

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 01-0030
)	
DYLAN SWANBERG)	DECISION [Corrected]*
Appellant)	
)	March 9, 2004
_____)	

STATEMENT OF THE CASE

Eric Swanberg, on behalf of his minor son, Dylan Swanberg, filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM], which denied Dylan's Application for a Transfer Eligibility Certificate [TEC] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. Mr. Swanberg can appeal the IAD because it directly and adversely affects his son's interests.¹ On February 26, 2004, I conducted an oral telephonic hearing in this matter from Juneau, Alaska. Both Dylan Swanberg, and his father, Eric Swanberg, testified from Sitka, Alaska, in support of Dylan's appeal.

ISSUE

Does Dylan Swanberg qualify for a TEC as an "IFQ Crew member" under 50 C.F.R. §679.2?

SUMMARY

The IAD is vacated. On appeal, Dylan Swanberg has submitted credible evidence that supports his claim that he has worked at least 150 days as a member of the harvesting crew of four vessels: the F/V REIVER, the F/V CAPE ENCHANTMENT, the F/V LUCY O, and the F/V TSIU. Because he meets the definition of an IFQ crew member, he is entitled to a TEC.

ANALYSIS

Dylan Swanberg must obtain a TEC before he can purchase quota share (QS) under the IFQ program, or have the QS transferred to him because he was not initially issued QS.² To be

¹50 C.F.R. § 679.43(b).

²50 C.F.R. § 679.41(d)(6)(i)

* On March 16, 2004, three days before the deadline for filing a Request for Reconsideration, RAM asked that we make a correction to the Decision. We informed RAM that its suggested correction did not affect the outcome of the Decision, and that we could correct the Decision (if it was necessary to do so) without requiring RAM to file a formal motion for reconsideration and changing the original effective date of the Decision.

eligible for a TEC, Dylan must meet the definition of “IFQ crew member” by showing that he spent at least 150 days performing work “directly related to the catching and retaining of fish.”

“IFQ crew member” means any individual who has worked at least 150 days as part of the harvesting crew in any United States commercial fishery. For purposes of this definition, “harvesting” means work that is directly related to the catching and retaining of fish. Work in support of harvesting, but not directly involved with harvesting, is not considered harvesting crew work. For example, searching for fish, work on a fishing vessel only as an engineer or cook, or work preparing a vessel for a fishing trip would not be considered work of a harvesting crew.³

When Dylan applied for a TEC, he was 14 years old.⁴ Dylan signed the TEC application, but his father filled it out for him. The application states that from the ages of 5 to 14, Dylan spent a total of 194 days working for his father as a crew member aboard the F/V REIVER. The application states that 190 days were spent performing “web, leads, and skiffman” duties, while harvesting salmon with seine gear between June 1992 and September 2001; and that 4 days were spent “coiling, baiting, and taking skates,” while harvesting sablefish with longline gear during September of 1999 and 2001.

RAM rejected Dylan’s TEC application on the ground that he did not submit credible evidence that he is an IFQ crew member. The IAD questions whether the application is credible given that Dylan had stated on his original application that he had 810 days experience working as an IFQ crew member; and that it was unlikely that Dylan, beginning at age 5, and at least until the age of 10, could have performed work “directly related to the catching and retaining of fish.”

In Karen N. Boyce,⁵ we ruled that credible testimony can demonstrate that young children can participate as crew members in the harvest of salmon and halibut in Southeast Alaska.

In the Decision, we stated that “RAM rejected Dylan’s TEC application on grounds that he did not submit credible evidence that he is an IFQ crew member, and that even if he did crew for 150 days, he was not properly licensed to do so.” According to RAM, the IAD did not reject Dylan’s application on the ground that he was not properly licensed. My review of the IAD shows that RAM is correct, and that the IAD only suggests that RAM would have done so if it had been determined that Dylan was not properly licensed.

This corrected decision, issued on March 18, 2004, does not change the outcome or the effective date of the original decision. It is written only to show that the IAD rejected Dylan’s TEC application solely on the ground that he did not have credible evidence that he is an IFQ crew member, and not on the ground that he was not a properly licensed.

³Definition of “IFQ crew member” at 50 C.F.R. § 679.2.

⁴Dylan was born on May 20, 1987.

⁵Appeal No. 01-0023, August 6, 2003.

The IFQ regulations do not suggest how Dylan might prove the number of days he has been a crew member. The captain and crew of vessels participating in the Southeast Alaska salmon seine, halibut, and sablefish fisheries are not required to record the number of days they spend working in those fisheries. Therefore, it would be unreasonable to require that Dylan or his father document each day he actually spent working. It is reasonable, however, to expect him to present testimony and some form of documentation showing that he worked as a crew member when he claims he did.

When Dylan timely appealed the IAD, he submitted a statement of appeal; a written statement from Mike Coleman, a crew member of the F/V REIVER for two seasons, 1992 and 1997; a written statement from Dylan's father to verify his son's duties aboard the F/V REIVER; two photographs of Dylan operating a seine skiff in 2001 at age 14; a settlement sheet for a one-quarter crew share paid to Dylan by Reiver, Inc. on September 22, 1999, at age 12; a settlement sheet for a three-quarter crew share paid to Dylan by Reiver, Inc., on September 7, 2000, at age 13; a computer print-out from State of Alaska licensing records that shows Dylan was issued crew licenses in 1997, 2000, and 2001, at ages ten, 13, and 14, respectively.

Dylan's statement of appeal, which was written by his father, Eric, states that Dylan began crewing at age five, pushing fish into the F/V REIVER's hold. He received \$5.00 per day in compensation. By age eight, he earned \$10.00 per day and had graduated to stacking webbing and handling the leads of the seine. By age 10, Dylan was operating the seine skiff. Dylan received a one-quarter share of the catch proceeds beginning at age 12 during the 1999 season, continuing until age 14, when he received a three-quarter share of the catch proceeds for the 2001 season.

Dylan testified that (1) he had harvested salmon with his father aboard the F/V REIVER for consecutive summers between 1992 and 2001, between the ages of five and 14; (2) the amount of days they had fished together remained constant over the years; (3) his duties aboard the F/V REIVER gradually increased over the years; and (4) he performed the duties his father said he had performed on the revised application. Dylan's testimony was candid and credible, and shows him to be a knowledgeable and conscientious crew member. Dylan's testimony varied with the information submitted by father only to the extent that he claims he started stacking web at age six; handling the leads at age 13, and operating the skiff at age 14; and that his father paid him \$20 a day by age seven, and a one-quarter crew share by age nine.

The statement of Mike Coleman supports Dylan's account of his work history. Mr. Coleman remembers Dylan "putting fish into the hold and [doing] anything else that we would let him do." Mr. Coleman writes that in 1997 Dylan "stacked web and helped out around the deck, and had improved greatly between 1992 and 1997 and was a useful addition to the crew."

Based on Dylan's testimony, the statement of appeal by Dylan's father, and Mr. Coleman, I find that Dylan performed the duties claimed to be performed by him aboard the F/V REIVER between 1992 and 2001, from the ages of five to 14; and that all of those duties are "directly related to the harvesting and retaining of fish."

Dylan's statement of appeal states that the 194-day estimate on his revised application is the "actual fishing time" that he spent crewing for his father aboard the F/V REIVER; and that the estimate is based on Dylan having fished an average of 22 days per salmon season for ten consecutive summers aboard the F/V REIVER, from 1992 to 2001, and longlined a total of four days for sablefish aboard the vessel in 1999 and 2001. Based on those numbers, Dylan actually would have crewed a total of 224 days, not 194 days.

Dylan's father testified that he based the 194-day estimate on the actual number of days that Dylan had fished while the fishing net of the F/V REIVER's was in the water. He also testified that the 1999 settlement sheet for the F/V REIVER,⁶ which shows the vessel made 20 trips between June and August of that year, was representative of the amount of fishing that both he and Dylan had been done aboard the vessel between 1992 and 2001. Dylan, who also testified, confirmed his father's statements.

In Karen Boyce,⁷ we calculated the number of days that Ms. Boyce had spent as part of an harvesting crew, based on the actual number of days per trip that she was at sea, working as part of an harvesting crew. Normally, it takes 2.5 days per salmon trip, and 2 days per halibut landing. Therefore, based on the Statement of Appeal and Mr. Swanberg's and Dylan's testimony, Mr. Swanberg underestimated the total number of days that Dylan crewed aboard the F/V REIVER (at least by as much as 50%). While the 194-day (or actually 224-day) estimate is lower than it should have been, it is still higher than the number needed to qualify Dylan for a TEC.

Based on Dylan's testimony, the statement of appeal by Dylan's father, and Mr. Coleman, I find that Dylan worked at least 224 days as a member of the harvesting crew of the F/V REIVER between 1992 and 2001, from the ages of five to 14.

Dylan also testified, and produced additional documents, that he had crewed at least 70 more days aboard the F/V REIVER and three other vessels, since filing his original application. Dylan testified and submitted his own written statement that at age 15 he made two trips, for a total of 8 days, longlining for blackcod and halibut aboard the F/V REIVER in 2002. He testified, and produced a written statement from the owner of the F/V CAPE ENCHANTMENT,⁸ that at age 12 Dylan earned \$800, based on a one-quarter crew share, for 10 days of gillnetting for salmon aboard the vessel in August, 1999. His primary duties included "taking fish out of the net and setting the net."

Dylan also testified, and submitted a written statement from the owner of the F/V LUCY O, that at age 15 he spent 26 days aboard the vessel seining for salmon during July and August of 2002.

⁶See the document entitled "REIVER Inc. Salmon Seine 9-22-99."

⁷Appeal No. 01-0023, August 6, 2003, at 3.

⁸See the statement of Brent Young, owner of the F/V CAPE ENCHANTMENT.

Dylan estimated that he was paid \$5,000, based on a full crew share. Dylan's duties included: "piloting the skiff; hooking the net up for every set; plunging when the fish were tight along the beach; wheel watch; side towing while the crew was hauling the net aboard the vessel."

Dylan further testified, and submitted his own written statement, that at age 16 he spent 26 days seining for salmon aboard the F/V TSIU during July and August of 2002. The settlement sheet for the vessel shows that he was paid \$7,160, based on a full crew share. He testified that his duties were the same duties he had performed for the F/V LUCY O in 2002 and the F/V REIVER in 2001.

Both Dylan's and his father's testimony, and the documents produced on appeal, show that Dylan has worked a minimum of 294 days for the past 12 consecutive summers, from the ages five to age 16, performing duties directly related to the harvesting and retaining of fish, as a member of the harvesting crew aboard four fishing vessels; and that 180 of those days were from the ages of 10 to 16.

Both Dylan and father's testimony were credible, and I have no reason to doubt the documents produced by Dylan on appeal. Consequently, I find that Dylan Swanberg has at least 150 days experience working as part of the harvesting crew aboard four vessels: the F/V REIVER, the F/V CAPE ENCHANTMENT, the F/V LUCY O, and the F/V TSIU. Therefore, I conclude that he is an IFQ crew member and entitled to a TEC.

FINDING OF FACT

Dylan Swanberg has at least 150 days experience working as part of the harvesting crew aboard four vessels: the F/V REIVER, the F/V CAPE ENCHANTMENT, the F/V LUCY O, and the F/V TSIU.

CONCLUSION OF LAW

Dylan Swanberg is an IFQ crew member and entitled to a Transfer Eligibility Certificate.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ordered to issue Dylan Swanberg a Transfer Eligibility Certificate. This Decision takes effect April 8, 2004, unless by that date the Regional Administrator orders review of this Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, March 19, 2004. 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 Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Randall J. Moen
Appeals Officer