

SOME PHASES OF THE ADMINISTRATIVE AND  
JUDICIAL INTERPRETATION OF THE  
IMMIGRATION ACT OF 1924

PHILIP C. JESSUP

It is not the purpose of this article to enter upon a discussion of the fundamental principles of restrictive immigration, nor to speculate upon the pleasing possibility of Nordic supremacy. It is intended rather to deal with concrete situations which have arisen and will arise under the Immigration Act of 1924<sup>1</sup> and to consider the interpretation of the Act by the courts and by the administrative authorities charged with its execution. It will be convenient first to outline the act briefly in order that its provisions may be in mind, and to touch even more lightly upon its historical antecedents in American legislation.<sup>2</sup>

What may be called the basic exclusion act from the viewpoint of individual qualification, is the Immigration Act of February 5, 1917.<sup>3</sup> Section 3 of that Act in great detail and at great length lists the classes of persons who are debarred from entering the country. Its provisions are generally familiar, but may be summarized as forbidding the entry of persons diseased in body, mind or morals, likely to become a public charge,<sup>4</sup> holding what are deemed anti-social views, coming under contract to labor and persons from the "barred zone" of the East. To all of these exclusion provisions there are exceptions which it is unnecessary to enumerate.

The other act of major importance is the so-called "Quota Act"

---

<sup>1</sup> Act of May 26, 1924 (43 Stat. at L. 153). For an analysis of the Act as a whole, see Trevor, *An Analysis of the American Immigration Act of 1924*, INTERNATIONAL CONCILIATION (Sept. 1924) 375, No. 202.

<sup>2</sup> A reference to two of the more important antecedent laws is the more necessary because Sec. 25 of the 1924 Act provides that "The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws. . . ."

<sup>3</sup> 39 Stat. at L. 874.

<sup>4</sup> This is the class known to the immigration officials as "L. P. C." which seems to have become a blanket exclusion provision. Apparently any alien subject to deportation is considered "likely to become a public charge," on the theory that he may be taken into custody and held at the public expense. The courts have generally not followed the immigration officials in this construction. *Nocchi v. Johnson* (1925, C. C. A. 1st) 6 Fed. (2d) 1; *United States ex rel. Mantler v. Commissioner* (1924, C. C. A. 2d) 3 Fed. (2d) 234; *Lisotta v. United States* (1924, C. C. A. 5th) 3 Fed. (2d) 103; *In re Keshishian* (1924, S. D. N. Y.) 299 Fed. 804; *cf. contra: Ex parte Horn* (1923, W. D. Wash.) 292 Fed. 455.

of May 19, 1921.<sup>5</sup> Section 2 of this law introduced the principle of numerical limitations in the form of quotas, based upon a percentage of residents of various nationalities in the United States. Certain classes were not to be counted in estimating the quotas, or in other words, they were exempt from the numerical limitation. Such classes included, *inter alia*, government officials, tourists, transients, and some professional groups and residents of other countries of the Western Hemisphere. Preference was also provided for certain relatives. The administration of this act inevitably involved great hardship. Consular officers who issued the visas to embarking aliens all over the world, could not keep accurate count of the total number of visas issued and the resulting exhaustion of the respective quotas, with the result that shiploads of aliens raced for our ports, each hoping to arrive before the quota was filled. Thousands who had sold their homes and possessions to embark for the land of promise were turned back at the doors and returned, often in despair and destitution, to the lands from which they came. Thousands more were found unfit under the provision of section 3 of the 1917 Act and were also compelled to retrace their steps.

The Immigration Act of 1924 may be said to have had two major purposes; first, to limit further the total number of aliens who should be allowed to enter, *i.e.*, to reduce the quotas;<sup>6</sup> and second, to alleviate the hardship of rejections at American ports by entrusting to consular officers in the field the preliminary duty of selection and rejection and the prevention of an over-issue of visas through the medium of monthly maximums of 10% of the annual quota.<sup>7</sup> The new power extended to consular officers is contained in Section 2 (f) of the Act, which provides:—

“No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails

---

<sup>5</sup> 42 Stat. at L. 5, as amended May 11, 1922 (42 Stat. at L. 540).

<sup>6</sup> Sec. 11 of the Act contains the numerical quota provisions. Subdivision (a) fixes the annual quotas for 1924-1927 at 2 percent of the number of foreign-born individuals of a given nationality resident in the continental United States, as determined by the United States Census of 1890. Subdivision (b) introduces a complicated system to commence July 1, 1927, which will further restrict the total number and give proportionately greater representation to the so-called Nordic races. The net reduction under the existing quota as compared with the quotas under the 1921 law is 193,136, a present total of 164,667 as against a former 357,803. See U. S. Dep't of Labor, Annual Report of the Commissioner General of Immigration (1924) 27. On this phase of the Act see Parker, *The Quota Provisions of the Immigration Act of 1924* (1924) 18 AM. JOUR. INT. LAW, 737.

<sup>7</sup> Sec. 11 (f).

to comply with the provisions of this Act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws."

Paragraph (g) of the same section provides that the visa issued by the consul shall not be conclusive of the alien's right to enter the United States if upon arrival he is found to be inadmissible.<sup>8</sup> Even with this qualification on the consular power it is obvious that fewer rejections will occur at the port after the weeding-out process abroad; and in practice this has been the fact.

Systematizing and modifying the exceptions in the 1921 Act, the Act of 1924 proceeds to classify aliens into non-immigrants, non-quota immigrants, preferred quota immigrants and quota immigrants. The non-immigrant classes<sup>9</sup> include: (1) Government officials, (2) visitors, (3 and 4) transients, (5) seamen, and (6) so-called treaty merchants. The non-quota group<sup>10</sup> comprises: (a) certain relatives of resident American citizens, (b) returning resident aliens, (c) persons born in other American countries, (d) ministers and professors, and (e) students. Preference is accorded<sup>11</sup> to certain other relatives of American citizens and to farmers.

Attention must also be drawn to the special exclusion provision of the Act.<sup>12</sup> No immigrant<sup>13</sup> is admitted without an immigration visa which must be properly issued. With certain exceptions aliens ineligible to citizenship are excluded,<sup>14</sup> this being the famous (or notorious) provision which provoked the controversy with Japan.

In analysing the interpretation of the Act it will be convenient to follow the groupings laid down therein. It must be borne in mind that the new function of the consular officers has for the first time in our history given the Department of State, under whose direction these officers operate, a major rôle in the administration of the immigration laws—a task hitherto confided

<sup>8</sup> That this was true also under previously existing law, see *United States ex. rel. Spinosa v. Curran* (1923, E. D. N. Y.) 4 Fed. (2d) 613.

<sup>9</sup> Sec. 3.

<sup>10</sup> Sec. 4.

<sup>11</sup> Sec. 6.

<sup>12</sup> Sec. 13.

<sup>13</sup> This does not include the non-immigrant group, and exception is specifically made of a child born subsequent to the issue of a visa to the accompanying parent [Sec. 13 (a)], and of a returning resident alien, "as may be by regulation prescribed" [Sec. 13 (b)]. By very sensible interpretation a child born during the temporary visit abroad of an alien mother who has previously been legally admitted to the United States, is likewise exempted from the necessity of securing a visa. See General Instruction Circular to Consular Officers, No. 926, Diplomatic Serial No. 273 (1925), Par. 5,—hereinafter cited as G. I. C. 926.

<sup>14</sup> Sec. 13 (c). See Parker, *The Ineligible to Citizenship Provisions of the Immigration Act of 1924* (1925) 19 AM. JOUR. INT. LAW, 23.

solely or principally to the Department of Labor. At present, in effect, the Department of State controls the issuance of visas in the first instance, while the Department of Labor retains the final control at the ports.<sup>15</sup>

#### NON-IMMIGRANTS

Although the Act of 1924 says nothing about documentation of non-immigrants, the rules and regulations prescribe that they shall bear passports visaed by consular officers.<sup>16</sup>

The first class of non-immigrants is that of Government officials with their families and retinues.<sup>17</sup> Very properly they have always been placed under our immigration laws in a favored position, free from the exacting requirements of the law. This group includes officers of any rank of foreign governments, whether national, provincial, state or municipal.<sup>18</sup> It does not, however, include officials of the United States.<sup>19</sup>

An interesting question is presented by the case of an official of a foreign government which has not been recognized by the United States. If the government exists *de facto*, it would seem that its representative would be entitled to this classification. Nor does it appear that the issuance of a visa, under Section 3 (1), to such an individual would constitute recognition of his

<sup>15</sup> Sec. 24 seems to give the Labor Department a measure of control over the Department of State, providing:

"The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor."

But in practice, the special interests and information of the State Department have been recognized, and the control of the consuls has not been divested from the Secretary of State.

<sup>16</sup> G. I. C. 926, par. 10. The authority for this regulation is found in Exec. Order No. 4125 of Jan. 12, 1925 which is based in part on Sec. 1 of the Act of May 22, 1918 (40 Stat. at L. 559) as amended by the Appropriation Act of March 2, 1921 (41 Stat. at L. 1205, 1217). The pertinent portions are printed at pp. 64-65 of U. S. Dep't of Labor, Bureau of Immigration pamphlet, "Immigration Laws and Rules of July 1, 1925," hereinafter cited as Labor Rules of 1925. Sec. 2 (f) of the Act, already referred to, gives consuls authority to refuse visas to "immigrants," but nothing is said concerning the refusal of visas to "non-immigrants." The Act (Sec. 3) defines an immigrant as "any alien departing from any place outside the United States destined for the United States" except the six non-immigrant classes already mentioned. The immigration visa provided for in the Act is not the usual stamp on a passport, but a separate document. See Secs. 2 (a) and 7.

As to criminal liability for entering without a visa under the order and acts above cited, see *Flora v. Rustad* (1925, C. C. A. 8th) 8 Fed. (2d) 335.

<sup>17</sup> Sec. 3 (1).

<sup>18</sup> G. I. C. 926, par. 39.

<sup>19</sup> *Ibid.* par. 41. When the Act is amended more consideration should be shown the foreign wives of American Foreign Service Officers.

government by the United States. On the other hand it may well be argued that the concessions made in the law to government officials are acts of courtesy only based on international comity, and as the New York Court of Appeals has said, there is no comity with an unrecognized government.<sup>20</sup> It is understood that the State Department has taken the view that a visa may be issued to such persons as government officials, at least when the *de facto* character of the government is fully admitted.<sup>21</sup>

The second non-immigrant class<sup>22</sup> causes probably more difficulty to both consular and immigration officials than any other. It is composed of the temporary visitors, or, as the act styles them, aliens "visiting the United States temporarily as a tourist or temporarily for business or pleasure." Such a person is thus defined by the administrative Departments:

"'An alien visiting the United States temporarily as a tourist or temporarily for business or pleasure' shall be construed to mean an alien who, having a fixed domicile in some other country which he has no intention to abandon, comes to the United States to remain for a temporary period only."<sup>23</sup>

Although the Department of Labor has relaxed the severity of its early rulings under which "temporary" and "six months" were almost synonymous, that period is still basic. Nevertheless, the port authorities may admit for any period not exceeding one year without reference to the Department at Washington. If the port

---

<sup>20</sup> *Russian Socialist Federated Soviet Republic v. Cibrario* (1923) 235 N. Y. 255, 139 N. E. 259.

<sup>21</sup> It is doubtful whether the courtesy of such a visa would be granted to an officer of the Soviet government. It does not seem unreasonable to allow the State Department a certain discretion in the application of this part of the law.

Another interesting question of recognition may be mentioned here. Section 12 (c) provides for the allotment of quotas to new countries, "the Governments of which are recognized by the United States." The Armenian Government recognized by the United States in 1920, had ceased to exist when the President on June 30, 1924, proclaimed the quotas under the 1924 Act (Proclamation No. 1703). Nevertheless, a quota of 124 was allotted to Armenia. The Proclamation concludes with this "General Note":

"The immigration quotas assigned to the various countries and quota-areas should not be regarded as having any political significance whatever, or as involving recognition of new governments, or of new boundaries, or of transfers of territory except as the United States Government has already made such recognition in a formal and official manner."

The then existing Government of Armenia had not been so recognized by the United States. There would thus seem to be a conflict between the terms of the law and the terms of the Proclamation, but since recognition is a purely executive function, it is believed that under international law the proclamation would control and therefore the assignment of the quota would not constitute recognition.

<sup>22</sup> Sec. 3 (2).

<sup>23</sup> G. I. C. 926, par. 43

authorities are not satisfied concerning the temporary nature of the visit, a bond, in the sum of \$500 is exacted, conditioned upon departure within a fixed time.<sup>24</sup> The opportunity for fraud in these cases is apparent, and unfortunately there are many ready to grasp it; \$500 is not considered an excessive sum to pay for a chance to stay in America. Once admitted, the alien hopes he or she will be lost in the multitude, thus rendering deportation impossible.

The State Department has laid down for the guidance of consular officers sensible general rules by which they are to be governed in issuing visas under section 3 (2).<sup>25</sup> Some weight is to be attached to the general financial situation and standing of the alien, the presumption being that the visit of a poor laborer accompanied by his whole family is less likely to be of a purely temporary character than is that of a well-to-do business man. A wife alleging that she wishes to pay a temporary visit to her husband in the United States is naturally suspected of an intent, or at least of a strong desire which may ripen into an intent, to remain here permanently. On the other hand, strong home ties abroad weigh in the applicant's favor.

At this point it may well be pointed out that the officials charged with the administration of the Act are frequently unfairly accused of being inhuman and unnecessarily harsh. Friends of an alien, who, they know, is a perfectly bona fide visitor, become incensed at a consul's or immigration official's insistence upon adequate proof of the individual's intention. Both have their justification; but the official's case has less heart appeal and receives far less sympathy. Although legitimate causes for complaint no doubt exist, it must be borne in mind that the thousands of frauds which are constantly practiced must necessarily put any conscientious officer on his guard, and the innocent must suffer for the sins of the guilty. You may be certain that Mrs. A.'s word can be accepted as gospel, but the officer has also to remember the cases of Mrs. B, C, D, . . . X, Y and Z, among whom several have proved untruthful. It is common knowledge that many a good church-goer recites with pride the success with which articles have been brought through the customs without being declared or with a declaration of part value. The discourtesy of some customs officials or a disagreement with the principle of the protective tariff as applied to the individual

---

<sup>24</sup> *Ibid.* par. 44 and Labor Rules of 1925, Rule 3, Subdivision H. That six months is a reasonable limit for a temporary visit, see *U. S. ex rel. Devenuto v. Curran* (1924 C. C. A. 2d) 299 Fed. 206; *U. S. ex rel. Ranzazzo v. Tod* (1924 C. C. A. 2d) 297 Fed. 214. For the Department of Labor's earlier rule and for an example of the difficulties involved in cases of temporary visitors, see *Chryssikos v. Commissioner* (1924, C. C. A. 2d) 3 Fed. (2d) 372.

<sup>25</sup> G. I. C. 926, pars. 46-52.

tourist seems a sufficient balm to even a rigorous conscience. The number of persons who deem it a virtue, or at least no wrong, to violate the 18th Amendment, is well known. A somewhat similar attitude has developed with respect to the immigration laws. If a friend or a servant has through ignorance been placed in a position where immediate and regular permanent entry has become impossible, it is apparently not considered very reprehensible to endeavor to secure an entry on a plea of a temporary visit, and thereafter to employ all available influence to regularize permanent residence. How then can the administrative officers be blamed for their skepticism?

A common situation against which the Department warns consular officers to be on their guard is one in which an alien originally applies for a quota visa for the purpose of going to the United States to live. After being told that the quota is full, the alien suddenly decides he merely wants to go to the United States for a temporary visit. He may go so far as to ask at the same time that he be left on the waiting list for a quota number. As the Department says, "the two applications are mutually inconsistent,"<sup>26</sup> and it is a fair presumption that in reality the applicant is not a bona fide tourist or one coming temporarily for business or pleasure. It is, however, merely a presumption and may be rebutted.

The whole tenor of sections 2 and 7 of the Act is believed to indicate that the law contemplates that the immigrant shall appear in person before the consular officer in order to receive his visa. It is therefore not the practice to permit an alien to receive his visa by mail after his arrival in this country. It would obviously be contrary to the intent of the Act to permit large numbers of aliens to enter the country as temporary visitors here to await the receipt of an immigration visa. Moreover, an alien entering with such intention would not legally be entitled in the first instance to a visa under Section 3 (2).

The provisions for transients<sup>27</sup> are not of particular interest here; but it may be mentioned that one of the common ruses adopted to secure entry into the United States when quota numbers are not available is for an alien in Canada to purchase a steamship ticket from New York to Europe, willingly sacrificing the passage price after he has crossed the border with a transit visa. The sum thus lost would probably be much less than that exacted by an "immigrant bootlegger" who may, in the bargain, leave his victim at some lonely border point stripped of all his possessions if not of life itself.

Alien seamen, landing on shore leave, or for the purpose of

<sup>26</sup> Ibid. par. 52.

<sup>27</sup> Secs. 3 (3) and (4).

"reshipping foreign"<sup>28</sup> are also classed as non-immigrants.<sup>29</sup> This class is likewise prolific of law evasions, since many aliens ship as seamen for the voyage to America with the sole purpose of deserting upon arrival. Unfortunately it seems that the steamship companies are not uniformly rigorous in ascertaining that persons signed on in the crew are in fact seamen and not immigrants. The law applicable to seamen is unusually complex and confusing and will not be gone into,<sup>30</sup> but one problem is of general interest. The historic position of the United States in protecting all seamen serving on its vessels, is well known.<sup>31</sup> For certain purposes at least, an alien serving on an American vessel is an American. For purposes of the immigration laws, however, the Supreme Court has held that the term "alien seamen" means "seamen who are aliens."<sup>32</sup>

From the viewpoint of international law, the treaty merchant class is the most interesting in the whole Act. Section 3 (6) classifies as a non-immigrant, "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." This clause has already been before the Supreme Court in the case of *Cheung Sum Shee et al. v. Nagle*<sup>33</sup> and a consideration of this case will disclose the nature of the problems.

A Chinese merchant was domiciled in the United States, having lawfully entered under Article II of the Treaty of Nov. 17, 1880<sup>34</sup> between the United States and China, and the so-called Chinese Exclusion Acts.<sup>35</sup> On July 11th, 1924, his wife and minor child sought to enter to join him permanently under the provisions of Sec. 3 (6) of the 1924 Act. They were excluded by the immigration officials on the ground that they were barred under Sec. 13 (c) of the 1924 Act, which provides:

<sup>28</sup> That is, on leaving the employment of one vessel and coming ashore to seek an engagement on another.

<sup>29</sup> Sec. 3 (5).

<sup>30</sup> See Labor Rules of 1925, Rule 6, and for documentation of vessels and crew list visas, see Department of State Diplomatic Serial No. 333, Jan. 12, 1925, cited in G. I. C. 926, par. 55; see Trevor, *op. cit.*, note 1, pp. 396-397.

<sup>31</sup> See 3 Moore, *Digest of International Law* (1906) sec. 484.

<sup>32</sup> *United States v. New York and Cuba Mail Steamship Co.* decided Dec. 14, 1925, not yet reported. Although it was the act of Dec. 26, 1920 (41 Stat. at L. 1082) which was before the Court, it seems probable from the reasoning of the opinion that a like construction would be placed upon the same words in the 1924 Act. Cf. 4 Moore *Digest of International Law* (1906) sec. 566.

<sup>33</sup> (1925) 268 U. S. 336, 45 Sup. Ct. 539.

<sup>34</sup> 22 Stat. at L. 826, 827; 1 Malloy, *Treaties* (1910) 237.

<sup>35</sup> Act of May 6, 1882, (22 Stat. at L. 58) as amended by Act of July 5, 1884 (23 Stat. at L. 115) U. S. Comp. Sts. 1916, sec. 4293.



“(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.”

It was argued that they were not non-immigrants as defined in Section 3 because Section 5 provides: “An alien who is not particularly specified in this act as a . . . non-immigrant shall not be admitted as a . . . non-immigrant by reason of relationship to any individual who is so specified. . . .” Since the wife and child were not coming “solely to carry on trade”, the Secretary of Labor contended they were not “particularly specified” in Sec. 3 (6). The aliens sought release by habeas corpus, but the writ was denied by the District Court.<sup>36</sup> The Circuit Court of Appeals for the Ninth Circuit, to which an appeal was taken, certified the question to the Supreme Court. Meanwhile the Secretary of State took up the cudgels in behalf of the aliens, on the ground that the Treaty of 1880 gave them a privilege to enter and that the Immigration Act did not destroy the privilege.<sup>37</sup>

It was natural that Secretary Hughes should be peculiarly interested in this case, since it involved the two sections of the Act in connection with which he had waged a valiant though partly unsuccessful battle with Congress while the Act was in course of passage. The first draft of the House bill proceeded on the theory that the treaty obligations of the United States were fully met by what is now Sec. 3 (2)—the temporary visitor provision.<sup>38</sup> Secretary Hughes was not satisfied and suggested an additional provision reading, “An alien entitled to enter the United States under the provisions of a treaty”. Later he agreed to the inserting of the word “existing” before “treaty”. The House Committee added other qualifications until the clause stood in its present form, which the Committee believed “fully satisfied treaty requirements.” In the Senate, this provision, already

<sup>36</sup> (1924, N. D. Calif.) 2 Fed. (2d) 995.

<sup>37</sup> The State Department has vigorously and properly maintained that when treaty questions are involved, the Department of Labor should yield to their interpretation. The Secretary of Labor has generally seemed to realize the reasonableness of this stand, although both admit that the law places upon the Labor Department the duty of enforcing the immigration laws at the ports.

<sup>38</sup> For these and other facts cited in this connection, see Report of the House Committee on Immigration, accompanying the introduction of the “Johnson Bill,” H. R. 7995, Report No. 350, H. R. 68th Congress, 1st session, March 24, 1924, and Memorandum of Charles Cheney Hyde, Solicitor for the Department of State, Feb. 18, 1925, approved by the Secretary of State Feb. 19, 1925, printed as an appendix to the brief of the United States in the case under discussion, hereinafter cited as “Solicitor’s Memo.”

adopted by the House, was sponsored by Senator Shortridge, who insisted that "All those who are admissible into this country under any existing treaty of commerce and navigation are to be admitted under this act."<sup>39</sup>

As already mentioned, Sec. 13, excluding aliens ineligible to citizenship, is the core of the dispute with Japan which is unfortunately only too well remembered in both this country and that. Although it was Japan which voiced the protest, the section of course applied equally to Chinese and other non-white races. The immigration of these peoples was already strictly limited, so that the real basis of objection was not the general exclusion policy, but the method and manner employed. As a question of international law it is believed that immigration being a domestic question, a state may discriminate against certain aliens, provided the discrimination amounts merely to reasonable classification. The problem may be compared to those classification questions arising under the equal protection clause of our Constitution. If this premise be granted it seems that assimilability—which is the theoretic basis of eligibility for citizenship—may readily be conceded to be a reasonable basis for classification.<sup>40</sup> Such legal justification, however, will not serve to prevent the feeling of wounded pride which is the inevitable concomitant of such discrimination, and in popular contemplation the fact will always overshadow the law.

The importance of these phases of our immigration law are believed to warrant this digression from the case under discussion. When the case came before the Supreme Court, the Chinese appellants were represented by an imposing array of distinguished counsel. The United States as appellee was in the rather amusing position of having one executive Department on one side of the question, another on the other, and a third presenting the case neutrally. The Department of Justice pointed out the disagreement for the Court's benefit, defended the Labor Department's position in 18 pages, and gave over 30 pages to a memorandum prepared by the State Department. Moreover, the Assistant to the Attorney General who had the case in charge refused to argue the case orally, allowing it to stand on the brief.

---

<sup>39</sup> See Solicitor's Memo, p. 26 and, more fully, pages 25-33.

<sup>40</sup> It seems sometimes to be assumed that the United States is alone in barring aliens upon racial grounds. That such is not the case will be apparent from an examination of pages 177-188 of a publication of the International Labour Office (1922) under the title, *Emigration and Immigration; Legislation and Treaties*, where the laws of Argentine, Australia, Canada, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, New Zealand, Panama, Paraguay, Peru, South Africa, the United States, Uruguay and Venezuela are analyzed. See also Trevor, *op. cit. supra* note 1, at 389 *et seq.* and texts of Japanese-American notes relative to the point in question, *ibid.* at 434 *et seq.*

The position of the Department of Labor has been already explained; it was a strong position. The bare language of the Act was in its favor. The Department of State based its case on the Supreme Court's oft-reiterated canon of construction that an act of Congress will never be construed to violate a treaty if any other construction is possible. They then demonstrated that the treaty gave the wife and child a right to enter.<sup>41</sup> This is believed to have been also the actual basis of the court's opinion, in which it is said:

"The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July first, when the present immigration act became effective. (*United States v. Mrs. Gue Lim*, supra.) That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

"In a certain sense it is true that petitioners did not come 'solely to carry on trade.' But Mrs. Gue Lim did not come as a 'merchant.' She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the act now before us.

"Nor do we think the language of section 5 is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the act itself as '*nonimmigrants*.' They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court 25 years ago."

Indeed a Circuit Court of Appeals has gone so far as to say that this decision of the Supreme Court holds that "nothing contained in that act . . . abrogated or destroyed existing treaty rights."<sup>42</sup> This is too broad a statement, since unfortunately it may be pointed out that the wives of Chinese students have a clear right under the treaty which no reasonable interpretation could preserve under the Act.<sup>43</sup>

Although the Department of State made a good argument in interpreting the difficult words, "particularly specified", as used in Section 5, the Supreme Court's decision is believed to be notable as an illustration of the vigor of the presumption against the legislative abrogation of a treaty.

It being established that the wife and minor child of a mer-

<sup>41</sup> The Supreme Court had so decided in *United States v. Mrs. Gue Lim* (1900) 176 U. S. 459, 20 Sup. Ct. 415.

<sup>42</sup> *Dang Foo v. Weedon* (1925, C. C. A. 9th) 8th Fed. (2d) 221, 222.

<sup>43</sup> Students ineligible to citizenship are admissible under Secs. 4 (e) and 13 (c) (1). In enumerating the non-quota classes in Sec. (4) mention is expressly made of the wives and minor children of non-quota nationals (Sec. 4 (c) ), and of non-quota professors and ministers (Sec. 4 (d) ), while such mention is significantly omitted in Sec. 4 (e) concerning non-quota students.

chant may enter under Section 3 (6),<sup>44</sup> the question arises, what is a merchant? The complete answer lies in a thorough study of the laws and regulations relating to Chinese, which is in itself an exhaustive field, treated by the two Departments as a subject separate from immigration in general.<sup>45</sup> It will be sufficient to state here that before the passage of the Immigration Act of 1924, the term "merchant" included one engaged in local trade.<sup>46</sup> In interpreting Section 3 (6) of the Immigration Act of 1924, the State Department held that only those coming to carry on international trade between the United States and the territory of the other contracting party<sup>47</sup> were to be classed as "treaty merchants". "The distinction to be observed is between the case of one engaged in trade or commerce between the two countries and the case of an immigrant or settler who seeks to come without such a relation to commerce, but who thereafter may engage in purely local transactions which lie outside the purposes of the commercial treaties."<sup>48</sup>

The theory on which this interpretation is based is believed to be this: when two nations conclude a commercial treaty, they do so with the idea of promoting their mutual trade; it is not to be assumed that Great Britain, for example, would trouble to make a treaty for the purpose of affording facilities to those of her subjects who, severing all ties with their native land, settle down in the United States for the purpose of vending peanuts on the street or managing a cafeteria; Great Britain is interested rather in those business men who come and go, developing the British import and export trade with the United States. This is believed to be a reasonable interpretation of the usual provisions of such treaties granting freedom to enter, travel and reside in the territory of the other party. But the Chinese Treaty presents

---

<sup>44</sup> The State Department has properly applied the Court's ruling to all nationalities. See G. I. C. 926, par. 62. See also Labor Rules 1925, Rule 3, Subdivision H, par. 3. But see *Ex parte So Hukp Yon* (1924, W. D. Wash.) 1 Fed. (2d) 814. It was recently held in *Jeu Jo Wan v. Naglo* (1925, C. C. A., 9th) 9 Fed. (2d) 309 that the only treaty rights preserved by the Immigration Act are those relating to merchants, and that a Chinese teacher who was privileged to enter under the Chinese treaty was excluded under the Immigration Act of 1924.

<sup>45</sup> It will be noted that neither G. I. C. 926 nor Labor Rules of 1925 deals with Chinese, separate instructions being issued for this purpose. See for example, G. I. C. 926, par. 23.

<sup>46</sup> See *Weedin v. Wong Tat Hing* (1925, C. C. A. 9th) 6 Fed. (2d) 201; *Weedin v. Wong Jun* (1925, C. C. A. 9th) 7 Fed. (2d) 311; and authorities there cited.

<sup>47</sup> The treaty itself may limit the territory involved, as *e.g.* Article I of the Convention of Commerce and Navigation of July 3, 1815 between Great Britain and the United States [1 Malloy, *Treaties* (1910) 624], which refers merely to "the territories of His Britannick Majesty in Europe," and does not therefore include the British dominions.

<sup>48</sup> G. I. C. 926, pars. 58-9.

special difficulties. In its inception it was without doubt an Immigration Treaty and not a Treaty of Commerce and Navigation. As an immigration treaty it was properly construed to admit local merchants, the distinction contemplated being between laborers and merchants, and not between international and local traders. But Congress evidently intended to include the Chinese Treaty in Section 3 (6), although it specified treaties "of commerce and navigation."<sup>49</sup> So far as merchants were covered by the Chinese Treaty, therefore, it was held by the State Department to be a commercial treaty.<sup>50</sup> As such, however, it must obviously be subjected to the same interpretation as other commercial treaties, that is, it must be construed as admitting only international and not local merchants. The resulting situation is that the Act of 1924 must be considered as cutting off the treaty right of local Chinese merchants to enter the country, since that right now could only be predicated on Section 3 (6).

Admittedly this is rather an involved question; and it is not surprising to find the courts abiding by their old construction and admitting local Chinese merchants as before.<sup>51</sup> Since the result operates to sustain our treaty obligations to China, it is to be welcomed.

Section 3 (6) presents another interesting problem. Suppose the X. Company, an American corporation, is engaged in exporting machinery to England. It has offices in both London and New York. A, an Englishman, is employed in the London office. The company desires to transfer him to the New York office. May A enter the United States under Section 3 (6)? It will perhaps be admitted that the X Company cannot, as to entry into the United States, claim the rights accorded to British subjects under the treaty.<sup>52</sup> A's status as a treaty merchant depends upon his connection with the X Company. Nevertheless, it is believed that A in his own right may properly claim that he is promoting trade between the two countries, and is therefore to be included in this non-immigrant class. The opinion of the Departments in this matter is not yet known.

It will be recalled that Section 3 (6) refers to "present existing treaties". The object of this limitation obviously was to allow Congress to keep control of immigration and to prevent the Executive from entering into international engagements which might let down the bars. Of course the Senate would still exercise

<sup>49</sup> This is apparent from the Congressional Debates; see Solicitor's Memo. pp. 25-35.

<sup>50</sup> See G. I. C. 926, p. 120, appendix D.

<sup>51</sup> See *Weedin v. Wong Tat Hing*, *op. cit. supra* note 46.

<sup>52</sup> It happens that the British Treaty confers rights, not upon British subjects, but upon "inhabitants of His Britannick Majesty's possessions in Europe." In most treaties, however, the term "citizen" or "subject" is used.

a control upon the treaty-making power; but the House of Representatives, to which immigration is an especial concern, evidently preferred not to risk this domestic affair even to a highly domestic Senate. If the Senate, however, should advise and consent to the ratification of a treaty admitting, let us say, all French miners, the later treaty would of course override the earlier Act; and such aliens could enter under the former regardless of the latter. On December 8th, 1923, the United States concluded a commercial treaty with Germany, providing in Article I that:

"The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established".<sup>53</sup>

The Senate advised and consented to ratification, with the reservation that "there shall be added to Article I of said treaty the following: 'Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes.'"

The immigration laws of the United States provided that only those with rights under treaties in force July 1, 1924 might enter; the German treaty was not then in force; the treaty (that is the reservation which forms part thereof) provides that the treaty shall not affect the immigration law; the conclusion that a German merchant cannot claim a right to enter under the treaty and Section 3 (6) seems unfortunate but inescapable. An amendment to the statute provides the only way out. Of course he may still enter as a temporary visitor under Section 3 (2); but in this way his stay is more restricted than it would be under the treaty provision.

With final reference to Section 3 (6) two points may be noted. First, the Department of Labor has ruled that the contract labor provisions of Section 3 of the Act of 1917 do not apply to treaty merchants. A laborer is of course not a merchant; but the line becomes shadowy when various classes of "brain workers" are considered.<sup>54</sup> Second, the Departments have been commendably

---

<sup>53</sup> United States Treaty Series No. 725.

<sup>54</sup> Cf. *Ex parte Gouthro* (1924, E. D. Mich.) 296 Fed. 506, and cases

broad in their interpretation of "trade" under this section. It is deemed to include such occupations as banking, insurance, travel bureaus, journalism, etc.

#### NON-QUOTA IMMIGRANTS

Section 4 exempts five classes from the numerical restrictions of the Act. The first exemption, in paragraph (a), is for the benefit of non-quota relatives, *i.e.* "An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein. . . ." The Chinese wife of such an American citizen applied for entry under this section. She was rejected on the ground that she was ineligible to citizenship and therefore excluded by Section 13 (c). That section makes exception of non-quota immigrants, "under the provisions of subdivision (b), (d), or (e) of section 4." The familiar rule of construction—"inclusion unius est exclusio alterius"—commands the finding that the relative class, [paragraph (a) of Sec. 4] under such circumstances is barred from entry. The Supreme Court so held.<sup>55</sup>

Section 4 (b) exempts from the quota "an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad." Much confusion has been caused by the Department of Labor's ruling that "lawfully admitted" means "lawfully admitted for permanent residence."<sup>56</sup> In other words a temporary visitor, no matter how regular his admission, cannot by going abroad for a short time re-enter with a new permanent status as a non-quota immigrant. This is a sound conclusion. This condition applies to all non-immigrants and to students, but apparently not to ministers and professors.<sup>57</sup>

Perhaps the most important ruling concerning non-quota nationals, [Section 4 (c)] and non-quota ministers and professors, [Section 4 (d)] relates to their wives and minor children, who, under the law are entitled to the same non-quota status if accompanying or following to join their husbands or fathers. The Department of Labor took the position that since the husband or father derived his right from the 1924 Act only, the right of the wife or child must be similarly derived, and existed only if the man arrived after that Act went into effect, namely, after June 30th, 1924.<sup>58</sup> The result is that if a minister entered the United States on June 29th, 1924, his wife may not in following to join

---

there cited. For Labor's ruling see Labor Rules of 1925, Rule 3, Subdivision H. par. 4.

<sup>55</sup> *Chang Chan et. al. v. Nagle* (1925) 268 U. S. 346, 45 Sup. Ct. 540.

<sup>56</sup> This ruling has been accepted by the State Department. See G. I. C. 926, par. 119.

<sup>57</sup> *Ibid.*

<sup>58</sup> See G. I. C. 926, pars. 129 and 139.

him, enjoy non-quota status. But if that same man now steps across the border and re-enters as a non-quota immigrant under Sec. 4 (d), his wife may share his status. Although technically defensible, the ruling is so absurd in operation that it is a satisfaction to find that it has so far not been sustained by the courts.<sup>59</sup>

The two Departments, in their published rulings, insist that a non-quota student who "is working his way" through school, must be deemed to have abandoned his status as a student.<sup>60</sup> Such a ruling is believed to be entirely out of line with American institutions. Most, if not all of our universities maintain student employment bureaus; and it is well known that a great number of students of necessity and without prejudice to their scholastic work, seek employment in order to make an education possible. Why an impecunious foreign student should be thus discriminated against is not apparent. The law-enforcing officers must of course be diligent to prevent the entry of unacademic immigrants in student guise; but such a blanket rule as that promulgated goes too far. It is believed that in practice the rule has been relaxed.

The student class is one of the most desirable for the United States to cultivate. No other single group can contribute so much to promoting friendly relations between this and other countries. Coming here during a most impressionable period, they carry home an intelligent appreciation of America and American institutions. Information, knowledge and understanding are the most potent opponents of national prejudice. Our present restrictions upon foreign students are so onerous that they are fast being diverted to the universities of other more hospitable lands. American materialism has made one concession; aliens desiring to proceed to the United States for training in "well-known banking or industrial institutions for a temporary but protracted period" are classified as "business pupils" and admitted as non-immigrants under Sec. 3 (2). The Department of Labor usually grants them the extension necessary to complete their work or study, providing them with a treatment more lenient than that accorded the usual temporary visitor. It is unnecessary to explain that a non-immigrant's path is not beset with so many technicalities and difficulties as is that of a non-quota student. This practice is commendable per se; but it is to be regretted that a "business pupil" in the laboratories of the General Electric Company should be more favorably treated than a student at the Massachusetts Institute of Technology. If the rule against out-

---

<sup>59</sup> *United States ex. rel. Duner v. Curran* (1925, C. C. A. 2d) 10 Fed. (2d) 38. It is understood that a petition for a writ of certiorari to review this decision has been taken to the Supreme Court.

<sup>60</sup> G. I. C. 926, par. 141; Labor Rules of 1925, Rule 9, Subdivision D.



side employment were strictly enforced against students, the contrast would be the more striking.<sup>61</sup>

#### NATIONALITY

As under the 1921 Act, nationality, for the purpose of quota allotment, is arbitrarily determined by place of birth entirely regardless of citizenship.<sup>62</sup> The use of the word "nationality" is perhaps unfortunate; but there can be no real objection to this practical method of classification. Although the child of the English missionary born in Syria may suffer hardships by being placed under the Syrian quota, yet it would lead to hopeless confusion and difficulty if consular officers in each instance had to pass judgment upon the actual nationality or citizenship of all applicants. Certain exceptions to the general rule apply in the cases of wives and minor children. The nationality of a minor child "shall be" determined by the country of birth of the accompanying parent, or if both parents accompany, then by that of the father. "If a wife is of a different nationality from her alien husband and the entire number of immigration visas which may be issued to quota immigrants of her nationality for the calendar month has already been issued, her nationality may be determined by the country of birth of her husband if she is accompanying him and he is entitled to an immigration visa, unless the total number of immigration visas which may be issued to quota immigrants of the nationality of the husband for the calendar month has already been issued."<sup>63</sup>

These provisions were inserted to prevent the separation of families. It is unfortunate, therefore, that the provision regarding the child is mandatory rather than permissive. A child born in Germany of a mother born in Poland might be able to get a visa under the German quota at once, whereas only one visa might be available for the mother under the Polish quota. To satisfy the law they would have to travel separately. This section is badly drafted, and should be amended to allow the child to benefit by whichever quota is still open.

The State Department has made an excellent ruling based on sound interpretation, concerning children who are non-quota nationals, by reason of birth in an American country.<sup>64</sup> Even when such children accompany a European-born parent, it is held that the child nevertheless retains his non-quota status. "Section 4

<sup>61</sup> As to "business pupils" see G. I. C. 926, par. 143. Attention should also be called to "official students" who proceed to study in the United States directly under the auspices of a foreign government—a practice more common in the countries of the East. Such persons are wisely admitted as government officials under Sec. 3 (1). See G. I. C. 926, par. 144.

<sup>62</sup> Sec. 12 (a) of the Act and G. I. C. 926, par. 263.

<sup>63</sup> Sec. 12 (a), (1) and (2).

<sup>64</sup> Sec. 4 (c) of the Act.

(c) grants non-quota status to certain persons. Section 12 (a) (1) gives a rule for the determination of the quota to which to charge certain aliens who are quota immigrants under the law."<sup>65</sup>

An interesting situation arises regarding the wife's nationality for quota purposes. Suppose the husband is already in America, having prudently gone ahead to establish a home before having her join him. Her quota is exhausted; his is not. He can return to Europe and by accompanying his wife, enable her to get a number from his quota. The act says he must be "entitled to an immigration visa"; but the State Department has held that this refers merely to his general eligibility, and that he may be documented as a returning (non-quota) alien under Sec. 4 (b).<sup>66</sup> The portion of Section 12 dealing with wives is permissive rather than mandatory and therefore is not open to the objection raised above. It seems absurd, however, to force the husband who is in the United States to cross the Atlantic again merely to allow his wife to benefit by his quota. Such an artificial situation should be removed when the law is amended.

In drafting the Act, it seems that persons born in our insular possessions, such as the Philippines and Porto Rico, were totally forgotten. Where such persons are nationals of the United States, it would seem clear that their entry should not be restricted, since they are not aliens as defined in Section 23 (b). As defined in the Act, an immigrant is "any alien departing from any place outside the United States destined for the United States" except the non-immigrant classes already discussed.<sup>67</sup> Also by express definition the "United States" for the purposes of the Act, includes Porto Rico and the Virgin Islands, but not the Philippines.<sup>68</sup> Now assume a German subject born in the Philippines, desiring to emigrate to the Continental United States, leaves from a place which for the purposes of the Act is outside the United States. He must therefore, presumably, be assigned to a quota. But Sec. 12 (c) provides that "in case of changes in political boundaries in foreign countries occurring subsequent to 1890 resulting in the transfer of territory from one country to another, such transfer being recognized by the United States, . . . aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred." The Philippines having been transferred to the United States since 1890, our German, at first blush, would seem to be considered as having been born in the United

<sup>65</sup> G. I. C. 926, par. 131; see also par. 130.

<sup>66</sup> G. I. C. 926, par. 269, 3. A returning alien may have in lieu of an immigration visa, a permit to re-enter issued under Sec. 10 of the Act; see G. I. C. 926, par. 114; Labor Rules 1925, Rule 24, Subdivisions B, C, and D.

<sup>67</sup> Sec. 3 of the Act.

<sup>68</sup> Sec. 28 (a).

States and therefore must be freely admitted without restriction as a citizen thereof. This result is too unreasonable to be tenable, even if it were not the fact that the whole tenor of Sec. 12 (c) indicates that only changes in foreign territory are contemplated. But it is equally clear that he cannot be charged to the quota for Spain; and he therefore becomes a man without a quota. Let our German be born in Porto Rico, which by definition is part of the United States. Assume that he is now living in Brazil and wishes to emigrate to the United States. Section 12 (a) says "nationality shall be determined by country of birth"; shall we then admit him as an American, without examination, numerical limitation or visa? The result seems absurd. The only mention in the Act<sup>69</sup> of an alien born in the United States deals with one who has lost his United States citizenship, and therefore is inapplicable here. Again we have a man without a quota. Probably not many such cases will arise; but it is hard to believe that Congress considered these eventualities and left the solution so much in doubt. They must be deemed lacunae in the law, to be filled by amendment rather than by administrative interpretation.

The Act has been criticized because it leaves so much to the discretion or judgment of administrative officers abroad, comparatively free from review in our courts. The newspapers have reported an attempt on the part of Countess Karolyi to mandamus the Secretary of State to give her a visa, but such an attempt is foredoomed to failure. As a matter of fact, the Act seems to have worked very well in this particular. Consular officers are human and therefore fallible; but they are generally intelligent and conscientious. The new system inaugurated in the summer of 1925 of establishing at the principal foreign ports, boards of review composed of consular officers, an immigration official and a public health officer, has been so successful that the original experiment in the British Isles has been extended to Holland and Belgium and doubtless will eventually spread over all the principal

---

<sup>69</sup> Sec. 12 (a). The result of this provision is well illustrated by the case of *Ex parte (NG) Fung Sing* (1925, W. D. Wash.) 6 Fed. (2d) 670. A woman born in the United States of Chinese parents went to China where she married a Chinaman in February, 1920. She thereby lost, under Section 3 of the 1907 Act (34 Stat. at L. 1228), the American citizenship which she acquired at birth. In 1924 her husband died and in the following year she attempted to return to the United States to resume her American citizenship. She was refused admission under Sec. 12 (a) and 13 (c) of the Act, on the ground that, being a person who had lost her American citizenship, she must be considered to have been born in the country of which she was then a citizen, namely in China, and as a person of the Chinese race, she was ineligible to citizenship. It would seem that the case might have been decided without citing Section 12 (a), since the law making her ineligible to citizenship is based primarily upon racial grounds rather than upon citizenship or place of birth. See (1926) 35 YALE LAW JOURNAL, 626 for a discussion of this case.

countries. The result of this system has been to reduce rejection at the port of destination to a minimum.<sup>70</sup>

The Act is not perfect, but it is believed to be one of the most humanitarian systems of restricted immigration ever devised. It has on the whole been sensibly interpreted and administered. Its amendment at this time seems doubtful; there is a legitimate fear that the sleeping Pacific Coast dog might resume his inhospitable barking. Better to leave a few imperfections than to endanger the foreign relations of the country. Numerous bills have been introduced in the present Congress, many probably in response to urgent demands from constituents who wish to lower the bars for friends or relatives. Probably none of them will be successfully passed through the Committees.

---

<sup>70</sup> See State Dept. press communiques of July 7 and December 31, 1925.