NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0118
	)	
DANIEL F. VEERHUSEN,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
PATRICK H. McBRIDE,	)	
Respondent	)	June 25, 1997
	)	

STATEMENT OF THE CASE

Appellant Daniel F. Veerhusen filed a timely appeal of an Initial Administrative Determination [IAD] issued on May 10, 1995, by the Restricted Access Management Division [Division] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program. Patrick H. McBride was joined as a Respondent by this Office on July 17, 1995. In the IAD, the Division determined that a partnership formed by the parties owned a fishing vessel[1] and leased it to a corporation (also owned by the parties) during the period January 11, 1984, through December 31, 1989. The IAD awarded qualifying pounds of halibut to the parties in proportion to their relative ownership interests in the dissolved corporation. Mr. Veerhusen was awarded 51 percent of the qualifying pounds; Mr. McBride was awarded 49 percent.[2] On appeal, Mr. Veerhusen asserts that all the qualifying pounds should be awarded to him. He has adequately alleged that his interest is directly and adversely affected by the IAD.

An oral hearing was held before Appeals Officer James C. Hornaday, October 28, 1995. Mr.

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[1]During this period Mr. Veerhusen was listed as the vessel's registered owner with the State of Alaska's Commercial Fisheries Entry Commission. It is undisputed, however, that Mr. McBride purchased a 10 percent ownership interest in the partnership and the vessel in 1982 for $30,000 and held that interest during the entire period of the claimed lease. *See,* McBride's Response to Veerhusen's Appeal, at 3; and Partnership Agreement, at 1-2. Finally, and most important, the U.S. Coast Guard abstract of title for the F/V INVADER shows that the Partnership owned the vessel from December 31, 1982, through March 14, 1990.

[2]The IAD, at 7, states that the quota shares [QS] resulting from the award of qualifying pounds would not be issued to either party pending the exhaustion of all administrative processes, including any appeal. In fact, the Division has issued to Mr. Veerhusen the amount of QS that corresponds to the award of 51 percent of the qualifying pounds. This appeal challenges only whether the 49 percent of qualifying pounds was properly awarded to Mr. McBride.

Veerhusen appeared in person and was represented by attorney Jess G. Webster. Mr. McBride appeared in person and was represented by attorney Carol Saboda. Additional witnesses included Marilyn Gnad, CPA; Barbara McBride, wife of Mr. McBride; and Deborah Shapiro, former wife of Mr. Veerhusen. The parties were given additional time to supplement their arguments and, in response, both filed timely briefs.

ISSUES

1. Whether a vessel lease existed between F/V Invader Partnership and F/V Invader, Inc. during the period of January 1984 - December 1989.

2. Whether Mr. Veerhusen is the sole successor-in-interest to F/V Invader, Inc., and to the F/V Invader Partnership.

3. Whether F/V Invader, Inc., should be disregarded as a corporate entity because of alleged flaws in its formation.

4. Whether Mr. Veerhusen leased the F/V INVADER from the Partnership in 1989.

BACKGROUND

In 1982 Mr. Veerhusen and Mr. McBride formed the F/V Invader Partnership [Partnership] for the purpose of jointly owning the fishing vessel F/V INVADER. Mr. Veerhusen held a 90 percent interest in the partnership and Mr. McBride held a 10 percent interest. This reflected their relative ownership interests in the vessel. The parties also created F/V Invader, Inc. [Corporation] for the purpose of managing and operating the vessel. Mr. Veerhusen held 51 percent of the corporate stock and Mr. McBride held 49 percent.

The Corporation's Articles of Incorporation were filed with the State of Alaska on June 8, 1982. [State of Alaska DEC Certificate of incorporation] The Corporation possessed a corporate checking account and filed biennial reports and corporate federal income tax returns. At its first meeting [August 24, 1982], the Corporation's board of directors elected Mr. Veerhusen as president of the Corporation.

In their pre-incorporation agreement [February 25, 1982], Mr. Veerhusen and Mr. McBride had agreed that the Corporation would manage and operate the F/V INVADER under a "Charter Agreement" with the partnership. The parties acknowledge that a written charter agreement or vessel

lease was never executed.[3] All of the witnesses at the hearing testified that there was no written lease for the charter of the F/V INVADER by the Corporation. Mr. McBride argues that a vessel lease between the Partnership and the Corporation existed, nonetheless. Mr. McBride asserts that from the evidence in the record it can be deduced that a vessel lease existed during the period January 1, 1984, through December 31, 1989, and that therefore the Corporation is entitled to receive IFQ credit for any qualifying pounds landed during that period. Mr. McBride also asserts that the Corporation was dissolved in June of 1990 by virtue of a "Settlement and Release" signed by both parties. He further argues that the IAD correctly awarded him 49 percent of the qualifying pounds based on his interest in the dissolved Corporation.

Mr. Veerhusen argues that qualifying pounds should be allocated to the successors-in-interest of the Partnership, which owned the vessel. He bases this argument on two theories: (1) that there was never a bona fide vessel lease from the Partnership to the Corporation; and (2) that the Corporation's existence should be disregarded because it was not properly formed in compliance with Alaska laws. In addition, Mr. Veerhusen asserts that he is the sole successor-in-interest to both the Partnership and the Corporation and that, regardless of whether a vessel lease existed or not, all qualifying pounds should be allocated to him. Finally, Mr. Veerhusen argues that he held a lease of the F/V INVADER from the Partnership during 1989 and, therefore, he should be credited with all qualifying pounds for 1989.

PRESUMPTIONS AND BURDEN OF PROOF

There are no presumptions in favor of either party on appeal from a Division IAD by virtue of either the Division's administrative presumption against leases or the party having prevailed in the IAD. An "appeal" is a *de novo* proceeding. Because our appeals are *de novo*, the parties on appeal should begin on an equal footing. To the extent that an appellant has the burden of production, that burden is minimally met by filing an appeal that complies with requirements of the IFQ regulations. Each party to an appeal has the same burden of persuasion that the evidence supports the party's position. Smee v.

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[3]The minutes of the first meeting of the board of directors state [at 4] that the "Chairman presented to the meeting a proposed lease for the purpose of leasing the premises for the Company's principal offices" and resolved "that the lease with Daniel F. Veerhusen and Patrick H. McBride for the F/V Invader, in the form presented to this meeting, is hereby approved, and the officers of the Company are authorized to execute such lease on behalf of the company, and that the Secretary is directed to file a copy of such lease with the minute [sic] of this meeting." As evidence of the existence of a proposed vessel lease, this language is ambiguous, at best. The minutes suggest that the proposed lease in question was for real estate premises to be used as office space, not a lease for use of the vessel. There is no evidence in the record that clarifies this ambiguity. If this was, in fact, a proposed vessel lease, it was never executed.

DISCUSSION

1. Whether a vessel lease existed between F/V Invader Partnership and F/V Invader, Inc. during the period of January 1984 - December 1989.

Under IFQ regulations, a person who owned or leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any quota share [QS] qualifying year [1988-1990], is a "qualified person." 50 C.F.R. § 679.40(a)(2),[5] A qualified person is eligible to receive QS based on the amount of legal landings made from the vessel during the qualifying and base years.[6] The owner of a vessel cannot become a qualified person on the basis of landings made while the vessel was leased to another person.[7] Such landings will be credited to the vessel lessee, but only if the lessee is a qualified person. If not, then neither the lessee nor the owner will receive credit for landings made during the period of the lease.

Under the IFQ regulations, a claimed lessee can conclusively establish the existence of a vessel lease by producing a valid written bareboat charter or vessel lease, or by submitting a notarized statement signed by the vessel owner and lease holder that attests to the existence of the lease. 50 C.F.R. § 679.40(a)(3)(iii). In the present case, a written vessel lease was never executed, nor has even a draft written lease been presented. Mr. McBride did submit to the Division a completed lease affidavit form, but he signed it as both vessel owner (on behalf of the Partnership) and vessel lessee (on behalf of the Corporation). I do not accept this as conclusive evidence of the existence of a lease because Mr. McBride held a minority interest in the Partnership and in the Corporation, and because the existence of the lease is contested by Mr. Veerhusen, who held a majority interest in the Partnership and in the Corporation. Under these circumstances I would not accept a lease affidavit as conclusive evidence unless it were signed by both Mr. Veerhusen and Mr. McBride. A lease affidavit is reliable evidence of

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[4]Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, at 4-5, *aff'd,* August 20, 1996, *aff'd,* Smee v. N.M.F.S, C96-1512WD (W.D. Wash., June 9, 1997).

[5]Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

[6]A qualified person's allocation is based on the best five years of landings, from all the person's vessels combined, during the period 1984-1990 [halibut] or 1985-1990 [sablefish]. The Division allocates to a qualified person only those qualified pounds resulting from legal landings made from vessels that the person owned or leased at the time of the landings.

[7]50 C.F.R. § 679.40(a)(2).

the existence of a lease only when the owner's signature constitutes a statement against the owner's interest. That is not the case with the affidavit submitted by Mr. McBride. Therefore, in this case there is no conclusive evidence of a lease.

In the absence of conclusive evidence, other evidence of a vessel lease may be submitted. 50 C.F.R. § 679.40(a)(3)(iii). In that event, the Appeals Officer is to review all the evidence in the record to determine whether the parties entered into a valid unwritten vessel lease agreement.

The IFQ regulations do not define what constitutes a lease. In a series of decisions by this Office, including most prominently, Seater v. Seater & Seater Partnership,[8] O'Rourke v. Riddle,[9] Kristovich v. Dell,[10] and Smee v. Echo Belle, Inc.,[11] we identified several factors that an Appeals Officer should consider when deciding whether a non-written vessel lease existed. These factors are:

(1) how the parties characterized their business arrangement at the relevant times.

(2) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

(3) whether the claimed lessee directed fishing operations of the vessel;

(4) whether the claimed lessee had the right to hire, fire, and pay the crew;

(5) whether the claimed lessee was responsible for the operating expenses of the vessel;

(6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes; and

(7) whether the claimed lease had a set or guaranteed term.

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[8] Appeal No. 94-0010, June 6, 1995, at 10, *aff'd,* June 9, 1995.

[9] Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

[10] Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996.

[11] Appeal No. 95-0076, August 1, 1996, at 7-8, *aff'd,* August 20, 1996, *aff'd,* Smee v. N.M.F.S., C96-1512WD (W.D. Wash., June 9, 1997).

In Smee we also stated:

> These were intentionally called *factors*, rather than *elements*, because they are meant to be used as analytical tools or guideposts to help the Appeals Officer decide whether there was a vessel lease. Because neither the IFQ regulations nor the regulatory history provided a definition of *vessel lease*, and because of the great variety of business arrangements between owners and operators of fishing vessels, we have found it necessary to apply a flexible case-by-case analysis in these types of appeals. In each case, we are trying to determine whether the party who claims to have held a vessel lease had sufficient control of the fishing operations and assumed sufficient entrepreneurial risk from the fishing operations to qualify as a lessee for purposes of the IFQ program. *Id.* at 6.

Recognizing the necessity for flexibility in case-by-case lease inquiries, Smee emphasized that these were non-exclusive factors and that others might be added in individual situations to determine the ultimate question of which of the contending parties "had sufficient control of the fishing operations and assumed sufficient entrepreneurial risk from the fishing operations" to establish whether there was a vessel lease or some other arrangement. *Id.*

As a guideline in weighing the factors, we stated that the North Pacific Fisheries Management Council [Council] intended to allocate QS to those persons who acted like *entrepreneurs* in controlling and directing the fishing operations that produced the legal landings in question.[12] We defined an entrepreneur as one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.[13] We said that this is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons" for QS.

I will now apply the factors to the evidence in the record.

(1) The parties' characterization of the arrangement

The pre-incorporation agreement signed by the parties provided that the Corporation would manage and operate the F/V INVADER under a "Charter Agreement" with the Partnership. The Partnership and the Corporation were both created in June 1982, and existed throughout the relevant period. The Articles of Incorporation, Art. II, specify that the purpose and object of the Corporation was to operate and manage a fishing vessel. Although the articles do not use the term "charter" or "lease," the articles are consistent with the intent to lease the vessel expressed in the pre-incorporation agreement. The minutes of the organizational meeting of the board of directors mentions a "lease with Daniel F.

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[12] O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, *aff'd*, May 23, 1995.

[13] Webster's II New Riverside University Dictionary 436 (1988).

Veerhusen and Patrick H. McBride for the F/V Invader" that was presented to the meeting. As mentioned earlier in this decision, however, the same section of the minutes creates an ambiguity by referring to this as a "proposed lease for the purpose of leasing the premises for the Company's principal offices." [*See,* f.n. 3, *supra.*]

The tax returns filed by the Corporation for 1984-1989 show that the Corporation claimed deductions for *rents* in its commercial fishing business. Corporate check registers for the years 1985 - 1987 show boat lease payments to the Partnership during fishing seasons. There is no evidence in the record that the parties ever referred to the Corporation's operation of the vessel as anything other than a charter or lease.

Given the specific language of *lease, charter,* and *rents* in various corporate documents and tax returns both before and during the relevant period, I find that the weight of the evidence shows that the Corporation and Partnership characterized their arrangement for the use of the vessel as a lease during the relevant period.

(2) Possession and command of the vessel and control of navigation

Mr. Veerhusen claims that Mr. McBride served as the F/V INVADER's master and operator until the summer of 1983, and that after that period either Mr. Veerhusen or skippers hired by him possessed and commanded the vessel and controlled the vessel's navigation. The evidence shows that Mr. McBride skippered the vessel at least for one halibut opening on September 9, 1989. The question of who possessed and commanded the vessel, and controlled the vessel's navigation, during the relevant period, is predicated on whether Mr. Veerhusen, the skippers, and Mr. McBride were acting on behalf of the Partnership or the Corporation. Given the absence of corporate records, policies, or meetings regarding such, I find that the evidence is inconclusive as to what entity possessed and commanded the vessel, and controlled the vessel's navigation during the relevant period.

(3) Direction of the fishing operations of the vessel

Mr. Veerhusen claims in his appeal that he determined what fisheries to fish, and where to market the fish. For the same reasons stated in factor 2, above, I find that the evidence is inconclusive as to whether Mr. Veerhusen was acting on behalf of the Partnership or the Corporation with regard to the fishing activities of the vessel during the relevant period.

(4) The right to hire, fire, and pay the crew

Mr. Veerhusen claims that he hired the crew and determined how much to pay the crew during the relevant period. The evidence shows that the crew was paid by the Corporation and that the Corporation claimed the payments as deductions on its tax returns for 1984-1989. Mr. McBride

asserts that four individuals skippered the vessel during the relevant period.[14] Mr. McBride submitted copies of the Corporation's 1985 check register showing advances and payments to various crewmembers. He also submitted cancelled checks of the Corporation showing payment of halibut shares in 1988 to Kirk Nelson, David Hasselquist, Robin Spivey, Bruce Buck, John Franklin, and Patrick McBride. The record shows that the Corporation issued federal tax form 1099s to (among others) David Hasselquist (1988), Patrick McBride (1988-1989), Bruce Buck (1988-1989), Kirk Nelson (1988-1989), and John Franklin (1988). The record does not contain any written crew contracts, and Mr. Veerhusen states that he does not recall there being any written contracts for employment of the crew, and that it is uncertain who employed the crew during the years in question. [Appeal, at 4]

Although the records showing crewmember payments during the years in question are incomplete, the Corporation consistently claimed the crewshare deductions for these years. Mr. Veerhusen does not dispute that the Corporation made many, if not all, the crewshare payments during the period of the claimed lease. Therefore, I find that the preponderance of the evidence shows that the Corporation paid the crew of the F/V INVADER during the period of the claimed lease.

(5) Responsibility for the operating expenses of the vessel

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

The evidence shows that the Corporation paid for the vessel's operating expenses, including crew shares, out of its corporate checking account. These payments are consistent with the Corporation's claim of a lease of the F/V INVADER during the relevant period. On the other hand, the Corporation paid no dividends, it retained none of its earnings, and its shareholders had paid little or nothing for its stock. Therefore, the Corporation had no capital of its own. The Corporation, furthermore, had no real credit line or obligations of its own. Any money needed to cover corporate shortfalls was loaned

[14]Mr. McBride submitted Alaska State fish tickets showing that landings of halibut were made on the gear cards of Pat McBride (1989), Garth Tyler (1986 and 1987), Kevin Fitzgerald (1986), and Jack Ranweiler (1985).

by the Partnership. Maritime liens relating to, and the CFAB loan acquired for, the vessel's operation were the responsibility of the Partnership, not the Corporation.

Thus, while the Corporation made the actual payments for the vessel's operating expenses, the Partnership was actually the financially responsible party. In effect, only the Partnership enjoyed the financial benefits of the vessel's operations; and only the Partnership suffered, if fishing failed. I therefore find that the Partnership bore the primary financial responsibility and risk for the vessel's operations.

(6) Treatment of the vessel's operations for tax and other purposes
The Corporation's tax returns show that the Corporation claimed business income and deductions for commercial fishing during the period 1984-1989. The deductions included expenses incurred for gear, fuel and oil, supplies, crew shares, and lease payments or rents for use of the vessel.

The lease payments are of particular interest. The amount of money that passed to the Partnership as "lease payments" varied widely from year to year, from a low of $73,110 in 1983 to a high of $151,668 in 1988. There was no uniformity in the amount of lease payments as a function of gross income of the vessel. Lease payments as a function of gross income varied from a low of 15.25% in 1989 to a high of 71.94% in 1988. While the dollar amount and percentage of gross varied from year to year, the payments consumed all of the proceeds left after payment of the other expenses of the fishing operations. In other words, from the Corporation's tax records I would have to infer that the Corporation had agreed to pay 100 percent of its profits to the Partnership as a lease fee. That is simply not an economically reasonable agreement that a prudent business person would make.

That a Corporation would enter into such a one-sided lease arrangement can only be explained by the fact that the same principals were involved on both sides of the transaction. The lease was not an arms-length transaction; it was obviously intended to benefit only the Partnership.
Characterizing 100 percent of the net profits as rent or lease payments appears to be nothing more than an accounting device intended to shift the profits to the Partnership and reduce the Corporation's taxable income to zero.

While it is not the purpose of the IFQ program to compensate a party for unfair or unwise business bargains,[15] it is the intent of the program to award QS to persons who acted like entrepreneurs. As we have previously stated, an entrepreneur is one who organizes, operates, and assumes the risk in a business venture *in expectation of gaining the profit*. The Corporation does not meet this definition.

The tax returns show that during the relevant period the Corporation paid no taxes (except for a small

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[15] *See,* Seater v. Seater & Seater Partnership, Appeal No. 94-0010, June 6, 1995, at 10, *aff'd,* June 9, 1995.

amount in 1986), retained none of its earnings, distributed no dividends, and had virtually no assets or stockholder equity. The Corporation was throughout that period an undercapitalized entity, created solely to obtain tax benefits and insulation from liability. The returns show that the Corporation's stockholders received no direct financial benefit from its commercial fishing operations.

Thus, I find that while the tax returns indicate on their face that the vessel was leased for the Corporation's business, a closer examination of the returns shows that the vessel was operated on behalf of, and for the sole benefit of, the Partnership. I also find that the evidence from the tax records strongly indicates that this was not a legitimate vessel lease as contemplated in the IFQ regulations as a basis for awarding QS.

(7) Whether the claimed "lease" was for a set or guaranteed term

There is no evidence that the parties agreed to a set or guaranteed term for the use of the vessel. The Partnership could at any time reclaim possession of the vessel. It appears that the Partnership did just that, at least during a portion of 1989, when Mr. Veerhusen used (perhaps "leased") the vessel, on his own behalf, for the October 1989 halibut opener.[16] Because of this, I find that the arrangement had no fixed term.

Summary of evidence

Having reviewed the evidence and arguments relating to the existence of a vessel lease, I conclude that the preponderance of the evidence supports Mr. Veerhusen's contention that there was no bona fide lease of the vessel from the Partnership to the Corporation. Two findings support Mr. McBride's position that a vessel lease existed: the parties characterized their arrangement for use of the vessel as a lease and the Corporation paid the crewmembers during the claimed lease period. The evidence on two other factors was inconclusive: whether Mr. Veerhusen possessed, commanded, and controlled the vessel, and whether he directed the fishing operations of the vessel, on behalf of the Partnership or the Corporation. Three findings support Mr. Veerhusen's position: the Partnership bore the primary financial responsibility and risk for the vessel's operations, the vessel was operated for the sole benefit of the Partnership, and the claimed lease had no fixed term.

Although the findings that support Mr. Veerhusen's position outnumber those that support Mr. MrBride's position, my conclusion is not based on this mere numerical advantage for Mr. Veerhusen. I did not give equal weight to all the factors. The most significant consideration in reaching my conclusion was that the Corporation did not act as an entrepreneur as contemplated by the IFQ program. The real entrepreneur was the Partnership. Although the documents in the record show some of the outward signs of a vessel lease, in substance it was the Partnership that bore the financial risks and

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[16] *See* Mr. Veerhusen's crew settlement statement for the October 1989 halibut opener, and his 1989 federal tax return, which shows income from commercial fishing, and a deduction for the rent or lease of property (more than $100,000).

responsibility of the fishing operations, and it was the Partnership that reaped the benefits of the fishing operations.

2. Whether Mr. Veerhusen is the sole successor-in-interest to F/V Invader, Inc., and to the F/V Invader Partnership.

The record contains a copy of a "Settlement and Release" signed by both parties in June 1990. The document recites that the Partnership had already sold the vessel and that Mr. Veerhusen and Mr. McBride "agree to dissolve the Partnership and the Corporation under the following terms and conditions . . .." The terms and conditions included:

- P McBride granted all his interest in the Partnership and Corporation assets to Veerhusen;
- P Veerhusen assumed all Partnership and Corporation liabilities;
- P Veerhusen agreed to indemnify McBride for any Partnership and Corporation liabilities;
- P Veerhusen agreed to pay McBride $12,000 and the title to certain crab pots; and
- P Both parties released each other from any claims arising out of their ownership or operation of the Partnership and Corporation.

Mr. McBride asserts that this document had the legal effect of dissolving the Partnership and the Corporation. [Response to Veerhusen's Appeal, at 10] He contends that at the time of dissolution he still held a 49 percent interest in the Corporation and, presumably, a 10 percent interest in the Partnership.

Mr. Veerhusen contends that he acquired a 100 percent interest in the Partnership and the Corporation when Mr. McBride transferred his interest in the Partnership and Corporation for value, as provided in the Settlement and Release. Mr. Veerhusen also asserts that the Corporation was not dissolved by the Settlement and Release, but only when the State of Alaska issued a Certificate of Involuntary Dissolution on September 8, 1992, more than two years after the Settlement and Release was executed. Thus, Mr. Veerhusen argues that he is the sole successor-in-interest of the Corporation, as well as of the Partnership, and that he is the only proper applicant for QS resulting from the fishing operations of the Corporation and the Partnership. [Veerhusen's Reply to McBride's Summary of Argument, at 1-5]

Under the IFQ regulations, qualifying pounds landed by a Partnership or Corporation that was subsequently dissolved are credited to those former partners or shareholders who are qualified applicants. The pounds are allocated to each former partner or shareholder in proportion to their

relative interests in the Partnership or Corporation. 50 C.F.R. § 679.40(a)(2)(iii).[17] Thus, when deciding whether an allocation was proper, it is necessary to determine the percentage interest each party held in the dissolved Partnership or Corporation.

Since I have already decided in this Appeal that a vessel lease of the type contemplated by the IFQ program did not exist between the Partnership and the Corporation, it is technically unnecessary to determine the parties' relative interests in the Corporation. The proper allocation must be based on the parties' relative interests in the Partnership. Nevertheless, I find it useful to the resolution of this Appeal to determine the parties' interests in both entities.

Relative interests in the Partnership

In several decisions this Office has approved the Division's view that, for purposes of the IFQ program, a partnership is dissolved whenever the membership changes. *See, e.g.,* Silver Ice Fisheries Partnership v. Arctic Select Seafoods, Inc., Appeal No. 95-0114, October 30, 1996, at 3-5, *aff'd,* November 12, 1996. The former partners' interests are measured as of the last moment when they were all still partners. *Id.,* at 5. By executing the Settlement and Release, the parties dissolved the Partnership. Their relative interests at that time were: Mr. Veerhusen = 90 percent and Mr. McBride = 10 percent. Therefore, Mr. Veerhusen is not the sole successor-in-interest of the Partnership.

Relative interests in the Corporation

Former shareholders' interests in a corporation are measured at the time of dissolution. F/V INVADER, Inc., was an Alaska corporation. Under Alaska law a corporation is not dissolved until a Certificate of Dissolution is issued by the state. Alaska Stat. § 10.06.625 (Michie 1989). A certificate dissolving the Corporation was not issued until September 8, 1992. [Appellant's Exhibit 16] That was more than two years after the Settlement and Release was executed and after Mr. McBride had transferred his entire interest in the Corporation to Mr. Veerhusen. Therefore, I find that the Corporation was not dissolved by the Settlement and Release. Rather, I find that the Corporation was dissolved on September 8, 1992. At the time of dissolution, Mr. Veerhusen held a 100 percent ownership interest in the Corporation. Therefore, Mr. Veerhusen is the sole successor-in-interest of the Corporation. Thus, if I had concluded that a vessel lease existed between the Partnership and the Corporation, as Mr. McBride argued, I would also have concluded that the proper allocation of qualifying pounds would have been 100 percent to Mr. Veerhusen.

Retention or transfer of IFQ rights

Mr. Veerhusen also asserts that when he sold the vessel,[18] he reserved all present and future rights to

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[17]Formerly, 50 C.F.R. § 676.20(a)(1).

[18]I note here that the U.S. Coast Guard abstract of title for the F/V INVADER shows that the vessel was sold by the Partnership to the Corporation on March 14, 1990. It also shows that the

participate in the longline fisheries, and that Mr. McBride knew this when he signed the Settlement and Release. Mr. Veerhusen thus argues that McBride's conveyance of all his interest in the Partnership and the Corporation included any future fishing rights. [Appeal, at 6] Mr. McBride responds that the transfer of his interests to Mr. Veerhusen did not include any future rights to QS because such rights were "unknown and unknowable" at that time. [Response to Veerhusen's Appeal, at 10]

The parties are here focusing on whether future fishing rights, i.e., eligibility for initial issuance of QS, were retained by, or transferred to, Mr. Veerhusen as a result of the vessel sales agreement or the Settlement and Release, or both. These arguments are irrelevant to the resolution of this Appeal. Determinations regarding the allocation of qualifying pounds and the issuance of QS are governed by the IFQ regulations, not by the terms of private agreements. This Office has approved the Division's view that eligibility for the initial issuance of QS cannot be assigned. One must be a qualified person's successor-in-interest, as contemplated by the IFQ regulations, to receive credit for that person's qualifying pounds. *See, e.g.,* Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd,* January 18, 1996; Alwert Fisheries, Inc. v. Oregon Seafood Producers and Dorothy L. Painter, Appeal No. 95-0073, March 21, 1996, *aff'd,* March 27, 1996.

3. Whether F/V Invader, Inc., should be disregarded as a corporate entity because of alleged flaws in its formation.

Mr. Veerhusen asserts that the Corporation did not comply with various formalities essential to the Corporation's existence under Alaska law. He states, for example, that an organizational meeting was never held, organizational minutes were never signed, stock was not issued, consideration for stock was not paid, and annual meetings of shareholders and directors were not held. Therefore, he argues, the Corporation's existence should be disregarded and qualifying pounds should be allocated to the successors-in-interest of the Partnership.

Again, it is unnecessary to decide this question because I have already concluded that the Corporation did not hold a vessel lease and that the proper allocation must be based on the parties' relative interests in the Partnership. But since I have already stated that the Corporation was dissolved in 1992, I will consider the argument that the Corporation's existence should be disregarded.

Mr. Veerhusen's argument for disregarding the Corporation is based on Alaska case law that sets out

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Corporation sold the vessel to a third party on March 1, 1991. The Settlement and Release was dated June 1990. Thus, I assume that the previous sale mentioned in the Settlement and Release refers to the sale to the Corporation.

factors to consider when deciding whether to pierce the corporate veil and impose liability on a parent entity or shareholder. [Appeal, at 9-10] Here, by contrast, the question is whether a corporation was sufficiently in legal existence that it could enter into a vessel lease or apply for QS. It is not clear that the same factors stated in the case law should be applicable in this context. Beyond that, the argument is disingenuous. Surely Mr. Veerhusen is not arguing that he is the sole successor-in-interest of an entity that never existed. And if someone were seeking to pierce the corporate veil and impose liability on Mr. Veerhusen, I presume he would assert the validity of the Corporation's existence to shield himself from personal liability.

If the Corporation failed to comply with certain legal formalities, Mr. Veerhusen has no one to blame but himself. He was the president and majority shareholder of the Corporation. It was he who proposed forming the Corporation. [McBride's Response to Veerhusen's Appeal, at 2] More to the point, the Corporation's existence was recognized by the State of Alaska when it issued the Certificate of Incorporation. Mr. Veerhusen himself acknowledged the legal existence of the Corporation by filing corporate income tax returns and by agreeing to purchase Mr. McBride's interest in the Corporation. It is too late now for Mr. Veerhusen to attempt to disavow the existence of his own corporation.

Notwithstanding the Corporation's alleged failure to comply with legal formalities of formation, the issuance of a Certificate of Incorporation by the State of Alaska is sufficient evidence of the existence of a corporation for IFQ program purposes. Therefore, I find that the Corporation began its existence on June 8, 1982. The Corporation remained in existence until the state issued a Certificate of Dissolution on September 8, 1992. I conclude that the Corporation's existence should not be disregarded in this Appeal.

4. Whether Mr. Veerhusen leased the F/V INVADER from the Partnership in 1989.

This Office has ruled that applicants who do not raise a claim on an RFA or application for QS, or in some other manner before the 90-day deadline for substantiating claims, do not have a timely claim for which relief could be granted on appeal.[19] Mr. Veerhusen's claim on appeal is altogether different than that made on his RFA or at any time during the application period, including the 90-day deadline for substantiating claims. On his RFA he stated that he was a 90 percent owner of a dissolved partnership, which owned the F/V INVADER during the relevant period. On appeal he raised an additional claim: that he individually leased the vessel from the Partnership in 1989. He made this claim for the first time on appeal. Since it was not made at any time during the application period, I find that it is untimely and may not be considered on appeal.

[19] Tiger, Inc., Appeal No. 95-0100 (Decision on Reconsideration), February 26, 1996, at 3.

FINDINGS OF FACT

1. The Corporation and Partnership characterized their arrangement for the use of the vessel as a lease during the relevant period.

2. The evidence is inconclusive as to which entity possessed and commanded the vessel, and controlled the vessel's navigation during the relevant period.

3. The evidence is inconclusive as to whether Mr. Veerhusen was acting on behalf of the Partnership or the Corporation with regard to the fishing activities of the vessel during the relevant period.

4. The Corporation paid the crew of the F/V INVADER during the period of the claimed lease.

5. The Partnership bore the primary financial responsibility and risk for the vessel's operations.

6. The F/V INVADER was operated on behalf of, and for the sole benefit of, the Partnership.

7. The arrangement between the parties for the use of the F/V INVADER did not have a fixed or guaranteed term.

8. The Partnership was dissolved in June 1990, when the Settlement and Release was executed.

9. When the Partnership was dissolved, Mr. Veerhusen held a 90 percent ownership interest and Mr. McBride held a 10 percent interest.

10. The Corporation began its existence on June 8, 1982.

11. The Corporation was dissolved on September 8, 1992.

12. When the Corporation was dissolved, Mr. Veerhusen held a 100 percent ownership interest.

CONCLUSIONS OF LAW

1. The arrangement between the parties for the use of the F/V INVADER was not a legitimate vessel lease as contemplated in the IFQ regulations as a basis for awarding QS.

2. By executing the Settlement and Release, the parties dissolved the Partnership.

3. Mr. Veerhusen is not the sole successor-in-interest of the Partnership.

4. An Alaska corporation begins its existence, for IFQ program purposes, when the State of Alaska issues a Certificate of Incorporation.

5. Former shareholders' interests in a corporation are measured at the time of dissolution.

6. An Alaska corporation is dissolved, for IFQ program purposes, when the State of Alaska issues a Certificate of Dissolution.

7. The Corporation was not dissolved by the Settlement and Release.

8. Mr. Veerhusen is the sole successor-in-interest of the Corporation.

9. The Corporation's existence should not be disregarded in this Appeal.

10. Mr. Veerhusen's claim to have leased the F/V INVADER in 1989 is untimely and may not be considered on appeal.

DISPOSITION

The Division's IAD, dated May 10, 1995, that allocated qualifying pounds between the parties, is VACATED. The Division is ORDERED to allocate to Mr. Veerhusen 90 percent of the qualifying pounds derived from landings made from the F/V INTRUDER from January 11, 1984, through December 31, 1989; to allocate to Mr. McBride 10 percent of the qualifying pounds landed from the same vessel during that same period of time; and to issue to them the resultant QS and 1997 IFQ permits. This decision takes effect on July 25, 1997, unless by that date the Regional Administrator orders review of the decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, July 7, 1997. 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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Edward H. Hein
Chief Appeals Officer