

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0055
)	
JOHN A. KARUZA,)	DECISION
Appellant.)	
_____)	July 21, 2005

STATEMENT OF THE CASE

John A. Karuza appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM], which denied his application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Karuza can appeal the IAD because it directly and adversely affects his interests.²

Mr. Karuza applied for a groundfish license with Central Gulf and Southeast Outside endorsements, based on the fishing history of the F/V VIS, ADFG # 61593. The F/V VIS is a catcher vessel with a length overall of less than sixty feet, which means it is a category C vessel.³ Later in the application process, Mr. Karuza asked that his application also be judged by fishing history of the F/V DEVOTION, ADFG # 32416. The F/V DEVOTION is also a catcher vessel with a length overall of less than sixty feet.

The record has sufficient information for me to decide this appeal. I therefore close the record and issue this decision.⁴

SUMMARY

The IAD is affirmed. Mr. Karuza owns the F/V VIS but that vessel meets only the endorsement qualification period [EQP] requirement for an LLP groundfish license. The F/V VIS does not meet a general qualification period [GQP] requirement for an LLP groundfish license. The F/V DEVOTION has a complete LLP-qualifying fishing history. Mr. Karuza owned the F/V DEVOTION when it made a GQP harvest but he did not own the F/V DEVOTION on June 17, 1995 and does not now own the fishing history of the F/V DEVOTION. Mr. Karuza is therefore not an eligible applicant for an LLP license based on the fishing history of the F/V DEVOTION,

¹ IAD (Oct. 7, 2002). 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)(4)(requirements for licenses) and 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 679.43(b).

³ 50 C.F.R. § 679.4(k)(3)(iii)(C).

⁴ 50 C.F.R. § 679.43(g)(2).

as that term, eligible applicant, is defined by federal regulation 50 C.F.R. § 679.2. NMFS does not have authority to issue Mr. Karuza an LLP groundfish license by combining the GQP fishing history of the F/V DEVOTION with the EQP fishing history of the F/V VIS. NMFS does not have authority to divide the fishing history of an original LLP qualifying vessel and does not have authority to issue two LLP licenses based on the fishing history of one vessel.

ISSUES

1. Does Mr. Karuza qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V VIS?
2. Does Mr. Karuza qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V DEVOTION?
3. Does Mr. Karuza qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the combined fishing history of the F/V VIS and the F/V DEVOTION?

ANALYSIS

To receive an LLP license, an applicant must show that its vessel made documented harvests in a general qualification period [GQP] and an endorsement qualification period [EQP].⁵ There are five possible area endorsements on a groundfish license: Aleutian Islands, Bering Sea, Central Gulf, Western Gulf and Southeast Outside.⁶ The GQP harvest requirement is the same for all the groundfish endorsements. The EQP harvest requirement is different for different endorsements.

To count toward an LLP license, a harvest must be a documented harvest.⁷ When I refer to a harvest in this Decision, I mean a documented harvest. To count towards an LLP license, a groundfish harvest must generally be of “license limitation groundfish.” The difference between license limitation groundfish and groundfish is small and has no significance for this appeal.⁸ When I refer to groundfish in this Decision, I mean license limitation groundfish, unless I note

⁵ 50 C.F.R. § 679.4(k)(4)(i)&(ii).

⁶ 50 C.F.R. § 679.4(k)(4)(ii).

⁷ A documented harvest means “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” 50 C.F.R. § 679.2.

⁸ Groundfish are “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2)” and license limitation groundfish are “target species and the ‘other species’ category, specified annually pursuant to [50 C.F.R.] § 679.20(a)(2), except that demersal shelf rockfish east of 140° W. longitude and sablefish managed under the IFQ program are not considered license limitation groundfish.” 50 C.F.R. § 679.2.

otherwise.

To determine if an applicant made the documented harvests necessary for an LLP license, NMFS constructed an official LLP record, which is a database containing information on vessel ownership, vessel characteristics and harvests by vessels during the qualification periods for licenses.⁹ The applicant who claims the official LLP record is incorrect has the burden of proving that the applicant's claims, rather than the official LLP record, are correct.¹⁰

1. Does Mr. Karuza qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V VIS? No.

To receive an LLP groundfish license, Mr. Karuza must show that the F/V VIS meets the general qualification period or GQP requirement in one of four ways.¹¹ The regulatory requirement is in bold, followed by an analysis of whether the F/V VIS meets the requirement.

[1] The vessel must have made one harvest of groundfish in the Gulf of Alaska between January 1, 1988 and June 27, 1992. [50 C.F.R. § 679.4(k)(4)(i)(B)(1)].

This period – January 1, 1988 to June 27, 1992 – is the basic general qualification period and this is the basic GQP requirement. According to the official LLP record, the F/V VIS made no documented harvests of groundfish between January 1, 1988 and June 27, 1992.

Mr. Karuza submitted [1] a printout from the State of Alaska Commercial Fisheries Entry Commission [CFEC] showing the fish caught on State permits held by Mr. Karuza from 1988 through 1994 and [2] copies of three fish tickets dated in May 1992. Although the fish tickets list groundfish species – arrowtooth flounder, grey cod, thornyhead rockfish (idiots), grenderier – none of the tickets lists the condition code, price per pound or total amount paid for the fish. The CFEC printout lists each of the groundfish reported on the May 1992 fish tickets and each has a delivery code of 98, which is the code for fish discarded at sea. This confirms the official LLP record for the F/V VIS, which also lists the groundfish caught in May 1992 as discarded at sea. Mr. Karuza did not present any evidence that these fish were not discarded at sea.

RAM does not count fish that are discarded at sea as a documented harvest. This is a valid interpretation of “documented harvest” for two reasons. First, the definition of “harvesting or to

⁹ 50 C.F.R. § 679.2. Sources for this database include “weekly production reports and observer reports from NMFS and fish tickets, processor annual reports, and vessel registration information from the State of Alaska.” Final Rule, 64 Fed. Reg. 42,826, 42,826 (1999).

¹⁰ 50 C.F.R. § 679.2; 50 C.F.R. § 679.4(k)(6)(v).

¹¹ 50 C.F.R. § 679.4(k)(4)(i)(B); 50 C.F.R. § 679.4(k)(4)(iv).

harvest” is “the catching and retaining of any fish.”¹² Mr. Karuza did not retain these fish. Second, a documented harvest must be the result of commercial fishing. Thus, if an applicant retains fish, but uses the fish himself, the applicant did not make a documented harvest for purposes of the LLP. For example, Pacific cod caught, retained and used for the applicant’s own bait is not a documented harvest for purposes of the LLP.¹³ Since Mr. Karuza discarded these fish at sea, they did not enter commerce and cannot constitute documented harvests.

I find that Mr. Karuza did not make a documented harvest of groundfish from the F/V VIS between January 1, 1988 and June 27, 1992. The regulation extends the general qualification period in two situations, described in the next two sections.

[2] The vessel must have made one harvest of groundfish in the Gulf of Alaska between January 1, 1988 and December 31, 1994, if the harvest was with pot or jig gear from a vessel less than 60 feet. [50 C.F.R. § 679.4(k)(4)(i)(B)(2)]

According to the official LLP record, the F/V VIS does not meet this requirement because the vessel did not harvest groundfish with pot or jig gear. Mr. Karuza submitted three fish tickets showing documented harvests of groundfish from the F/V VIS on May 21, 1993, May 27, 1993 and May 24, 1994. Although the F/V VIS is less than 60 feet length overall, the fish tickets do *not* show the harvests were made with pot or jig gear. The fish tickets show these harvests as made with longline gear. I conclude that Mr. Karuza does not meet this GQP provision.

[3] The vessel must have made one harvest of groundfish in the Gulf of Alaska [GOA] between January 1, 1988 and June 17, 1995; one harvest of groundfish [¹⁴] in the GOA or BSAI between February 10, 1992 and December 11, 1994, with trawl gear or longline gear, except sablefish with fixed gear; and one harvest of BSAI king or Tanner crab between January 1, 1988 and February 9, 1992. [50 C.F.R. § 679.4(k)(4)(i)(B)(3)]

This provision is for crab vessels that “crossed over” into groundfish in the Vessel Moratorium Program (VMP), the program that preceded the LLP.¹⁵ It has three parts. Mr. Karuza satisfies the two parts that require groundfish harvests. The F/V VIS harvested groundfish in the GOA

¹² 50 C.F.R. § 679.2.

¹³ *Darjen, Inc.*, Appeal No. 00-0015 (Dec. 31, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (April 5, 2002); *Paula Brogdon*, Appeal No. 00-0011 (Feb. 26, 2002); *Willard S. Ferris*, Appeal No. 01-0004 (Jan. 18, 2002). These decisions are available on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/appeals/default.htm>.

¹⁴ This is a requirement for a groundfish harvest, not a license limitation groundfish harvest.

¹⁵ Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998). See Final VMP Rule, 60 Fed. Reg. 40,763 (1995).

between January 1, 1988 and June 17, 1995. The F/V VIS harvested groundfish in the GOA or BSAI between February 10, 1992 and December 11, 1994 using trawl or longline gear but not sablefish with fixed gear.

But the official LLP record does *not* show the F/V VIS harvested BSAI king or Tanner crab between January 1, 1988 and February 9, 1992. Mr. Karuza has not submitted any evidence that the official LLP record is incorrect. Without a crab harvest, the F/V VIS does not satisfy this way of meeting the GQP. I conclude Mr. Karuza does not meet this GQP provision.

[4] The vessel must satisfy the general qualification period requirement for a Bering Sea or Aleutian Islands endorsement. [50 C.F.R. § 679.4(k)(4)(iv)]

Mr. Karuza submitted fish tickets showing that the F/V VIS meets the EQP requirement for a Central Gulf endorsement for a category C vessel: one harvest of groundfish in the Central Gulf between January 1, 1992 and June 17, 1995.¹⁶ I assume that Mr. Karuza meets the EQP requirement for a Central Gulf endorsement. Since the F/V VIS meets the EQP requirement for a Gulf of Alaska endorsement, it could satisfy the GQP requirement for a Central Gulf endorsement if it met the GQP requirement for a Bering Sea or Aleutian Island endorsement.¹⁷

The F/V VIS did not harvest groundfish in the Bering Sea or Aleutian Islands between January 1, 1988 and June 27, 1992, which is the first way of meeting the GQP requirement for a Bering Sea or Aleutian Islands endorsement.¹⁸ It did not harvest groundfish in BSAI with pot or jig gear between January 1, 1988 and December 31, 1994, which is the second way of meeting the GQP requirement for a Bering Sea or Aleutian Islands endorsement.¹⁹ It did not harvest BSAI crab between January 1, 1988 and February 9, 1992, which is required for the third way of meeting the GQP requirement for a Bering Sea or Aleutian Islands endorsement.²⁰ Therefore, the F/V VIS does not meet a GQP requirement for a Bering Sea or Aleutian Islands endorsement and cannot gain a Central Gulf endorsement this way.

¹⁶ 50 C.F.R. § 679.4(k)(4)(ii)(K). The fish tickets show groundfish harvests in the Central Gulf on May 21, 1993, May 27, 1993 and May 24, 1994. Mr. Karuza did not submit any evidence showing the F/V VIS meets the EQP requirement for a Southeast Outside endorsement: one groundfish harvest in Southeast Outside District between January 1, 1992 and June 17, 1995. The IAD does not state whether, according to the official LLP record, the F/V VIS meets the EQP requirement for a Central Gulf or a Southeast Outside endorsement. Even if it did, Mr. Karuza does not meet the GQP requirement for either endorsement.

¹⁷ 50 C.F.R. § 679.4(k)(4)(iv).

¹⁸ 50 C.F.R. § 679.4(k)(4)(i)(A)(1).

¹⁹ 50 C.F.R. § 679.4(k)(4)(i)(A)(2).

²⁰ 50 C.F.R. § 679.4(k)(4)(i)(A)(3).

I conclude that the fishing history of the F/V VIS does not satisfy any GQP requirement for an LLP groundfish license. I therefore conclude that Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V VIS.

2. Does Mr. Karuza qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V DEVOTION? No.

Mr. Karuza asks NMFS for an LLP groundfish license based on the fishing history of the F/V DEVOTION. Mr. Karuza states that he owned the F/V DEVOTION and sold it to Steven Good but retained the fishing history of the vessel.²¹

To receive an LLP license, the applicant must be an “eligible applicant.” An eligible applicant means [1] a person who owned a vessel with an LLP-qualifying fishing history on June 17, 1995 or [2] a person owns the qualifying fishing history “by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained .”²²

Mr. Karuza admits that he did not own the F/V DEVOTION on June 17, 1995 and that he sold the vessel to Steven Good before June 17, 1995. Mr. Karuza states that he has “torn his house apart” looking for a record showing that he did not sell the fishing history of the F/V DEVOTION to Mr. Good but has not found it.²³ The only record Mr. Karuza found was a statement signed by Mr. Good on May 3, 1991. In that statement, Mr. Good states he purchased the F/V DEVOTION from John Karuza in December 1990 and

It is not my intent to have Mr. Karuza’s “quota” of black cod or halibut; i.e., a quota based on the production record *prior to 1991*.²⁴

This written document does not clearly and unambiguously retain the F/V DEVOTION’s LLP-qualifying history to Mr. Karuza. First, it states that Mr. Karuza retained only the black cod and halibut fishing history of the F/V DEVOTION. It says nothing about groundfish. Second, it retains to Mr. Karuza only the black cod and halibut fishing history of the F/V DEVOTION *prior to* the sale, which means *prior to* December 1990. But, to qualify for an LLP groundfish license, a vessel must have harvested groundfish between January 1, 1992 and June 17, 1995, the

²¹ Letter from John Karuza to NOAA (Dec. 9, 2002).

²² 50 C.F.R. § 679.2. The regulation does not specify a date when the applicant must have owned the fishing history, but Mr. Karuza did not own an LLP-qualifying fishing history at any time.

²³ Letter from John Karuza to NOAA (Dec. 9, 2002).

²⁴ Statement by Steve Good, signed May 3, 1991 [emphasis added].

EQP for all endorsements on an LLP groundfish license.²⁵ Without specific language, it is not credible that the parties intended that Mr. Karuza would receive a license based on fishing done by the F/V DEVOTION *after* Mr. Karuza no longer owned the vessel. Third, Mr. Good applied for and received a permanent transferable LLP license based on the fishing history of the F/V DEVOTION.²⁶ This is inconsistent with Mr. Karuza's claim that, in their contract, Mr. Good agreed that Mr. Karuza retained the LLP-qualifying groundfish fishing history of the F/V DEVOTION.

I conclude that Mr. Karuza is not an eligible applicant for an LLP license based on the F/V DEVOTION's fishing history because he did not own the vessel on June 17, 1995 and does not own the LLP-qualifying fishing history of the vessel. I therefore conclude that Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the fishing history of the F/V DEVOTION.

3. Does Mr. Karuza qualify for an LLP license with Central Gulf and Southeast Outside endorsements based on the combined fishing history of the F/V DEVOTION and the F/V VIS? No.

Mr. Karuza asks for a license by combining the fishing history of the F/V DEVOTION, which harvested groundfish in the general qualification period [GQP] while he owned it in 1988, 1989 and 1990, with the fishing history of the F/V VIS, which harvested groundfish in the Central Gulf endorsement qualification period [EQP] while he owned that vessel in 1993, 1994 and 1995. Even if Mr. Karuza could prove that he retained the GQP groundfish fishing history of the F/V DEVOTION, NMFS does not have the authority to combine fishing histories in this way.

The LLP regulation defines an eligible applicant for an LLP license as a person who owned "*a vessel* on June 17, 1995, from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5)" or the person to whom "*the fishing history of a vessel*" that made those harvests was transferred.²⁷ A vessel – one vessel – must have made the harvests in the qualifying periods that are required for an LLP license. This Office stated in *Kevin Suydam*: "[T]he existence of both the GQP and EQP harvests by the same vessel is what makes

²⁵ 50 C.F.R. § 679.4(k)(4)(ii). Depending on the size of the vessel and the area endorsement, an applicant can need more than one harvest in this time period but all endorsements require at least one

²⁶ NMFS Alaska Region website <<http://ww.fakr.noaa.gov/ram/daily/llp_gf.pdf>> visited November 22, 2004. The website lists the licenses NMFS has issued and the original qualifying vessel, by ADFG number, for each license. The website shows Steve Good is the current license holder.

²⁷ 50 C.F.R. § 679.2 (emphasis added).

that vessel a ‘qualifying vessel.’”²⁸

The LLP regulations do not allow NMFS to combine the GQP history of one vessel with the EQP history of another vessel, unless the vessel that made the GQP history is lost or destroyed.²⁹ The commentary to the original LLP rule explicitly states: “[O]nly one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel’s fishing history cannot be divided so that multiple licenses would be issued.”³⁰

But Mr. Karuza’s position would require NMFS to do just that. NMFS issued an LLP license based on the fishing history of the F/V DEVOTION to Steven Good. If NMFS issued Mr. Karuza an LLP license based on the GQP harvest of the F/V DEVOTION, NMFS would both be dividing the fishing history of the F/V DEVOTION – between Mr. Good and Mr. Karuza – and issuing two LLP licenses based on the F/V DEVOTION’s fishing history – one to Mr. Good and one to Mr. Karuza. This result would contradict the language and fundamental structure of the LLP. The whole point of the definition of eligible applicant is that NMFS must determine a single eligible applicant – *either* the person who owed the vessel on June 17, 1995 *or* the person who owns the vessel’s LLP fishing history through a contract with the June 17th owner

I conclude that NMFS has no authority to combine the GQP history of the F/V DEVOTION with the EQP history of the F/V VIS. I therefore conclude that Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the combined fishing history of the F/V DEVOTION and the F/V VIS.

FINDINGS OF FACT

²⁸ *Kevin Suydam*, Appeal No. 02-0032 at 5 (Aug. 23, 2004). *Suydam* involved an LLP crab license. To retain a crab LLP license, NMFS added a requirement that the license holder must have the status as a participant of crab in a recent participation period [RPP]. Final Rule, 66 Fed. Reg. 48,813 (Sept. 24, 2001) amended by Final Rule, 68 Fed. Reg. 46,117 (Aug. 5, 2003) *codified at* 50 C.F.R. § 679.4(k)(5)(iii). The license holder may meet the RPP requirement through a harvest from *any* vessel and may use the same harvest to retain more than one LLP license. *See Bella K of Seattle, LLC*, Appeal No. 02-0006 at 3 - 7 (March 25, 2004).

²⁹ NMFS may combine the fishing history of a vessel that is lost, destroyed or unable to participate in the fishery with a replacement vessel under the unavoidable circumstance regulation. 50 C.F.R. § 679.4(k)(8)(iv); *Mark Donovick*, Appeal No. 02-0008(A)(Sept. 27, 2002). Mr. Karuza does not allege that either the F/V VIS or the F/V DEVOTION was lost or destroyed.

³⁰ Final Rule, 63 Fed. Reg. 52,642, 52,646 (Oct. 1, 1998). NMFS has, on rare occasions, allowed the same vessel’s fishing history to result in two licenses or quotas but only if, because of agency action, an innocent third party purchaser for value purchased a second license or quota share. *In re Application of Darius Baltz*, Appeal No. 95-0028 (Jan. 30, 1996)(quota share); *R.J. Fierce Packer*, Appeal No. 00-0004 (Dec. 18, 2000)(LLP license). Mr. Karuza is not a third party purchaser of this LLP license.

1. The F/V VIS did not make a documented harvest of groundfish between January 1, 1988 and June 27, 1992 in the Gulf of Alaska.
2. The F/V VIS did not make a documented harvest of groundfish between January 1, 1988 and December 31, 1994 with pot or jig gear in the Gulf of Alaska.
3. The F/V VIS did not make a documented harvest of king or Tanner crab in BSAI between January 1, 1988 and February 9, 1992.
4. The F/V VIS did not make a documented harvest of groundfish in the BSAI between January 1, 1988 and June 27, 1992.
5. The F/V VIS not make a documented harvest of groundfish between January 1, 1988 and December 31, 1994 with pot or jig gear in BSAI.

CONCLUSIONS OF LAW

1. The fishing history of the F/V VIS does not meet any general qualification period requirement for an LLP groundfish license in 50 C.F.R. § 679.4(k)(4)(i) or (iv).
2. Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement, based on the fishing history of the F/V VIS.
3. Mr. Karuza does not own the LLP-qualifying fishing history of the F/V DEVOTION according to a written contract that clearly and unambiguously provides that he owns that history.
4. Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf of Southeast Outside endorsement, based on the fishing history of the F/V DEVOTION.
5. Mr. Karuza does not qualify for an LLP groundfish license with a Central Gulf or Southeast Outside endorsement based on the combined fishing history of the F/V VIS and the F/V DEVOTION.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect August 22, 2005, unless by that date the Regional Administrator orders review of the Decision.

Any party 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, August 1, 2005. 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 in support of the motion.

Mary Alice McKeen
Appeals Officer