September 29, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: P[redacted] A[redacted] B[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, P[redacted] A[redacted] B[redacted], expatriated himself on December 13, 1976, under the provisions of section 349(a)(1) of the Immigration and Nationality Act (hereinafter "the Act") by obtaining naturalization in New Zealand upon his own application. 1/

I

Appellant B[redacted] was born in the [redacted]. According to his own statement, he served in the United States Army for nearly two years and was honorably discharged in December 1969. He moved to New Zealand in 1971, traveling on a passport issued October 26, 1970.

B[redacted] was issued a new passport by the United States Embassy at Wellington in 1975. It appears that he married a New Zealand citizen in December of that year, and traveled with her and her two daughters to the United States on holiday in May and June 1976.

On December 13, 1976, B[redacted] received a certificate of naturalization from the New Zealand Department of Internal Affairs, having made application therefor several months previously. After swearing an oath to be "faithful and bear true allegiance to Her Majesty Queen Elizabeth 11, her heirs and successors, according to law," B[redacted] became a New Zealand citizen, with effect from December 13 1976. In 1977 a son was born to appellant and his wife.

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

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

B[redacted] wrote to the Embassy at Wellington on May 5, 1979, to inq[redacted]e about his citizenship status, stating that he, his wife, infant son and two step-daughters were thinking about "immigrating" to the United States. He informed the Embassy that he had become a New Zealand citizen and wondered how that fact, which he observed "usually results in loss of American citizenship," would affect the prospects of his gaining permanent entry into the United States. 2/

In reply to B[redacted] letter, the Embassy informed him on May 21 that his na[redacted]ization was highly persuasive evidence that he intended to relinquish his United States citizenship, and requested that he fill out a short questionnaire to assist in determining his citizenship status. A few days later B[redacted] replied, stating in the questionnaire that he had voluntarily acquired New Zealand citizenship but did not intend thereby to relinquish his United States citizenship.

As required by section 358 of the Act 3/ the Embassy on October [redacted] 1979, prepared a certificate of loss of nationality in B[redacted] name. The Embassy certified that appellant

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2/ Burr's letter was apparently the first indication the Embassy had received that he had been naturalized in New Zealand. In response to the Embassy's inquiry, the Department of Int[redacted]nal Affairs in a letter dated July 26, 1979, confirmed that B[redacted] had become a naturalized New Zealand citizen.

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

> 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 part III of this subchapter, 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.

was born at Woodland, California, on December 23, 1944; acquired the nationality of the United States by virtue of his birth therein; acquired the nationality of New Zealand by virtue of naturalization on December 13, 1976; and had thereby expatriated himself under the provisions of section 349(a)(1) of the Act.

In forwarding the certificate to the Department, the Embassy observed that B[redacted] had become naturalized "on his own volition with the knowledge that the act was strictly self-serving and that he would probably lose his United States citizenship thereby." Since B[redacted] had not wished to provide additional details in his case when requested to do so, the consular officer concerned had made no further attempt to arrange an interview with him.

The Department held the certificate under consideration for a year. Meanwhile, B[redacted] was discussing with the Embassy how he and his family (all New Zealand citizens) might enter the United States. On November 4, 1980, the Department informed the Embassy that it realized the question of B[redacted] citizenship would have to be resolved before the visa aspects of his and his family's case could be dealt with. Accordingly, the Department instructed the Embassy to ask B[redacted] to complete the standard questionnaire on information for determining United States citizenship.

B[redacted] filled out the questionnaire on November 30. Not until approximately three months later, however, on February 25, 1981, did the Embassy forward it to the Department. On April 21, 1981, the Department approved the certificate, approval constituting an administrative determination of loss of citizenship from which an appeal may be taken to this Board.

B[redacted] initiated this appeal in September 1981.

II

We must first determine whether appellant voluntarily performed a statutory expatriating act, for it has long been settled that citizenship must be deemed to continue unless the actor has been deprived of it by his voluntary action in conformity with applicable legal principles. Perkins v. Elg, 307 U.S. 325 (1939).

There is no dispute that B[redacted] performed a statutory expatriating act, namely, obtaining naturalization in a foreign state upon his own application. Under section 349(c) of the Immigration and Nationality Act any person who performs

one of the enumerated expatriating acts of section 349(a) is presumed to have done so voluntarily. 4/ This presumption may, however, be rebutted by a preponderance of the evidence. Appellant thus bears the burden of proving that he acted involuntarily. Burr did not choose to assume this burden. From the first he conceded that he obtained naturalization voluntarily.

We find that appellant performed the specified expatriating act voluntarily.

The sole issue therefore which we must decide is whether B[redacted] obtained naturalization in New Zealand with the intention of relinquishing his United States citizenship.

In Terrazas v. Vance, 444 U.S. 252 (1980), the Supreme Court, in affirming and extending the reach of Afroyim v. Rusk, 387 U.S. 253 (1967), held that in order to find expatriation "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." The Court also held that an intent to relinquish one's citizenship may be expressed in words or found as a fair inference from proven conduct.

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

> (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.

Under section 349(c) of the Immigration and Nationality Act 5/ the Government bears the burden of proving by a preponderance of the evidence that the expatriating act was performed with the necessary intent to relinquish citizenship. The burden is a heavy one. As the Department has observed in the Foreign Affairs Manual, (8 FAM 224.20(b)(2),

> the ability of the U.S. Government to sustain its burden to prove intent to relinquish U.S. citizenship by a preponderance of the evidence is most unlikely in all but the most clear-cut cases.

Following the Supreme Court's decision in Terrazas, the Department informed all diplomatic and consular posts:

> ...it is possible for a U.S. citizen to obtain foreign naturalization....and nonetheless intend to retain his American citizenship. In such cases it is extremely important to consider the citizen's entire course of conduct, in particular, conduct contemporaneous with the possibly expatriating act, to determine whether the citizen intended to relinquish U.S. citizenship. 6/

In the instant case the record reveals little of appellant's conduct contemporaneous with his naturalization in New Zealand. Aside from the act itself, nothing has been recorded of the period in late 1976 which sheds clear light on the question of whether or not appellant had an intent to relinquish his United States citizenship.

We do note, however, that in 1975, B[redacted] applied for and received a new United States passport from the Embassy at Wellington. According to his reply brief, in the spring of 1976, he traveled to the United States, presumptively on the U.S. passport issued in 1975 and thus would have held himself out as a formally documented American citizen. We may assume that B[redacted]s visit to the United States, accomplished as an American citizen, occurred at a time close to the date on

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5/ Note 4 supra.

6/ Department of State Circular Airgram No. 1767, August 27, 1980.

which he executed an application for a certificate of New Zealand naturalization. It is thus suggestive of the absence of intent to relinquish his citizenship at or near the time he applied for naturalization.

B[redacted] Explaining why he applied for a certificate of naturalization, wrote in the questionnaire he filled out in November 1980:

> I applied for and was naturalized in New Zealand voluntarily, mainly as a matter of convenience and personal security, as I intended to reside permanently in New Zealand at that time. (The renewal of my US passport in 1975 was costly and time consuming.) However, it was never my intention to relinquish my US citizenship, even though I was aware that New Zealand naturalization would probably result in loss of U.S. citizenship.

He added:

> I wanted to avoid the hassle and expense of renewing my US passport every five years and any possibility of being deported under who knows what circumstances, as I have a family, all of whom are New Zealand citizens.

In his reply brief he amplified the foregoing explanation by stating that "one of my reasons for being naturalized was to strengthen my claim to them /his step-daughters/ as my children" /vis-a-vis their natural father/.

The reasons appellant offers for his having obtained naturalization in New Zealand do not, taken as a whole, clearly manifest an intention to relinquish United States citizenship.

The oath of allegiance appellant took to Queen Elizabeth II on December 13, **1976,** contained no language renunciatory of his United States citizenship; nor was there any undertaking t[redacted]he British Crown which would render it impossible for B[redacted] to perform the obligations of United States citizenship.

Although the courts have held that an oath of allegiance to a foreign sovereign even devoid of renunciatory language is highly persuasive evidence of an intent to relinquish United States citizenship, the oath alone has been held insufficient to prove conclusively an intent to abandon one's birthright citizenship. Baker v. Rusk, **296** F. Supp. 1244 **(1969);** King v. Rogers, 463 F. 2d 1188 (1972). As the Court said in Baker,

> ...it would seem evident that any time a person takes an oath of allegiance to the sovereign of the country in which he is then residing, he gives substantial indication that he considers himself to be a national of that country and that he has relinquished any prior citizenship. However, this is not invariably so....

In both the Baker and King cases, the court looked to other words and conduct of the citizen to determine whether he had displayed the requisite intent to relinquish United States citizenship. In Baker, the Court found that plaintiff had made no expressions or performed any act which might be considered inconsistent with his United States citizenship. On the other hand, in King, the Court found that the citizen had made it crystal clear by explicit statements that he no longer considered himself a United States citizen and therefore had unmistakably revealed an intention to divest himself of United States nationality.

In the appeal before us, we find little in the record that categorically supports the Department's contention that appellant intended to abandon his United States citizenship. He did not surrender his United States passport when he applied for a certificate of naturalization, or upon the issuance of that certificate. He still had in his possession a valid United States passport in 1979 when he inquired at the Embassy about how he and his family might gain entry into the United States. There is no evidence before us that B[redacted] applied for or obtained a New Zealand passport.

Moving on to 1979, we note that when B[redacted] filled out the short questionnaire at the request of the E[redacted]ssy he stated that although he voluntarily obtained naturalization in New Zealand, he did not thereby intend to forfeit his United States citizenship. He made the same assertion in the 1980 questionnaire. Although these two statements are remote by three and four years from the allegedly expatriating act, they are entitled to fair weight, absent clearly contradictory acts or words on B[redacted] part, especially since they were made before the Department approved his certificate of loss of nationality.

Finally, B[redacted] took a prompt appeal -- within five months after learning that the Department had approved his certificate of loss of nationality.

The Department argues that, although there is no evidence in the record of statements or acts of appellant contemporaneous with his naturalization that might reveal his intent in 1976, there is evidence of a course of conduct leading up to his inquiry at the Embassy in 1979 from which his intent to relinquish his citizenship might be inferred. The Department adduces the following elements of appellant's behavior as indicative of such an intent:

-- he believed that he would lose his citizenship by obtaining naturalization in New Zealand, and assumed he was no longer an American citizen.

-- he did not approach the Embassy between his naturalization and 1979 for any reason, including the possible registration of the birth of his son in 1977.

-- he did not exercise the rights and duties of American citizenship, e.g., vote or pay income taxes.

-- after becoming naturalized, he held himself out in all things to be a citizen of New Zealand.

-- he carefully considered the expatriating act in light of his own realities /priorities2/ and was determined to perform it.

We do not find the Department's argumentation entirely persuasive. The inferences the Department would draw from the foregoing catalog of appellant's acts and words are quite as susceptible of being turned around, permitting contrary inferences to be drawn from them.

His belief that he had lost his citizenship by becoming naturalized in New Zealand could as easily be interpreted to mean that he was concerned lest he lose it, and wished to take steps to ensure that he would not. The absence of any contact between him and the Embassy from 1976 to 1979 and his failure to register the birth of his son could be due to a variety of reasons in no way probative of or relevant to his intent in 1976. Other acts of omission -- not voting or paying taxes in the United States -- are hardly omissions unique to this particular individual; it would be difficult to estimate how many Americans living

abroad do not exercise their native franchise or file U.S. income tax returns. Although B[redacted] served in the United States Army several years befor[redacted]e became naturalized, it might be observed that he had honorably discharged one of the chief responsibilities of an American citizen. We do not agree that appellant held himself out "in all things" as a New Zealand citizen; at least, if he did (and the record is far from clear on this) he did not in the process deny his American citizenship. Continued residence abroad does not, in itself, manifest an intention to relinquish United States citizenship; in no way does it evidence voluntary renunciation of nationality. It may be compelled by family, business or other legitimate reasons. Schneider v. Rusk, 377 U.S. 163 (1963). See also Acosta v. Gaffney, 558 F. 2d 1153 (1977).

Nevertheless, appellant seems to have calculated shrewedly the advantages of becoming a New Zealand citizen, as indicated by his words, "as a matter of convenience and personal security". He clearly wanted to have the advantages of both citizenships, perhaps only one -- that of New Zealand. One could infer from his statement: "I wanted to avoid the hassle and expense of renewing my US passport every five years" that in 1976 he did not intend to remain a documented American citizen, but rather that in the future he proposed to hold himself out as a New Zealand citizen exclusively. Further, he admits that for several years he was quite content with his status as a New Zealand citizen and did not propose ever to return to the United States. Latterly, he appears to have undergone a change of heart, regretted his "great mistake", in spite of his original reasons for having become naturalized in New Zealand, suggesting thereby that in 1976 he may have intended to exchange his allegiance to the United States for New Zealand citizenship. And he shows an attitude toward American citizenship which is little less than cynical, viz, his statement in a letter to the Board dated November 24, 1981: "I feel the opportunities will be better in the United States, especially as a citizen."

In our opinion, appellant's words and proven conduct do not manifest a clear-cut intent to abandon his United States citizenship. As shown in the foregoing analysis, a number of factors strongly suggest that appellant did not have the requisite intent to relinquish his native nationality. A few others leave some doubt in our minds about whether such intent was absent.

The courts have held that ambiguities in the evidence are to be resolved in favor of citizenship. Nishikawa **v.** Dulles, 356 U.S.129 (1959). As the appeal court stated in United States **v.** Matheson, 532 F. 2d 809 (1976), the courts "must strain" to construe both facts and applicable law as far as reasonably possible in favor of the citizen.

Following these judicial precepts, we find that the preponderance of the evidence in this case weighs in favor of appellant's intention to retain his United States citizenship. The few doubts we have regarding his true intentions are entitled to less weight. The record does not, in our view, support the Department's contention that B[redacted] intended to abandon his United States citizenship by becoming naturalized in New Zealand in 1976. Accordingly, we conclude that the Department has failed to sustain its burden of proving by a preponderance of the evidence that appellant intended to relinquish his citizenship.

III

On consideration of the foregoing analysis and the entire record before us, we conclude that appellant did not expatriate himself by obtaining naturalization in New Zealand upon his own application. Accordingly, we reverse the Department's administrative determination of April 21, 1981, to that effect.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member