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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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**U.S. Citizenship
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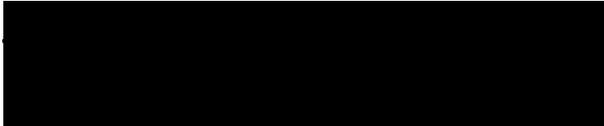
Office: NEBRASKA SERVICE CENTER

Date: **JAN 06 2006**

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IN RE:

Petitioner:



Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be sustained.

The petitioner is an international company organized in 1949. It is engaged in international hotel operations. It seeks to employ the beneficiary as one of its subsidiary's hotel *sous* chef. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits documentation and a brief.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

On April 7, 2005, the director denied the petition. The director acknowledged that the petitioner in this matter had established that it owns and controls The Drake Hotel, the beneficiary's proposed place of United States employment. However, the director questioned and ultimately determined that the petitioner had not established it owned and controlled the beneficiary's place of foreign employment, the Maldives Hilton. The director first noted that the petitioner had not provided any evidence it owned the beneficiary's foreign place of employment. The director then reviewed a management agreement (agreement) dated September 1996 supplied by the petitioner covering a hotel site on Rangalifinolhu Island where the beneficiary had been employed from May 1999 to May 2001.

The director referenced Article III, Paragraph 3 of the agreement that had been highlighted by the petitioner. This paragraph reads in pertinent part:

Nothing herein shall constitute or be construed to be or to create a partnership or joint venture between First Party (Crown Company PTE limited) and [the petitioner] and the right of First Party to receive financial returns based on the operation of the Hotel shall not be deemed to give the First Party any interest, control or discretion in the operation of the Hotel. The control and discretion by [the petitioner] shall include the use of the Hotel for all customary purposes, terms of admittance, charges for rooms and commercial space, entertainment and

amusement, sport and recreation, food and beverages, labour policies (including wage rates, the hiring and discharging of employees), the maintenance of the bank accounts and holding of funds, and all phases of promotion and publicity relating to the Hotel.

The director acknowledged that the above paragraph demonstrated that the petitioner had some control over the activities of the foreign entity but noted that two paragraphs later, the agreement states:

All the activities of [the petitioner] in the management, use and operation of the Hotel shall be on behalf of and for the account of First Party. The employees of the Hotel shall be employees of First Party. All contracts of employment and all leases and concessions, all purchase orders and agreements shall be executed in the name of First Party by [the petitioner] as Manager.

The agreement indicated that the petitioner would receive a management fee for operating the hotel.

The director determined that upon review of the totality of the agreement, Crown Company PTE Limited controlled the major aspects of the foreign business and that the record contained evidence that Crown Company PTE Limited held the lease on the island and thus the hotel. The director concluded that as the petitioner was simply contracted to manage the hotel, it did not appear that an actual affiliate or subsidiary relationship existed between the petitioner and the beneficiary's foreign employer. The director further concluded that the beneficiary was an employee of Crown Company PTE Limited, an entity unrelated to the petitioner, and thus the beneficiary had not been employed with the same employer, a subsidiary, or an affiliate of the petitioner.

On appeal, counsel for the petitioner observes that the petitioner does not claim control of Crown Company PTE Limited or ownership of the Maldives Hilton hotel property; but rather it claims ownership and control of the management operations of the Maldives Hilton. Counsel explains that most major hotel chains do not own both the physical property and the management operations; but that through the petitioner's ownership of management operations, the petitioner retains all control over employment and that the employees are considered working for the petitioner. Counsel acknowledges that the hotel employees are paid from the owner's (Crown Company PTE Limited) account, but notes that the petitioner has the right to use the hotel for all customary purposes, which includes hiring, disciplining, and firing all employees, assigning their work, directing the manner in which it is performed, and determining the conditions of their employment including wage levels.

Counsel cites *Matter of Pozzoli*, 14 I&N Dec. 569 (1974 Reg. Comm.) which holds that the essential elements of the employment relationship is the right of control by the master to order and control the servant in the performance of work by the latter, and the right to direct the manner in which the work shall be done. Counsel argues that like *Matter of Pozzoli*, when determining whether the right of control exists, possession of either the power to employ or to discharge is regarded as strong evidence of the master and servant relationship, whereas the payment of wages is the least important factor. *Matter of Pozzoli*, 14 I&N Dec. at 572 quoting, 53 Am. Jur. 2d, Master and Servant, S.2.

Counsel contends that in this matter the petitioner has full control and discretion in the operation of the Maldives Hilton including the right to hire and discharge employees, such as the beneficiary. Counsel concludes that since the petitioner totally owns and controls the management operations of the Maldives Hilton and that since the petitioner is both the foreign entity that employed the beneficiary under *Matter of Pozzoli* and the petitioning entity, that there is no need to provide further evidence of a corporate relationship.

The record in this matter establishes that the petitioner and the management company of the Maldives Hilton are one and the same. When the beneficiary was employed with the Maldives Hilton his duties were subject to the management of the petitioner and the petitioner had the authority to hire and fire the beneficiary based on language contained in the management agreement. In this matter, the petitioner's right to hire and fire the beneficiary and to direct and control his duties is sufficient to establish the employer-employee relationship, albeit the petitioner did not pay the beneficiary his salary. The petitioner has established that the petitioner and the beneficiary's foreign employer, for the purposes of this visa classification are one and the same, so that a qualifying relationship exists.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. For the foregoing reasons the decision of the director will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained.