

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 98-0004
	)	
ESTATE OF NGHIA NGUYEN,	)	DECISION
Appellant	)	
_____	)	September 27, 2001

**STATEMENT OF THE CASE**

Jung Sook Oh filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM] on June 18, 1998. Jung Sook Oh is the widow of the deceased, Nghia Nguyen, and personal representative of his estate.<sup>1</sup> The IAD denied Ms. Oh's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because Ms. Oh applied close to four years after the end of the application period.

Ms. Oh's application was dated May 29, 1998. RAM received the application on June 8, 1998. I treat Ms. Oh as having applied on May 29, 1998, since the record does not show the postmark date of the application. The application period for the IFQ program was January 17, 1994 to July 15, 1994.<sup>2</sup>

Ms. Oh argues that NMFS should toll, or suspend, the IFQ application deadline of July 15, 1994 until May 29, 1998 and accept her application as timely. The basis for equitable tolling urged by Ms. Oh is that she did not file her application until May 29, 1998 due to extraordinary circumstances resulting from the disappearance of her husband, Nghia Nguyen, in a tragic fishing accident in October 1991.

I concluded that an oral hearing was necessary to resolve the issues in this appeal.<sup>3</sup> On June 28, 2000, I held a hearing in Anchorage, where Ms. Oh now lives. The following people were present: Jung Sook Oh; Lynda Lee, a translator provided by this Office; Cuong Ve, a witness who also submitted a written statement; and Chonin Oh, as a representative of Ms. Oh and a witness. Chonin Oh was married to Jung Sook Oh, before her marriage to Nghia Nguyen. The tape of this hearing is Exhibit 1.

I held a second hearing to take testimony, by telephone, from Sun Huy Stafford, a resident of \_\_\_\_\_

<sup>1</sup> Jung Sook Oh sometimes used the name Jung Sook Nguyen. Ms. Oh signed her application and filed her appeal under the name Jung Sook Oh.

<sup>2</sup> Notice of Application Period, 59 Fed. Reg. 701, 702 (1994).

<sup>3</sup> 50 C.F.R. § 679.43(g); 50 C.F.R. § 679.43(n).

Dutch Harbor, Alaska. Ms. Oh waived her right to be present at that hearing. The tape of this hearing, which occurred on July 18, 2000, is Exhibit 2.

After reviewing the record, I concluded it was incomplete. I entered an Order for Continuation of Oral Hearing, dated August 24, 2000, which stated: "The subject of the hearing will be the events that occurred after Ms. Oh returned to Alaska from Korea in 1997 and before she filed an application for quota share in June 1998."

Ms. Oh waived her right to thirty days' notice of this hearing and asked to participate without a translator. Based on Ms. Oh's request and my observation of Ms. Oh during the first hearing, I concluded that Ms. Oh could effectively participate in this hearing without a translator because the subject was limited and non-technical. The tape of this hearing, which occurred on August 30, 2000, is Exhibit 3. Mr. Oh and Ms. Oh testified at that hearing.

### **SUMMARY OF DECISION**

The original application period for the IFQ program was January 17, 1994 to July 15, 1994. NMFS may process an application filed after July 15, 1994, only if the applicant meets the three requirements for equitable tolling. After three hearings and a careful examination of the written record, I conclude:

First, the first requirement of equitable tolling is that an applicant must prove that he or she submitted a late application due to extraordinary circumstances beyond the applicant's control. The disappearance of Mr. Nguyen, and circumstances resulting from his disappearance, were extraordinary circumstances beyond Ms. Oh's control. It is not clear when the extraordinary circumstances ended. Viewing the record in the light most favorable to Ms. Oh, the extraordinary circumstances which prevented her from filing an IFQ application ended on August 7, 1997, when Ms. Oh received a presumptive death certificate for Nghia Nguyen.

Second, the second requirement of equitable tolling is that the applicant must prove that he or she was diligent in submitting an application after the end of the extraordinary circumstances that prevented filing within the application period. Ms. Oh filed an IFQ application on May 29, 1998, which is 295 days, approximately ten months, after August 7, 1997. The original IFQ application period was 180 days, approximately six months.

I conclude, as a matter of law, that a late applicant has not shown diligence in filing an IFQ application, if she applies 295 days after the end of the extraordinary circumstances that prevented her from filing by the original application deadline.

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Third, the applicant must show that processing the late application would not harm or frustrate the IFQ program. I assume, for purposes of this decision, that processing Ms. Oh's application would not harm or frustrate the IFQ program.

Since, as a matter of law, Ms. Oh did not show diligence in applying for an IFQ permit after the end of the extraordinary circumstances that prevented her from filing within the original application period, I conclude that Ms. Oh's application cannot be treated as timely filed.

### ISSUES

1. Viewing the record in the light most favorable to Ms. Oh, when did the extraordinary circumstances end, which prevented Ms. Oh from filing an IFQ application within the original application period?
2. As a matter of law, does a late applicant act diligently in filing an IFQ application, if she applies 295 days after the end of extraordinary circumstances that prevented her from filing within the original application period?
3. Is the test whether the late applicant acted diligently after the end of the extraordinary circumstances or after the late applicant learned of the IFQ filing deadline?

### BACKGROUND

The key dates in this appeal are as follows:

October 28, 1991	Nghia Nguyen disappears at sea during a storm
April 1992	Jung Sook Oh goes to Korea
January 17, 1994 - July 15, 1994	IFQ application period
April 1997	Jung Sook Oh returns to Alaska and petitions for a certificate of presumptive death for Nghia Nguyen
July 1997	Jung Sook Oh applies for Social Security survivor benefits
July 31, 1997	A certificate of presumptive death is issued for Nghia Nguyen
August 7, 1997	Jung Sook Oh receives a death certificate for Nghia Nguyn <sup>4</sup>
May 29, 1998	Jung Sook Oh signs IFQ application; application deemed filed

Nghia Nguyen was a commercial fisherman in Alaska, who fished for halibut and sablefish in the Aleutian Islands, out of Dutch Harbor/Unalaska. Mr. Nguyen went fishing on October 28, 1991 in his boat, the F/V LOUISA, with one crew member. When he did not come back as scheduled,

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<sup>4</sup> Ms. Oh received, or clearly could have received, a death certificate by this date. *See* pages 8-9 *infra*.

the United States Coast Guard and the Alaska State Troopers conducted an intensive search.<sup>5</sup> Neither Mr. Nguyen's body nor the body of his crew member nor the vessel nor any part of the vessel has ever been found. He left behind his wife, Jung Sook Oh, and a two-year-old daughter.

A death, where the body is never found, is likely to cause severe psychological problems for surviving family members.<sup>6</sup> The record contains ample evidence that this was true for Ms. Oh. In the wake of her husband's disappearance, Ms. Oh testified that she could not stop thinking about what had happened to him and that she thought "all kinds of crazy thoughts." [Exhibit 1] Sun Huy Stafford, a friend of Ms. Oh in Dutch Harbor, testified that Ms. Oh would simply go to the dock and wait for Mr. Nguyen to return. [Exhibit 2] Ms. Oh told the State troopers that she thought her husband might be hiding out somewhere or dealing drugs.<sup>7</sup>

In April 1992, Cuong Ve, a family friend, stated that Ms. Oh was "hysterical and in unstable condition," saying that her husband "abandoned her and their daughter and fled to his native country, Vietnam and/or committed suicide."<sup>8</sup> She had no assets and no source of income. [Exhibit 1] Ms. Oh's brother-in-law urged her to come to Korea.<sup>9</sup> The Dutch Harbor police arranged for Ms. Oh to receive a plane ticket to Korea. [Exhibit 1] Ms. Oh went to Korea with her daughter in April 1992.

Ms. Oh stayed with her sister and brother-in-law in Korea from April 1992 to April 1997. Ms. Oh's brother-in-law, Kim Joon-Taek, wrote that Ms. Oh would say "contradictorily or crying with that her husband had run away to his native country, Vietnam, abandoned wife and the loving baby (daughter), and the husband committed suicide himself by plunging into the deep sea, etc."<sup>10</sup> Ms. Oh testified that she received outpatient treatment for her condition at a hospital for the first year after she arrived in Korea. [Exhibit 1] Even now, Ms. Oh does not fully believe her husband is dead because "they never found the boat, never found the body." [Exhibit 1].

When a person disappears, and no body was found, the State of Alaska does not automatically issue a death certificate. When a person disappears, an interested party usually petitions the State

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<sup>5</sup> United States Coast Guard Records [Exhibit 4]; State of Alaska, Department of Public Safety Records [Exhibit 5].

<sup>6</sup> T. Rondo, TREATMENT OF COMPLICATED MOURNING 44 - 46, 511 - 518 (1993).

<sup>7</sup> State of Alaska, Department of Public Safety Records [Exhibit 5].

<sup>8</sup> Statement of Cuong Ve, June 28, 2000 [Exhibit 6].

<sup>9</sup> Affidavit of Kim Joon-Taek, December 17, 1999 [Exhibit 7].

<sup>10</sup> *Id.*

to determine that the person is dead and to issue a death certificate.<sup>11</sup> Ms. Oh testified that the Dutch Harbor police told her, before she left for Korea, that since Mr. Nguyen was missing, she had to wait five years before seeking a death certificate. [Exhibit 3] This was an apparent reference to the Alaska law that a person missing for five years is presumed dead.<sup>12</sup>

Ms. Oh was in Korea for the entire IFQ application period: January 17, 1994 to July 15, 1994. RAM mailed application packets to persons who owned vessels that made halibut or sablefish landings in 1988, 1989 or 1990 because those persons were likely to receive IFQ permits if they applied.<sup>13</sup> RAM did not send Ms. Oh an application packet, since Ms. Oh did not own a vessel that had halibut or sablefish landings in 1988, 1989 or 1990. RAM also sent applications to persons who requested them.<sup>14</sup> Ms. Oh offered no evidence that she asked RAM to send her information about the IFQ program or provided RAM with her address.

Nghia Nguyen owned the F/V LOUISA, which did have halibut or sablefish landings in 1988, 1989 and 1990.<sup>15</sup> RAM's records show that RAM sent Mr. Nguyen an application packet in December 1993, a reminder post card in April 1994 and a second application packet on June 17, 1994. RAM has no record that the first packet was returned. RAM received the second application packet back on July 11, 1994 with the notice "MOVED LEFT NO ADDRESS."<sup>16</sup>

While in Korea, Ms. Oh testified that she did not learn of the IFQ program through any of RAM's outreach or publicity efforts, which understandably did not extend to Korean publications distributed in Korea. While in Korea, Ms. Oh stated that she had no contacts with any friends or fishermen from Alaska or anybody who know about developments in Alaskan commercial fishing. [Exhibit 1]

Ms. Oh returned to Alaska in April 1997 so her daughter, then age seven, could go to American

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<sup>11</sup> See Alaska Statutes 09.55.020 - 09.55.050.

<sup>12</sup> Alaska Statute 13.06.035(5). Although an interested person may petition the court, before five years, for a death certificate for a missing person, it is only after five years that the death is presumed. *Id.*

<sup>13</sup> Leonard R. Haglund, Appeal No. 95-0039, Aug. 6, 1996 at 2. To receive an QS under the IFQ program, an applicant must have owned or leased a boat that made halibut or sablefish landings in 1988, 1989 or 1990. 50 C.F.R. § 679.40(a)(2); 50 C.F.R. § 679.40(a)(3)

<sup>14</sup> 50 C.F.R. § 679.40(a)(6)(i).

<sup>15</sup> Bill of Sale for F/V LOUISA, Oct. 10, 1988, from Jan Medhaug to Nghia Nguyen [Exhibit 8]; State of Alaska, Commercial Fisheries Entry Commission Fish Ticket Printout [Exhibit 9].

<sup>16</sup> E--mail memorandum from Tracy Buck, Permit Operations Manager, to Mary Alice McKeen, Aug. 21, 2000 [Exhibit 10]; Returned Envelope [Exhibit 11].

schools.<sup>17</sup> Before Ms. Oh returned, Mr. Oh visited Ms. Oh and her family in Korea. He offered to help Ms. Oh obtain Social Security benefits and to temporarily support her until she obtained those benefits. [Exhibit 1]

Shortly after returning to Alaska, Ms. Oh filed a petition for a presumptive death certificate for Nghia Nguyen. On July 31, 1997, a jury found that Mr. Nguyen had been absent for five years and should be presumed to have died on or about October 28, 1991. The Magistrate in Unalaska signed a death certificate that same day. Ms. Oh testified by phone at the trial, stating that she thought her husband was dead.<sup>18</sup> Ms. Oh applied for Social Security benefits in July 1997. She notified Social Security Administration [SSA] of the results of the trial and began receiving benefits.<sup>19</sup>

Ms. Oh did not apply for a permit until May 29, 1998. What is the evidence in the record about the events leading to Ms. Oh's applying for an IFQ permit? After Ms. Oh returned to Alaska in April 1997, she contacted friends in Dutch Harbor. Ms. Oh was able to provide the name and contact information for one of those friends, Sun Huy Stafford. [Exhibit 1] Ms. Oh testified that Ms. Stafford said to her, "Why don't you get a fishing license?" [Exhibit 3] Ms. Stafford testified that she spoke with Ms. Oh by phone and told her to find out whether she could renew her husband's fishing license. [Exhibit 2] Ms. Stafford testified that she suggested that Ms. Oh contact the Alaska Department of Fish and Game. [Exhibit 2] Ms. Oh did not know when she spoke to Ms. Stafford. Ms. Stafford testified that they spoke in 1997 but could not be more specific about when, in 1997, they spoke. [Exhibit 3]

Jung Sook Oh testified that she did not contact the Department of Fish and Game or any government agency herself. Mr. Oh testified that Ms. Oh told him that her friend told her about a "very valuable license that you are supposed to renew." Mr. Oh testified that Ms. Oh thought she "missed her big chance" to renew her husband's license and asked Mr. Oh if there was any way she could renew it still. [Exhibit 3]

Mr. Oh testified that, after talking to Ms. Oh, he contacted one or more friends who are attorneys and some government agencies. Mr. Oh testified, "I went to Fish and Game in Anchorage. I didn't know the Feds handled it. I asked a lawyer friend. Somehow I got to the proper agent to

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<sup>17</sup> Jung Sook Oh's Passport [Exhibit 12]; Testimony of Jung Sook Oh [Exhibit 1]; Testimony of Chonin Oh [Exhibit 3].

<sup>18</sup> Presumptive Death Petition, April 12, 1997 [13]; Presumptive Death Verdict, July 31, 1997 [Exhibit 14]; Certificate of Presumptive Death for Nghia Nguyen, July 31, 1997 [Exhibit 15]; Log Notes of Trial held on Presumptive Death Petition, July 31, 1997 [Exhibit 16].

<sup>19</sup> Social Security Administration Entitlement Status Record, provided by Ms. Oh [Exhibit 17]; Letter from Unalaska Trial Courts to SSA, August 7, 1997, responding to SSA's request for a tape of the presumptive death trial [Exhibit 18].

deal with.” At another point in the hearing, he stated, “I didn’t know where to apply. I asked around.” Mr. Oh did not know when he talked to any government agencies or his attorney friends. [Exhibit 3]

Mr. Oh obtained an IFQ application. Mr. Oh testified that he did not know when he obtained the application. The application is dated May 29, 1998. RAM received it on June 8, 1998. [Exhibit 19]

## ANALYSIS

In 1993, NMFS established the Individual Fishing Quota [IFQ] program for the halibut and fixed gear sablefish fishery.<sup>20</sup> NMFS specified an application period for the IFQ Program of January 17, 1994 through July 15, 1994.<sup>21</sup> The Federal Register notice of the application period stated: “Application for initial allocation of QS received after the close of business on July 15, 1994, will not be considered.”

An applicant met the application deadline of July 15, 1994, if the applicant filed an application by July 15, 1994, mailed an application by July 15, 1994 usually as shown by the application’s postmark, or took decisive action to submit an application by that date.<sup>22</sup> Where an applicant took none of these steps, NMFS may process the application only if the applicant presents sufficient evidence to support equitable tolling of the application deadline. In this context, tolling means suspending the application deadline, so that an application that is filed after the deadline is treated as though it were filed before the deadline.

The IFQ application deadline will be tolled, or suspended, if the applicants meets three requirements.<sup>23</sup> First, the applicant must prove that the late application was the result of extraordinary circumstances beyond his or her control. Second, the applicant must prove that he

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<sup>20</sup> 58 Fed. Reg. 59,375 ( 1993). The IFQ regulations, originally at 50 C.F.R. § 676.20, were moved to 50 C.F.R. § 679.40. 61 Fed. Reg. 31,228 (1996). When this Decision refers to sablefish, it means sablefish caught with fixed gear, the type managed by the IFQ program.

<sup>21</sup> Notification of Application Period, 59 Fed. Reg. 701, 702 (1994)

<sup>22</sup> Michael B. White, Appeal No. 94-0009 (Jan. 17, 1995) (delivery of application to a tender vessel for mailing by the application deadline considered timely filing). A form entitled “Request for Application” counted as an IFQ application. Estate of Kuzmin, Appeal No. 95-0097 at 1 (Jan. 30, 1996).

<sup>23</sup> John T. Coyne, Appeal No. 94-0012 (Jan. 31, 1996); Decision on Reconsideration, John T. Coyne, Appeal No. 94-0012 (May 24, 1996)(application filed fourteen days late); Estate of Kinberg, Appeal No. 95-0035 (Aug. 1, 1997)(application filed five months late); Christopher O. Moore, Appeal No. 95-0044 (Sept. 5, 1997)(application filed eight months late) . Estate of Kinberg, noted that “any circumstance or disability personal to [Mrs. Kinberg, the personal representative] is attributable to the estate.” *Id.* at 3 n.4.

or she was diligent in submitting an application after the end of the extraordinary circumstances that prevented filing within the application period. Third, the applicant must prove that processing the application would not harm or frustrate the IFQ program. I assume, for purposes of this Decision, that Ms. Oh meets the third requirement. I now turn to the first and second requirements.

I have no trouble concluding that extraordinary circumstances beyond Ms. Oh's control compelled her to leave this country and go to Korea in April 1992. These circumstances were: [1] the disappearance of Nghia Nguyen, [2] Ms. Oh's psychological and financial condition in the wake of his disappearance, [3] the lack of a death certificate and [4] Ms. Oh's sincere and reasonable belief that she needed to wait five years to seek a death certificate. Once in Korea, I also have no trouble concluding that Ms. Oh did not, and reasonably could not have been expected to, learn about the IFQ program and the application deadline. But Ms. Oh did not file an IFQ application until May 1998.

The record is exceedingly unclear when – between April 1992 and May 1998 – the extraordinary circumstances ended. Even though April 1997 is when Ms. Oh did return to Alaska, could she have returned earlier? Upon her return in April 1997, Ms. Oh promptly petitioned for a death certificate. This shows that, as of April 1997, Ms. Oh accepted her husband's death enough to plan for the future and take steps to protect her legal interests. Does that mean her extraordinary circumstances ended in April 1997? But even if Ms. Oh had applied in April 1997, RAM could not have granted Ms. Oh's IFQ application based on landings by Mr. Nguyen, until RAM received a death certificate for Mr. Nguyen.<sup>24</sup>

In light of this uncertainty, I am going to view the record in the light most favorable to Ms. Oh to determine the date for the ending of the extraordinary circumstances. I will then use that date to analyze whether Ms. Oh meets the second requirement for tolling, namely whether she was diligent in applying for an IFQ permit after the end of the extraordinary circumstances.

**1. Viewing the record in the light most favorable to Ms. Oh, when did the extraordinary circumstances end, which prevented Ms. Oh from filing an IFQ application within the original application period?**

The State of Alaska issued a death certificate for Nghia Nguyen on July 31, 1997. Ms. Oh did not testify when she received a copy of the death certificate. But on August 7, 1997, the Social Security Administration [SSA] asked the Magistrate in Unalaska for a tape of the presumptive death trial. [Exhibit 17] I conclude that Ms. Oh had informed SSA of the results of the trial by that date. The fact that SSA did not ask for a copy of the death certificate for Nghia Nguyen strongly suggests that Ms. Oh had provided SSA a copy of the death certificate.

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<sup>24</sup> The application states: "If this application is made on behalf of the estate of a deceased fisherman, please provide the following information regarding date of death, social security number, and estate representation. Attach copy of death certificate." [Exhibit 19]



In any event, August 7, 1997 is one week after the trial on July 31, 1997, which led the State of Alaska to issue a death certificate for Nghia Nguyen. A week is a reasonable period of time to give Ms. Oh to obtain a copy of a death certificate for Nghia Nguyen. Ms. Oh testified at the trial and the trial resulted from a petition that Ms. Oh filed. Therefore, by August 7, 1997, I conclude that Ms. Oh received, or clearly could have received, the death certificate for Mr. Nguyen.

Viewing the record in the light most favorable to Ms. Oh, I conclude that the extraordinary circumstances that prevented Ms. Oh from filing an IFQ application ended on August 7, 1997. By August 7, 1997, Ms. Oh had returned to Alaska and therefore had access to information about the IFQ program. By that date, Ms. Oh was able to act to protect her interests. She had filed a petition to establish Mr. Nguyen's death as a legal fact and to issue a death certificate. She had applied for social security benefits based on Mr. Nguyen's death.

By that date, the State of Alaska had issued a death certificate, which Ms. Oh had received or clearly could have received. The issuance of a death certificate established Mr. Nguyen's death as a legal fact. By August 7, 1997, Ms. Oh was not under any disability which prevented her from filing an IFQ application.

I will assume, for purposes of this Decision, that extraordinary circumstances beyond Ms. Oh's control prevented her from filing an IFQ application until August 7, 1997. This is the latest date for the ending of Ms. Oh's extraordinary circumstances that this record will support. The length of time between August 7, 1997 and May 29, 1998, when Ms. Oh filed an IFQ application, is 295 days.

**2. As a matter of law, does a late applicant act diligently in filing an IFQ application, if she applies 295 days after the end of extraordinary circumstances that prevented her from filing within the original application period?**

The second requirement for equitable tolling is that the late applicant must be diligent in applying after the extraordinary circumstances have ended.<sup>25</sup> After extraordinary circumstances are no longer preventing a person from filing an application, that person is not expected to file an application immediately. But neither does the late applicant receive an indefinite period of time to apply. Another way of stating the diligence requirement is that the applicant must apply within a reasonable period of time. Viewing the record in the light most favorable to Ms. Oh, I have determined that Ms. Oh applied 295 days after the end of the extraordinary circumstances.

A period of 295 days, approximately ten months, is substantially longer than the original application period. The IFQ regulations provided: "An application period of **no less than 180 days** will be specified by notification in the Federal Register and other information sources that

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<sup>25</sup> John T. Coyne, Appeal No. 94-1102, Decision on Reconsideration at 14; Estate of Kinberg, Appeal No. 95-0035 at 3.

the Regional Director deems appropriate.”<sup>26</sup> The regulations gave the NMFS Regional Director for Alaska the responsibility of setting the precise application period. By notice in the Federal Register, the Regional Director specified an application period of 180 days: from January 17, 1994 through July 15, 1994.<sup>27</sup> Thus, all original applicants received 180 days to file an IFQ application.

The doctrine of equitable tolling is remedial. It provides a remedy to persons who were prevented from filing within the original application period due to extraordinary circumstances beyond their control. I conclude that, after the extraordinary circumstances end, the late applicant cannot receive a period of time longer than applicants had to file during the original application period. After the end of the extraordinary circumstances, an applicant is entitled to a period of no less than, but also no more than, 180 days to file an application. Since Ms. Oh applied 295 days after the end of the extraordinary circumstances that prevented her from filing within the original application period, I conclude, as a matter of law, that Ms. Oh’s application cannot be treated as timely filed.

### **3. Is the test whether the late applicant acted diligently after the end of the extraordinary circumstances or after the late applicant learned of the IFQ filing deadline?**

NMFS has tolled the IFQ application deadline in three cases: John T. Coyne, Christopher Moore and Estate of Kinberg.<sup>28</sup> Coyne and Kinberg contain language that suggests that the applicant must show diligence in applying after learning of the IFQ filing deadline.<sup>29</sup> I wish to clarify that a late applicant’s duty to act diligently to file an IFQ application is triggered by the end of the extraordinary circumstances, not by actual notice of the IFQ program or the IFQ filing deadline. This is the correct standard for many reasons.

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<sup>26</sup> 50 C.F.R. § 679.40(a)(6)(ii)(emphasis added).

<sup>27</sup> Notification of Application Period, 59 Fed. Reg. 701, 702 (Jan. 6, 1994)

<sup>28</sup> John T. Coyne, Appeal No. 94-0012 (Jan. 31, 1996); Decision on Reconsideration, John T. Coyne, Appeal No. 94-0012 (May 24, 1996); Estate of Kinberg, Appeal No. 95-0035 (Aug. 1, 1997); Christopher O. Moore, Appeal No. 95-0044 (Sept. 5, 1997). Cf. Wayne Brosman, Appeal No. 94-0007 (Jan. 10, 1995)(late application accepted as timely filed where applicant was in IFQ database as eligible for QS, RAM did not notify him through an oversight, applicant was outside the mainstream of publicity about the IFQ program and other unique circumstances existed).

<sup>29</sup> John T. Coyne, Appeal No. 94-0012, Decision on Reconsideration at 14 (applicant must show diligence “in submitting his application after learning of the filing deadline.”); Estate of Kinberg, Appeal 95- 0035 at 3 (applicant must show diligence “in submitting an application after learning of the filing deadline [and after the disability to filing was removed].”)(brackets in original). The Coyne decision, however, also states: “The doctrine of equitable tolling is generally not applied where the party who seeks tolling has failed to exercise due diligence in pursuing a claim after the disability has been removed.” Decision on Reconsideration at 14 (emphasis added).

First, the language in Coyne and Estate of Kinberg is dicta. In Coyne, Kinberg and Moore, the extraordinary circumstances condition ended and the applicant learned about the IFQ deadline at substantially the same time. The applicants in Coyne, Kinberg and Moore each applied within one month after learning of the IFQ deadline and within one month after the extraordinary circumstances ended. These decisions do not address what happens if a substantial period of time, in this case approximately ten months, elapses between [1] when the extraordinary circumstances end and [2] when a person files an IFQ application.

Second, during the original application period, Ms. Oh did not have – by regulation or agency practice – a right to actual notice of the IFQ program.<sup>30</sup> I cannot use Ms. Oh’s status as a late applicant to give her a right to actual notice, a right she would not have had during the original IFQ application period.

Third, if the application deadline were tolled until the applicant knew about the program, this could toll the application period indefinitely. An applicant could take years after the end of the extraordinary circumstances to learn about a program because, after the application deadline, the publicity about the program ends. In essence, the late applicant would really have no deadline for applying. This, again, gives late applicants far more time than the original applicants.

Fourth, under equitable tolling, extraordinary circumstances beyond the applicant’s control prevent the applicant from filing by the deadline. Extraordinary circumstances beyond the applicant’s control excuse the applicant from filing by the deadline. Once the extraordinary circumstances end, those conditions no longer prevent an applicant from learning about the program and filing an application. At that point, the late applicant is therefore under a duty to act diligently to file an IFQ application. From that point, the late applicant should have a reasonable period of time to learn about the program and file an application.

Fifth, a key problem with a standard of actual notice is actual notice of what. The filing deadline of July 15, 1994? If a late applicant knew of the IFQ program itself, but not the filing deadline, it is hard to say that person would not be under an obligation to inquire further, just because the applicant did not know a precise deadline that passed years ago. But then would the late applicant need only know generally about the existence of a federal fishing program? Of the IFQ program specifically? Of the applicant’s potential eligibility to a license or benefits under the program?

On this record, when did Ms. Oh know of the IFQ program? Of the filing deadline? Of her potential eligibility under the IFQ program? When Sun Huy Stafford told Ms. Oh to find out about renewing her husband’s fishing license? When Ms. Oh talked to Mr. Oh and said she thought she might have missed “her big chance?” When Mr. Oh first talked to a government agency about the program? When Mr. Oh first learned that “the Feds handled” the IFQ program?

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<sup>30</sup> See Richard D. Foss, Appeal No. 95-0003 (Aug. 6, 1996), *aff’d sub nom*, Foss v. NMFS, 161 F. 3d 584, 590-91 (9<sup>th</sup> Cir. 1998).

And when did any of those events occur?

Such an inquiry would focus on slight differences of knowledge and would require a difficult, subjective determination as to what an applicant knew and when. Again, that is not the standard applied to any of the original applicants: what they subjectively knew and when. The timeliness of the original applications was measured by an objective standard: whether the application was filed within a 180 day application period. Original applicants received 180 days to learn about and apply for the program. After late applicants are no longer under a disability that prevents them from learning about the IFQ program, they cannot receive a longer period of time, than the original IFQ applicants, to learn about the program and file an application.

### **Conclusion**

Because the IFQ program had an application deadline, this Office denied applicants who missed that deadline by as little as one or two days.<sup>31</sup> For these applicants, this Office did not have the authority to extend the 180-day application period by even one or two days. Therefore, I cannot in effect give this applicant a 295-day application period. I conclude that this application cannot be accepted as timely filed.

### **FINDINGS OF FACT**

1. Ms. Oh received, or clearly could have received, a death certificate for Nghia Nguyen by August 7, 1997.
2. Ms. Oh filed an IFQ application on May 29, 1998.
3. The length of time between August 7, 1997 and May 29, 1998 is 295 days.

### **CONCLUSIONS OF LAW**

1. Viewing the record in the light most favorable to Ms. Oh, the extraordinary circumstances beyond Ms. Oh's control, that prevented her from applying for an IFQ permit within the original IFQ application period, ended on August 7, 1997, when Ms. Oh received the death certificate for Nghia Nguyen.
2. Ms. Oh applied for an IFQ permit 295 days after her extraordinary circumstances ended.
3. As a matter of law, a late applicant who files an IFQ application 295 days after the end of extraordinary circumstances has not acted diligently in filing an IFQ application.

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<sup>31</sup> Roy O. Pederson, Appeal 94-0002 (March 22, 1995)(application one day late); George M. Ramos, Appeal 94-0008 )(March 21, 1995)(application two days late); Jimmy Tony, Appeal 94-0004 (Dec. 23, 1994) (application twelve days late).

4. A late applicant's obligation to act diligently to file an IFQ application begins with the end of the extraordinary circumstances, not when the applicant learns about the IFQ program or the IFQ filing deadline.
5. Ms. Oh's IFQ application should not be accepted as timely filed.

#### **DISPOSITION**

The IAD denying the Appellant's application as untimely filed is **AFFIRMED**. This Decision takes effect on October 29, 2001, unless by that date the Regional Administrator orders review of the Decision.

The 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 Time, on the tenth day after the date of this Decision, October 9, 2001. 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 Appeals Officer, and must be accompanied by a written statement or 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.

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Mary Alice McKeen  
Appeals Officer