



INTERIOR BOARD OF INDIAN APPEALS

Jerry Nagel, d.b.a. Nagel Systems v. Acting Phoenix Area Director,
Bureau of Indian Affairs

25 IBIA 174 (02/15/1994)



United States Department of the Interior

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

JERRY NAGEL, d. b. a. NAGEL SYSTEMS, : Order Affirming Decision
Appellant :
 :
v. :
 : Docket No. IBIA 93-129-A
ACTING PHOENIX AREA, DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : February 15, 1994

Appellant Jerry Nagel, d.b.a. Nagel Systems, seeks review of an August 9, 1993, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA; Area Director), denying appellant's request for a U.S. Direct Loan. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

By an application dated May 26, 1993, appellant, a member of the Three Affiliated Tribes of the Fort Berthold Reservation, applied for a loan in the amount of \$120,000 to be used for operating capital and equipment acquisition "for licensed general residential contractor to build presold homes in southwest Arizona which includes Phoenix." The application included a business plan which described the homes appellant proposed to construct. Appellant indicated that most of his business would be in conjunction with the construction of Bienestar Estates in San Luis, Arizona, but that he anticipated receiving other construction jobs.

The application was reviewed by both the Fort Yuma Agency, BIA, and the Phoenix Area Office. By letter dated August 9, 1993, the Area Director denied appellant's application, stating:

Section 103 of the Indian Financing Act [1/] states in part that loans may be made only when there is a reasonable prospect of repayment. We have serious questions about your ability to repay this loan because you lack solid commitments on construction projects.

Our agency personnel contacted the Housing and Urban Development Offices in Phoenix and Somerton and were advised that no contracts were awarded to you and no projects were planned within the

1/ 25 U.S.C. § 1463 (1988). This section provides:

"Loans may be made only when, in the judgment of the Secretary, there is a reasonable prospect of repayment, and only to applicants who in the opinion of the Secretary are unable to obtain financing from other sources on reasonable term and conditions."

25 CFR 101.3(a) also states in pertinent part that "[l]oans may be made to applicants only when, in the judgment of the Commissioner, there is a reasonable prospect of repayment."

Yuma area for the next year or two. Also, you advised our agency staff at the Fort Yuma Agency that projects were being planned at Yuma Proving Grounds, Hopi Reservation and in Mexico. We could not get confirmation of any definite commitment by any of these parties.

It appears that your business would be dependent upon the housing construction project at Comite de Bienestar, Inc., a company in San Luis, Arizona. We spoke with Tony Reyes, Mayor of the City of San Luis and Executive Director of Bienestar and were advised that construction may start next week, next month or within the next two years depending upon available resources. This type of market does not establish the stability needed in this type of business to ensure adequate repayment of a loan.

We have also denied your request for a direct loan because you did not adequately support the fact that this business adds to the economy of the reservation.

We were able to verify that you had met with both the Cocopah and Quechan Tribes' employment offices and advised them that you are establishing a construction company and are interested in hiring local tribal members. However, we did not find adequate documentation in loan application of a commitment by the tribes or by you. The statement that you made in your application that "the client will give employment preference to qualified American Indians in the construction trades, including vendors and subcontractors" does not adequately explain how this will add to the economy of the reservation. We do not believe that merely giving preference in hiring to qualified American Indians fulfills this requirement.

Appellant appealed this decision to the Board. Appellant filed two briefs; the Area Director did not file a brief.

Appellant devotes a great deal of his briefs to recitation of circumstances leading up to the submission of his application and its consideration, including statements concerning his discussions with banks and people in the construction trade regarding his proposed home designs; his attempts to locate direct loan funds in the Washington, D.C., BIA office; and problems he had with the BIA Agency and Area Offices relating to the processing of his application. This information, although obviously very important in appellant's perception of the situation, is not relevant to the determination of whether the Area Director's decision can or cannot be sustained. The decision not to approve the loan application does not equate with an attack on appellant personally or on the ultimate merits of his business proposal or home design.

The Area Director first determined that, without more concrete commitments for construction projects than were shown in the application, appellant had not shown there was a reasonable prospect that he could repay the loan.

Appellant states that he has been invited to participate as a builder in Bienestar Estates. With his opening brief he submitted a letter from the Executive Director of Comite de Bienestar, Inc., the company developing Bienestar Estates. The letter confirms this invitation, but continues:

Of course, final approval of [appellant's] building activity involves the prospective homeowner either selecting a Nagel Systems designed home or selecting [appellant] to design a particular system home plan around their needs.

Finally, the client will have to secure mortgage financing. [Appellant] may also be able to assist clients in securing mortgage and construction loan capital.

I have read the letter sent to [appellant] in reference to the current situation of our Bienestar project and there seems to be confusion as to when actual construction can begin. Let me clarify, housing construction can begin immediately on any of the lots already available plus any of additional 291 lots that have been delivered to the same number of families the 8th of August of this year [1993].

Although this letter shows more commitment than anything appellant had previously submitted, it is still a very qualified commitment. Even considering this additional information, the Area Director could reasonably have determined that there was not adequate assurance of repayment. ^{2/}

Appellant contends that the Area Director should have considered the fact that he was seeking a loan for a start-up business, and therefore firm commitments would be difficult to obtain. Appellant states that it appears there was a reluctance to make a loan to a start-up business, but argues that the regulations do not prohibit loans for such businesses.

Direct loans can be awarded for start-up businesses. The fact that a business does not have an existing client base may, however, be used in determining whether there is a reasonable prospect of repayment. When a loan is sought for a start-up business, it is incumbent upon the applicant to provide sufficient data on which BIA can base a reasoned decision. Here, appellant could have the best home design in the world, but if he has no customers, he could not repay the loan. Under these circumstances, it was

^{2/} Appellant mentions other possible construction projects and suggests that the Area Director's statement that there is no commitment for these projects is unfounded because the projects are going forward. The Board does not read the Area Director's decision to say that there is a lack of commitment to proceed with the projects, but rather that there is a lack of commitment to include appellant in them. Nothing appellant has submitted on appeal shows otherwise.

