RAM sent Appellant a Notice of Opportunity to Submit Evidence.⁷ In that notice, RAM advised Appellant that the Official Record showed that she met the CHLAP program requirements for 2008; however, she did not meet the CHLAP requirements for 2004/2005. RAM recognized Appellant's unavoidable circumstance claim and set a May 28, 2010 deadline for her to submit evidence in support of that claim. On April 28, 2011, RAM received a package of documents from Appellant in support of her claim.⁸

On July 21, 2010, RAM sent Appellant the IAD which is the subject of this appeal. In the IAD RAM denied Appellant a CHP reasoning that she did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM reiterated that Appellant did meet the participation requirements for 2008. RAM also acknowledged Appellant's claim of unavoidable circumstances, but did not determine its validity as those claims must be adjudicated by OAA.⁹

On September 8, 2010, Appellant filed her appeal of the IAD with OAA. In her appeal, Appellant does not dispute that she does not meet the basic or general participation requirements for 2005; rather she argues that due to unavoidable circumstances in 2005 she was unable to engage in charter fishing operations. Appellant explained in her appeal that she purchased Vessel in January 2005. Appellant planned on [REDACTED] operating Vessel for charter halibut trips during the 2005 fishing season.¹⁰ However, in August 2005, [REDACTED] fell on a commercial fishing boat. As a result of the fall, [REDACTED] experienced a serious injury [REDACTED] [REDACTED]. Appellant argues that it was impossible for her to charter in 2005 as she had planned due to [REDACTED] injury which continued into the winter of 2006. Appellant maintains but for [REDACTED] injury, she would have made the requisite qualifying charter fishing trips in 2005. By the 2006 charter season, however, Appellant submits she had a successful charter business.

On November 15, 2010, NAO sent Appellant an informational letter about procedures and asked her to submit any additional materials she had in support of her appeal by December 6, 2010. On February 11, 2011 I sent Appellant a written notice of hearing. On March 22, 2011, the hearing commenced and concluded.¹¹ At the conclusion of the hearing I set April 15, 2011 as the deadline for submitting additional documentation. On

⁶ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, Page 3.

⁷ Original File Tab.

⁸ Original File Tab.

⁹ Original File Tab, IAD dated July 21, 2010.

¹⁰ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant's Hearing Testimony.

¹¹ Notice of Hearing dated February 11, 2011.

March 31, 2011, Appellant sent by facsimile a letter from a local lodge dated March 29, 2011. On April 15, 2011, I closed the record.

ISSUES

There is no factual or legal dispute in this appeal but the unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves five basic questions:

1. Did Appellant prove by a preponderance of the evidence that she held the specific intent to operate a charter halibut fishing business during 2005?
2. If the answer to Question 1 is “yes,” did Appellant prove by a preponderance of the evidence that in 2005 she suffered an “unavoidable circumstance” that “actually occurred.”
3. If the answer to Question 2 is “yes,” did Appellant prove by a preponderance of the evidence her specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.
4. If the answer to Question 3 is “yes,” did Appellant prove by a preponderance of the evidence that she took all reasonable steps to overcome the unavoidable circumstance.
5. If the answer to Question 4 is “yes,” is Appellant eligible for an angler endorsement of four on one non-transferable permit.

FINDINGS OF FACT

1. For 2005, Appellant held a sport fish business license.¹²
2. In January 2005, Appellant purchased Vessel which she intended to use for charter fishing trips.¹³
3. In March 2005, Appellant began work on her charter business’ website.¹⁴

¹² Original File, 2005 Sport Fish Business Owner/Guide License;

¹³ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant’s Hearing Testimony.

¹⁴ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant’s Hearing Testimony.

4. From January 2005 to August 2005, Appellant purchased equipment such as tackle, bait, radios, GPS unit, a fish finder, and life preservers for her charter halibut business.¹⁵

5. In July 2005, Appellant purchased insurance for Vessel.¹⁶

6. Appellant's life partner, [REDACTED], was duly licensed to operate Vessel.¹⁷

7. In August 2005, [REDACTED] fell while working on a commercial vessel. As a result of the fall, [REDACTED] seriously injured [REDACTED].¹⁸

8. In August 2005, Appellant had four charter halibut trips booked. The trips had to be canceled because [REDACTED] illness prevented him from operating Appellant's boat.¹⁹

9. [REDACTED] illness continued until the end of the 2005 charter halibut fishing season.²⁰

10. [REDACTED] injury was so severe that he could not continue with one of his jobs as a commercial fisherman.²¹

11. Appellant operates in a small community. Once [REDACTED] was injured, she walked the docks in an attempt to hire another skipper to operate her vessel used in charter halibut fishing. The qualified skippers were occupied with other vessels and were not available to operate Appellant's vessel.²²

12. On April 1, 2010, Appellant applied to NMFS for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).²³

13. Appellant recorded one logbook bottomfish fishing trip with four anglers for 2005.²⁴

¹⁵ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant's hearing Testimony.

¹⁶ Original File, Appeal, Insurance Brokers letter dated July 5, 2005.

¹⁷ Original File, Attachment C to Appellant's Submission in Response to Notice of Opportunity to Submit Evidence.

¹⁸ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant's hearing Testimony.

¹⁹ Evidence Tab, Letter from a lodge dated March 29, 2011; Appellant's Hearing Testimony.

²⁰ Original File, Appeal, Doctor's Chart Notes dated December 4, 2005 to March 31, 2008; D.O.'s letter dated November 17, 2005.

²¹ Original File, Appeal, D.O.'s letter dated November 17, 2005.

²² Appellant's Hearing Testimony.

²³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

²⁴ Original File, Print Summary; Original File, Notice of Opportunity to Submit Evidence; Original File, IAD.

14. Appellant recorded seventeen logbook halibut fishing trips for 2008.²⁵

PRINCIPLES OF LAW

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP). 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP and evaluating applications for Charter Halibut Permits. See 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556.

“Applicant-selected year means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and nontransferable permits.” 50 C.F.R. § 300.67(f)(1).

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. Further, the participation must have occurred in the International Pacific Halibut Commission (IPHC) regulatory area (either 2C or 3A) for which the applicant seeks the permit. See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555. This threshold criteria may be referred to as the participation requirements.

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2005, but does meet the participation requirements for the other period, as in this case in 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule. See 50 C.F.R. § 300.67(g)(2).

Under the unavoidable circumstances rule as it applies to this case, an applicant for a CHP may be eligible for a permit if:

(1) she met the participation requirements for 2008, but not for 2004 or 2005;

(2) she specifically intended to operate a charter halibut fishing business in at least one year of the qualifying period [2004 or 2005];

²⁵ Original File, Print Summary; Original File, Notice of Opportunity to Submit Evidence; Original File, IAD.

(3) her intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;

(4) she took all reasonable steps to overcome the unavoidable circumstance.

See 50 C.F.R. § 300.67(g)(2).

If an applicant proves the requirements of an unavoidable circumstance claim as outlined above, then she will receive a CHP. 50 C.F.R. § 300.67(g)(2)(v).

If an applicant operated only one vessel during the applicant selected qualifying year, then the applicant is eligible for one permit. See 50 C.F.R. § 300.67(c).

To qualify for a transferable CHP, among the requirements is that the applicant prove she took fifteen or more qualifying trips during both the qualifying year and participation year. See 50 C.F.R. § 300.67(d). Thus, if an applicant does not prove she had at least fifteen qualifying trips during the appropriate years, she is not eligible for a transferable CHP, but remains eligible for a nontransferable CHP.

For nontransferable permits, the number of anglers will be the greatest number that would have been reported on a logbook trip in the qualifying period. See 50 C.F.R. § 300.67(e) and (g)(2)(v)(B). Or, by default, once an applicant proves her unavoidable circumstance claim as outlined above, she can be awarded a non-transferable permit with an angler endorsement of four. 50 C.F.R. § 300.67(g)(2)(v) and 74 Fed. Reg. 18178, 18187.

ANALYSIS

In analyzing this case, I considered the evidence in the record, including the hearing testimony and the documents submitted by Appellant in support of her appeal. The first issue I must decide is whether Appellant has proven by a preponderance of the evidence that she held the specific intent to operate a charter halibut business during 2005. This issue arises under the rules codified at 50 C.F.R. § 300.67(g)(2), as summarized in pertinent part above.

The evidence shows that Appellant owned a property suitable as a base of operations for a charter halibut business.²⁶ Appellant's business was properly licensed.²⁷ Also the evidence shows that in January 2005 Appellant purchased a boat suitable for sport fishing, and secured a duly licensed captain to operate it. Her Vessel was insured beginning in July 2005.

²⁶ Original File, Appeal, Explanation in Support of Unavoidable Circumstances Claim for 2005; Appellant's hearing Testimony.

²⁷ Original File, 2005 Sport Fish Business Owner/Guide License.

Appellant walked the docks in an attempt to take reservations from “walk-ups” for charters on her Vessel. In point of fact, she had lined up four charters for August 2005.

Given the totality of the evidence and facts I have drawn therefrom, I conclude that Appellant held the specific intent to operate a charter halibut fishing business in 2005. I turn, then, to the next inquiry in the unavoidable circumstances analysis.

The second issue I must decide is whether Appellant has proven by a preponderance of the evidence that in 2005 she suffered an “unavoidable circumstance” that “actually occurred.” An event that is generally thought to be impossible to avoid is an accident and the resulting illness. That is what occurred in this case. Appellant’s boat operator, [REDACTED] injured [REDACTED]. The injury was so severe that he could not continue with one of his jobs as a commercial fisherman. Under the circumstances, I conclude that Appellant did meet her burden of proving that she suffered from an unavoidable circumstance that actually occurred.

The third issue before me is whether Appellant proved by a preponderance of the evidence her specific intent was thwarted by a circumstance that was unique, unforeseen, and reasonably unforeseeable. Appellant testified, and I find her testimony credible, that but for [REDACTED] accident she was prepared to move forward with her business by taking out at least four halibut fishing charters in August 2005. Thus, I find that there was a causal relationship between [REDACTED] accident and Appellant’s inability to provide charters in 2005. Further, the circumstance was unique to Appellant inasmuch as it was her [REDACTED] who fell, injured himself and was put out of commission. As indicated previously, just as the circumstance was “unavoidable” I conclude it was also unforeseen and reasonably unforeseeable.

Fourth, I must decide whether Appellant took all reasonable steps to overcome the unavoidable circumstance. When [REDACTED] was injured in July 2005, it was already well into the chartering season. Appellant testified, and I find her testimony credible that she operates in a small community. Once [REDACTED] was injured, she walked the docks in an attempt to hire another skipper to operate her vessel used in charter halibut fishing. The qualified skippers were occupied with other vessels and were not available to operate Appellant’s vessel.²⁸

As Appellant has proven the four prongs of her unavoidable circumstance claim, I now will decide whether Appellant is eligible for an angler endorsement of four on one nontransferable permit. To qualify for a transferable CHP, among the requirements is that the applicant prove she took fifteen or more qualifying trips during both the qualifying year and participation year. See 50 C.F.R. § 300.67(d). Appellant has not argued nor does the record reflect that Appellant would have likely taken fifteen or more

²⁸ Appellant’s Hearing Testimony.

qualifying trips in 2005. Therefore, she does not qualify for a transferable permit.²⁹ Thus, she is eligible for a nontransferable permit.³⁰

Further, if an applicant operated only one vessel during the qualifying year, then the applicant is eligible for one permit. See 50 C.F.R. § 300.67(c). There is no dispute that Appellant had only one vessel in 2005 and therefore she is only eligible for one permit.

Finally, once an applicant proves her unavoidable circumstance claim as outlined above, she can be awarded a nontransferable permit with an angler endorsement for the number of anglers she likely would have taken had it not been for the unavoidable circumstances. 50 C.F.R. § 300.67(e) and (g)(2)(v)(B). Or, by default, once Appellant proves her unavoidable circumstance claim she is eligible for a permit endorsed for four anglers. 50 C.F.R. § 300.67(g)(2)(v) and 74 Fed. Reg. 18178, 18187. Appellant's logbook showed she took four anglers out in 2005. Further, Appellant advertised boat excursions limited to four or five persons, and the boat's capacity was limited to six passengers.³¹ Given this evidence, I conclude that Appellant should be awarded a nontransferable CHP with an angler endorsement of four.

CONCLUSIONS OF LAW

As required by 50 C.F.R. § 300.67(g)(2) to establish a claim for unavoidable circumstances, Appellant had the specific intent to operate a charter halibut business during 2005.

As required by 50 C.F.R. § 300.67(g)(2) to establish a claim for unavoidable circumstances, in 2005 Appellant suffered an "unavoidable circumstance" that "actually occurred."

As required by 50 C.F.R. § 300.67(g)(2) to establish a claim for unavoidable circumstances, Appellant held a specific her intent that was thwarted by the unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance.

As required by 50 C.F.R. § 300.67(g)(2) to establish a claim for unavoidable circumstances, Appellant took all reasonable steps to overcome her unavoidable circumstance.

Pursuant to 50 C.F.R. § 300.67(d), (e), and (g)(2), Appellant is eligible for a nontransferable permit because she would have taken less than fifteen qualifying charter halibut trips in 2005.

²⁹ See generally 74 Fed. Reg. 18178, 18187.

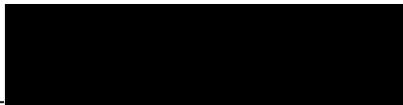
³⁰ See 50 C.F.R. § 300.67(d) and (g)(2)(v).

³¹ Original File, Vessel Application; Original File, Print-outs from Appellant's webpage.

Pursuant to 50 C.F.R. § 300.67(c) and (g)(2), Appellant is eligible for one permit with an angler endorsement of four.

ORDER

The IAD dated August 2, 2010 is vacated. RAM shall issue Appellant one nontransferable CHP for area 3A endorsed for four anglers. This decision is effective thirty days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o).³²


Eileen G. Jones
Chief Administrative Judge

Date Issued: April 29, 2011

³² <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 679.43(k) and (o).