June 2, 1988

DEPARTMENT OF STATE
BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] H[redacted] W[redacted]

The Board of Appellate Review, in a decision rendered on April 19, 1988, reversed the administrative determination made by the Department of State on August 14, 1986, that appellant, H[redacted] H[redacted] W[redacted], expatriated himself on May 12, 1970, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Poland upon his own application. 1/ We concluded that the Department had not satisfied its burden of proving by a preponderance of the evidence that the expatriating act was performed with the necessary intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

On May 23, 1988, the Department moved for reconsideration of the Board's decision, pursuant to 22 CFR 7.10, on the ground that a preponderance of all the evidence in the record supports a finding of loss of nationality. In particular, it is stated, that the Board failed to give proper weight to appellant's "statements and actions completed in 1985" thereby "disregarding

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1/ In 1970 when appellant obtained Polish citizenship, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, read in pertinent part as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653, (Nov. 14, 1986), 100 Stat. 3655, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

the appellant's wish to relinquish his citizenship." In that connection, the Department attached to its motion for reconsideration a copy of a declassified secret telegram of the American Embassy at Warsaw, Poland, dated June 16, 1986, regarding certain statements appellant purportedly made when applying for a visa to the United States, and a video cassette of appellant's appearance on December 9, 1986, on a television program entitled "1986", "to demonstrate his overall attitude."

It is clear from Vance v. Terrazas, supra, and Afroyim v. Rusk, supra, that a person's will or intent to relinquish citizenship is determined as of the time the act of expatriation was performed and as ascertained from his words and conduct. In the instant case, it is the Department's burden to prove that appellant's naturalization in Poland on May 12, 1970, was accompanied by an intent to relinquish his United States citizenship. The record before us did not support such a finding.

We consider the declassified secret telegram and video cassette, attached to the motion for reconsideration, to be inadmissible. This material was available to the Department prior to the submission of the Department's case record to the Board in 1987, and could have been included in the case record. The telegram and video cassette can scarcely be considered newly discovered evidence, that could not, by the use of due diligence, have been discovered prior to the hearing on the appeal. Moreover, it is readily apparent from the nature of the telegram and the video cassette that the material adds little of substantive value, if any, to the record of proceedings before the Board on the question of appellant's intent to relinquish citizenship at the time he acquired Polish nationality in 1970.

The Department also believes that the Board misapprehended the law. The Board, it is said, "appears to be applying a more stringent standard than that which is required by applicable case law" to prove intent to relinquish United States citizenship. We see no basis for that assertion. Vance v. Terrazas, supra, requires that in proving expatriation, an expatriating act and an intent to relinquish citizenship be established by a preponderance of the evidence. As the Supreme Court stated therein, this is a heavy burden that the government must carry. The trier of fact, the court also pointed out, must in the end conclude, based on all the evidence, that the government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.

Having examined carefully the Department's motion for reconsideration, we are of the view that the motion does not raise any facts or points of law that the Board has overlooked or misapprehended in reaching its decision, or any new matters that would warrant reconsideration of its decision of April 19, 1988.

Accordingly, the Department's motion for reconsideration is denied.

Alan G. James, Chairman

Edward G. Misey, Member

Mary Elizabeth Hoinkes, Member