



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

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

JUN 25 2001

Joseph D. Weinstein, Esquire
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Seattle, Washington 98101-1688

Re: Docket Number MARAD-2000-8517 - Ruling of the Chief Counsel Regarding the Applicability of the Ownership and Control Requirements for a Fishery Endorsement to the Owners of the Vessel PACIFIC KNIGHT

Dear Mr Weinstein:

You filed a petition with the Maritime Administration ("MARAD") dated October 13, 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 Pacific Knight, LLC, its members or parent companies as the owners¹ of the vessel PACIFIC KNIGHT, Official Number 561771 (the "Vessel"). 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 Japan, signed at Tokyo April 2, 1953, and entered into force October 30, 1953 ("Japan FCN"), 4 UST 2063; TIAS 2863; 206 UNTS 143, and both the AFA and 46 C.F.R. Part 356.

Your petition was published in the Federal Register for public comment on December 19, 2000, (65 *Fed. Reg.* 79451) as Docket No. MARAD-2000-8517. 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 United States Trade Representative and United States Coast Guard in reaching the ruling set forth below.

¹Maruha Corporation (Maruha), its subsidiaries, Westward Seafoods, Inc. ("WSI") and Westward Alaska Fisheries, Inc. ("WAF"), Pyramid Fishing Co. ("Pyramid"), and Western Alaska Investment Co. ("WACO") are direct and indirect owners of Pacific Knight, LLC and together with Pacific Knight, LLC are herein referred to as the "Petitioners."



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 exceed 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 §202(a) of the AFA to document the vessel with a fishery endorsement. The vessel in question, the PACIFIC KNIGHT, is owned by Pacific Knight, LLC, which does not meet the requirement that 75% of the ownership and control in the vessel-owning entity be vested in U.S. Citizens. Pacific Knight, LLC is composed of two members, Pyramid and WACO, both U.S. Corporations indirectly owned by a Japanese corporation, Maruha, which qualify as documentation citizens³ but are Non-Citizen for the purposes of the AFA. Pyramid is a wholly owned subsidiary of WSI, and WACO is a wholly owned subsidiary of WAF. Both WSI and WAF are U.S. corporations, are wholly owned subsidiaries of Maruha and are not considered U.S. Citizens for purposes of vessel documentation and the AFA.

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. Limited Liability Companies that utilize a corporate structure have been treated as corporations by the United States Coast Guard for purposes of determining eligibility to document a vessel under 46 U.S.C. §12102(a).

Article V(1) of the Japan 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, in their capital, or in the skills, arts or technology which they have supplied; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

The Department of State has advised that Article V(1) of the Japan FCN protects nationals and companies of one Party (here, Japan) 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 V(1) is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful. As a Japanese company, Maruha is a "compan[y] of the other Party" within the meaning of Article V(1) and the interests at issue are "within the territories" of the United States. The other Petitioners are "enterprises" that Maruha has "established" and in which Maruha has invested its "capital." The petition asserts, and we do not have any evidence to the contrary, that Maruha's ownership interests were acquired legally, in accordance with U.S. laws applicable at the time of acquisition.

The ownership interest that Maruha 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 Pacific Knight, LLC to be eligible to document the Vessel with a fishery endorsement in compliance with the citizenship requirements of the AFA, Maruha would be required to divest itself of 75% of the interest that it holds in Pacific Knight, LLC through Pyramid, WACO, WSI, and WAF.

As applied to Maruha's existing ownership interest, the Department of State has advised that this differentiation between foreign investors and U.S. Citizen investors contained in §202(a) of the AFA, 46 U.S.C. §12102(c)(1), which would require that Maruha partially divest itself of ownership interests that were legally acquired prior to the change in the law is "discriminatory" within the meaning of Article V(1). The Department of State has advised that, in the circumstances of this petition, it considers the requirement under the AFA to elect between divestment of shares in 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 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 ownership restrictions of §202(a) of the AFA, 46 U.S.C. §12102(c)(1), and MARAD's implementing regulations are inconsistent with the Japan FCN with respect to the Petitioner's existing ownership interest in the Vessel. 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 PACIFIC KNIGHT to the extent of the conflict.

You stated in your petition that the Vessel was “grandfathered” under the savings clause of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 (“Anti-Reflagging Act”), Public Law 100-239, 46 U.S.C. §12102 note (1998).⁴ Although it was not specifically addressed in your petition, you implicitly raised the question of what ownership standard should be applied to the Vessel if it is not subject to the new requirements of the AFA. Vessels “grandfathered” under the savings clause of the Anti-Reflagging Act were only required to be owned by a documentation citizen in order to be eligible for documentation with a fishery endorsement and therefore were not required to comply with the ownership and control provisions of §2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), to which most vessels were subjected in order to obtain a fishery endorsement prior to the passage of the AFA. As I have determined that the ownership restrictions of the AFA and MARAD’s implementing regulations are inconsistent with the Japan FCN with respect to the petitioner’s existing ownership interest in the PACIFIC KNIGHT, Pacific Knight, LLC will be subject to the documentation citizen standard, the standard to which it had been “grandfathered,”⁵ and with which it was required to comply prior to the passage of the AFA.

The maximum amount of Non-Citizen ownership permitted in the PACIFIC KNIGHT will be established as of October 1, 2001. Section 213(g) of the AFA provides in part:

... 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.

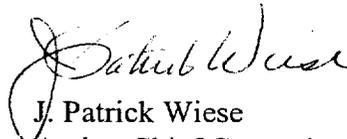
⁴The Anti-Reflagging Act increased the citizenship requirement for the owner of a vessel with a fishery endorsement from the standard of a documentation citizen to the requirement that the vessel owner comply with the controlling interest requirements of §2(b) of the Shipping Act, 1916, as amended, 46 App. U.S.C. §802(b). However, section 7(b) of the Anti-Reflagging Act provided that the increased citizenship requirement would not apply if, prior to July 28, 1987, the vessel (1) was documented and operating as a fishing, fish tender or fish processing vessel in the U.S. Exclusive Economic Zone (EEZ) or (2) was contracted for purchase for use as a fishing, fish tender, or fish processing vessel in the navigable waters of the U.S. EEZ and the purchase was shown by the contract or similarly reliable evidence acceptable to the Secretary to have been made for the purpose of using the vessel in the fisheries.

⁵The “grandfather” provision of the Anti-Reflagging Act was deemed by the Coast Guard to run with the vessel; however, the grandfather provisions of the Anti-Reflagging Act have been repealed by §204 of the AFA, effective October 1, 2001. Therefore, the “grandfathered” right of a vessel to be documented with a fishery endorsement, provided that the vessel owner qualifies as a documentation citizen, no longer runs with the vessel, and any subsequent owner will be required to meet the citizenship requirements of the AFA.

Consequently, if any transfer of an ownership interest in the vessel-owning entity is made after October 1, 2001, and the vessel-owning entity has a Non-Citizen ownership interest in excess of 25% at any tier or in the aggregate, the transfer must be to U.S. Citizens. If, after October 1, 2001, any ownership interest in the vessel-owning entity is transferred to a Non-Citizen and the vessel-owning entity has not fully complied with 46 U.S.C. §12102(c), as amended by the AFA, Pacific Knight, LLC 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 PACIFIC KNIGHT. If any ownership interest in the vessel is transferred to Non-Citizens prior to October 1, 2001, the owners of the PACIFIC KNIGHT 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.⁶ Furthermore, in order to confirm that no interest in the vessel-owning entity is transferred to a Non-Citizen after October 1, 2001, Pacific Knight, LLC is required to submit on an annual basis to MARAD's Citizenship Approval Officer relevant ownership information as required by 46 C.F.R. §356.53(f), as well as an Affidavit of Citizenship to demonstrate that it qualifies as a documentation citizen.

Sincerely,



J. Patrick Wiese
Acting Chief Counsel

⁶As part of this petition, the Petitioner submitted the 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.