



INTERIOR BOARD OF INDIAN APPEALS

Frank Dayish, Jr. v. Acting Navajo Area Director, Bureau of Indian Affairs

25 IBIA 159 (02/03/1994)



United States Department of the Interior

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

FRANK DAYISH, JR., : Order Affirming Decision
Appellant :
 :
v. :
 :
 : Docket No. IBIA 93-110-A
ACTING NAVAJO AREA DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : February 3, 1994

Appellant Frank Dayish, Jr., seeks review of a July 8, 1993, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving appellant's application for a grant under the Indian Business Development Program (IBDP). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

By an application dated December 14, 1992, appellant, an enrolled member of the Navajo Nation (Nation), applied for an IBDP grant in the amount of \$23,215 to open a Mail Boxes, Etc., franchise in Shiprock, New Mexico. Mail Boxes, Etc., provides postal, shipping, facsimile transmission, other communication services, and miscellaneous services to both individuals and businesses. Appellant also sought a loan from the Nation.

The application was considered by the Navajo Area Loan and Grant Committee on March 17, 1993. By letter dated July 8, 1993, the Area Director informed appellant that his grant application was being disapproved. The letter stated:

We cannot support your application at this time for the following reasons:

1. Although the market appears to be good elsewhere, we do not agree that a sufficient demand exists for this type of business to become self sustaining within this area. Sales projections are not in line with the size and type of customers available that would frequently use this type business.
2. The application does not provide evidence that the matching loan funds from the Navajo Tribe is attainable to finance the planned business start-up cost. Other personal sources of financing appear to be limited since a high percentage of your income is currently being used for student loans and consumer type debts.
3. A valid lease from the Navajo Tribe for the business has not been finalized to date. Also, the proposed rental/lease rate

is excessive to insure the success of a new business at this location.

Appellant appealed this decision to the Board. Both appellant and the Area Director submitted briefs on appeal.

On appeal, appellant challenges each of the reasons for disapproval given by the Area Director. Appellant first contends that he based his estimates of potential customers on information furnished by the Shiprock Regional Business Development office, which is a part of the Nation. He states that the information provided showed there were 86 home-run small businesses in the Shiprock area; 59 Shiprock government Tribal offices and businesses; apparently 5 large businesses; and a primary market of 17,000 customers with a secondary market of 7,877 customers. He contends that his projection of 32 business and 118 residential customers was very conservative.

The Area Director argues that this information was not provided in the application and therefore cannot be considered on appeal. As the Board stated in Hammerberg v. Acting Portland Area Director, 24 IBIA 78 (1993):

The Board has been very lenient in reviewing appeals brought under the Indian Financing Act, holding that it will not apply the usual rule of appellate procedure that reviewing bodies do not normally consider information and/or arguments presented for the first time on appeal. This deviation from usual procedure is intended to ensure that BIA's decisions in this area are based upon consideration of all relevant information, while keeping the adversarial nature of the proceedings to a minimum. The Board has also suggested that BIA might consider using a preliminary determination of disapproval, rather than an appealable decision, in order to allow the applicant to respond to problems BIA finds in the application before entering into the appellate process. See, e.g., Nockey Construction, Inc. v. Portland Area Director, 22 IBIA 38 (1992); Gauthier v. Portland Area Director, 18 IBIA 303, 305-06 (1990).

(24 IBIA at 78-79). The Board thus considers the information furnished on appeal.

The materials appellant submitted provide statistics relating to businesses and individuals in the Shiprock area. None of the materials contains a publication date. ^{1/} Although information of the type presented may be a valid starting point for a projection of appellant's potential customers, the Area Director was entitled to rely upon his own expertise and that of

^{1/} The Area Director states that Yellow Front Store, which is listed as an anchor tenant of the Shiprock Shopping Center (Center), the proposed location of appellant's business went into bankruptcy 4 years ago, and that its replacement, Shiprock Bargains West, went into bankruptcy 2 years ago.

his staff in determining that more specific information was needed to support appellant's estimates for his projected customer base. Realistic customer estimates form the basis for the projected pro forma balance sheets required by 25 CFR 286.12(d). The mere fact that people and businesses exist in an area does not mean that all of those people and businesses are potential customers for appellant. Especially in light of appellant's projection that a high percentage of the businesses in the area would lease his more expensive business mailboxes, it is reasonable for the Area Director to require some additional information to support appellant's belief that these businesses would actually use his services.

Appellant next contends that the Nation would not loan money to him without approval of the BIA grant, and BIA would not approve the grant without the Nation's loan. The Area Director states that it is a common practice to approve a grant or loan contingent upon receipt of other financing. The materials before the Board indicate that both the Area Director and the Nation found deficiencies in appellant's application package. It appears likely that, because of those deficiencies, both BIA and the Nation wanted greater assurance that there was a reasonable likelihood other financing would be forthcoming.

Appellant asks for the criteria used in determining his financial position. This request relates to the Area Director's statement that other personal sources of financing appeared limited because a high percentage of appellant's income was being used for student loans and consumer debt. The materials appellant submitted contained information related to his personal credit history, and showed personal debt in the amount of \$40,538, with a combined family income of \$61,481. It is a reasonable statement, that does not require further support or explanation, that a high percentage of appellant's income is being used for existing personal debt.

Appellant also contends that he is unable to obtain a lease without assurance that his request for a BIA grant will be approved. Appellant states that the amount of rent, which the Area Director believed to be too high, is still negotiable.

The Area Director responds that rental rates and leasing practices at the Center are matters within his knowledge and expertise because he is required to approve all leases at the Center. The Area Director is entitled to rely on his experience with and knowledge of the business experience at the Center in making decisions concerning other businesses interested in locating there. Even if the Board were to conclude that appellant should not be required to have a lease in hand before a grant could be approved, a decision it does not reach, the remaining reasons for disapproval would support the Area Director's decision.

In reviewing the Area Director's decision and appellant's objections, the Board concludes that the Area Director gave proper consideration to all legal prerequisites to the exercise of his discretion. Abbott Bank v. Aberdeen Area Director, 23 IBIA 243, 244 (1993).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 8, 1993, decision of Navajo Area Director is affirmed. 2/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

2/ This decision does not preclude appellant from continuing to work with BIA in an effort to open his business.