

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0006
)	
CHRIS R. OPHEIM, Sr.)	DECISION
Appellant)	
_____)	December 27, 2002

STATEMENT OF THE CASE

The Restricted Access Management (RAM) Program issued an Initial Administrative Determination (IAD) that denied the application of Chris R. Opheim, Sr., for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program (LLP). The IAD denied the application on the basis that the application was filed after the application deadline. Mr. Opheim's application for a groundfish license is based on the qualifying fishing history of the F/V LOIS ANN.

Mr. Opheim filed a timely appeal of the IAD. Mr. Opheim can file an appeal because the IAD directly and adversely affects Mr. Opheim's interests. [50 C.F.R. § 679.43(b)] RAM issued a non-transferable LLP groundfish license to Mr. Opheim, which authorizes him to participate in the Aleutian Islands, Bering Sea, and Central Gulf of Alaska federal groundfish fisheries, pending resolution of his appeal and final agency action of his application. On December 10, 2001, I conducted a telephonic hearing with Mr. Opheim, in Kasilof, Alaska, from Juneau, Alaska. The next day, I closed the record on appeal.

ISSUE

Did Mr. Opheim file a timely application for an LLP groundfish license?

ANALYSIS

The application period for an LLP license opened on September 13, 1999, and closed on December 17, 1999. Applications that were neither postmarked nor delivered by December 17, 1999, were denied.¹ RAM received Mr. Opheim's application on March 8, 2000. The envelope in which the application arrived was postmarked from Anchorage, Alaska, in March 2000. The day of the month cannot be determined from the postmark. The application itself shows a signature date of March 2, 2000, and Mr. Opheim's cover letter is dated March 4, 2000. None of the dates indicating when the application was prepared, mailed, and received meet the requirements for the filing of a timely application. Thus, as a matter of fact, Mr. Opheim's application was almost three months late. The question remains, however, whether the

¹The dates of the application period and the requirement to submit a timely application were announced in 64 Fed. Reg. 49,104 (September 10, 1999).

application should be deemed timely as a matter of law.

Mr. Opheim did not file an LLP application until nearly three months after the application deadline of December 17, 1999.

Under the LLP regulations, and our prior decisions, there are two situations that excuse a late LLP application when the appellant took no action on or before the deadline to submit the application:

- a. if RAM did not comply with its regulatory duty to send an LLP application form to the last known address of the person identified as an eligible applicant by the official LLP record (or if RAM failed to send an LLP application form as requested) [50 C.F.R. § 679.4(k)(6)(I)]; or
- b. if the circumstances show that the deadline should be “equitably tolled.”

RAM’s duty to send an LLP application form to the last known address of an eligible applicant

The administrative record shows that:

- a. Kathy O, Inc., was an eligible applicant for an LLP license, based on the ownership of the F/V LOIS ANN on June 17, 1995;²
- b. On October 29, 1999, RAM mailed an LLP application form to Kathy O, Inc., at P.O. Box 685, Kodiak, Alaska 99615;³
- c. On November 26, 1999, RAM also sent a reminder postcard to Kathy O, Inc. at the same address;⁴ and
- d. Both mailings were returned to RAM by the U.S. Postal Service (USPS), and they were marked, “Return to Sender: Not Deliverable As Addressed Unable to Forward.”

As a matter of policy and procedure, the USPS does not forward mail to an address after 18

²See the LLP Qualifications Summary for Kathy O, Inc., October 28, 1999.

³See the envelope in Mr. Opheim’s LLP file which contained the LLP application and LLP qualifications summary sent to Kathy O, Inc., on November 8, 1999.

⁴See the postcard in Mr. Opheim’s LLP file that was sent to Kathy O, Inc., on November 26, 1999.

months.⁵

RAM's staff claims that:

- a. It mailed the LLP application form to the "best known address" that it had for Kathy O, Inc.;⁶ and
- b. The address that RAM had for Kathy O, Inc., was the "most recent address" that RAM had in its records for Mr. Opheim during the LLP application period.⁷

Mr. Opheim stated in his appeal or testified that:

- a. Kathy O, Inc., is a dissolved corporation that was owned solely by him and his wife;
- b. The mailing address for Kathy O, Inc., was also his personal mailing address;
- c. He changed his mailing address in 1997 when he and his family moved from Kodiak to Soldotna, Alaska;
- d. He submitted a change of address - forwarding order to the Kodiak post office before he moved in 1997;
- e. The Kodiak post office forwarded his mail to his address in Soldotna;
- f. He did not receive an LLP application form (or reminder postcard) from RAM during the LLP application period;
- g. He has been not been commercial fishing since the loss of the F/V LOIS ANN to a fire in 1995; and
- h. He first heard of the LLP after the application deadline.

The administrative record in this case does not show that:

- a. Mr. Opheim informed NMFS of a change of address, the sale of the F/V LOIS ANN, or the dissolution of Kathy O, Inc., before or during the LLP application

⁵This Office obtained the information from the head of the USPS in Juneau, Alaska.

⁶See the e-mail from Tracy Buck (RAM) to Randall Moen, October 3, 2000.

⁷See the e-mail from Jessica Gharrett (RAM) to Randall Moen, December 12, 2001.

period; or

b. Mr. Opheim acquired a commercial fishing license or permit from the State of Alaska or NMFS after 1994.

The weight of evidence establishes by a preponderance that RAM mailed an LLP application form and reminder card to the last known address of Kathy O, Inc., as the eligible applicant for an LLP license, based on ownership of the F/V LOIS ANN on June 17, 1995; that Mr. and Mrs. Opheim were the owners of Kathy O, Inc.; and that Mr. Opheim and Kathy O, Inc., had the same mailing address at all times during the relevant periods in this case. Therefore, I conclude that RAM complied with its regulatory duty to send an LLP application form to the eligible applicant in this case.

Given that Mr. Opheim filed his LLP application after the application deadline, RAM is required to deny the application, unless the circumstances show that the LLP application deadline should be “equitably tolled.”

Equitable Tolling

The doctrine of “equitable tolling” has been applied by this Office in appeals brought under the Individual Fishing Quota Program⁸ and the LLP.⁹

To obtain relief under the doctrine of equitable tolling, an appellant must show three things: (1) extraordinary circumstances beyond the applicant’s control prevented the applicant from filing a timely application; (2) the applicant was diligent in submitting an application after the disability to filing was removed; and (3) implementation of the (LLP) program would not have been harmed or frustrated if the application had been processed by RAM when it was submitted.

Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant’s control that prevented the applicant from filing in a timely manner. These include circumstances such as mental incompetence, chronic alcoholism, minority, acts of God, misconduct by an opposing party, and the failure of a government agency to provide statutorily required individual notice. What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application, and, thereby, effectively unable to apply. In our equitable tolling cases, we tolled the application filing deadline because the Appellant was in an “extremely isolated environment”

⁸See, e.g., John T. Coyne, Appeal No. 94-0012, May 24, 1996; Estate of Marvin C. Kinberg; Appeal No. 95-0035, August 1, 1997; Christopher O. Moore, Appeal No. 95-0044, September 5, 1997.

⁹See, Application of John B. Lee III, Appeal No. 00-0003, December 5, 2002.

(Coyne), a state of “severe psychological trauma” (Kinberg), or subject to a “unique medical condition” (Moore).¹⁰

Mr. Opheim stated in his appeal or testified that:

- a. He has spent 44 years fishing for a living, but that he has not engaged in commercial fishing for a living since 1995, when a fire “completely totaled” his fishing vessel, the F/V LOIS ANN;
- b. He suffered from a “great depression” as a result of the loss of his vessel and commercial livelihood;
- c. When his depression ended in 1997, he sold the hull of the vessel, and he and his family moved from Kodiak to Soldotna, Alaska;
- d. After he moved to Soldotna, he was going back and forth to Kodiak, Alaska to care for an aging parent;
- e. He was no longer commercial fishing or reading fishing publications, and his wife was suffering from “severe depression,” during the LLP application period; and
- f. He has limited work experience outside of commercial fishing and is in financial need.

Although Mr. Opheim did not specifically claim in his appeal that the doctrine of equitable tolling should be applied in his case, I construe his statements as an equitable tolling claim. The weight of evidence in the record, however, does not support such a claim.

Mr. Opheim lost his vessel and his livelihood as a commercial fisherman at least four years before the LLP application deadline; and he moved to a different city while caring for an aging parent and suffered from depression at least two years before the LLP application period. While his wife’s depression coincided with the LLP application deadline, and he is currently underemployed and in financial need, Mr. Opheim did not present evidence that he was physically, mentally, emotionally, or legally unable to apply for an LLP license during the LLP application period. Therefore, I conclude that the untimely filing of Mr. Opheim’s application cannot be excused by the doctrine of equitable tolling.

FINDINGS OF FACT

1. RAM mailed an LLP application form and reminder card to the last known address of Kathy O, Inc., as the eligible applicant for an LLP license, based on ownership of the F/V LOIS ANN on June 17, 1995.

¹⁰See note 8.

2. Mr. and Mrs. Opheim were the owners of Kathy O, Inc.
3. Mr. Opheim and Kathy O, Inc., had the same mailing address at all times during the relevant periods in this case.
4. Mr. Opheim was physically, mentally, emotionally, and legally able to apply for an LLP license during the LLP application period.

CONCLUSIONS OF LAW

1. RAM complied with its regulatory duty to send an LLP application form to the eligible applicant in this case.
2. The untimely filing of Mr. Opheim's application cannot be excused by the doctrine of equitable tolling.
3. NMFS is not required to accept Mr. Opheim's application for an LLP groundfish license as timely filed.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on January 27, 2003, unless by that date the Regional Administrator orders review of the Decision.

Any party, including 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 on January 6, 2003. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Randall J. Moen
Appeals Officer