DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A M S

The Department of State made a determination on June 12, 1987 that A M S expatriated herself on November 15, 1984 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/ A timely appeal was filed through counsel.

There is one issue to be decied: whether appellant intended to relinquish her United States nationality when she made a formal declaration of allegiance to Mexico. For the reasons that follow, it is our conclusion that the Department of State has not met its burden of proving that appellant possessed the requisite intent. Accordingly, we reverse the Department's holding of loss of nationality.

I

Appellant, A. M S , acquired United States citizenship by birth of an American citizen father in Mexico on [redacted]. 2/ By virtue of her birth in Mexico, she also

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1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), provides that:

> 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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> . . . .
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> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or ...

2/ Appellant acquired United States nationality under the provisions of section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1401(a)(7), nowsection 301(g), 8 U.S.C. 1401(g).

acquired the nationality of that state at birth, and so enjoyed the status of a dual national. The Embassy executed a report of birth on behalf of appellant in 1968, and issued her a card of identity in 1973 and a passport in 1978.

In June 1983 the Embassy issued her a second passport of limited validity, pending advice from the Mexican authorities whether she had applied for and obtained a certificate of Mexican nationality (CMN). 3/ Shortly afterward, the Mexican authorities informed the Embassy that in 1971 while appellant was a minor her parents took an oath of allegiance on her behalf and obtained a CMN for her. In August 1983, appellant informed the Embassy by telephone that since she had a United States passport valid until June 1984 she would not then decide which citizenship she would choose. Accordingly, she was informed that when she returned to the Embassy in 1984, another inquiry would be made of the Mexican authorities. In May 1984, in reply to a further Embassy inquiry, the Mexican authorities again stated that appellant had applied for a CMN through her parents, but had not confirmed her Mexican citizenship. "Case closed on this date, if she comes trying to get her passport extended we will send another Dip. Note. srd.", reads an entry in the Embassy's record of its dealings with appellant.

Later in May 1984, appellant, her father and her brother visited the Embassy and spoke to a consular officer about dual citizenship. The record made by the consular officer of that discussion reads as follows:

> May 31, 1984 A , son of P came to the Embassy to ask questions concerning dual citizenship. A , his sister also took part in the meeting. A said that he may take an oath of allegiance to Mexico but that he did not want to lose his US citizenship. He was advised of US law and attitude along

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3/ The government of Mexico tolerates dual nationality until an individual reaches the age of eighteen, freely issuing a Mexican passport to enter and re-enter Mexico as a Mexican citizen. Upon attaining the age of eighteen Mexican law requires that a dual national elect either Mexican or his other nationality. If such person wishes to exercise the rights of Mexican nationality, he must possess a certificate of Mexican nationality, application for which must be made one year after his eighteenth birthday. To obtain a certificate of Mexican nationality the applicant must expressly renounce previous nationality and make a declaration of allegiance to Mexico.

> with Supreme Court decisions. He was given our info sheet on the above and it was pointed out that he could do nothing in advance that would guarantee he would not lose his US citizenship. He asked to make a sworn statement, the original of which was given to him. A copy should be in our files. gjs.

On that occasion, appellant executed an affidavit which reads as follows:

> I would like to state and certify that if in the future before the Mexican State Department (Goberna-cion) I may have to renounce with signature my U.S. citizenship in order to be able to stay in Mexico in my present situation. This is not my intention, I am American, I'm proud to be American, and I want to stay American until the day I die.

The Embassy extended appellant's passport to full validity (10 years) in October 1984. In January 1985, the Embassy inquired again of the Mexican authorities whether a CMN had been issued to appellant. In February 1985, the Department of Foreign Affairs sent the Embassy a diplomatic note, stating that on November 15, 1984 appellant had applied for and on the same date was issued a CMN. The note enclosed a copy of the CMN that was issued to appellant and her application therefor. In the application appellant expressly renounced United States nationality and all allegiance and fidelity to the United States. Further, she declared adherence, obedience and submission to the laws and authorities of Mexico.

Shortly after receiving the diplomatic note, the Embassy wrote to appellant to inform her that by making a formal declaration of allegiance to a foreign state she might have expatriated herself. The Embassy stated that it wished to learn whether appellant intended to relinquish her United States nationality when she declared her allegiance to Mexico. She was therefore asked to complete a questionnaire to facilitate determination of her citizenship status, and invited to discuss the matter with a consular officer. Appellant completed the questionnaire on March 20, 1985 and, for information purposes, filled out a form for registration as a citizen. On April 1, 1985, as required by law, a consular officer executed a

certificate of loss of nationality in appellant's name. 4/ The officer certified that appellant acquired United States nationality by birth in Mexico of a United States citizen father; that she also acquired the nationality of Mexico by birth in that state; that she made a formal declaration of allegiance to a foreign state, to wit Mexico; and thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act. In forwarding the certificate to the Department, the Embassy recommended that the certificate not be approved, expressing the view that appellant lacked the requisite intent to relinquish her United States nationality.

For reasons not disclosed in the record, The Department took no action in the case for more than two years. Finally, on June 12, 1987, the Department approved the certificate, approval being an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. An appeal was filed through counsel in May 1988. The Board heard oral argument in April 1989. 5/

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 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.

5/ After oral argument, a delay of several months ensued while counsel for appellant and counsel for the Department sought additional information regarding the facts and circumstances surrounding appellant's visit in May 1984 to the Embassy where she executed an affidavit disclaiming intention to relinquish United States citizenship, if she were at a future date to make a renunciation of United States citizenship before the Mexican authorities.

II

Section 349(a)(2) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily making a formal renunciation of allegiance to a foreign state with the intention of relinquishing United States nationality.

It is undisputed that appellant duly made a formal declaration of allegiance to Mexico, and thus brought herself within the purview of the statute. Furthermore, at the hearing appellant's counsel conceded that his client had acted voluntarily when she made a formal declaration of allegiance to Mexico. 6/ The sole issue to be determined therefore is whether appellant intended to relinquish her United States nationality.

The government bears the burden of proving that one who performed a statutory expatriative act did so with an intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. 252, 262 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The evidentiary standard is a preponderance of the evidence. Id. at 267. Proof by a preponderance is proof which would lead the trier of fact to find that the existence of the contested fact is more probable than its non-existence. McCormick on Evidence, 3rd Ed., section 339. It is the citizen-claimant's intent at the time he performed the expatriative act that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Any of the enumerated statutory expatriative acts may be highly persuasive evidence of an intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), Black, J., concurring. But, the Supreme Court said, it would be inconsistent with Afroyim v. Rusk, 387 U.S. 252 (1967) to treat any of the statutory expatriative acts "as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen." Vance v. Terrazas, 444 U.S. at 261.

In cases, where, as in the instant appeal, a citizen expressly renounces United States nationality while making a declaration of allegiance to a foreign state, the courts have held that such words constitute very strong evidence of an intent to relinquish United States citizenship. Absent persuasive counterbalancing factors, the evidence of a

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6/ Transcript of Hearing in the Matter of A M S , Board of Appellate Review, April 18, 1989 (hereafter referred to as "TR"). TR 60.

renunciatory intent expressed in the party's own words will support a finding of an intent to relinquish citizenship.

In Terrazas v. Haig, supra, the plaintiff like appellant in the case before the Board, made a declaration of allegiance to Mexico and expressly renounced his United States citizenship. The court indicated that the plaintiff's renunciatory statement, standing alone, would not support a finding of intent to relinquish citizenship, but found "abundant evidence" of intent to relinquish in a number of other factors.

Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985), involved the naturalization in Canada of a United States citizen who swore an oath of allegiance and made a concomitant declaration in effect renouncing his United States citizenship. The Court of Appeals for the Ninth Circuit agreed with the district court 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 renounce United States citizenship." 753 F.2d at 1421. Nonetheless, the court recognized that the totality of the evidence should be weighed, but concluded that: "We also believe that there are no factors here that would justify a different result." Id.

In the same vein as Richards, is Meretsky v. Department of Justice et al., memorandum opinion, No. 86-5184 (D.C. Cir. 1987). There the petitioner obtained naturalization in Canada and swore an oath of allegiance that included a declaration renouncing all other allegiance. In affirming the decision of the district court, the court of appeals declared that the oath the petitioner took renounced United States citizenship "in no uncertain terms." But it should be noted that the court also took into account other evidence which it considered contradicted the petitioner's allegations that he always considered himself to be a United States citizen.

See also United States v. Matheson, 400 F.Supp. 1241, 1245 (S.D.N.Y. 1975), aff'd. 532 F.2d 809 (2nd Cir. 1976); cert. denied 429 U.S. 823 (176). "...an oath expressly renouncing United States citizenship...would leave no room for ambiguity as to the intent of the applicant." King v. Rogers, 463 F.2d 1188 (9th Cir. 1972) is in similiar vein.

The leading cases make it clear that in order to find an intent to relinquish United States citizenship, the trier of fact must also conclude that the individual acted knowingly and intelligently and that there are no other factors that would justify a different result.

No single act, no particular set of words, alone is sufficient to establish intent to relinquish citizenship. As the Supreme Court has made quite clear, even if the actor fails

to prove that the expatriative act was involuntary, "the question remains whether on all the evidence the Government has satisfied its burden of proof....Vance v. Terrazas, 444 U.S. at 270. (Emphasis added).

As the Department submits in its brief, two factors bear on the issue of appellant's intent at the time she took the oath of allegiance to Mexico. These are her knowledge and understanding of the consequences of her act, and her execution of a pre-oath affidavit in which she stated her intention to retain U.S. citizenship.

We agree that appellant knowingly and intelligently made an oath of allegiance to Mexico. The facts of the case show plainly that she did so. But the essential question is whether, despite the fact that she acted wittingly and understood that there were risks to her United States citizenship in declaring allegiance to Mexico, she intended to relinquish her United States nationality.

The Department notes that appellant contends she took measures to safeguard her citizenship, but asserts that "her showing in this regard is limited to her pre-oath affidavit disclaiming an intention to relinquish United States citizenship." Appellant was informed at the time she executed the affidavit, the Department points out, that execution of the affidavit would not guarantee retention of citizenship. It is therefore the Department's contention that: "Given this understanding, her reliance on the affidavit as proof of her concerted effort to safeguard her citizenship is not persuasive. Nor has she augmented this showing in any other way that would clearly demonstrate her attachment to and identification with the United States." The Department adds that: "contrary to her assertions, there is no evidence of record that appellant used her U.S. passport after taking the oath."

In assessing the weight to be given to appellant's pre-oath to Mexico affidavit, we must consider evidence from three sources: the contemporary evidence; appellant's own testimony at the hearing in April 1989; and post-hearing declarations made by the consular officer concerned, appellant's father and her brother.

Appellant's affidavit of May 31, 1984 aside, the contemporary evidence is meager. As noted above, the consular officer's record of the May 31, 1984 meeting at the Embassy mentions appellant only in passing, noting simply that she participated in a meeting at which her brother, accompanied by their father, discussed the implications of dual nationality.

The record says nothing about appellant's making an affidavit, merely that her brother made one. 7/

At the hearing, appellant was examined and cross examined about what transpired on May 31, 1984. On cross examination, counsel for the Department asked appellant "How did you understand that conversation?" Appellant replied: "I understood that I could protect myself of losing my citizenship by writing this paper [the affidavit] and before I had to fill that paper [application for a CMN]. What I understood is that it was not 100 percent sure, but with this I could retain my citizenship. But that he thought there would be no problem." 8/ She also said on cross examination that she thought it was she who brought up the idea of making an affidavit stating her intention to retain United States citizenship and that the consular officer did not state specifically what evidential weight could be given to her affidavit.

Appellant's brother's declaration, dated August 23, 1989, states in pertinent part that:

> ...
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> 3. The Consul told us at that time [on May 31, 1984] that there was no guarantee we could keep U.S. citizenship if the Mexican government asked us to sign an oath of allegiance to Mexico, but that the most important thing was our intent to keep our U.S. citizenship, especially if we did not wish to voluntarily renounce our U.S. citizenship. He then said that he did not think we would have any problem.
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> 4. My sister and I wrote statements that we wished to declare our allegiance to the United States and filed the statements with the Consul after signing them.

7/ The consular officer noted at the time that he gave appellant's brother a copy of "our info sheet on [dual nationality]," thus implying that appellant too was made aware of the information contained therein. That document has not been identified by the Department and is not included in the record before the Board. It would therefore be impermissible to speculate about its contents.

8/ TR 31.

Appellant's father made these statements in the declaration he executed on August 23, 1989:

> .....
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> 5. The Consul who interviewed my children and me informed us that, although there was no guarantee that they would automatically retain their U.S. citizenship by making a declaration of allegiance, especially if they thereafter retained their Mexican nationality, the key issue in citizenship cases was whether an individual intended to renounce U.S. citizenship . He said that he did not think A and A would have any problem at all in relation to their losing U.S. citizenship.
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> 6. After speaking with the Consul, and at his suggestion, my children made formal declarations of their allegiance to the U.S. and their desire to remain U.S. citizens as a concrete way of demonstrating their intent not to renounce American citizenship.
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> 7. My daughter then drafted the statement....

The consular officer who talked to the S family on May 31, 1984, executed an affidavit on May 9, 1989, in which he gave his recollection of the discussion. Appellant's father asked most of the questions; appellant occasionally asked one. The Embassy handled many such cases around 1984, the consular officer observed, and he could state "with a high degree of certainty" that the family was told about the provisions of Mexican law pertaining to dual nationals, including the requirement that dual nationals who opted for Mexican nationality would have to make an oath of allegiance renouncing other citizenship. The consular officer was also sure that he told appellant about Mexican procedures to notify the United States Embassy when a dual national had made the oath of allegiance to Mexico; and about the U.S. procedures for handling potential loss of nationality cases. The consular officer's account of what he was certain he told appellant continues as follows:

> ...
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> D. That U.S. citizenship laws state that the taking of the oath before a foreign official, although an indication of intent, is not by itself sufficient cause for a

finding of loss. Other actions taken contemporaneously with the taking of the oath, which would indicate (1) if the oath was taken only to obtain a benefit from the foreign government or (2) if the person taking the oath intended to renounce his/her US citizenship, would be taken into consideration in determining the loss;

E. That the Department had been consistently refusing to accept CLNs in cases where there was clear evidence that it was not the intention of the person taking the oath to give up their American citizenship;

F. That taking of the oath should be considered a serious step and that there was no action one could take in advance of taking the oath which would guarantee retention of U.S. citizenship.

3... It was evident their purpose in asking for the conference was that they wanted to retain the benefits of Mexican citizenship and that it was their hope that they could do this and retain their American citizenship. At the time of the conference it was clear that they did not wish to lose their U.S. citizenship.

4. That my role in the conference was to provide as much information as possible about this particular situation involving Mexican/American dual citizenship. It is understandable that Ms. S would have taken the information given in 2(D) and 2(E) and conclude that she could take the oath before a Mexican official and have a reasonable chance of retaining her U.S. citizenship if she somehow otherwise indicated what her true intent was. I did not recommend that she take such action, stressed that the decision was hers to make and was extremely careful to point out that there were no guarantees. etc.

Our inquiry centers on the evidential significance of the affidavit appellant executed on May 31, 1984 disclaiming any intention to relinquish United States nationality.

On its face, the affidavit bespeaks an unmistakable intent to retain United States citizenship, should she later make a declaration of allegiance to Mexico and renunciation of United States nationality. The evidence leaves in doubt who introduced the matter of appellant's executing an affidavit. At the hearing, appellant thought it was she. Her father stated in his post-hearing declaration, however, that the consular officer had suggested that she execute such a statement. The consular officer did not address the point in his declaration. In the circumstances, the authorship of the suggestion is not pertinent; the fact remains appellant executed a clear statement of intent to keep her United States citizenship.

Appellant at the hearing, and her father and brother as well as the consular officer in post-hearing statements are agreed that at the conference, the consular officer made it clear that no single action would guarantee that appellant would not expatriate herself if she applied for a CMN and declared allegiance to Mexico. But appellant, her father and her brother go on to declare that the consular officer said he did not think she would have any problem if she executed the affidavit. So, we must ask, was appellant entitled to assume from what the consular officer told her that she had a reasonable chance not to jeopardize her citizenship if she took the precaution to execute the affidavit? The answer to that question lies in what the consular officer recalled "with a high degree of certainty" he told appellant and her brother.

As an initial matter, we wish to make clear that we believe the consular officer made a fair, comprehensive and responsible exposition of the problems facing dual nationals of the United States and Mexico and the implications of making declarations of allegiance to Mexico and renunciation of United States citizenship. Yet, in so doing he almost inevitably gave appellant reason to believe that if she clearly indicated an intention not to give up American citizenship, the Department would not approve a CLN in her case. As the consular officer conceded: "It is understandable that Ms. S would have taken the information given in [paragraphs] 2(D) and 2(E) [of his declaration] and conclude that she could take the oath before a Mexican official and have a reasonable chance of retaining her U.S. citizenship if she somehow otherwise indicated what her true intent was."

Lay people like appellant and her father would, in our view, be justified to conclude from what the consular officer says he told them that appellant's affidavit would probably protect her citizenship. So assured or believing herself assured, appellant performed an expatriative act a few months later which, it is arguable, she might not otherwise have done had she not been given the kind of advice she was given.

Appellant submits that other conduct evidences her intent not to forfeit United States citizenship. In particular, she cites her use of a United States passport (not the Mexican passport she acquired in 1984) to travel abroad in 1985-86 and 1986-87 after she performed the expatriative act. 9/ The Department points out that there is no evidence of record that appellant used her United States passport after November 1984, but we note that appellant has so averred while constructively under oath, and we are not prepared to conclude that she did not.

In other respects, appellant contends she conducted herself as a United States citizen, thereby indicating an intent not to relinquish citizenship. In this connection, she cites frequent and continuing visits to the United States to see her extended family here. She further points out that having no income of her own, (she is totally dependent on her father), she does not file U.S. income tax returns. As a female, she has not registered for U.S. Selective Service. In short, she has not been in a position to do things that the Department usually contends are indicia of a will to retain citizenship.

On balance, we are of the view that appellant did all she reasonably could to show a will and purpose to retain American citizenship. It therefore follows that the Department has not carried its burden of proving that she intended to relinquish citizenship when she declared allegiance to Mexico.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated herself.

Alan G. James, Chairman

Gerald A. Rosen, Member

George Taft, Member

9/ TR 20-22.