



INTERIOR BOARD OF INDIAN APPEALS

Philip and Gloria Kozak, d.b.a. Valley Convenience Mart
v. Aberdeen Area Director, Bureau of Indian Affairs

27 IBIA 159 (02/06/1995)

Reconsideration denied:
27 IBIA 189



United States Department of the Interior

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

PHILIP and GLORIA KOZAK,	:	Order Affirming Decision
d.b.a. VALLEY CONVENIENCE MART,	:	
Appellants	:	
	:	
v.	:	Docket No. IBIA 94-159-A
	:	
ABERDEEN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	February 6, 1995

Appellants Philip and Gloria Kozak, d.b.a. Valley Convenience Mart, seek review of a June 16, 1994, decision issued by the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), denying their application for a direct loan. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Appellants submitted this loan application in January 1994. ^{1/} The application sought a \$280,000 loan to refinance a \$150,000 Small Business Administration (SBA) loan, pay accounts payable, and finance certain renovations. The Area Director denied the application on June 16, 1994, stating at pages 1-2:

1. Your application requests refinancing an existing loan with SBA to reduce the interest rate charge and extend the loan term. * * * SBA has agreed to accomplish both of these goals with their restructuring offer. Therefore, this loan remains available to you under reasonable terms and conditions.
2. Repayment of the balance of your request would solely be dependent upon the ability of the business to generate a profit and your business has yet to do so. Although projections anticipate a reversal of the loss trend your business has shown in the past three years and you have taken steps that should positively impact this, there is insufficient proof that indicates you will make a profit. Therefore, we believe there to be an unreasonable prospect of repayment at this time.

Three main factors contributed to this finding:

1. Long-term improvements have historically been paid with short-term cash which has contributed to the accumulation in current payables.

^{1/} A previous application was denied on July 14, 1993. Appellants attempted to appeal from this decision, but failed to file a timely notice of appeal. 24 IBIA 207; recon. denied, 24 IBIA 242 (1993).

2. Your business has shown a low gross profit margin based upon your pricing structure.

3. Owners' payments will continue to represent a large expense to the business because of high personal debts and the lack of supplemental income.

We believe your business has great potential. Its location and established market are strengths. Despite this, however, the managerial and financial weaknesses are large obstacles that you have begun to address. Once you have shown positive results, we feel that any lender, including the government, will be able to justify extension of additional credit. You must also bring your personal finances under control so that these are not an added burden to the business.

In Moore v. Portland Area Director, 25 IBIA 243, 244 (1994), the Board summarized the law relating to applications for direct loans:

25 U.S.C. § 1466 (1988) provides: "Loans may be made only when, in the judgment of the Secretary, there is a reasonable prospect of repayment." The Board's decisions in appeals from loan denials establish that (1) BIA's decision to approve or deny a loan is discretionary; (2) the Board will not substitute its judgment for BIA's; (3) the Board's role in such cases is to ensure that BIA gave consideration to all legal prerequisites to the exercise of discretion; (4) an appellant bears the burden of proving that BIA's discretion was not properly exercised; and (5) where there is no procedural error, and the decision and/or administrative record show how BIA reached its conclusions, the BIA decision will be affirmed.

Most of the arguments and analysis in appellants' opening brief suggest that they believe they have a right to receive the loan. The direct loan program is not an entitlement program. Approval of loan applications is committed to the sound and informed discretion of BIA. There is no "right" to receive a loan. Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 215 (1994).

Appellants concede that their business has not been profitable. Specifically, they admit the business was initially undercapitalized and did not have resources for unforeseen contingencies, state that they borrowed against their credit cards to obtain cash to meet the unexpected obligations, and acknowledge they failed to supervise the business properly because of a family tragedy. Despite this history, they contend that the loan should have been approved, apparently because the causes of the problems have been identified and corrective measures have been taken.

Assuming appellants have made every change they indicate, there is no guarantee that the changes will be sufficient to make the business profitable or that they will be sustained over a longer term. Appellants clearly are more optimistic about their business' future than BIA. However, the

Area Director acted well within the scope of his discretion in being more guarded in his assessment of appellants' prospects. See, e.g., Moore.

Appellants repeatedly cite SBA's willingness to work with them in an apparent attempt to show that BIA's failure to approve their loan application was unreasonable. SBA's willingness to adjust appellants' large outstanding loan is completely understandable, just as is BIA's reluctance to grant a new loan to an existing business which had not yet proven itself capable of producing, let alone sustaining, a profit. The Board finds no reversible error arising from the different attitudes of SBA and BIA.

Appellants also apparently argue that BIA should have approved the loan on their terms. They state that when they suggested a loan in the reduced amount of \$90,000, BIA indicated it was willing to approve a loan of that amount but required that the proceeds be used for operating expenses and imposed a 5- or 7-year repayment term. Appellants state that when they told BIA the conditions were not acceptable because of the high monthly payment, their request "was met with a resounding denial" when the Area Director issued his June 16, 1994, decision (Opening brief at 11).

Assuming the facts are precisely as appellants state, BIA does not commit reversible error by denying a loan application after the applicants have rejected a counteroffer.

Appellants' business--like many others--would benefit from an infusion of cash. However, they have not shown a violation of a statutory or regulatory requirement, identified any procedural error, or otherwise shown that the decision and the administrative record do not support the Area Director's exercise of his discretionary authority.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's June 16, 1994, decision is affirmed. 2/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge

2/ Other arguments raised, but not specifically addressed, were considered and rejected.