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W O R K I N G   P A P E R

on international exchange of knowledge and experience and problems related to visa policies.

I. Switzerland's interest in international intercourse.

International intercourse between Switzerland and other nations developed at an early time. It grew out of necessities created by the country's geographical position in the heart of Europe, far away from ocean ports, on a territory with few natural resources, which produces barely half of the food needed for the population. To be able to pay for necessary imports of food and raw materials, the Swiss developed products of high quality, requiring ingenuity, skill and precision. The ensuing commerce led to a steady and extensive exchange of goods, services, ideas and people between Switzerland and the outside world.

To keep abreast with other nations, it became the custom of young people, after finishing their education - professional or vocational, as the case may be - to work in foreign countries for a few years, before they would settle down at home.

Before World War I, there were few obstacles in Europe to a free movement of people. After the war, European nations made the employment of foreigners dependent on a working permit, in order to have control over their labor markets.

Nowhere, however, was the granting of a working permit connected with the question of immigration or future naturalization. A person who obtained permission to work in a nation not his own, remained a foreigner, although he might have resided

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there for many years, even for the rest of his life. He was subject to the obligations of a resident but not to the duties connected with citizenship until he actually acquired the country's nationality. Not until then, when he was entitled to exercise the rights of citizenship, was he also expected to assume its full duties. Military service, for instance, is in Europe, particularly in Switzerland, regarded as a duty of citizenship. Therefore it has never posed any problems, since European countries have never extended the draft to non-citizens.

After World War II, the dramatic progress in science and technology required an ever widening exchange of knowledge and experience through personal contacts. By now, the United States had entered prominently into European life, commercially as well as culturally. Her leading position in many fields of science as well as the establishment of many American firms in Switzerland made it important for young Swiss scientists to become acquainted not only with American research, but also with its application in American industry. The appearance of great numbers of American machinery, such as airplanes, automobiles and others, made it desirable for young technicians to study American working methods at the source. They therefore want to work for a few years in American garages and workshops and use the occasions to travel in the U.S. in order to become acquainted with the country and its people. Quite generally, the development of air travel has brought the U.S. closer to Europe, so that young people in Switzerland frequently have a desire to include a possible stay in the U.S. into the plans of their professional or vocational education. Young Swiss citizens who wish to go to the U.S. for a few years, belong to all kinds of occupations; they may be physicians,

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chemists, engineers, teachers, watchmakers, bookkeepers, mechanics, commercial clerks or secretaries, not to forget the people working in hotels. They all have in common that they prefer to make their own plans on an individual basis. Quite aside from the fact that employment is the very means by which they are able to achieve their purposes, most of them need the earnings, since they rarely have sufficient independent income to finance an extended stay in the United States.

Scientists, students and all the others who wish to come to the United States do so, of course, in their own interest in order to enhance their own knowledge and experience. But at the same time they bring to the United States contacts which are valuable not only to American science, but also to other professions and vocations. In many of these cases, the Swiss people can hardly be considered as immigrants in the true sense of the word. But if they plan to work for a certain period of time in the United States in their field of interest, they often have no other choice but to take out an immigrant visa. As will be shown below, this causes certain difficulties.

II. American Visa Policy.

Originally the U.S. was an immigration country and, barring comparatively few exceptions, people arriving here were immigrants and expected to become U.S. citizens. As time went on, immigration into the U.S. has increasingly been restricted. However, the idea that foreigners seeking entry into the U.S. normally come as immigrants and prospective U.S. citizens still governs the American laws regulating the admission of foreigners to the U.S.

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The Immigration and Nationality Act contains a legal definition to this effect.

Section 214 (b) provides:

"Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under sec. 101(a)(15).."

Sec. 101 (a)(15) which regulates the visa for nonimmigrants has the same approach. It says :

"(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens.."

The significance of this negative definition is that a person who asks to enter the U.S. for a temporary purpose may be regarded as an immigrant if he does not satisfactorily show that he is a nonimmigrant falling within one of the categories as defined in sec. 101(15)(A)-(J). * Each of these categories sets forth the exact terms and conditions which limit a nonimmigrant's activities and stay.

Acceptance of employment has traditionally been considered as inconsistent with a nonimmigrant status.

For instance, the 1924 Act provided for a nonimmigrant visa to aliens who were visiting the U.S. temporarily for business or pleasure. But in accordance with a ruling of the U.S. Supreme Court in Karnuth v. Albro, 279 U.S. 231 (1929), the

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* Gordon & Rosenfield, Immigration Law and Procedure (1965 p.99)

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Regulations (22 CFR 41.25(b)) specify that "business" refers to legitimate activities of a commercial or professional character and does not include purely local employment or labor for hire.

Under this definition, representatives of foreign newspapers and other information media could not be classified as temporary visitors for business, but before 1952, they had been. It was obvious, though, that under the definition of the Supreme Court and the Regulations they were "immigrants", since they usually were working in the U.S. in a status for permanent employment. Yet they had no intention of becoming immigrants in a true sense, with the aim of acquiring U.S. citizenship. Rather, they intented to return to their homes or proceed to some other country. The 1952 Act recognized this factor and created for them and their families a special nonimmigrant category: sec.101(15)(I).

The 1952 Act recognized as nonimmigrants still another group of people coming to the U.S. temporarily to perform certain work, usually people of distinguished merit and ability to do work of an exceptional nature, such as artists and athletes, furthermore persons performing temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in the U.S., and finally industrial trainees who, as the name implies, are subject to a more or less closely defined training program.

Thus it appears that the 1952 Act did recognize the fact that there were groups of people who - although working as employees or laborers - were not immigrants in a real sense. But true to the above mentioned general philosophy behind the immigration and Nationality Act, these people were treated as

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exceptions and grouped in special carefully circumscribed categories. However, for the groups described heretofore who wish to come to the U.S. temporarily to add to their training and experience by working for a while, there is no generally applicable visa available.

The practice shows that people who want to stay a while in the U.S., but have not, or not yet, a real desire of becoming immigrants, find themselves nevertheless normally led to secure an immigrant visa, because no other visa is in effect available to them giving them similar flexibility to live and work in the U.S.

Before 1965 it was comparatively easy for a person born in Switzerland to obtain an immigrant visa. Even under the 1965 amendments of the Immigration and Nationality Act, it is not difficult for members of the professions or certain occupations to obtain an immigrant visa.

III. <u>Difficulties arising from the American Visa Policy.</u>

The nature of the American immigrant visa causes certain problems. They are :

1. <u>The problem of compulsory military service.</u>

In accordance with the presumption that every alien in the U.S. is coming here as an immigrant and prospective citizen, the present laws in the U.S. impose on any alien with an immigrant visa and even on aliens with nonimmigrant visas who have remained in the U.S. longer than one year, compulsory military service and training (sec.4(a), Universal Military Training and Service Act), a duty connected in Switzerland,

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as in other European countries, only with the duties of citizenship.

If applied indiscriminately, this would defeat the very purpose of those young men who wish to make individual plans to spend a few years in the U.S. as an addition to their training after the termination of their European education. It also would bring Swiss citizens into conflict with Swiss law which prohibits them from serving in the armed forces of a foreign power and provides for penal sanctions in case of violation of this prohibition.

The Treaty of Friendship and Commerce concluded between the U.S. and Switzerland in 1850 provides in Art. II that citizens of one of the two countries, residing or established in the other, shall be free from personal military service. But subsequent American legislation made it difficult to find practical solutions which would have been in accordance with this treaty provision. A modus vivendi has been worked out administratively. It is, however, precarious and in many respects not satisfactory. Moreover, no assurance could be obtained as of this writing that under the planned new draft legislation an at least equally acceptable modus vivendi might be accomplished.

Of interest in this connection is a note in explanation of proposed new regulations contained in the Report of the National Advisory Commission on Selective Service (on p.55), according to which the State Department has made a series of recommendations "which it believes will make current policies more equitable and bring them into closer conformity with the country's treaty arrangements".

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As far as the American-Swiss Treaty of Friendship and Commerce is concerned, a step in this direction might be seen in the Commission's recommendation to exempt all nonimmigrants from military service. Such provision, of course, could only achieve its beneficial significance, if a new more general nonimmigrant visa became available.

With respect to immigrants, the Commission recommends that they are to be exempt from military service only during one year after entry into the United States. Thereafter they must elect either to become subject to military service, or to abandon permanently the status of immigrant and the prospect of U.S. citizenship.

This recommendation impliedly makes reference to, and obviously considers the retention of Sec. 315 of the Immigration and Nationality Act which permanently bars from U.S. citizenship aliens relieved upon their application from training and service in the U.S. armed forces. While inability to acquire U.S. citizenship might not be a hardship for a young man not intending to remain in the United States, he risks being grossly handicapped in the future by the consequences which the Immigration and Nationality Act attaches to a person's ineligibility to citizenship. According to Sec. 212(a)(22) of that Act he becomes an excludable alien. Although the law permits the granting of a nonimmigrant visa to aliens ineligible to citizenship, experience has taught that that group is apt to be subjected to all sorts of unforeseeable and quite intolerable inconveniences. In one such case, a Swiss citizen was employed by a Swiss firm requiring regular business trips to the U.S. about twice a year. Because

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of his knowledge of the language and American business conditions gained through his stay in the U.S., this young man seemed to be the perfect person for these trips. But because of his status as excludable alien, he was subjected to difficulties and delays every time he entered the U.S., notwithstanding his nonimmigrant visa.

An even worse experience was encountered by two young Swiss automobile mechanics. They had entered the United States on an immigrant visa, evidently because they had been told that this was the only visa permitting them to work. They had been advised that they would have to register for military service within six months. They understood this to mean that they would not be liable to military service if they remained in the U.S. for less than six months. They worked as mechanics with a firm in Chicago for 5 1/2 months. They were careful to leave the U.S. before the expiration of six months, without having registered for military service. They went to work in Canada. Before returning home, they planned a trip to Mexico via the west coast of the U.S. They applied to the U.S. Consulate in Vancouver for a tourist visa and were told that they could never be admitted to the U.S., not even as tourists, because they had refused military service. These two young men are unable to understand how they can be adjudged guilty of refusal of military service since they were not registered. It is obvious that they did not intend to be immigrants and that they would and certainly should have applied for another visa, if such a visa had practically been available.

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2. The problem of the so-called "Brain-Drain".

It is well known that the U.S., because of her highly developed facilities in all fields of science and her industries, exercises a great deal of attraction on young scientists, engineers and physicians of other countries, and in this respect the Swiss are no exception. Most of them consider several years of research or practical work in the U.S. not only as desirable, but essential for their future careers. As a rule, they have no difficulties in arranging for such a stay. However, if they do not qualify for one of the specific programs mentioned in Section 101(a)(15)(J), or do not wish to subject themselves to the regulations connected with such programs, but prefer to work out plans of their own, they have to secure an immigrant visa.

The problem has also been noted by American universities. This appears from the testimony given on March 10, 1967, by Mr. David Dickinson Henry, Director of the International Office at Harvard University, before the Immigration and Naturalization Subcommittee of the Senate Judiciary Committee. There it was said :

> "But existing immigration laws make it difficult for colleges to employ foreign-born scholars who occasionally prove to be the persons best qualified to teach these subjects.
>
> We are reluctant to suggest that every privately supported post-doctoral scholar or visiting professor apply for admission to the United States as a Third Preference immigrant. In most cases both we and they fully expect that they will return to their native lands. On the other hand, unless they have freely assented to a prior arrangement that requires their repatriation, or unless they are supported substantially by government funds, we believe the "J" visa is inappropriate.
>
> In short, we need a temporary visa for these people.."

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Similarly, American business firms which wish to offer employment to foreign scientists, regularly advise them to secure an immigrant visa, since no general nonimmigrant visa is apparently available.

Some scientists might shy away from the rather cumbersome process of securing an immigrant visa and thus forego their chances to come to the U.S. For others, this might create a psychological and factual situation inimical to their return which otherwise could normally have been expected. Yet, it would hardly seem to be in harmony with the idea of free international intercourse to place these people in a situation based on the assumption that they would not return to their country.

In the interest of international cooperation, it seems therefore desirable to have available a general flexible nonimmigrant visa which would not be too cumbersome to secure and at the same time, would not give its holders a feeling of permanency, as the possession of an immigrant visa usually does.

3. Regard for the beneficial purpose of the immigrant visa.

The granting of an immigrant visa is generally looked upon as a special benefit available to people who wish to start a new life in the U.S. They often are persons driven from their homeland for political or other reasons, or who left because of poor living conditions. Since, for considerations of national interest the U.S. had to restrict immigration, any use of an immigrant visa by persons not really intending to

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immigrate, diminishes the chances of others who might be in great need of such a visa.

IV. Possible solutions.

A free exchange of knowledge and experience between the U.S. and Switzerland certainly is in the best interest of both countries. Although vastly different in size and natural resources, both nations have in common wide international interests of political, economic and cultural nature. Americans will very probably find it beneficial if many persons in Swiss business and cultural life were familiar with the U.S. and her people, a familiarity gained through previous visits and work in the U.S. Especially the modern developments in the fields of science have made a free exchange of ideas indispensable, and this is only possible through constant close contacts and cooperation between nations. International travel has now become comparatively easy and within reach of more people than ever before. But American laws on which the visa policy is based still adhere to a psychology that people entering the U.S. ought to come in as immigrants, and that nonimmigrant foreign residents ought to be exceptions. This image no longer quite fits into today's realities.

A solution, at least for the problems discussed herein, might probably lie in a visa policy which treats the admission of nonimmigrants not as an exception but rather as a regular occurence. It could perhaps be accomplished by the creation of a general nonimmigrant visa or by the liberalization of an already existing visa (for instance of H(ii) concerning the performance of temporary services or labor). Such a visa should not place the

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recipient in a particular category or program but permit him flexibility similar to that of an immigrant visa, subject to customary governmental controls. The conditions surrounding such a visa should not be made too burdensome, in order not to discourage applicants from availing themselves of this new visa and select an immigrant visa instead.

On the other hand, the Swiss authorities would do their best to keep Swiss citizens who do not really intend to immigrate into the U.S. from applying for an immigrant visa. It would be desirable if the U.S. Consular missions advising visa seekers would do the same.

It may be hoped that on this basis also the very cumbersome problem of military service would become largely irrelevant.

Embassy of Switzerland
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