

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

In re Application of)
)
) Appeal No. 10-0034
)
) DECISION
)
 Appellant)
)

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, Maryland 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 OAA. The undersigned is the administrative judge assigned to adjudicate this case.¹

On June 17, 2010, NMFS's Restricted Access Management program (RAM) issued an Initial Administrative Determination (IAD) denying [REDACTED] doing business as (dba) [REDACTED] (Appellant's) application for a charter halibut permit (CHP or permit) pursuant to the Charter Halibut Limited Access Program (CHLAP).²

Appellant filed his application on March 25, 2010.³ On the application, Appellant indicated he was basing his request for a permit on the "unavoidable circumstance" provision of the CHLAP regulations. (The unavoidable circumstance provision is addressed in the Principles of Law section and Analysis section of this Decision.)

After RAM received Appellant's application, on May 3, 2010 RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁴ In the Notice, RAM advised Appellant that generally, in order to be eligible for a permit, an applicant had to prove participation in the charter halibut industry during two time periods, the qualifying period

¹ I was assigned this appeal after the completion of the contract for a former contractor (Contractor) of OAA.

² The CHLAP was adopted in 2010. Final Rule, 75 Fed. Reg. 554 (2010). The CHLAP is codified at 50 C.F.R. §§ 300.61, 300.66 and 300.67.

³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A received by RAM on March 25, 2010.

⁴ Original File Tab, Notice dated May 3, 2010.

in 2004 or 2005, and the recent participation period in 2008. RAM advised Appellant that he met the recent participation period requirement. However, Appellant did not meet the qualifying period requirement. RAM acknowledged Appellant's unavoidable circumstance claim and provided Appellant with an opportunity to submit evidence in support of his claim.

On June 2, 2010, Appellant submitted additional information in response to RAM's Notice. The supplemental information included his mother's medical records and his logbook pages for 2006 to 2009. Following that submission, RAM issued the IAD at issue in this appeal. In the IAD, RAM advised Appellant that for resolution of his unavoidable circumstances claim, as provided in the CHLAP regulations, he would have to file an appeal with OAA. On August 13, 2010, Appellant filed a timely appeal with OAA.

On November 4, 2010, Contractor held a hearing for this case. Appellant was the only witness. I have determined that information in the record is sufficient to render a decision and I have closed the record.⁵ In rendering my Decision I have carefully reviewed the entire record, including the audio recording of the hearing.

STATEMENT OF ISSUES

On appeal, Appellant does not allege that RAM erred when it determined that he did not meet participation requirements for the qualifying period in 2004 or 2005. Thus, the only way for Appellant to prevail on appeal is if he establishes by a preponderance of the evidence the requirements of an unavoidable circumstance claim.

To resolve Appellant's unavoidable circumstance claim, I must decide the following:

1. Did Appellant hold a specific intent to operate a charter halibut fishing business in the qualifying period in 2005?
2. Was Appellant's specific intent to operate a charter halibut fishing business in the qualifying period thwarted by an actual circumstance that was unavoidable, unique to Appellant, unforeseen and reasonably unforeseeable?
3. Did Appellant take all reasonable steps to overcome the circumstance that prevented Appellant from operating a charter halibut fishing business?
4. If Appellant satisfies the elements of the unavoidable circumstance provision, should his permit be transferable?
5. If Appellant satisfies the elements of the unavoidable circumstance provision, for how many anglers should his permit be endorsed?

⁵ 50 C.F.R. § 679.43(n)(8); 50 C.F.R. § 679.43(g)(2).

FINDINGS OF FACT

1. In 2004, Appellant purchased a vessel suitable for charter fishing. That vessel was the same one Appellant intended to use for charter fishing in 2005.⁶
2. Throughout 2004, Appellant planed and prepared to start a charter halibut fishing business in 2005. Appellant targeted 2005 as his year to begin providing charter fishing trips.⁷
3. In 2004, Appellant solicited business (clients) for his charter fishing business.⁸
4. In 2004, Appellant's elderly mother (who was living with Appellant and his spouse) began to show [REDACTED]⁹ Appellant's mother was eighty-four years old in 2004.¹⁰
5. In March 2005, Appellant obtained a U.S. Coast Guard "Operator of Uninspected Passenger Vessel (commonly known as "6-Pack") License."¹¹
6. By the Spring of 2005, Appellant became increasingly concerned about his mother, [REDACTED] worsened. Appellant's mother was [REDACTED].
[REDACTED] Additionally, Appellant's mother [REDACTED] Appellant was concerned about his mother's physical safety.
7. By the Spring of 2005, Appellant's mother needed full-time care and physical supervision and monitoring. Initially, Appellant and his spouse thought that role could be filled by the spouse; however, [REDACTED] they agreed that Appellant would have to provide the needed care-giving.
8. In the Spring of 2005, Appellant sought assistance from his siblings to care for their mother, but none could assist until later in 2005.¹⁴

⁶ Appellant's hearing testimony (November 4, 2010).

⁷ Appellant's hearing testimony (November 4, 2010).

⁸ Original File Tab, Appellant's appeal letter received by RAM on August 13, 2010; Appellant's hearing testimony (November 4, 2010).

⁹ Appellant's hearing testimony (November 4, 2010).

¹⁰ Medical Records, including e.g., [REDACTED] (undated report on evaluation that was conducted in January 2006).

¹¹ The license authorizes its holder to captain a 100 gross tons (or less) vessel carrying a maximum of paying passengers, within Inland and International waters, sail or power. Appellant's hearing testimony (November 4, 2010).

¹² Appellant's hearing testimony (November 4, 2010).

¹³ Appellant's hearing testimony (November 4, 2010).

¹⁴ One of Appellant's sisters lived in another Alaska city and was unavailable to assist; his brother was fully engaged in Arizona, and his other sister lived in Seattle and could not immediately leave for Alaska to provide assistance. Appellant's hearing testimony (November 4, 2010).

9. Appellant did not operate his charter fishing business in 2005 and did not report any bottomfish logbook fishing trips to the Alaska Department of Fish and Game (ADF&G).¹⁵
10. Appellant and his spouse purchased a new, larger, house so that a permanent care-taker could live with them and attend to the needs of his mother.¹⁶
11. In October or November 2005, one of Appellant's sisters came to Alaska to care for their mother.¹⁷
12. In late 2005, a local ██████████ examined Appellant's mother and referred Appellant's mother to specialists ██████████.¹⁸
13. Appellant testified that he was certain that if he had started his halibut charter fishing business in 2005, he would have made, and timely reported, at least fifteen bottomfish logbook fishing trips in that year.¹⁹
14. Appellant had a business relationship with a local bed and breakfast that intended to refer charter fishing business to Appellant.²⁰
15. Appellant had booked a trip for 2005 that consisted of a family of four (husband, wife, and two sons) and two of their friends, for a total of six anglers.²¹
16. Appellant began providing charter halibut fishing trips in 2006. In the years 2006 through 2009, he reported to ADF&G the following numbers of halibut logbook fishing trips taken in Area 2C:

<u>Year</u>	<u>Trips</u>
2006	27
2007	39
2008	39

¹⁵ Official Charter Halibut Record is defined in the CHLAP regulations: "Official charter halibut record means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits." 50 C.F.R. 300.67(f)(5).

¹⁶ Appellant's letter addressed To Whom it May Concern, received by RAM on June 2, 2010.

¹⁷ Appellant's hearing testimony hearing (November 4, 2010).

¹⁸ Original File Tab, medical records from internist, neurologist, and psychiatrist, dated various dates from November 2005 to August 2008.

¹⁹ Appellant's hearing testimony (November 4, 2010).

²⁰ Letter from bed and breakfast dated March 15, 2010.

²¹ Appellant's hearing testimony hearing (November 4, 2010); Letters to NOAA/NMFS/RAM "To Whom it May Concern" from potential clients in Colorado (April 7, 2010), North Dakota (April 7, 2010), and North Carolina (March 28, 2010).

2009

25²²

17. In each of the years for which halibut logbook fishing trip data were supplied, the highest number of anglers reported was six.²³

PRINCIPLES OF LAW

Under the CHLAP, to be eligible for a permit an applicant must prove he reported charter fishing trips during two participation periods: (1) the *qualifying* period, in 2004 and 2005,²⁴ and (2) the *recent participation* period, in 2008.²⁵

If an applicant can only prove he met participation requirements during one period, he may still qualify for a permit under the unavoidable circumstance provision of the CHLAP.²⁶ To prevail on an unavoidable circumstance claim as it applies in this case, Appellant must prove: (1) he held a specific intent to operate a charter halibut fishing business in 2005; (2) his intent was thwarted by an actual circumstance that was unavoidable, unique, and unforeseen and reasonably unforeseeable; and, (3) he took all reasonable steps to overcome the circumstance.²⁷

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.²⁸ Whether the CHP is designated as transferable depends on how many logbook fishing trips Appellant proves he would have taken in the qualifying year (in this case 2005) but for the unavoidable circumstance.²⁹ If the applicant proves he would likely have taken fifteen or more trips in the qualifying year (2005) and did in fact take fifteen or more trips in the participation year (2008), then his permit will be transferable.³⁰ Further, the number of anglers for which the permit will be endorsed depends on the highest number of anglers that would have been on the trips Appellant would have taken in 2005 but for the unavoidable circumstance.³¹

²²ADF&G, summary computer reports of Appellant's timely reported halibut logbook trips in 2006, 2007, 2008, and 2009 (Generated on March 17, 2010); Original File Tab, Logbook Pages.

²³ADF&G, summary computer reports of Appellant's timely reported halibut logbook trips in 2006, 2007, 2008, and 2009 (Generated on March 17, 2010).

²⁴ 50 C.F.R. § 300.67(c)(6).

²⁵ See 50 C.F.R. § 300.67(c)(7).

²⁶ 50 C.F.R. § 300.67(g).

²⁷ 50 C.F.R. § 300.67(g)(2)(iv).

²⁸ 50 C.F.R. § 300.67(g)(2)(v).

²⁹ See 50 C.F.R. § 300.67(g)(2)(v)(B).

³⁰ See 50 C.F.R. § 300.67(d).

³¹ See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (2009).

Based on the evidence of record, I conclude that the highest number of anglers that Appellant likely would have reported on a bottomfish logbook fishing trip reports during 2005, but for the intervening unavoidable circumstance, is six.

ORDER

The denial of Appellant's application for a charter halibut permit, as set out in the IAD that is the subject of this appeal, is vacated. RAM is ordered to issue a transferable charter halibut permit, endorsed for six clients, for use in IPHC regulatory area 2C to Appellant. This decision takes effect on August 29, 2011 unless by that date the Regional Administrator orders review of the decision.

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 August 10, 2011, 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.³⁵

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date Issued: July 29, 2011

³⁵ The NAO "Procedures for filing Motions for Reconsideration" are published on the NMFS Alaska Region web site: <http://alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>