



INTERIOR BOARD OF INDIAN APPEALS

Helen Polzer, et al. v. Minneapolis Area Director, Bureau of Indian Affairs

20 IBIA 158 (08/01/1991)



# United States Department of the Interior

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

HELEN POLZER ET AL.

v.

MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-142-A

Decided August 5, 1991

Appeal from a decision denying a loan guaranty.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Financial Matters: Financial Assistance

Benefits under the Indian Financing Act are available to economic enterprises which are at least 51 percent owned by members of Federally recognized Indian tribes.

APPEARANCES: Karl J. Goethel, Esq., Durand, Wisconsin, for appellants; Mark A. Anderson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Helen Polzer, Anton J. Polzer, Richard Polzer, David Polzer, and Polzer's Garage, Inc., seek review of an April 4, 1990, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), denying a request for a loan guaranty. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

### Background

Helen Polzer is an enrolled member of the Mdewakanton Sioux Tribe. Anton J. Polzer, Richard Polzer, and David Polzer are Helen's sons, but are not enrolled members of a Federally recognized Indian tribe. Anton E. Polzer, Helen's now deceased husband, was also not an enrolled member of a Federally recognized tribe.

Polzer's Garage, Inc. (garage), has been in business for over 50 years. Originally, it was an unincorporated, family-owned business. When the business was incorporated, Anton J., Richard, and David each owned 5 percent of the stock, and Anton E. owned the remaining 85 percent.

According to information in the administrative record, on September 7, 1989, Anton J. submitted a loan package to the Great Lakes Agency, BIA, requesting a preliminary commitment to guarantee a \$500,000 loan under the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453, 1481-1498 (1988). <sup>1/</sup> See also 25 CFR Part 103. By letter dated September 20, 1989, the Acting Superintendent denied the request, stating:

The Indian Financing Act of 1974 \* \* \* stipulates that an applicant for the [BIA's] credit programs be an enrolled member of a federally recognized Tribe. [2/] Therefore, we contacted the four Sioux Tribes in Minnesota to verify your tribal enrollment. You and your brothers are not listed as enrolled members with the Sioux Tribes in Minnesota. The identifying numbers you provided are application numbers for sharing as lineal descendants under the Mississippi Sioux Judgments Award Act of October 25, 1972, P.L. 92-555. It is possible to be a lineal descendant and not an enrolled member.

You are ineligible for Bureau financial assistance, as you are not an enrolled member of a federally recognized Tribe. \* \* \*

By letter dated February 9, 1990, the Bank of Alma, Alma, Wisconsin (bank), agreed to lend appellants \$225,000 with a BIA loan guaranty. Helen submitted a loan guaranty request to BIA on February 12, 1990. Helen stated: I will own 51% of Polzer's Garage, Inc., with my three sons owning 49%, or 16.33% each. I will have controlling interest, and will be the majority stockholder." <sup>3/</sup>

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<sup>1/</sup> All further references to the United States Code are to the 1988 edition.

<sup>2/</sup> 25 U.S.C. § 1452(b) defines "Indian" as "any person who is a member of any Indian tribe \* \* \* which is recognized by the Federal Government as eligible for services from the [BIA]." See also 25 CFR 103.1(c), 103.8.

<sup>3/</sup> 25 U.S.C. § 1452(e) defines "economic enterprise" as "any Indian-owned \* \* \* commercial, industrial, or business activity established or organized for the purpose of profit: Provided, That such Indian ownership shall constitute not less than 51 per centum of the enterprise." See also 25 CFR 103.1(i).

The loan request was reviewed by the Great Lakes Agency Superintendent, who by memorandum dated March 29, 1990, advised the Area Director:

The loan package documentation reflects that Helen Polzer, an enrolled member of Santee Sioux of Minnesota, is 51% owner of Polzer Garage, Inc. According to Mrs. Polzer, the remaining 49% of the business is owned by her sons. Our cursory review of this package reflects that the father, Anton Sr., currently owns 85% of the stock with the remaining 15% being held by the brothers. There is no documentation which would indicate that any transfer of stock ownership to Mrs. Polzer has taken place.

In addition, the CPA's compilation report indicated that Polzer Garage Inc. has been leasing their present facility from a partnership (Polzer Brothers). According to the compilation, the three brothers of the partnership are also stockholders of Polzer Garage Inc., who will own 75% of the shares of stock in Polzer Garage Inc. Based on the information provided in the compilation transfer of majority ownership to the brothers will take place once the financing has been secured. The loan package contains no verifiable documentation that Mrs. Polzer will own majority stock in the company.

By letter dated April 4, 1990, the Area Director informed the bank that the loan guaranty request would not be approved. The Area Director stated: "We find, primarily, that the substantive beneficiaries of this loan are not eligible for a guaranty from the BIA."

At some point during the application process, Anton E. died. During April and June 1990, attorney Earl J. Goethel, stating that he represented Helen, wrote the Area Director concerning Anton E.'s estate, and indicated that Helen would inherit Anton E.'s 85-percent share in the garage. Goethel initially sought information concerning the status of the loan guaranty request, but after learning that the request had been denied, sought the reasons for denial.

By letter dated July 31, 1990, the Area Director responded to Goethel's last letter stating:

We denied the loan because the loan package makes it apparent that the loan beneficiaries in fact of the loan are the Polzer brothers, who are not members of an Indian tribe.

The Indian Financing Act is clear that only "Indians" are eligible for its benefits (25 U.S.C. 1451 et seq.). "Indian" is defined in section 1452 as any person who is a member of any Indian tribe.

We are aware that since the Polzer brothers originally applied for a bank loan with our guaranty, their mother, who

is eligible for these benefits, has been substituted as the borrower. The loan package, however, does not indicate that she has any involvement in the business being purchased. The borrower must be a real party in interest in the business being financed to be eligible for a guaranty. [4/]

The letter concluded with a statement of procedures for filing an appeal. 5/

The Board received appellants' notice of appeal from this decision on August 29, 1990. 6/ Appellants and the Area Director filed briefs.

### Discussion and Conclusions

[1] The Area Director initially argues that the Board lacks jurisdiction to review this decision because the decision is based on an exercise of discretion. The Board has previously held that decisions concerning whether or not to approve a particular request for financing under the Indian Financing Act are committed to BIA's discretion. In reviewing those decisions the Board will not substitute its judgment for that of BIA, but will ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Stone Trucking v. Portland Area Director, 19 IBIA 312, 314 (1991); Reed v. Minneapolis Area Director, 19 IBIA 249, 252 (1991), and cases cited therein. Although the Area Director is correct that the Board lacks jurisdiction to review the ultimate decision of whether or not to guarantee the loan, legal issues leading up to that decision are reviewable.

Appellants contend that Helen Polzer is actively involved in the management of the garage. They allege that

Helen Polzer and the other applicants meet at least bi-monthly for discussion of the business, financial matters and organizational matters of the business. There is no question that Helen Polzer does not sell vehicles, or service them, but she is active in the more important aspects of the corporation.

\* \* \* \* \*

Being owner of 85 per cent of the corporate stock empowers Helen Polzer to elect the Directors as she chooses, and naturally,

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4/ On Aug. 1, 1990, attorney Peter Grosskopf wrote the Area Director, stating that he represented Helen and requesting an explanation for the loan guaranty request denial and a statement of appeals procedures. By letter dated Aug. 15, 1990, an Acting Area Director gave Grosskopf the same information as contained in the July 31, 1990, letter to Goethel.

5/ The information given incorrectly stated that the notice of appeal was to be filed with the Area Director. Correct appeal procedures are found in 43 CFR 4.310-.340. See especially 43 CFR 4.332(a).

6/ A second notice of appeal was received from attorney Grosskopf on Aug. 31, 1990.

the resulting Board of Directors would appoint the Officers, and she would control that as well. She definitely and emphatically is not a "strawman," being in complete control of those who manage, and therefore, logically, in complete control of management. [Emphasis in original.]

(Appellants' Opening Brief at 3-4).

Appellants' loan application contains no verification of ownership of any interest in the garage by Helen. Although Anton E. died at some point during the application process, and it was asserted that Helen would inherit his 85 percent interest in the garage, no evidence of such inheritance was ever presented to BIA. In her February 12, 1990, application, Helen indicated that she would own 51 percent of the garage, not 85 percent. Furthermore, in a November 9, 1989, Compilation Report of Independent Certified Public Accountants filed with the application it was indicated that the three brothers would own 75 percent of the outstanding stock. It is thus readily apparent that the application not only did not show that Helen had an ownership interest in the business to be financed, but also failed to show the percentage of any claimed interest.

In addition, the only evidence that Helen actively participated in the management of the business is the unsubstantiated statement of counsel in briefs to the Board. No evidence of her participation was given to the Area Director.

[2] 25 U.S.C. § 1452 clearly provides that benefits to economic enterprises under the Indian Financing Act are available only to those enterprises which are at least 51 percent owned by members of Federally recognized Indian tribes. Proof that the applicant is eligible to receive a loan guaranty is a threshold issue. Because Helen's application and supporting documents failed to prove eligibility, the Area Director did not err in denying her application.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 4, 1990, decision of the Minneapolis Area Director is affirmed.

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed

Anita Vogt  
Administrative Judge