May 15, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A A R de P

The Department of State determined on April 29, 1988 that A A R de P expatriated herself on April 5, 1956 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/ She appeals that determination.

There are two issues for decision: whether appellant's formal declaration of allegiance to a foreign state was voluntary and whether she intended to relinquish her United States nationality. For the reasons that follow, we conclude that appellant performed a voluntary act of expatriation with the intention of relinquishing her American citizenship. Accordingly, we will affirm the Department's determination of loss of appellant's nationality.

1/ In 1956, Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), read as follows:

> Section 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 --
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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;....

Pub. L. No. 99-653, 100 Stat. 3655 (1986), 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;". Pub. L. No. 99-653 also amended paragraph (2) of section 349(a) by inserting "after having attained the age of eighteen years" after "thereof".

I

Appellant acquired United States nationality under the provisions of section 1993 of the Revised Statutes of the United States by birth in Mexico to a United States citizen father on [redacted]. 2/ Her father had resided in Mexico since 1922 as a representative of the Otis Elevator Company, a United States commercial organization having its principal office in the United States. Appellant was documented as a United States citizen in 1932. According to statements she made to the Board, she has lived in Mexico since birth and is married to a citizen of [redacted].

On February 28, 1956 appellant executed an application for a certificate of Mexican nationality (CMN). In the application she expressly renounced her United States nationality and all allegiance to the United States. She also declared adherence, obedience and submission to the laws and authorities of Mexico. A CMN issued on April 5, 1956.

Twenty-nine years later, appellant wrote to the Department of State on May 17, 1985 "to request the status of citizenship for myself and, ultimately, for my children." In reply, the Department informed appellant that her United States citizenship was a matter of record with the Department. In order for her to transmit citizenship to her children, however, the Department stated, it would be necessary for her to have fulfilled certain requirements of the Immigration and Nationality Act. Accordingly, she was advised to consult an American consular office for further information. Appellant's subsequent inquiry at the Embassy in Mexico City brought to light the fact that she had made a formal declaration of allegiance to Mexico in an application for a CMN. In response to the Embassy's request, the Mexican authorities

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2/ In 1931, sec. 1993 of the Revised Statutes read as follows:

> Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

confirmed that appellant had applied for and obtained a CMN, and enclosed copies of her application and the CMN. After appellant had completed questionnaires to facilitate determination of her citizenship status and was interviewed, a consular officer executed a certificate of loss of nationality in her name on December 4, 1985, as required by section 358 of the Immigration and Nationality Act. 3/ The officer certified that appellant acquired United States citizenship by birth in Mexico of a United States citizen father; that she made a formal declaration of allegiance to Mexico; and that she thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

When she forwarded the certificate to the Department, the consular officer recommended that the Department not approve it. The consular officer noted that appellant stated in the citizenship questionnaires that sometime between the ages eighteen and twenty-one (that is, 1949 to 1952) she had been told by a vice consul of the Embassy, whose name she recalled, that she had no right to claim American citizenship because in order to keep it she would have to reside in the United States for five years, a condition it was too late for her to comply with. (See note 4, infra.) On the strength of that information, appellant asserted, her father had advised her to legalize her status as a citizen of Mexico. This

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3/ 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.

she did in 1956 by obtaining a CMN. The consular officer who processed appellant's case in 1985 argued that the certificate should not be approved for the following reason:

> It is possible that the Vice Consul at the time misinformed Ms. R de P that she was subject to the retention requirement for United States citizens born abroad under Section 201(g) of the Nationality Act of 1940. 4/ If Mrs. R de P had been subject to the retention requirement, by the time she would have spoken to the Vice Consul, she would have lost her citizenship because it would have been impossible for her to have lived in the United States for the five years necessary to retain citizenship. According to what Mrs. R de P said, it is possible that this is exactly what happened: the Vice Consul mistakenly thought that Mrs. R de P was subject to retention provisions and had not complied with them. Taking this misinformation as fact, the reasonable thing for her to do was to affirm her claim to Mexican citizenship, since she honestly believed she had claim to no other.

The Department did not make a decision in appellant's case until two and one half years after submission of the certificate of loss of nationality for reasons the record does not disclose. On April 29, 1988, the Department approved the certificate of loss of nationality, an action that constitutes an administrative

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4/ Section 201(g) of the Nationality Act of 1940, 54 Stat. 1138, read as follows:

> Sec. 201. The following shall be nationals and citizens of the United States at birth:

determination of loss of citizenship from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

Appellant entered a timely appeal pro se.

II

It is evident that appellant duly made a formal declaration of allegiance to Mexico and thereby brought

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4/ (cont'd).

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> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States, who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.
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> The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philan-

herself within the purview of section 349(a)(2) of the Immigration and Nationality Act. However, the statute prescribes that citizenship shall only be lost if the U.S. national who performs an expatriative act does so voluntarily with the intention of relinquishing United States nationality. 5/

In law it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not voluntary. 6/ If she is to prevail on this issue,

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4/ (cont'd).

> thropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation.

5/ Note 1 supra.

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

> (c) 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. Except as otherwise provided in subsection (b), 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.

appellant must establish that it was more probable than not that she made a formal declaration of allegiance to Mexico against her fixed will and intent to do otherwise.

Appellant has not addressed voluntariness and intent to relinquish citizenship as discrete issues. Reiterating what she wrote in the citizenship questionnaires in 1985, and citing the consular officer's recommendation that the certificate of loss of nationality not be approved, appellant simply alleged that:

> I was misinformed as to my right to keep my citizenship, had I known better I would have never acted in this manner, but I was told I didn't have the right to dual nationality and if I wanted to keep my American Citizenship I would have to reside in the United States for five years, which at that time was not possible for me. Had I not been given the wrong information I would not be bothering you with this matter at this time which is of great importance to me.

In effect, she argues that she did not make an oath of allegiance to Mexico voluntarily with the intention of relinquishing United States nationality.

We do not believe that appellant has shown that she performed the expatriative act involuntarily. Even if we were to accept that a consular officer told appellant she would lose her American citizenship, there is no apparent element of compulsion in her declaring allegiance to Mexico. She has not shown that the consular officer counseled her or pressed her to document herself as a Mexican citizen. Nor does she allege that she was coerced by force or threat of force or threat of deprivation of a

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6/ (cont'd.)

Pub. L. No. 99-653, 100 Stat. 3655 (1986), repealed section 349(b) but did not redesignate section 349(c), or amend it to reflect repeal of section 349(b).

necessity to perform the expatriative act. It would appear that she was free to accept the advice she was allegedly given, or to reject it. In the end she chose to believe what she says she was told and document herself as a Mexican citizen. (Curiously, she acted on the basis of what she suggests was only a one-time, oral statement which neither she nor her parents evidently made an effort to substantiate.) Since appellant had opportunity to make a personal decision on the basis of choice, there was no coercion. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971); cert. denied 404 U.S. 946 (1971).

Plainly, appellant has not rebutted the presumption that she voluntarily made a formal declaration of allegiance to Mexico.

III

It remains to be determined whether appellant intended to relinquish her United States citizenship when she made a formal declaration of allegiance to Mexico. It is the Department's burden to prove that appellant intended to relinquish citizenship; it must do so by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252, 267 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260. The intent the government must prove is the party's intent when the expatriating act was done, in appellant's case, her intent when she voluntarily declared allegiance to Mexico. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Supreme Court has held that performance of any of the enumerated statutory expatriating acts may be highly persuasive evidence of an intent to relinquish United States nationality; it is not, however, conclusive evidence of such an intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). In the case before the Board, appellant not only performed a statutory expatriating act but also expressly renounced her United States nationality and all allegiance to the United States. The case law is clear about the legal consequences of making a formal declaration of allegiance to a foreign state and abjuring allegiance to the United States. Subscribing to such undertakings will result in loss of United States citizenship, if it be established that the party performed the expatriative act voluntarily, knowingly and intelligently, and provided there are no factors that would mandate a different result.

In Terrazas v. Haig, supra, the court found abundant evidence of the petitioner's intent to relinquish United States citizenship in the fact that he willingly, knowingly and voluntarily made a declaration of allegiance to Mexico that included renunciation of his United States citizenship, and in his subsequent conduct. 653 F.2d at 288. In Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985), the court held that "the voluntary taking of a formal oath of allegiance that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship," provided that there are no factors that would justify a different result. 752 F.2d at 1421. Similarly, Meretsky, v. U.S. Department of Justice, et. al., CA No. 85-01985, memorandum opinion (D.C. Cir. 1986). 7/

It is not enough for the Department to show that appellant expressly renounced her United States nationality when she made a formal declaration of allegiance to Mexico. The Department must also establish that appellant, more probably than not, acted knowingly and intelligently. The Department submits that appellant acted in full awareness of the legal consequences of making a formal declaration of allegiance to Mexico. We agree. There is no evidence that appellant did not or could not comprehend the words and implications of the declaration of allegiance to Mexico and renunciation of her United states nationality.

Appellant argues in effect, however, that she could not have formed the requisite intent to relinquish United States citizenship because she believed in 1956 that she was not a United States citizen. She suggests therefore

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7/ See also United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975). "An oath expressly renouncing United States citizenship....would leave no room for ambiguity as to the intent of the applicant." Aff'd. 532 F.2d 809 (2nd Cir. 1976); cert denied, 429 U.S. 823 (1976). The foregoing proposition was cited with approval by the court in Terrazas v. Vance, No. 75 C 2370, memorandum opinion, (N.D. Ill. 1977), and by the Court of Appeals for the 7th Circuit in Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

that she could not knowingly and intelligently waive or forfeit a right she did not possess. 8/

The Department contends that appellant has not established that she was given erroneous advice about her citizenship status. We agree.

If there were credible evidence that a consular officer informed appellant in 1949 that she would soon lose her citizenship, or in 1952 that she had actuallly lost her citizenship, then, arguably, the Department might not be able to establish that appellant knowingly and intelligently forfeited her United States citizenship in 1956. The difficulty we have in accepting appellant's contentions is that there is not a shred of evidence to substantiate them.

The initial evidential problem here is that there is no evidence of record that appellant or her parents consulted anyone in the Embassy about appellant's United States citizenship between 1949 and 1952, or indeed, between 1952 and 1956, when appellant made a declaration of allegiance to Mexico. Granted, if a record was made of such a consultation, it might have been destroyed long ago. So, let us assume, arguendo, that appellant did discuss her citizenship status with a consular officer. Is there any evidential basis to assume that the officer told appellant, or even might have told appellant, that she would lose or had lost her United States nationality? We find none.

Although we do not know the context of appellant's alleged conversation with the consular officer or what questions she asked him, we may fairly assume that the consular officer would have asked appellant where and when she was born and what was the nationality of her parents. We may also assume that appellant knew the answers to those questions and said she was born in Mexico in 1931 and that her parents were United State citizens. The consular officer then would have looked up the law on

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8/ In United States v. Matheson, 532 F.2d 809, 814 (2nd Cir. 1976); cert. denied 429 U.S. 823 (1976), the court declared that "Afroyim's [Afroyim v. Rusk, 387 U.S. 253 (1967)] requirement of a subjective intent reflects the growing trend in our constitutional jurisprudence toward the principle that conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such."

acquisition and retention of United States citizenship by a person in appellant's situation, and ascertained that section 1993 of the Revised Statutes, which is brief and crystal clear (see note 2 supra), was applicable to appellant's case. Consular officers are hardly infallible, but in the absence of evidence to the contrary (and we find none here), it may be presumed that if appellant did speak to a consular officer about her citizenship status, the officer gave her a correct answer which she may or may not have understood. For there is a well-settled presumption that public officials carry out their official duties correctly and know the laws they are charged to execute. United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926).

We are also skeptical that a consular officer would have told appellant that she was subject to the acquisition and retention provisions of section 201(g) of the Nationality Act of 1940. See note 4 supra. Since appellant was born nine years before the Nationality Act of 1940 went into effect, it plainly could not have been applicable in her case.

But suppose that although appellant said she was born in 1931, she did not know whether at her birth her mother was a United States citizen or an alien, and that the officer for some inexplicable reason assumed that section 201(g) of the Nationality Act of 1940 was applicable in appellant's case. We still do not consider it probable that he told appellant she had not complied with the statutory condition subsequent to retain citizenship. Surely appellant would have known that her father represented a United States company in Mexico when she was born and would have mentioned that fact to the consular officer who must have been aware that section 201(g) of the Nationality Act of 1940 exempted from any retention requirement persons born of an alien parent and a United States parent, if the latter worked for a U.S. company in the foreign state.

In short, while it is conceivable that a consular officer might have made an egregious error in construing statutes it was his duty to understand, we cannot accept that he did so, absent at least a modicum of evidence to support such a contention. Appellant's allegations are legally inssuficient to support a finding that she was misinformed about her citizenship status, and thus that she lacked the requisite intent in 1956 to relinquish her United States citizenship. In our opinion, the Department has shown that appellant probably made a formal declaration of allegiance to Mexico knowingly and intelligently.

Finally, we must inquire whether there are any other factors in the case that would warrant our concluding that appellant did not intend to relinquish her United States nationality when she declared allegiance to Mexico.

In the thirty years between documenting herself as a Mexican citizen and her inquiry of the Department about her citizenship status, there is no record that appellant made any effort to ascertain whether there was a possibility of recovering United States citizenship, or even to verify the accuracy of the oral information she alleges she was given by a consular officer.

One explanation for such passivity might be that she assumed the officer's advice was correct and that her situation was unchangeable, and therefore resigned herself to loss of her citizenship, although she did not intend in 1956 to forfeit that citizenship.

On the other hand, it would be no less plausible to believe that appellant, who has not convinced us that she acted involuntarily, unknowingly and unintelligently, did intend to relinquish her United States citizenship in 1956, as she made manifest by express renunciation of her United States nationality.

The trier of fact must, of course, construe the facts and law as far as reasonably possible in favor of retention of citizenship. Nishikawa v. Dulles, 356 U.S. 129 (1958). Here, however, the essential facts, although somewhat meager, are quite explicit and show that appellant intended to relinquish her United States citizenship. It would be wholly impermissible for us to construe the facts in favor of this appellant, solely on the basis of her contention, unsupported by any tangible evidence, that some thirty years ago a consular officer, who may be presumed to know the laws he was charged to apply, gave appellant erroneous information that induced her to perform an act that resulted in loss of her United States citizenship.

On the evidence, we have no reason to conclude that the Department erred in fact or law when it determined that appellant voluntarily, knowingly and intelligently made a formal declaration of allegiance to Mexico with the intention of relinquishing her United States nationality. It follows that the Department has carried its burden of proof.

IV

Upon consideration of the foregoing, we conclude that the Department's determination that appellant expatriated herself should be, and hereby is, affirmed.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Dissenting Opinion

As the majority notes, the issue involved is whether the appellant, A A R de P , intended to relinquish her United States citizenship when she made a formal declaration of allegiance to a foreign state. For the reasons set forth below I believe that while appellant acted voluntarily, she was incapable of forming an intent to relinquish U.S. citizenship at the time she made the declaration. As a consequence I would reverse the Department of State's finding of loss of U.S. nationality.

The Department of State contends that appellant expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico in 1956. The declaration was contained in the standard application form for a Mexican Certificate of Nationality (CMN). Appellant completed such a form in order to regularize her status as a Mexican citizen.

While a formal declaration of allegiance to a foreign state is a statutorily expatriating act, the law requires that such an act must be performed voluntarily and with the intention of relinquishing U.S. citizenship, as opposed to some other purpose, if it is to have any effect upon an individual's U.S. citizenship. The law further provides that the burden of proof is upon the Department to show such intent by a preponderance of the evidence. The majority has acknowledged that the burden lies with the Department, but has failed to hold the Department to that standard.

Performance of an expatriating act, such as a declaration of allegiance to a foreign country, can itself evidence an intention to relinquish U.S. citizenship. On the other hand, the courts have long recognized that such evidence is not conclusive. Consequently, if an intent other than relinquishment of U.S. citizenship is shown to have motivated the individual to perform an otherwise expatriating act, the performance of the expatriating act cannot be found to evidence intent to relinquish.

Appellant maintains that she was informed by a U.S. consular officer that because she could not fulfill U.S. residency requirements she had lost her claim to U.S. citizenship. In order to ensure that she had some citizenship, she maintains, she thereafter sought to regularize her Mexican citizenship status. While there is some dispute as to the facts regarding the advice appellant was given, there is no

dispute that the manner of regularizing Mexican citizenship status afforded appellant no choice with respect to the declaration of allegiance. If she intended to be secure in her status as a Mexican citizen she had to complete the CMN application form, of which the declaration was an integral part.

The majority states that if it were shown that appellant received advice to the effect that she had lost her U.S. citizenship, "the Department might not be able to establish that appellant knowingly and intelligently forfeited her United States citizenship in 1956." This is surely true. But it is too narrow an approach to the issue of intent. The issue is not solely or even most importantly what appellant was actually told, but what appellant understood, what her frame of mind was, and what she thought her options were. The majority, however, has looked only at the question of the advice she was actually given, and has mistakenly put the burden on appellant to prove that it was erroneous, stating that it agrees with the Department's contention that appellant "has not established that she was given erroneous advice" and that it cannot accept appellant's contentions because "there is not a shred of evidence to support them." The majority offers no explanation for an exception in this case to the rule that the burden of proving intent is on the Department and no explanation for its requirement that appellant prove lack of intent.

The facts in this case are indeed sketchy, and the passage of time makes it difficult to assess the situation as it existed in 1956. However, quite the opposite from the majority, I find much more than a shred of evidence to support appellant's contentions. Indeed, I find that, in combination, the elements of appellant's story paint a clear and internally consistent picture of an individual who wished to be a U.S. citizen, was convinced that that was not possible, and, desiring not to be stateless, took the steps necessary to confirm her Mexican citizenship status. My conclusion requires that I find appellant's contentions credible. I do. Furthermore, I find that acceptance of the Department's (and the majority's) conclusions requires conscious disregard of important, uncontested facts, and an attribution to appellant of fundamentally, inconsistent behavior.

Appellant states that she visited the U.S. Embassy, on a date she cannot recall when she was between 18 and 21 years of age, and spoke with one John Wilson, a vice consul. The Department says it finds no evidence that she so visited the Embassy. Does the Department contend that there never was a John Wilson who served as vice consul? No, in fact a current consular official in the Embassy confirmed Mr. Wilson's status

as vice consul at the time. Appellant maintains she was told she had no claim to U.S. citizenship. The majority insists that if she did visit the Embassy the consular officer would have given her the correct advice "which she may or may not have understood." A current consular official is not so certain that the advice rendered was necessarily correct. In her recommendation to the Department on the disposition of the case the consular officer states "it is possible that the vice consul at the time misinformed [appellant] that she was subject to the retention requirement for United States citizens born abroad under Section 201(g) of the Nationality Act of 1940. If [appellant] had been subject to the retention requirement, by the time she would have spoken to the vice consul, she would have lost her citizenship because it would have been impossible for her to have lived in the United States for the five years necessary to retain citizenship." This is an interesting conclusion, constituting at the very least a recognition of human, even official, fallibility. The majority is, however, not only not willing to concede that a consular officer might have made a mistake (in disregard of the demonstrated correctness of appellant's contentions regarding Mr. Wilson's role) but proceeds with an elaborate speculation as to what Mr. Wilson might have asked appellant and the advice he should have, and therefore must have, provided. Apparently the majority finds this hypothetical conversation more believable than the conversation appellant remembers.

But recall that the question is one of intent. Thus, whether Mr. Wilson made a mistake or not, the relevant consideration is what appellant concluded, how his words affected her and what she thought her options were.

Appellant's signed statements, contained in the questionnaire she completed on August 19, 1985, should not be relegated to a status below that of a "shred" of evidence. Unless the Department and the majority conclude that her signed answers are a complete fabrication, they must give them some evidentiary value. If the appellant did visit the Embassy (and neither the Department nor the majority has actually disputed that fact) that visit alone suggests that appellant must have wanted some advice or information. Appellant has produced a sensible explanation for the visit - to see what she could do to establish her U.S. citizenship. Had she intended to relinquish U.S. citizenship would she have gone to the Embassy? Perhaps, but if she had raised <u>that</u> question with Mr. Wilson, it is highly likely that some written record of a renunciation would exist. Just as the Department and the majority are loath to conclude that appellant was misinformed, I find it beyond credibility that appellant came to the Embassy

intending to give up her U.S. citizenship and was advised that the way to do that was to take out a CMN, rather than making a formal renunciation.

Appellant is not a lawyer. Appellant went to the Embassy seeking legal advice. Appellant has attested what she understood the counsel to say - that she "had no right to retain ... American citizenship" but that she could regain her U.S. citizenship by living in the U.S. for five years.

The Department has cited (thereby apparently giving credence to that portion of appellant's sworn statement) appellant's answer to question 12(a). The Department notes that there appellant stated that John Wilson told her that she "had no right to claim [her] American citizenship because in order to keep it [she] would have to reside in the United States for five years..." (emphasis added.)

In her answer to question 3 appellant states that she was told by John Wilson that while she had no right to retain, ... she could (if she at some time in the future lived in the U.S. for five years) regain U.S. citizenship. Did appellant think she had already lost her citizenship or did she believe she would do so if she did not return to the U.S.? Is this as significant as the Department indicates it believes it to be when it argues that appellant stated "that when told that to retain her citizenship she would have live (sic) in the United States for five years, she decided that she would not go to the United States. Where was the desire and intent to hold on to her U.S. nationality?"

What does the Department really mean by this. I suggest that the Department cannot have it both ways. Either the vice consul gave appellant erroneous advice or he didn't, but what possible basis is there for the Department's assuming that in informing appellant (erroneously) that she was subject to a retention requirement, he would then misread the law and erroneously tell her that she could meet the retention requirement by returning to the United States? Why does the Department think Mr. Wilson made not just one but two fundamental mistakes? As the currently serving consular officer pointed out, at the time in question, had appellant been subject to the retention requirement, she could not have met it, and would have already lost her claim to U.S. citizenship. And that is what appellant says she understood.

If any reliance is to be placed on appellant's sworn statement, the "evidence" it provides is primarily with respect to appellant's state of mind, as opposed to the correctness of

her reporting of John Wilson's actual words. Her answer to question #2 is straightforward on that score "... as I thought I had no right to my American citizenship I proceeded to get my Mexican citizenship in order..."

The course of action appellant describes, from approaching the U.S. embassy (before taking any action with respect to her status vis a vis Mexico) to her recollection of John Wilson's name, to her interpretation of his advice as leaving her only the option of regularizing her Mexican status, is straightforward, consistent, and in my opinion entirely credible. She may have completely misunderstood Mr. Wilson, but we are considering the behavior of a very young woman, taking what appears to be an entirely consistent, if misguided, course of action.

The burden is on the Department to show intent to abandon U.S. citizenship. Is the fact that only after her meeting with the vice consul did she apply for a CMN evidence of an intention to give up U.S. citizenship? Hardly. Appellant's course of action points to a person desirous of regularizing her status, desirous of establishing her U.S. citizenship if she can, and if she can't, anxious to be secure in a citizenship, as opposed to stateless, status.

Does appellant's action, in signing a printed application form that contains a renunciation of U.S. citizenship, in and of itself demonstrate, by a preponderance of all available evidence, that appellant intended to give up U.S. citizenship? I believe not. I believe it is a much more reasonable inference that appellant thought she had nothing to lose. Her intention, therefore, was not to relinquish U.S. citizenship (which she could have easily done while at the U.S. Embassy) but to affirm Mexican citizenship.

The majority has stated that it agrees with the Department that "appellant has not established that she was given erroneous advice about her citizenship status." As discussed above, I believe no such burden is placed on appellant and the majority has cited no authority for imposing such a burden on appellant. But let us assume that John Wilson's advice was absolutely correct. If it was, then presumably appellant was advised that she was a U.S. citizen and should take no action to jeopardize that status. An action in defiance of such advice would certainly provide evidence of intent to relinquish. But the Department offers no such evidence, although it is the Department upon whom the burden is placed. Instead the Department first argues that there is a presumption that John Wilson gave appellant the correct advice, then,

without any evidentiary basis other than one word, "retain" in one answer appellant provided, suggests he gave the wrong advice and that appellant chose not to exercise a non-existent right to retain U.S. citizenship by a five year return to the U.S. This is the only "evidence" the Department offers to support the contention that appellant understood John Wilson to say she was a U.S. citizen. The contention, however, is vital to the Department's case. For only if it can be shown that appellant thought she was a U.S. citizen would her signing the CMN application evidence intent to abandon such citizenship. Appellant would have to have believed she had something to abandon. She says she didn't think she did, and all her actions support that statement.

The Department has not met the burden of proof the law places upon it. It has not shown that, despite her approach to the American Embassy, and despite her sworn statements, and despite any Embassy record of a meeting with a U.S. citizen who wanted to relinquish her citizenship, appellant really believed she was a U.S. citizen and wanted to cast off that citizenship in order to regularize herself as a Mexican. The only intent that the record evidences is that of a young person desiring to regularize her citizenship status, approaching first the American Embassy, and only thereafter filling out the prescribed forms to be recognized as a Mexican.

I would reverse the Department of State.

Mary Elizabeth Hoinkes, Member