

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

In re Application of



Appellant

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Appeal No. 10-0068

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) 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 (OAA), Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On September 29, 2010, [REDACTED] doing business as [REDACTED] (Appellant) filed this appeal with the National Marine Fisheries Service (NMFS). I accept the appeal as timely pursuant to 50 C.F.R. § 679.43(d).

After receipt of Appellant's appeal, I sent a letter to Appellant setting a deadline of December 10, 2010 to submit additional materials in support of his claims. Appellant did not respond by submitting additional evidence. I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2). I therefore close the record and render this decision. 50 C.F.R. § 679.43(k).

In the paperwork filed in support of his appeal on September 29, 2010, Appellant requested an oral hearing to discuss his land purchase in 2002; his investment in his property; his age, and; that the official record for 2008 is incorrect. Under applicable regulations, I have the discretion to order an oral hearing if Appellant's appeal documentation shows an adjudicative fact or a factual issue that needs to be resolved by an oral hearing. See generally 50 C.F.R. § 679.43(g). The first three concerns of Appellant are not facts that weigh in favor or against the validity of the IAD. The fourth concern could suggest a basis to reverse the IAD but other than argumentation and

unnotarized statements, there is no evidence in the record to support the claim. Under the circumstances, I decline to order an oral hearing because it is not necessary to resolve the regulatory issues in this case. See 50 C.F.R. § 679.43(g). In denying Appellant's request for a hearing I have reviewed his statement that if a hearing were held he could produce a proof of purchase, proof of the cost of his investment, and affidavits of clients who fished with him.¹ The purchase, ownership and cost of Appellant's business are not at issue in this case. Further, for reasons developed in the Analysis section of this Decision, even if that evidence were presented, it would not tend to show that Appellant met the requirements for a charter halibut permit. See 50 C.F.R. § 679.43(g)(3)(iii). Also, Appellant has had numerous opportunities and ample time to submit for the record any evidence to support his claim.²

This appeal arises from an Initial Administrative Determination (IAD) issued on August 2, 2010 by Restricted Access Management (RAM), a program within the National Fisheries Service (NMFS).³ In the IAD, RAM denied Appellant a permit under the charter halibut program for regulatory area 3A. RAM reasoned that Appellant did not qualify for a charter halibut permit (permit) because he did not participate in the qualifying period in 2004 or 2005 and participation period of 2008. Further, RAM opined that Appellant would not be eligible for a permit under the exception to the general rule for permit eligibility because of "unavoidable circumstances." RAM advised Appellant he could appeal the IAD to OAA.

Among the general requirements for a permit is that an applicant prove certain fishing history in 2004 or 2005 and 2008. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.⁴ On appeal, Appellant concedes he was not charter fishing in 2004 and 2005, but contends he meets the participation requirements for 2008. Appellant argues that the 2008 official record is not accurate because he actually operated more charters than recorded with the State of Alaska Department of Fish & Game (ADF&G).⁵ He states it is difficult to send mail from his remote location, but he has affidavits from clients to show he actually operated more than four charters

¹ I note that documents relevant to proof of ownership were submitted by Appellant and are part of the case record.

² Those opportunities include RAM's pre-IAD letter dated May 5, 2010. In that letter RAM provided Appellant with its preliminary opinion that he would not qualify for a permit. However, RAM also notified Appellant that he could submit additional evidence to show why he did qualify. In response, Appellant supplied RAM with twelve pages of documentation. Original File, Fifteenth to Twenty-Sixth Page.

³ Original File, Second Page.

⁴ The charter halibut limited access program (CHLAP) regulations became effective in 2010 and will be codified at 50 C.F.R. § 300.67. At present, the regulations can be obtained by accessing the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition of the C.F.R. Citations to the CHLAP are to the e-CFR, unless otherwise noted.

⁵ Pleadings, Second Page.

in 2008.⁶ Indeed, Appellant has submitted non-notarized "affidavits" purportedly from four individuals who state they took a charter halibut trip with Appellant on two days in the summer of 2008.⁷ Appellant notes his dedication to his business by renovating a cannery into a lodge, going to trade shows, and spending his summers at the remote location of his business.⁸ Appellant is concerned that without a permit, his business may fail.⁹ Appellant also thinks his relatively young age has limited his business opportunities because it took him a few years to qualify for a captain's license.¹⁰ Appellant thinks the regulations are unfair because they favor businesses in less remote locations.¹¹

On January 11, 2011, I sent an email message to RAM asking for clarification about its record of Appellant's logbook fishing trips. In response RAM sent me data confirming RAM's statements in the IAD that Appellant's official logbook trips for 2008 were four. The recorded trips were taken on June 30, 2008, July 1, 2008, July 3, 2008, and July 6, 2008.¹²

ISSUES

Did Appellant not participate in charter halibut fishing in the qualifying period of 2004 or 2005 within the meaning of 50 C.F.R. § 300.67(a),(b)&(f)(1), and therefore does not qualify for a permit under the general eligibility standards?

Should the IAD be upheld because Appellant has not shown by a preponderance of the evidence that he made at least five qualifying halibut logbook fishing trips in 2008 and therefore he is not eligible for a charter halibut permit under the "unavoidable circumstance" provisions?

⁶ Pleadings, Second Page.

⁷ Pleadings, Fifth-Eighth Pages.

⁸ Pleadings, First to Third Page.

⁹ Pleadings, Third Page.

¹⁰ Pleadings, Third Page.

¹¹ Pleadings, Third Page.

¹² Email dated 11 January 2011 with attachment. I have added the referenced documents to the case record.

FINDINGS OF FACT

1. In 2002, Appellant and his brother bought a cannery for the purpose of renovating it into a fishing lodge.¹³
2. In 2004 and 2005, Appellant did not operate charter halibut trips.
3. In 2004 and 2005, Appellant did not submit to ADF&G the requisite and timely information for recording five or more bottomfish logbook fishing trips.
4. In 2007, Appellant operated charter halibut trips.¹⁴
5. In 2008, Appellant had four charter halibut trips recorded with ADF&G.¹⁵
6. In 2008, Appellant did not submit to ADF&G the requisite and timely information for recording five or more halibut logbook fishing trips.

PRINCIPLES OF LAW

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business in regulatory area 3A, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.

Proof of participating in the industry during the *qualifying period* consists of a applicant reporting at least five "bottomfish logbook fishing trips." 50 C.F.R. § 600.67(b)(ii)(A).

A "bottomfish logbook fishing trip" has specific regulatory criteria: It is timely reported to the State of Alaska in a Saltwater Charter Logbook and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. See 50 C.F.R. § 300.67(f)(2) and (4).

¹³ Pleadings, First Page.

¹⁴ Original File, Forty-Second Page.

¹⁵ Original File, Thirty-Fourth Page; IAD; Email dated 11 January 2011 with attachment.

Proof of participating in the industry during the *recent participation period* in 2008 consists of an applicant reporting at least five "halibut logbook fishing trips." See 50 C.F.R. § 300.67(b)(ii)(B).

A "halibut logbook fishing trip" has specific regulatory criteria: It is one reported to the State of Alaska by a deadline established by state law in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3)&(4).

A charter halibut permit will not be issued by NMFS unless, among other criteria, the participation requirements are met or the applicant meets the regulatory exception for not meeting one of the participation requirements. The regulatory exception is sometimes referred to as the "unavoidable circumstance" rule. See 50 C.F.R. § 300.67(b)(1) and (g).

Under the regulatory exception, an applicant who meets the participation requirements in one but not both relevant periods (i.e., the qualifying period in 2004 or 2005 *and* recent participation period in 2008), may nevertheless be eligible for a charter halibut permit if he or she can meet the requirements for an "unavoidable circumstance claim." See 50 C.F.R. § 300.67(g).

If the applicant cannot meet the participation requirements for either the qualifying period (2004 or 2005) or recent participation period (2008), he or she is not eligible for a charter halibut permit under the unavoidable circumstance exception. See 50 C.F.R. § 300.67(g).

ANALYSIS

The purpose of this appeal is to determine whether the IAD is consistent with applicable regulations and to determine whether Appellant is eligible for a permit pursuant to the "unavoidable circumstance" rule. On the first issue, as I have noted in the Legal Principles above, among the threshold criteria for obtaining a permit to operate a charter halibut fishing business in regulatory area 3A, is the requirement that the applicant participated in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008.

Since Appellant agrees he was not operating a charter halibut business in 2004 and 2005, he cannot satisfy the minimum participation requirements during the qualifying period of 2004 or 2005 to qualify for a permit. Consequently, to prevail in this appeal,

Appellant must establish that he met the minimum participation requirements of the recent participation period in 2008. Only after establishing that he met the 2008 recent participation requirements can Appellant claim that he qualifies for a permit based on unavoidable circumstances that affected his participation in 2004 or 2005. See 50 C.F.R. § 300.67(g).

Proof of participating in the industry during the *recent participation period* in 2008 consists of an applicant reporting at least **five** "halibut logbook fishing trips." See 50 C.F.R. § 300.67(b)(ii)(B). A "halibut logbook fishing trip" has specific regulatory criteria: It is one reported to the State of Alaska by a deadline established by state law in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3)&(4).

The record in this case shows only four halibut logbook fishing trips meeting the criteria outlined above.¹⁶ In the absence of other evidence to show at least one more qualifying trip was made, I am compelled to deny Appellant redress. Thus I must consider what evidence of record tends to show that Appellant took five or more qualifying trips. That evidence consists of Appellant's written statements¹⁷ and the purported affidavits.¹⁸ While I do not doubt Appellant's honesty, his written statements, without other corroborating evidence, do not overcome RAM's records of four trips. Moreover, even if Appellant's statements are accurate, they do not prove that RAM's record showing four qualifying trips is wrong. At best, Appellant's statements could show that Appellant took two additional trips in 2008. However, his statements do not establish that the putative trips met the regulatory criteria of being *timely* submitted to the State of Alaska about Appellant's 2008 participation in a Saltwater Charter Logbook, including "the number of halibut...kept, the number...released, the statistical area(s) where bottomfishing occurred, or the boat hours that the vessel engaged in bottomfish fishing." See 50 C.F.R. § 300.67(f)(3)&(4).

I also conclude that the purported affidavits are not sufficient to overcome RAM's records of Appellant's trips. The affidavits are not notarized as proof that the signatory exists and was the one who actually signed the document. In any event, even if the purported affidavits were valid statements accepted on their face as accurate, they do not prove that RAM's record showing four qualifying trips is wrong. At best, the affidavits could show that Appellant took two additional trips in 2008. But merely taking

¹⁶ IAD; email dated 11 January 2011 with attachment.

¹⁷ Pleadings, First to Fourth Page.

¹⁸ Pleadings, Fifth to Eighth Page.

charter halibut trips does not meet the regulatory standard. Like Appellant's statements, the affidavits fail to prove the putative trips met the regulatory criteria of being *timely* submitted to the State of Alaska about Appellant's 2008 participation in a Saltwater

Charter Logbook, including "the number of halibut...kept, the number...released, the statistical area(s) where bottomfishing occurred, or the boat hours that the vessel engaged in bottomfish fishing." See 50 C.F.R. § 300.67(f)(3)&(4).

Given the evidence, I find that Appellant took four official halibut logbook trips in 2008. As such, he does not meet the pre-requisite for an unavoidable circumstance claim. That is, without having proof of participating in a qualifying year (2004 or 2005) or the recent participation period (2008), Appellant cannot obtain a permit based on an unavoidable circumstance claim. See 50 C.F.R. § 300.67(g).

In reaching my decision, I have considered all of Appellant's arguments presented on appeal, including his concerns about his investment, delay in getting a captain's license that he attributes to his age, and his perception that the regulations are unfair to remote operators. While I empathize with Appellant, nevertheless I am bound as an administrative judge to follow the regulations as they are written. I am not authorized to base my decision on the perceived inequities or policy behind or policy effects of a regulation. Accordingly, for the reasons stated above, I uphold the IAD and deny Appellant's unavoidable circumstance claim.

CONCLUSIONS OF LAW

Appellant did not participate in charter halibut fishing in the qualifying period of 2004 or 2005 within the meaning of 50 C.F.R. § 300.67(a),(b)&(f), and therefore does not qualify for a permit under the general eligibility standards.

Appellant did not participate in charter halibut fishing in the recent participation period in 2008 within the meaning of 50 C.F.R. § 300.67(b)(ii)(B) & (f), and therefore, does not meet the threshold eligibility requirements to qualify for a permit based on the unavoidable circumstance provisions.

ORDER

The IAD dated August 2, 201 is upheld. 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 or the Regional Administrator elects to review this decision.¹⁹

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date Issued: 2/11/11

¹⁹ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).