

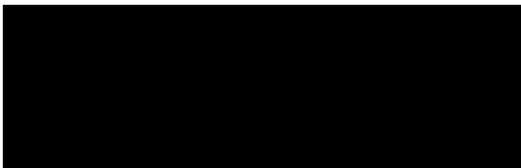


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U.S. Department of Justice
Immigration and Naturalization Service

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
DIVISION OF PERSONAL SERVICE

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



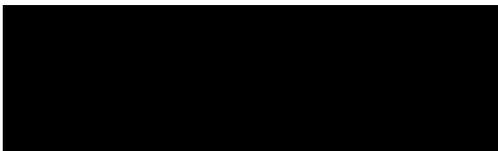
File: WAC-98-193-52403 Office: Vermont Service Center

Date: JUL 11 2002

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:



Public Copy

INSTRUCTIONS:

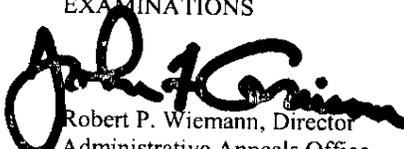
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 that 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 that 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner, Examinations, summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the appeal will be adjudicated on its merits and the petition will be denied.

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 a qualifying investment of lawfully obtained funds in a targeted employment area or that she would be involved in the management of the new commercial enterprise.

On appeal, counsel argued that the director committed reversible error and requested oral argument.

On October 4, 2001, the Administrative Appeals Office (AAO) on behalf of the Associate Commissioner summarily dismissed the appeal. On motion, counsel asserts that a brief and exhibits were timely submitted in support of the appeal and submits a Federal Express receipt confirming that the Service received an eight-pound parcel from counsel on May 24, 2000. The petitioner resubmits the brief and exhibits. As such, we will withdraw our previous decision and review the appeal on its merits.

Regarding counsel's request for oral argument, oral argument is limited to cases in which cause is shown. A petitioner must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied.

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).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

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

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. Matter of Soffici, I.D. 3359, 2-3 (Assoc. Comm., Examinations, June 30, 1998) cited with approval in Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

The record indicates that the petition is based on an investment in a business, [REDACTED] (GAM). On the petition, the petitioner listed the address of the business as [REDACTED] Encino, California. In his brief, prior counsel argued that the business

was located in the city of Los Angeles, a targeted employment area. The petitioner submitted a list of targeted employment areas published by the Employment Development Department (EDD) of California based on 1997 unemployment data. The list indicates that Los Angeles County includes qualifying cities, but is not a qualifying county. The qualifying cities are listed, and include the city of Los Angeles. This designation, however, does not include greater Los Angeles, as is evident from the fact that the list also includes East Los Angeles, Compton, Inglewood, Lynwood, and Rosemead, all within Greater Los Angeles. Encino is not specifically listed and is clearly not within the city of Los Angeles. Encino is located several miles northwest of central Los Angeles, notably farther than Inglewood and Lynwood. It is noted that Beverly Hills, Hollywood, and Studio City are located between Los Angeles and Encino.

In addition, the petitioner's responses to the director's requests for additional documentation revealed that the Encino location was merely temporary. In his brief submitted in response to the director's March 10, 1999 request for additional documentation, prior counsel asserted that the Encino location was temporary and that GAM had now secured a lease in Los Angeles. The petitioner submitted a lease for [REDACTED] in Los Angeles to commence August 1, 1999. On July 3, 1999, the director requested additional documentation, noting that the landlord had not signed the Los Angeles lease. In response, prior counsel conceded that the Los Angeles lease had not been accepted by the landlord, but that the petitioner had secured a location in Canoga Park, alleged by prior counsel to be within Los Angeles City. The petitioner submitted a five-year lease, signed by all parties, for [REDACTED] Canoga Park, California. The lease is dated August 23, 1999. It is noted that Canoga Park is even farther northwest of Los Angeles than Encino. Canoga Park is not listed by the EDD as a qualifying city in Los Angeles County according to the 1997 data submitted.

The director concluded that since the location keeps changing, the petitioner has not established that the ultimate location will be in a targeted employment area. On appeal, counsel asserts that the director ignored GAM's five-year lease in Canoga Park and argues that Canoga Park is "a political subdivision of the City of Los Angeles."

For the reasons discussed above, we conclude that Canoga Park was not a targeted employment area in 1997.¹ As such, we concur with the director that the petitioner has not demonstrated an investment in a targeted employment area. Thus, the minimum investment amount in this case is \$1,000,000.

SOURCE OF FUNDS

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

¹ The petitioner did not submit any unemployment data for July 1998, the date of filing.

(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, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) 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, CIV-F-99-6117, 22 (E.D. Calif. 2001)(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).

In his initial brief, prior counsel asserted that the petitioner's funds were gifted from her husband and that he derived those funds from his two businesses: [REDACTED] (Theta), with registered capital of \$2,000,000 and [REDACTED] (Tonghai), with registered capital of \$275,000.

Initially, the petitioner submitted a wire transfer receipt dated June 3, 1998, reflecting the transfer of \$499,980 from the petitioner to prior counsel. The petitioner also submitted a deposit receipt and bank letter documenting that prior counsel transferred \$500,000 from his attorney client trust fund to GAM on June 26, 1998. In addition, the petitioner submitted a bank letter from Qian Ling Bank dated January 20, 1998 asserting that the petitioner had an account with that bank with a balance of RMB 5,000,000 and documentation of the petitioner's purchase of a Golf Villa in February 1997 for \$390,782, for which the petitioner completed payments in

February 1998. Finally, the petitioner submitted business documents for Theta and Tonghai. The business license for Theta, originally issued in February 1993, indicates the registered capital was \$200,000 and lists the petitioner's spouse as the General Manager. The Tax Registration Certificate dated November 8, 1996 and the Foreign Investor Enterprise Registration Certificate dated October 24, 1996 reveal that the business' registered capital was RMB 16,000,000 or approximately \$2,000,000 according to the translation. The Audit Report dated November 22, 1994, however, reveals that Theta was founded by [REDACTED] Li of Hong Kong who transferred \$1,034,579.97 of capital to the company on November 22, 1994. While the report lists the registered capital as \$2,000,000, the report concludes, "this office is to conduct audit again when Mr. Li makes up all his invest[ment] later on." Despite the fact that the report reflects that Mr. Li began his investment by transferring just over 50 percent of the registered capital on November 22, 1994, the petitioner also submitted an "investment transfer certificate" purportedly from Mr. Li dated August 28, 1993 which states:

[REDACTED] is a foreign investment enterprise, which was established in [REDACTED] with my investment in the amount of 2,000,000 in US dollars. Now I am willingly to transfer my entire investment to [the petitioner's spouse] who is fully authorized to be responsible for the business operation and management. I shall not be hold liable for any problem incurred during the business operation and management as well as company debts and other financial responsibility. This hereby certifies the transfer.

The director stated that the petitioner had provided no explanation for Mr. Li's transfer of a \$2,000,000 investment to the petitioner's spouse. As stated by the director, the record includes no evidence that the petitioner's spouse purchased the investment interest. There is also no evidence of any relationship between the petitioner's spouse and Mr. Li. Counsel makes no attempt to explain this transfer on appeal. While this document raises concern regarding the spouse's financial dealings in general, the remaining documentation in the record reveals that the petitioner's investment funds apparently derived from her spouse's investment in his other company, Tonghai. As such, that documentation will be analyzed below.

The business license for Tonghai reflects that the petitioner is the company's representative and that the registered capital is 500,000 in an unspecified currency. The auditor's report dated November 8, 1995, indicates that 275,000 in an unspecified currency is to be contributed by the petitioner and 225,000 is to be contributed by another individual, Shieh Chen-Rong. The report continues:

Upon check up: 10,000 cash already deposited into Credit Union of [REDACTED] the account of [REDACTED] Tonghai [REDACTED]

Fix assets are two (2) units of cars worth 490,000 after physical check and it was real and true so to certify their capital is 500,000.

As two cars worth a total \$59,192 (RMB 490,000) is more credible than two cars worth a total of \$490,000, it appears that currency referenced is RMB Yuan, not U.S. dollars. As such, the

auditor's report confirms that the petitioner's share of the investment was \$33,220, with a total cash investment of only \$1,208. The accounting statement for the period ending December 31, 1997, reflects paid-in-capital of RMB 5,000,000 (approximately \$604,000), undistributed profits of RMB 23,676,965.52 (approximately \$2,860,177), and no paid dividends. The petitioner also submitted a gift letter from her spouse and the family registry documenting their marriage. Curiously, while the registry includes the birth of their son in 1997, it lists both the petitioner and her spouse as unemployed.²

In response to the director's request for additional documentation, the petitioner submitted the minutes of a Tonghai shareholder's meeting on October 8, 1997. The minutes reflect that the company resolved to issue a pre-distribution dividend of which the petitioner's spouse would receive 65 percent, or \$711,512. The petitioner submitted receipts and transaction records reflecting that the company transferred these funds to the petitioner's spouse between December 2, 1997 and December 5, 1997. The petitioner also submitted her spouse's passbook reflecting the deposits. The passbook further reflects that the petitioner's spouse withdrew \$2,416 on December 7, 1997, \$24,160 on December 8, 1997, \$422,800 on the same date, \$334,86 on the same date, \$60,400 on December 9, 1997, an additional \$60,400 on December 15, 1997, \$24,160 on December 19, 1997, \$3,624 on December 26, 1997, and \$4,832 on December 30, 1997, leaving a balance of \$873 on that date. On January 5, 1998, the shareholders resolved to issue a final dividend, with the petitioner's spouse to receive 42 percent of the total distributed. The amount of the dividend was to be reduced by the amount previously distributed as a pre-distribution dividend. As such, the petitioner's spouse would receive an additional \$260,194, or \$971,706 total. The petitioner submitted her spouses' March 1998 tax return reflecting that he paid a 40 percent tax on the dividend, or \$388,682.50. The company's balance sheet, however, does not reflect the dividends claimed. As stated above, the 1997 balance sheet does not reflect any dividends that year. And the 1998 balance sheet reflects total dividends of \$136,093.29 at the beginning of the year and \$218,299.91 at the end of the year. These dividends cannot account for the \$971,706 allegedly received by the petitioner's spouse and the remaining dividends issued to the other shareholders. While a statement from Tonghai dated January 16, 1998 indicates that the dividends would be reflected as "other payables" on financial statements, no such entry exists on the balance sheets.

On July 3, 1999, the director requested evidence tracing the funds in the petitioner's account at [REDACTED] Bank to prior counsel's attorney client trust account. In response, prior counsel asserted that most transactions in China are done with cash, leaving no documentary record. He further asserted that the petitioner withdrew the funds from her bank in China and traveled to Hong Kong where she transferred them to prior counsel. The petitioner submitted a transaction record for her account at [REDACTED] Bank, reflecting a deposit of RMB 5,000,000 on January 30, 1998, a withdrawal of RMB 1,500,000 on May 9, 1998, a withdrawal of the same amount on

² The registry also lists the petitioner's first and last name as the same as her spouse's, indicating that she formerly used the name provided on the petition. The notarial certificate evidencing their marriage, dated five years after the fact, lists the petitioner's name as reflected on the petition as her current name and her spouse's name as her former name. This oddity raises concerns about the credibility of the uncertified translations submitted initially.

May 10, 1998, and a withdrawal of RMB 1,800,000 on May 12, 1998. The withdrawals amount to approximately \$579,840. The petitioner also submitted her passport which confirms her travel to Hong Kong on June 2, 1998 and return on June 3, 1998. Finally, the petitioner submitted the wire transfer receipt for her transfer of \$500,000 to prior counsel on June 3, 1998. The petitioner failed to submit evidence that she reported carrying these funds out of China to Chinese authorities. Such documentation has been submitted with other petitions.

The director concluded that while the petitioner had traced her funds from the United States back to China, the petitioner had not established the "initial source" of these funds. The director determined that prior counsel's explanation that transactions in China are usually done in cash and that individual tax returns are only filed upon distributions from the company, insufficient to resolve the issue of how the petitioner's spouse acquired his assets.

On appeal, counsel questions the director's reference to "initial source," noting that this term is not used or defined in the regulations. Counsel then reviews the previously submitted documentation, concluding that such documentation adequately resolves the source of the petitioner's funds.

We concur with the director that the above documentation leaves too many issues unresolved. While not a source of the invested funds, it is still not clear why Mr. Li transferred a \$2,000,000 investment to the petitioner's spouse without any known compensation. The spouse's realization of a \$971,706 dividend four years after investing \$33,220 or, at the very most, \$275,000, in a company doing business in a non-capitalist economy is not adequately explained. Such a return on an investment would be spectacular even in a capitalist economy. Nor has the petitioner explained how her spouse accumulated the \$275,000 allegedly invested, assuming such an investment was even made. As stated above, the family register lists him as unemployed. In addition, while the petitioner's spouse appears to have paid taxes on the alleged distribution from Tonghai, this distribution is not reflected on Tonghai's balance sheet. Moreover, the spouse's removal of those funds in several withdrawals, some on the same day, one month before the petitioner deposited them in her own account is not consistent with a one time gift. The petitioner's removal of the funds in several withdrawals a month before her trip to Hong Kong is also perplexing. While prior counsel asserted that most transactions in China involve cash, it does not appear credible that the petitioner's spouse would keep a small fortune in cash outside a bank for an entire month. Finally, the petitioner has not established that her travel to Hong Kong to transfer her funds complied with China's currency control laws. In light of these unresolved issues, the record does not establish the lawful source of the petitioner's funds.

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*, CIV-F-99-6117, 19 (E.D. Calif. 2001)(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.

On the Form I-526 petition, the petitioner indicated that GAM did not have any employees but would create 10 jobs. The business plan indicated that GAM would hire six employees in October 1998, two additional employees in the fourth quarter of 1998 and two more in the first quarter of 1999. The plan also anticipated the creation of four to five more jobs by the end of 1999 with the opening of the Orange County office. While the business plan lists the job titles: receptionist, secretary, computer operator, legal assistant, assistant manager, manager, sales person, and accounting clerk/bookkeeper, the petitioner did not provide job descriptions for these jobs.

In response to the director's initial request for additional documentation, prior counsel asserted that GAM had hired three employees, one of whom was terminated. Prior counsel asserted that a secretary and legal analyst remained. Prior counsel further stated that delays in acquiring a permanent space had delayed hiring, but that GAM was currently interviewing. The petitioner submitted the resume and Form W-4 of a single employee. The petitioner also submitted evidence that GAM had secured a client, Shiatsu of California. The cover letter requests that GAM select a manager for the spa and the contract reveals that any business manager GAM selects will be an employee of the spa.

On July 3, 1999, the director requested Form I-9s for the current employees and payroll records reflecting the hours worked. In response, the petitioner submitted Forms I-9 for two employees, a Form 941 containing the names of two employees, and payroll records. The petitioner also submitted a new business plan calling for 10 employees by fiscal year 2000, namely a receptionist, a secretary, two computer technicians, a legal assistant, a manager, a salesperson, two accountants, and an assistant manager. The plan further states that GAM will be directed by

GEI, with day-to-day operations being handled by a hired manager and assistant manager. The petitioner will direct marketing in China. The plan notes that GEI has over 100 years of experience in business management. Finally, the plan indicates that outside agents will be hired as independent contractors.

The director noted that the business plan indicated that GAM would provide a full range of business services including record keeping, insurance, legal advice, consultation, absentee management, and establishing turnkey operations and that GEI was providing "expertise and services" valued at \$250,000 for its investment. The director further noted that the listed positions did not require specialization in the services GAM would be providing and that the business plan contemplated the use of outside consultants who were not employed by GAM. The director determined that the petitioner had not established that the business as described would require the 10 employees listed in the business plan.

On appeal, counsel attempts to distinguish Matter of Ho, supra, asserting:

By contrast, [the petitioner's] expanded business plan demonstrates that the enterprise has the required potential to meet the job-creation requirements. Her plan contains a market analysis based on census data, discusses the enterprise's marketing strategy, sets for the business's organizational structure and staffing requirements (including a hiring timetable and job descriptions for all positions), and contains detailed revenue and expense projections.

Counsel's description of the business plan is inaccurate in some respects. For example, the plan does not include job descriptions for the listed jobs.

Counsel also argues on appeal that GEI has the business experience necessary to provide the services offered by GAM. The director never questioned that experience. But GEI's experience does not resolve the issue of how GAM will create jobs for many of the non-management related jobs. For example, the business plan does not explain why an office of eight employees would require two full-time computer technicians. In addition, the plan does not provide the duties of the receptionist and the secretary such that we can determine that an office of this size would truly require both. Without credible job descriptions, it is also not clear why an office of 10 would require a manager and an assistant manager. As of November 1998, GAM has been operating with two employees, a secretary and a legal assistant. President Daniel [REDACTED] of GEI works without a salary in lieu of GEI's cash investment. GAM was scheduled to move into its new space in Canoga Park in August 1999. As of the date of this motion, October 30, 2001, the petitioner has not submitted any evidence that GAM has hired any additional employees. In light of the above, we concur with the director's conclusions on this issue.

MANAGEMENT

8 C.F.R. 204.6(j)(5) states:

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

- (i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;
- (ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
- (iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

The director concluded that the petitioner was merely a passive investor, similar to a limited partner. On appeal, counsel rightly notes that the regulations specifically provide that limited partners exert sufficient managerial control when they have the normal limited partner rights specified in the Uniform Limited Partnership Act. Counsel further notes that the petitioner is the vice president and a director of GAM, which is adequately supported by the record. As quoted above, evidence that the petitioner is a corporate officer or a member of the corporate board of directors is sufficient to meet this criterion. While the agreement setting forth GEI's obligations, rights and duties in exchange for its interest in GAM might shed more light on this issue, the petitioner has demonstrated that she will be sufficiently engaged in the management of the corporation according to the regulations.

CAPITAL AT RISK

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.

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, he/she must establish that he/she placed his/her own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Beyond the decision of the director, the petitioner has not established that the \$500,000 transferred to GAM is fully at risk. More specifically, the record reflects that GAM is grossly overcapitalized. Thus, the full \$500,000 cannot be said to be at risk.

The initial business plan, dated June 1998, includes the following start-up costs for the first six months of business:

Advertising & promotion	\$	30,000
Equipment		40,000
Furniture & furnishings		40,000
Insurance		5,000
Leasehold improvements		35,000
Legal/Accounting		25,000
Office supplies/stationary		10,000
Payroll		125,000
Rent		30,000
Security deposits		10,000
Taxes-Payroll		12,500
Working capital - initial		<u>50,000</u>
Total Start-up Costs		\$412,500
Reserve/expansion capital		87,500
Total Cash Investment		\$500,000

The documentation submitted subsequently, however, has not demonstrated expenses at nearly this level, and the subsequent business plan includes significantly different numbers. The lease for the initial address in Encino, in effect from June 1998 through July 1999, reveals that the monthly rent was only \$3,884.50, or \$23,307 for six months, with a security deposit of an additional \$3,884.50. An office depot receipt for office equipment totals only \$1,921.42. GAM's 1998 tax return reflects \$34,851 in wages, \$2,000 in repairs and maintenance, \$19,427 in rent, \$3,244 in taxes and licenses, \$223 in insurance costs, \$2,000 in legal fees, \$1,120 in outside services fees, \$286 in postage costs, \$55 in printing costs, \$350 in supply costs, and \$1,070 in telephone utilities, for a total of \$59,908 in cash expenditures. The company maintained cash assets of \$430,311 and earned \$1,948 in dividends during the year. The petitioner did not submit Part VI of Form 4562 which allows a corporation to amortize its start-up expenses. The payroll for May 1999 reflects year to date wages of only \$13,405. The August 1999 Business Plan includes the following expense table:

Start-up Expenses	
Legal	\$5,000
Stationary etc.	\$2,000
Brochures	\$10,000
Insurance	\$5,000
Rent	\$7,500

Security Deposit (Letter of Credit)	\$45,000
Expensed equipment	\$5,000
Other	\$2,500
Total Start-up Expense	\$82,000
Start-up Assets Needed	
Cash Requirements	\$250,000
Other Short-term assets	\$10,000
Total Short-term Assets	\$260,000
Long-term Assets	\$125,000
Total Assets	\$385,500
Total Start-up Requirements:	\$467,000

While some amount of cash reserves is expected, placing half of the petitioner's investment in a reserve account strongly suggests that the business is grossly overcapitalized. The projected profit and loss statement reflects that in Fiscal Year 2000, GAM's proceeds are expected to cover all but \$91,890 of its expenses. By Fiscal Year 2001, GAM expects to turn a profit. The petitioner has not established that the full \$250,000 placed in reserve will be used for employment-generating activities.

Finally, as stated above, the minimum investment amount in this case is \$1,000,000. The petitioner only claims to have invested \$500,000 and the record does not support an investment of more than that amount.

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 decision of the Associate Commissioner dated October 4, 2001, is vacated. The petition is denied.