

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 03-0020
)	
JOSEPH W. HARLAN,)	DECISION
Appellant)	
_____)	December 20, 2006

STATEMENT OF THE CASE

Joseph W. Harlan filed a timely appeal of an Initial Administrative Determination (IAD), which the Restricted Access Management (RAM) Program issued on July 10, 2003, under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹

The IAD denied Mr. Harlan's application for an LLP groundfish license with a Central Gulf endorsement based on the fishing history of the F/V DELIVERANCE (ADFG No. 59340, USCG No. 943922). The F/V DELIVERANCE is 48 feet length overall, which puts it in vessel length Category C.² Mr. Harlan acknowledged that he did not meet the endorsement qualification period [EQP] requirement for an LLP groundfish license with a Central Gulf endorsement: one documented harvest of license limitation groundfish in the Central Gulf between January 1, 1992, and June 17, 1995.³

Mr. Harlan stated that, because of his health problems resulting from the sinking of his prior vessel, the F/V TIDINGS, he could not personally captain the F/V DELIVERANCE in the Pacific cod fishery and therefore had to try to hire a skipper. Mr. Harlan stated that, for the 1991, 1992, 1993, 1994, 1995 and 1996 seasons, he was unable to find a qualified skipper and therefore the F/V DELIVERANCE did not harvest Pacific cod in the endorsement qualification period.

Mr. Harlan claimed eligibility for an LLP license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), and the Rehabilitation Act of 1973.

Mr. Harlan was entitled to appeal the IAD because the IAD directly and adversely affected his interests, as required by 50 C.F.R. § 679.43(b). The record provides sufficient information to decide Mr. Harlan's appeal as required by 50 C.F.R. 679.43(g)(2). I therefore close the record and decide Mr. Harlan's appeal.

¹ Mr. Harlan died after he filed this appeal. The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(k)(license requirements); 50 C.F.R. § 679.7 (prohibitions); and 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/reggs/summary.htm>

² 50 C.F.R. § 679.4(k)(3)(iii)(C)(category "C" are vessels less than 60 feet length overall).

³ 50 C.F.R. § 679.4(k)(4)(ii)(K)(requirement for vessels less than 60 feet length overall).

SUMMARY

The IAD is affirmed. Mr. Harlan is not eligible for an LLP license under the unavoidable circumstance regulation, which is 50 C.F.R. § 679.4(k)(8)(iv). An applicant seeking relief under the unavoidable circumstance regulation must have harvested groundfish in the area for which the applicant is seeking an endorsement – in this case the Central Gulf – “after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.” 50 C.F.R. § 679.4(k)(8)(iv)(E). Mr. Harlan states that he did not harvest groundfish in the Central Gulf from the F/V DELIVERANCE in 1991, 1992, 1993, 1994, 1995 and 1996 because he had health problems, which meant he could not safely participate in that fishery, and because he was unable to hire a substitute skipper. The F/V DELIVERANCE did not harvest groundfish until January 20, 1997, when Mr. Harlan was able to hire a skipper. Since this date is after June 17, 1995, Mr. Harlan does not satisfy section (E) of the unavoidable circumstance regulation. Therefore, NMFS does not have authority to grant Mr. Harlan an LLP license under the unavoidable circumstance regulation.

Mr. Harlan is not eligible for an LLP license based on the Rehabilitation Act. To be eligible for an LLP license based on the Rehabilitation Act, an applicant must show that, if NMFS made a reasonable accommodation in the requirements of the LLP, the applicant would receive an LLP license. The reasonable accommodation proposed by Mr. Harlan is that NMFS should award an applicant an LLP license if the applicant shows that, but for the applicant’s disability, the applicant would have made the harvests necessary for an LLP license. This is not a reasonable accommodation for two reasons.

First, a reasonable accommodation cannot be a change in an essential requirement of the government program. The LLP awards licenses based on actual harvests either under the standard criteria or under the unavoidable circumstance regulation. An award of an LLP license based on harvests that an applicant would have made, but did not make, abrogates the essential requirement for an LLP license: a history of actual harvests. Second, a reasonable accommodation must change a requirement that is discriminatory. The requirement of owning a vessel with a particular fishing history does not discriminate against disabled persons. This requirement is not based on any outdated or archaic notions of what disabled persons can and cannot do. To meet this requirement, applicants do not have to show they can perform any of the physical activities in operating a boat. An inquiry by NMFS *for disabled persons only* as to why they did not own a vessel with an LLP-qualifying history does not redress discrimination or the effects of discrimination.

ISSUES

1. Is Mr. Harlan eligible for an LLP license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(iv)(8)?
2. Is Mr. Harlan eligible for an LLP groundfish license based on section 504 of the Rehabilitation Act of 1973?

ANALYSIS

To receive an LLP license, an applicant must be an eligible applicant.⁴ To be an eligible applicant, an applicant must have owned a vessel on June 17, 1995, that had an LLP-qualifying fishing history or must own the LLP-qualifying fishing history apart from the vessel.⁵ An LLP-qualifying fishing history consists of harvests in two periods: a general qualifying period [GQP] and an endorsement qualifying period [EQP].⁶

Mr. Harlan applied for an LLP groundfish license with a Central Gulf endorsement based on the fishing history of the F/V DELIVERANCE. The basic GQP requirement for all LLP groundfish licenses is one documented harvest of license limitation groundfish in the Bering Sea/Aleutian Islands or the Gulf of Alaska between January 1, 1988, and June 27, 1992.⁷ Mr. Harlan meets the GQP requirement. The F/V DELIVERANCE made seven documented harvests of Pacific cod in the Central Gulf between January 1990 and March 1990.

The EQP requirement depends on the area endorsement on the LLP groundfish license.⁸ The EQP requirement for an LLP groundfish license with a Central Gulf endorsement for a catcher vessel under 60 feet, the size of the F/V DELIVERANCE, is one documented harvest or license limitation groundfish in the Central Gulf between January 1, 1992, and June 17, 1995.⁹ Mr. Harlan does not meet that requirement. The F/V DELIVERANCE did not harvest any license limitation groundfish between March 1990 and January 1997.

Mr. Harlan argues that he is eligible for an LLP license under [1] the unavoidable circumstance regulation and [2] the Rehabilitation Act.

Factual claims

In support of these arguments, Mr. Harlan provided statements from himself; Mary Ellen Harlan, his wife; Kenneth Hansen, a personal friend and NMFS law enforcement officer; Mark Withrow, M.D.; and Loren Halter, D.O. Mr. Harlan also submitted the book *Nights of Ice: True Stories of Disaster and Survival on Alaska's High Seas*, by Spike Walker (1997). Chapter 1 describes the sinking of the F/V TIDINGS in 1989, Mr. Harlan's prior vessel. For purposes of this appeal, I

⁴ 50 C.F.R. § 679.2 (definition of eligible applicant), 50 C.F.R. § 679.4(k)(4), 50 C.F.R. § 679.4(k)(5).

⁵ 50 C.F.R. § 679.2 (first and second definition of eligible applicant).

⁶ 50 C.F.R. § 679.4(k)(4) (LLP groundfish license); 50 C.F.R. § 679.4(k)(5)(LLP crab license).

⁷ 50 C.F.R. § 679.4(k)(4)(i)(B)(1); 50 C.F.R. § 679.4(k)(4)(iv) & (v). I do not analyze the alternate ways to meet the GQP in 50 C.F.R. § 679.4(k)(4) since Mr. Harlan met this GQP requirement.

⁸ 50 C.F.R. § 679.4(k)(4)(ii)(A) to (O).

⁹ 50 C.F.R. § 679.4(k)(4)(ii)(K).

accept as true the facts contained in the written statements and the book.

Mr. Harlan almost died while crab fishing in January 1989, when his vessel, the F/V TIDINGS, capsized in minus 50 degree weather in the Gulf of Alaska. Mr. Harlan miraculously extricated himself from the holds of the vessel and, along with his crew, was saved because a nearby vessel heard the mayday that Mr. Harlan was able to send out before his radio went dead. The F/V TIDINGS sank and was a total loss.

The F/V TIDINGS had harvested bairdi Tanner crab in the Central Gulf in January 1988 and in January 1989.¹⁰ After the F/V TIDINGS sank, Mr. Harlan bought a vessel, the F/V DELIVERANCE. Mr. Harlan, acting as the captain of the F/V DELIVERANCE, continued to harvest bairdi Tanner crab in the Central Gulf: two harvests in January 1990, two in January/February 1991, three in January 1992, two in January 1993 and two in January 1994.¹¹

Mr. Harlan states that, before the F/V TIDINGS sank, he intended to branch out into the Pacific cod fishery with the F/V TIDINGS but he was unable to do that because it sank. With the F/V DELIVERANCE, Mr. Harlan was able to do that. He hired a skipper, Lloyd Lutke, and the F/V DELIVERANCE made seven documented harvests of Pacific cod between January and March of 1990. But, after March 1990, the F/V DELIVERANCE did not harvest Pacific cod, or any other groundfish, until January 1997.

Mr. Harlan offers two reasons for his lack of Pacific cod harvests in the 1991, 1992, 1993, 1994, 1995 and 1996 Pacific cod seasons. First, Mr. Harlan states that he personally could not take the F/V DELIVERANCE out Pacific cod fishing because, due to his traumatic experience on board the F/V TIDINGS, he developed Post Traumatic Stress Disorder and debilitating alcoholism. Mr. Harlan states that he could take the F/V DELIVERANCE crab fishing because crab had a shorter season than cod and crab fishing occurred closer to shore than cod fishing, but he could not safely participate in the cod fishery. Mr. Harlan's health problems did not abate until November 1998, when he achieved sobriety.

Second, Mr. Harlan states that he was not able to hire a skipper despite his best efforts to do so. Mr. Harlan had to find a skipper who was acceptable to his insurance company. Mr. Harlan was competing with bigger boats for qualified skippers and they chose bigger boats over his relatively small (48-foot) boat. Mr. Harlan stated that he had a skipper for the 1992 cod season who backed out at the last minute. Mr. Harlan did not overcome this problem until 1997, when he was able to hire a qualified skipper. The F/V DELIVERANCE started harvesting Pacific cod

¹⁰ This is according to the official LLP record for the F/V TIDINGS, which covers the years 1988 to 1999. Official LLP record for the F/V TIDINGS (Dec. 5, 2006). I do not believe the fishing history of the F/V TIDINGS of the F/V DELIVERANCE is in dispute. If Mr. Harlan's representative wishes to review the fishing history of either vessel, the representative should contact me and I will explain the process for providing that information.

¹¹ LLP crab species are king and Tanner crab *in the Bering Sea/Aleutian Islands*. 50 C.F.R. § 679.2 (definition of crab species). Crab in the Gulf of Alaska is not an LLP species.

on February 9, 1997, and harvested substantial amounts of Pacific cod in 1997 and subsequent years.¹²

1. Is Mr. Harlan eligible for an LLP license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(iv)(8)? No.

The unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), provides:

A qualified person **who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the [documented harvest] criteria in paragraph (k)(4) of this section for a groundfish license or paragraph (k)(5) of this section for a crab species license because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries)** may receive a license if the qualified person is able to demonstrate that:

(A) The owner of the vessel at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel during a specific time period in a specific area.

(B) The specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel was thwarted by a circumstance that was:

(1) Unavoidable.

(2) Unique to the owner of that vessel, or unique to that vessel.

(3) Unforeseen and reasonably unforeseeable to the owner of the vessel.

(C) The circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species actually occurred.

(D) Under the circumstances, the owner of the vessel took all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.

(E) **Any amount of license limitation groundfish or appropriate crab species was harvested on the vessel in the specific area that corresponds to the area endorsement or area/species endorsement for which the qualified person who owned a vessel on June 17, 1995, is applying and that the license limitation groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.** [emphasis added]

To qualify under the unavoidable circumstance regulation, an applicant must meet each

¹² The last year in the official LLP record is 1999 and it shows substantial amounts of Pacific cod harvested from the F/V DELIVERANCE in 1997, 1998 and 1999.

requirement.¹³ The unavoidable circumstance regulation provides a limited remedy to an applicant faced with a calamitous circumstance beyond the applicant's control.¹⁴ The remedy is limited by the terms of the regulation. In addition to proving certain facts about the "unavoidable circumstance" – that it was unavoidable, unique, unforeseen, unforeseeable – the applicant must have made two harvests.

Mr. Harlan's health problems were unique to him but, after the first year he experienced them, they were not unforeseen or unforeseeable. His health problems did not stop him from seeking to hire a captain for the F/V DELIVERANCE and seeking to participate that way in the Pacific cod fishery. The need to hire a qualified captain was not unique to Mr. Harlan. Every vessel owner who owns a small vessel, and does not operate it personally, has to hire a captain or lease the vessel to someone who hires a captain. The need to hire a qualified captain if the owner is unable to operate the vessel personally is not unforeseen or unforeseeable. Thus, generally, the inability to hire a captain would not be unique, unforeseen or unforeseeable.

Mr. Harlan asserts that his captain for the 1992 season backed out at the last minute. I do not decide whether a captain backing out at the last minute could ever be a circumstance that was unavoidable, unique, unforeseen and unforeseeable because, even assuming that it could, Mr. Harlan did not make the harvest before June 17, 1995 required by section (E) of the unavoidable circumstance regulation. If an applicant does not meet that requirement, NMFS is without authority to award the applicant an LLP license, even if the applicant meets the other provisions of the unavoidable circumstance regulation.¹⁵

First harvest required by the unavoidable circumstance regulation - between January 1, 1988 and February 9, 1992

¹³ The language of the regulation, on its face, requires an applicant to meet every requirement. The commentary to the final LLP rule states: "*If all these criteria are met to the satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area. This provision is not designed to be a 'loop hole' through which an eligible applicant that does not meet the qualification requirements can be issued a license.*" Final Rule, 63 Fed. Reg. 52,642, 52,647 (1998)(emphasis added).

¹⁴ Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

¹⁵ *Golden Fleece, Inc.*, Appeal No. 02-0015 (Oct. 4, 2006); *MGF Fisheries, Inc.*, Appeal 02-0047 at 7 - 10 (Dec. 28, 2004); *Arctic Baruna, L.L.C.*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 at 2 - 13 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sept. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovick*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (April 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (April 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002). The unavoidable circumstance claim for all these appellants was denied because they did not make the harvest by June 17, 1995 required by section (E) of the unavoidable circumstance regulation. 50 C.F.R. § 679.4(k)(8)(iv)(E).

Under the first sentence of the regulation, the applicant must have “owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992.”¹⁶ Mr. Harlan owned the F/V DELIVERANCE on June 17, 1995, and it made seven documented harvests of Pacific cod in the Central Gulf between January and March 1990, any one of which would meet this requirement.

It is no accident that Mr. Harlan meets this “first harvest” requirement in the unavoidable circumstance regulation with the same Pacific cod harvests that meet the GQP requirement. The time period in the first sentence – January 1, 1988, to February 9, 1992 – is contained within the basic GQP – January 1, 1988, to June 27, 1992. Therefore, if an applicant made the first harvest required by the unavoidable circumstance regulation, the applicant necessarily met the GQP requirement for an LLP groundfish license. The unavoidable circumstance regulation is designed to help some applicants who met the GQP but were unable to meet the EQP.

Second harvest requirement of the unavoidable circumstance regulation - after the unavoidable circumstance and before June 17, 1995

Under the last sentence of the unavoidable circumstance regulation, in section (E), the applicant must make another harvest: “any amount of license limitation groundfish . . . was harvested on the vessel in the specific area that corresponds to the area endorsement . . . for which the qualified person who owed a vessel on June 17, 1995, is applying and that the license limitation groundfish . . . was harvested *after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.*”¹⁷

To meet this requirement, Mr. Harlan must show that his vessel harvested groundfish in the Central Gulf, the area that corresponds to the endorsement he is seeking. The F/V DELIVERANCE made seven documented harvests of groundfish in the Central Gulf between January and March 1990. These harvests cannot meet section (E) because these harvests are not “after the vessel was prevented from participating by the unavoidable circumstance.”

Mr. Harlan argues that the F/V DELIVERANCE was prevented from participating from 1991 to 1996 by the lack of a qualified skipper. I therefore take the beginning of Mr. Harlan’s claimed unavoidable circumstance to be January 1, 1991, the beginning of the 1991 Pacific cod season. Mr. Harlan did not overcome that problem until January 20, 1997, when the F/V DELIVERANCE harvested Pacific cod in the Central Gulf. A harvest in January 1997 does not meet section (E) because it is after, not before, June 17, 1995.

¹⁶ 50 C.F.R. § 679.4(k)(8)(iv). This period is the basic qualifying period for the Vessel Moratorium Program, the predecessor to the LLP. An applicant cannot get relief because of an unavoidable circumstance under the LLP unless the applicant met this requirement for a moratorium permit. *St. George Marine, Inc.*, Appeal No. 02-0024 at 6 (Feb. 19, 2004).

¹⁷ 50 C.F.R. § 679.4(k)(8)(iv)(E) (emphasis added).

The sinking of the F/V TIDINGS

I wish to comment on the sinking of the F/V TIDINGS in January 1989, an event during which Mr. Harlan showed extraordinary valor, leadership and presence of mind, and his actions, no doubt, are a crucial reason why no crew member lost their life. Although a terrifying experience, and definitely unavoidable, unfortunately the sinking of the F/V TIDINGS does not support Mr. Harlan's claim for an LLP license in this appeal.

First, the F/V TIDINGS did not harvest any LLP crab or groundfish between January 1, 1988, and February 9, 1992. To make an unavoidable circumstance claim, an applicant must have ***“owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the criteria in paragraph (k)(4) of this section for a groundfish license***

. . . because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries).”¹⁸

I conclude that the vessel that made the harvest between January 1, 1988, and February 9, 1992, must be the vessel that could not meet the EQP requirements because it was “lost, damaged or otherwise unable to participate in the license limitation groundfish or crab fisheries.” The vessel that made the groundfish harvest between January 1, 1988, and February 9, 1992, was the F/V DELIVERANCE. Mr. Harlan must show that the F/V DELIVERANCE, not the F/V TIDINGS, was lost, damaged or otherwise unable to participate in the LLP groundfish fishery.

Second, the vessel must be unable to meet the EQP requirement “because of an unavoidable circumstance (i.e., ***the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish of crab fisheries***).”¹⁹ The F/V DELIVERANCE was not lost or damaged. The F/V DELIVERANCE was completely equipped to harvest Pacific cod in the Central Gulf from 1990 to 1997 and did so in 1990 with skipper Lloyd Lutke. Mr. Harlan states that the “unavoidable circumstance” that made the F/V DELIVERANCE “otherwise unable to participate” in the Pacific cod fishery was that he could not hire qualified skippers and that his skipper in 1992 backed out at the last minute.

For an LLP groundfish license with a Central Gulf endorsement, section (E) requires that the applicant have harvested groundfish in the Central Gulf “after the vessel was prevented from participating ***by the unavoidable circumstance*** but before June 17, 1995.” I conclude that “the unavoidable circumstance” in section (E) refers to the “unavoidable circumstance” that prevented the applicant from meeting the EQP. The unavoidable circumstance claimed by Mr. Harlan was that he could not hire a qualified skipper. Mr. Harlan did not overcome this “unavoidable circumstance,” and find a qualified skipper for the F/V DELIVERANCE, until

¹⁸ 50 C.F.R. § 679.4(k)(8)(iv) (emphasis added).

¹⁹ 50 C.F.R. § 679.4(k)(8)(iv)(emphasis added) (first sentence).

January 20, 1997, when the F/V DELIVERANCE harvested Pacific cod. This is after June 17, 1995.

The Secretary of Commerce adopted the final LLP rule as recommended by the North Pacific Fishery Management Council.²⁰ The Council took final action on the LLP on June 17, 1995.²¹ That date – June 17, 1995 – is also the end of the endorsement qualification period for all LLP groundfish licenses.²² The Council made a policy choice that NMFS could not issue an LLP license based on any fishing that occurred after June 17, 1995.²³ The Council adopted a rule that required an applicant to overcome the unavoidable circumstance by June 17, 1995 and make a groundfish harvest in the area that corresponds to the endorsement the applicant is seeking. If an applicant was unable to do that, whatever the reason, the regulation does not authorize NMFS to issue that applicant an LLP license.

I therefore conclude that Mr. Harlan is not eligible for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because he did not make the harvest required by section (E) of that regulation.

2. Is Mr. Harlan eligible for an LLP groundfish license based on section 504 of the Rehabilitation Act of 1973? No.

To receive an LLP license, an applicant must be an “eligible applicant.” An applicant is an eligible applicant if the individual “can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a).”²⁴ That provision of the Rehabilitation Act is known as section 504 of the Rehabilitation Act of 1973. Section 504 provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, **solely by reason of her or his disability**, be excluded from the participation in, **be denied the benefits of, or be subjected to discrimination under any program** or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.²⁵ [emphasis added]

²⁰ Final Rule, 63 Fed. Reg. 52,642, 52,642 - 52,643 (1998).

²¹ Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998)(response to Comment 17).

²² 50 C.F.R. § 679.4(k)(4)(ii).

²³ Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998)(response to Comment 17).

²⁴ 50 C.F.R. § 679.2 (fifth definition of eligible applicant).

²⁵ 29 U.S.C. § 794(a).

To be eligible for an LLP license under the Rehabilitation Act, an applicant must show four things:²⁶ first, that the applicant is an individual with a disability, as defined by the Act;²⁷ second, apart from the disability, that the applicant is otherwise qualified for an LLP license; third, that the applicant is being denied an LLP license solely by reason of the disability; fourth, that the LLP is a program conducted by a federal Executive agency.

For purposes of this appeal, I accept as true that Mr. Harlan is an individual with a disability and thus meets the first requirement.²⁸ The License Limitation Program is a program conducted by an Executive agency, namely the National Marine Fisheries Services within the National Oceanic Atmospheric Administration, which is part of the Department of Commerce. Therefore, Mr. Harlan meets the fourth requirement.

To meet the second and third requirements of Section 504, Mr. Harlan must prove that he is “otherwise qualified” for an LLP license and is being denied “solely by reason of her or his disability.” This Office explained in *Jonathan Schumacher*, the first appeal that discussed the Rehabilitation Act:

The government violates the Rehabilitation Act when a person can show that he or she would receive a government benefit if the government made **reasonable accommodations** for the person’s disability. If an applicant could participate in a government program only if the government made substantial modifications or fundamental alterations in the program, the applicant is *not* “otherwise qualified” for the program and is *not* being denied solely based on a disability. The fundamental nature of the program, not the individual’s disability, is causing the individual to be denied.²⁹

The Department of Commerce regulations implementing the Rehabilitation Act adopt this standard. The regulations define an otherwise qualified individual as one who meets “the essential eligibility requirements for participation in, or receipt of benefits from, that program or

²⁶ *Jonathan Schumacher*, Appeal No. 00-0010 at 5 (Sept. 16, 2002); *Charles G. West*, Appeal No. 03-0011 at 4 (July 28, 2004); *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 11 (Dec. 28, 2004); *Rex W. Duncan*, Appeal No. 04-0006 at 4 (June 29, 2005). All prior OAA decisions are available on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>

²⁷ The definition of “individual with a disability” in the Rehabilitation Act is at 29 U.S.C. § 705(20). A “disability” is a physical or mental impairment that “constitutes or results in a substantial impediment to employment” or “substantially limits one or more major life activities.” 29 U.S.C. § 705(9)(A)(B).

²⁸ Mr. Harlan states that the disabilities he had were alcoholism and Post Traumatic Stress Disorder, both as a result of his nearly dying in the sinking of the F/V TIDINGS. Statement of Joseph Harlan (Dec. 3, 1999); Appeal Statement of Joseph Harlan (Oct. 1, 2003).

²⁹ *Schumacher I* at 6 (emphasis in original).

activity.”³⁰ Under these regulations, a measure cannot be a reasonable accommodation if it changes a fundamental requirement of a program.³¹

A measure also cannot be a reasonable accommodation if it goes beyond what is necessary to eliminate discrimination or the effects of discrimination. The decision in *Jonathan Schumacher* also addressed this point:

The reasonable accommodation or reasonable modification test must be interpreted, keeping the “nondiscrimination principle” of Section 504 firmly in mind. The Rehabilitation Act seeks to eliminate discrimination. The basic purpose of Section 504 is “to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.” Section 504 seeks to assure “evenhanded treatment of qualified handicapped persons” in government programs, not “affirmative efforts to overcome the disabilities caused by handicaps.” If a proposed change goes beyond what is necessary to eliminate discrimination, or the effects of discrimination, it is not a reasonable accommodation under the Rehabilitation Act.³²

Thus, to be eligible for an LLP license based on the Rehabilitation Act, Mr. Harlan must propose a reasonable accommodation in the LLP, which is a change in a non-essential requirement of the LLP that overcomes discrimination against disabled persons. Mr. Harlan’s proposed “reasonable accommodation” is implicit in his argument. He states that, but for his health problems and his inability to hire a skipper, he would have made the harvests necessary for an LLP license.³³ Therefore, Mr. Harlan proposes that NMFS should award an LLP license to an applicant if the applicant can prove that “but for” his disability, the applicant would have made the harvests necessary for an LLP license. Mr. Harlan’s proposal is not a reasonable accommodation in the context of the Rehabilitation Act for two reasons.

First, Mr. Harlan’s proposed criteria for receiving an LLP license changes the fundamental requirement for an LLP license. To receive an LLP groundfish license, the LLP established a set of detailed requirements, by vessel type and by geographic area, of how many harvests a vessel

³⁰ 15 C.F.R. § 8c.3, definition of “qualified individuals with handicaps”, subsection (2). This term means the same as an “otherwise qualified” individual. The regulation differentiates between programs “under which a person is required to perform services or to achieve a level of accomplishment” and “any other program or activity.” Whatever the type of program, the disabled person must meet the “essential eligibility requirements” of the program to be “otherwise qualified.”

³¹ Final Rule, 53 Fed. Reg. 19,270, 19,272 (1988)(commentary to regulations).

³² *Jonathan Schumacher*, Appeal No. 00-0010 at 7 (Sept. 16, 2002)(footnotes omitted).

³³ Affidavit of Joseph Harlan (June 7, 2000).

had to make, when the vessel had to make them and where the vessel had to make them.³⁴ An award of an LLP license to a disabled person who did not own a vessel, or the fishing history of a vessel, that made the actual harvests necessary for an LLP license would waive the essential requirement of the LLP. As this Office explained in *MGF Fisheries, Inc.*:

MGF states that, but for Mr. Stewart's debilitating illness, it would have harvested Pacific cod in the Bering Sea and the Aleutian Islands in 1993. Therefore, MGF's proposed reasonable accommodation is that a person should receive an LLP license, if the person can prove that, but for a disability, the person *would have made* the harvests necessary for an LLP license even if the person did not make the harvests necessary for an LLP license. This is not a reasonable accommodation because it changes an essential requirement of the program: ownership of a vessel *that made the harvests necessary for the particular LLP license sought by the applicant*, or ownership of that fishing history apart from the vessel.

The fundamental structure of the LLP is a detailed description of the harvests that a vessel must have made for NMFS to award an LLP license based on that vessel's history. The only exception to that statement is the unavoidable circumstance provision, which does allow some applicants to receive credit for harvests that they would have made, but did not, due to an unavoidable circumstance. But the Council and NMFS quite intentionally and consciously required two documented harvests by the unavoidable circumstance applicant: one between January 1, 1988, and February 9, 1992, and a second before June 17, 1995. It is not credible that the Council and NMFS intended to say no to applicants under the unavoidable circumstance provision and yes to the same applicants, based on the very same facts, under the Rehabilitation Act provision.³⁵

Second, the criteria of vessel ownership, or vessel fishing history ownership, for award of an LLP license does not discriminate against disabled persons. As this Office explained in *Jonathan Schumacher*:

[T]he criteria of vessel ownership for award of an LLP license does not discriminate against disabled persons. It does not result from outdated or archaic assumptions about what disabled persons can and cannot do. It does not require that an applicant prove that he or she can perform any of the physical activities in operating a boat. A disabled person can own a vessel. Even a corporation – a legal entity only – can own a vessel. The criteria of vessel ownership has no intrinsic relationship to an applicant's disability or lack of disability.

³⁴ 50 C.F.R. § 679.4(k)(4)(i) & (ii); 50 C.F.R. § 679.2 (definition of eligible applicant).

³⁵ Appeal No. 02-0047 at 12 - 13 (Dec. 28, 2004)(emphasis in original) (footnotes omitted).

Many reasons exist why an applicant might not have owned a vessel on June 17, 1995: a financial setback, poor fishing season, personal problems, such as divorce or death in the family, boat breakdown, a natural disaster, a withdrawal of promised financial support from a partner or bank or, as Mr. Schumacher has argued, onset of a disability. NMFS does not examine why any applicant did not own a vessel on June 17, 1995, and does not award an LLP license based on *any* reason why an applicant did *not* own a vessel on June 17, 1995.

In essence, Mr. Schumacher asks NMFS to conduct such an inquiry for disabled persons only. This does not redress discrimination or the effects of discrimination. This would result in disabled persons receiving special treatment because of their disabilities, rather than equal or even-handed treatment which takes into account their disabilities. The change is therefore not a reasonable modification under section 504 of the Rehabilitation Act.³⁶

Mr. Harlan has not shown that he would be eligible for an LLP license if NMFS made a reasonable accommodation in the LLP requirements. I therefore conclude that Mr. Harlan is not eligible for an LLP license based on section 504 of the Rehabilitation Act.

FINDINGS OF FACT

1. In this appeal, the unavoidable circumstance claimed by Mr. Harlan was his inability to find a qualified skipper for the F/V DELIVERANCE, which began on January 1, 1991, the beginning of the 1991 Pacific cod season.
2. Mr. Harlan did not harvest groundfish in the Central Gulf after January 1, 1991 but before June 17, 1995.
3. The first groundfish harvest by Mr. Harlan in the Central Gulf after he was unable to find a qualified skipper for the 1991 season, and after his skipper backed out on him for the 1992 season, occurred on January 20, 1997.

CONCLUSIONS OF LAW

1. In the unavoidable circumstance regulation, the vessel that made a harvest of license limitation groundfish or crab between January 1, 1988, and February 9, 1992, must be the same vessel that is unable to meet the endorsement qualification period requirement.
2. According to section (E) of the unavoidable circumstance regulation, an applicant must make

³⁶ *Jonathan Schumacher*, Appeal No. 00-0010 at 9 (Sept. 16, 2002). *Accord Rex W. Duncan*, Appeal No. 04-0006 at 9 (June 29, 2005).

a harvest of groundfish in the endorsement area “after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.” 50 C.F.R. § 679.4(k)(8)(iv)(E). The “unavoidable circumstance” in section (E) means the same unavoidable circumstance that caused the vessel to be “lost, damaged or otherwise unable to participate” in the fishery during the endorsement qualification period.

3. Mr. Harlan did not meet section (E) of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8), because he did not harvest groundfish in the Central Gulf after he was unable to find a qualified skipper for the 1991 and 1992 seasons but before June 17, 1995.

4. Mr. Harlan is not eligible for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).

5. Mr. Harlan did not propose a reasonable accommodation in the LLP within the meaning of the Rehabilitation Act of 1973.

6. Mr. Harlan is not eligible for an LLP groundfish license based on Section 504 of the Rehabilitation Act of 1973.

DISPOSITION

The IAD that is the subject of this Decision is **AFFIRMED**. This Decision takes effect on January 19, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

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, January 2, 2007. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that the administrative judge overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Administrative Judge