FRED A. REED
v.
MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-137-A Decided March 5, 1991

Appeal from a decision denying a guaranteed loan.

Vacated and remanded.

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

When a Bureau of Indian Affairs Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

APPEARANCES: Fred A. Reed, pro se; Marcia M. Kimball, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Minneapolis Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Fred A. Reed seeks review of a July 31, 1990, decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; Area Director), denying a guaranteed loan. For the reasons discussed below, the

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Board of Indian Appeals (Board) vacates that decision and remands this case for further proceedings as set forth in this opinion.

Background

On February 5, 1990, appellant, an enrolled member of the Sault Ste. Marie Tribe of Chippewa Indians, submitted to the Great Lakes Agency, BIA, an application for a small business guaranteed loan in the amount of $75,000. Appellant sought to open an ice cream and sandwich shop in New London, Wisconsin, next to a liquor store which he operated. Appellant indicated that the loan was to be secured by all inventory, equipment, furniture and fixtures, accounts receivable, then-owned or later acquired, which pertained to either the liquor store or the new business, in addition to an existing $25,000 second mortgage on his home. Appellant sought an 80 percent guaranty from BIA. According to a memorandum discussing the guaranty request from the president of the bank working with appellant:

> [Appellant] has a pleasing personality and good customer relations and he seems to have a good flow of customers going through his present business. In my judgment in this short period of time knowing [appellant], I feel his management abilities show that he is very capable of running these two operations in a very professional manner. He possesses a very positive attitude and is not afraid to put in long hours or work in his business.
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> * * * * * *
>
> * * * The property [appellant] is seeking to develop is in a prime location in our community. It offers very good availability of parking. The proposed remodeling and additional business would have inside seating which there is a need for this type of business in our community. He is demonstrating good abilities to be operating what should became a successful business in his present Beverage Mart store, but by the addition of this additional business he would be able to manage an additional profit center and use the present building without additional expansion and adding operating costs. This additional business would help fully utilize this business location and help service the indebtedness that he has with the land contract on the real estate property.

By letter dated April 3, 1990, and sent to appellant's bank, the Area Director offered a 60 percent guaranty on a $75,000 loan, with three other stipulations. The Area Director signed a loan guaranty agreement setting forth those conditions.

On May 2, 1990, appellant submitted a revised guaranty request, seeking a 90 percent guaranty on a $56,238 loan. The collateral listed for the second guaranty request was all inventory, equipment, furniture and fixtures, and accounts receivable, then-owned or later acquired, in the new business. Appellant's bank indicated that "[d]ue to the collateral

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position, we are not interested in approving the loan with less than a 90% guaranty."

On May 11, 1990, BIA requested additional information concerning the differences between the initial and amended requests. Specifically, BIA requested information as to why the working capital request of $3,800 for both the liquor store and the ice cream/sandwich shop was increased to $5,000 for just the ice cream/sandwich shop; why a new request for $30,400 for equipment was included; and why a request for $5,760 for building a deck was added.

Appellant responded that he had increased his request for working capital based upon his experience in finding that something unexpected always arose when beginning a new business; the used equipment he had intended to purchase was no longer available and, although he still intended to purchase good used equipment, he wanted flexibility in case none was available; and local financing he had intended to use for the deck was no longer available. Appellant also explained that he would be doing much of the work himself and, although the request might be slightly more than he would actually need, he wanted the flexibility to put the business together in a professional manner.

On July 31, 1990, the Area Director denied the guaranty request stating:

> The revised request differs substantially from the Request for Guaranty and Approval with conditions which I signed on February 5, 1990. The significant differences are that you have decreased the amount of the loan from $75,000 to $56,000 (with no refinancing involved) and increased the percentage of guaranty from 60 percent to 90 percent. We note that you are willing to accept a lower interest rate and no interest subsidy.
>
> The different terms reflect the fact that the new loan will be used only for establishing the ice cream shop. The loan in place (unguaranteed) will continue to be secured by profits and assets of the liquor store and mortgages on land and other property of the borrower. We do not have sufficient confidence in the ability of the new business to repay the loan out of its profits to guaranty repayment.
>
> We regret, therefore, that we must decline the request for guaranty in its revised form. The new business is unproven, the borrower has insufficient equity in it, substantial other debt, and unforeseen contingencies could cause problems for which there is no adequate reserve.

The Board received appellant's notice of appeal from this decision on August 16, 1990. Although advised of his right to do so, appellant did not file an opening brief. On November 5, 1990, the Board received a motion from appellee, in which be asked that the appeal be dismissed.

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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. See Aubertin Logging and Lumber Enterprises v. Acting Portland Area Director, 18 IBIA 307, 308 (1990), and cases cited therein.

In the present case, the administrative record contains a rather detailed analysis of appellant's original application, upon which the Area Director based his decision to approve a loan guaranty on different terms than those requested. It also contains appellant's revised application, submitted, apparently, as a form of "counter-offer" to the Area Director's approval of an altered loan guaranty; BIA's request for additional information; and appellant's response to that request. There is no analysis of the second proposal comparable to the memorandum discussing the original application. Instead, there is merely a decision letter, denying the revised application on the grounds that BIA did "not have sufficient confidence in the ability of the new business to repay the loan out of its profits to guaranty repayment." The basis for this statement and judgment is not shown in the record.

[2] In S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 19 IBIA 69, 71 (1990), the Board held:

> The decision and the administrative record for an appeal, read together, should be sufficient to show how BIA reached its conclusion. * * *
>
> Where the administrative record does not support BIA's decision, the case must be remanded for development of an adequate record. * * * This is true even where the decision is based on the exercise of discretion. [Citations omitted]

It is common knowledge that any new business faces many potential unforeseen problems getting started, and is unproven. The mere recitation of such statements does not constitute an adequate explanation of or reason for the Area Director's decision. Because the administrative record also does not disclose any basis for the Area Director's determination, in accordance with the principles set forth above, this case must be remanded for development of an adequate record and issuance of a new decision.

1/ This opinion in no way precludes the parties from attempting to reach an agreement on the revised application submitted by appellant, or any other application that he may submit seeking financing for his business venture.

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Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 31, 1990, decision of the Minneapolis Area Director is vacated, and this case is remanded to him for further proceedings as discussed in this opinion. 2/

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

2/ Because of this decision, the Area Director's motion to dismiss is denied.

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