

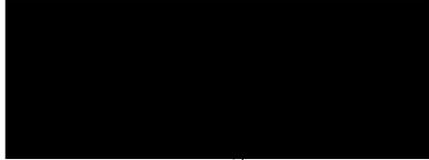


U.S. Department of Justice

Immigration and Naturalization Service

Public Copy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:



Office: Texas Service Center

Date:

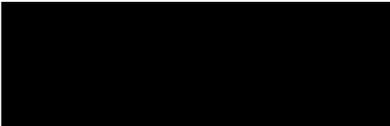
JUL - 9 2001

IN RE: Petitioner:



Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

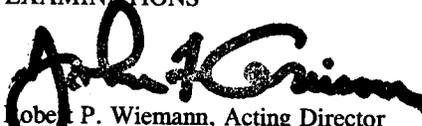
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that she had made a qualifying investment of lawfully obtained funds or that she would create the necessary jobs.

On appeal, counsel argues the petitioner invested \$1,000,000 of personal funds obtained as a dividend from her company and that she demonstrated five current employees and the need for more than 10 employees.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, Omega Data Ventures, LLC (ODV), not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

In support of the petition, the petitioner submitted undated wire transfer receipts reflecting transfers of \$450,000 and \$550,000 from [REDACTED] Ltd.; an accountant's letter asserting the petitioner had transferred \$1,000,000 of "earnings and profits" from her business in China to ODV; and an unaudited balance sheet for ODV as of May 31, 2000 reflecting equity of \$1,050,000, cash of \$1,000,662, and non-cash assets worth \$50,000. The petitioner also submitted a Bank of America transaction summary for ODV reflecting an initial balance of

\$60,000 prior to May 15, 2000, a wire transfer credit of \$549,982 on May 15, 2000, another wire transfer credit of \$449,982 on May 23, 2000, "sweep" debits and transfers from investment reflecting the apparent transfer to and from passive investment accounts between May 26, 2000 and June 7, 2000. The summary reflects a final "sweep" debit of \$941,676 on June 7, 2000, leaving only the original \$60,000.

In response to a request for additional documentation, the petitioner submitted passbooks from two savings accounts for [REDACTED] reflecting withdrawals of \$550,019 on May 13, 2000 and \$1,014,059 on May 23, 2000; a May 2000 bank statement for ODV reflecting the May 15, 2000 and May 23, 2000 wire transfers of \$549,982 and \$449,982 from Elite Win International; and an unaudited ODV balance sheet for September 30, 2000 reflecting equity of \$1,050,000, \$962,890 cash, and non-cash assets worth \$50,000.

Counsel claimed that the funds from [REDACTED] represented a dividend issued to the petitioner. As evidence of the petitioner's ownership in [REDACTED] the petitioner submitted two declarations of trust dated December 1, 1998, a letter of appointment signed by the petitioner on December 1, 1998, the Certificate of Incorporation for [REDACTED] an accountant's letter from [REDACTED] and an attorney letter from [REDACTED]

Investment of Personal Funds

The Certificate of Incorporation reflects that Project Management Limited and Pioneer Secretaries Limited incorporated [REDACTED] on November 25, 1998. The two declarations of trust are from Eastnom Limited and [REDACTED] they indicate they are the nominees for the petitioner, the beneficial owner of their shares in [REDACTED]. The accountant purports to "confirm" that the petitioner is the sole beneficiary owner of [REDACTED] and that the company issued a HK \$16,000,000 dividend to the petitioner "up to" September 2000. The lawyer, based on the assumption that the accountant reviewed [REDACTED] original register of members, confirms the legality of nominees and beneficial owners, asserts that it "appears" the above mentioned nominees purchased [REDACTED] in inoperable "shelf" company incorporated by Project Management and Pioneer Secretaries, and finds the conclusion that the petitioner is the sole owner of Elite Win International to be appropriate.

The director concluded the evidence did not demonstrate the petitioner ever had possession of the funds, and that the funds were actually invested by the Chinese business, a separate legal entity from the petitioner.

On appeal, counsel asserts the evidence already submitted clearly establishes that the funds were distributed by [REDACTED] to the petitioner, and transferred directly to ODV per her instructions.

The record, however, is missing one critical connection. The certificate of incorporation reflects that [REDACTED] was incorporated by Project Management and Pioneer Secretaries.

The declarations of trust reflect that the petitioner is the beneficial owner of the shares issued to Eastnom and [REDACTED]. The record does not, however, contain any evidence that Eastnom and [REDACTED] acquired any rights in Elite Win International. In his letter [REDACTED] makes clear that he is presuming the accountant confirmed this element, but the accountant letter does not indicate that he did so. Regardless, if Eastnom and [REDACTED] are the nominal owners of [REDACTED] [REDACTED] official documentation confirming their ownership should be available. In addition, the record does not contain a corporate resolution authorizing the issuance of a HK\$16,000,000 dividend. The legitimacy of this transaction will be discussed in more detail below. In light of the above, the petitioner has not demonstrated her interest in [REDACTED] [REDACTED] nor that the company issued a dividend to her. Thus, the petitioner has not demonstrated that the \$1,000,000 transferred to ODV were her personal funds.

Capital Placed At Risk

In addition, the regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, she must establish that he/she placed her own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Counsel asserts that the balance sheets document the expenditure of \$50,000 of the petitioner's funds. This assertion is not supported by the record. As stated above, the May 31, 2000 balance sheet reflects that ODV had \$1,000,662 in cash and had property, an industrial plant, and equipment worth \$50,000. As of September 30, 2000, the balance sheet reflects that \$962,890 remained in unused cash. The business plan sets technical support goals for October 1999, indicates 16 call centers would have been installed by the end of 1999 and that the Simulation and Integration Lab was scheduled to be completed by November 1999. The petitioner does not claim to have contributed any funds until May 2000. Furthermore, the bank transaction summary demonstrates ODV merely shifted the petitioner's funds from the operating account to investment accounts and back again. The record contains no invoices or receipts for capital expenses paid after Elite Win International transferred funds to ODV. Counsel also refers to the payment of employee wages. The payment of wages, however, is a normal operating expense, and not a capital expense. The business plan provides no indication of how the petitioner's funds will be used; in fact, the plan fails to indicate that ODV will incur any additional capital expenses. Funds which cause a business to be grossly overcapitalized cannot be said to be at risk.

In light of the above, the petitioner has not established that she has invested the full \$1,000,000, all of which is at risk.¹

¹ As will be discussed below, it appears the petitioner merely transferred \$1,000,000 to a fully-funded preexisting business.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, supra, at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, supra, at 22 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted the documentation discussed above as evidence that the "invested" funds derived from her business interest in Hong Kong. The record demonstrates that Elite Win International was formed as a "shelf" company in November 1998. [REDACTED] asserts that a "shelf" company is one which has yet to begin business.

The auditor's report indicates that Elite Win International derived consultancy fees of HK\$4,390,615 in 1999 and HK\$12,561,523 in 2000. The report also indicates, however, that the

company had no assets other than cash and very few expenses. For example, the report does not reflect any employee wages. The report also indicates all services were performed in China, not Hong Kong, and that the Hong Kong company was set up solely to receive service fees in Hong Kong. The source of the HK\$16,952,138 claimed as profit for [REDACTED] is not documented. The record provides no explanation for how a new company is suddenly able to amass such profits in only two years. The petitioner has not established that [REDACTED] a legitimate business, as opposed to a shell company used solely to circumvent the currency exchange laws of China. Regardless, the petitioner has not demonstrated the source of the funds used to invest in [REDACTED]. The petitioner has not submitted five years of tax returns or other evidence of the lawful accumulation of the funds invested into Elite Win International in December 1998. As stated above, the petitioner has not documented the source of [REDACTED] very considerable profits for its first two years of operation. The petitioner cannot demonstrate lawful source of funds simply by funneling her money through [REDACTED] and then removing nearly all the money as a "dividend."

In light of the above, the petitioner has not demonstrated the source of the funds transferred by [REDACTED] lawful or otherwise.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary

resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, supra, at 9 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

In support of the petition, the petitioner submitted a business plan which identifies three managers and asserts ODV will hire additional employees "as the company achieves new performance and revenue levels."

In response to the director's request for additional documentation, the petitioner submitted a list of five employees, their resumes, and a proposal prepared by ODV. The proposal appears to be a computer-generated slide presentation to be given to prospective customers which includes an organizational chart for the "Omega/PeopleSoft Project Team."

The director concluded that the petitioner had not demonstrated any business activity that would create employment and that the employee list is insufficient evidence of current employees.

On appeal, counsel asserts that the director "disregarded" the employee list and ODV proposal, that the business is operating, and that ODV has five current employees and will hire more than five additional employees in the next two years.

As implied by the director, the record contains no direct evidence of business activity. For example, the record contains no business contracts, invoices, cancelled checks for business expenses, corporate tax returns certified by the Internal Revenue Service, audited income and loss statements, or wage and withholding reports evidencing wages paid to employees. One printout of five alleged employees and their resumes, without more, is insufficient evidence of ongoing business activity and employment.

Regardless, even if we accepted the business plan and proposal submitted by the petitioner, ODV was already installing systems and building a lab long before the petitioner's involvement.² Thus, it is not clear how many employees were already working prior to the petitioner's involvement. A petitioner must create 10 new jobs. As the petitioner has not demonstrated the number of preexisting jobs, it is not known how many total jobs she will need to demonstrate.

The business plan and proposal do not meet the requirements set forth in Matter of Ho and quoted above. Neither specifically provide the exact number of employees that will be hired by ODV, job descriptions, and expected hiring dates. The proposal appears to refer to a joint ODV/PeopleSoft project. It is not clear how many of the "teams" referenced on the chart would be staffed with direct, full-time, permanent employees of ODV.

Finally, as the business plan does not explain how the petitioner's funds will be used, the petitioner has not established that her investment will be responsible for any job creation. While an investor who seeks benefits through the entrepreneur program may take credit for all job creation resulting from a joint venture with an investor who does not seek such benefits, the petitioner must still demonstrate a nexus between the investment of her funds and the projected job creation.

² As will be discussed below, the business plan suggests the petitioner did not establish a new commercial enterprise.

In light of the above, the petitioner has not demonstrated that it is reasonable to conclude that she will create 10 new jobs within the next two years.

ESTABLISHMENT OF A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established . . .*" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is ODV, owned 20 percent by the petitioner and 80 percent by Omega Group International.

However, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

The business plan included technical support goals for 1999, indicated that 16 call centers would have been completed by the end of 1999, and projected the completion of the Simulation and

Integration Lab in November 1999.³ ODV was not formed until April 5, 2000, and Elite Win International did not transfer funds to ODV until May 2000.⁴

Beyond the decision of the director,⁵ the record strongly suggests the petitioner is claiming credit for establishing a business which was operational well before her claimed "investment." The record does not reflect that the petitioner restructured or reorganized the data branch of Omega Group International. In addition, the record does not contain audited balance sheets prior to the petitioner's investment which might reflect an expansion of net worth. Nor does the record contain any evidence that the petitioner is responsible for an expansion of employment.

In light of the above, the petitioner has not demonstrated that she established a new commercial enterprise.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ Omega International Group's website, www.omegaco.com, confirms that that the lab was completed in November 1999.

⁴ Omega International Group's website also indicates that that company has been in existence for 20 years and that it includes several subsidiaries including Omega Data, LLC, which performs all the services discussed in ODV's business plan and runs the Simulation and Integration Lab. The website does not mention ODV, although it refers to "Omega Ventures," a consulting and project development service for businesses and private investors.

⁵ An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. Spencer Enterprises, Inc. v. United States, *supra*, at 29.