

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 97-0012
)
JAMES M. ANDERSON,) DECISION
Appellant)
_____) October 29, 1999

STATEMENT OF THE CASE

The Appellant James Anderson filed a timely appeal of an Initial Administrative Determination [IAD] issued on June 30, 1997, by the Restricted Access Management Program¹ [RAM]. The IAD denied Mr. Anderson's application for quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish, on grounds that his application was untimely filed and that he is not a qualified person for QS. Mr. Anderson's interests are directly and adversely affected by the IAD. A hearing was not ordered because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution.²

In this Decision, I affirm the IAD and conclude that Mr. Anderson is ineligible for QS for the same reasons stated in the IAD.

ISSUES

1. Did Mr. Anderson file a timely application for QS?
2. Did Mr. Anderson acquire rights to initial issuance of QS with the purchase of the F/V SALVAGE ONE?

BACKGROUND

Mr. Anderson filed a Request for Application for QS [RFA] on March 20, 1997, nearly three years after the July 15, 1994, filing deadline.³ Mr. Anderson claimed on the RFA that he owned the F/V

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

²50 C.F.R. § 679.43(g)(2) and (3); formerly, 50 C.F.R. § 679.25(g)(2) and (3). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

³An RFA is considered an application for QS for purposes of meeting the filing deadline.

SALVAGE ONE between March 26, 1991, and October 1994. To be considered a “qualified person” for initial issuance of QS, a person must have owned or leased a vessel (from which legal landings of halibut or sablefish were made) during 1988, 1989, or 1990. Mr. Anderson claimed no ownership or lease of any other vessels. RAM’s records do not show that he owned or leased any vessel during the QS qualifying years. Mr. Anderson enclosed a copy of a bill of sale with the RFA, which shows that he purchased the F/V SALVAGE ONE on March 26, 1991. In a letter filed with RAM, Mr. Anderson writes that he first found out about the IFQ program when he arrived in Juneau, Alaska in December 1994, and that he did not file an RFA until March 1997 because he was gathering evidence. RAM denied Mr. Anderson’s application for QS on grounds that he did not file a timely application for QS, but that even if he had, he did not own or lease a vessel during the QS qualifying period.

On appeal, Mr. Anderson claims that the IFQ filing deadline should have been tolled because he was in Japan serving in the U.S. Navy during the application period between November 1993 and November 1994. He notes that he was also in the Gulf War, serving aboard the U.S.S. Reeves, during the development of the IFQ program. Mr. Anderson also claims that he is qualified for QS because he acquired the QS associated with the F/V SALVAGE ONE when he purchased the vessel.

Mr. Anderson produced a copy of the orders transferring him from Pearl Harbor, Hawaii to Kyushu Sasebo, Japan in November 1993. He also produced a copy of the fishing records of the F/V SALVAGE ONE from the International Pacific Halibut Commission, which show that the vessel made halibut landings in 1989. He has also produced a letter from the vessel’s former owner, stating that Mr. Anderson acquired the vessel’s fishing rights at the time he acquired the vessel (on March 26, 1991).

DISCUSSION

1. Did Mr. Anderson file a timely application for QS?

On January 6, 1994, the National Marine Fisheries Service (NMFS) established the time period for the filing of an application of QS and published notice of the time period in the Federal Register.⁴ The time period for the filing of an application for QS was January 17, 1994, through July 15, 1994. NMFS informed the public that an application that is not filed by the July 15, 1994 deadline “will not be considered” for QS.⁵

RAM treated an RFA as the equivalent of an application for QS for purposes of meeting the application

⁴59 Fed. Reg. 701 (1994).

⁵See, John T. Coyne, Appeal No. 94-0012, January 31, 1996, at 3.

filing deadline under the IFQ program.⁶ An RFA was timely filed if it was delivered to RAM, or mailed or postmarked on or before the application deadline. If not, an RFA can be considered timely filed, as a matter of law, only if the doctrine of equitable tolling applies. Under that doctrine, the filing deadline can be equitably tolled if (1) extraordinary circumstances beyond the applicant's control prevented filing by the deadline; (2) the applicant acted diligently once the circumstances were removed; and (3) accepting the application when it was received would not significantly harm or frustrate the agency's ability to implement the IFQ program.⁷

In Coyne,⁸ we stated that "extraordinary circumstances" are circumstances beyond an applicant's control that "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." Once an applicant has made a threshold showing of equitable tolling, the applicant must show that he or she acted diligently in submitting an application after first learning of the filing deadline.

Mr. Anderson did not file his RFA by the filing deadline of July 15, 1994. He claims he did not know of the deadline because he was in Japan during the application period, serving in the U.S. Navy, and in the Gulf War during the development of the IFQ program. Mr. Anderson had constructive notice of the IFQ application filing deadline because the deadline was published in the Federal Register. Accordingly, the only way NMFS can accept Mr. Anderson's RFA as timely filed is if the filing period is equitably tolled.

The documents produced by Mr. Anderson show that he was ordered to Japan to serve in the U.S. Navy during the application period for QS. Mr. Anderson also contends that prior to that time he served in the Gulf War, and as a consequence, he was unaware of the development of the IFQ program. Even if true, the Gulf War was several years prior to the published notice of the IFQ program, and even though he was in the military overseas during the application period, nothing in the record shows that Mr. Anderson was incapacitated or suffering from a disability during that time or that he was in such an unusually isolated environment that he could not have reasonably learned of the application period if he had inquired about it. Peacetime military service does not by itself relieve a person from taking care of personal responsibilities and business affairs. Thus, even though Mr. Anderson was in the military overseas, he was not relieved of his responsibility to learn about the IFQ program and its filing requirements. Furthermore, his service in the Navy, and consequent absence

⁶See also, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

⁷See, e.g., John Coyne, Appeal No. 94-0012, (Decision on Reconsideration), May 24, 1996, at 14.

⁸See, John Coyne, Appeal No. 94-0012, January 31, 1996; and John Coyne, Appeal No. 94-0012, (Decision on Reconsideration), May 24, 1996.

from Alaska and the commercial fishing world, was voluntary. Although Mr. Anderson was “ordered” to Japan, he does not state whether he requested that assignment. In light of all of the above, I conclude that the Gulf War and Mr. Anderson’s military service overseas do not constitute “extraordinary circumstances beyond his control” justifying the tolling of the application deadline.

But even if Mr. Anderson’s military service constituted an “extraordinary circumstance,” Mr. Anderson did not act diligently in filing his RFA. Mr. Anderson admits that he waited over two years after learning of the IFQ deadline to file an RFA. Mr. Anderson’s claim that he needed that time to gather information is not credible. As a result, the period for filing an RFA could not have been equitably tolled for Mr. Anderson, even if his military service constituted an “extraordinary circumstance beyond his control.” Because the application period cannot be equitably tolled, I conclude that Mr. Anderson did not file a timely application for QS.

2. Did Mr. Anderson acquire rights to initial issuance of QS with the purchase of the F/V SALVAGE ONE?

Under the regulations of the IFQ program, NMFS is required to initially issue QS only to qualified persons. To be considered a qualified person, the person must have owned (or leased) a fishing vessel that made legal landings of halibut or sablefish harvested with fixed gear during a QS qualifying year (1988, 1989, or 1990). The relevant regulations provide:

§ 679.40 Sablefish and halibut QS. ...

(a) Initial allocation of QS

(1) General. The Regional Administrator shall initially assign to qualified persons, on or after October 18, 1994, halibut and sablefish fixed gear fishery QS that are specific to IFQ regulatory areas and vessel categories. ...

(2) Qualified person.

(i) As used in this section, a “qualified person” means a “person,” as defined in § 679.2:
(A) That owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year; ...

(3) Qualification for QS

(i) Year. A QS qualifying year is 1988, 1989, or 1990.

Mr. Anderson states on his RFA that he owned the F/V SALVAGE ONE between March 26, 1991 and October 1994. The bill of sale that shows he purchased the vessel on March 26, 1991. Mr. Anderson does not claim, nor is there evidence in the record showing, that he owned (or leased) any vessel during the QS qualifying period (1988, 1989, or 1990). Consequently, Mr. Anderson is not a

“qualified person” for purposes of initial issuance of QS.

Mr. Anderson claims that he acquired rights to QS with the purchase of the F/V SALVAGE ONE, which made legal landings of halibut in 1989. Mr. Anderson submitted a letter from the former owner of the F/V SALVAGE ONE, testifying to that effect.

This Office has ruled in several decisions⁹ that the IFQ regulations do not provide for assignments of eligibility for an initial issuance of QS, and that the transfer of a vessel does not transfer eligibility for the initial issuance of QS. Eligibility for an initial issuance of QS cannot be assigned by private agreement. QS can be transferred only after it has been initially issued and only through RAM to qualified transferees. In light of this, I conclude that Mr. Anderson did not acquire rights to initial issuance of QS with the purchase of the F/V SALVAGE ONE. Therefore, Mr. Anderson could not have been issued QS in this case, even if he had filed a timely RFA.

FINDINGS OF FACT

1. Mr. Anderson did not file his RFA by the filing deadline of July 15, 1994.
2. Mr. Anderson had constructive notice of the filing deadline of his RFA.
3. Mr. Anderson first received notice of the application period and filing deadline when he first arrived in Juneau, Alaska, in December 1994.
4. Mr. Anderson did not file his RFA until March 20, 1997.
5. Mr. Anderson did not need over two years to gather information in order to file his RFA.
6. Mr. Anderson did not act diligently when he filed his RFA.
7. The Gulf War was several years prior to the published notice of the IFQ program.
8. Mr. Anderson was not incapacitated or suffering from a disability while he was in the military overseas during the IFQ application period.
9. Mr. Anderson did not own or lease a vessel during the QS qualifying period that made legal landings of halibut or sablefish.

⁹See, Prowler Partnership v. Samuelson, Decision on Reconsideration, Appeal No. 95-0084, March 12, 1996; and Alwert Fisheries, Inc. v. Oregon Seafood Producers and Dorothy L. Painter, Appeal No. 95-073, March 21, 1996.

10. Mr. Anderson purchased fishing rights pertaining to the F/V SALVAGE ONE from the vessel's former owner on March 26, 1991.

CONCLUSIONS OF LAW

1. NMFS provided Mr. Anderson with legally sufficient notice of the IFQ application filing deadline.
2. The Gulf War and Mr. Anderson's military service overseas does not constitute an extraordinary circumstance justifying the tolling of the deadline for the filing of his RFA.
3. The time period for the filing of Mr. Anderson's RFA cannot be equitably tolled on the basis of the evidence in the record.
4. Mr. Anderson did not file a timely application for QS.
5. Mr. Anderson is not a qualified person for purposes of initial issuance of QS.
6. Mr. Anderson did not acquire rights to initial issuance of QS with the purchase of the F/V SALVAGE ONE.
7. Mr. Anderson could not have been issued QS, even if he had filed a timely RFA.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on November 29, 1999, unless by that date the Regional Administrator order review of the decision.

Any party, including 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 8, 1999. 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 or authorities in support of the motion.

Randall J. Moen
Appeals Officer