

reported at least five halibut logbook fishing trips in 2008. It reported seventy-five halibut logbook fishing trips in 2008 with the [REDACTED] (VESSEL 1).⁴

Appellants state they are eligible for a permit based on the unavoidable circumstance regulation because they specifically intended to operate a charter halibut fishing business in 2004 and 2005 but were thwarted from doing that by Wife's [REDACTED] which was diagnosed in April 2004 and which required [REDACTED] a process which lasted through June 2005. A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.⁶ Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

The prior administrative judge held a hearing on February 8, 2011.⁷ By mistake, it was not recorded. I therefore held another hearing with Appellants on October 18 and October 22, 2011.⁸ Husband and Wife [REDACTED] (Witness) testified by phone. In this decision, I refer to [REDACTED] (Business Owner), who operated [REDACTED] (Charter Halibut Business). Husband and Wife intended to purchase Charter Halibut Business from Business Owner before Wife was diagnosed [REDACTED]. I conclude that the record contains sufficient information upon which to decide this appeal.⁹ I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellants meets the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2), with respect to their lack of participation in 2004 and 2005, and should be awarded a transferable charter halibut permit for use in IPHC Area 3C with an angler endorsement of six.

ISSUES

1. Does Appellant satisfy the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), the unavoidable circumstance regulation for persons that did not meet the minimum participation requirement in the charter halibut fishery in the qualifying period (2004, 2005)?
2. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), should Appellant receive a transferable or non-transferable permit?
3. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R.

⁴ Official Record Summary (date created Jan. 26, 2010).

⁵ Letter from Appellants with Application (Feb. 22, 2011); Testimony of Wife (Oct. 18, 2011).

⁶ 50 C.F.R. § 300.67(g) ("Unavoidable circumstances claims must be made pursuant to paragraph (h)(6) of this section . . ."); 50 C.F.R. § 300.67(h)(6) ("An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title."). See Final Rule, 75 Fed. Reg. 554, 597 (Jan. 5, 2010)(Change 19 from Proposed Rule).

⁷ Order Scheduling Hearing (Jan. 20, 2011).

⁸ Order Scheduling Hearing (Oct. 12, 2011).

⁹ 50 C.F.R. § 679.43(g)(2).

§ 300.67(g)(2), what is the proper angler endorsement on the permit?

FINDINGS OF FACT

1. Husband has had a charter captain's license from the United States Coast Guard (USCG) since 1989 when he was twenty-one.¹⁰
2. Husband worked as a charter captain in Florida in the 1990's and had his own boat in Florida, [REDACTED].¹¹
3. Husband visited Alaska in 1998. Wife visited Alaska in the summer of 2000. They decided to move to [REDACTED] Alaska and operate a charter business in [REDACTED].¹²
4. Husband and Wife bought a lot in [REDACTED] in December 2000.¹³ They paid off the note on the lot by May 2002, got a construction loan to build a house on the property in July 2002 and the house was finished in November 2002.¹⁴
5. Husband and Wife wanted to purchase a charter vessel with a history of participation in the charter halibut fishery because they thought that might be necessary to continue in the charter fishery if NMFS adopted a limited access program.¹⁵
6. Husband and Wife wanted to operate their charter business as a family-run business with Husband running the vessels, keeping them in good repair, overseeing any upgrades and Wife handling all bookkeeping and accounting aspects of the business, adherence to legal requirements, submitting required reports for payroll, sales tax and other legal requirements, handling computer systems for reservations, dealing with clients.¹⁶
7. From 1987 to 2005, Wife was an Executive Assistant in a private investment bank in London (1987 – 1992) and then relocated to the United States and worked in Houston, New York and Florida managing activities of holding companies for the

¹⁰ Testimony of Husband (Oct. 18, 2011); Submission by Appellants (Oct. 19, 2011): USCG License (Issue 3, valid Aug. 19, 1999 to August 19, 2004)(Issue 3 means he had two prior licenses which are valid for five years each); Submission by Appellants (Oct. 21, 2011): USCG License (Issue 4, valid June 29, 2004 to June 9, 2009); USCG License (Issue 5, Feb. 3, 2009 to Feb. 3, 2014). These licenses authorize Appellant to operate a vessel of 100 tons or less.

¹¹ Testimony of Husband (Oct. 18, 2011).

¹² Testimony of Husband (Oct. 18, 2011).

¹³ Submission by Appellants (Oct. 19, 2011): Letter from Realtor (Nov. 8, 2000); Statutory Warranty Deed (Dec. 26, 2000).

¹⁴ Submission by Appellants (Oct. 19, 2011): Letter from Wife to Wells Fargo (May 10, 2002)(refers to discussion in March 2002 regarding construction loan); Construction Loan Agreement (Loan Date, July 8, 2002); Disclosure Statement for Loan (July 8, 2002).

¹⁵ Testimony of Wife (Oct. 18, 2011).

¹⁶ Testimony of Wife (Oct. 18, 2011).

Chief Executive Officer. Her duties included accounting, employee management, marketing customer services and organizing corporate events.¹⁷

8. Husband and Wife met with the couple who owned [REDACTED] in Anchorage in the fall of 2003 and discussed buying that business but Husband and Wife concluded it was not a good investment because of the condition of the vessel.¹⁸
9. Husband worked as a charter captain for Business Owner in Business Owner's Halibut Charter Business during the 2003 season.¹⁹
10. The Halibut Charter Business of Business Owner was a well-established charter business. Business consisted of [REDACTED] vessels, which carry six clients, and also [REDACTED] which is about 400 feet in length, a building on [REDACTED] which has the owner's [REDACTED] [REDACTED] that are rented.
11. Business Owner was elderly and wished to sell his business.²¹
12. In 2003, Business Owner and Witness had agreed verbally that Witness would buy Business. Witness had worked for Business Owner in 1998 and then became a charter captain and took clients of Business Owner on river charter trips. Business Owner and Witness had negotiated a purchase price of [REDACTED] for Business Owner's entire business – [REDACTED] Business Owner had given Witness the keys to the vessels and Witness had started working on them.²²
13. In the fall of 2003, Witness and his wife decided that it was more business than they could handle and did not go through with the deal.²³
14. In late 2003/early 2004, Appellant Husband and Wife discussed with Business Owner and his wife the possibility of buying Business Owner's established charter business and other business assets in [REDACTED]. Husband discussed a possible purchase in depth with Witness because Witness had knowledge of the business based on his near-purchase of it.²⁴

¹⁷ Testimony of Wife (Oct. 18, 2011); Submission by Appellants (Oct. 22, 2011): Description of work history.

¹⁸ Testimony of Husband (Oct. 18, 2011); Testimony of Wife (Oct. 18, 2011).

¹⁹ Submission by Appellants (Mar 2, 2010): 2003 W-2 Wage and Tax Statement for Husband.

²⁰ Testimony of Husband (Oct. 18, 2011); Testimony of Wife (Oct. 18, 2011); Testimony of Witness (Oct. 18, 2011);

²¹ Testimony of Husband, Wife, Witness (Oct 18, 2011). Business Owner was seventy-four years old in the fall of 2003. He died [REDACTED] [REDACTED] (Obituary of Business Owner, on-line, May 20, 2009).

²² Testimony of Witness (Oct. 18, 2011); Testimony of Witness (Oct. 22, 2011).

²³ Testimony of Witness (Oct. 18, 2011); Testimony of Witness (Oct. 22, 2011).

²⁴ Testimony of Husband, Wife, Witness (Oct. 18, 2011); Written Statement by Witness (Jan. 29, 2011).

15. In the spring of 2004, Husband and Wife reached an agreement in principle to purchase from Business Owner his charter halibut business and other business assets. The purchase price was [REDACTED] and included [REDACTED] vessels, [REDACTED] business.²⁵
16. The parties were going to finalize the agreement and financing after Husband and Wife came to Alaska for the 2004 charter season.²⁶
17. Husband and Wife reviewed the books of the charter business and the other businesses, discussed with tenants the traffic flow in the business, discussed with the [REDACTED] manager the inventory (what sold, what did not) and the strengths of particular employees and satisfied themselves that it would be a good deal.²⁷
18. Business Owner was willing to hold a note for a portion of the purchase price.²⁸ Husband and Wife had the ability to raise a significant part of the purchase price through the sale of their home in Florida, a line of credit, loan from Wife's father and savings.²⁹
19. A week before they were scheduled to leave for Alaska, Wife had a suspicious test result which was diagnosed [REDACTED]. Husband and Wife and their [REDACTED] son remained in Florida while Wife underwent further tests and procedures which confirmed the initial diagnosis. Wife's mother died [REDACTED]. Wife's sister was being treated for [REDACTED] at the same time as Wife.
20. Wife had a [REDACTED] at the end of May 2004, [REDACTED] at the end of September 2004 and then an extensive and painful process of reconstructive surgery and procedures that lasted through June 2005.³¹
21. Wife had health insurance through her job in Florida. The cost of Wife's medical treatment exceeded [REDACTED].³²

²⁵ Testimony of Husband, Wife (Oct. 18, 2011).

²⁶ Testimony of Husband, Wife (Oct. 18, 2011).

²⁷ Testimony of Husband, Wife (Oct. 18, 2011).

²⁸ Testimony of Witness (Oct. 18, 2011); Testimony of Wife (Oct. 18, 2011); Statement of Wife (email Oct. 19, 2011).

²⁹ Testimony of Husband, Wife (Oct. 18, 2011); Submission by Appellants (Oct. 19, 2011): Settlement Statement from Sale of Home in Florida (April 22, 2005) [REDACTED] net proceeds to Appellants from sale); Submission by Appellants (Oct. 21, 2011): Home Equity Loan and Line of Credit on [REDACTED] Property [REDACTED], June 23, 2005); Check Register (balance of [REDACTED] on August 2005). These funds were available in 2004 as well.

³⁰ Submission by Appellants (Mar. 2, 2010): Medical Records (April 20, 2004 to September 21, 2004) (reference to Wife's Mother in May 4, 2004 record); Testimony of Wife (Oct. 18, 2011).

³¹ Submission by Appellants (Mar. 2, 2010): Medical Records (April 20, 2004 – September 21, 2004); Explanation of Benefit Statements from Insurance Company (April 16, 2004 – May 24, 2005). Testimony by Wife (Oct. 18, 2011).

³² Letter from Husband to OAA (Feb. 22, 2010); Submission by Appellants (Mar. 2, 2010): Explanation of Benefits Forms from Insurance Company (April 16, 2004 – May 24, 2005).

22. Husband and Wife continued to discuss with Business Owner the purchase of his business after Wife's initial diagnosis in April 2004.³³ Husband and Wife went to ██████ for several weeks in the summer of 2004 and Husband acted as charter captain for several charters on behalf of Business Owner.³⁴
23. Business Owner was initially willing to put the sale to Appellants on hold but in early 2005 Business Owner informed Husband and Wife that he was going forward with the sale. As Wife was still ██████ Husband and Wife decided that they could not go through with the purchase of the business at that time.³⁵ Business Owner sold his business to another buyer who operated it during the 2005 season.³⁶
24. When Wife's ██████ was complete, Wife moved to Alaska in the summer of 2005. Husband either moved with her or was already here to work as a charter captain for ██████, which he did in the summer of 2005 and the summer of 2006.
25. At the end of 2006, Husband and Wife bought a charter business with a partner which included the purchase of the ██████ (VESSEL 2). VESSEL 2 took thirty-four trips pursuant to Appellant's ADF&G Business Owner License in 2007.³⁹ Husband and Wife have sold their interest in VESSEL 2 to their business partner.⁴⁰
26. In March 2007, Appellants bought a charter vessel, ██████ (VESSEL 1) in March 2007, for ██████ and still own it.⁴¹
27. In 2007, VESSEL 1 took sixty-eight halibut logbook fishing trips pursuant to an ADF&G Business Owner/Guide License issued to Appellant.⁴²
28. In 2008, VESSEL 1 took seventy-five halibut logbook fishing trips pursuant to an ADF&G Business Owner License issued to Appellant.⁴³
29. If Wife had not been diagnosed ██████ Husband and Wife would have likely purchased Business and operated it as their own business in the 2004 and 2005 seasons.⁴⁴

³³ Testimony of Husband, Wife (Oct. 19, 2011); Submission by Appellants (Oct. 19, 2011): Planner entry of phone conversation with Business Owner (May 8, 2004).

³⁴ Submission by Appellants (Mar 2, 2010): 2004 W-2 Wage Statement for Husband.

³⁵ Testimony of Husband (Oct. 18, 2011).

³⁶ Testimony of Husband (Oct. 22, 2011); Testimony of Husband, Witness (Oct. 22, 2011).

³⁷ Testimony of Wife (Oct. 19, 2011).

³⁸ Submission by Appellants (Mar. 2, 2010): 2005 & 2006 W-2 Wage Statement for Husband.

³⁹ Official Record Listing of Trips by Appellant (Oct. 13, 2011) attached to email from NMFS Computer Specialist (Oct. 13, 2011).

⁴⁰ Testimony of Husband (Oct. 19, 2011).

⁴¹ Submission by Appellant (Oct. 23, 2011): Check ledger entries for ██████ for downpayment in January 2007 and ██████ to seller in March 2007; ██████ cashier's check to Seller (Mar. 2, 2007); Agreement to Purchase (unsigned); Testimony of Husband (Oct. 18, 2011).

⁴² Official Record Listing of Trips by Appellant (Oct. 13, 2011).

⁴³ Official Record Listing of Trips by Appellant (Oct. 13, 2011).

30. Appellant submitted a timely application for a charter halibut permit on March 2, 2010.⁴⁵

PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.⁴⁶

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.⁴⁷

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005, and a recent participation period, which is the sport fishing season for halibut in 2008.⁴⁸

An applicant must prove different levels of participation for a non-transferable permit and for a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).⁴⁹

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).⁵⁰

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.⁵¹ If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent participation period (2008), the applicant may claim to meet the requirements in the

⁴⁴ I base this on the evidence supporting Findings of Fact 1 – 28.

⁴⁵ Application (dated Feb. 11, 2010, received Mar. 2, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

⁴⁶ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

⁴⁷ 50 C.F.R. § 300.67(b)(1)(ii).

⁴⁸ 50 C.F.R. § 300.67(f)(6)-(7).

⁴⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 50 C.F.R. § 300.67(f)(2)(definition of bottomfish logbook fishing trip); 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip).

⁵⁰ 50 C.F.R. § 300.67(d)(1).

⁵¹ 50 C.F.R. § 300.67(g).

unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).⁵²

Similarly, if an applicant meets a minimum participation trip level in the recent participation period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may seek to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.⁵³

For an applicant that participated in the recent period, but did not meet the participation requirement in the qualifying period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), the unavoidable circumstance regulation, requires that the applicant prove the following:

Section (i): the applicant had a specific intent to operate a charter halibut fishing business in one year of the qualifying period (2004 or 2005);

Section (ii): the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, unforeseen and reasonably unforeseeable;

Section (iii): the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred;

Section (iv): the applicant took all reasonable steps to overcome the circumstance.

ANALYSIS

1. Do Appellants satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), which is the unavoidable circumstance regulation for persons that did not meet the participation requirement for the qualifying period (2004 or 2005)? Yes.

I analyze the requirements in sections (i) through (iv).

Section (i). Did Appellants have a specific intent to operate a charter halibut fishing business in 2004 and 2005? Yes.

A specific intent is more than a general desire or interest to operate a charter halibut fishing business. An applicant who had a specific intent to operate a charter halibut fishing business will have a definite commitment to operate its own charter halibut fishing business and will typically have all the essential elements of a charter business in place, or a realistic plan to have all the essential elements of a charter business in

⁵² 50 C.F.R. § 300.67(g)(1).

⁵³ 50 C.F.R. § 300.67(g)(2).

place, by the charter halibut season. An applicant with a specific intent will usually have taken concrete steps to operate a charter halibut business.

Appellants state that they had a specific intent to operate a charter halibut fishing business in 2004 and 2005 out of ██████████ Alaska. Appellants had not operated a charter halibut business in Alaska before 2004 and therefore did not have all the essential elements of a charter business in place before 2004. The question is whether Appellants showed that they had a specific intent to start a charter halibut business in 2004. Husband and Wife state they were committed to doing that. They had taken concrete steps. They purchased property in ██████████ and had a house constructed on their property.

As for steps more specifically oriented to operating a charter halibut business, Husband had worked as a charter captain in Alaska in 2003 for Business Owner and had a marine credential that authorized him to operate a charter vessel. Wife had the experience to handle the paperwork and customer-relations aspects of the business: keeping the books, ensuring adherence to legal requirements relating to licensing, payroll, sale tax, corporate governance, procuring appropriate insurance, maintaining a website and advertising. Husband had some clients from his charter business in Florida who wanted to charter with him in Alaska.⁵⁴

What Appellants were missing was a vessel. I conclude that Appellants had a realistic plan to obtain a vessel, namely purchase a vessel with a history of participating in the charter halibut fishery. They met with the owners of one charter halibut business in 2003, but concluded it was not a wise investment because of the condition of the vessel.

When the opportunity arose for them to purchase Business from Business Owner, they reached an agreement in principle. That Business was a rather ambitious purchase: ██████████ vessels but also ██████████ and other spaces in the building to rent to commercial tenants. Appellants investigated the business and concluded it was a good deal. But Appellants did not have a final, written agreement with Owner.

I found that Appellants have shown that they likely would have purchased Business if Wife had not been diagnosed ██████████⁵⁵ I found Appellants' contention credible that they would have finalized their agreement after Husband and Wife got to Alaska for the 2004 season. The basic reason for this finding is that both parties wanted to reach a final agreement and, based on the record, there was no obstacle to them doing that. They had reached an agreement in principle with Business Owner on key terms – the sale price and what the sale included. Appellants had the skills, the drive and the interest to operate the business. Appellants had a relationship with Business Owner since Husband worked for Business Owner as a charter captain in 2003. Husband had worked as a charter captain for all his adult life and had a rapport

⁵⁴ Testimony of Husband (Oct. 18, 2011).

⁵⁵ Finding of Fact 29.

with Business Owner.⁵⁶ Business Owner was willing to carry a note for a portion of the purchase price. Husband and Wife had access to assets to pay a significant portion of the purchase price.

Business Owner died in 2009 so Appellants could not introduce his testimony to prove that he would have sold his business to them. But Business Owner had almost sold the business to Witness in 2003, who also was a charter captain that had worked with Business Owner. Business Owner and Witness had agreed to a sale and Business Owner had even given Witness keys to the two boats. But before they finalized the sale, Witness and his wife decided it was more business than they could handle – [REDACTED] – and they did not go through with the purchase of the business.

Appellants provided a written statement and testimony from Witness. Witness wrote:

I am submitting this affidavit to confirm that in early 2004 I had various telephone conversations with [Husband] regarding his intention to purchase [Business] and [REDACTED] Alaska. [Husband] and I had discussed his intent to purchase this business, including asking/offer price, condition of the [REDACTED] vessels and other matters. I specifically remember these conversations as [Husband] approached me for information as I had also looked at purchasing the same business a year earlier.⁵⁷

Witness also had some insight into Business Owner's thinking. Witness had worked for Business Owner in 1998 repairing his vessels, then became a river guide, did river charters for Business Owner and remained was close friends with him.⁵⁸ With regard to Business Owner's interest in selling, Witness testified:

But, in talking to [Business Owner and his wife] they were willing to take a minimum amount down and sell it on a contract to whoever they could. They wanted that business, which was very successful, to continue on. They wanted to make sure who they sold it to was going to run the business properly.”⁵⁹

Witness testified that, after he decided he could not purchase the Business, “[Business Owner] was very happy [Husband] was interested. He had faith it was going to happen.”⁶⁰ Witness testified: “I know [the owners] were really eager to get rid of it. But as I said before, they weren't just going to give it to just anyone. The [Appellants]

⁵⁶ Wife testified: “(The owner) was an elderly gentleman, [REDACTED] [Husband] got on really, really well with him.” (Testimony of Wife, Oct. 18, 2011) 41 min.

⁵⁷ Written Statement by Witness (Jan. 29, 2011).

⁵⁸ Testimony of Witness (Oct. 22, 2011).

⁵⁹ Testimony of Witness (Oct. 18, 2011) 53 min.

⁶⁰ Testimony of Witness (Oct. 18, 2011) 54 min.

and I had direct affiliation with the [owners] as far as working with them and had prior knowledge of how the business ran.”⁶¹

This evidence from a third party corroborates Husband and Wife’s testimony that they believed they would have finalized the purchase. Husband and Wife liked the fact that the business included more than just the charter vessels. Husband testified: “Price was negotiated. Everything seemed perfect.”⁶² Husband testified later in the hearing: “That was the one that was going to be perfect for us. . . . It was quite disappointing because I really liked it.”⁶³ Wife testified: “I’m not sure how many years [the owner] had had it but it was a long time. They were ready to move on. We’d built that relationship up with them. It would have been a good deal for us and there’s no way we would have let it get away.”⁶⁴

Finally, Business Owner did sell his business in 2005 which supports the finding that Business Owner would have likely sold it to Appellants, if they had not experienced this medical crisis in their lives.

From these facts, I conclude that Appellant had a specific intent to operate a charter halibut business in 2004 and 2005 and had a realistic and definite plan to purchase a charter halibut business including two charter vessels and the client list from that business.

Section (ii). Was Appellant’s intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable? Yes.

I conclude that Wife’s ██████████ was unavoidable, unique, unforeseen and reasonably unforeseeable.

I conclude that Wife’s ██████████ thwarted the intent of Husband and Wife to operate a charter halibut fishing business in 2004 and 2005 and that, but for her illness, Appellants would have operated a charter halibut business in 2004 and 2005. Husband and Wife had reached an agreement in principle with Business Owner and the record has evidence of no other event that intervened to prevent that agreement from going forward except Wife’s illness.

Section (iii). Did the circumstance that thwarted Appellant’s intent to operate a charter halibut fishing business actually happen? Yes.

Wife was diagnosed ██████████ in April 2004 and had a succession of surgeries and treatment through June 2005.

⁶¹ Testimony of Witness (Oct. 22, 2011) 6 min.

⁶² Testimony of Husband (Oct. 22, 2011) 10 min.

⁶³ Testimony of Husband (Oct. 18, 2011) 23 min, 24 min.

⁶⁴ Testimony of Wife (Oct. 18, 2004) 42 min.

Section (iv). Did Appellants take all reasonable steps to overcome the circumstance? Yes.

Wife immediately sought medical care. The course of treatment took a full year. Husband and Wife kept discussing a possible purchase with Business Owner. Husband and Wife came to Alaska for several weeks in 2004. Husband took several charter trips as a captain for Business Owner during that time. But Husband and Wife could not continue with their plans to purchase the business until Wife's medical condition was resolved.

It is not a reasonable step to expect that Husband and Wife should have moved to Alaska and begun operating their charter halibut business before Wife's condition was resolved. They reasonably made her treatment and recovery their overriding priority. Further, until her treatment was complete, Wife was not willing to leave her job in Florida because she would lose the health insurance that came with her job.

As soon as Wife's medical condition was resolved, they moved to Alaska permanently in 2005 and were operating a very busy charter halibut business by 2007. I conclude they took all reasonable steps to overcome the circumstance of Wife's illness and treatment.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), the next question is whether the applicant will receive a transferable or non-transferable permit and whether the angler endorsement will be four or some other number.

**2. Should Appellant receive a transferable or non-transferable permit?
Transferable.**

To receive a transferable permit, an applicant who has shown an unavoidable circumstance in one year of the qualifying period must meet two requirements. First, the applicant must meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips with the same vessel in 2008.⁶⁵ Appellant meets that requirement with seventy-five trips with VESSEL in 2008.

Second, the applicant must show that it would likely have taken fifteen or more bottomfish logbook fishing trip in one year of the qualifying period but for the unavoidable circumstance. This is based on subsection (v) of 50 C.F.R. § 300.67(g)(2):

- (v) If the applicant proves the foregoing (see paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:
 - (A) One non-transferable permit with an angler endorsement of four (4); or

⁶⁵ 50 C.F.R. § 300.67(d)(1)(ii).

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

I conclude that Appellants would likely have taken fifteen or more bottomfish logbook fishing trips in 2004 and 2005 if Wife had not been diagnosed [REDACTED] and underwent treatment for a year and a half. I rely on these facts for that conclusion. Appellants were planning to purchase two vessels and a very successful charter halibut business. Husband had some charter clients from Florida that wanted to fish with him in Alaska. When Appellants were able to carry through on their plans to operate a charter halibut business in 2007, they took substantially in excess of fifteen halibut logbook fishing trips. In 2007, Appellants took 102 trips with two vessels: 68 trips with VESSEL 1 and 34 trips with VESSEL 2. In 2008, Appellants took 75 trips with VESSEL 1. I conclude that Appellant's permit should be transferable.

3. What is the proper angler endorsement on Appellant's permit? Six.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), section (v) states that the applicant's permit will have an angler endorsement of four unless the applicant shows that it would likely have taken a trip with a higher number of anglers but for the circumstance that thwarted the applicant's participation.

If Appellant had participated as they had planned, in 2004 and 2005, they would have likely participated with the two vessels belonging to Business Owner. Each of those vessels carried six clients. The vessel that Appellants eventually did purchase – VESSEL 1 – took numerous trips in 2007 and 2008 with six clients but no trips with more than six clients.⁶⁶ Therefore, I conclude that Appellant's charter halibut permit should be endorsed for six anglers.

CONCLUSIONS OF LAW

1. Appellants meet the minimum participation requirement for a transferable charter halibut permit in the recent participation period: fifteen halibut logbook fishing trips with the same vessel in 2008.
2. Appellants meet the requirements in sections (i) through (iv) of 50 C.F.R. 300.67(g)(2), the unavoidable circumstances regulation, with respect to their lack of participation in both years of the qualifying period: 2004 and 2005.

⁶⁶ Official Record Listing of Trips by Appellant (Oct. 13, 2011).

3. Appellants had a specific intent to operate a charter halibut fishing business in 2004 and 2005.
4. Appellants' intent was thwarted by a circumstance that was unavoidable, unique to him, unforeseen and reasonably unforeseeable, namely Wife's diagnosis [REDACTED] which required over a year of intensive treatment.
5. The unavoidable circumstance actually occurred.
6. Appellants took all reasonable steps to overcome the circumstance.
7. Appellants meet the requirement in section (v) of 50 C.F.R. 300.67(g)(2) to receive a transferable permit. Appellants have shown they likely would have taken fifteen bottomfish logbook fishing trips with the same vessel in 2004 and 2005 if they had not experienced the unavoidable circumstance of Wife's illness and treatment in 2004 and 2005.
8. Appellants meet the requirements in section (v) of 50 C.F.R. 300.67(g)(2) to receive an angler endorsement of six. Appellants have shown that they likely would have taken at least one bottomfish logbook fishing trip with six anglers in 2004 or 2005 but for the unavoidable circumstance of Wife's illness and treatment in 2004 and 2005.

ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a transferable charter halibut permit, endorsed for six anglers, for use in IPHC Regulatory Area 3A to Appellant. This Decision is effective on January 30, 2012, unless by that date the Regional Administrator reverses, remands, or modifies the Decision pursuant to 50 C.F.R. § 679.43(k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., A.S.T., on January 9, 2012, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.

[REDACTED]
Mary Alice McKeen
Administrative Judge

Date issued: December 30, 2011