January 11, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on an appeal brought by Raphael [redacted] from an administrative determination of the Department of State that he expatriated himself on February 4, 1981, under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The issues presented an appeal are (1) whether appellant performed the expatriating act voluntarily, and (2) if he did so, whether he had the intention of relinquishing his United States nationality. We find that appellant's declaration of allegiance to Mexico was made freely and further, that that act was accompanied by an intention to relinquish his American nationality.

1/ Section 349(a)(2) 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 --
>
> . . .
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof... .

I

Appellant was born on [redacted], and acquired the nationality of both the United States and Mexico by virtue of his birth in Mexico to an American citizen father. Appellant's father registered appellant's birth at the United States Embassy at Mexico, D.F. According to appellant's own statement he lived in the United States from 1958 to 1961. Since 1961 he has resided in Mexico where, except for brief attendance at school in Ohio in 1970, he received all his education.

On August 15, 1980, appellant applied for a certificate of Mexican nationality; in so doing he made a formal declaration of allegiance to Mexico and expressly renounced his United States citizenship. Appellant was then twenty-two years old and mid-way through a university course in accounting. A certificate of Mexican nationality was issued to appellant on February 4, 1981. It appears that shortly thereafter appellant obtained a Mexican passport; there is no record that he ever held a United States passport.

The Department of Foreign Relations informed the United States Embassy at Mexico, D.F. on February 8, 1982, that appellant had applied for and had been issued a certificate of Mexican nationality. 2/

2/ Diplomatic Note No. 100295, Department of Foreign Relation to the United States Embassy, Mexico, D.F., February 8, 1982.

Accordingly, the Embassy wrote to appellant on April 16, 982, to inform him that by making a formal declaration of llegiance to Mexico he might have lost his United States itizenship. He was asked to complete a questionnaire for he purpose of determining his citizenship status, and in- ited to call at the Embassy to discuss his case. Appellant isited the Embassy on June 10, 1982. He was interviewed by consular officer and completed the questionnaire. In ompleting the questionnaire, appellant signed a statement to he effect that he had performed the expatriating act voluntarily and with the intention of relinquishing my .S. nationality."

As required by section 358 of the Immigration and ationality Act 3/, the Embassy prepared a certificate of oss of nationality in appellant's name on June 23, 1982.

/ Section 358 of the Immigration and Nationality Act, 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 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.

The Embassy certified that appellant acquired the nationality of both the United States and Mexico at birth; that he made a formal declaration of allegiance to Mexico; and thereby expatriated himself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Department of State approved the certificate on July 30, 1982, approval being an administrative determination of loss of nationality from which a proper and timely filed appeal may be brought to this Board.

On February 17, 1983, appellant initiated this appeal through counsel.

Appellant's principal grounds for the appeal are: he did not sign the application for a certificate of Mexican nationality voluntarily, having been "the victim of a form of economic duress;" that he did not intend to relinquish his United States nationality; and that he was misled by incorrect advice of consular officials into signing the statement in the questionnaire to the effect that he voluntarily performed the act with the intention of relinquishing his nationality.

An oral hearing was held on November 7, 1983. Appellant was not present at the hearing but was represented by legal counsel.

II

Section 349(a)(2) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by making a formal declaration of allegiance to a foreign state. Loss of citizenship will not ensue, however, unless the expatriating act in question was performed voluntarily and in accordance with applicable legal principles, Perkins v. Elg, 307 U.S. 325 (1939); Nishikawa v. Dulles, 356 U.S. 129 (1958).

It is not disputed that appellant made a formal declaration of allegiance to Mexico in the manner prescribed by Mexican law; he thus brought himself within the reach of section 349(a)(2). Appellant argues, however, that inasmuch as he made a formal declaration of allegiance to Mexico under economic duress, he performed the act involuntarily. Specifically, appellant contends that having decided to

practice accountancy in Mexico, he was required by Mexican law to give proof of his Mexican nationality in order to qualify as an accountant. Hence, he was forced by Mexican law against his will to choose between his United States and Mexican nationalities.

Appellant bears the burden of proving that his performance of an allegedly expatriating act was involuntary. For section 349(c) of the Immigration and Nationality Act presumes that performance of an act designated as expatriating under the statute was done voluntarily, though the presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act was not done voluntarily. 4/

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

Sec. 349(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.

The test for determining whether a United States citizen performed an expatriating act under duress was laid down in Doreau v. Marshall, 170 F. 2d 721 (1948). There the court stated:

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not authentic abandonment of his own nationality.

Under the rule in Doreau it is clear that two elements must be shown to be present in order for performance of an expatriating act to be deemed to have been performed involuntarily: the circumstances under which a person acted must have been "extraordinary", and the actor must have been "forced" by circumstances beyond his control to perform the expatriating act.

In Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971), the court made clear that in order for a defense of duress to prevail the actor must prove that the duress he alleges was not of his own making. The court stated that "the opportunity to make a decision based upon personal choice is the essence of voluntariness."

In the case before us, appellant was not subjected to "extraordinary circumstances" in the sense defined by numerous cases involving true duress, e.g., fear of imprisonment for not obeying the conscription laws of the country of one's other nationality; fear of loss of ration cards for failure to vote in a foreign election: fear for economic survival of one's self or close relative if one did not take the only available job, to wit, employment in a foreign government. 5/

See Nishikawa v. Dulles, 356 U.S. 129 (1958); Takano v. Dulles, 116 F, Supp, 307 (1953); Insogna v. Dulles, 116 F. Supp. 473 (1953); Stipa v. Dulles, 233 F. 2d 551 (1956).

Appellant was studying accountancy, a profession he wished to be able to enter after graduation from college. Under Mexican law, accountancy appears to be a profession that one may practice only if one is a citizen of Mexico. In order to prove his Mexican citizenship appellant was required to apply for a certificate of Mexican nationality. Prerequisite to obtaining such certificate is the making of a declaration of renunciation of one's previous nationality and making a formal declaration of allegiance to Mexico. Under Mexican law, persons who hold the nationality of Mexico and another country must after age eighteen chose one or the other. Appellant was thus faced with the necessity of deciding whether to retain his United States citizenship or his Mexican birthright. He chose to relinquish his United States citizenship and retain that of Mexico.

It seems to us incontravertible that appellant made a personal choice; any duress he may have felt was, like that of the petitioner in Jolley, supra, self-generated. "The compulsion to renounce his citizenship was of his own design." Unlike many petitioners in previous cases who had successfully pleaded that their expatriating act was performed under duress, the duress this appellant felt was of his own making. He may not be heard to plead that because the law of Mexico required him to chose citizenship of that country or of the United States he was subjected to duress. No one forced him to choose Mexican nationality; he could as freely have decided to retain his American nationality and planned a career that did not require him to divest himself of United States citizenship. That he wanted to practice accountancy and not some other profession does not render his act less voluntary.

As a matter of law, appellant had an alternative. His declaration of allegiance to Mexico was therefore the product of personal choice and consequently voluntary.

III

Even though we have found that appellant voluntarily made a formal declaration of allegiance to Mexico, it remains to be determined whether he did so with the intention of relinquishing his United States citizenship. For expatriation will not result unless the trier of fact is able to conclude on all the evidence that the citizen not only voluntarily committed an expatriating act prescribed by the statute but also intended to relinquish citizenship. Vance v. Terrazas, 444 U.S. 252 (1980).

As the Supreme Court made clear in Terrazas, section 349(c) of the Immigration and Nationality Act requires that the Government prove by a preponderance of the evidence that the actor intended to divest himself of United States citizenship, Such intent, the Supreme Court said, may be ascertained from a person's words or be found as a fair inference from proven conduct.

Intent is to be determined as of the time the expatriating act was performed. Terrazas v, Haig, 653 F. 2d 285 (1981).

Making a formal declaration of allegiance to a foreign state, like the performance of the other acts denominated as expatriating by section 349 (a) of the Immigration and Nationality Act, may be highly persuasive of an intent to relinquish United States citizenship, but it is not conclusive evidence of such intent. Vance v. Terrazas.

Standing alone, however, making a formal declaration of allegiance to a foreign state is insufficient evidence to show intent. King v. Rogers, 463 F. 2d 1188 (1972); Baker v. Rusk, 296 F. Supp. 1244 (1969).

In the case before the Board, appellant on August 15, 1980, stated in his application for a certificate of Mexican nationality in part as follows:

> I expressly renounce United States nationality, as well as any submission, obedience or fidelity to any foreign government of which I may have been a citizen, especially to the Government of the United States of America...I renounce any protection alien to the laws and authorities of Mexico...

Appellant is unquestionably an educated young man. And the renunciatory declaration and pledge of allegiance to Mexico are clear and explicit. It is difficult to believe that appellant did not understand the import of the document to which he appended his signature, Further, as will be discussed below, appellant undoubtedly knew that Mexican law required him to make a choice between United States and Mexican nationality -- and did so.

In Terrazas v, Haig, supra, the plaintiff made a similar declaration of allegiance to Mexico and made an explicit renunci of his United States nationality. There the court concluded:

> Plaintiff's knowingly and understandingly taking an oath of allegiance to Mexico and an explicit renunciation of his United States citizenship is a sufficient finding that plaintiff intended to relinquish his citizenship.

In an earlier case, Matheson v. United States, 400 F. Supp. 241 (1975), Aff'd. 532 F. 2d 809 (1976), the court stated:

> an oath expressly renouncing United States citizenship as is required by the 1949 amendment /to the Mexican Law of Nationality and Naturalization/ would leave no room for ambiguity as to the intent of the applicant.

As a United States District Court in California recently eld, the taking of an oath which contains both an express ffirmation of loyalty to the country where citizenship is ought and an express renunciation of loyalty to the country here citizenship has been maintained "effectively works enunciation of American citizenship because it evinces an ntent by the citizen to so renounce." Richards v. Secretary f State, CF80-4150, D.C.C.D. Cal. (1982).

Furthermore, in filling out the citizenship questionaire at the Embassy on June 10, 1982, appellant signed a tatement captioned "Voluntary Relinquishment of U.S. ationality," wherein he stated that he had pledged llegiance to Mexico voluntarily and with the intention of elinquishing his United States citizenship.

Appellant alleges that he was induced to sign the foregoing statement by a consular officer who told him he could asily recover his United States citizenship since he had a .S. citizen sister. (Appellant's Affidavit of March 31, 1983.) e has offered no proof of the allegation that a consular fficer made a statement clearly in direct conflict with tanding instructions. Absent evidence to the contrary, it is ell established that sworn public officials are presumed to xecute their official duties in accordance with law and egulations. Boissonas v. Acheson, 101 F. Supp. 138 (1951).

Appellant argues that his lack of intent is clearly shown y the statement made in the citizenship questionnaire he illed out at the United States Embassy in June 1982. herein he stated:

> I am relinquishing to /sic/ my U.S. nationality because I have to turn down one nationality, but if I could keep my U.S. nationality even if I had the Mexican nationality, I would certainly keep it. I have nothing against been /sic/ American and I'd like to maintain my nationality but the law forces me to relinquish because I want to keep my Mexican nationality.

At the hearing counsel for appellant argued that the foregoing statement is evidence that appellant had no intent to relinquish his United States nationality, 6/

Counsel further argued:

> On June 10, 1982 it is demonstrable that [redacted] had no intent to give up his United States citizenship. I refer to section 12(b) of that form. Nothing in the world could be plainer...He is shouting it at us in his own handwriting. And that must control the interpretation of that document more than the pre-printed or typed language of the State Department form. 7/

And in his summation, counsel asserted:

> And this man is saying -- he is sounding -- and if you read this he is obviously under the impression that he is then on June 10, 1982 giving up his United States nationality. This is not the words of a person who thought he was giving it up on August 15, 1980, nearly 22 months before that. He says in the present tense, "I am relinquishing U.S. nationality now,". ,.He is shouting out to us at a time contemporaneous with the expatriating act that, "I don't want to do this. I have to turn down one nationality, and the law forces me to relinquish it," 8/

6/ Transcript of Proceedings in the Matter of [redacted], Department of State, Board of Appellate Review, November 7, 1983 (hereinafter cited as "TR") p.7.

7/ TR p. 19.

8/ TR pp. 39, 40.

Appellant's June 10, 1982 explanation of his intent oes not, in our judgment, permit of more than one inter- retation. We consider that appellant indicated unambiguously hat he knew that Mexican law required him to opt for either exican or his other nationality, that he made the choice of exican nationality with reluctance, but that he did so onsciously and understandingly. Arguably, he would have referred to hold both nationalities, but knew he might not o so. Reluctance to surrender United States nationality xpressed nearly two years after the event does not, in the ace of the unambiguous language of the application for a ertificate of Mexican nationality, vitiate his intent as xpressed in the words he signed on the application for the ertificate.

Nothing of record indicates that appellant performed any ubsequent act that would cast doubt on the meaning of the eclaration of allegiance he made to Mexico. He accepted the ertificate and apparently enjoyed or anticipated enjoying the enefits it would confer on him. According to his own state- ent, he obtained a Mexican passport. In short, appellant's ords and conduct manifest an intention to transfer his alle- iance from the United States to Mexico. His oath of allegiance o Mexico placed him in a position where he was no longer able egally to enjoy or perform the rights and duties of a United tates citizen.

On all the evidence, we believe that the Department as shown that appellant intended to relinquish his United tates citizenship when he made a formal declaration of alle- iance to Mexico and expressly renounced his United States itizenship.

IV

Upon consideration of the foregoing and our review of the ntire record, we conclude that appellant expatriated himself on February 4, 1981. Accordingly, we affirm the Department of State's determination of loss of appellant's nationality.

Alan G. James, Chairman

Gerald A. Rosen, Member

James G. Sampas, Member