

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 98-0004
)
ESTATE OF NGHIA NGUYEN,) ORDER DENYING RECONSIDERATION
Appellant)
_____) November 6, 2001

I decided Ms. Oh's appeal on September 27, 2001. Jung Sook Oh is the widow of the deceased, Nghia Nguyen, and the personal representative of his estate. Ms. Oh filed a letter with this Office on October 9, 2001, which I have treated as a motion for reconsideration of the Decision¹ Because Ms. Oh filed a motion for reconsideration, this Office stayed the effective date of the Decision in this appeal.² The Restricted Access Management Program [RAM] did not oppose Ms. Oh's motion for reconsideration.³

The standard for reconsidering a decision is whether the appeals officer overlooked or misunderstood a material question of fact or law.⁴ I conclude that I did not overlook or misunderstand a material question of fact or law when deciding the appeal. I therefore deny Ms. Oh's motion for reconsideration.

Ms. Oh filed an IFQ application on May 29, 1998, close to four years after the IFQ application deadline of July 15, 1994. The Decision found that Ms. Oh did not meet the requirements for equitable tolling of the application deadline.

Ms. Oh argues that "extraordinary circumstances still exist to the present time from the shock of my husband's disappearance."⁵ Ms. Oh's letter describes conflict between herself and Mr. Oh, who was Ms. Oh's first husband, before Ms. Oh's marriage to Nghia Nguyen. Ms. Oh states that, upon her return to Alaska, she and her daughter crowded into Mr. Oh's one-bedroom apartment and that she frequently argued with Mr. Oh. Ms. Oh states: "I decided [sic] to move out and moved to the same apartment # C-9, next building of Mr. Oh because I depended on him so many things and seek his help." Ms. Oh submitted a domestic violence protective order

¹ Letter to Mary Alice McKeen from Jung Sook Oh, October 5, 2001.

² Order Staying Effective Date of Decision, October 9, 2001.

³ Response from Restricted Access Management to Order Staying Effective Date of Decision, October 15, 2001.

⁴ Revised Policy on Motions for Reconsideration, April 26, 1999, by Edward Hein, Chief Appeals Officer, Office of Administrative Appeals. The NMFS website published this policy at <<http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.html>>.

⁵ Letter to Mary Alice McKeen from Jung Sook Oh, October 5, 2001.

dated June 1, 1999 that the court granted to Mr. Oh. Ms. Oh's letter states that she has been "hysterical and [exhibited] abnormal behavior beyond my control."

I conclude that Ms. Oh has not shown grounds to reconsider the first conclusion of law in the Decision: "Viewing the record in the light most favorable to Ms. Oh, the extraordinary circumstances beyond Ms. Oh's control, that prevented her from applying for an IFQ permit within the original IFQ application period, ended on August 7, 1997, when Ms. Oh received the death certificate for Nghia Nguyen."⁶ I base this on four reasons.

First, the Decision did not overlook or misunderstand evidence of conflict between Ms. Oh and Mr. Oh because Ms. Oh did not present this evidence at the hearing on June 28, 2000 or the hearing on August 24, 2000. The subject of the hearing on August 24, 2000 was specifically "the events that occurred after Ms. Oh returned to Alaska from Korea in 1997 and before she filed an application for quota share."⁷ The testimony at both hearings only described Mr. Oh helping Ms. Oh.

Second, the Decision did not overlook that Ms. Oh is still suffering adverse psychological effects, such as hysteria and abnormal behavior, from the disappearance and death of Mr. Nguyen. The Decision noted that, even at the time of the hearing, Ms. Oh did not fully accept the fact of Mr. Nguyen's death.⁸ The issue is not whether Ms. Oh is still experiencing ill effects from the death of Mr. Nguyen. The issue is when Ms. Oh was able to apply for Quota Share, despite the continuing effects on her from Mr. Nguyen's death and disappearance.

Obviously, Ms. Oh was able to apply for Quota Share by May 29, 1998 because that is when she did apply. But the question is whether the record shows that Ms. Oh was psychologically and legally able to apply for quota share before May 29, 1998. The Decision analyzed this question and concluded that the record, viewed most favorably to Ms. Oh, showed that Ms. Oh was able to apply for Quota Share in August 1997, despite any continuing effects on Ms. Oh from the disappearance and death of Mr. Nguyen.⁹

The Decision concluded that Ms. Oh was able to make decisions and protect her interests beginning in April 1997. The Decision relied on evidence of the following facts.¹⁰ Ms. Oh returned to Alaska in April 1997 so her daughter could attend school in this country. Ms. Oh immediately petitioned the court to issue a presumptive death certificate for Mr. Nguyen. Ms.

⁶ Decision at 12.

⁷ Order for Continuation of Oral Hearing, August 24, 2000.

⁸ Decision at 4.

⁹ Decision at 8 - 9.

¹⁰ *Id.*

Oh applied for social security benefits in July 1997, based on the death of Mr. Nguyen. Ms. Oh testified by telephone at the hearing on her petition for a death certificate on July 31, 1997. Ms. Oh informed the Social Security Administration (SSA) that a death certificate had been issued for Mr. Nguyen and she started receiving social security survivor benefits.

As with social security benefits, the issuance of a death certificate for Mr. Nguyen, and Ms. Oh's receipt of the death certificate on August 7, 1997, eliminated the last element of the extraordinary circumstances that prevented Ms. Oh from applying for Quota Share. Just as Ms. Oh was able to apply for social security survivor benefits, in spite of continuing emotional turmoil from Mr. Nguyen's disappearance and death, Ms. Oh was psychologically and legally able to apply for Quota Share accumulated in Mr. Nguyen's name, in spite of continuing turmoil from Mr. Nguyen's disappearance and death.

Third, the evidence of conflict between Ms. Oh and Mr. Oh does not show that Ms. Oh was disabled by extraordinary circumstances beyond August 7, 1997 and prevented from applying for Quota Share. Any conflict between Ms. Oh and Mr. Oh did not prevent Mr. Oh from helping Ms. Oh take the steps described in the previous section: petitioning for a death certificate, testifying at the hearing, applying for social security benefits. Conflict between Ms. Oh and Mr. Oh did not prevent Ms. Oh from moving into an apartment in the same apartment complex as Mr. Oh so that Mr. Oh could continue to help her.

Conflict between Ms. Oh and Mr. Oh did not prevent Ms. Oh from telling Mr. Oh that Sun Huy Stafford told her she might be able to renew Mr. Nguyen's fishing license. Conflict between Ms. Oh and Mr. Oh did not prevent Mr. Oh from checking with an attorney and government agencies as to whether Ms. Oh could pursue fishing rights based on Mr. Nguyen's commercial fishing history.¹¹ Conflict between Ms. Oh and Mr. Oh did not prevent Mr. Oh from helping Ms. Oh apply for Quota Share, file an appeal with this Office when she was denied and diligently prosecute the appeal. In short, whatever conflict existed between Mr. Oh and Ms. Oh, the record shows a consistent pattern of Mr. Oh assisting Ms. Oh.

Fourth, the only suggestion of limited communication between Ms. Oh and Mr. Oh is the domestic violence protective order, which was in effect from June 1, 1999 until December 31, 1999. This order prohibited in-person communication between Ms. Oh and Mr. Oh but permitted telephone contact. The court entered this order on June 1, 1999, approximately one year after Ms. Oh applied for Quota Share on May 29, 1998. Any events that occurred after May 29, 1998 could not possibly be extraordinary circumstances that prevented Ms. Oh from applying for Quota Share because she had already applied.¹²

¹¹ Decision at 6-7.

¹² On December 27, 1999, Ms. Oh submitted to this Office an affidavit from her brother-in-law in Korea, which was dated December 17, 1999 [Exhibit 7]. Thus, during the domestic violence order (June 1, 1999 to December 31, 1999), Ms. Oh took steps to protect her legal interests, either because she could do it on her own or because Mr. Oh helped her.

Therefore the evidence in Ms. Oh's motion for reconsideration does not undermine the conclusion of the Decision: "By August 7, 1997, Ms. Oh was not under any disability which prevented her from filing an IFQ application."¹³

This means that Ms. Oh applied for Quota Share 295 days, or approximately ten months, after the extraordinary circumstances ended that had prevented her from applying during the original IFQ application period. Ms. Oh did not challenge the conclusion that, as a matter of law, a late applicant who files an IFQ application 295 days after the end of extraordinary circumstances has not acted diligently in filing an IFQ application.¹⁴ The basis for that conclusion was that the IFQ regulations provided original applicants 180 days, or approximately six months, to learn about the IFQ program and apply for Quota Share. Once a late applicant is not under a disability that prevents him or her from applying, the doctrine of equitable tolling does not permit the government to extend the application period beyond 180 days for the late applicant.

I therefore conclude that the Decision correctly decided that Ms. Oh does not meet the requirements for equitable tolling of the IFQ application deadline.

DISPOSITION

The Decision in this Appeal, dated September 27, 2001, affirmed the Initial Administrative Determination made by the Restricted Access Management Program on June 8, 1998. Pursuant to federal regulation 50 C.F.R. § 679.43(o), the Decision in this Appeal takes effect on December 6, 2001, unless the Regional Administrator orders review of the Decision by that date.

Mary Alice McKeen
Appeals Officer

¹³ Decision at 9.

¹⁴ Decision at 9 - 10.