

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0005
)	
AFANASY REUTOV,)	DECISION
Appellant)	
_____)	November 8, 2002

STATEMENT OF THE CASE

Afanasy Reutov appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Reutov applied for two licenses: a groundfish license with a Central Gulf endorsement based on the fishing history of the F/V NEVA and a groundfish license with a Central Gulf endorsement based on the fishing history of the F/V DELTA. The IAD denied Mr. Reutov both licenses, stating that he applied for both licenses after the LLP application deadline of December 17, 1999.

NMFS has in its possession *two* LLP applications based on the F/V NEVA: one dated December 2, 1999, without an envelope showing when it was postmarked, without a datestamp showing when NMFS received it; another dated January 25, 2000, postmarked January 2000 (the exact day in January is unreadable), datestamped as received on February 1, 2000.

The IAD did not mention the LLP application dated December 2, 1999. I asked RAM, via written questions, whether it had any information when and how NMFS received that the December 2nd application. RAM had no information how NMFS came into possession of that LLP application, why the application did not have a datestamp showing when NMFS received it and why NMFS did not have the envelope showing the postmark date of the application. [Exhibit K]

RAM noted that the application “raises the inference that the application . . . may have been transmitted to RAM before the application deadline” but stated that it had “insufficient information . . . on which to make an informed judgment on that topic.” [Exhibit K] RAM urged this Office to conduct a hearing to determine the facts:

As a result of the unanswered questions and the need to fully develop the record by examining the Messrs. Reutov, the matter is best left in the hands of OAA [Office of Administrative Appeals] to conduct a factual probe and to prepare a decision by review by the Regional Administrator. [Exhibit K]

¹ The LLP is located in 50 C.F.R. § 679. Specifically: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS website: <http://www.fakr.noaa.gov/regs/summary.htm>

I concluded that Mr. Reutov met the requirements for a hearing in 50 C.F.R. § 679.43(g)(3) and held a hearing by telephone on April 2 -3, 2002. Afanasy Reutov and Fred Reutov, Mr. Reutov's nephew who helped him fill out the LLP applications, testified.

SUMMARY

Afanasy Reutov proved that he filed an application for an LLP license based on the history of the F/V NEVA by the LLP application deadline. He is therefore an eligible applicant for any LLP licenses based on the history of the F/V NEVA.

Afanasy Reutov filed an application for an LLP license based on the history of the F/V DELTA after the LLP application deadline. NMFS should treat the F/V DELTA application as amending Mr. Reutov's F/V NEVA application and relating back to the date of filing of the F/V NEVA application.

I base this conclusion on the following: [1] the definition of "eligible applicant" in 50 C.F.R. § 679.2 as a qualified person "who submitted *an application* during the application period announced by NMFS" is ambiguous; [2] NMFS policy is to apply the application deadline liberally and to accept an application as timely if the applicant took decisive steps to apply by the application deadline, [3] the structure of the application process permits NMFS and applicants to correct mistakes that either made at the time the applicant timely filed for an LLP license; [4] Mr. Reutov applied for an LLP license based on the F/V DELTA before RAM had taken any action on Mr. Reutov's LLP application based on the F/V NEVA and before RAM had taken any action on any application based on the F/V DELTA.

ISSUES

1. Is Mr. Reutov an eligible applicant for an LLP license based on the fishing history of the f/V NEVA?
2. Is Mr. Reutov an eligible applicant for an LLP license based on the fishing history of the F/V DELTA?
3. Should NMFS treat Mr. Reutov's LLP application based on the fishing history of the F/V DELTA as an amendment to Mr. Reutov's timely application based on the F/V NEVA?
4. Is Mr. Reutov's LLP application based on the fishing history of the F/V DELTA timely filed as a matter of law?

RECORD AND EXHIBITS

In evaluating Mr. Reutov's appeal, I considered all the material in the record. The record consists of RAM's file, OAA's file and the testimony at the hearing on April 2 - 3, 2002. The following are the Exhibits from the hearing. The Exhibit list uses the following abbreviations:

License Limitation Program = LLP
Federal Fishing Permit = FFP
Restricted Access Management = RAM

- Exhibit A LLP Application for F/V NEVA, dated December 2, 1999
- Exhibit B FFP Applications for F/V DELTA, dated December 2, 1999 (two applications)
- Exhibit C LLP Application for F/V NEVA, dated January 25, 2000
- Exhibit D LLP Application for F/V DELTA, dated January 25, 2000
- Exhibit E FFP Application for F/V NEVA, dated January 25, 2000
- Exhibit F Initial Administrative Determination, March 10, 2000
- Exhibit G Affidavit of Fred Reutov, April 12, 2000
- Exhibit H Order to Produce Evidence, September 10, 2001
- Exhibit I RAM's Response to Order to Produce Evidence, January 15, 2002
- Exhibit J E-mail memoranda re missing exhibits from RAM's Response, March 6-8, 2002
- Exhibit K RAM's Response to Order to Produce Evidence, January 15, 2002 [with exhibits].
 - Exhibit K - 1 FFP Form letter and Blank FFP Application
 - Exhibit K - 2 FFP Application for F/V DELTA, dated December 2, 1999
 - Exhibit K - 3 Federal Fishing Permit for F/V DELTA
 - Exhibit K - 4 FFP Application for F/V NEVA, dated December 2, 1999
 - Exhibit K - 5 Federal Fishing Permit for F/V NEVA
 - Exhibit K - 6 Qualification Summary, F/V DELTA
 - Exhibit K - 7 Note, Envelope, LLP Application for F/V DELTA, dated January 25, 2000
 - Exhibit K - 8 Computer Screen, F/V NEVA, for FFP
 - Exhibit K - 9 Coast Guard Vessel Documentation Sheet for F/V NEVA
 - Exhibit K - 10 Computer Screen, F/V DELTA, for FFP
- Exhibit L LLP Instruction Booklet, September 1999
- Exhibit M LLP Application (blank)
- Exhibit N LLP Special Notice, September 1999
- Exhibit O E-mail from Mary Alice McKeen to Phil Smith, March 13, 2002 to obtain original RAM LLP and original FFP file for F/V DELTA
- Exhibit P E-mail re LLP interim groundfish license for F/V DELTA, March 14 - 15, 2002
- Exhibit Q Memorandum to File, March 27, 2002, with four attachments
 - Exhibit Q - 1 E-mail from Tracy Buck to Mary Alice McKeen, March 27, 2002
 - Exhibit Q - 2 LLP application packet cover sheet with mailing labels for September LLP 1999 mailing, showing two mailing labels for Afanasy Reutov
 - Exhibit Q - 3 LLP Reminder Postcard for November 1999 mailing and one mailing label for Afanasy Reutov
 - Exhibit Q - 4 E-mail from Tracy Buck to Mary Alice McKeen, March 27, 2002
- Exhibit R LLP Qualifications Summary, September 9, 1999, F/V NEVA, ADFG 53477
- Exhibit S LLP Qualifications Summary, September 9, 1999, F/V DELTA, ADFG 58255

FINDINGS OF FACT

Based on the record, I find the following facts.

1. In September 1999, RAM mailed Afanasy Reutov an LLP application packet with a Qualification Summary Sheet that listed the F/V NEVA under the heading, "Identification of Qualifying Vessel (Block "C" of the Application)." [Exhibits L, M, N, R]
2. In September 1999, RAM mailed Afanasy Reutov an LLP application packet with a Qualification Summary Sheet that listed the F/V DELTA under the heading, "Identification of Qualifying Vessel (Block "C" of the Application)." [Exhibits L, M, N, S]
3. The two LLP applications packets that RAM mailed to Mr. Reutov contained the following materials: a 24 page application instruction booklet, a blank six-page application, a six-page letter explaining upcoming changes in the LLP and a one page Qualification Summary sheet.
4. In November 1999, RAM mailed Afanasy Reutov two preprinted FFP applications for the F/V DELTA.
5. In November 1999, RAM sent a reminder postcard to all applicants to whom RAM had sent an LLP application but who had not sent back an application, including Afanasy Reutov.
6. On December 2, 1999, Fred Reutov filled out and Afanasy Reutov signed an LLP application based on the F/V NEVA and two FFP applications for the F/V DELTA.

The context for this finding is that, although Afanasy Reutov is a skilled fisherman and tradesman, English is not his first language and he had no formal schooling. Fred Reutov, Afanasy Reutov's nephew, who also fishes, assists his uncle with paperwork from NMFS.

7. On December 3, 1999, Afanasy Reutov mailed the LLP application based on the F/V NEVA dated December 2, 1999, at the same time he mailed the FFP applications for the F/V DELTA, which are also dated December 2, 1999.

Overall, it is an unusual factual claim: that an applicant filed an LLP application for one vessel and FFP applications for another vessel. I find that the evidence shows that Mr. Reutov did that unusual thing: he mailed an LLP application for one vessel and FFP applications for another vessel and he did it on December 3, 1999. I base this finding on the following evidence:

[1] The first and foremost piece of evidence is the LLP application itself. NMFS has in its possession an LLP application based on the F/V NEVA, dated and signed December 2, 1999, with nothing showing the date NMFS received it or the date it was mailed. Since this is something entirely within NMFS's control – whether it datestamps correspondence or retains envelopes – this is very strong evidence in Mr. Reutov's favor.

[2] Fred Reutov's affidavit that he helped Afanasy Reutov fill out the LLP application dated December 2, 1999 [Exhibit G].

[3] Fred Reutov's testimony at the hearing, consistent with his affidavit.

[4] Afanasy Reutov's testimony at the hearing, consistent internally and consistent on the main points with Fred Reutov's affidavit and testimony.

[5] RAM's records show that it received Mr. Reutov's FFP application on December 6, 1999 [Exhibit K-10].

[6] The two FFP applications for the F/V DELTA [Exhibit B] and the LLP application for the F/V NEVA [Exhibit A] are both dated and signed December 2, 1999 by Afanasy Reutov. The signature blocks on all three applications look very similar and look as if they were signed at the same time: the printed name looks the same, the signature looks the same, the applications look as if they were all filled out with the same black pen.

[7] The FFP applications for the F/V DELTA and the LLP application for the F/V NEVA are folded the same way. The folds in the applications are consistent with Mr. Reutov folding them together and putting them in the same envelope at the same time.

[8] RAM does not keep envelopes for applications for FFPs because these applications are not time sensitive: a vessel owner can apply for an FFP at any time. The fact that RAM does *not* have the envelope in which it received the LLP application dated December 2, 1999, is consistent with RAM receiving that application in the same envelope that RAM received Mr. Reutov's applications for a FFP for the F/V DELTA.

Although Mr. Reutov need only prove a disputed fact by a preponderance of evidence, I find that he proved beyond a reasonable doubt that he filed the LLP application based on the F/V NEVA, dated December 2, 1999, by the LLP application deadline.

8. On December 3, 1999, when Afanasy Reutov submitted his LLP application listing the F/V NEVA as the qualifying vessel, he believed that he only could receive one LLP license.

9. When Afanasy Reutov submitted his LLP application, dated December 2, 1999, listing the F/V NEVA as the qualifying vessel, he intended to apply for everything under the LLP to which he was entitled.

10. On December 6, 1999, RAM received the LLP application based on the fishing history of the F/V NEVA, dated December 2, 1999, at the same time it received the FFP applications for the F/V DELTA.

11. On or about December 15, 1999, Afanasy Reutov contacted RAM, when he received a FFP for the F/V DELTA but not an LLP license for the F/V NEVA.

12. During this telephone call, Afanasy Reutov was checking on the LLP application he had already filed and he did not request that RAM send him any additional LLP applications.

13. When Afanasy Reutov telephoned RAM on January 19, 2000 to check on the status of his LLP application, he learned from a RAM permit assistant that the LLP awarded one license for each qualifying vessel and that he had two vessels with an LLP qualifying fishing history.

Mr. Reutov's testimony was consistent and convincing on this point. I will quote one passage to illustrate:

Q: At the time, in December 1999, did you want to apply for both boats?

A: I did not know until when I call and talk to Ibn² but they said you qualify for both boats, not for one.

Q: I see. I see. So if you had known that the DELTA qualified, when you applied in December, would you have wanted to get that also?

A: Well, I don't know how many and how they distributing this thing. When I talk, in, they ask "which boat?" So I said, "I got two boats." Then he look in the computer. And he tell me I qualify for both of them, for NEVA and DELTA. I don't know, if, no matter how many boats, just one permit or I can get for each boat then. So he tell me, I'm qualified for both of them, for two boats. Then I ask him send me a form for two boats. Then we fill it and send it for both boats. But that was not actually not my idea and I never was thinking about for each boat. I thought one person getting one permit. But he said you qualify for both of them, two boats, you qualify for two permits. But then I ask him to send me applications and they did. [Hearing, Tape 2, Side A, Log 379]

14. During that telephone call, Mr. Reutov asked RAM to send him two LLP applications, which RAM promptly did.

15. Mr. Reutov promptly filled out two LLP applications on January 25, 2002, one based on the fishing history of the F/V NEVA and one based on the fishing history of the F/V DELTA, and mailed them to NMFS. [Exhibit D, Exhibit E]

16. The postmark date on the envelope for these two applications is January, 2000 but the exact date is not readable.

17. RAM datestamped these two LLP applications as received on February 1, 2000.

18. When Mr. Reutov submitted the LLP application based on the F/V DELTA, dated January 25, 2000, NMFS had taken no action on Mr. Reutov's LPP application based on the F/V NEVA dated December 2, 1999.

² Ibn refers to Ibn Bailey, a Permit Assistant for the Restricted Access Management Program.

19. No applicant, besides Afanasy Reutov, has applied for an LLP license based on the fishing history of the F/V DELTA.

ANALYSIS

1. Is Mr. Reutov an eligible applicant for an LLP license based on the fishing history of the F/V NEVA? Yes.

To receive an LLP license, a person must be an “eligible applicant.”³ An eligible applicant means

a qualified person who submitted an application during the application period announced by NMFS and . . . 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)⁴

The LLP application period was September 13, 1999 to December 17, 1999.⁵ Mr. Reutov is an eligible applicant for an LLP license based on the fishing history of the F/V NEVA because he submitted an LLP application based on the F/V NEVA within the LLP application period and because he owned a vessel, the F/V NEVA, that made the harvests necessary for an LLP license.

2. Is Mr. Reutov an eligible applicant for an LLP license based on the fishing history of the F/V DELTA? Yes.

Mr. Reutov did not submit an LLP application based on the F/V DELTA until January 25, 2000, which is after the LLP application period, but he did submit an LLP application based on the F/V NEVA within the LLP application period. The question is whether Mr. Reutov’s timely F/V NEVA application has any bearing on whether NMFS may accept Mr. Reutov’s F/V DELTA application. There are two competing answers to that question.

One answer is that NMFS must deny Mr. Reutov’s application based on the F/V DELTA, notwithstanding that he did submit a timely application for an LLP license for another vessel. The

³ “A groundfish license will be issued to an eligible applicant that meets the criteria [for documented harvests] in paragraph (k)(4)(i) and (k)(4)(ii).” 50 C.F.R. § 679.4(k)(4). “A crab species license will be issued to an eligible applicant who owned a vessel that meets the criteria [for documented harvests] in paragraphs (4)(5)(i) and (k)(5)(ii) of this section.” 50 C.F.R. § 679.4(k)(5).

⁴ 50 C.F.R. § 679.2 (definition of eligible applicant)(emphasis added). A qualified person for the LLP means “a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC.” 50 C.F.R. § 679.2.

⁵ Notification of application period, 64 Fed. Reg. 49,104, 49,104 (Sept. 10, 1999).

other answer is that NMFS may treat Mr. Reutov's application based on the F/V DELTA as amending his LLP application based on the F/V NEVA and relating back to the date of the F/V NEVA application. This is how federal courts treat amendments of complaints in civil cases. The claims added by amendment relate back to the date the complaint was filed.⁶

To determine which answer represents the most fitting interpretation of the LLP regulations, I examine three things: the definition of eligible applicant for the LLP program, the policy of the Regional Administrator to liberally construe actions as meeting the application deadline and the LLP application process. I then look at the specific facts in this Appeal.

A. The definition of “eligible applicant” in 50 C.F.R. § 679.2.

To receive an LLP license, an applicant must be an “eligible applicant.” An “eligible applicant,” as defined in 50 C.F.R. § 679.2, is “a qualified person who submitted **an application** during the application period announced by NMFS” and who owned a vessel on June 17, 1995 that made the harvests necessary for an LLP license or who owned the fishing history – the harvests themselves – apart from the vessel.

This language is ambiguous. Specifically, the phrase “an application” is ambiguous. It could mean that an applicant need only submit one application during the application period to be an eligible applicant for that vessel and additional vessels. Or it could mean that an applicant must submit one application during the application period for every license that the applicant seeks. The LLP regulatory history has nothing that specifically addresses this question.⁷

B. NMFS Policy.

In George M. Ramos, a decision in the IFQ program, the Regional Administrator stated:

By definition, any one-time application period must end at some specific point in time. Also, it can be reasonably predicted and expected that no matter when the deadline is set, there will be those who file late. **Both the agency and previous decisions have applied the application deadline in as liberal a fashion as possible. In each of these situations, however, this has been accomplished by finding that the appellant has complied with the requirements of the regulations as a matter of law through performance of some significant act in furtherance of filing his/her application prior to expiration of the deadline**, whether it be the treatment of a timely-filed Request for Application (RFA) as a timely-filed application, the placing of the application in the mail, or the acceptance of faxed applications. **Neither Mr. Ramos nor Mr. Pederson have**

⁶ Wright, Miller & Kane, FED. PRACTICE AND PROCEDURE: Civil 2d § 1496 (1990).

⁷ See Proposed rule, 62 Fed. Reg. 43,866 (1997); Final rule, 63 Fed. Reg. 52,642 (1998); Proposed rule, 64 Fed. Reg. 19,113 (1999); Final rule, 64 Fed. Reg. 42,826 (1999).

met this liberalized standard. They took no action whatsoever, significant or otherwise, until after expiration of the deadline. The decision of both the RAM Division not to process their applications, and the decision of the Appeals Officer to affirm those initial decisions, are therefore correct and are hereby AFFIRMED.⁸

Although Ramos refers to “significant” action, the key decision by this Office on what actions meet an application deadline, short of a complete application filed with NMFS, refers to an applicant taking “decisive action by [the application deadline] to complete his or her filing.”⁹

Apart from the exact wording of the test – whether it is significant action or decisive action – I take Ramos to mean that, as a matter of policy, NMFS *prefers* deciding whether an applicant actually meets the substantive requirements for a license over denying an application because it is late. This policy lets NMFS get to the merits of as many applications as possible. This policy is consistent with this Office’s approach in Adamonis, where we broadly construed an applicant’s IFQ claim and decided it on the merits rather than finding it was untimely:

Claims for QS [Quota Share] should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice.¹⁰

But the Ramos policy is *not* without limits. If an applicant has not taken any significant or decisive act to apply by the application deadline, NMFS’s hands are tied. It must deny the application.

A refusal to allow Mr. Reutov to amend his timely LLP application by adding another vessel represents a strict interpretation of the LLP application deadline and what actions can meet it. That is not in keeping with the policy in Ramos and Adamonis that NMFS will liberally construe actions and claims by applicants to meet application deadlines so that NMFS can get to the merits of claims.

An acceptance of Mr. Reutov’s F/V DELTA application is in keeping with Ramos and Adamonis and follows the traditional judicial rule that amendments relate back to the date of the original timely action. It is in keeping with the directive in Ramos to “[apply] the application deadline in as liberal a fashion as possible.” It recognizes that Mr. Reutov took significant and decisive steps to apply for a license under the LLP by the application deadline: he actually filed with NMFS an application for an LLP license based on the F/V NEVA. It interprets Mr. Reutov’s application for

⁸ George M. Ramos, Appeal No. 94-0008, Decision on Review Affirmed, April 21, 1995 at 3-4 (emphasis added).

⁹ Michael White, Appeal No. 94-0009 at 4 (Jan. 17, 1995)(IFQ application deemed timely filed because the applicant gave it to a tender for mailing by the application deadline).

¹⁰ Admonis, Appeal No. 95-0133, Decision on Reconsideration (Feb. 7, 1997) at 9. This decision became final agency action without any modification by the Regional Administrator.

an LLP license as communicating his intention and desire, by the LLP application deadline, to participate in the *License Limitation Program*. An acceptance of Mr. Reutov's F/V DELTA application lets NMFS get to the merits of the application and award him this license, if he meets the requirements for it.¹¹

C. The LLP application process.

The amendment theory complements well the structure and purpose of the LLP application process. After RAM receives a timely application, RAM evaluates it, informs the applicant whether the applicant's claims are consistent with the official LLP record and gives the applicant 60 days to submit additional information or evidence.¹² If an application is incomplete, RAM will ask the applicant for more information. If an application is confused, RAM will ask the applicant to clarify their application.

Or *an applicant*, after filing a timely application, might change what he or she has requested in the application. An applicant might change the length overall (LOA) that the applicant requested on an LLP license. An applicant might request additional or different endorsements. RAM would, of course, not automatically grant these new requests but also would not deny these new claims as untimely. RAM would decide whether the applicant should get the new things that the applicant added to the application – the longer LOA, the additional endorsements – and issue an Initial Administrative Determination on all of the applicant's claims – the ones made in the initial application and the ones added afterwards.¹³

I view the purpose of the application process as giving NMFS and the applicant a chance to fix things. The application process clearly envisions the agency or the applicant uncovering new information which will change what the applicant receives. If NMFS is still processing an application, and the applicant realizes that he or she made a mistake and did not apply for all the LLP licenses to which the applicant was entitled, the application process provides a perfect opportunity to fix the mistake.

It is reasonable to presume that a person who applied for one LLP license by the deadline, and did not apply for a second license by the deadline, made a mistake rather than a conscious decision not to seek a second license. Why else would someone with two LLP-qualifying vessels, who has stated that he or she wants an LLP license, *not* apply for a second license? This presumption is in keeping with another conclusion by this Office in *Adamonis*: "When in doubt, the division should presume that an applicant would want to receive the maximum amount of QS [Quota Share] for

¹¹ According to the official LLP record, Mr. Reutov meets the requirements for an LLP groundfish license with a Central Gulf endorsement based on the history of the F/V DELTA. [Exhibit S]

¹² 50 C.F.R. § 679.4(k)(6)(v)(application evaluation), 60 C.F.R. § 679.4(k)(6)(vi)(additional information or evidence), 50 C.F.R. § 679.4(k)(6)(vii)(60-day evidentiary period).

¹³ 50 C.F.R. § 679.4(k)(6)(viii).

which he or she qualifies.”¹⁴

The amendment theory treats a timely application as getting *the LLP applicant* in the door, not simply an LLP application. And, at the risk of sounding saccharine, it is people that the government serves, not pieces of paper. The amendment theory recognizes that applicants can sometimes be confused and, by mistake, not request everything to which they are entitled in their initial application. It permits the applicant and NMFS to correct that mistake rather than saying to the applicant, “Even though we still have you, an LLP applicant, in front of us, your mistake was fatal and you cannot bring up the question of whether you are entitled to an additional license.”

The structure of the application process also suggests limits on an applicant’s power to amend a timely application. RAM evaluates every application and makes an initial administrative determination.¹⁵ This suggests that an applicant must seek to amend an application before RAM makes an IAD on the original application.¹⁶ The application process is designed to yield one transferable license based on one vessel’s fishing history. This suggests that an applicant could not request an additional license based on another vessel’s fishing history if NMFS had taken final agency action and awarded the license based on that vessel’s fishing history to another applicant.¹⁷

But neither limitation applies here. Mr. Reutov sought a license based on the F/V DELTA before NMFS had taken any action on his F/V NEVA application. And Mr. Reutov is seeking a license based on the F/V DELTA for which no other applicant applied and for which, according to the official LLP record, no other applicant is qualified.

D. The facts of this Appeal.

I found that Mr. Reutov would have applied for LLP licenses for the F/V NEVA *and* the F/V DELTA on December 2, 1999, if he had realized that he qualified for two LLP licenses. Although RAM sent Mr. Reutov two LLP application packets in September 1999, because he had two qualifying vessels, it only sent one reminder postcard to him in November 1999 which stated: “[W]e have not yet received your LLP application,” and which told him, “Therefore, it is very important for you to complete and return the application as soon as possible.” Both were references to “application,” in the singular. That would not have alerted him to the need to fill out two applications. And the IFQ program, in which Mr. Reutov participates, only required one

¹⁴ Adamonis, Appeal No. 95-0133, Decision on Reconsideration at 9 (Feb. 7, 1997).

¹⁵ 50 C.F.R. § 679.4(k)(6)(viii).

¹⁶ An applicant may not raise entirely new claims on appeal. *Tiger, Inc.*, Appeal No. 95-1000 at 6, Decision on Reconsideration at 3 (Feb. 26, 1996); *David W. Brower*, Appeal 95-0057 (Aug. 16, 1996).

¹⁷ *Cf.* Wright, Miller & Kane, FED. PRACTICE AND PROCEDURE: Civil 2d § 1484 (1990)(“If no prejudice is found, then leave to amend [complaints] normally will be granted)(footnote omitted); *Id.* at § 1507 (amendments of complaints that add new parties are limited).

application for landings made by different vessels, not an application for each vessel.

On December 2, 1999, Mr. Reutov filled out everything he had, or thought he had, including two identical applications for a Federal Fishing Permit for the F/V DELTA.¹⁸ Mr. Reutov's testimony was consistent and convincing that he found out that he could get two LLP licenses when he called RAM in January 2000 to check on the status of the LLP application he had sent in. He immediately requested two LLP applications for two LLP licenses. RAM promptly sent him two LLP applications. Mr. Reutov immediately filled them out and sent them in.

The amendment theory recognizes this as a positive, productive chain of events. In response to a question from an applicant, a RAM representative checked the official LLP record and informed the applicant about how the program worked. RAM told the applicant that the LLP awarded a license for each qualifying vessel that the applicant owned. This corrected the applicant's misimpression about the nature of the program and caused the applicant to apply for a separate license for his second vessel. This brought to NMFS's attention the mistake that was about to occur, namely a vessel owner whose vessel made the harvests necessary for an LLP license was not going to get that LLP license.

If NMFS does not let Mr. Reutov correct this mistake, it was an exercise in futility for the RAM permit assistant to assist Mr. Reutov with accurate information about the nature of the LLP program. It was already too late, even though Mr. Reutov was still before the agency and NMFS had not processed Mr. Reutov's LLP application.

Given NMFS policy of liberally interpreting actions by applicants to meet the application deadline, and given that Mr. Reutov's first application was still before the agency, I conclude that it was not too late for Mr. Reutov to learn the true basis for licensing under the LLP: one vessel/one license. I conclude that Mr. Reutov's application for an LLP license based on the F/V DELTA, which he filed after the application deadline, amends his application for an LLP license based on the F/V NEVA, which he filed before the application deadline, and relates back to the date of the F/V NEVA application. I therefore conclude that Mr. Reutov is an eligible applicant for any LLP licenses resulting from the fishing history of the F/V DELTA.

CONCLUSIONS OF LAW

1. Afanasy Reutov is an eligible applicant for an LLP license based on the fishing history of the

¹⁸ It is not clear what happened to the LLP application packet based on the F/V DELTA that RAM mailed to Mr. Reutov in September 1999. It could have gotten lost in the mail. It could have gotten mislaid in Mr. Reutov's house. Mr. Reutov may have thought the application packets for the F/V NEVA and the F/V DELTA were the same thing. The packets would have looked exactly the same, except for one page Qualification Summary sheets, which also looked exactly the same, except for the vessel name and numbers under the heading, "Identification of Qualifying Vessel (Block "C" of the Application)."

F/V NEVA.

2. Afanasy Reutov's timely LLP application based on the fishing history of the F/V NEVA is a decisive act which communicated to NMFS, before the LLP application deadline, his intent to participate in the LLP.

3. Mr. Reutov's LLP application based on the fishing history of the F/V DELTA amends Mr. Reutov's timely application based on the F/V NEVA and relates back to the date Mr. Reutov filed his timely F/V NEVA application.

4. Mr. Reutov's LLP application based on the F/V DELTA was timely filed as a matter of law.

5. Afanasy Reutov is an eligible applicant for an LLP license based on the fishing history of the F/V DELTA.

DISPOSITION

The IAD that denied Mr. Reutov's application for an LLP license based on the fishing history of the F/V NEVA and Mr. Reutov's application for an LLP license based on the fishing history of the F/V DELTA is VACATED. RAM is ordered to accept and process these applications. This Decision takes effect December 9, 2002.

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, November 18, 2002. 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.

Mary Alice McKeen
Appeals Officer