

MICHAEL G. DIRGO

IBLA 2002-322

Decided April 20, 2005

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting an Alaska Native Veteran allotment application. AA-83656.

Affirmed.

1. Alaska: Native Allotments

Under the implementing regulations at 43 CFR 2568.50(f), an Alaska Native who does not reside in the State of Alaska is not eligible, as a matter of law, to select an allotment pursuant to the Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g(b)(1) (2000).

APPEARANCES: Michael G. Dirgo, Wormleysburg, Pennsylvania, pro se; Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Michael G. Dirgo has appealed from a March 27, 2002, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Alaska Native Veteran allotment application, AA-83656, filed with BLM on January 25, 2002, pursuant to the Alaska Native Veterans Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000). The BLM decision rejected the allotment application on the ground that it contained two “legal deficiencies.” (Mar. 27, 2002, Decision at 1.) First, the decision stated that Dirgo failed to qualify for the allotment because he did not establish that he resides in the State of Alaska, as required by 43 CFR 2568.50(f). Second, BLM rejected Dirgo’s application because his military service dates did not include “at least six months between January 1, 1969, and December 31, 1971,” or demonstrate that he enlisted or was drafted “after June 2, 1971, but before December 3, 1971,” as required by the terms of the statute.

43 U.S.C. § 1629g(b)(1)(B) (2000). Additionally, the BLM decision noted that Dirgo failed to submit the following information with the application, which resulted in several “application deficiencies,”^{1/} as follows: (1) a “Certificate of Indian Blood”^{2/} as required by 43 CFR 2568.74(a); (2) a map with a scale of 1:63,360 or larger showing the location of the allotment, as required by 43 CFR 2568.74(d); (3) a “written legal description and estimated number of acres for each parcel as required by 43 CFR 2568.74(d);” and (4) proof of use and occupancy for 5 or more years begun before December 14, 1968, as required by 43 CFR 2568.90(a)(4) and (5).

Dirgo timely filed a Notice of Appeal and included with it a Statement of Reasons for the appeal (NA/SOR).^{3/} In the NA/SOR, Dirgo contends that the residency requirement “discriminates against Alaskans who live outside of the state and is therefore not fulfilling the intent of benefitting all Alaskan veterans.” (NA/SOR at 1.) The dates for military service are “grossly discriminatory,” Dirgo argues, because they “exclude the majority of veterans who served throughout the Vietnam era period,” thereby violating the intent behind ANVAA. *Id.* With regard to the application deficiencies, Dirgo states that, with the application, he enclosed “a copy of my 13th Regional Corporation card, which has my BIA number * * * on it.”

^{1/} The decision did not explain the difference between “legal” and “application” deficiencies. We interpret a “legal defect” or “legal deficiency” to refer to a declaration of material facts on the face of the application demonstrating a fundamental failure of the applicant to satisfy the requirements of law, which is incapable of being corrected and will therefore cause an application to fail as a matter of law. *See, e.g., Serfean Alexie*, 147 IBLA 137, 139-40 (1999); *Lena Baker Maples*, 129 IBLA 167, 169 (1994). By contrast, we construe BLM’s use of the phrase “application deficiencies” to refer to omissions of proof which by law and/or regulation may be curable by an ANVAA applicant after an application has been filed. *See, e.g.,* 43 CFR 2568.75; 2568.81; 2568.82(b).

^{2/} With his application, Dirgo provided BLM with a copy of his “13th Regional Corporation card” (Notice of Appeal and Statement of Reasons (NA/SOR) at 1), which identifies Dirgo as having been assigned an identification number by the Bureau of Indian Affairs (BIA). This information would be insufficient proof of Dirgo’s Alaskan Native status to qualify him for a Native allotment pursuant to 43 CFR 2568.74(a), which requires the applicant to file a “Certificate of Indian Blood.” However, regulation 43 CFR 2568.75(a) establishes that an applicant’s “Certificate of Indian Blood” may be filed subsequent to the deadline for filing an Alaska Native Veteran allotment application.

^{3/} On Apr. 24, 2002, the Board received Dirgo’s Request for Stay of the effect of the BLM decision. In view of our decision affirming the BLM decision, the petition for stay is denied as moot.

Dirgo avers that “[t]his was stated as an acceptable substitute in the instructions with the application.” Id. He further states:

I have not received sufficient information from the BIA and BLM regarding potential land allotments to be able to send a map specific to an allotment. I did enclose a map of the Cook Inlet Region area, which is all I was provided with in the way of information regarding my numerous requests for land allotment information.

Id.

[1] The relevant statutory provision was enacted as part of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998). Section 432 of that Act amended the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629a (2000), by adding a new section 41. Section 41 has become known as the ANVAA and has been codified at 43 U.S.C. § 1629g (2000). ANVAA provides in part:

During the eighteen month period following promulgation of implementing rules * * *, a person described in subsection (b) shall be eligible for an allotment of not more than two parcels of federal land totaling 160 acres or less under the Act of May 17, 1906 * * *, as such Act was in effect before December 18, 1971. [^{4/}]

43 U.S.C. § 1629g(a)(1) (2000). ANVAA expressly restricted this eligibility to persons (1) who would have been eligible under the Alaska Native Allotment Act as that Act was in effect before December 18, 1971, 43 U.S.C. § 1629g(b)(1)(A) (2000), and (2) who are veterans who served during the period between January 1, 1969, and December 31, 1971, and either served at least 6 months between January 1, 1969, and December 31, 1971, or enlisted or were drafted into military service after June 2, 1971, but before December 3, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000). Thus, the statute does not create a new eligibility for Alaska Native allotments for Native veterans on account of their military service, but limits eligibility to those Native Alaskans who would have been eligible to file for a Native allotment under the 1906 Act as it was in effect on December 18, 1971, but were unable to do so because they were in active military duty status. See Robert P. Vlasoff, 158 IBLA 380, 382 n.2 (2003).

^{4/} The Act of May 7, 1906 (the Alaska Native Allotment Act), formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), was repealed by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000).

The Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), provided, in pertinent part:

The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska * * * to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska * * *. [Emphasis added.]

Thus, the Board has held that an applicant for a Native Allotment under the Act of May 17, 1906, as amended, must be a resident of Alaska at the time the application is filed. Alice Thompson, 149 IBLA 98, 103-04 (1999); see 43 CFR 2561.0-3. In implementing the ANVAA, the Department has promulgated regulations specifically providing that, in order to be eligible for and qualify for an allotment under ANVAA, a living applicant “must * * * reside in the State of Alaska.” 43 CFR 2568.50(f).^{5/} That regulation clearly imposes the requirement that an applicant under ANVAA must be a resident of the State of Alaska at the time he or she files an application under ANVAA, regardless of whether he or she might have been a resident of the State of Alaska at any prior time.

Dirgo’s application states that he resides in Wormleysburg, Pennsylvania. The application further states that Dirgo’s “parents moved to Pennsylvania when [he] was an infant” (Application at 2); it contains no documentation or supporting evidence that Dirgo resides in Alaska. Id. at 1-2. Thus, the record before us establishes that Dirgo was not eligible to receive an allotment under the ANVAA, as he does not reside in the State of Alaska.

Dirgo complains that the statute discriminates against “Alaskans who live outside of the state.” (NA/SOR at 1.) We addressed a similar argument raised within the context of ANVAA in George F. Jackson, 158 IBLA 305, 307 (2003), where we stated: “This Board has no authority to reconsider the terms or qualifying conditions set forth in the Alaska Native Veterans Allotment Act. The Board’s authority derives from the executive branch; it does not coincide with that of the judiciary.” See also Robert P. Vlasoff, 153 IBLA at 383. We are bound to construe the statute as it is written; we are not empowered to reconsider an Act of Congress or take exception to its fairness. See Mack Energy Corporation, 153 IBLA 277, 290 (2000).

^{5/} deceased veteran must “have been a resident of Alaska at the time of death.” 43 CFR 2568.50(f).

Because he is not a resident of Alaska, Dirgo is not eligible, as a matter of law, to select a Native allotment under the plain terms of the relevant Departmental regulation. 43 CFR 2568.50(f). Accordingly, even if the Board were to consider the remaining arguments raised by Dirgo, our only conclusion would be to affirm the decision.^{6/}

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed is affirmed and appellant's petition for stay is denied as moot.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

^{6/} BLM is correct, however, in its decision holding that Dirgo did not meet the eligibility requirements set forth in 43 U.S.C. § 1629g(b)(1)(B) (2000), as his Form DD-214, by which military service is documented throughout the Government, demonstrates that he served on active duty in the United States Army from July 11, 1966, through June 21, 1969. His qualifying service dates for purposes of ANVAA are from Jan. 1, 1969, through June 21, 1969, just under the six-month period required by the statute. Dirgo's Form DD-214 likewise establishes that he did not enlist and was not drafted into military service after June 2, 1971, but before Dec. 3, 1971.