



INTERIOR BOARD OF INDIAN APPEALS

Shiree Dupuis-Ryan v. Acting Portland Area Director, Bureau of Indian Affairs

25 IBIA 139 (01/25/1994)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

SHIREE DUPUIS-RYAN

v.

ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-65-A

Decided January 25, 1994

Appeal from the denial of a loan guaranty.

Vacated and remanded.

1. Indians: Financial Matters: Financial Assistance

It is error for the Bureau of Indian Affairs to deny an application under the Indian Financing Act on the grounds that an applicant failed to provide certain information when that information was not required by either the applicable program regulations or specific request.

2. Indians: Financial Matters: Financial Assistance

Each application for assistance under the Indian Financing Act is unique. In considering an application, it is important that the Bureau of Indian Affairs address the specific facts of that application.

APPEARANCES: Shiree Dupuis-Ryan, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Shiree Dupuis-Ryan seeks review of a March 15, 1993, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), denying her application for a loan guaranty. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision, and remands this matter to the Area Director for further consideration.

Appellant, a member of the Confederated Salish and Kootenai Tribes (Tribes), is the sole proprietor of Eagle Drug, a pharmacy located in Ronan, Montana. Eagle Drug, which has been in operation since June 1989, primarily serves tribal members on the Flathead Indian Reservation. Its

largest billing is to the Indian Health Service (IHS), ^{1/} whose payments have apparently been somewhat unpredictable. Because of this problem, appellant sought a guaranteed loan in the amount of \$100,000 to be used as a line of credit. The loan was to be renewed each year for a period of three years.

On March 15, 1993, the Area Director denied the loan guaranty in letters to the bank and appellant. The letter to appellant stated:

The accounts receivable were not aged so we were unable to determine their value which would diminish with time, and there was no certificate of lending to establish how the credit line would be managed.

We were also concerned that you are an absentee owner of the business. This can lead to questions about the management of money, and in this case also proper precautions in the security of and management of drug supplies.

The problem of a lengthy time period to receive payment from the [IHS] may not be reduced due to the possibility of a * * * contract [under the Indian Self-Determination Act, P.L. 93-638 (P.L. 93-638)], but may extend the time due to another entity that funds need to pass through.

It appears that term financing may be more beneficial to this enterprise at the present time, but more information would be required on Inventory, ageing of accounts receivable, and the same information would be required on accounts payable to complete an analysis.

There were also concerns related to the Indian Business Development Grant that you were awarded to expand your lumber brokerage business, and your failure to make the required reports on this enterprise which we understand is now out of business.

Due to the above reasons there is not a reasonable assurance of repayment of the requested operating line of credit.

Appellant appealed this decision to the Board. Because appellant's notice of appeal contained information that had not been before the Area Director when he issued his decision, on June 18, 1993, the Board requested that the Area Director review the additional information and determine if that information would cause him to reconsider the denial. See Nockey Construction, Inc. v. Portland Area Director, 22 IBIA 38 (1992); Gauthier v.

^{1/} The IHS is part of the Public Health Service (PHS) in the Department of Health and Human Services. Some documents in the administrative record refer to the IHS, and some refer to the PHS. For consistency, the Board will refer only to the IHS.

Portland Area Director, 18 IBIA 303 (1990). By letter dated July 20, 1993, the Area Director confirmed the denial.

Discussion and Conclusions

The Area Director concluded that there was not a reasonable assurance that appellant could repay the loan. A reasonable assurance that a loan can be repaid is required under 25 CFR 103.11, which provides that "[a] guaranty certificate shall be issued only when, in the judgment of the Commissioner [of Indian Affairs], there is a reasonable prospect of repayment of the loan." 25 CFR 103.15 further provides:

(b) Reasonable assurance of repayment will be considered to exist:

(1) In the case of individuals, where past operations and future prospects of the applicant's operations demonstrate ability to repay the loan from production' earnings, or other assets. Full consideration will be given to the applicant's managerial ability and experience.

The Board has frequently stated that the decision whether to approve requests for assistance under the Indian Financing Act is committed to BIA's discretion, and that its role in reviewing these decisions is limited. The Board does not substitute its judgment for that of BIA, but rather reviews the decision to ensure that all legal prerequisites to the exercise of discretion were met. See, e.g., Abbott Bank v. Aberdeen Area Director, 23 IBIA 243, 244 (1993), and cases cited therein.

In this case, the administrative record is composed primarily of the application. It also contains a credit memorandum which was apparently prepared by the credit staff in the Portland Area Office, and which supports approval of at least a modified loan. The credit memorandum discusses the issues raised in the Area Director's denial, but its author(s) did not recommend denial of the loan guaranty on the basis of any or all of those issues. Because no other document in the record recommends denial, the Area Director's decision to deny the loan guaranty must stand on its own.

The Area Director cited four separate reasons for his denial. Based on the discussion below, the Board finds problems with each of these reasons, and concludes that the denial must be vacated and this matter remanded to the Area Director for further consideration.

The first reason for denial was that appellant's accounts receivable had not been aged. In her notice of appeal, appellant states that although she was not asked to age accounts receivable when she submitted her application, only the IHS is slow in paying claims; 98 percent of her accounts receivable are IHS patients; and regardless of other insurance, any denial or account balance is submitted to IHS for final payment.

The older an account receivable is, the less chance there is that it will ultimately be paid, especially if payment is sought from an individual and there have been no interim payments. The age of accounts receivable and the expectation of receiving payment on those accounts could therefore have a significant bearing on the determination of whether there was a reasonable assurance that appellant could repay the loan.

Appellant asserts, however, that she was not asked to age accounts receivable before she submitted her application. The Area Director has not disputed this statement, and has cited no regulation or other authority requiring that accounts receivable be aged in a loan guaranty application. The Board is not independently aware of any such requirement. Although it is arguable that this information should have been part of any loan application, it is understandable that appellant might not have believed that the age of accounts receivable was significant here, where most of the payments were sought from a Federal entity. 2/

[1] The Board has previously held that it is error for BIA to deny an application for financial assistance under the Indian Financing Act based on an applicant's failure to provide information that BIA never requested. See Wounded Head v. Aberdeen Area Director, 22 IBIA 41 (1992); Pourier v. Acting Aberdeen Area Director, 19 IBIA 266 (1991), and cases cited therein. Appellant was not informed through the regulations governing the loan guaranty program that she was required to age accounts receivable. The Area Director does not contend that appellant was informed in any other way prior to denial that this information was required. It is error for BIA to deny an application on the grounds that information was not provided when that information was not required either by the applicable program regulations or by request prior to the submission of the application or during its consideration.

The Area Director also expressed concern that appellant is an "absentee owner." He stated in his July 20, 1993, letter:

The owner of the business (Appellant) which is located in Montana continues to reside in Colorado, and cannot effectively manage the required day to day needs of the business as an absentee owner. The risk of mismanagement of funds and a tight control in regards to drugs in this business is considered too high risk with an absentee owner.

2/ Exhibit Q in the administrative record shows that as of Feb. 15, 1993, appellant's accounts receivable totalled \$73,037.98. Of that amount, only \$1,363.59 was attributed to private debt. The remainder consisted of amounts payable by various insurance companies, and \$45,407.46 which had been billed to IHS. The credit memorandum states that appellant's primary financial problem was the length of time required to receive payment from IHS. It does not appear that the size and/or age of appellant's accounts receivable is the problem; rather the problem is the inability of IHS to pay promptly.

Appellant argues:

I am the owner, however I am not the pharmacist and therefore my daily presence is not required for this business to conduct daily dispensing of pharmaceuticals. This is handled by my licensed pharmacist * * *. I monitor daily transactions by terminal access via modem located at my Denver residence. Every transaction can be viewed within seconds of initial input. All reports, billings, purchasing, payroll, and other financial matters are administered by myself. 99.5% of all transactions are either direct deposit or in check form. Physical inventories of stock are conducted on a select and random basis by either myself or contracted party. * * * There has never been a discrepancy in inventories, transactions nor even a hint of an impropriety.

At present, I maintain a dual residency and the location in Colorado is both recent and temporary but necessary for the present time due to my husband's employment with a national Indian owned corporation in Denver. Considering the nature of my business and the availability of terminal access for monitoring daily transactions, we determined that commuting would be less for me than my husband and that is the reason for our present location. My husband, a Cherokee descendant, is continuing to seek employment on the Flathead Reservation.

Appellant's ability to manage this Montana business from Colorado is, without question, an issue that must be considered. It was addressed in the credit memorandum: "The strength of this loan is [appellant's] experience in starting and operating a business. * * * The weakness is that [appellant] currently resides in * * * Colorado, but has stated that she intends to return to Montana."

[2] Each application for assistance under the Indian Financing Act is unique. In considering an application, it is important that BIA address the specific facts of that application. It does not appear here that the Area Director considered appellant's ability to manage this business as an absentee owner/manager. Instead, it appears that he considered only the generalization that it is difficult to be an absentee owner/manager.

Appellant's notice of appeal indicates that she is aware of her managerial responsibilities, and has taken steps to ensure that she is informed on a daily basis of what is happening in her business. The question that the Area Director must consider is whether appellant, with her unique and individual managerial background and with her prior involvement with this business, is capable of managing the business from a distance. Consideration of this question requires an analysis of the specific steps appellant has taken to remain in constant contact with her business despite her physical location. The Board finds that the Area Director did not

adequately consider appellant's ability to manage this business as an absentee owner/manager. ^{3/}

The Area Director's third basis for denying the loan guaranty was that appellant had not shown that if the IHS program were operated by the Tribes under a P.L. 93-638 contract, payment would be faster than from IHS. He states in his July 20, 1993, letter: "In normal circumstances increasing the number of times documents must be audited before payment can be made does increase the length of time before payment." This statement appears to assume that if the Tribes operate the IHS payment program, the Tribes will be an additional party in the process. Normally, when a tribe contracts a Federal program, the tribe replaces the Federal entity.

The credit memorandum again offers a different perspective:

The business has a contract with [IHS] to provide prescriptions. The length of time to receive payment is so long that it leaves the business with a high accounts receivable and a cash shortage for operations. The Flathead Tribe is negotiating for a [P.L. 93-638] contract. When the tribe receives the contract the payments will be more prompt which will reduce the need for this small business to carry such a large accounts receivable. Until this happens, the operating loan will assist by providing funds to cover operational costs. Which will achieve a positive cash flow for the business.

The Area Director has asked appellant to prove something which is basically unprovable at this time. Appellant cannot guarantee that payment will be faster if the Tribes contract the IHS program. However, there is a reasonable basis for a belief that if the Tribes contract the program, they will have a greater incentive to ensure prompt payment, and a smaller number of bills for their consideration. The Area Director's reason for believing that payment may be longer is not adequately supported in his decision or the administrative record.

The Area Director's final basis for denying the loan guaranty related to his concerns about an Indian Business Development Grant that appellant was awarded for a separate lumber business. The Area Director indicated that appellant had failed to file required reports on this business.

Appellant states that her accountant informed her that all required reports were filed until the lumber business was forced to discontinue operations. She indicates that "[l]itigation is still pending due to a client who failed to ship lumber owned by [her business] and then that client filed bankruptcy. Any reports filed after this event simply stated 'Litigation still pending, no further transactions.'"

^{3/} Although in some cases, generalizations may be adequate, a generalization should be reviewed when specific information opposing it is presented. Cf. Price v. Portland Area Director, 18 IBIA 272, 279 (1990) (noting that the Area Director based his decision upon generalizations without considering the abilities of the individual applicant).

Appellant's statements are echoed in the credit memorandum:

[Appellant] has been involved in other business ventures. The [BIA] participated with [appellant] in the expansion of a wood product brokerage by providing an Indian Business Development grant. This business ran into trouble when a large order was defaulted on by a customer. There is currently litigation on this transaction in court and involves over \$100,000 that could be collected if [appellant] wins.

The Area Director is justified in considering whether problems concerning financial matters of one business owned by an individual may be indicative of that individual's ability to operate another business profitably. However, under the circumstances recited by appellant and noted in the credit memorandum, it does not appear that appellant's management ability was at issue in the failure of her lumber business. Appellant's ability to repay the requested loan is based on the profitability of Eagle Drug, not that of any other business in which appellant may be or have been involved. Although the Area Director may legitimately have considered whether appellant might have liability because of the litigation over the lumber business, this was not the issue he raised related to that business.

There appears to be a factual dispute concerning whether appellant filed all the required reports for her lumber business. The Area Director submitted more specific information concerning this matter with his July 20, 1993, letter, but appellant has not yet been given an opportunity to respond to this information. The Area Director should allow appellant to respond to the new information when he reconsiders this matter on remand.

Based on the preceding discussion, the Board finds that the Area Director's denial of appellant's loan guaranty request is not supported by the administrative record and the denial letter.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 15, 1993, decision of the Acting Portland Area Director is vacated, and this matter is remanded for further consideration in accordance with this decision. 4/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

4/ This decision does not require that appellant's request for a loan guaranty be approved. The Area Director retains discretion to determine whether the guaranty should be granted after taking the Board's discussion into consideration.