DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E J M

This an appeal from an administrative determination of the Department of State that E J M expatriated himself on July 25, 1986, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Brazil upon his own application. 1/

The issue in this appeal is whether appellant's naturalization was accompanied by an intent to relinquish his United States citizenship. For the reasons given below, we conclude that the Department has satisfied its burden of proving that he performed the expatriating act with such intent. Accordingly, we affirm the Department's determination of loss of United States nationality.

I

Appellant, E J M , acquired United States citizenship by virtue of his birth at [redacted] Indiana on [redacted].

In 1970, appellant's parents, both United States citizens, took him to Brazil where he has since resided. According to appellant, he became interested in flying at an early age, and in 1979 became licensed as a private pilot in Brazil. During a visit to the United States in 1984, he allegedly obtained a FAA (Federal Aviation Administration) certificate as a private pilot which, he said, was not valid for employment.

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1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides as follows:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
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> > (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; or ...

At the time, appellant stated he had many flying hours to his credit and was engaged to a young Brazilian studying dentistry. It became apparent to him that in order to marry and support a family he would have to become a licensed commercial air pilot. To be a commercial pilot in Brazil, appellant was required under the Brazilian Air Code to hold Brazilian citizenship status.

Sometime in 1985, appellant applied to the Brazilian Minister of Justice for naturalization by executing an application form in which he expressed his desire to acquire Brazilian nationality and renounce his present nationality. By Ordinance No. 326 of May 22, 1986, the Minister of Justice granted naturalization to appellant pursuant to article 145, II, (b), (3) of the Federal Constitution and in accordance with article III of Law No. 6,815 of August 19, 1980, as amended by Law No. 6,964 of December 9, 1981. 2/

A certificate of Brazilian naturalization was issued by the Ministry of Justice at Brasilia on June 13, 1986, and presented to appellant on July 25, 1986, before a district judge at Bauru. On the reverse of the certificate of naturalization, the district judge certified:

> According to the document drawn up on this date, the person referred to herein took an oath to fulfill faithfully the obligation of a Brazilian citizen, demonstrated that he is able to read and write Portuguese by reading and transcribing articles from the Federal Constitution, and renounced, for all purposes, his previous nationality. 3/

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2/ Certificate of Naturalization, Ministry of Justice, Federal Department of Justice, Brasilia, June 13, 1986. English translation, Division of Language Services, Department of State, LS No. 128424, Portuguese (1989).

3/ Id.

Article 128(1) of Law No. 6,815 of August 19, 1980, as amended by Law No. 6,964 of December 9, 1981, prescribes that at the naturalization ceremony the naturalized citizen must:

> I. Demonstrate that he can read and write Portuguese, according to his circumstances, by reading passages from the Federal Constitution;

In September 1986, appellant married his Brazilian fiancee and commenced working as a commercial pilot. He also acquired a Brazilian passport.

In February 1987, appellant visited the United States Consulate General at Sao Paulo to apply for a nonimmigrant visa to the United States. He informed the consular officer that he held Brazilian citizenship. At the consular officer's request, he completed a citizenship questionnaire to facilitate determination of his citizenship status. He was also advised to apply for a new United States passport pending a decision by the Department on his citizenship. On March 19, 1987, the Consulate General issued appellant a new passport valid for six months pending the Department's decision in his case.

Thereafter, the consular officer prepared a certificate of loss of United States nationality in appellant's name in compliance with section 358 of the Act. 4/ The consular officer certified that appellant acquired United States citizenship by virtue of his birth in the United States, acquired Brazilian nationality through naturalization upon his own application, and thereby expatriated himself under the provisions of section 349(a)(1) of the Act.

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3/ (cont'd.)

II. Declare expressly that he renounces his previous citizenship;

III. Undertake a commitment duly to fulfill the duties of a Brazilian citizen.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the

In forwarding the certificate of loss of nationality to the Department for its consideration, the Consulate General reported:

> Mr. M stated that he is a commercial pilot by profession, and that he applied for naturalization as a Brazilian citizen because he could not obtain a Brazilian pilot's license to practice his profession here unless he held Brazilian nationality. He stated further that he inquired at this office in approximately 1984 about the possible consequences naturalization as a Brazilian citizen could have for his U.S. citizenship. He said he was informed that he would not lose his U.S. citizenship if he had a 'good enough reason' for becoming a Brazilian citizen. He considered his need to pursue his profession here a good enough reason.

The Department approved the certificate of loss of nationality on July 16, 1987, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board. The Consulate General forwarded to appellant a copy of the approved certificate.

This appeal followed. Appellant contends that he did not intend to voluntarily renounce or relinquish his United States citizenship. He attributes his renunciation of citizenship to the requirement of Brazilian law requiring a declaration of renunciation as a condition to obtaining Brazilian citizenship, and to the fact that he was obliged to acquire Brazilian citizenship "in order to practice my profession as a commerical aircraft pilot in Brazil."

II

Section 349(a)(1) of the Act provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state with the intention of relinquishing United States nationality. There is no dispute that appellant sought and obtained Brazilian

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4/ (cont'd.)

> diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

citizenship. The Brazilian authorities also confirmed his naturalization.

Under section 349(b) of the Act, a person who performs a statutory act of expatriation is presumed to have done so voluntarily. 5/ Such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act was not performed voluntarily.

In his citizenship questionnaire, appellant stated that in order to receive a commercial pilot's license in Brazil he had to have Brazilian citizenship status. He also stated in his notice of appeal that the renunciation of his United States citizenship was not his desire but was "due to circumstances of economic survival." Appellant, however, did not submit any evidence on the matter nor does he contend that his act of naturalization was done under duress. In a submission of January 5, 1989, to the Board, he said that he "acted voluntarily" to obtain Brazilian citizenship.

It is apparent that appellant chose to become a commercial pilot in Brazil and pursue a career in that field for personal and economic reasons. The compulsion he thus felt to obtain Brazilian citizenship in order to be licensed as a commercial pilot was due to his own choice. There is no evidence that he made any effort to act in a manner otherwise than he chose. The opportunity to make a decision based on personal choice is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971). Admittedly, appellant was confronted with a

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5/ Section 349(b) of the Immigration and Nationality Act, 8 U.S.C. 1481(b), reads as follows:

> (b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

difficult choice of electing between obtaining naturalization and pursuing a course of action that would not require him to jeopardize his United States citizenship. Once having exercised his choice, however, he may not be relieved from the consequences flowing from it.

It may be observed in this connection that, for a defense of duress to prevail, it must be shown that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course of action against his fixed will, intent, and efforts to act otherwise. Doreau v. Marshall, 170 F.2d 721, 724 (3rd Cir. 1948). In cases involving so-called economic duress, compelling circumstances involving a matter of survival must be shown in order to support a finding of involuntariness. Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956); Insogna v. Dulles, 116 F.Supp. 473 (D.D.C. 1953). The alleged economic circumstances confronting appellant do not present an extraordinary situation involving his survival or show that he was faced with a dire economic situation. The explanations given by appellant would not support a finding of duress as a matter of law.

As noted, appellant bears the burden of rebutting, by a preponderance of the evidence, the statutory presumption that his naturalization was voluntary. Here, appellant has not attempted to rebut the presumption that he acted of his own free will, and we conclude, therefore, that his naturalization was done voluntarily.

III

Although appellant conceded that he voluntarily obtained naturalization in Brazil, he maintained that he did not perform the act with the intention of relinquishing his United States citizenship. He claimed that his intention was "rather to obtain dual citizenship, as children born in Brazil of American citizens often possess," and believed this would have to be done through an appeal and a decision by the Board.

Appellant is mistaken in his belief that he could become a dual national as a consequence of his naturalization in Brazil. By obtaining naturalization, he performed a statutory act of expatriation under United States law with the result that he placed his United States citizenship in jeopardy.

Appellant is also mistaken in his belief that he would obtain dual nationality status by taking an appeal to the Board. As previously noted, he alleged that sometime in 1984, before applying for naturalization, he consulted at the Consulate General, and was informed that, if he had a "good enough reason" for obtaining naturalization, which he believed

he had, he would not lose his United States citizenship. It thus appears to have been appellant's expectation that the Board on appeal would find that he had a good enough reason for his naturalization and conclude that he did not expatriate himself.

There is, however, no evidence of record to support appellant's contention that he was advised by the Consulate General that he would not lose his United States citizenship if he had a good enough reason for becoming a Brazilian national. The Consulate General, in response to the Department's request for information about appellant's alleged consultation, stated that, while it had no reason to doubt appellant's statement that he visited the office in 1984 to inquire about the possible effect Brazilian citizenship might have on his United States citizenship, the records contain no reference to such a visit.

The question remains whether appellant's naturalization was performed with the intention of relinquishing his United States citizenship. It is settled that, even though a citizen voluntarily performs a statutory expatriating act, loss of citizenship will not ensue unless it is proved that the citizen intended to relinquish his United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). The government must prove a party's intent by a preponderance of the evidence. Vance v. Terrazas, supra, at 267. Intent may be proved by a persons words or found as a fair inference from proven conduct. Id., at 260.

The intent to relinquish citizenship that the government must prove is the citizen's intent at the time of the performance of the statutory act of expatriation. The person's own words or conduct at the time the expatriating act occurred are to be looked at in determining his or her intent. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). It is recognized, however, that a party's specific intent to relinquish citizenship "rarely will be established by direct evidence", but that circumstantial evidence surrounding the performance of a voluntary act of expatriation may establish the requisite intent. Terrazas v. Haig, supra, at 288. In the case before the Board, the intent that the government must prove by a preponderance of the evidence is appellant's intent at the time he voluntarily obtained naturalization in Brazil.

Obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish citizenship. It is not, however, conclusive evidence of the assent of the citizen. The Supreme Court stated in Vance v. Terrazas, supra, at 261:

> ...it would be inconsistent with Afroyim to treat the expatriating

> acts specified in sec. 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course,' any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

In cases, where, as in the instant case, a United States citizen knowingly, intelligently, and voluntarily obtains naturalization in a foreign state and simultaneously renounces his citizenship, the evidence of intent to relinquish citizenship becomes more compelling. The voluntary performance of the expatriating act in such circumstances demonstrates an intent to relinquish United States nationality, provided there are no other factors that would justify a different result. In Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985), the court of appeals said that "the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to relinquish United States citizenship." The court also recognized that the totality of the evidence should be weighed in reaching a conclusion as to the citizen's intent. Similarly, in Meretsky v. U.S. Department of Justice, et al., No. 86-5184, memorandum op. (D.C. Cir. 1987), plaintiff took an oath of allegiance to Canada that explicitly required him to renounce allegiance and fidelity to the United States. The court adopted the reasoning in Richards, supra, to the effect that a United States citizen's free choice to renounce his citizenship results in loss of that citizenship. It was the court's conclusion that the oath he took renounced his United States citizenship "in no uncertain terms."

As we have seen, appellant obtained naturalization in Brazil and, in the process, renounced his previous nationality. His certificate of nationality bears a statement, signed by a local district judge, reciting that appellant swore to fulfill the duties of a Brazilian citizen, demonstrated that he could read and write Portuguese, and renounced for all purposes his previous nationality. Such conduct, in our view, is highly probative of the requisite intent to relinquish citizenship.

Appellant, however, disputes that there was a naturalization ceremony for the delivery of the naturalization certificate or that he swore at such ceremony to fulfill his duties as a Brazilian citizen and renounce his former nationality. In a submission to the Board, he stated:

> 1985 - I applied for Brazilian citizenship by merely answering a form of questions, as it became apparent that in order to marry and support a family I would have to continue in the only field in which I was trained and in which I was happy, on a commercial basis. The application form for citizenship included a statement that I renounce my previous citizenship.
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> 1986 - The process of application took nearly a year and was completed in June. Contrary to former times, no ceremony took place, nor any oath of allegiance of any kind was made verbally or in writing at the moment of presentation to me of the certificate of acceptance and naturalization.

The record shows that under prevailing Brazilian naturalization procedures once an application for naturalization is approved and granted, and the naturalization order is published in the official government gazette, the applicant has one year in which to appear before a federal judge to receive the certificate of naturalization. On this occasion, the applicant must read some passages from the Federal Constitution to demonstrate his knowledge of the Portuguese language, solemnly swear to fulfill the duties of a Brazilian citizen, and renounce his former nationality. 6/ The judge then dates and signs a statement on the reverse of the certificate of naturalization certifying the applicant's compliance with such requirements. This is the effective date of naturalization. 7/

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6/ See note 3, supra.

7/ The United States Embassy at Brasilia, on June 2, 1989, informed the Department that it was aware of no instances or conditions under which Brazilian naturalization procedures are waived or not followed.

On the evidence of record, we must accept as fact that on July 25, 1986, appellant appeared before a district judge at Bauru, made a declaration renouncing his previous nationality, and complied with the other requirements of Brazilian nationality law. These proceedings, as indicated above, were recorded and signed by the district judge on the reverse of the certificate of naturalization that was delivered to appellant. We are unable to conclude that the proceedings were not as described on the reverse of the certificate of naturalization on the basis of appellant's unsupported allegations that no ceremony took place nor "any oath of allegiance of any kind was made" at the presentation "of the certificate of acceptance and naturalization". It has been long settled that the presumption of regularity that attaches to the public acts of United States officials also extends to the public acts of foreign officials. 8/

Notwithstanding appellant's version of the presentation of his certificate of naturalization, it is clear that he renounced his United States citizenship. In his application for naturalization, he declared that he intended to acquire Brazilian citizenship and to renounce his present nationality. Moreover, the judge's certification on the certificate of naturalization states that appellant actually renounced for all purposes his previous citizenship and swore to faithfully fulfill his duties as a Brazilian citizen. These expressions of renunciation are inconsistent with an intent to retain United States citizenship. Renouncing United States citizenship before a foreign official in the course of performing a statutory expatriating act plainly is an act in "derogation of allegiance to this country." 42 Op. Atty. Gen., 397, 400 (1969). It leaves "no room for ambiguity" as to the intent of the citizen. United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975); aff'd 502 F.2d 809 (2nd Cir. 1976); cert. denied 429 U.S. 823 (1976). In our view,

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8/ See United States v. King, 3 How. 773, 786 (1845):

> It is inconsistent with the comity due to the officers of a foreign government to impute to them fraud where their conduct has not been questioned by the authority under which they were acting and to which they were responsible...and as regards the interests of others, the acts of the officer in line of his duty will prima facie be considered as performed honestly and in good faith.

appellant's renunciation manifests his intent to surrender his United States citizenship when he obtained naturalization in Brazil. The record fails to disclose any other factors that would warrant a contrary finding of lack of intent to relinquish citizenship.

Although the evidence is compelling that it was appellant's intent to relinquish United States nationality, we must be satisfied that appellant knowingly and intelligently, as well as voluntarily, obtained naturalization in Brazil and swore an oath of allegiance that included renunciation of his United States citizenship. From the evidence of record, it is apparent that he acted with full awareness of the legal consequences of his act. He was 25 years old when he obtained naturalization, fluent in Portugese, and evidently understood precisely what he would have to do to obtain Brazilian citizenship. By his own admissions, he knew he would put his United States citizenship at risk if he obtained naturalization.

We do not doubt that appellant wanted to retain his United States citizenship and that his motive in obtaining Brazilian citizenship was to pursue a career as a commercial pilot. The motive with which an act is done is for the most part immaterial. An expatriating act is not excused because it is done with the best of motives. The petitioner in Richards v. Secretary of State, supra, made essentially the same argument as appellant here. The court held it to be without legal merit:

> ...a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.
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> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship.

> If a citizen makes that choice and carries it out, the choice must be given effect.

F.2d at 1421, 1422.

It is a person's conduct at the time the expatriating act occurred that is to be looked at in determining his or her intent to relinquish citizenship. The assertions made by appellant that he did not intend to relinquish his United States citizenship are contravened by his voluntarily applying for naturalization in Brazil, by declaring a desire to renounce his United States citizenship on his application for naturalization, by actually renouncing his United States citizenship before a judge at the time his certificate of naturalization was presented to him, and by taking an oath to fulfill the duties of a Brazilian citizen. We are persuaded that the record supports a finding that appellant's naturalization was accompanied by an intent to relinquish his United States citizenship.

Taking into account the facts and circumstances surrounding appellant's naturalization in Brazil, we are of the opinion that appellant's own words and conduct at the time establish the requisite intent to give up his United States citizenship. In our judgment, the Department has satisfed its burden of proof by a preponderance of the evidence that the expatriating act was performed with an intent to relinquish citizenship.

IV

Upon consideration of the foregoing and on the basis of the record before the Board, we conclude that appellant expatriated himself by obtaining naturalization in Brazil upon his own application, and affirm the Department's determination of loss of United States nationality.

Alan G. James, Chairman

Edward G. Misey, Member

Warren E. Hewitt, Member