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SHORTER ARTICLES, COMMENTS AND NOTES

Immigration Law: Alien Employment Certification

Background and Scope

Several millions of undocumented aliens live and work in the United States. They are often exploited, working for low wages and under conditions not suffered by lawful resident workers. Faced with the problem of limited manpower brought about by, in this case, a penurious Congress, a freeze on hiring last fall decreed by former President Carter, and now budgetary cutbacks by President Reagan, the Immigration and Naturalization Service (herein called INS) can hardly be expected to cope with its herculean task of enforcement of the immigration laws. Efforts to enact federal legislation penalizing employers who hire illegal alien workers have been unsuccessful.¹

Assume your client wishes to immigrate to the United States to work, or is already here on a temporary nonimmigrant status, such as a student or a visitor; but, to remain here in a permanent resident status and work, he has changed his mind about returning to his foreign residence.

Which aliens require the approval of the U.S. Department of Labor (herein called DoL) to work in the United States and how can they obtain that approval?

To protect the wages, working conditions, and job opportunities of U.S. citizens and lawful permanent resident aliens and to assure that an entering alien would not be one who likely would replace an American worker or fill a function readily available to American job aspirants² the Immigration and Nationality Act (herein called the Act) was radically amended as of October 3, 1965, to place direct responsibility on the alien to obtain a labor certification clearance from the Secretary of Labor. The Act provides a safeguard vis-à-vis the alien seeking to immigrate to this country with the view towards engaging in full-time, permanent employment. In accordance

¹On the other hand, a state statute barring the knowing employment of aliens not entitled to lawful residence, if such employment would adversely affect lawful resident workers, was held not unconstitutional by the United States Supreme Court in *Decanas v. Bica*, 424 U.S. 351 (1976) as a state attempt to regulate immigration.

²See *Matter of Wang*, 15 I. & N. Dec. 376 (1975).

with Section 212(a)(14) of the Act, as amended,³ such an alien shall be ineligible to receive an immigrant visa for admission into the United States unless he is in possession of a certification from the Secretary of Labor that: (1) there are not sufficient workers already in this country "able, willing, qualified, and available" to fill the job to which the alien aspires; and (2) the employment of the alien will not adversely affect the wages and working conditions of the workers in this country similarly employed.

Similarly, an alien who is already in the United States as a nonimmigrant (e.g., a student, visitor, temporary worker, treaty trader or investor, or intracompany transferee⁴) who seeks to adjust his status to that of an immigrant or permanent resident alien (the two terms are used interchangeably) and thereby engage in lawful full-time, permanent employment must, under Section 245 of the Act, as amended,⁵ meet the labor certification requirement or establish that he is exempt from that requirement.⁶ A non-immigrant seeking adjustment is in no different position from an alien seeking an immigrant visa from a consular office abroad.⁷

As referred to above, the House has repeatedly passed bills, rejected by the Senate, seeking to impose civil and criminal penalties against any employer employing any alien who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien had been authorized by the Attorney General.⁸ Nonetheless, under the 1976 Amendments to the Act, the alien himself is indeed penalized by accepting or continuing in unauthorized employment after January 1, 1977, if his intention is to ultimately adjust his status to that of a permanent resident alien. The new provision, contained in Section 245(c) of the Act, however, does not prohibit his being issued an immigrant visa by a consular official abroad as a result of the unauthorized employment here. It only

³8 U.S.C. 1182(a)(14), as amended, which states as follows: "... the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . . (14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8)."

⁴Essentially, a nonimmigrant alien is one having a residence in a foreign country which he has no intention of abandoning and who seeks to enter the United States temporarily. On the other hand, an immigrant alien is one who intends to abandon his residence in a foreign country and who seeks to enter the United States permanently. See 8 U.S.C. 1101(a)(15).

⁵8 U.S.C. 1255, as amended.

⁶See *Matter of Ko*, 15 I. & N. Dec. 695 (1976).

⁷*Matter of Mirza*, 11 I. & N. Dec. 756 (1966); *Matter of Danquah*, 16 I. & N. Dec. 191 (1977).

⁸H.R. 8713 (94th Congress, 1st Session).

prohibits his adjustment of status while remaining in this country, leaving open for him the possibility to depart the United States and apply for an immigrant visa abroad.⁹ This could be a costly penalty indeed to the alien from a far-off land.

The Requirement

The labor certification requirement of Section 212(a)(14) by its own terms is only applicable to members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit the national economy, cultural interests, or welfare of the United States ("third preference" immigrants); those capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States ("sixth preference" immigrants); and all other aliens who reside in a foreign country and, with the intent of abandoning the same, wish to immigrate to the United States, remain here on a permanent status, and engage in full-time, permanent employment ("nonpreference" immigrants).

The requirement does not exist for spouses of United States citizens ("special immigrants"); or for unmarried children of U.S. citizens ("first preference" immigrants); or for spouses of married children of aliens lawfully admitted for permanent residence ("second preference" immigrants); or for married children of U.S. citizens ("fourth preference" immigrants); or for siblings of U.S. citizens at least twenty-one years old ("fifth preference" immigrants).

Investor Exemption

Federal regulations provide for the exemption of certain classes of aliens from the labor certification requirement, such as a member of the armed forces; a spouse or child accompanying or following to join his spouse or parent who either has a labor certification or is a nondependent alien who does not need such a certification; a female alien who intends to marry a U.S. citizen or alien resident, and who does not intend to seek employment in the United States, and whose fiancé has guaranteed her support; and an investor.¹⁰

⁹8 U.S.C. 1255, as amended, which reads as follows: "(a) The status of an alien, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulation as he may prescribe, to that of an alien lawfully admitted for permanent resident if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. . . ."

"(c) The provisions of this section shall not be applicable to (1) an alien crewman; (2) an alien (other than an immediate relative as defined in section 201(b) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status; or (3) any alien admitted in transit without visa under section 212(d)(4)(C)."

¹⁰8 C.F.R. 212.8(b).

The investor exemption was of shortlived usefulness, however, because the investor is of the "nonpreference" category; and nonpreference visas have been completely unavailable since August, 1978. Because of serious concern for the plight of the investor and the real need for him in the United States there has been considerable discussion of further amending the Act to add him to "third preference"; or without amending the Act, by the DoL amending its regulations to afford him a Schedule A blanket certification.¹¹

Any alien who establishes that he is seeking to enter the United States for the purpose of engaging in an enterprise in which he has invested, or is actively in the process of investing, at least \$40,000, that he is a principal manager of such enterprise, and that the enterprise will employ persons in the United States other than the alien, his spouse, and children, does not require a labor certification.¹²

The Board of Immigration Appeals (herein called the Board) in the leading case on the question, *Matter of Heitland*, 14 I. & N. Dec. 563 (1974), held that the nature of the investment must be such that it tends to guard against the possibility that the alien will compete with American labor for available skilled or unskilled positions. Thus, mere land holdings and savings bank accounts do not qualify as investments within the contemplation of 8 C.F.R. 212.8(b)(4). The funds invested must actually be employed in the operation of the business. The investment must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the job market, or must be of an adequate sum to sufficiently insure that his primary function will not be as a skilled or unskilled laborer.

The Board further clarified the issue in *Matter of Ahmad*, 15 I. & N. Dec. 81 (1974), by firmly stating that an alien who asserts that he qualifies for the investor exemption has the burden of establishing his claim through unambiguous proof and any doubt in connection therewith should be resolved against the investor claimant. The Board again warned against using the investor exemption as a means of circumventing the normal labor certification procedures for ordinary skilled or unskilled labor.

If an alien seeks exemption as an investor in one company and holds with another company an unrelated full-time job for which he has not obtained a labor certification, he would be ineligible for the exemption.¹³

The Board appreciates an alien's hesitancy in acting in the face of uncertainty and deferring a portion of his investment pending approval of his application for adjustment of status. But such a conditional intent does not qualify.¹⁴

¹¹Position paper of Assoc. of Immigration and Naturalization Lawyers to DoL, Mar. 23, 1980, pp. 9-10.

¹²8 C.F.R. 212.8(b)(4), as amended.

¹³*Matter of Chiang*, 15 I. & N. Dec. 656 (1975).

¹⁴*Matter of Lui*, 15 I. & N. Dec. 206 (1975).

Procedure, Review, and Appeal

Unless exempt from the labor certification requirement, an alien being in one of the following categories is subject to the requirement.

1. An alien who intends to work in a Schedule A occupation,¹⁵ that is, an occupation for which the DoL has predetermined that there are not sufficient U.S. workers who are able, willing, qualified, and available and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens. Schedule A is then, in effect, a blanket certification and it obviates an application for individual labor certification. For example, Schedule A includes physical therapists, physicians and nurses, persons of exceptional ability in the sciences or arts including university teachers, persons who seek admission to the United States to perform a religious occupation, and managerial-executive types employed as such by international organizations for at least the immediately prior year and coming to an office in the United States which has been doing business for at least one year.¹⁶

2. An alien who intends to work in a Schedule B occupation,¹⁷ that is, an occupation for which the DoL has predetermined that there generally are sufficient U.S. workers who are able, willing, qualified, and available and that the wages and working conditions of U.S. workers similarly employed will be adversely affected by the employment of aliens. Schedule B is then, in effect, an automatic denial of certification and it too obviates an application for individual labor certification. Schedule B includes a wide variety of workers, such as parking lot attendants, bartenders, cashiers, clerks, common laborers, and receptionists.

3. Any other alien who intends to work in an occupation not included in either Schedule A or Schedule B must apply for individual labor certification.

Where an alien's occupation is not listed in Schedule A, his employer or prospective employer may apply for the required labor certification by submitting the appropriate form to the local office of the state employment service serving the area of intended employment. The address of the local office can be obtained from the Regional Office of the Employment and Training Administration. The form, called "Application for Alien Employment Certification," is available at the local office itself or at the immigration office. The form needs to be carefully completed, signed, and filed in duplicate. Further, to establish the recruitment efforts the employer has made to fill the job from U.S. workers, proof of current advertising, published in a newspaper of general circulation in the relevant geographic and job market areas, should be filed as well as a job order for the local job

¹⁵20 C.F.R. part 656. The DoL regulations setting forth the labor certification process in detail were amended, effective February 18, 1977. They were substantially revised, effective January 19, 1981. Schedule A occupations, for example, were substantially altered.

¹⁶45 Fed. Reg. No. 246 (Dec. 19, 1980).

¹⁷20 C.F.R. part 656.

bank and a copy of the notice of the job opportunity posted for at least ten days in a conspicuous place at the place of business. Upon filing, an advertisement for the job opportunity must be placed in a newspaper of general circulation to run for three consecutive days and directing applicants to report or send resumes to the local office for referral to the employer.

The pay offered the alien must be at least as much as the prevailing wage for the occupation in the area. For instance, there will be some employers paying \$10,000 per year for a job and others paying \$12,000. If the majority of workers are being paid \$11,000 per year, as determined by the DoL, then the wage offered the alien must be at least \$11,000 per year. The DoL allows the offered wage to be within 5 percent of the prevailing wage.

Any language requirements must be job-related and must arise from business necessity, not convenience. Thus, if the job is in a Polish bookstore whose customers are Polish and the Polish language would be required to transact business with them, this would be a legitimate requirement.

Information submitted in response to questions related to the job requirements and the alien's qualifications should not coincide with or be tailored to the alien's job experience and training. That certification depends on qualifying experience gained through unauthorized employment in the United States does not in itself justify refusal to grant adjustment of status.¹⁸ Job descriptions should not be simply copied from the *Dictionary of Occupational Titles*.¹⁹ Simply stated, the job requirements and the alien's qualifications should be, respectively, the answers to the questions: What does the employer really want? And what can the alien really do?

Upon carefully completing the necessary form, and having it signed, it is filed with the local office, as aforesaid. It should be hand-delivered and receipted for or sent certified mail, return receipt requested, so that proof of filing is obtained. This is important because the priority date for the allocation of an immigrant visa number is fixed by the date on which an application for labor certification based on a job offer was accepted for processing at the local office level.

The local office does the initial fact-finding and documentation on the availability of U.S. workers and prevailing wages. Generally only the immediate area is canvassed, but in some critical job occupations a wider search is made for qualified workers who would be willing to relocate to obtain employment. Also, research is undertaken to determine the availability of potentially available United States workers who will become qualified in the near future to fill jobs. These include those enrolled in vocational schools, technical schools, and colleges. Further attempts to recruit U.S. workers ensue for a thirty-day period, with the employer cooperating with the local office in these efforts, such as the requirement to

¹⁸Matter of Lam, 16 I. & N. Dec. 432 (1978).

¹⁹DICTIONARY OF OCCUPATIONAL TITLES (DoL, 4th ed., 1977).

advertise in a newspaper of general circulation, as aforesaid, or in a professional or trade journal. The local office cannot make any recommendations concerning the application. After the thirty-day recruitment period, it presents the case file to the state office of the state employment service factually, neutrally, and with documentation.

At the state office the case file is reviewed and further research may ensue. The state office cannot make any recommendations concerning the application either, but submits the entire case file factually, neutrally, and with documentation to the regional office of the Employment and Training Administration.

The certifying officer at the regional office reviews the case file and, from the information presented, or from further research of his own, renders a decision on the application; either to grant certification or to issue a Notice of Findings. If a Notice is issued, rebuttal evidence may be submitted within thirty-five days. If evidence is submitted, the certifying officer will review same and either grant or deny certification. If it is not submitted, the certification is denied. When certification is denied, the decision is generally based upon availability, i.e., current labor market information indicates qualified U.S. workers are available, or the job description is so restrictive in its requirements that they exclude otherwise qualified, available U.S. workers and appear specially tailored to meet the alien's qualifications. Infrequently the decision of denial is based upon the wage rate offered the alien being below the prevailing wage for the job in the area.

If the application has been denied, the employer may appeal the decision by filing with the certifying officer within thirty-five days of the determination date a written request for administrative-judicial review, which will be considered by a DoL administrative law judge, who may either reverse or uphold the decision, or remand the matter to the certifying officer for further consideration, or direct that a hearing be held in the case. His decision is final and the applicant will have then exhausted his administrative remedies.

Although the DoL continues to believe that the labor certification process is not subject to the judicial review procedures of the Administrative Procedure Act,²⁰ some court decisions have held otherwise. Perhaps the best discussion of jurisdiction to review the denial of the application for labor certification is found in *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973), where the court unanimously ruled that the issuance of a labor certification is not a discretionary act and that its denial is subject to judicial review under the Administrative Procedure Act. Courts in other circuits have held similarly, upholding their jurisdiction to review denials of certifications.²¹ Judicial review is limited to a determination of whether there has

²⁰42 Fed. Reg. 12 (Jan. 18, 1977).

²¹*Digilab v. Secretary of Labor*, 357 F. Supp. 941, 942 (D. Mass. 1973); *Wang v. Reg'l Manpower Administrator*, 352 F. Supp. 260, 261 (N.D. Ill. 1972); *Bitung v. Reg'l Manpower Administrator*, 351 F. Supp. 1342, 1344 (N.D. Ill. 1972); *Golabek v. Reg'l Manpower Adminis-*

been arbitrary or capricious abuse of discretion by the DoL. Once the court has determined that the labor certification was wrongfully denied, it may order its issuance in accordance with Section 10(e) of the Administrative Procedure Act.²²

Issuance of Certification

Labor certifications issued will be sent by the regional office to the employer for use with a third or sixth preference visa petition at the INS in the absence of a specific request that some other disposition be made. This request should be indicated in the attorney's notice of appearance (Form G-28 "Notice of Entry of Appearance as Attorney or Representative") which is filed with the "Application for Alien Employment Certification."

The issuance of a labor certification does not operate to authorize an alien's employment. An alien's employment is authorized only upon specific approval from INS.²³

Certifications are valid indefinitely, unless there has been fraud or willful misrepresentation of a material fact involving the labor certification application. Labor certifications are invalid if the representations upon which they are based are "materially incorrect." Materially incorrect means that, if the correct facts had been known, a certification would not have been issued.²⁴

Moreover, an alien admitted in possession of a labor certification, who ceases his employment because he cannot perform all the duties as described in the application, is deportable as one excludable at entry for lack of a valid certification.²⁵ An alien who, at the time he obtained his immigrant visa, knew that the job offer in support of his labor certification had been withdrawn, and who nevertheless proceeded to the United States and obtained other employment, is deportable for lack of a valid labor certification, notwithstanding even that such other employment is with a different employer in the same occupation and in the same geographic area as the employment specified in the job offer, because the validity of the labor certification is limited to the particular job described in his labor certification.²⁶ An applicant for adjustment of status who is no longer employed by the employer who had applied for the labor certification is no longer in possession of a valid labor certification.²⁷

trator, 329 F. Supp. 892, 894 (E.D. Pa. 1971); *Ozbirman v. Reg'l Manpower Administrator*, 335 F. Supp. 467, 470-71 (S.D.N.Y. 1971).

²²*Digilab, supra*; *Golabek, supra*; *Seo v. U.S. Dept. of Labor*, 523 F.2d 10 (9th Cir. 1975).

²³*Matter of Raol*, 16 I. & N. Dec. 466 (1978); *Matter of Tien*, 17 I. & N. Dec. (Int. Dec. 2808, 1980).

²⁴*Matter of Patel*, 16 I. & N. Dec. 444 (1978).

²⁵*Matter of La Pietra*, 13 I. & N. Dec. 11 (1968).

²⁶*Matter of Tamayo*, 15 I. & N. Dec. 426 (1975).

²⁷*Matter of Stevens*, 12 I. & N. Dec. 694 (1968); *Matter of Danquah, supra*; *Matter of Tien, supra*.

But, an alien admitted to the United States, destined to an existing certified job with the intention of taking up the employment, is considered as having been lawfully admitted for permanent residence, and where he reports to such employment but declines to take the job for valid reasons not reflecting a lack of good faith, the validity of his admission is not impugned.²⁸

Conclusion

The U.S. employer is urged by this country's immigration laws and the enforcement procedures to diligently recruit for a U.S. worker to fill his job opening. Alien workers seeking to immigrate to this country from abroad to enter the work force will not be able to do so for about a year, and in many cases longer. The employer applying for labor certification must demonstrate to the DoL that he has been actively recruiting U.S. workers to fill his job needs.

Because of the large numbers of applications being filed, about six months may be required from date of filing the application until a determination is received from DoL.

Then, under the visa allocation system of the Act, numbers for natives of some countries are simply unavailable, or, if available, are available only to those who have established priority dates of as much as almost two years ago. Numbers allocated and available for current issuance of immigrant visas under this visa allocation system are published in a monthly bulletin of the United States Department of State, Bureau of Security and Consular Affairs, Visa Section, and can be obtained, without charge, from that office.

As indicated, considerable time, trouble, expense, and effort go into the labor certification process, but with care and patience success can be achieved much of the time.

GARY C. FURIN

History of the Section of International Law: The First Thirty-Five Years

On August 21, 1878, in the city of Saratoga, New York, the American Bar Association was organized. Its first constitution was adopted that day, and among the seven standing committees authorized by that charter was one "On International Law." The era of the ABA from 1878 through 1902 is

²⁸Matter of Cardoso, 13 I. & N. Dec. 228 (1969).

frequently referred to as the "Saratoga Era" because, with few exceptions, the ABA met there throughout those years. Committees came and went during these years, but the International Law Committee's life was continuous. The first section of the ABA was created in 1893, and conflict soon developed between sections and committees. The use of special committees became a common practice, and as early as 1896 a special committee on International Law and Arbitration was set up after the United States Senate had failed to ratify an arbitration treaty between the United States and Great Britain. The reason for taking the matter out of the jurisdiction of the International Law Committee (ILC) does not appear in the record.

In its early years the ILC made annual reports that were largely informational, dealing with the development of law throughout the world. Such subjects as "Civil Law as Transplanted in Louisiana" (1882) and "Historical Relation of Roman Law to the Law of England" (1895) were the subject of reports to the Association. But before long the ILC's reports were the subject of lengthy debates in the Association and sometimes caused "great agitation," in the words of some of the members. Shades of more recent debates, such as those on the United Nations, Bricker and Connolly amendments, etc.

In 1891 a series of actual and attempted assassinations, ending in a vicious attempt to kill the Chief of Police of New Orleans, convinced the citizens of that city that they had in their midst a murderous organization allied with the Mafia. A trial of several of the assassins, all of whom were Italians, some naturalized and some not, resulted in acquittal, due probably in part to jury-fixing and in part to terror on the part of the jurors induced by fear for their own lives. After the trial a meeting was held and a plan deliberately formed and carried out for an attack on the jail where the prisoners were held. The attack was successful and the Italian prisoners were seized and killed. The grand jury afterwards reported that the party of avenging citizens "embraced several thousands of the first, best, and most law-abiding citizens" and that "the act seemed to involve the entire people of the parish and city of New Orleans." In fact, during debate in the ABA it was stated by a member from Louisiana that some members of the Association had participated in planning and carrying out the executions.

The Italian government reacted to the lynching by demanding the punishment of the members of the mob by the President of the United States, citing treaty obligations between the two countries. The United States stuck to the position it had taken in previous instances of assaults on aliens, stating that crimes against both citizens and aliens were under the jurisdiction of the individual states and that the federal government was not involved. This position had been somewhat modified on previous occasions by the payment of indemnity to foreign governments whose citizens had been wrongfully abused by our citizens. Ultimately the Italian government accepted such an indemnity payment in settlement of this matter.

Recognizing that "treaties are the supreme law of the land," the ABA felt that something should be done to straighten out the inconsistencies involved and asked the ILC to make a report on the subject. A bill "to Provide for the Punishment of Violation of Treaty Rights of Aliens" was introduced in both houses of Congress. It would have give the federal courts jurisdiction over such crimes, apparently *adding* federal jurisdiction to that of the state courts. The ABA was asked to support the bill which seemed at the time to impinge on states' rights.

The ILC presented its first report on the subject in 1892, and most of that year's ABA meeting was taken up in debate on the issue. Fifty pages of the annual report were devoted to it. While it was conceded that "treaties should be the supreme law of the land," it was argued that the proposed legislation would give aliens *superior* rights to those enjoyed by citizens. The 1892 debate makes for familiar reading to those of the section who were involved in the Bricker Amendment debates in the ABA.

Throughout the following year the subject of treaties and the rights of aliens occupied the Association, and the ILC presented a supplemental report of twenty-two pages in 1893. Another lengthy debate followed; the annual report of that year contains forty-three pages of it. The ABA finally adopted a resolution that made no recommendation for new federal legislation, a result remarkably like the result of the vigorous debates of the 1950s.

The ILC had consistently recommended against the adoption of any new federal law giving the federal courts jurisdiction over the property or persons of aliens, arguing that aliens are only entitled to the same protection our law gives to its citizens. There is presently in Arizona a case involving the alleged abuse of undocumented aliens by two United States citizens who were acquitted of the charge by a state court. Federal indictments based upon the same facts but alleging "interference with interstate commerce" (a violation of the Hobbs Act) were returned. Upon trial of the case two different juries returned conflicting verdicts for the two defendants. The case, which is on appeal, is the subject of widespread interest because it seems to involve double jeopardy and certainly the idea that aliens may enjoy more protection than do citizens. The UN Draft Convention on Responsibility of States to Aliens may ultimately settle the question on an international basis.

After three years of lively debate on international law matters, in 1894 the ILC recommended that the ABA take no position on a proposed International Court of Arbitration, and in 1895 the Committee's report consisted of a paper on "The Historical Relation of the Roman Law to the Law of England," a fairly non-controversial subject, for a change. In 1896, at the urging of the ILC, the Association did adopt resolutions in support of setting up a system of international arbitration to settle disputes and ultimately supported (1899) the Hague Convention on international arbitration.

The subject of arbitration seems to have had a checkered career during those early years. For example, in 1896, after hearing an address by the Lord Chief Justice of England on the subject, the ABA adopted the ILC's recommendation that a permanent system of arbitration be set up by treaty between the United States and England. As a result, such a treaty was drafted, signed by President Cleveland, and sent to the Senate where it failed of ratification. The ILC brought the matter back in 1897, recommending that the ABA support the treaty. The ABA refused to support it but came out strongly in favor of arbitration and treaties establishing it!

The 1898 report of the ILC contains an excellent review of the laws of war with respect to shipping, including that related to privateering. The report was timely but probably became obsolete when submarine warfare became so common in 1914-18.

As might be expected, after the war with Spain in 1898 the ABA adopted a resolution calling for the U.S. government "to secure to the people of the Philippine Islands as far as practicable the benefits of American Civilization." It was referred to the ILC for study, and fifty dollars was appropriated to defray expenses in connection with this obviously monumental study. The following year the ILC neatly ducked the problem by reporting that bringing benefits of American civilization to the Philippines was not "within the objects of the Association." It did not report what happened to the fifty dollars.

By 1901 the Convention for the Peaceful Adjustment of International Differences had been adopted by twenty-three countries, and the judges of the International Court of Arbitration had been appointed by all but three of the signatories. The adherence of the United States was due largely to the work of the ILC. While the ILC called it the "Supreme Court of the World" in its 1901 report, none of the weaknesses of the court, such as its lack of power to enforce its decisions, were mentioned.

1902 appears to have been a quiet year for the ILC. It made no report. In 1903 it reported on the first case to be submitted under the Hague Convention on Arbitration. It involved the Pious Fund set up in Mexico in the 1600s. The purpose of the fund was to aid the Jesuits in educating and converting the California Indians. The fund had its tortuous history but it had grown substantial in amount. The 1848 war with Mexico had resulted in the division of California into two parts. Mexico claimed that no part of the fund should go to Upper California because there were few Indians there. (As a matter of fact, there were still fewer in Baja California, a not too habitable land.) The claim between the respective Catholic churches had been referred to a mixed commission and later to a British Umpire who awarded the U.S. California bishops twenty-one sums of \$43,050.99. The Mexican government claimed this was a lump sum award while the U.S. bishops contended it was a continuing annuity. The claim was submitted to the International Court by Mexico and the United States. Also involved was the question of the currency to be used (at the time of the original

award the peso was worth more than the U.S. dollar). The Hague court's decision in favor of the U.S. bishops to the effect that the British Umpire's award was continuing was diluted by the fact that by this time the peso was worth only about fifty cents in U.S. currency. The decision of the tribunal was unanimous and its make-up was truly international, numbering judges from Russia, Great Britain, the Netherlands and Denmark. Other disputes were successfully arbitrated and the committee felt that international law in the world was on its way to becoming firmly established.

The path of international law did not run smoothly for very long. The 1905 report of the ILC decried the refusal of the Senate of the United States to ratify general arbitration treaties with Great Britain and France. The Senate sought to amend them to provide that *each* arbitration would have to be ratified by the Senate. Obviously such a provision would limit the power of the President to conduct foreign relations. His treaty-making power was thoroughly discussed in the 1905 report. It was pointed out that the first treaty made by President Washington involved general arbitration. Three arbitrations had actually taken place under the Jay Treaty of 1794. The report stated that it was the supreme law of the land, and the President was required to implement it. The report also contains an interesting discussion of the rights of warships of warring nations.

Although the function of the ILC was frequently described in ABA documents as being only "informational," it is apparent that the Committee became a strong advocate for the adoption of universal international law to settle disputes among nations. Its early reports did describe important developments in the field of public international law, including an analysis of the treaties entered into by the United States each year.

In 1907 the ABA began to place more emphasis on the study of comparative law, and it organized an auxiliary body called the "Comparative Law Bureau." It had been clear from the inception that the purpose of the ILC was to report on developments in international *public* law. It did not, however, confine its activities to that field. The objects of the Bureau were described as being "the study, presentation, and discussion of methods whereby important laws of foreign nations affecting the science of jurisprudence might be brought to the attention of American Lawyers and institutions of learning and become available in the general study of private law."

The Bureau was a mixed body, and private individuals and organizations not part of the ABA were members of it. For six years it published an Annual Bulletin consisting of translations of important current foreign laws, codes, and even ancient codes and laws. The *ABA Journal* took up this task of publication after the demise of the Bulletin. The Bulletins have become collectors' items and are found in only those libraries having a most comprehensive collection of foreign law. The ILC continued to be active, and its work and that of the Bureau combined to give the Association a rather complete overview of international law developments during the 1907-33 period.

In addition to the work done by the Bureau, the ABA had established a Committee on Comparative Study of World Legislation in 1902. This was apparently a forerunner of the Bureau but it did not enjoy the independent status of the Bureau. There is some confusion in the records, but it is clear that what was referred to as the "Comparative Law Bureau" was changed from a committee to a section in 1919. At this point sections did not enjoy the status they did after 1933. During this period there was substantial opposition in the ABA to what was called "fragmentation of the profession" by the establishment of special fields of interest among members of the bar, among them specialization in international law. The "complete lawyer" was supposed to be proficient in all fields.

The original constitution of the Association had provided that one must have been a member of the bar for at least five years to be eligible for membership, and at one point it was recommended that this should be raised to seven years, as the Association "was becoming too crowded." Every member did not personally know every other member. The requirement was subsequently reduced to three years (1917) and later abolished altogether (1928).

Membership dues of five dollars per year were provided for in the original constitution of the ABA, and although this figure increased somewhat over the years, a young lawyer admitted for less than five years could still join for the five dollar figure. (Your reporter was able to scrape up that amount in 1935.)

As a result of the war between Russia and Japan, the ILC devoted most of its 1905 report to the rights of neutrals during warfare. It did not neglect the treaty-making power of the President and contended that the way to the acceptance by all nations of universal international law might be through treaties. The report rather assumed that since treaties are the supreme law of the land in the United States, they are automatically the supreme law of each nation and thus of the whole world. Seventy-five years later we are still trying to make this theory work through the United Nations.

The 1906 report of the ILC noted the termination of the war between Japan and Russia, contained a report on various peace conferences, and for the first time, discussed the Geneva convention for the treatment of combatants during warfare. The convention had originally been adopted by various nations in 1864, and an important protocol to it was signed in July 1906. A discussion of the various Pan-American conferences was also included. It was noted that the United States did not accept the Drago doctrine that the collection of public debts should never be made by force. This was to become a serious bone of contention between the United States and its Latin American neighbors in later years. The contents of a number of treaties were reviewed, and it was pointed out that bribery was made an extraditable offense in a number of them. In 1906 the United States was instrumental in settling the war between El Salvador, Guatemala, and Hon-

duras, and the Committee expressed the hope that war could be avoided in Europe.

The ILC was instrumental in the formation of the American Society of International Law in 1907. The society held its first annual meeting in April of that year, and the cooperation between the society and the ABA has continued to this day. The boundary dispute with Mexico concerning the so-called "bancos" in the Rio Grande River, as well as irrigation rights, was examined and it was stated that the two treaties signed with Mexico would terminate the controversy. The "Chamizal" agreement of sixty years later probably did.

The Committee noted that the Senate was still insisting that United States participation in international conferences be subject to certain caveats, including one that read: "without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope." A similar reservation had been attached by the Senate to our adherence to the Hague conventions. Isolationism raised its head from time to time to chill the efforts of the Committee.

The important Hague Convention of 1907 occupied the attention of the ILC in 1908. It was ratified by the United States Senate on April 2, 1908, with a reservation declaring that it shall not be construed to require interference with "questions of policy or internal administration of any foreign state, nor shall anything contained in said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions." The last clause alluded to the Monroe Doctrine. The various provisions of the convention were summarized by the Committee, which pointed out that the convention represented a great advance in establishing humane rules for the conduct of war. Other United States treaties were listed, including several calculated to repress trade in white women. (Possibly "white slavery" could have been interpreted to include ladies of other hue.)

In 1909 the ILC reported that the United States had entered into some twenty-five treaties during the past year. Among them were many related to public health problems. These called for the international control of such diseases as the plague, cholera and yellow fever. Eight treaties related to the general interpretation of treaties. An amendment to the Berne Copyright Convention proposed the establishment of an international copyright and a bureau for its administration. Diplomatic relations with Venezuela, breached the year before over a debt dispute, were reestablished in 1909.

At the 1910 meeting of the ABA in Chattanooga, Tennessee, a member of the ILC, in absence of the Chairman, introduced its report by saying that it was similar to "gossip at a neighborhood quilting party," stating that it would be read if the members desired it. His unique introduction went over like the proverbial lead balloon. He was asked if he would prefer not to read it, to which he replied that it made not the slightest difference to him.

One member, apparently seeking to relieve the reporter, moved to dispense with the reading. After debate, the chair ultimately ruled the motion to dispense out of order, whereupon the reporter started to read it but subsequently abandoned the project with the comment that few members were listening. The report is anything but dull, and in fact it makes interesting reading for international lawyers. New arbitration treaties were entered into by the United States with Peru, Costa Rica, Paraguay and Haiti. Other treaties of importance were mentioned. Three international conferences were described and numerous arbitrations were discussed. Both the Waterways and Fishing treaties with Great Britain were analyzed. Disputes over fishing rights over the Grand Banks and the use of boundary waters were settled, perhaps as essential agreements as we have ever made with respect to Canada. The annexation of the Congo Free State by Belgium and the effect of existing treaties with the Congo were subjects of the report. The strained relations between the United States and Nicaragua caused by the execution of two U.S. citizens serving in the revolutionary army of Estrada were described. It will be recalled that we sent warships to Nicaragua as a result of this incident. Problems arising in Manchuria as a result of the Russian-Japanese war were detailed in the report.

In addition, the 1910 report contained a good discussion of the revision of our rules for Diplomatic Service, noting with disapproval that "No extra pay is allowed for mastery of hard languages as in the British Services." The problems caused by this policy are still with us in 1981. Most of the new regulations, however, were approved by the ILC which concluded that under the new regulations the United States would have a "real Diplomatic Service which . . . should in time aid materially in the direction of trade extension, protection of our citizens, and peace." The 1910 report was surely not "gossip" and included real substance. We must hope that the members who would not listen to it took it home and read it.

The 1910 Conference of the American Republics was one of the subjects of the 1911 report of the ILC. Treaties with respect to copyrights, patents, and trademarks were adopted and it was provided that the "recognition of a right of literary property obtained in one state in conformity with its laws shall be of full effect in all the others without the necessity of fulfilling any further formality, whenever there appears in the work some statement indicating reservation of the property right." Similar provisions were made as to patents and trademarks. Certainly there has been a great deal of retrogression in this field since the adoption of those precise and simple principles. The rights of U.S. fishermen under previous treaties were settled by an arbitration commission sitting in the Hague. The third Conference on Maritime Law was discussed briefly. The Chamizal dispute with Mexico was reviewed with no indication that it would take another fifty years to settle it. Treaties with several countries were mentioned, and the establishment of the Carnegie Peace Foundation was applauded by the ILC.

The 1911 report contained frequent references to articles in the *American Journal of International Law*, which by this time had become recognized as a leading journal of international public law. One member of the Committee filed a "semi-dissent" to the 1911 report, complaining that our ambassadors were living in the lap of luxury on their \$17,500 salaries—possibly a point well taken in those days when the greenback was a most respected and powerful currency.

The 1912 report discussed the treaties of extradition with El Salvador and France, as well as other treaties. The protection of fur seals was the subject of several treaties. Events in China affecting the United States government was the subject of a lengthy report. During this period the United States stationed 500 marines at its legation in Peking, which indicates that in those days of violence in a foreign country we did not hesitate to employ substantial force to protect our diplomatic personnel. Our treaty with Russia was terminated because of Russia's insistence that she had a right to exclude from her territory all alien Hebrews, including American citizens. In accordance with treaty provisions, we sent substantial naval and military forces to Cuba to help preserve order there.

The 1910-1917 Mexican revolution was attracting a lot of attention in the United States, and the President issued proclamations admonishing all citizens to observe the neutrality laws. As a matter of fact, much of the financial and military support for the Zapata-Carranza-Villa revolution was openly coming from the United States, where sympathy for the revolutionary cause was strong. It was stated in the report that the newly adopted laws would enable the President to prevent such aid. If much attempt to do so was made, it was not apparent in Mexico.

One innovation appeared in the 1912 report. Cases in U.S. courts involving treaties and foreign law were the subject of brief comment.

In 1913 the ILC adopted a slightly different format in its report in an attempt to cover all treaties negotiated, confirmed or proclaimed by the United States, as well as the principal incidents affecting the U.S. Great Britain protested a provision in the Panama Canal Bill which would have exempted all U.S. ships from the payment of tolls on the ground that it violated a provision of the Hay-Pauncefote Treaty that the canal would be open to the ships of all nations on "terms of entire equality." The United States took the position that since it "enjoyed absolute rights of ownership and control over the canal," this included the right to use the canal on such terms as it saw fit. "All nations" was apparently interpreted to mean "all other nations." Great Britain demanded the matter be submitted to arbitration. Much of the report was taken up by describing the events in Nicaragua where increasing numbers of U.S. Marines were sent during the months of September and October. The Marines had put down the revolution of General Mena, but our occupation of the country was just beginning. A treaty granting the U.S. the right to build a canal across Nicaragua was entered into.