

In his application for a CHP, Appellant asserted that an unavoidable circumstance prevented him from meeting the participation requirements for 2008. In the IAD, RAM explained that Appellant had to file an appeal with OAA to pursue his claim of unavoidable circumstance.⁴

In his appeal, Appellant explained that he had planned to operate charter fishing trips during the qualifying period, 2004 or 2005, but could not obtain his license to operate a charter fishing vessel due to the limited availability of the licensing course in his remote area and due to difficulties in pursuing a self-study course given his time constraints as a [REDACTED].⁵

I reviewed Appellant's appeal and the case record and determined that an oral hearing would best resolve the issues of adjudicative fact presented in this case.⁶ Accordingly, I ordered a hearing on April 20, 2011, and provided Appellant with at least thirty days advance notice of the date, place, and time of the oral hearing and of the issues to be determined at the hearing.⁷ At the conclusion of the hearing on April 20, 2011, I determined the record contained sufficient information on which to reach final judgment and I closed the record. This decision follows.⁸

ISSUES

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and (B) and 300.67(d)(1). If Appellant does not meet the minimum participation requirements, that is participation in 2004 or 2005, and in 2008, then I must determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(2), qualifies Appellant to receive a CHP in lieu of meeting the participation requirement for the qualifying period (2004 or 2005).

⁴ Case File, Original File Tab, IAD dated July 23, 2010.

⁵ Case File, Pleadings Tab, Appellant's appeal letter received on September 14, 2010.

⁶ 50 C.F.R. §§ 679.43(g)(3)(i) 679.43(h)(2), and 679.43(n)(1).

⁷ Case File, Appeals Correspondence Tab, Notice of Scheduled Hearing; 50 C.F.R. § 679.43(n)(1)-(2).

⁸ 50 C.F.R. §§ 679.43(n)(8) and (k).

to unreliable Internet access in Appellant's remote area, Internet-based coursework was not a viable option prior to 2007.¹⁴

7. Also in 2007, Appellant purchased a larger vessel, Vessel 2, to utilize in a charter fishing operation.¹⁵
8. In 2008, Appellant reported eighteen halibut logbook fishing trips.¹⁶
9. On February 8, 2010, Appellant submitted his completed and signed an *Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A* (Application). In Application, Appellant stated that he operated a charter halibut fishing business as of 2008, operated Vessel 2 in 2008 for his operation, and reported nineteen fishing trips in 2008. Appellant stated he was seeking a CHP based on an unavoidable circumstance that occurred in 2004 or 2005.¹⁷
10. In an IAD dated July 23, 2010, RAM notified Appellant it denied his Application because Appellant did not meet the minimum participation requirements in 2004 or 2005 by reporting a minimum of five bottomfish logbook fishing trips.¹⁸

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if, among other factors, the applicant meets certain minimum participation requirements. Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.¹⁹

An applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the

¹⁴ Case File, Pleadings Tab, September 14, 2010 appeal submission; Appellant's Hearing Testimony.

¹⁵ Appellant's Hearing Testimony.

¹⁶ Case File, Original File Tab, Official Record summary.

¹⁷ Case File, Original File Tab, CHP Application.

¹⁸ Case File, Original File Tab, IAD dated July 23, 2010.

¹⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period.²⁰

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.²¹

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.²²

There is no dispute that Appellant did not meet the minimum participation requirements for the qualifying period. Appellant did not report bottomfish logbook fishing trips in either 2004 or 2005.²³ In fact, Appellant was not operating a charter fishing business during these years because he had not obtained his licensing to operate a charter fishing vessel for such charter trips.²⁴ By 2008, however, Appellant was licensed to operate a charter fishing vessel and, as confirmed by the Official Record summary, had taken eighteen fishing trips in the 2008 fishing season.²⁵ Since Appellant did not meet the minimum participation requirements for both periods of participation, RAM correctly denied Appellant a CHP.

I now turn to the second issue presented in this case—whether, in lieu of not meeting the minimum participation requirements of 2004 or 2005, Appellant nevertheless qualifies to receive a CHP based on the unavoidable circumstance provisions of the CHLAP regulations.

²⁰ 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²¹ 50 C.F.R. § 300.67(f)(5).

²² 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

²³ Case File, Original File Tab, Official Record summary.

²⁴ Appellant's Hearing Testimony.

²⁵ Case File, Original File Tab, Official Record summary; Appellant's Hearing Testimony.

The CHLAP regulations provide, specific to the circumstances of this case, that an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv). I will now address each element.

Fifty C.F.R. § 300.67(g)(2)(i) requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period. The evidence presented shows that Appellant had intended to operate a charter halibut fishing business in 2004 and/or 2005, the qualifying years of participation. Appellant had established a bed and breakfast in 2000 to generate charter fishing clients and provide lodging for them. Appellant owned a vessel, Vessel 1, which was used for charter fishing. Appellant had, prior to 2004, assisted Business Partner with a charter fishing business from which Business Partner operated two charter fishing vessels, one belonging to Appellant and the other belonging to Business Partner (Vessel 1 and Business Partner's Vessel, respectively).²⁶

Appellant had also made initial efforts in 2003/2004 to acquire his own licensing to operate a charter fishing vessel by obtaining self-study materials for such licensing. Further, in 2003/2004, 2004/2005, and 2005/2006, Appellant explored an in person class-based course to obtain the licensing he needed to operate a charter fishing vessel, but, through no fault of his own, was unable to take the course. The classes were offered during periods outside the summer season, when Appellant was otherwise consumed by his full-time ██████████ schedule. Initially, the class was scheduled during the day, which conflicted with Appellant's full-time employment. Later, the classes were offered in the evenings. Although these evening classes would not have conflicted with Appellant's schedule, they were subsequently cancelled due to an insufficient number of class participants.²⁷ Based on these facts, I conclude Appellant had the specific intent to operate a charter halibut business in at least one year of the qualifying period.

Fifty C.F.R. § 300.67(g)(2)(ii)(A)-(C) requires that the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business. Fifty C.F.R. § 300.67(g)(2)(iii) requires that the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred.

²⁶ Case File, Pleadings Tab, Appellant's September 14, 2010 appeal submission; Appellant's Hearing Testimony.

²⁷ Case File, Original File Tab, Appellant's May 14, 2010 letter; Pleadings Tab, Appellant's September 14, 2010 appeal submission; Appellant's Hearing Testimony.

The evidence presented shows that Appellant's specific intent to operate a charter halibut business in 2004 or 2005 was thwarted by a circumstance, namely the limited availability of the course Appellant needed to take to obtain his license to operate a charter fishing vessel. Appellant repeatedly tried to take this course by signing up for the class-based course offered in his remote area. The class offered in 2003/2004 was offered during the day, which conflicted with Appellant's full-time employment as a ██████████. Subsequent classes, offered in 2004/2005 and 2005/2006, were offered in the evenings and would not have conflicted with Appellant's work schedule, but were ultimately cancelled because they lacked the minimum number of students (10) to proceed.²⁸ This circumstance was unavoidable. That is, Appellant could not have forced the organization to offer the class at times which did not conflict with his employment, and he could not have forced the organization to proceed with the course even though the minimum number of enrollees were not reached. The circumstance was also unique to Appellant, especially given the remote area in which Appellant resided and the limited availability of the licensing course Appellant needed to obtain his certification to operate a charter fishing vessel. The circumstance was unforeseen and reasonably unforeseeable. Appellant could not have anticipated that the class would be offered at a time that conflicted with this full-time work schedule. Nor could Appellant have anticipated that, when the classes were finally offered in the evenings, posing no conflict with his full-time employment, the classes would ultimately be cancelled because a minimum number of students were not enrolled. Lastly, the circumstance actually occurred. Based on these facts, I conclude Appellant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable, and that the circumstance actually occurred.

Fifty C.F.R. § 300.67(g)(2)(iv) requires that the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period. As stated, the circumstance in this case was the limited availability of the course Appellant needed to take to obtain his license to operate a charter fishing vessel. The evidence presented shows that Appellant did not take all reasonable steps to overcome the circumstance. It is true that, as previously discussed, Appellant attempted to take the class-based course on several occasions but was unable to because the class offering either conflicted with his full-time work schedule or was cancelled due to an insufficient number of students enrolled for the class. It is also true that Appellant eventually located an online course in 2007 that he successfully completed, obtaining his license in 2008 to operate a charter fishing vessel (due to unreliable Internet access in Appellant's

²⁸ Case File, Original File Tab, Appellant's May 14, 2010 letter; Pleadings Tab, Appellant's September 14, 2010 appeal submission; Appellant's Hearing Testimony.

remote area, taking an online course earlier than 2007 was not a viable option).²⁹ The evidence shows, however, that a self-study option was available to Appellant as early as 2003. In fact, Appellant obtained the self-study materials in 2003 to begin such self-directed coursework. Business Partner successfully obtained his licensing through such a self-study program in 2003. However, Appellant did not avail himself of this option because of time constraints imposed by his full-time employment as a ██████████
██³⁰ While Appellant's employment may very well have been demanding of his time, that does not excuse the fact that Appellant could have utilized non-work hours, and certainly time during the summer months when he was not ██████████ to pursue a self-study program to obtain the needed licensing by 2004 or 2005. Consequently, I do not find Appellant's argument about time constraints convincing on this point. Accordingly, I conclude Appellant did not take all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period.

CONCLUSIONS OF LAW

RAM correctly denied Appellant's application for a CHP. Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005.

The unavoidable circumstance provisions of the CHLAP regulations do not qualify Appellant to receive a CHP in lieu of such participation since Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²⁹ Case File, Pleadings Tab, September 14, 2010 appeal submission; Appellant's Hearing Testimony.

³⁰ Case File, Pleadings Tab, September 14, 2010 appeal submission; Appellant's Hearing Testimony

ORDER

The IAD dated July 23, 2010 is upheld. This decision is effective thirty (30) days from the date issued³¹ 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).

[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: May 13, 2011

³¹ 50 C.F.R. § 679.43(k) and (o).