



INTERIOR BOARD OF INDIAN APPEALS

Merlin Schurz v. Acting Phoenix Area Director, Bureau of Indian Affairs

23 IBIA 92 (11/19/1992)



# United States Department of the Interior

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

MERLIN SCHURZ,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 92-152-A
ACTING PHOENIX AREA DIRECTOR	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	November 19, 1992

Appellant Merlin Schurz, a member of the Salt River Pima Maricopa Indian Community (Community), sought review of an April 1, 1992, decision issued by the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying an application for a U.S. Direct Loan in the amount of \$350,000. For the reasons discussed in this order, the Board of Indian Appeals (Board) affirms that decision.

At the time he filed his application for a loan, appellant worked as the Sales Manager for American Pride Homes, Inc. (American Pride), a housing construction company owned and operated by Bill Hayes, Jr., also a member of the Community. After Hayes acquired American Pride in 1988, he received two loans from BIA, totalling \$350,000. Both of these loans were apparently intended to retire existing debts and to provide operating capital. Appellant applied for a loan in order to purchase 20 percent of the common stock in American Pride. Appellant's loan was to be secured by full and undivided partial interests in several parcels of trust property.  
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By letter dated April 1, 1992, the Area Director denied appellant's application. The Board received appellant's notice of appeal from this decision on April 28, 1992. Appellant filed a statement of reasons with his notice of appeal and an opening brief.

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1/ At the same time, Hayes requested that his existing \$350,000 BIA loan be increased. Hayes' loan modification was denied by the Area Director on Apr. 2, 1992. Hayes appealed this decision. On July 6, 1992, Hayes requested that his appeal be dismissed because negotiated loan funds were being made available to him by BIA. The appeal was dismissed on July 7, 1992. See Hayes v. Acting Phoenix Area Director, 22 IBIA 169 (1992).

Although they intended both loans to benefit American Pride, Hayes and appellant independently sought separate loans. Therefore, the Board assumes that the present appeal was not rendered moot by the withdrawal of Hayes' appeal.

The Board has previously held that BIA's decision whether or not to approve a loan under Title I of the Indian Financing Act, 25 U.S.C. §§ 1461-1469 (1988), is discretionary, and that the Board will not substitute its judgment for that of BIA. The Board will, however, review the decision to ensure that all legal prerequisites to the exercise of discretion were met. See, e.g., McCloud v. Acting Aberdeen Area Director, 21 IBIA 254, 256 (1992). In addition, as with all cases arising under 25 CFR Part 2, the appellant bears the burden of proving that the Area Director's decision was erroneous or not supported by substantial evidence. See, e.g., Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, 22 IBIA 153, 157 (1992).

The loan requested by appellant was clearly intended to be used to purchase a 20 percent interest in American Pride. What is not clear from the record or appellant's application is the intended source of funds for repayment of the loan. The Area Director appears to have considered both appellant personally and American Pride as a company as the source of funds for repayment. Consideration of both appellant's personal finances and those of American Pride in determining repayment ability was to appellant's advantage.

The first reason the Area Director gave for denying appellant's loan was that

[i]n our judgment, based on the financial documents submitted on American Pride Homes, a reasonable prospect for adequate servicing of this debt is not possible. In January 1989, the Bureau provided a direct loan of \$100,000 to Mr. Billman Hayes, owner of American Homes, and a year later he received a second direct loan of \$250,000. Both of these loans were for operating capital amounting to total of \$350,000.00.

The Bureau has been able to collect only the interest of \$7,700.35 due on the initial \$100,000.00 loan. There have been no repayments made on the \$350,000.00 loan to date by the company. At our March 26, 1992 meeting, we requested additional documents which would substantiate the profitability of American Pride Homes, and the repayment schedule on the loan. Your financial advisor \* \* \* stated that she would have them delivered on March 27, 1992. On March 27th she advised by telephone that all the documentation for our decision had been submitted and she would not be providing any additional information.

Appellant responds that

under Project Information [in an August 1991 Final Report entitled "Capital Injection Analysis," prepared for appellant by American Indian Consultants, Inc.], page 1 the first paragraph line 7 states: "Start-up costs, bonding requirements, and limited operating capital, etc., have continuously hampered the company's ability to turn a profit and maintain a positive cash

flow. As a result, the company's bidding activities have been extremely limited, as only one or two jobs at a time could be financed."

This reason for denying the loan examines the repayment ability of American Pride. The Area Director found that the repayment record on existing loans to American Pride was not satisfactory. Although he requested information that would have further substantiated whether or not American Pride could repay its loans, this information was not supplied.

Appellant's response is merely a recitation of two sentences in the Capital Injection Analysis prepared for American Pride. The statement acknowledges that American Pride has not been able to develop a positive cash flow. It does not show that the Area Director erred in finding there was not a reasonable assurance that American Pride could repay the loan requested by appellant. If anything, the statement supports the Area Director's decision. Appellant has failed to show error in the Area Director's first reason for denying his loan application.

The Area Director's second and third reasons for denying appellant's loan application considered appellant's individual ability to repay the loan. The second reason was that the application "does not show that you have substantial experience in the housing construction business. It is our understanding that you are a salesman for the American Pride Homes, and not directly involved in the business, or a co-owner or partner." Appellant responds that he has

5 years experience in the housing construction business, and 3 and half additional years experience under "HUD's" [the Department of Housing and Urban Development] Indian housing programs, with the tribal housing authority. Furthermore, the reason for the loan request was to purchase ownership in American Pride Home Systems, Inc., an Indian owned Arizona Corporation located on the Salt River/Pima Maricopa Indian Community.

Appellant's response makes no attempt to show what kind of experience he has in the housing construction business or under HUD's Indian housing program. In determining whether there is a reasonable assurance of repayment, it is not unreasonable for BIA to consider the experience of an individual in operating a business as opposed to experience in merely managing a business or in even less responsible positions. See, e.g., Herrera v. Acting Portland Area Director, 23 IBIA 84 (1992). Appellant's response does not show error in the Area Director's decision.

Finally, the Area Director found that appellant had "not responded to our request for a cash flow projection which would provide evidence of your capability to repay the loan." Appellant argues that "[w]ithin the Capital Injection Analysis there are five sets of financial statements. All indicating repayment ability."

It is clear from the administrative record that, at this point, the Area Director was addressing appellant's ability to repay the loan from

personal resources. In a February 21, 1992, letter, the Superintendent of the Salt River Agency, BIA, reminded appellant that at a February 5, 1992,

meeting you had agreed to furnish this Agency with income verification for the years 1988, 1989, 1990 and 1991, with copies of your Income Tax returns for those years. As was indicated at the time, we must have this information to complete your application. No action can be taken on your loan application until such time as the financial data, agreed upon, has been furnished to this Agency.

A reminder letter was sent to appellant on March 5, 1992. On March 16, 1992, appellant responded, stating:

This letter is to respond formally \* \* \* to your request for my tax returns. I have recently moved and during the move the requested tax returns were lost.

According to the various information that I have received, there is no requirement that you have my tax returns in order to make a decision on my request for a BIA loan. This letter and the accompanying disbursement letter are all of the materials that you have requested. Please make your decision as soon as possible.

The accompanying letter shows how the funds to be realized from Hayes' amended loan and the loan requested by appellant would be applied.

The information presented in the Capital Injection Analysis to which appellant refers relates to income projections for American Pride; nothing within that Analysis shows appellant's personal income, from either American Pride or other sources. It is clear from appellant's response to the Area Director that he understood there was a concern about his personal income. Appellant was or should have been aware that his income would be an issue because he had requested a loan based upon his personal assets. Appellant has not shown that the Area Director erred in concluding that appellant had failed to provide income information.

Accordingly, the Board affirms the Area Director's decision.

Appellant raises several other issues that the Board has determined need not be addressed in order to resolve this appeal. The Board does not normally address issues that are not necessary for a decision. Appellant is hereby advised that the Board considered his additional arguments and statements, and determined that they were not relevant to its decision.

Appellant raises two matters which the Board will address briefly. In his opening brief appellant contends that he is eligible for a loan because he is an enrolled member of an Indian tribe; the loan is for a "for profit" business that will benefit the economy of an Indian reservation; the requested loan amount was within the established limitations; and the loan was secured by personal unencumbered assets in excess of 100 percent of the loan

requested. Based upon these facts, appellant concludes that he is entitled to a loan.

The Revolving Loan program, like other programs under the Indian Financing Act, is not an entitlement program. 25 U.S.C. § 1463 (1988) provides in pertinent part: "Loans may be made only when, in the judgment of the Secretary, there is a reasonable prospect of repayment." Although financing under the Act is available to high-risk applicants who are unable to obtain financing through conventional sources, applicants must demonstrate to the satisfaction of BIA, as the Secretary's delegate, that there is a reasonable assurance that they will be able to repay the loan.

Finally, appellant requests "two grants to cover costs of the appeal up to the appeal filing and a grant to cover costs associated with this appeal and the associated appeal process. The first grant for \$23,000 and the second for \$24,900" (Opening Brief at 6).

The Board is aware of no statutory or regulatory provision for "grants" under the circumstances of this case. Accordingly, appellant's request is denied.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 1, 1992, decision of the Acting Phoenix Area Director is affirmed.

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Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge