

**Editor's note: Reconsideration granted; decision vacated -- See Mary Ayojiak (On Reconsideration, 59 IBLA 384 (Nov. 9, 1981))**

MARY AYOJIAK

IBLA 75-496

Decided November 21, 1975

Appeal from the decision of the Alaska State Office of the Bureau of Land Management rejecting Alaska Native Allotment Application AA 7152.

Affirmed.

1. Alaska: Native Allotments -- Appeals -- Evidence: Generally

Where, prior to the rejection of her application, an applicant for a Native allotment was advised of findings which, unless rebutted, would result in the rejection of the application, and was afforded an extended period of time in which to submit additional evidence, evidence which is thereafter submitted for the first time on appeal from the rejection decision, without explanation of why it was not submitted when due, will not be favorably considered in adjudicating the propriety of the decision appealed from.

2. Alaska: Native Allotments -- Appeals -- Evidence: Generally

Where the preponderance of credible evidence indicates that the land applied for was not substantially used and occupied by the applicant, to the potential exclusion of others, for at least 5 years, the application is properly rejected.

APPEARANCES: Henry W. Cavallera, Esq., Alaska Legal Services Corp., for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Appellant's Alaska Native allotment application was rejected by the Alaska State Office of the Bureau of Land Management after a field examination revealed that the land applied for had been used only one time as a campsite less than a year before the inspection.

The law and regulations require that to qualify to receive an allotment, an eligible applicant must show "substantially continuous use and occupancy" of the land applied for a minimum period of 5 years. "Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a). This contemplates the customary seasonality of use by the applicant of any land used by the applicant for his livelihood and well being and that of his family. Id.

The field examination was conducted on August 10, 1973, by helicopter and on the ground. The examiner was accompanied by the Togiak Village Council Vice President, who acted as guide. The 160-acre tract fronts on the Togiak River. At the tip of a point of land which projects into the river the examiner found evidence of a small campsite less than a year old. From the physical evidence on the site the examiner concluded that it had been used only one time. The rest of the land showed no evidence of use whatever.

On July 9, 1974, the Alaska State Office informed the applicant by letter of the findings of the examination and advised her that the use indicated thereby was insufficient to permit favorable consideration of her application. She was allowed 30 days within which to submit convincing evidence of qualifying use. She responded by filing a list of names of people who allegedly knew that she "has used and occupied all the lands" applied for. There was no indication in this submission of the term of such use, the duration of the claimed occupancy, the nature of the use or any fact which would rebut the finding of the examiner.

On July 30, 1974, the Alaska State Office again informed the applicant of the deficiency in her proof and noted that the additional information was not sufficient to support a conclusion that she had met the substantial use and occupancy requirements to obtain an allotment. She was provided with a copy of the report of the field examination and suggested guidelines for statements of

witnesses who could verify her use and occupancy of the land. This time she was given an additional 60 days to respond. No response was made.

On March 24, 1975, the Alaska State Office rejected the application and appellant's notice of appeal was filed. The time was twice extended for filing her statement of reasons, which was finally filed on November 6, 1975. The statement of reasons does not recite any details of her alleged use or point out any error in the decision of the State Office. It merely makes the naked assertion that, "The applicant has used his [sic] native allotment in a manner consistent with the Native mode of living and consistent with the land and climate thereby qualifying him [sic] to receive a patent to his [sic] native allotment."

[1] The statement of reasons is accompanied by the unverified statement of a friend of the appellant. The statement alleges that appellant has used and occupied the land as asserted in the application. No explanation is given to show why this evidence was not submitted to the Bureau of Land Management within the period between July 9, 1974, when the State Office first advised her that additional evidence was required, and March 24, 1975, when that office finally rejected the application. This Board will not give favorable consideration to new or additional evidence submitted for the first time on appeal in the absence of a showing satisfactory to it why the evidence was not submitted to the Bureau after it had informed the applicant of the need for such evidence and had afforded extensive opportunities for its submission. Moreover, counsel for appellant was so advised by the Chief Administrative Judge in a letter dated September 24, 1975. This letter informed counsel that in such cases any future offers of evidence on appeal must be accompanied by a satisfactory showing of the reason why it was not produced below, and declared that in the absence of such showing, newly offered evidence will not be favorably considered by this Board.

[2] In this case the preponderance of credible evidence indicates that the land applied for was not substantially used and occupied by the applicant, to the potential exclusion of others, for at least 5 years. The burden to present clear and credible evidence to establish compliance with the law and regulations is upon the applicant. Gregory Anelon, Sr., 21 IBLA 230 (1975).

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 from is affirmed.

Edward W. Stuebing  
Administrative Judge

We concur:

Newton Frishberg  
Chief Administrative Judge

Douglas E. Henriques  
Administrative Judge

