



U.S. Department
of Transportation
**Maritime
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

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William N. Myhre, Esquire
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Re: Docket Number MARAD-2001-8665 - Ruling of the Chief Counsel Regarding the Applicability of the Ownership and Control Requirements for a Fishery Endorsement to the Owners of the Vessel ARICA

Dear Mr. Myhre:

You filed a petition with the Maritime Administration ("MARAD") dated November 10, 2000, in which you requested a ruling from the Chief Counsel of the Maritime Administration that the U.S. Citizen ownership and control requirements of the American Fisheries Act of 1998, Public Law 105-277, Division C, Title II, Subtitle I ("AFA"), and MARAD's implementing regulations at 46 C.F.R. Part 356 do not apply to Royal Greenland Trading ApS, its wholly-owned subsidiary, Royal Greenland, Inc., USA, or its equity ownership in the vessel ARICA, Official Number 550139 (the "Vessel"), through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.¹ The petition was filed pursuant to §213(g) of the AFA and 46 C.F.R. §356.53 on the basis that a conflict exists between the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, signed at Copenhagen October 1, 1951, and entered into force July 30, 1961 ("Denmark FCN") and both the AFA and 46 C.F.R. Part 356.

Your petition was published in the Federal Register for public comment on January 17, 2001, (66 *Fed. Reg.* 4069) as Docket No. MARAD-2001-8665. No comments were submitted in response to the notice. As required by MARAD's regulations, I have consulted with other departments and agencies within the Federal government that have responsibility or expertise related to interpretation or application of international investment agreements. I have considered advice provided to MARAD by the Department of State, the Department of Treasury, Office of the

¹Arica Fishing Company, LP is a limited partnership consisting of one general partner and four limited partners. Royal Greenland, Inc., U.S.A. is a wholly-owned subsidiary of Royal Greenland ApS, a Danish company, and is one of the limited partner in Arica Fishing Company, LP. Royal Greenland Inc., U.S.A. also owns a minority interest in JOMM Enterprises, Inc., the General Partner, and JZ, Ltd., one of the limited partners. The other limited partners are individual U.S. Citizens.



United States Trade Representative and United States Coast Guard in reaching the ruling set forth below.

Section 202(a) of the AFA, 46 U.S.C. §12102(c)(1), requires that in order for an entity to be eligible to document a vessel with a fishery endorsement, at least 75% of the ownership and control of the vessel-owning enterprise must be vested in U.S. Citizens at each tier of ownership and in the aggregate. If Non-Citizen² ownership interests in a vessel-owning entity exceeds 25% at any tier of ownership or in the aggregate, a sufficient portion of the Non-Citizens must divest their interests so that the level of Non-Citizen ownership and control in the vessel-owning entity does not exceed 25%, or the vessel-owning entity will not be deemed eligible under 46 U.S.C. 12102(c), as amended by §202(a) of the AFA, to document the vessel with a fishery endorsement. In the present case, Royal Greenland Trading ApS is not a U.S. Citizen, and its wholly owned subsidiary, Royal Greenland, Inc., USA, only qualifies as a documentation citizen³ and is a Non-Citizen for the purposes of the AFA. Royal Greenland Trading ApS and Royal Greenland, Inc., USA have aggregate ownership interest totaling nearly 54% of Arica Fishing Company, LP, the vessel-owning entity.

Section §213(g) of the AFA provides in part:

In the event that any provision of section 12102(c) or section 31322(a) of title 46, United States Code, as amended by [the AFA], is determined to be inconsistent with an international agreement relating to foreign investment to which the United States is a party with respect to the owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, such provision shall not apply to that owner or mortgagee with respect to such vessel to the extent of any such inconsistency.

MARAD's implementing regulations at 46 C.F.R. §356.53(e) require that, to the extent the AFA and the implementing regulations are determined to be in conflict with an international investment agreement, the requirements of the implementing regulations and 46 U.S.C. §12102(c) will not be applied to the owner or mortgagee to the extent of the inconsistency with respect to the specific vessel. If the petitioner is a vessel owner, as here, the regulations require the owner to comply with the documentation requirements as in effect prior to enactment of the AFA on October 21, 1998.

²The term "Non-Citizen" as used herein refers to a person that does not qualify as a U.S. Citizen under §2(c) of the Shipping Act, 1916, as amended, 46 App. U.S.C. §802.

³The term "documentation citizen" refers to an entity that meets the requirements of 46 U.S.C. §12102(a) for the documentation of a vessel. A corporation is deemed a documentation citizen able to document a vessel if: (1) it is established under the laws of the United States or of a State; (2) the chief executive officer, by whatever title, and the chairman of its board of directors are U.S. Citizens; and (3) no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum. A limited partnership is deemed to be a documentation citizen if: (1) the general partners are U.S. Citizens and (2) the controlling interest in the partnership is owned by U.S. Citizens.

Article VI(4) of the Denmark FCN provides that:

Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied.

The Department of State has advised that Article VI(4) of the Denmark FCN protects nationals and companies of one Party (here, Denmark) with respect to their legally acquired rights or interests in the territory of the other Party (here, the United States) in enterprises "which they have established" and that the intent of Article VI(4) is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful. As a Danish company, Royal Greenland Trading ApS is a "compan[y] of the other Party" within the meaning of Article VI(4) and the interests at issue are "within the territories" of the United States. Royal Greenland, Inc., USA, and Arica Fishing Company, LP are "enterprises" that Royal Greenland Trading ApS (with its U.S. co-investors, in the case of Arica Fishing Company LP) has "established" and to which it has supplied "capital." The petition asserts, and we do not have any evidence to the contrary, that Royal Greenland Trading ApS's ownership interests were acquired legally, in accordance with U.S. laws applicable at the time of acquisition.

The ownership interest that Royal Greenland Trading ApS has in the vessel-owning entity exceeds the 25% maximum aggregate limit for Non-Citizen ownership and control provided for in §202(a) of the AFA. In order for Arica Fishing Company, LP to be eligible to document the Vessel with a fishery endorsement in compliance with the citizenship requirements of the AFA, Royal Greenland Trading ApS would be required to divest itself of nearly half of the ownership interest that it holds in Arica Fishing Company, LP, through Royal Greenland, Inc., USA, JOMM Enterprises, Inc, and JZ Ltd.

As applied to Royal Greenland Trading ApS's existing ownership interest, the Department of State has advised that the differentiation between foreign investors and U.S. Citizen investors contained in §202(a) of the AFA, 46 U.S.C. 12102(c), which would require that Royal Greenland Trading, ApS partially divest itself of ownership interests that were legally acquired prior to the change in the law is "discriminatory" within the meaning of Article VI(4) of the Denmark FCN. The Department of State has advised that, in the circumstances of this petition, it considers the requirement under the AFA that petitioners elect between divestment of shares or partnership interests in the enterprises that directly or indirectly own the Vessel, on the one hand, and the loss of the fishery endorsement (a prerequisite for continued economic viability of the Vessel that the enterprises partially own, directly or indirectly), on the other hand, to constitute an impairment of vested rights or interests in an enterprise and in ownership capital. Therefore, I have concluded that the increased U.S. Citizen ownership threshold of §202(a) of the AFA, 46 U.S.C. §12102(c)(1), and MARAD's implementing regulations are inconsistent with the Denmark FCN with respect to Royal Greenland ApS's existing ownership interest in the Vessel and the vessel-owning entity. Accordingly, the new ownership requirements of 46 U.S.C. §12102(c)(1), as

amended by §202(a) of the AFA, and MARAD's implementing regulations at 46 C.F.R. Part 356 will not be applied to the owners of the ARICA to the extent of the conflict.

Arica Fishing Company, LP will be subject to the controlling interest standard of §2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), the ownership standard in effect prior to the enactment of the AFA. Because the tiered ownership structure would have qualified under the law as it existed prior to the enactment of the AFA,⁴ Arica Fishing Company, LP will be allowed to maintain its tiered ownership structure as set forth in the petition. However, section 213(g) provides in part that:

. . . The provisions of section 12102(c) and section 31322(a) of title 46, United States Code, as amended by [the AFA], shall apply to all subsequent owners and mortgagees of such vessel, and shall apply, notwithstanding [the language of this section], to the owner on October 1, 2001 of such vessel if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity after such date.

If any of the ownership interest held directly or indirectly in Arica Fishing Company, LP is transferred on or after October 1, 2001, and the vessel-owning entity has Non-Citizen ownership interest in excess of 25% at any tier or in the aggregate, §213(g) of the AFA dictates that the transfer must be to U.S. Citizens. If any of the ownership interest in Arica Fishing Company, LP is transferred after October 1, 2001, to a Non-Citizen, before such time as the vessel owner complies with 46 U.S.C. §12102(c), as amended by the AFA, Arica Fishing Company, LP will be deemed ineligible to document the Vessel with a fishery endorsement and the Vessel's fishery endorsement will be invalidated pursuant to §213(g) of the AFA and 46 C.F.R. §356.53(g).

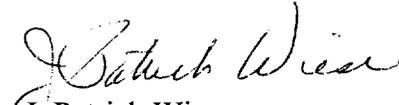
Finally, this determination applies to the existing ownership structure of the ARICA. If any ownership interest in the Vessel is transferred to a Non-Citizen prior to October 1, 2001, the owners of the ARICA will be required to submit a separate petition under 46 C.F.R. §356.53 with respect to the new ownership structure of the Vessel.⁵ Furthermore, in order to confirm that no interest in the vessel-owning entity is transferred to a Non-Citizen after October 1, 2001, Arica Fishing Company, LP is required to submit on an annual basis to MARAD's Citizenship

⁴Arica Fishing Company, LP would qualify under the pre-AFA citizenship standard for documentation of a vessel with a fishery endorsement that requires the owner to qualify as a U.S.-Citizen that meets the controlling interest requirements of §2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b). Because tiering is allowed under the current interpretation of §2 of the Shipping Act, 1916, 53% of the ownership in Arica Fishing Company, LP would be deemed to be held by U.S. Citizens under current law. However, when the Non-Citizen ownership is aggregated as required by the AFA, the calculation reduces the ownership of U.S. Citizens in Arica Fishing Company, LP to less than 50%.

⁵As part of this petition, the Petitioner submitted a certification required by 46 C.F.R. §356.53(b)(5) stating that it does not intend to transfer any direct or indirect interest of a Non-Citizen in the vessel to another Non-Citizen prior to October 1, 2001.

Approval Officer all relevant ownership information as required by 46 C.F.R. §356.53(f), as well as an Affidavit of U.S. Citizenship which demonstrates that it complies with the ownership and control requirements of §2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), as in effect prior to the enactment of the AFA.

Sincerely,



J. Patrick Wiese
Acting Chief Counsel