

Appellant responded to the Notice.⁴ Appellant stated that intended to start his charter business in summer 2004, but that in December 2002 he was given orders from the Coast Guard to report for service and that he did not return to Alaska until August 2006.⁵ Appellant submitted with his response to the Notice a copy of a Standard Travel Order issued by the Department of Homeland Security, U.S. Coast Guard, indicating that he was to report to North Bend, OR from July 15, 2003 to July 1, 2007.⁶

On June 17, 2010, RAM sent Appellant the IAD which is the subject of this appeal.⁷ In the IAD, RAM denied Appellant a CHP. RAM explained Appellant was not the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the Business Owner License that authorized taking logbook fishing trips. RAM also indicated that although Appellant did meet the minimum participation requirements in 2008, he 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 noted Appellant had the right to appeal the IAD to OAA. RAM acknowledged Appellant's military service unavoidable circumstance claim, but it explained that the claim needed to be determined by OAA, provided Appellant filed an appeal with OAA to pursue his claim.

On August 7, 2010, Appellant timely filed his appeal of the IAD with OAA.⁸ On September 24, 2010, NAO sent Appellant an Order Scheduling a Hearing.⁹ On October 4, 2010, the Appellant testified during his scheduled hearing that in November 2002, he received orders from the U.S. Coast Guard to report for active duty in Coos Bay, OR, and that he returned to Kodiak, Alaska in August 2006.¹⁰ Appellant further testified that in late 2003, he purchased a vessel for his planned charter operations in Alaska.¹¹ Appellant presented three witnesses at his hearing all of whom stated Appellant wanted to go into the charter fishing business before and during the qualifying period.¹²

I have determined that the information in the record is sufficient to render a decision.¹³ I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

⁴ Original File Tab, type-written letter received June 1, 2010.

⁵ Original File Tab, type-written letter received June 1, 2010.

⁶ Original File Tab, copy of Standard Travel Order received June 1, 2010.

⁷ Original File Tab, IAD.

⁸ Pleadings Tab, letter dated August 7, 2011, and received August 10, 2010.

⁹ Pleadings Tab, Order Scheduling Hearing.

¹⁰ Audio recording of October 4, 2010, scheduled hearing.

¹¹ Audio recording of October 4, 2010, scheduled hearing; there is no documentary evidence of the purchase of such a vessel in Appellant's file.

¹² Audio recording of October 4, 2010, scheduled hearing.

¹³ 50 C.F.R. § 679.43(g) (2).

ISSUES

1. Was Appellant ordered to report to active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period?
2. If the answer to Question 1 is “yes”, then I will decide whether Appellant proved by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business before or during 2004 or 2005;

If the answer to Question 2 is “no,” I must conclude Appellant is not eligible for a CHP under the military unavoidable circumstance provisions and, therefore, uphold the IAD.

FINDINGS OF FACT (FOF)

1. During the CHLAP qualifying period, Appellant was ordered to report for active duty military service as a member of the U.S. Coast Guard.¹⁴
2. On November 15, 2002, Appellant received an Alaska Nautical Training School Certificate of Training.¹⁵
3. Appellant presented no evidence of a business license, advertising, or reservations for charter vessel trips before or during 2004 or 2005.
4. On April 5, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).¹⁶ RAM denied Appellant’s application on June 17, 2010, and the instant appeal followed.

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).¹⁷

¹⁴ Original File Tab, copy of Standard Travel Order received June 1, 2010.

¹⁵ Pleadings Tab, copy of certificate.

¹⁶ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, received April 5, 2010, signed March 31, 2010

¹⁷ 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, including evaluating applications for Charter Halibut Permits.¹⁸

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. This threshold criteria may be referred to as the participation requirements.¹⁹

An applicant for a charter halibut permit that meets the participation requirement in the recent participation period, but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves the following:

1. The applicant was ordered to report for active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period; and
2. The applicant had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service.²⁰

ANALYSIS

In analyzing this case, I considered the entire record, including statements made during the scheduled hearing and the documents submitted by Appellant in support of his appeal. Appellant does not dispute the substantive basis for the denial of his Application articulated in the IAD, i.e., that he did not have sufficient logbook trips in 2004 or 2005. I will first address whether Appellant was ordered to report to active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period. I will next address whether Appellant held the specific intent to operate a charter halibut fishing business before or during 2004 or 2005.

Appellant submitted evidence that he was ordered to report for active duty with the U.S. Coast Guard from July 15, 2003 to August 2006. The U.S. Coast Guard is one of the five armed forces of the United States. Given the above, it is reasonable to conclude Appellant was ordered to report to active duty military service as a member of a branch of the U.S. military, during the qualifying period.

¹⁸ 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556 (2010).

¹⁹ 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555 (2010).

²⁰ 50 C.F.R. § 300.67(g)(3).

The next criterion I consider is whether Appellant held the specific intent to operate a charter halibut business during the 2004 or 2005 qualifying period.

Appellant did receive a Nautical Training School Certificate late 2002, and claims to have purchased a fishing vessel in late 2003. It is not reasonable to conclude, however, that these events constitute a specific intent to operate a charter halibut fishing business before or during 2004 or 2005. Appellant did not present any evidence that he possessed a business owner's license in 2004 or 2005, nor did he present any evidence that he operated a charter vessel business prior to that time. The record also does not indicate other evidence of intent to operate a charter halibut business before or during 2004 or 2005, such as advertising or reservations for charter vessel trips. Although Appellant presented three witnesses at his hearing who stated he wanted to go into the charter fishing business, this only demonstrates Appellant's general motive or desire of operating a charter fishing business and does not establish he had a specific intent to operate such a business during the qualifying period. Appellant did not take substantial steps towards operating a charter halibut fishing business before or during the qualifying period. Based on the evidence, it is speculative to conclude Appellant specifically intended to operate a charter halibut fishing business during the qualifying period.

Given the totality of the evidence and facts it is not reasonable to conclude that Appellant held a specific intent to operate a charter halibut business before or during 2004 or 2005. Appellant failed to prove by a preponderance of the evidence that he held a specific intent to operate a charter halibut fishing business before or during 2004 or 2005.

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.

Appellant did not specifically intend to operate a charter halibut business before or during 2004 or 2005.

ORDER

The IAD dated June 17, 2010, is upheld. This decision takes effect thirty days from the date issued, November 16, 2011, 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 reverses, modifies, or remands this 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 at this Office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, October 27, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Steven Goodman
Administrative Judge

Date Issued: October 17, 2011