

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 95-0097  
)  
ESTATE OF ZAHARY KUZMIN, ) DECISION  
Appellant )  
) January 30, 1996  
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STATEMENT OF THE CASE

Appellant applied for Quota Share [QS] under the Pacific Halibut and sablefish Individual Fishing Quota [IFQ] program. Restricted Access Management Division [Division] denied the application in an IAD issued April 18, 1995, finding that the Appellant did not file a timely application. Appellant filed a timely appeal. An oral hearing held was before this Appeals Officer in November 1995. The Estate appeared in person by Nikita Kuzmin, son; Agripina Kuzmin, widow; Fedor Kuzmin, son; Sergi Kuzmin, son; and Alexei Kuzmin, son. Attorney Michael Hough appeared for appellant, Steve Callison also attended. Appellant's appeal adequately demonstrates that the Division Determination has an adverse and direct effect on its interest.

ISSUE

Whether NMFS should accept Appellant's application as timely filed.

BACKGROUND AND DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for this IFQ Program.<sup>1</sup> By its terms, the agency's notice of the application period required that an application form be received at the Division's office in Juneau by July 15. Subsequently, the Division initiated a preliminary step in the application process by requiring the filing of a Request for Application ("RFA") form before submitting the application itself. The Division announced that for the purpose of meeting the filing deadline, it would accept a completed RFA in lieu of an application, so long as the RFA was received by the deadline. Ultimately, the Division decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.<sup>2</sup> The Division has interpreted the July 15 deadline as essentially requiring that an applicant either deliver an RFA to the agency by that date or otherwise take decisive action by that

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<sup>1</sup>"Applications must be received during the application period beginning January 17, 1994, and ending at close of business on July 15, 1994....Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered. " 59 Fed. Reg. 701, 702 (1994)

<sup>2</sup>Policy announced July 26, 1994, by Memorandum of Philip J. Smith, Chief of RAM Division.

date to complete the application filing, as by depositing an RFA in the mail.<sup>3</sup>

The original signed RFA is not in the file and there is no record that it was ever received by the Division. This case involves an application by the Estate of Zahary Kuzmin for sablefish and halibut QS. The QS sought do not duplicate QS issued to any other applicant and no other applicant has claimed the QS for which the Appellant is applying based on his Zahary Kuzmin's catch history.

The controlling issue is whether or not the Appellant took decisive action to complete the filing of an Request for Application (RFA) and/or application for QS on or before July 15, 1994. The testimony and evidence submitted at the hearing confirms that the RFA and/or application was placed in the United States mail in a timely manner and prior to the deadline for doing so.

Given the thousands of applications processed within an extremely short period of time by NMFS, it is conceivable and believable that an RFA or application could have been misplaced or misfiled, particularly when several applicants' names are similar, when application are from the same extended family, and where the vessels used by the several applicants changed yearly within the family. As an example, portions of Zahary's application sent to NMFS on June 3, 1994, particularly Form D of RFA vessel information, are very relevant to the applications of others, such as Alexei Kuzmin, Nikita Kuzmin and Sergi Kuzmin. Nikita even testified to some of such misfilings. At the hearing, there were various examples given of applications the NMFS office had misplaced, but later located. It is also possible, of course, that the Appellant's RFA/application was lost or misdelivered by the U.S. Postal Service.

Zahary Kuzmin is a deceased "Old Believer" Russian-speaking United States citizen. Mr. Kuzmin died unexpectedly in a car accident on December 7, 1992. He was born in 1933 and, at the time of his death, he was married to Agripina Kuzmin, and he had several children, several of whom were adults and applied for QS based on their own catch history. The children and Agripina are United States citizens. Sergi Kuzmin, one of Zahary's sons, applied for his own QS and assisted his mother, Agripina, in applying for QS on behalf of Zahary Kuzmin.

Since the IFQ program was new, very complicated and required detailed information, as well as the fact that the Kuzmins, particularly Agripina, felt uneasy about relying on their limited understanding of English, particularly written forms, all of the Kuzmin sons and Agripina sought the assistance of a permit and vessel broker in the Homer area, Steve Callison of Alaska Marine Brokers. Mr. Callison had been involved with the "Old Believer" community for several years in his business and, although he did not benefit financially from providing the assistance, he spent several hours preparing the applications, notarizing documents when necessary and performing whatever functions he could to assist the Kuzmin

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<sup>3</sup>Michael B. White, Appeal No.94-009, January 17, 1995, affirmed January 20, 1995, at 4.

family in understanding the application process, the forms and procedures to be followed.

Each of the Kuzmins prepared his own application in the presence of Steve Callison and placed the complete RFA and/or applications in the envelopes addressed to NMFS at Juneau. The Kuzmin family then left Steve Callison's office and went to the United States Post Office in Homer where they deposited the RFA and/or applications in the United States mail at Homer on June 3, 1994. The RFA and/or applications were mailed postage prepaid and properly addressed to NMFS in Juneau, Alaska.

Following the July 15, 1994, date, NMFS had responded to some of the RFAs and/or applications by the Kuzmin family, so Sergi commenced making several calls to the NMFS office in Juneau, inquiring about the status of Zahary Kuzmin's application. Each time he called, he was told that NMFS was extremely busy, and therefore could not confirm or deny receipt of the Estate of Zahary Kuzmin's application. Sergi had also made calls prior to the July 15, 1994, application deadline inquiring about the status of Zahary Kuzmin's application. He was told at the time that NMFS was extremely busy and therefore could not confirm or deny the receipt of Zahary Kuzmin's application. Another son of Zahary and Agripina, Nikita, was also concerned, because he had not received his quota shares either. Later, Nikita also decided to call NMFS. He was informed that his application had not been received and therefore he did not qualify for any quota shares. Additionally, he was told by NMFS that Zahary's application had also not been received, and therefore Zahary did not qualify for QS either. Nikita thereafter repeatedly called NMFS to insist that they search their files for his application and that of his father. Pursuant to this request, Nikita was told that his paper work had been misfiled or otherwise combined with the files of other members of his family, that this RFA and/or application had fortunately been located, and that he did indeed qualify for his quota shares. However, he was also told that NMFS had not yet found the application of Zahary Kuzmin, but that some parts of Zahary Kuzmin's paper work had been found in the wrong files, similar to what occurred with regard to Nikita's paper work.

On January 6, 1995 Zahary Kuzmin's Estate submitted what copies it had of the June 3, 1994, RFA and/or application. The Kuzmin family continued trying to assist NMFS in locating the balance of the June 3, 1994, RFA/application, but on April 18, 1995, NMFS issued its IAD denying Zahary Kuzmin's claims. It would appear that at least one of the people employed by NMFS with whom Agripina and other family members communicated was with a person named Peggy. Agripina, for example, had sent a letter to NMFS, attention Peggy, as shown by the March 28, 1995, letter. The writing on the letter appears to be that of someone within NMFS indicating how to contact Sergi Kuzmin, giving his morning telephone number, as well as a telephone number for Steve Callison who was able to confirm that the application for Zahary Kuzmin was timely mailed.

A review of the RFA/applications of the Kuzmin sons confirms the testimony of all the sons, the widow Agripina, and Steve Callison, that the RFA's/applications were prepared on June 3, 1994, and placed in the mail on June 3, 1994, properly addressed and that, with the exception of misplacing parts of

Nikita's file initially, NMFS received and ultimately acknowledged receipt of all those applications.

This case illustrates the prudence of sending important, time-sensitive documents by a method that produces evidence of the date of fact of sending or delivery. Although it was not required, the Appellant, in retrospect, would have been well advised to send the RFAs by certified mail, Express Mail, or private delivery service. Alternately, the Appellant could have avoided the problem of untimely delivery by contacting the Division before the July 15, 1994, filing deadline to verify that the RFAs had been received. Nonetheless, these precautions were not required and many applicants sent their RFAs by regular mail without a problem. Under such circumstances, it cannot be said that the Appellant acted unreasonably by relying on regular U.S. mail service. An appellant is entitled to try to prove that he or she took "decisive action" to complete the filing of an RFA or application by the filing deadline even where, as here, the Division has no record of ever receiving it.

#### FINDINGS OF FACT

Appellant, in my judgment, has established by a preponderance of the evidence that it mailed the appropriate RFA/Application forms to the Division on June 3, 1994. I also make the following findings of fact:

1. Zahary Kuzmin died on December 7, 1992.
2. Zahary Kuzmin is survived by his widow, Agripina, as well as numerous sons and daughters including Nikita, Sergi, Alexei, Fedor and Vasily.
3. On June 1, 1994, at home, as personal representative of the Estate of Zahary Kuzmin, Agripina Kuzmin signed Form A of the RFA/Quota Share Application form for individuals for sablefish and halibut.
4. One June 3, 1994, the Kuzmin family, consisting of at least Agripina, Sergi, Alexei, Nikita, Vastly and Fedor, met with Steve Callison, a vessel and permit broker in the Homer, Alaska, area doing business at Alaska Marine Brokers.
5. In the presence of Steve Callison, on June 3, 1994, Agripina Kuzmin and Sergi Kuzmin, acting on the behalf of the Estate of Zahary Kuzmin prepared the RFA/application forms necessary to apply for quota shares for the halibut and sablefish fisheries.
6. Steve Callison testified that he knows the Estate of Zahary Kuzmin completed the application forms for the quota shares in his presence on June 3, 1994, and placed those forms in an envelope addressed to the National Maine Fisheries Service in Juneau.

7. Steve Callison took the same actions to provide assistance to the remaining members of the Kuzmin family, including Sergi Kuzmin, who also prepared RFA/applications on his own behalf, as well as Nikita Kuzmin and Alexei Kuzmin.
8. The Estate of Zahary Kuzmin has produced copies of the Form A and Form D of the RFA/application for Quota Shares for halibut and black cod.
9. Several witnesses, including Steve Callison, confirm that Form A and Form D and the balance of forms in support of the application were placed in an envelope, properly addressed, postage prepaid, to NMFS on June 3, 1994.
10. Numerous witnesses, including Agripina, Sergi, Nikita, Alexei, Fedor and Vastly, all testified that they left Steve Callison's office on June 3, 1994, went a few blocks to the United States Post Office at Homer, and placed the RFA/application of Zahary Kuzmin for quota shares in the United States mail on June 3, 1994.
11. NMFS did receive the applications of the remaining Kuzmin family members, which were mailed at the same time and in the same manner as the application of Zahary Kuzmin, although NMFS initially had misplaced the application of Nikita Kuzmin.
12. NMFS later found Nikita Kuzmin's application.
13. NMFS initially indicated to Nikita that NMFS was able to locate parts of the Zahary Kuzmin application in other files, but not the complete application. NMFS was later unable to find any of the parts of the application for Zahary Kuzmin.
14. A significant stated reason for the Kuzmin family to seek the assistance of Steve Callison and to meet as a group was that Zahary Kuzmin had leased his vessels to his sons during several years. Since there were two vessels involved, and at least three sons, confusion for the applicants and NMFS was alleviated by meeting on June 3, 1994, as a group with Steve Callison.
15. Sergi Kuzmin called NMFS several times both before and after the deadline of July 15, 1994, regarding the RFA/application of Zahary Kuzmin for black cod and halibut. He has testified he was told that NMFS was extremely busy and it could not verify whether or not the RFA/application of Zahary Kuzmin was received.
16. The Estate of Zahary Kuzmin, by Sergi Kuzmin, did not know until January of 1995, that NMFS was unable to locate the RFA/application of Zahary Kuzmin, at which time written correspondence commenced with NMFS, including attaching a copy of the forms Sergi Kuzmin still had that were part of the RFA/application of Zahary Kuzmin, including Form A and two sheets of

Form D of the RFA/application. Two sheets of Form D were necessary due to the number of vessels, number of sons who leased vessels, and different dates for leasing the two vessel owed by Zahary Kuzmin to his sons.

17. Sergi Kuzmin contacted NMFS (probably Peggy) and understood that NMFS "doesn't have all of" Zahary's RFA/application, so Sergi suggested to Peggy that she look in other applications of the Kuzmin family that were submitted at the same time.

18. The Kuzmin family believes that the forms and affidavits signed by Agripina Kuzmin regarding the Kuzmin family RFA/applications mailed to NMFS will confirm that Agripina was present at Steve Callison's office of June 3, 1994, and that the applications for the Kuzmin family were prepared and mailed to NMFS, postage prepaid and properly addressed on June 3, 1994.

19. Vasily Kuzmin had also asked NMFS to look for a vessel lease which NMFS indicated was not in Vasily Kuzmin's file. Vasily Kuzmin insisted that NMFS check various other files to find the lease and ultimately the lease was located. The Kuzmin family, particularly Agripina and Sergi, had been told by NMFS that some of Zahary's RFA/application forms were located in the files for Agripina's sons, but later Zahary Kuzmin's application could not be located, in whole or in part, in any of the NMFS files. The testimony submitted was sincere and credible.

#### CONCLUSION OF LAW

Based on my finding that the Appellant mailed the RFA on June 3, 1994, I conclude that appellant took decisive action to complete the filing of his application by the July 15, 1994, filing deadline and, therefore, I conclude as a matter of law that the Appellant's application was timely filed.

#### DISPOSITION AND ORDER

The Division's Initial Administrative Determination denying Appellant's application as untimely filed is VACATED. The Division is ORDERED to process the Appellant's IFQ application as if it had been filed in a timely fashion. This decision takes effect on February 28, 1996, unless, by that date, the Regional Director orders review of the decision

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James C. Hornaday  
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

In order to ensure that QS and Individual Fishing Quota [IFQ] is issued to the Appellant for the 1996 season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

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Edward H. Hein  
Chief Appeals Officer