DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal from an administrative determination of the Department of State that appellant, [redacted], expatriated himself on November 13, 1978, under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

Two principal issues are presented by the appeal: whether appellant voluntarily declared allegiance to Mexico; and, if he did so, whether the act was accompanied by an intent to relinquish his United States citizenship.

We hold that appellant made a free and unfettered declaration of allegiance to Mexico and that in so doing he manifested an intention to surrender his United States citizenship. Accordingly, we will affirm the Department's holding of loss of appellant's citizenship.

I

Appellant became a United States citizen by birth at [redacted], Texas, on [redacted]. He subsequently acquired the nationality of Mexico by naturalization through marriage to a Mexican citizen on February 7, 1978. 2/

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; . . .

2/ Article 30(B)(II) of the Mexican Political Constitution of 1917, as amended, provides that alien men who marry Mexican nationals and live or establish domicile within Mexico are Mexican nationals by naturalization.

Appellant grew up in the United States and received his education in Texas, attending Oblate College of the Southwest at San Antonio as an undergraduate and graduate student. In 1963 he went to Mexico. In that year he obtained a passport from the United States Embassy at Mexico City, and renewed it in 1968, 1973 and in 1978. He is employed as a research biologist in a decentralized agency of the Mexican Government.

On August 10, 1978, appellant applied for a certificate of Mexican nationality. As required by Mexican law, he expressly renounced his United States citizenship and all allegiance to the Government of the United States; and declared "adherence, obedience and submission to the law and authorities of Mexico." On November 13, 1978, appellant was issued a certificate of Mexican nationality.

The Department of Foreign Relations informed the United States Embassy on February 19, 1979, that a certificate of Mexican nationality had been issued to appellant, and forwarded his United States passport that he had surrendered to the Mexican authorities. 3/

3/ Diplomatic Note No. 12766, Department of Foreign Relations to the United States Embassy, February 19, 1979.

In March 1979 the Embassy wrote appellant to inform him that he might have lost his United States nationality. At the request of the Embassy, he filled out and returned a short questionnaire in which he indicated that he had voluntarily made a declaration of allegiance to Mexico, but in so doing had not intended to relinquish his United States citizenship. Under "Remarks," appellant wrote:

> My wife and I want all our children (two of hers prior to our marriage, and one born since) to bear the same family name. The "Procuraduria del Menor" of the DIF 4/ here in Xalapa instructed us that it is a legal requirement for me to be a Mexican citizen in order to adopt the first two boys.

After receiving the completed questionnaire, the Embassy asked him to call and bring a statement from the Procuraduria del Menor attesting that Mexican citizenship was required in order for him to adopt his step children.

On May 4, 1979, appellant visited the Embassy and was asked to complete a long form questionnaire to facilitate a determination of his citizenship status. Appellant did not complete that form.

More than two years later appellant telephoned the Embassy on October 26, 1981, to request that his citizenship case be expedited so that he might visit his mother in Texas with the children on either a U.S. passport or a visa. He said that he had Seen unable to get a statement from the person at the Procuraduria del Menor who had told him he

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4/ Office /or agency/ for the Protection of Minors and the Family, System for Complete Family Development (DIF). English translation, Division of Language Services, Department of State, LS 112555, Spanish (1984).

would have to procure a certificate of Mexican citizenship in order to prove his eligibility to adopt his wife's children. He was invited to visit the Embassy and fill out a new form of questionnaire so that his case could be submitted to the Department for decision. Appellant went to the Embassy two days later, and completed the citizenship questionnaire on October 28, 1981. He told a consular officer that he had not called before because the man at the Procuraduria del Menor refused to give him a sworn statement attesting that he had told appellant Mexican citizenship was necessary for appellant to adopt his wife's two children. Appellant added that after he had protested to the head of the agency, the man told him to return and he would give appellant excerpts from the civil code stating this requirement. The consul recorded that appellant never returned to get copies of the code. Appellant, however, stated in the questionniare that he went back *twice* to pick up the Code but the person was out of town. Appellant admitted to the consular officer, however, that he had subsequently learned there is no provision in Mexican law that only Mexican citizens may adopt Mexican citizen children. In the course of his conversation with the consul it emerged that appellant did not in the end adopt the children. Instead, after marrying their mother, appellant made an act of recognition at the civil registry, acknowledging that her two boys were his blood children.

On October 29, 1981, the Embassy prepared a certificate of loss of nationality in appellant's name, in compliance with section 358 of the Immigration and Nationality Act. 5/

5/ 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 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 was a national of both the United States and Mexico; that he had 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 approved the certificate on December 16, 1981, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

The appeal was entered on December 1, 1982. Appellant asserts that he performed the expatriating act involuntarily in the mistaken belief that he would have to prove his Mexican nationality in order to adopt his wife's two children: he also maintains that he did not declare allegiance to Mexico with the intention of relinquishing his United States citizenship.

II

Under the Statute, a national of the United States shall lo his nationality by making a formal declaration of allegiance to a foreign state. 6/ It is firmly settled, however, that performance of a statutory expatriating act shall not result in expatriation unless the act was done voluntarily and in accordance with applicable legal principles. 7/ Under the

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6/ Note 1, supra.

7/ Nishikawa v. Dulles, 356 U.S. 129 (1958), citing Perkins v. Elg, 307 U.S. 325.

statute the Government has the burden of proving that a valid expatriating act was performed. 8/

Appellant concedes that he made a declaration of allegiance to Mexico when he applied for a certificate of Mexican nationality. He points out, however, that the "protesta" (affirmation) of allegiance he signed is not a "juramente" (oath), and, he says, "..../It/ is taken rather lightly by the great majority of Mexicans." He submits that the Department may be cognizant of the legal aspect but perhaps not of the "de facto" aspect of the reduced value or respect given to "protestas" or declarations.

8/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), provides in pertinent part as follows:

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 ertablish such claim by a preponderance of the evidence....

Appellant's challenge to the legal force of his declaration of allegiance to Mexico will not, of course, stand up in light of the District Court's holding in Terrazas v. Vance, No. 75-2370, slip op. (N.D. Ill. 1977). There the court found that the declaration of allegiance made by the plaintiff Terrazas, which was identical to the one this appellant made, was a meaningful one within the terms of the statute, since it placed him in complete subjection to Mexico. That precedent is controlling here. Thus, we conclude that appellant here made a valid declaration of allegiance to a foreign state and brought himself within the purview of section 349(a)(2) of the Act.

III

There is a legal presumption that a citizen who performs a statutory expatriating act has done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not done voluntarily. 9/

9/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), provides in relevant part as follows:

. . .

...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.

With respect to the issue of voluntariness, appellant conceded in the questionnaire he filled out in April 1979 that he had acted voluntarily. And in a letter to the Board in November 1983, which constituted his reply brief, appellant also stated that he voluntarily made a formal declaration of allegiance to Mexico. Nevertheless, throughout his other submissions runs the theme that he would not have sought a certificate of Mexican nationality except for his strong devotion to his wife and her two children and because he was misled to believe that in order to adopt his wife's two sons he had to prove his Mexican nationality by obtaining a certificate of Mexican nationality.

It is our view that although one might read a concession of voluntariness in appellant's submissions, fairness requires that the issue of whether he acted voluntarily be briefly explored.

A defense of family or marital devotion may be invoked in loss of nationality cases, but the courts have insisted that the citizen show he was forced to perform an expatriating act in order to safeguard the life, health or well-being of a close family member. 10/ That is not the situation in the case now before the Board. Although we concede that appellant was prompted by a concern for the civil status of his wife's two children, he has not shown that his not applying for a certificate of Mexican nationality would have menaced the life or well-being of the children or his wife. The fact that appellant did not in the end adopt the children, but found other means to give them his own name, is ample evidence that a defense of marital or family devotion is inapplicable here.

10/ See Mendelsohn v. Dulles, 207 F. 2d 37 (1953); and Ryckman v. Acheson, 106 F. Supp. 739 (1952).

That appellant may genuinely have believed he would have to obtain a certificate of Mexican nationality in order to adopt the children we do not gainsay. The fact remains, however, that, as he subsequently learned, Mexican law permits non-Mexicans to adopt Mexican citizen children. Appellant's mistaken belief may have arisen from bad advice given him at the Procuraduria de Menor, but such advice, if given, was contrary to fact, and appellant could so have ascertained by making more thorough inquiries. Furthermore, under these circumstances, a mistaken belief about the provisions of foreign law may not excuse performance of an act proscribed by U.S. statute.

It is our conclusion that appellant voluntarily made a formal declaration of allegiance to Mexico.

IV

Even though we have concluded that appellant voluntarily made a meaningful declaration of allegiance to Mexico, we must still determine whether he did so with the intention of relinquishing his United States citizenship. For, as the Supreme Court held in Vance v. Terrazas, 444 U.S. 252 (1980), loss of nationality will not ensue unless the trier of fact in the end concludes on all the evidence that the citizen not only voluntarily committed an expatriating act prescribed by the statute, but also intended to relinquish citizenship. The Government must, the Supreme Court stated, establish such intent by a preponderance of the evidence. Under the Court's holding, intent 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 allegedly expatriating act was done. Terrazas v. Haig, 653 F. 2d 285 (1981).

Making a formal declaration of allegiance to a foreign state, like performance of the other enumerated acts of the statute, may be highly persuasive evidence of an intent to relinquish United States citizenship, but it is not conclusive evidence. Vance v. Terrazas, citing Nishikawa v. Dulles, 356 U.S. 129 (1958).

In April 1979, six months after appellant received a certificate of Mexican nationality, he stated in the questionnaire sent him by the Embassy that he did not intend to relinquish his United States citizenship when he declared allegiance to Mexico. In his reply to the Department's brief , appellant contended, in effect, that his motive in seeking the certificate of Mexican nationality - simply to be able legally to adopt his wife's children - indicates a lack of intent to relinquish United States citizenship. And we note that appellant obtained a new United states passport on August 9, 1978, one day before he executed an application for a certificate of Mexican nationality. Neither appellant nor the Department briefed or commented on this latter act which is contemporaneous with appellant's doing a statutory act of expatriation.

On the other hand, appellant made a declaration of allegiance to Mexico on August 10, 1978, in which he promised "adherence, obedience and submission to the laws and authorities of the Mexican Republic." He also expressly renounced his United States citizenship, and "all submission, obedience and allegiance to any foreign Government," especially the United States of America.

The case law leaves no doubt that making a declaration of allegiance to a foreign state in conjunction with renunciation of one's United States citizenihp manifests an intent to give up United States citizenship. As the court said in Terrazas v. Haig, supra,:

> Plaintiff's knowing and understanding taking of 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.

The Terrazas court found that plaintiff, an educated man, 22 years old, knowingly declared his allegiance to Mexico. And it found in his conduct after he received a certificate of Mexican nationality abundant confirmatory evidence of his intent to relinquish his United States citizenship when he made the declaration of allegiance,

Here, appellant was over 40 years of age at the time he applied for a certificate of Mexican nationality, and, by his own statements, was of more than average educational attainment. Furthermore, as he stated in the questionnaire he executed in October 1981, he knew he might lose his United States nationality by making a declaration of allegiance to Mexico, "but I took the risk in favor of my two oldest boys."

Although appellant did apply for and obtain a new United States passport the day before he applied for a certificate of Mexican nationality, he was required to surrender it to the Mexican authorities in accordance with Mexican regulations. We are thus unable to accord his apparent wish to maintain his U.S. documentation significant probative value as a sign of lack of intention to relinquish United States citizenship.

Nor is his averrment of lack of intent made in the questionnaire he completed in April 1979, standing alone, sufficient evidence of lack of intent.

That appellant may have done an expatriating act out of the selfless motives, is not in issue. He may have lacked "subjective" intent to relinquish his United States citizenship, but the only intent we are able to measure objectively is the intent he manifested when he subscribed to a declaration of renunciation of his United States citizenship.

Years after he applied for and obtained a certificate of Mexican nationality and after the Department had determined that he had expatriated himself, appellant obtained a United States passport in 1983 for the child born in 1978 of his marriage to his Mexican citizen wife. We are, however, unable to see in that act any persuasive evidence of lack of his intent in 1978 to relinquish his United States citizenship. His action in belatedly documenting his natural child stands as the only act after he did the expatriating act that is remotely suggestive of a wish to retain United States citizenship.

Surveying the entire record, we receive the picture of a citizen who arguably for generous motives voluntarily performed a statutory expatriating act, but did so with full awareness of the possible consequences for his United States citizenship. Nothing in his subsequent conduct calls into doubt the engagement he made to Mexico to renounce his United States nationality and place himself in total submission to the laws and authorities of Mexico in exchange for issuance of a certificate of Mexican nationality.

On all the evidence we conclude that appellant made a knowing and understanding declaration of allegiance to Mexico and manifested an intention in so doing to surrender his United States citizenship.

IV

Upon consideration of the foregoing, it is our judgment that appellant voluntarily performed a valid act of expatriation and that it was accompanied by an intent to terminate his allegiance to the United States. Accordingly, we affirm the Department's holding of loss of his nationality.

Alan G. James, Chairman

Gerald A. Rosen, Member

George Taft, Member