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Beyond the FCN Treaty: Japanese Multinationals Under Title VII

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BEYOND THE FCN TREATY: JAPANESE MULTINATIONALS UNDER TITLE VII

INTRODUCTION

As rapid communication and transportation have come of age, multinational enterprises have become increasingly commonplace. Corporations are expanding beyond their national borders and establishing subsidiaries in other parts of the world.[1] By providing employment opportunities to citizens of the host country, most corporations have adapted well to international expansion and have assimilated easily.[2] Japanese multinationals, on the other hand, have exported their unusual management techniques when establishing a foreign subsidiary and have staffed their international operations primarily with executives who are citizens of Japan.[3] These Japanese companies believe that it would be impracticable for them to use managers who are citizens of the host nation in their overseas subsidiaries because the successful, yet highly unusual, Japanese management style requires employees who are intimately familiar with Japanese business practices.[4]

This policy of favoring Japanese citizens for executive or managerial positions has often caused conflict because of alleged discrimination on grounds of national origin. The issue was recently raised in *Avagliano v. Sumitomo Shoji America, Inc.*,[5] in which American employ-

1. *See* D. Heenan & H. Perlmutter, Multinational Organization Development 3 (1979); International Labour Office, Multinational Enterprises and Social Policy 4-16 (1973); V. Salera, Multinational Business 5 (1969); Aharoni, *On the Definition of a Multinational Corporation*, in The Multinational Enterprise in Transition 3 (1972).

2. *See* A. Dickerman, Training Japanese Managers 96 (1974); T. Gladwin & I. Walter, Multinationals Under Fire 408 (1980); Y. Tsurumi, The Japanese Are Coming 261 (1976).

3. A. Dickerman, *supra* note 2, at 96; T. Gladwin & I. Walter, *supra* note 2, at 408; Y. Tsurumi, *supra* note 2, at 260-62; M. Yoshino, Japan's Multinational Enterprises 167-68 (1976); Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 Employee Rel. L.J. 485, 502 (1979).

4. Y. Tsurumi, *supra* note 2, at 262 (The unusual methods of inter- and intra-organizational communication require that only " 'their own people' be placed in key posts within the overseas subsidiaries."); M. Yoshino, *supra* note 3, at 168 (A manager of a Japanese-owned subsidiary "would find it impossible to manage an organization without the support of subordinates who share the same work style."); Stevens, *Applicability of U.S. Employment Discrimination Laws to Foreign Corporations in the United States*, 1 U.C.L.A. Pac. Basin L.J. 153, 160 (1982) ("[K]nowledge of Japanese language and business practice[s] could be justified as being necessary to the successful operation of the company's business."); *see* Sumitomo Shoji Am., Inc. v. Avagliano, 102 S. Ct. 2374, 2382 n.19 (1982) ("There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country.").

5. 473 F. Supp. 506 (S.D.N.Y. 1979), *rev'd in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982).

ees of a United States-based subsidiary of a Japanese corporation alleged in district court that they were injured as a result of this discrimination.[6] The plaintiffs argued that the policy of treating Japanese citizens more favorably than their American co-workers violated Title VII of the Civil Rights Act of 1964.[7]

Title VII makes it an unlawful employment practice for an employer to "refuse to hire or . . . otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . . "[8] The Japanese subsidiary maintained that it was immune from Title VII[9] because of Article VIII of the 1953 Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the United States and Japan.[10] The Treaty provides that "[n]ationals and companies of either Party shall be permitted to engage . . . executive personnel . . . of their choice."[11] The defendant in *Avagliano* asserted that this particular clause placed its actions beyond the reach of Title VII.[12] The Supreme Court held, however,

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6. Avagliano v. Sumitomo Shoji Am., Inc., 473 F. Supp. 506, 508 (S.D.N.Y. 1979), *rev'd in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982). Plaintiffs had also charged their employer with sex discrimination and with violating 42 U.S.C. § 1981 (1976). The district court dismissed the § 1981 claim, finding that plaintiffs' allegations were "insufficient to sustain a cause of action under section 1981." 473 F. Supp. at 514.

7. 473 F. Supp. at 508.

8. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976).

9. Avagliano v. Sumitomo Shoji Am., Inc., 473 F. Supp. 506, 508 (S.D.N.Y. 1979), *rev'd in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982).

10. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

11. *Id.*, art. VIII, 4 U.S.T. at 2070.

12. 473 F. Supp. at 508 (citing 42 U.S.C. §§ 2000e to 2000e-17 (1976)). The district court found that because Sumitomo was incorporated in the United States, it was not a Japanese company, and therefore could not invoke Article VIII(1) of the FCN Treaty. 473 F. Supp. at 512-13. The court certified for interlocutory appeal to the court of appeals. 638 F.2d 552 (2d Cir. 1981). The circuit court held that locally incorporated subsidiaries of a foreign company are covered by the FCN Treaty. 638 F.2d at 557-58. The court further found that the "of their choice" language of the treaty did not immunize Sumitomo from complying with Title VII of the Civil Rights Act of 1964. *Id.* at 558. The Supreme Court granted certiorari on the issue of whether Article VIII(1) of the FCN Treaty can be invoked by a U.S.-based subsidiary of a Japanese corporation. 102 S. Ct. 2374, 2376 (1982). The Court held that Sumitomo is not a Japanese company, and therefore is not covered by the specific provision of the FCN Treaty. *Id.* at 2382.

Virtually the same issue was presented in Spiess v. C. Itoh & Co. (Am.), 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated*, 102 S. Ct. 2951 (1982). The Supreme Court remanded the case for further consideration in light of *Avagliano*. 102 S. Ct. 2951; *see* Linskey v. Heidelberg E., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1686 (E.D.N.Y. 1981) (even if Treaty applies to an American-based subsidiary of a Danish parent company, it does not override Title VII); Porto v. Canon, U.S.A., Inc., 29 Empl. Prac. Dec. (CCH)¶ 32,903 (N.D.

that because the subsidiary was incorporated under the laws of New York, it was a company of the United States[13] and thus could not invoke the rights provided by the FCN Treaty exemption.[14] The Court specifically reserved judgment on whether the Japanese practice of staffing their international operations with citizens of Japan is violative of Title VII.[15]

Discriminatory hiring practices such as those of the Japanese multinationals will not automatically constitute a violation of Title VII, for once an employment policy is found to be discriminatory, one of two defenses may be available. The bona fide occupational qualification (BFOQ) defense, specifically provided for in the statute,[16]

Ill. 1981) (FCN Treaty does not protect domestically incorporated subsidiaries of a Japanese parent company); Shiseido Cosmetics (Am.), Ltd. v. State Human Rights Appeal Board, 72 A.D.2d 711, 421 N.Y.S.2d 589 (1979) (mem.) (employment policies of a Japanese subsidiary do not discriminate on the basis of national origin), *aff'd mem.*, 52 N.Y.2d 916, 419 N.E.2d 346, 437 N.Y.S.2d 668 (1981).

13. 102 S. Ct. at 2378. Sumitomo Shoji America, Inc., is a New York-incorporated, wholly owned subsidiary of a Japanese general trading company. General trading companies market Japanese products, participate in the importation to Japan of raw materials and manufactured products, and play a significant role in financing Japan's international trade. *Id.* at 2376 n.1. *See generally* A. Young, The *Sogo Shosha*: Japan's Multinational Trading Companies (1979) (discussion of Japanese general trading companies).

14. 102 S. Ct. at 2378-79. The Supreme Court, however, "beclouded the issue," 3 A. Larson & L. Larson, Employment Discrimination § 95A.10, at 20-41 (1982 & Supp. 1982), when it asserted that "[w]e also express no view as to whether Sumitomo may assert any [treaty] rights of its parent," 102 S. Ct. at 2382 n.19. The meaning of this statement is unclear, but it seems to imply that although Sumitomo on its own may not be able to invoke the FCN Treaty exemption, the subsidiary may have standing to assert the treaty rights of its parent.

Another means by which a locally incorporated subsidiary can take advantage of the treaty exemption is to reorganize into a branch of the parent company. Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 556 (2d Cir. 1981) (Japanese subsidiaries could use the treaty exemption by "transforming . . . wholly-owned U.S. subsidiaries into branches."), *rev'd on other grounds*, 102 S. Ct. 2374 (1982); Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 369 (5th Cir. 1981) (Reavley, J., dissenting) ("If a company of Japan wishes to safeguard a few superior legal rights under the Treaty, it may choose to do business in the form of a branch office."), *vacated and remanded*, 102 S. Ct. 2951 (1982); United States v. R.P. Oldham Co., 152 F. Supp. 818, 823 (N.D. Cal. 1957) (If defendant subsidiary "had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch."); *see* Sumitomo Shoji Am., Inc. v. Avagliano, 102 S. Ct. 2374, 2382 (1982).

15. 102 S. Ct. at 2382 n.19. The Court did not express an opinion whether the defenses to a Title VII action would be available to the Japanese. The Court did recognize, however, that "[t]here can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country." *Id.*

16. 42 U.S.C. § 2000e-2(e)(1)(1976). This section provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national

shields a discriminatory hiring practice from Title VII's proscription if it is essential to the proper operation of an employer's business.[17] This statutory exception is available only to defend those discriminatory employment policies that are purposely based on a prohibited criterion.[18] For instance, an employer's announced policy of not hiring females can be continued under Title VII only if being male qualifies as a BFOQ for the position in question.[19]

Title VII also prohibits those practices which are facially neutral but discriminatory in impact.[20] The disparate impact theory was established by the Supreme Court in *Griggs v. Duke Power Co.*,[21] in which the scope of Title VII was expanded to include not only intentionally discriminatory practices, but also those practices which have an adverse impact upon the employment prospects of a protected group.[22] Despite the expanded coverage of Title VII, under the disparate impact theory such employment practices may be justified by the judicially created business necessity defense.[23] Although discrimina-

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> origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id. Race may never qualify as a BFOQ. 110 Cong. Rec. 2548 (1964) (remarks of Rep. Celler); B. Schlei & P. Grossman, Employment Discrimination Law 244 & n.25 (1976).

17. See *infra* notes 51-70 and accompanying text.

18. *E.g.*, Burwell v. Eastern Air Lines, 633 F.2d 361, 369-70 & n.13 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Garcia v. Gloor, 609 F.2d 156, 163, *vacated*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Harriss v. Pan Am. World Airways, 649 F.2d 670, 674 & n.2 (9th Cir. 1980); B. Schlei & P. Grossman, *supra* note 16, at 292; Note, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Mar. L. Rev. 667, 672 & n.22 (1982) [hereinafter cited as *Language Discrimination*]. *But see* Garcia v. Rush-Presbyterian Medical Center, 26 Fair Empl. Prac. Cas. (BNA) 1556, 1560 (7th Cir. 1981) (applying the BFOQ defense in a disparate impact case).

19. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (requirement that prison guards be male is a BFOQ); Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1195-96 (E.D. Ark. 1981) (policy of excluding male nurses from the labor and delivery section of its obstetrics and gynecology department is a BFOQ), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

20. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *accord* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 583 (1978) (Marshall, J., concurring in part); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976); *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

21. 401 U.S. 424 (1971).

22. *See id.* at 431.

23. *See id.* The business necessity defense, like the disparate impact theory, has no basis in Title VII. Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 Yale L.J. 98, 98 (1974) ("The business necessity doctrine thus adopted in *Griggs* appears in neither the explicit language nor the legislative history of the 1964 Act.") [hereinafter cited as *Business Necessity*]; *see* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 950-51 (1982).

tory in operation, these practices may be continued if the employer can show that they are compelled by some nondiscriminatory business purpose.[24]

Unfortunately, the challenged employment practices of the Japanese do not lend themselves to simple classification within the traditional applications of these defenses. If favoring Japanese citizens is equated with national origin discrimination, the BFOQ is the relevant defense. Conversely, if the citizenship qualification is viewed as a neutral hiring criterion that adversely impacts a protected group, the business necessity defense must be applied. Thus, in resolving this controversy, it is essential to consider both possible routes of court adjudication.

Part I of this Note discusses whether the hiring practices of the Japanese multinationals constitute an intentional violation of the statute, the availability of the BFOQ defense, and whether the traditional BFOQ analysis may properly be applied in cases of national origin discrimination.[25] Part II considers whether the employment qualifica-

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24. *E.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 583 (1978) (Marshall, J., concurring); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

The business necessity defense and the BFOQ exception apply in different instances. Some courts, however, have confused their application, and have used them interchangeably. *E.g.*, Burwell v. Eastern Air Lines, 458 F. Supp. 474, 496 n.1 (E.D. Va. 1978) ("As a practical matter . . . the Court sees little difference between the two tests."), *aff'd in part, rev'd in part per curiam*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Harriss v. Pan Am. World Airways, 437 F. Supp. 413, 434 (N.D. Cal. 1977) (defendant's discriminatory policy sustained as a "business necessity/B.F.O.Q."), *aff'd in part, rev'd in part*, 649 F.2d 670, 674 (9th Cir. 1980).

25. The BFOQ defense has never been offered to rebut a charge of national origin discrimination. 3 A. Larson & L. Larson, *supra* note 14, § 95.40; B. Schlei & P. Grossman, *supra* note 16, at 267; *see* S. Agid, Fair Employment Litigation; Proving and Defending a Title VII Case 532 (2d ed. 1979). All arguments, therefore, will be derived from the legislative history of Title VII and analogies to claims of sex and age discrimination.

Principles of sex discrimination law are applicable to cases of national origin discrimination. Hollon & Bright, *National Origin Harassment in the Work Place: Recent Guideline Developments from the EEOC*, 8 Employee Rel. L.J. 282, 282 (1982). Moreover, although age discrimination is not proscribed by Title VII, the Age Discrimination in Employment Act of 1967 (ADEA) contains a provision that is virtually identical to the BFOQ exemption in Title VII of the Civil Rights Act of 1964. The ADEA provides that it is not unlawful for an employer to discriminate on the basis of age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1976). In analogous situations, many courts have applied the Title VII BFOQ analysis to this similar provision of the ADEA. *See, e.g.*, Tuohy v. Ford Motor Co., 675 F.2d 842, 844-45 (6th Cir. 1982); Murnane v. American Airlines, 667 F.2d 98, 100-01 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234-35 (5th Cir. 1976).

tion is discriminatory in impact,[26] even if not an intentional violation of Title VII, and the availability of the business necessity defense. This Note concludes that these two defenses, as traditionally applied, are not available to the Japanese in defending their current hiring practices. In light of the legislative history of Title VII, however, the argument is made that a more lenient BFOQ standard should be applied in cases of national origin discrimination. Conversely, should the business necessity defense be found relevant, despite the recent trend towards a more liberal application of the defense, the existence of a less restrictive alternative selection procedure should preclude the Japanese from continuing their present employment practices.

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26. The Japanese employment practices are not violative of Title VII the under discriminatory treatment theory. This theory, articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies when an individual alleges that he has been subject to disparate treatment because he belongs to a protected group. *Id.* at 802; *see* Connecticut v. Teal, 102 S. Ct. 2525, 2536 (1982) (Powell, J., dissenting); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). The disparate treatment theory applies only to private, non-class action suits, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); 2 A. Larson & L. Larson, *supra* note 14, § 50.10, at 10-4, while the disparate impact analysis applies also to class actions, *see* Sumitomo Shoji Am., Inc. v. Avagliano, 102 S. Ct. 2374, 2375 (1982). *But see* Pegues v. Mississippi State Employment Serv., No. 80-3212, slip op. at 2969 (5th Cir. Mar. 11, 1983). In addition, disparate treatment involves covertly discriminatory practices, while a BFOQ analysis concerns only overtly discriminatory hiring policies. *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (failure to rehire employee was a result of unexpressed racial bias) *with* Dothard v. Rawlinson, 433 U.S. 321 (1977) (state rule prohibiting employment of women as prison guards). *See generally* Bartholet, *supra* note 23, at 947, 965 n.58, 1004-06 (comparing the discriminatory treatment and discriminatory impact theories). Proof of discriminatory intent in a disparate treatment case is critical. Connecticut v. Teal, 102 S. Ct. 2525, 2537 (1982) (Powell, J., dissenting); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1978); 2 A. Larson & L. Larson, *supra* note 14, § 50.40, at 10-40. A disparate impact case, on the other hand, involves the validity of a facially neutral hiring criterion or testing device which has an adverse impact on a protected group. Proof of discriminatory intent, therefore, is irrelevant. Connecticut v. Teal, 102 S. Ct. 2525, 2537 (1982) (Powell, J., dissenting); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-06 (1973). One commentator suggests, however, that the Supreme Court is moving toward a synthesis of the two types of cases. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. Rev. 419, 419-20 (1982); *see* Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 938 n.11 (D. Md. 1982) (effect of disparate treatment analysis upon discriminatory impact theory is unclear). *But see* Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982) ("criteria for disparate *treatment* cases do not apply to disparate *impact* cases" (emphasis in original)).

I. Availability of the BFOQ Defense

A. *Citizenship as National Origin Discrimination*

While Title VII prohibits all hiring decisions that are based on national origin,[27] the Japanese multinationals have been accused of discriminatory practices that are predicated strictly upon an individual's citizenship.[28] The important question, therefore, is whether hiring on the basis of citizenship constitutes national origin discrimination. The statute provides no guidance; Title VII contains no definition of national origin.[29] In the brief legislative debates that preceded the passage of the statute, it was suggested that national origin "means the country from which you or your forebears came from."[30] Thus, the debates do not indicate whether Congress intended to include citizenship within the concept of national origin.[31]

The Supreme Court first considered the issue in *Espinoza v. Farah Manufacturing Co.*,[32] in which it was alleged that the refusal to hire an applicant because of her Mexican citizenship violated Title VII.[33] The Court held that a refusal to hire those who lack United States citizenship does not by itself constitute national origin discrimination.[34] The Court did recognize, however, that in certain instances, a citizenship requirement may be prohibited if it is "part of a wider scheme of unlawful national-origin discrimination."[35] In *Espinoza*, the employer did not discriminate against those of Mexican ancestry—ninety-six percent of the employees of the subject division were of

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27. 42 U.S.C. § 2000e-2(a) (1976).

28. Avagliano v. Sumitomo Shoji Am., Inc., 473 F. Supp. 506, 508 (S.D.N.Y. 1979), *rev'd in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982); *see* Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 355 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2951 (1982); Porto v. Canon, U.S.A., Inc., 29 Empl. Prac. Dec. (CCH) ¶ 32,903, at 26,283 n.3 (N.D. Ill. 1981).

29. H. Anderson, Primer of Equal Employment Opportunity 47 (1978); 3 A. Larson & L. Larson, *supra* note 14, § 93.20, at 20-3; B. Schlei & P. Grossman, *supra* note 16, at 246. The Equal Employment Opportunity Commission (EEOC) guidelines contain a definition of national origin. 29 C.F.R. § 1606.1 (1982). The guidelines provide that national origin discrimination should be defined "broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." *Id.*

30. 110 Cong. Rec. 2549 (1964) (remarks of Rep. Roosevelt).

31. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) ("The statute's legislative history [is] quite meager.").

32. 414 U.S. 86 (1973).

33. *Id.* at 87.

34. *Id.* at 95-96. Justice Douglas, writing in dissent, argued that a citizenship requirement is always national origin discrimination because aliens are entitled to the same protection as citizens of the United States. *See id.* at 96 (Douglas, J., dissenting).

35. *Id.* at 92.

Mexican descent.[36] The citizenship requirement, therefore, was upheld.[37] Subsequently, courts confronted with the issue presented in *Espinoza* have consistently found that citizenship is distinct from the concept of national origin discrimination.[38]

The employment practices of the Japanese subsidiaries, however, may present one of the rare instances when citizenship and national origin can be equated. Unlike the situation in *Espinoza*, the Japanese citizenship requirement can be seen as a pretext for national origin discrimination. Japan is a homogeneous country—ninety-nine percent of its population is of Japanese ancestry.[39] Consequently, a citizenship qualification creates a work force which almost exclusively consists of those of Japanese national origin. Because favoring one national origin results in discrimination against all other ethnic groups,[40] the practice of favoring Japanese citizens in this instance may be equated with intentional national origin discrimination.

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36. *Id.* at 93.

37. *Id.* at 95-96.

38. Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) ("National origin must not be confused with . . . citizenship."), *cert. denied*, 449 U.S. 1113 (1981); Ramirez v. Sloss, 615 F.2d 163, 167 n.5 (5th Cir. 1980) ("The 1964 act does not apply to employment discrimination on the basis of alienage."); Jalil v. Campbell, 590 F.2d 1120, 1123 (D.C. Cir. 1978) (per curiam) (national origin does not equal alienage); Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 (9th Cir. 1975) (Title VII does not "bar discrimination on the basis of alienage."); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 646-47 (5th Cir. 1974) ("Like Mrs. Espinoza, [plaintiff] has failed to demonstrate that he suffered from discrimination based on his national origin rather than on his status as an alien."); Dowling v. United States, 476 F. Supp. 1018, 1022 (D. Mass. 1979) ("Title VII . . . does not bar employment discrimination based on citizenship."); Chavez-Salido v. Cabell, 427 F. Supp. 158, 165 n.13 (C.D. Cal. 1977) (Title VII does not prohibit discrimination based on alienage), *vacated and remanded sub. nom.* County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978); *cf.* Nguyen v. Montgomery Ward & Co., 513 F. Supp. 1039, 1040 (N.D. Tex. 1981) (Equal Credit Opportunity Act does not equate national origin with alienage). *But see* Caton v. Canal Zone Gov't, 522 F. Supp. 1, 13 (D.C.Z. 1981) (court construes a citizenship requirement as national origin discrimination), *aff'd per curiam*, 669 F.2d 218 (5th Cir. 1982).

39. D. Whitaker, Area Handbook for Japan 70 (3d ed. 1974); Brief for Respondents at 18, Sumitomo Shoji Am., Inc. v. Avagliano, 102 S. Ct. 2374 (1982); *see* M. Yoshino, *supra* note 3, at 162; Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 959 n.60 (1979) [hereinafter cited as *Case of Japanese Employers*].

40. B. Schlei & P. Grossman, *supra* note 16, at 256 ("[T]he requirement that an employee be trained in a foreign country, if not job-related, violates Title VII where its purpose is to employ persons of a particular national origin. Discrimination in favor of a particular national origin is tantamount to discriminating against all other national origins.") (footnotes omitted); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group . . . is precisely . . . what Congress . . . proscribed."); 3 A. Larson & L. Larson, *supra* note 14, § 95.70, at 20-39 (" 'reverse' discrimination is as much subject to Title VII as any other" form of discrimination).

In addition, the Equal Employment Opportunity Commission (EEOC) guidelines interpreting Title VII also lend support to a claim that the Japanese citizenship requirement constitutes national origin discrimination.[41] The guidelines provide that "[i]n those circumstances, where citizenship requirements have the purpose . . . of discriminating against an individual on the basis of national origin, they are prohibited by Title VII."[42] Pursuant to this interpretation, the Japanese subsidiaries' policy of favoring Japanese citizens for managerial positions may well constitute an intentional violation of Title VII. Although no courts have relied on the EEOC's interpretation,[43] the guidelines are entitled to "great deference."[44]

B. *Citizenship as a BFOQ*

1. The Traditional BFOQ Defense

Title VII contains an exception which provides:

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .[45]

This provision is applicable solely to those practices that are considered purposely discriminatory,[46] and will be available to the Japanese employers as a defense only if the citizenship criterion is equated with national origin discrimination.[47] The exception, however, is narrowly construed by both the EEOC guidelines[48] and judicial interpreta-

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41. 29 C.F.R. § 1606.5(a) (1982).

42. *Id.*

43. 3 A. Larson & L. Larson, *supra* note 14, § 97.10, at 20-52. It has been suggested that this guideline adds nothing to the interpretation of the statute. If the *purpose* of an alienage requirement is national origin discrimination, the citizenship qualification is already within the purview of Title VII, with or without reference to the guideline. Therefore, it has been asserted, it is "not surprising" that no cases have relied on the EEOC's interpretation of the statute. *Id.*

44. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); *accord* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-41 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973); *cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (rulings of the Administrator of the Fair Labor Standards Act "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

45. 42 U.S.C. § 2000e-2(e)(1) (1976).

46. See *supra* note 18 and accompanying text.

47. See *supra* notes 27-31 and accompanying text.

48. The EEOC guidelines on national origin discrimination assert that the BFOQ exception "shall be strictly construed." 29 C.F.R. § 1606.4 (1982). A similar admonition exists in the Commission's guidelines on sex discrimination, which provide that

tion.[49] Only those discriminatory practices that are absolutely essential to a business operation have been found to be within the narrow purview of the BFOQ defense.[50]

In determining whether a purposely discriminatory job qualification constitutes a BFOQ, courts have most frequently applied a two-pronged test.[51] The first prong was developed in *Weeks v. Southern Bell Telephone and Telegraph Co.*,[52] in which a policy of not hiring women for the job of switchman was challenged as discriminatory.[53] In finding a violation of Title VII, the court held that "in order to rely on the [BFOQ] exception an employer has the burden of proving that he had reasonable cause to believe . . . that all or substantially all women would be unable to perform safely and efficiently the duties of

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"the bona fide occupational qualification exception as to sex shall be interpreted narrowly." *Id.* § 1604.2(a). Finally, the guidelines applicable to the Age Discrimination in Employment Act propose that the BFOQ defense "will have limited scope and application [and] must be construed narrowly." *Id.* § 860.102(b).

49. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) ("We are persuaded—by the restrictive language of [the defense], the relevant legislative history, and the consistent interpretation of the [EEOC]—that the bfoq exception was in fact meant to be an extremely narrow exception . . . ."); *see* Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); Burwell v. Eastern Airlines, 633 F.2d 361, 370 n.15 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Jatczak v. Ochburg, 540 F. Supp. 698, 702 (E.D. Mich. 1982); Wilson v. Southwest Airlines, 517 F. Supp. 292, 298-99 (N.D. Tex. 1981). *But see* Condit v. United Air Lines, 558 F.2d 1176-77 (4th Cir. 1977) (per curiam) (use of a liberal BFOQ test), *cert. denied*, 435 U.S. 934 (1978); S. Agid, *supra* note 25, at 533 (court in *Condit* uses a "diluted version" of the BFOQ test).

50. The burden of proving a BFOQ, however, is not insurmountable. The defense is most often successful when the discriminatory criterion has a positive effect on public safety. *E.g.*, Murnane v. American Airlines, 667 F.2d 98, 101 (D.C. Cir. 1981) (maximum age limit for applicants for a position as airline pilot), *cert. denied*, 102 S. Ct. 1770 (1982); Condit v. United Air Lines, 558 F.2d 1176, 1176 (4th Cir. 1977) (per curiam) (policy of refusing to allow stewardesses to fly from the time they learned they were pregnant found valid, since pregnancy may interfere with the stewardesses' duties relating to the safe operation of the aircraft), *cert. denied*, 435 U.S. 934 (1978); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 226 (5th Cir. 1976) (maximum age for employment as bus driver); Hodgson v. Greyhound Lines, 499 F.2d 859, 861 (7th Cir. 1974) (same), *cert. denied*, 419 U.S. 1122 (1975); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 335-37 (1977) (rule prohibiting female prison guards found valid due to risk of sexual assault).

51. *See, e.g.*, Tuohy v. Ford Motor Co., 675 F.2d 842, 844 (6th Cir. 1982); Stewart v. Smith, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); Harriss v. Pan Am. World Airways, 649 F.2d 670, 676 (9th Cir. 1980); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234-35 (5th Cir. 1976). *But see* Jatczak v. Ochburg, 540 F. Supp. 698, 703 & n.3 (E.D. Mich. 1982) (use of a four-pronged test).

52. 408 F.2d 228 (5th Cir. 1969).

53. *Id.* at 230.

the job involved."[54] The court added, however, that if it is impossible to test for the qualifications on an individualized basis, a "reasonable general rule" such as a sex qualification would be justified.[55]

The second prong of the test was formulated in *Diaz v. Pan American World Airways*,[56] in which a class action was brought charging that Pan American's policy of not employing males as cabin attendants violated Title VII.[57] The court held that in order to justify a challenged practice as a BFOQ, the employer must show that without the discriminatory hiring criteria, "the *essence* of [his] business operation would be undermined."[58] Although the court acknowledged that a female flight attendant may be able to perform certain "non-mechanical" functions on an airplane better than most men,[59] it also noted that being female did not relate to the primary function of an airline—the safe transportation of passengers.[60] In this instance, the goals of the discriminatory hiring criteria did not relate to the "essence" of the business operation. Thus, the court held, the policy of hiring only females did not qualify as a BFOQ.[61]

In *Usery v. Tamiami Trail Tours, Inc.*,[62] the court proposed that the tests enunciated in *Weeks* and in *Diaz* be used concurrently.[63] In *Tamiami*, a policy of denying employment as bus drivers to applicants over age forty was challenged as age discrimination.[64] The court found that the discriminatory practice was unquestionably related to the "essence" of the bus company's business—the safe transportation of passengers.[65] Therefore, the *Diaz* prong was easily satisfied. The *Weeks* facet of the test, however, presented a greater obstacle. The defendant-employer had not shown that "all or substantially all" individuals over age forty were unable to operate a bus safely.[66] The bus company did establish through expert testimony, however, that it was extremely difficult to determine when an individual's age would

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54. *Id.* at 235.
55. *Id.* at 235 n.5.
56. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S 950 (1971).
57. *Id.* at 385-86.
58. *Id.* at 388 (emphasis in original).
59. *Id.* at 387-88. These non-mechanical functions include the superior ability to provide psychological assurance to anxious passengers, giving "courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." *Id.* at 387 (quoting Diaz v. Pan Am. World Airways, 311 F. Supp. 559, 563 (S.D. Fla. 1970), *rev'd and remanded*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)).
60. *Id.* at 388.
61. *Id.* at 388-89.
62. 531 F.2d 224 (5th Cir. 1976).
63. *See id.* at 235-36 & n.27.
64. *Id.* at 226.
65. *Id.* at 236.
66. *Id.*

begin to interfere with his driving ability.[67] The use of a general age limit, therefore, was necessary to the safe and efficient operation of the bus company's business.[68] Consequently, the combined *Weeks-Diaz* test had been met by the defendant, and therefore the discriminatory age criterion was held to constitute a BFOQ.[69] Most courts since *Tamiami* have applied this two-step method of analysis when determining whether a discriminatory hiring criterion can be justified by the BFOQ defense.[70]

2. The Case for a More Liberal Analysis

This traditional analysis of the BFOQ exception, however, may not be entirely appropriate in the case of Japanese subsidiaries, which presents a question of national origin discrimination.[71] Not only has the exception evolved in the areas of sex and age discrimination,[72] but more importantly, the legislative history of Title VII indicates that the BFOQ defense should be liberally applied in this area.[73]

While no committee reports exist, during the House debates Representative Rodino gave an example of permissible national origin discrimination under the BFOQ exception. The Congressman suggested that an owner of a pizzeria "would probably seek as chef a person of

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67. *Id.* at 237-38.

68. *Id.* at 238.

69. *Id.*

70. *E.g.*, Tuohy v. Ford Motor Co., 675 F.2d 842, 844-45 (6th Cir. 1982); Stewart v. Smith, 673 F.2d 485, 491 & n.26 (D.C. Cir. 1982); Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); Harriss v. Pan Am. World Airways, 649 F.2d 670, 676 (9th Cir. 1980); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977).

71. Avagliano v. Sumitomo Shoji Am., Inc., 473 F. Supp. 506, 508 (S.D.N.Y. 1979), *rev'd in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982); *see* Spiess v. C. Itoh & Co. (Am.), 469 F. Supp. 1, 2 (S.D. Tex. 1979), *rev'd and remanded*, 643 F.2d 353 (5th Cir. 1981), *vacated*, 102 S. Ct. 2951 (1982).

72. *E.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (age); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.) (sex), *cert. denied*, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (sex).

73. B. Schlei & P. Grossman, *supra* note 16, at 267. The congressional debates that preceded the enactment of Title VII are especially important. In the Senate, the bill did not go through the usual committee procedure, but instead was discussed in informal bipartisan conferences. Consequently, neither a committee report, nor a Senate-House conference report, was written. EEOC, Legislative History of Titles VII and IX of the Civil Rights Act of 1964, at 3001 [hereinafter cited as Legis. Hist.]. The statements made prior to the adoption of the statute, therefore, are the only guides available to aid in the determination of the congressional intent. *Id.*; Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex. L. Rev. 1025, 1027 (1977); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. and Com. L. Rev. 431, 457-58 (1966); *Language Discrimination*, *supra* note 18, at 667 & n.2.

Italian origin. He would do this because pizza pie is something he believes . . . people of Italian national origin are able to make better than others—and is reasonably necessary to the operation of his particular business."[74] The Congressman's suggestion seems to indicate that a mere showing that a person of one national origin is perceived to be better qualified to perform the duties of a certain job is sufficient to justify the hiring criteria as a BFOQ. Certainly, this interpretation of the statutory exception is more lenient than the tests commonly applied to the BFOQ defense.[75]

The remarks of Representative Roosevelt also suggest that a fairly liberal standard should be applied when determining whether a hiring criterion based on national origin qualifies as a BFOQ.[76] When asked whether it would be permissible to advertise for an employee of a particular ethnic group, the Congressman asserted that "if you were to have a Polish organization I do not think that they [would] want to have me as a Dutchman . . . and they would have a right to say something about [all applicants being] Polish in their advertisement."[77] Moreover, the interpretative memorandum on Title VII introduced by Senators Clark and Case[78] indicates that "the preference of a French restaurant for a French cook" would be a permissible basis of discrimination pursuant to the BFOQ defense under Title VII.[79] These comments evince a congressional intent to construe the BFOQ defense rather liberally in the area of national origin discrimination.[80]

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74. 110 Cong. Rec. 2549 (1964) (statement of Rep. Rodino). When no committee reports are written, the statements made by one legislator, although probably not controlling, "are an authoritative guide to the statute's construction" and "are the only . . . indications of congressional intent." North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1920-21 (1982).

75. One commentator has suggested that "[t]he congressional intent inferred from the legislative history of Title VII . . . contrasts sharply with the narrow interpretation of the BFOQ provision currently employed by the courts." Sirota, *supra* note 73, at 1032. *But see* Laffey v. Northwest Airlines, 567 F.2d 429, 475 (D.C. Cir. 1976) (when congressional intent is unclear, courts traditionally resolve ambiguities in Title VII "in favor of those whom the legislation was designed to protect"), *cert. denied*, 434 U.S. 1086 (1978).

76. *See* 110 Cong. Rec. 2549 (1964) (remarks of Rep. Roosevelt).

77. *Id.*

78. Senators Clark and Case were the Senate floor managers of the House-approved bill. Legis. Hist., *supra* note 73, at 3001. Their responsibilities included explaining Title VII in detail, defending it, and leading additional discussion on the legislation. Vaas, *supra* note 73, at 445. The written interpretative memorandum of the Senators should also be given great weight in the absence of any committee reports. *See* North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1921 (1982).

79. Legis. Hist., *supra* note 73, at 3040.

80. Title VII was designed primarily to protect blacks from invidious discrimination. In fact, the addition of "sex" to the list of prohibited categories met opposition; it was felt that the amendment would "clutter up the bill" and "jeopardize [the]

C. *The Japanese Multinationals and the BFOQ Defense*

1. Justifications for the Citizenship Requirement

In the context of the Japanese citizenship requirement, the employers will contend that citizenship is a BFOQ for most managerial positions within their subsidiary operations. They may argue that their management philosophy is so fundamentally different from prevailing Western attitudes that only an individual intimately familiar with the workings of a Japanese corporation could effectively operate within the United States-based subsidiary. Undoubtedly, the problems that an American would face functioning within a Japanese-controlled company are manifold.[81] The language barrier, for example, presents a formidable obstacle;[82] few Americans are sufficiently fluent in Japanese to communicate effectively with either their Japanese co-workers or the representatives of the parent company.[83] Because of the strong ties that usually exist between the subsidiary and its Japanese parent, this communication problem is significant.[84]

Another important difference between the two systems is that the loyalty existing between employers and employees in a Japanese corporation is unparalleled in any Western nation. A Japanese employee is given lifetime employment;[85] the employer receives in return a worker who is devoted to the successful operation of the company.[86] An American worker, on the other hand, would probably have significant difficulty in adjusting to such a paternalistic environment in light

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primary purpose" of the statute. 110 Cong. Rec. 2581 (1964) (remarks of Rep. Green). Thus, it can be argued, justifications for national origin discrimination should not be as strictly construed as a defense to a charge of racial discrimination under Title VII.

81. *See* Y. Tsurumi, Japanese Business 108-13 (1978); Y. Tsurumi, *supra* note 2, at 262; M. Yoshino, *supra* note 3, at 168-71; Johnson & Ouchi, *Made in America (Under Japanese Management)*, in Managing and Organizing Multinational Corporations 495 (S. Davis ed. 1979).

82. M. Yoshino, *supra* note 3, at 168; *see* T. Gladwin & I. Walter, *supra* note 2, at 408. The Supreme Court has noted that certain positions within a Japanese-controlled, U.S.-based subsidiary necessitate a "great familiarity" with the language of Japan. Sumitomo Shoji Am., Inc. v. Avagliano, 102 S. Ct. 2374, 2382 n.19 (1982).

83. *See* M. Yoshino, *supra* note 3, at 168.

84. Y. Tsurumi, *supra* note 2, at 262; M. Yoshino, *supra* note 3, at 168-71; *see* Y. Tsurumi, *The Multinational Spread of Japanese Firms and Asian Neighbors' Reactions*, in the Multinational Corporation and Social Change 118, 143 (D. Apter & L. Goodman eds. 1976).

85. A. Dickerman, *supra* note 2, at 18; W. Ouchi, Theory Z 15-22 (1981); S. Sethi, Japanese Business and Social Conflict 60-62 (1975); M. Yoshino, *supra* note 3, at 163; Sethi & Swanson, *supra* note 3, at 504.

86. M. Yoshino, *supra* note 3, at 163; *see* J. Fayerweather, International Business Management: A Conceptual Framework 62 (1969); Sethi & Swanson, *supra* note 3, at 493.

of the individualistic nature of Western society.[87] In addition, the group orientation that pervades every aspect of a Japanese company,[88] a result of the socioeconomic environment of Japan,[89] would also be quite alien to an American, accustomed as he is to the competitive atmosphere fostered in most United States corporations.

The most significant obstacle an American manager would face, however, is adjusting to the Ringi system—the Japanese decision-making process.[90] This unusual procedure is often referred to as "decision-making by consensus."[91] Each idea originates at a lower echelon of the organizational hierarchy.[92] The suggestion is then passed up through the ranks, with each executive adding his comments and eventually giving his approval.[93] Although this process is painstakingly slow,[94] the final decision is the responsibility of the entire group, rather than the burden of one individual who occupies the leadership role.[95] The proper functioning of "decision-making by consensus" depends on both a sharing of values within the group and a common understanding of company goals.[96] Without these common values, a decision could never be reached. Thus, the Japanese maintain that only citizens of Japan can effectively hold managerial positions within the American-based subsidiary, for they alone are familiar with these methods.[97]

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87. Johnson & Ouchi, *supra* note 81, at 500; *see* W. Ouchi, *supra* note 85, at 44-47.

88. M. Yoshino, *supra* note 3, at 162-64; *see* S. Sethi, *supra* note 85, at 41-45; Y. Tsurumi, *supra* note 2, at 220.

89. *See* M. Yoshino, *supra* note 3, at 161-62; Sethi & Swanson, *supra* note 3, at 503-04.

90. *See* R. Clark, The Japanese Company 126-27 (1979); W. Ouchi, *supra* note 85, at 36-39; S. Sethi, *supra* note 85, at 50-52; M. Yoshino, *supra* note 3, at 165-66; Sethi & Swanson, *supra* note 3, at 506-08.

91. A. Dickerman, *supra* note 2, at 14; W. Ouchi, *supra* note 85, at 36; S. Sethi, *supra* note 85, at 51-56; Sethi & Swanson, *supra* note 3, at 506; *see* Johnson & Ouchi, *supra* note 81, at 500-01 (decision by consensus).

92. R. Clark, *supra* note 90, at 127; A. Dickerman, *supra* note 2, at 14; S. Sethi, *supra* note 85, at 51; M. Yoshino, *supra* note 3, at 165; Johnson & Ouchi, *supra* note 81, at 496-97; Sethi & Swanson, *supra* note 3, at 507.

93. A. Dickerman, *supra* note 2, at 14; M. Yoshino, *supra* note 3, at 165; Sethi & Swanson, *supra* note 3, at 507.

94. *See* A. Dickerman, *supra* note 2, at 15; W. Ouchi, *supra* note 85, at 37; S. Sethi, *supra* note 85, at 55.

95. W. Ouchi, *supra* note 85, at 39; M. Yoshino, *supra* note 3, at 165-66; Johnson & Ouchi, *supra* note 81, at 496.

96. W. Ouchi, *supra* note 85, at 38-39; *see* M. Yoshino, *supra* note 3, at 168.

97. *See* Y. Tsurumi, *supra* note 2, at 262. It has been argued that the policy of staffing subsidiaries with Japanese citizens actually hampers the operation of the company. The commentators suggest that the Japanese management system is a product of its national environment and cannot be exported with success. The practice, it is argued, fosters resentment within the host company, places a strain on the number of qualified Japanese managers available and results in tremendous cost to the parent (the cost of maintaining a manager abroad is double what it would be

2. Applying *Tamiami*

As persuasive as these arguments may seem, the traditional *Tamiami* test[98] precludes finding that Japanese citizenship is a BFOQ for managerial positions within United States-based operations. Although productivity certainly would be hampered by having an American who is unfamiliar with the Japanese system occupy a managerial position,[99] it cannot be said that "all or substantially all" Americans would be unable to perform such a job. In addition, because it would be possible to test prospective job applicants for qualities which would make them effective managers within the subsidiary, a general Japanese citizenship requirement will not be justified under the *Weeks* exception.[100] Finally, the "essence" of the business would not be impaired if the Japanese were forced to use nondiscriminatory hiring policies; their operations would merely be less efficient.[101] Therefore, if the traditional analysis of the exception is applied, the BFOQ defense would not be available to the Japanese in defending their discriminatory employment policies.

3. Applying the Liberal Analysis

In light of the legislative history which preceded the passage of Title VII, courts should not be obliged to apply blindly the traditionally rigorous BFOQ analysis.[102] Certainly, the justifications of the Japanese are as compelling as the examples given in the congressional debates. The desire to give authenticity to a French restaurant pales in comparison with the actual business needs of the Japanese in employing managerial personnel who are fully acquainted with their unusual management system. Hiring a French cook to work in a French restaurant is merely an attempt to increase customer appeal, and is not compelled by any actual business need. Courts have consistently held that such third party preference is insufficient to justify a discriminatory practice as a BFOQ.[103] The subsidiaries' practice of favoring Japanese citizens for managerial positions, on the other hand, goes

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in Japan). Thus, it is asserted, these practices actually hinder the effective expansion of Japan's multinational companies. A. Dickerman, *supra* note 2, at 96; M. Yoshino, *supra* note 3, at 161, 175-76.

98. See *supra* notes 62-70 and accompanying text.

99. M. Yoshino, *supra* note 3, at 177; *see* Johnson & Ouchi, *supra* note 81, at 497.

100. *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969). See *supra* notes 54-55 and accompanying text.

101. M. Yoshino, *supra* note 3, at 177; *see* Johnson & Ouchi, *supra* note 81, at 497.

102. See *supra* notes 71-80 and accompanying text.

103. *E.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981) (refusal to find being male as a BFOQ for a position that requires traveling in countries that bar women from business); Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir.) (to allow customer preference to dominate would encourage

beyond third party preference to the actual business needs of the company. They are not trying to please potential customers, but rather are trying to operate their businesses more efficiently.[104] Although traditional BFOQ analysis would preclude finding that the practices of the subsidiaries are justified,[105] perhaps a more lenient approach, as indicated by the legislative history,[106] should be applied with respect to the charge of national origin discrimination under these circumstances.[107]

II. Discriminatory Impact Theory

A. *Neutral Employment Criteria that are Discriminatory in Operation*

Originally, Title VII applied only to those hiring criteria that were purposely based on an impermissible classification.[108] The Supreme

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prejudices that Title VII was intended to overcome), *cert. denied*, 404 U.S. 950 (1971); American Jewish Congress v. Carter, 23 Misc. 2d 446, 448, 190 N.Y.S.2d 218, 220-21 (Sup. Ct. 1959) (refusal to hire Jews in the American operations of a Saudi Arabian company found not to be a BFOQ), *aff'd per curiam*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961); *see* 29 C.F.R. § 1604.2 (a)(1)(iii) (1982) ("refusal to hire an individual because of the preferences of . . . customers" is not a BFOQ). *But see* EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) ("[I]t is not the law that customer preference is an insufficient justification as a matter of law."); Wilson v. Southwest Airlines, 517 F. Supp. 292, 299 (N.D. Tex. 1981) ("[C]ourts have held . . . that customer preference for one sex may be taken into account in those limited instances where satisfying customer preference is [a BFOQ].").

104. See *supra* notes 81-97 and accompanying text.

105. See *supra* notes 98-101 and accompanying text.

106. See *supra* notes 73-80 and accompanying text.

107. The United States has recognized the importance of staffing a branch of a foreign corporation with whomever the company chooses. The FCN Treaty does give the parties an opportunity to hire personnel "of their choice." Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII(1), 4 U.S.T. 2063, T.I.A.S. No. 2863. The United States is currently bound by over 100 FCN Treaties, all of which are designed to promote commercial activities between the signatories. Note, *Amenability of Foreign Corporations to United States Employment Discrimination Laws*, 14 Vand. J. Transnat'l L. 197, 198 (1981).

Although the Japanese subsidiaries have chosen to incorporate within the United States, and therefore cannot avail themselves of the FCN Treaty exemption, the need to hire personnel of their choice still exists. It has been suggested that if a Japanese corporation was intent upon taking advantage of the treaty rights, it could transform its wholly owned subsidiary into a branch of the parent, and thereby use the "of their choice" language of the FCN Treaty. Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 556 (2d Cir. 1981), *rev'd*, 102 S. Ct. 2374 (1982); United States v. R.P. Oldham Co., 152 F. Supp. 818, 823 (N.D. Cal. 1957); Sethi & Swanson, *supra* note 3, at 514. This possibility seems unlikely, however, due to the negative tax consequences of restructuring. Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 369 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2951 (1982).

108. M. Miner & J. Miner, Employee Selection Within The Law 6-8 (1978); *see* Bartholet, *supra* note 23, 950-51; Comment, *The Business Necessity Defense to*

Court in *Griggs v. Duke Power Co.*,[109] however, expanded the scope of the statute to prohibit those employment qualifications that are neutral on their face but discriminatory in effect.[110] In *Griggs*, blacks challenged an employer's policy of requiring a high school degree or the passing of an intelligence test as a condition of employment.[111] The plaintiffs argued that the requirement, while not related to job performance, had an adverse impact on the employment prospects of minorities.[112] The Supreme Court, in a momentous decision,[113] held that it was irrelevant that the employer lacked a discriminatory intent;[114] it was sufficient that the challenged practice operated to discriminate on the basis of race.[115] Therefore, those policies that appear to be legitimate may still be prohibited if they are discriminatory in operation and adversely affect the employment prospects of a protected group.[116]

Under the disparate impact theory, even if citizenship is not equated with national origin,[117] the employment practices of the Japanese will be found to discriminate because almost all citizens of Japan are of Japanese national origin.[118] The effect of favoring Japanese citizens in employment decisions, therefore, is to create a managerial work force that is made up entirely of individuals of Japanese national origin. Discriminating in favor of one national origin is tantamount to discriminating against all other ethnic groups.[119] Thus, the defendants' policy of giving preferential treatment to Japanese citizens adversely impacts those who are not of Japanese ancestry.[120] Consequently, even absent -an intentional violation of the statute, the

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Disparate Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911, 911 & n.3 (1979) [hereinafter cited as *Disparate Impact Liability*].

109. 401 U.S. 424 (1971).

110. *Id.* at 432 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." (emphasis in original)).

111. *Id.* at 425-26.

112. *Id.* at 426.

113. *Griggs* has been described as "the most important court decision in employment discrimination law." B. Schlei & P. Grossman, *supra* note 16, at 5.

114. 401 U.S. at 432.

115. *Id.* at 431.

116. *See id.*

117. See *supra* notes 27-44 and accompanying text.

118. D. Whitaker, *supra* note 39, at 70; Brief for Respondents at 18, Avagliano v. Sumitomo Shoji Am., Inc., 456 U.S. , (1982).

119. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group . . . is precisely . . . what Congress has proscribed."); *see* 3 A. Larson & L. Larson, *supra* note 14, § 95.70, at 20-39; B. Schlei & P. Grossman, *supra* note 16, at 256. See *supra* note 40 and accompanying text.

120. See *infra* note 124.

personnel policies of the subsidiaries implicate Title VII because their effect is to discriminate on the basis of national origin.

B. *The Business Necessity Defense*

The business necessity defense, also established in *Griggs*,[121] is available to justify those employment policies that are found to be neutral on their face but discriminatory in impact.[122] Unlike the BFOQ exception, the business necessity defense may not be used to justify intentionally discriminatory practices.[123] Once a showing of adverse impact has been made,[124] the defendant has an opportunity to prove that his

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121. 401 U.S. 424, 431 (1971) ("The touchstone is business necessity. If an employment practice which [is discriminatory in impact] cannot be shown to be related to job performance, the practice is prohibited."); *Disparate Impact Liability*, *supra* note 108, at 911; *Business Necessity*, *supra* note 23, at 98; *see* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 Ga. L. Rev. 376, 383-84 (1981) [hereinafter cited as *Search for Adequate Standards*].

122. 401 U.S. at 431.

123. Burwell v. Eastern Airlines, 633 F.2d 361, 369-70 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Harriss v. Pan Am. World Airways, 649 F.2d 670, 674 & n.2 (9th Cir. 1980); B. Schlei & P. Grossman, *supra* note 16, at 292-93; *Language Discrimination*, *supra* note 18, at 672 & n.22.

124. For a plaintiff to establish a prima facie showing of adverse impact, he must prove that the challenged qualification results in a pattern of discriminatory hiring. New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). To illustrate that a hiring criterion discriminates against or unduly favors a particular group, statistical analysis of the qualified labor pool is undertaken. Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); *see* 2 A. Larson & L. Larson, *supra* note 14, § 50.84(a).

Much dispute has arisen as to what constitutes a qualified labor pool. If the job skills required are the kind that people can readily acquire, the relevant labor pool is viewed to be the general population. Conversely, if the job requires special skills, "comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977). Thus, in such instances, a narrower labor pool should be used to determine the discriminatory effect of an employer's procedures. *See* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1259 n.5 (6th Cir. 1981); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 (4th Cir. 1979). It is possible, however, to establish a prima facie case "without evidence of qualifications where the inference of discrimination is supported by a compelling level of . . . underrepresentation in a sizeable work force [of a protected group]." Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1259 (6th Cir. 1981); *see* Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 544 (5th Cir. 1980); Parham v. Southwestern Bell Tel., Co., 433 F.2d 421, 426 (8th Cir. 1970). Thus, a plaintiff challenging the discriminatory practices of the Japanese subsidiaries may rely on significant underrepresentation to establish a prima facie case, and as a result, shift the burden to the defendant to prove a lack of qualifications in the labor pool.

practice is compelled by a legitimate business purpose and is therefore justified by business necessity.[125]

In determining whether a challenged practice that is discriminatory in impact may be continued, most courts have adopted a rather strict balancing test,[126] weighing the discriminatory effect of the policy against the employer's legitimate need for the hiring criteria.[127] The standard analysis employed by federal courts was established in *Robinson v. Lorillard Corp.*[128] In denying the existence of business necessity to justify a seniority system that was racially discriminatory in impact, the court found that "the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[129] Many courts employing this

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Because the Japanese subsidiaries would maintain that an intimate knowledge of Japanese management techniques is a valid job qualification, the above line of cases will serve to relieve the plaintiffs of a significant evidentiary burden. *See* Fisher v. Proctor & Gamble Mfg., 613 F.2d 527, 544 (7th Cir. 1980).

125. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *accord* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Guy v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1719 (1982); Harless v. Duck, 619 F.2d 611, 616 n.6 (6th Cir.), *cert. denied*, 449 U.S. 872 (1980); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *see* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

126. *Disparate Impact Liability*, *supra* note 108, at 912.

127. For an employer to have a legitimate need for a discriminatory hiring criterion, the suspect qualification must be shown to be "job related." The disputed hiring criterion must bear a relationship to the successful performance of the employment in question. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1259 (6th Cir. 1981); Craig v. County of Los Angeles, 626 F.2d 659, 662 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); 3 A. Larson & L. Larson, *supra* note 14, § 78.11, at 15-94. The test for job-relatedness is often said to require that the practice be "necessary to safe and efficient job performance." *E.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977); Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979) (quoting *Dothard*), *cert. denied*, 446 U.S. 928 (1980); deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678 (9th Cir. 1978) (same); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

128. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

129. *Id.* at 798.

formulation emphasize that when a discriminatory job qualification is intended to avoid great human risks, the corresponding burden upon the employer to prove that his practice is justified by business necessity is lessened.[130] Other federal courts have used alternate formulations of the test which also construe the defense extremely narrowly.[131]

The Supreme Court, however, has taken a more lenient view of the business necessity defense.[132] In a series of decisions[133] culminating with *New York City Transit Authority v. Beazer*,[134] and *Connecticut v. Teal*,[135] the Court liberally interpreted the defense and placed a much lighter burden on the employer in justifying his discriminatory

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130. *See, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) (quoting Spurlock v. United Airlines, 475 F.2d 216, 219 (10th Cir. 1972)); Harriss v. Pan Am. World Airways, 649 F.2d 670, 675 & n.4 (9th Cir. 1980); Spurlock v. United Airlines, 475 F.2d 216, 219 (10th Cir. 1972); *see also* B. Schlei & P. Grossman, *supra* note 16, at 130, 146 (when the human risks are great, the required showing of business necessity is reduced).

The relevance of the safety factor has also been recognized in cases that analyze the availability of the BFOQ defense to justify a discriminatory criterion that directly violates the statute. *See, e.g.*, Tuohy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982); Murnane v. American Airlines, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982); Hodgson v. Greyhound Lines, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); Beck v. Borough of Manheim, 505 F. Supp. 923, 926 (E.D. Pa. 1981).

131. *See, e.g.*, Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980) (there must be a "compelling need" for an employer to continue his discriminatory practice); Rogers v. International Paper Co., 510 F.2d 1340, 1347 (8th Cir.) ("compelling business necessity"), *vacated*, 423 U.S. 809 (1975); United States v. St. Louis-S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972) (en banc) ("compelling need"), *cert. denied*, 409 U.S. 1107 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (business necessity "connotes an irresistable demand"). *But see* EEOC v. Ball Corp., 661 F.2d 531, 541 (6th Cir. 1981) (showing that criterion relates to the effective functioning of the job is sufficient); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981) (test must merely predict job performance), *cert. denied*, 456 U.S. (1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) (criterion need only promote the efficient operation of the business); Craig v. County of Los Angeles, 626 F.2d 659, 664 (9th Cir. 1980) (test must merely bear a significant relationship to job performance), *cert. denied*, 450 U.S. 919 (1981).

132. Many commentators have suggested that the stringent business necessity tests applied by lower federal courts conflict with the rather liberal Supreme Court formulation of the defense. *See, e.g.*, Furnish, *supra* note 26, at 426; *Search for Adequate Standards*, *supra* note 121, at 420; *Disparate Impact Liability*, *supra* note 108, at 918, 933.

133. Connecticut v. Teal, 102 S. Ct. 2525 (1982); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

134. 440 U.S. 568 (1979).

135. 102 S. Ct. 2525 (1982).

practice.[136] To prove the existence of business necessity, the Court in *Beazer* and *Teal* required only that the qualification "[bear] a 'manifest relationship to the employment in question.'"[137] This formulation of the defense, which merely necessitates a relationship between the discriminatory hiring criteria and the subject employment position, is far more liberal than the test applied by the lower courts which requires that there be an overriding business purpose that is "necessary to safe and efficient job performance."[138] Despite the Supreme Court's willingness to apply the business necessity defense rather liberally by lessening the defendant's burden in justifying a practice that is discriminatory in impact, numerous federal courts continue to apply an extremely strict standard.[139]

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136. Only in Dothard v. Rawlinson, 433 U.S. 321 (1977), was the lower courts' formulation of the business necessity defense even mentioned. In a footnote, the Court stated that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Id. at 332 n.14. In subsequent discussions of the business necessity defense, however, the Court has retreated from this strict interpretation. Furnish, *supra* note 26, at 428-29; *see* Contreras v. City of Los Angeles, 656 F.2d 1267, 1279-80 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1719 (1982).

137. 102 S. Ct. at 2531 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)); 440 U.S. at 587 n.31 (same). It is arguable, however, that the Supreme Court's liberal interpretation of the business necessity defense in *Beazer* was influenced by the public safety considerations involved in the case. In *Beazer*, the Transit Authority (TA) sought to exclude methadone maintenance users from employment. Many of the positions within the TA, such as subway motorman and city bus driver, involved danger to the public. *Id.* at 571. If a question of public safety arises, the corresponding burden of proof upon an employer to show business necessity is reduced. Spurlock v. United Airlines, 475 F.2d 216, 219 (10th Cir. 1972). See *supra* note 130 and accompanying text. Thus, the lenient formulation of the defense in *Beazer* may be a reflection of public safety considerations, and should not be unduly relied upon. In *Teal*, however, the Court also interpreted the business necessity defense rather liberally, even absent questions of public safety. *See id.* at 2531.

138. Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979) (quoting Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977)), *cert. denied*, 446 U.S. 928 (1980); *e.g.*, deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678 (9th Cir. 1978); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Robinson v. Lorillard Co., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

139. *See, e.g.*, Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980); Harless v. Duck, 619 F.2d 611, 616 n.6 (6th Cir.), *cert. denied*, 449 U.S. 872 (1980); Communications Workers v. South Cent. Bell Tel. & Tel. Co., 515 F. Supp. 240, 246 (E.D. La. 1981); Furnish, *supra* note 26, at 426; *Search For Adequate Standards*, *supra* note 121, at 420; *Disparate Impact Liability*, *supra* note 108, at 912. In light of *Teal* and *Beazer*, however, it is now difficult to determine whether lower federal courts will continue to construe the business necessity defense so strictly. The trend indicates that some circuit courts are following the lead of the Supreme Court and have reduced the employer's burden in a disparate impact case. *See* EEOC v. Ball Corp., 661 F.2d 531, 541 (6th Cir. 1981) (mere showing that

After an employer has established that business necessity justifies a discriminatory hiring criterion, the burden of proof shifts back to the plaintiff.[140] At this point an employee is given an opportunity to prove that despite the business necessity, an alternative selection procedure exists which has a less discriminatory effect on a protected group.[141]

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without the discriminatory criterion employees "would not function effectively" is sufficient to establish business necessity); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981) (test must merely be "predictive of . . . important elements of work behavior" to be justified by business necessity) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975)), *cert. denied*, 102 S. Ct. 1719 (1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) ("[I]ndispensibility is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business.").

140. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1260 (6th Cir. 1981). Prior to the *Albemarle* decision, courts required the employer, not the plaintiff-job applicant, to show that no suitable alternative hiring criterion was available. *See* Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); United States v. St. Louis-S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); B. Schlei & P. Grossman, *supra* note 12, at 134-35; *Search for Adequate Standards*, *supra* note 121, at 415.

141. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Peques v. Mississippi State Employment Serv., slip op. at 2980 (5th Cir. 1983); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1719 (1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981); Kirby v. Colony Furniture Co., 613 F.2d 611, 616 n.6 (6th Cir.), *cert. denied*, 449 U.S. 872 (1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 939 (D. Md. 1982); *see* Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). It has been argued that the plaintiff's burden is not to prove that a "less discriminatory" alternative exists, but rather that a "nondiscriminatory" alternative is available. *See* 3 A. Larson & L. Larson, *supra* note 14, § 79-30, at 15-153 to 15-154. This interpretation is based on Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), in which the Court stated that once business necessity is established, the challenged procedure will be preempted only if the plaintiff's proposed alternate procedure does not present a "similar[ly] undesirable [discriminatory] effect." *Id.* at 425. The Larsons, while acknowledging the ambiguity of the Court's language, posit that "any [discriminatory] effect is undesirable, and that an alternative plan with any [discriminatory] effect is therefore 'similarly undesirable.'" Under this theory, plaintiff can meet his burden of proof, therefore, only by demonstrating that there exists an alternative selection procedure that has no discriminatory effect. 3 A. Larson & L. Larson, *supra* note 14, § 79-30, at 15-154. This interpretation, however, conflicts with the EEOC guideline requiring an employer to implement a selection procedure that creates a "lesser adverse impact." 29 C.F.R. § 1607.3(B) (1982). The Supreme Court has held that EEOC administrative guidelines are "entitled to great deference" in determining the validity of a discriminatory selection criterion. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973); *cf.* North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1932 n.12 (1982) (deference to Department of Education guidelines).

For if it is proven that there exists a less discriminatory manner in which to select qualified employees, the practice can never be essential to the orderly operation of the business.[142] In such a case, the disputed hiring criterion cannot be used.[143]

C. *Justification of the Citizenship Criterion by Business Necessity*

The Japanese have a compelling interest in continuing to hire and promote citizens of Japan. An employee who is familiar with the unusual Japanese management style would operate more efficiently within a United States subsidiary than one who is accustomed to Western methods.[144] In addition, as discussed earlier in this Note, the language difficulties that would be encountered[145] and the unusual decision-making procedures[146] used by the subsidiaries clearly would hamper the efficient functioning of an American executive. As a result, it would not be difficult for the subsidiary to prove that a compelling and legitimate business purpose requires that nearly all employees in managerial positions be citizens of Japan.[147] The hiring criterion, therefore, although discriminatory in impact, responds to a business necessity.

Nonetheless, these practices will not survive scrutiny under Title VII in light of the availability of less discriminatory alternatives.[148] If hiring and promotional decisions within the United States-based subsidiary were premised on an intimate understanding of the Japanese business environment and language, instead of Japanese citizenship, those American citizens who possess the required knowledge would benefit. Even though these individuals would not be Japanese citizens, they nonetheless would be given opportunities to advance within the

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142. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

143. Connecticut v. Teal, 102 S. Ct. 2525, 2531 (1982); *accord* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

144. *See* Y. Tsurumi, *supra* note 2, at 262; M. Yoshino, *supra* note 3, at 168. See *supra* notes 81-97 and accompanying text.

145. See *supra* notes 82-84 and accompanying text.

146. See *supra* notes 90-96 and accompanying text.

147. It is significant to note that the business necessity argument that would be offered by the Japanese does not involve a question of public safety. Thus, their burden in proving the existence of a compelling reason for the continuation of the practice is significantly increased. *See* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) ("where considerations of public safety are negligible, employment standards [must be] appropriately less demanding"). See *supra* note 130. Although most courts construe business necessity narrowly, not all consider safety in their formulation of the defense. See *supra* note 131. If the hiring criterion that is discriminatory in effect must be justified by "compelling need," Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980); Rogers v. International Paper Co., 510 F.2d 1340, 1347 (8th Cir.), *vacated*, 423 U.S. 809 (1975), the Japanese will have an easier time in defending their policy.

148. See *supra* notes 140-43 and accompanying text.

subsidiary. A job qualification based upon actual understanding of the Japanese business community would serve the business purposes of the subsidiary,[149] while not uniformly discriminating against those not of Japanese national origin. This alternative hiring criterion would still be somewhat discriminatory in effect, because those of Japanese national origin would be more likely to possess the required skills.[150] However, such a criterion would have a less prejudicial effect than an outright Japanese citizenship requirement. The existence of this less discriminatory selection criterion would preclude the use of the business necessity defense,[151] and invalidate the Japanese employment policies as they now stand.

CONCLUSION

The employment practices of Japanese subsidiaries present a case of first impression in the employment discrimination field. While the companies' employment practices deliberately favor citizens of Japan, they may not constitute an intentional violation of Title VII because citizenship requirements have not, in the past, been equated with national origin discrimination. The Japanese practices, however, present an instance in which citizenship and national origin should be equated. If, as this Note advocates, a deliberate violation of Title VII is found, the strict judicial interpretation of the BFOQ exception will preclude a finding that the Japanese citizenship qualification is justified. The legislative history of Title VII, however, indicates that the BFOQ exception should be applied more liberally in instances of national origin discrimination.

Even if a court does not equate citizenship with national origin, the practices of the Japanese are discriminatory in effect. Armed with the Supreme Court's liberal view of the business necessity defense, the Japanese multinationals may nonetheless be able to justify their culturally based management practices. However, the existence of a less discriminatory alternative selection procedure calls for the rejection of these discriminatory hiring policies.

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149. See *supra* notes 81-97 and accompanying text.

150. For instance, there are very few Americans who are fluent in Japanese. M. Yoshino, *supra* note 3, at 168.

151. The Japanese will not face this obstacle, however, if the alternative selection procedure must be nondiscriminatory, not less discriminatory, as is suggested by two commentators. 3 A. Larson & L. Larson, *supra* note 14, § 79.30. Requiring all employees to have complete understanding of Japanese language and business practices would continue to discriminate in favor of those of Japanese national origin. Therefore, under this interpretation, no nondiscriminatory alternative selection procedure would exist. The challenged hiring criteria, if justified by business necessity, could be continued. There are, however, numerous problems with this interpretation of the business necessity defense. See *supra* note 141 and accompanying text.