ROBERT GAUTHIER
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-21-A Decided May 24, 1990

Appeal from a denial of a loan guaranty.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

   Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Financial Matters: Financial Assistance

   Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and, the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

3. Administrative Procedure: Burden of Proof--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

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APPEARANCES: Robert Gauthier, pro se; Wilford G. Bowker, Portland Assistant Area Director (Program Services), for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Robert Gauthier seeks review of a September 20, 1989, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; appellee), denying a loan guaranty request under Title II of the Indian Financing Act of 1974, 25 U.S.C. §§ 1481-1498 (1982). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On or about September 12, 1989, appellant, through the Ronan State Bank (bank), Ronan, Montana, filed a request for a loan guaranty with the Portland Area Office, BIA. Appellant, a member of the Confederated Salish and Kootenai Tribes, sought a 75 percent guaranty for a 15-year loan in the amount of $280,000 for his restaurant business. The loan was sought to refinance existing short-term debt with the bank, refinance an existing contract for the deed on the restaurant, remodel the restaurant's kitchen, expand the lounge and dining facilities, and landscape the parking area.

After reviewing the financing package, on September 20, 1989, appellee notified both appellant and the bank that the loan guaranty was being denied. As reasons for this denial, appellee indicated: "1. The applicant did not put the 20 percent down. 2. The business has lost money for the past 2 years. 3. Land and building [were] not appraised and there is question whether collateral would be adequate to secure the loan."

The Board received appellant's notice of appeal from this decision on October 31, 1989. In his statement on appeal, appellant indicated he believed he had put the required 20 percent investment into the business, the business lost money in 1987 and 1988 because he was learning the restaurant trade and figures for 1989 indicated the business would probably show a profit for that year, and he would have the land and building appraised if necessary.

Appellee responded that he exercised his discretion in determining that the application package did not show there was reasonable reassurance of repayment as is required by 25 CFR Part 103. Appellee accordingly asked that the appeal be dismissed.

Because the information presented to the Board on appeal was not before appellee when he issued his decision, by order dated March 27, 1990, the Board stayed further proceedings before it pending initial consideration of the additional materials by appellee. The Board received appellee's response on April 30, 1990. Appellee indicated: (1) the additional information presented on appeal should not be considered because it was not before him when he issued his decision and (2) even if the additional information was considered, it would not cause him to change his decision.

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Discussion and Conclusions

[1] The Board has previously held that decisions concerning whether or not a particular request for a loan guaranty should be approved are committed to the discretion of BIA. In reviewing such decisions, it is not the Board's role to substitute its judgment for that of BIA. Instead, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Home Respiratory Services, Inc. v. Muskogee Area Director, 18 IBIA 299 (1990); McCoy Industries, Inc. v. Eastern Area Director, 18 IBIA 234 (1990).

Appellee first argues that the additional information presented on appeal cannot be considered because it was not presented to him with the application. In support of this argument, appellee contends:

> Due to funding limitations and competition for funds by tribes and individuals, there are constraints on the time that a loan can be held in abeyance to allow applicants time to provide additional information. It is the Bureau's prerogative in administering this loan program to require that applications contain all information needed to reach a Bureau decision.

(Apr. 26, 1990, response at page 2). Appellee accordingly states that the Board can only consider the information before him when he issued his decision.

It is a general rule of appellate procedure that reviewing bodies do not normally consider information and/or arguments presented for the first tine on appeal. The Board follows this general rule. See, e.g., Joy Sundberg v. Acting Sacramento Area Director, 18 IBIA 207, 210 (1990); Estate of Alice Jackson (John), 17 IBIA 162, 165 (1989). The rule is intended to require parties in adversary proceedings to present all of their arguments and evidence to the initial decisionmaker in order to permit the issuance of a prompt and informed decision at the earliest stage in the proceeding and to conserve the time, energy, and resources of everyone involved in appeals, including the parties. The Board finds, however, that this rule does not apply to the present situation for the reasons discussed below.

[2] It is the initial responsibility of an applicant for assistance under BIA's Indian Financing Act programs to provide all information specifically required by the relevant regulations or requested on the standard application form or any accompanying instructions. When BIA receives such a fully completed application, it is required to consider all information provided in determining whether the application should be granted. The information requested may be sufficient for such a final determination. If, however, BIA finds that information relevant to its determination was not requested on the standard form, or that the application raises questions that were not fully addressed in the requested information, it should give the applicant an opportunity to provide the additional information needed for full consideration of the application. 1/ Because it is

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1/ Cf., e.g., 25 CFR 103.16, 103.18.

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improper to base a decision on the failure to provide information that was never requested, if BIA issues a decision and the record shows that the decision was based on the lack of information that was not requested either on the standard form or as a supplemental submission, BIA's decision is not supported by the record. Accordingly, the Board will allow an applicant under these program to submit on appeal information relating to the basis of BIA's decision when that information was not requested on the standard application form or as a supplemental submission.

Appellee also responded to each of appellant's arguments relating to the merits of the denial of its application. Appellee states that an appraisal was not provided with the application, and that appellant's remaining arguments were either considered before the application was denied, or in response to the Board's March 27, 1990, order.

[3] In cases arising under 25 CFR Chapter I, the appellant bears the burden of showing that the decision appealed from was erroneous. When the decision being appealed involves the exercise of discretion, the appellant thus bears the burden of proving that BIA's discretion was not properly exercised. Home Respiratory Services, Inc., 18 IBIA at 302. Although appellant clearly disagrees with appellee's conclusion here, he has not made such a showing.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 20, 1989, decision of the Portland Area Director, as supplemented on April 26, 1990, is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

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