February 9, 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 [redacted] from an administrative determination of the Department of State that he expatriated himself on February 19, 1974, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Mexico upon his own application. 1/

The issues for decision are whether appellant performed the allegedly expatriating act voluntarily, and, if so, whether he intended to relinquish his United States citizenship. We conclude that appellant's naturalization was free and uncoerced, and that it was accompanied by the requisite intent to give up his American nationality. Accordingly, we will affirm the Department's determination of loss of citizenship.

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

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, . . .

I

Appellant acquired the nationality of Mexico by birth in that country of Mexican citizen parents on [redacted]. He acquired the nationality of the United States through naturalization before the United States District Court for the Southern District of New York on June 13, 1955. Upon naturalization in the United States, appellant lost his Mexican nationality under the provisions of the Mexican Law of Nationality and Naturalization of January 5, 1934.

Appellant lived in Mexico from 1917 to 1919, when he moved with his parents to the United States where he resided until 1951.

Appellant served in the United States Army from 1943 to 1946. Between 1951 and 1973 he lived and worked variously in the United States and Mexico. He has resided in Mexico since 1973.

The record shows that appellant had been registered as a United States citizen at the Embassy at Mexico, D.F. from June 1959, and that he was issued passports in 1965 and 1973.

On October 19, 1973, appellant made application to recover his Mexican nationality under the provisions of Article 44 of the Mexican Law of Nationality and Naturalization of 1934. 2/

2/ Article 44 of the Law of Nationality and Naturalization of January 5, 1934, provides in pertinent part:

> Persons of Mexican birth who lose or have lost their nationality can recover it with the same status, provided that they reside and are domiciled in the national territory, and that they notify the Ministry of Foreign Affairs of their desire to recover the said nationality.

As required by Mexican law, appellant declared in his application that he renounced his United States nationality, and all submission, obedience and fidelity to any government, especially to the United States, and formally pledged allegiance to Mexico.

The Department of Foreign Relations issued a certificate of Mexican nationality to appellant on February 19, 1974. The certificate recited that in accordance with article 44 of the Law of Nationality and Naturalization, appellant had recovered the Mexican nationality he had acquired at birth.

In August 1981 appellant obtained a Mexican passport which was visaed by the United States Embassy at Mexico, D.F. in September 1981 for multiple entries into the United States.

It appears that in September 1982 appellant visited the United States Embassy to inquire about his citizenship status. He was interviewed by a consular officer, and completed a questionnaire to assist in the determination of his citizenship. He signed a statement in the form entitled "Statement of Voluntary Relinquishment of U.S. Nationality" acknowledging that he had made a formal declaration of allegiance to a foreign state voluntarily and with the intention of relinquishing his United States citizenship. 3/

In October 1982, the Department of Foreign Relations, replying to an inquiry of the Embassy, confirmed that appellant had been issued a certificate of Mexican nationality. 4/

3/ On the form appellant indicated that he had made a formal declaration of allegiance to Mexico, but he circled "No" on the form against the question whether he had been naturalized in a foreign state.

4/ Diplomatic Note No. 7003469, Department of Foreign Relations to the United States Embassy, Mexico, D.F., October 14, 1982.

Appellant submitted to the Embassy in January 1983 two letters explaining in further detail the circumstances under which he had obtained naturalization In Mexico. On January 19, 1983, the Embassy, in compliance with section 358 of the Immigration and Nationality Act, prepared a certificate of loss of nationality in appellant's name. 5/

The Embassy certified that appellant acquired the nationality of the United States by naturalization; that he acquired the nationality of Mexico By-naturalizatfon upon his own application; and thereby expatriated himself under the provisions of section 349(a) (1) of the Immigration and Nationality Act.

The Department of State approved the certificate on March 18, 1983, approval being an administrative determination of loss of nationality from which an appeal may be brought to this Board. Appellant brought this appeal on May 18, 1983.

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

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.

Appellant contends that he was compelled to apply for Mexican nationality in order to qualify for a position of employment that required Mexican citizenship. He states that he voluntarily re-acquired the nationality of Mexico and that it was accompanied by an intent to relinquish his United States citizenship but that extenuating circumstances prevailed at the time of his performing the expatriating act. Although appellant has not so stated, he implicitly raises the issue of economic duress.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a person who is a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. There is no dispute that appellant applied for and obtained naturalization in Mexico.

The first issue presented is whether appellant performed the allegedly expatriating act voluntarily, for the Supreme Court has held that citizenship continues unless the actor is deprived of it by his voluntary action in accordance with applicable legal principles. Perkins v. Elg, 307 U.S. 325 (1939); Afroyim v. Rusk, 387 U.S. 253 (1967).

Under section 349(c) of the Immigration and Nationality Act, a person who performs a statutory act of expatriation shall be presumed to have done so voluntarily. 6/ Such

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6/ 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.

presumption, however, may be rebutted upon a showing, by a preponderance of the evidence, that the act of expatriation was not performed voluntarily. Although appellant admits that he obtained naturalization in Mexico upon his own application, he seeks to rebut the statutory presumption of voluntariness by implicitly alleging that his act was done under duress.

A defense of duress Is, of course, available to persons who have performed an act of expatriation. Perkins v. Elg, supra; Nishikawa v. Dulles, 356 U.S. 129 (1958); Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971). For a defense of duress to prevail, the courts require proof that the circumstances surrounding performance of the expatriating act were extraordinary. As the court made clear in Doreau v. Marshall, 170 F. 2d 721 (1948), unless a citizen was forced against his fixed will, intent, and efforts to act otherwise, the expatriating act cannot be considered to have been performed under duress, In later cases where duress was successfully pleaded the courts found that the actor had no choice but to perform an expatriating act if he were to cope with a situation that menaced his own safety, health or economic survival, or that of a close member of his family. Nishikawa v. Dulles, (supra); Stipa v. Dulles, 233 F. 2d 551 (1956); Mendelsohn v. Dulles, 207 F. 2d 37 (1953); Insogna v. Dulles, 116 F. Supp. 473 (1953); Ryckman v. Dulles, 106 F. Supp, 739 (1952).

In Jolley, the court reviewed with approval many earlier cases on the issue of voluntariness, noting that fear of financial burden has been rejected as a sufficient ground upon which to posit duress. The court also declared that the opportunity to make a decision based on personal choice is the essence of voluntariness.

Appellant stated that he had but two choices: First, to retain his United States citizenship and return to the United States to seek employement, with his family following him, if and when he obtained employment; and second, to obtain Mexican citizenship, relinquish his United States citizenship, accept an employment offer in Mexico and keep his family together, He states that at the age of 56, being unable to obtain employment as an American citizen in Mexico, and Believing that it "would have been well nigh impossible" to obtain employment in the United States, he "felt obligated"

to "give up my U.S. citizenship ...in order to obtain employment as a Mexican citizen in order to be in a position to work locally and support my family." Appellant is now retired and wishes to reacquire his U.S. citizenship and live in the United States, where most of his children and all of his brothers and sisters now reside.

Appellant maintains that there were no employment opportunities for him in Mexico, if he were not a Mexican citizen. He states that he would have accepted any position available. However, he does not indicate the scope of his search for employment in Mexico, which led him to conclude that he could not have obtained employment without reacquiring Mexican nationality. Moreover, while recognizing his concerns about the difficulties of obtaining employment in the United States, we note that from 1969 to 1973 he had been employed in New York, while his family remained in Mexico.

While we are very sympathetic to appellant's plight, his allegations of economic pressure do not meet the standards of legal duress.

In appellant's case, it is difficult to find any extraordinary circumstances surrounding his naturalization amounting to legal duress. He has not made out a case based upon economic survival. While he has alleged that there were no positions in Mexico for an American citizen with his qualifications, he has not established that was so. While he has alleged that there were no positions available to him in the United States, he did not establish that was the case.

Appellant had a choice -- to become naturalized and secure a job in Mexico or to take another course of action in order to avoid placing his United States citizenship in jeopardy. He chose the former.

Under the provisions of section 349(c) of the Immigration and Naturalization Act, appellant bears the burden of rebutting by a preponderance of the evidence the statutory presumption that his naturalization was voluntary. In our opinion, his evidence falls short of negatfng such statutory presumption. We conclude that his acquisition of Mexican citizenship upon his own application was a voluntary act of expatriation.

III

Although we have found that appellant voluntarily obtained naturalization in Mexico, it must still be determined whether

that act was accompanied by an intent to relinquish his United States citizenship. For, as the Supreme Court held in Vance v. Terrazas, 444 U.S. 252 (1980), if a person fails to prove that his act of expatriation was involuntary, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intention to relinquish citizenship.

In Terrazas, the Supreme Court held that under section 349(c) of the Immigration and Nationality Act 7/, the Government must establish by a preponderance of the evidence that the actor intended to divest himself of United States citizenship; 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 expatriating act was done. Terrazas v. Haig, 653 F. 2d 285 (1981).

Obtaining naturalization in a foreign state, like performance of the other enumerated acts of section 349(a) of the statute, may be highly persuasive, but not conclusive, evidence of an intent to surrender United States citizenship. Vance v. Terrazas, citing Nishikawa v. Dulles, supra.

Thus, standing alone, obtaining naturalization in a foreign state will not furnish evidence of the requisite inten to surrender United States citizenship. Xing v. Rogers, 463 F. 2d 1188 (1972,) The Government may prove intent, the court said in King, by formal renunciation; acts inconsistent with United States citizenship; or acts clearly manifesting an intent to transfer allegiance from the United States to a foreign state,

The prescribed procedure for obtaining naturalization in Mexico entails making application for a certificate of Mexican nationality, On October 19, 1973, appellant executed such an application which, as prescribed by Mexican law, contained inter alia, an explicit statement of renunciation of his United States nationality and his fidelity to any foreign Government, especially to the United States. The application also contained a declaration of allegiance to Mexico.

7/ Note 4, supra.

In deciding a case where the plaintiff had made a similar voluntary declaration of allegiance to Mexico and expressly renounced his United States nationality, the Court of Appeals for the Seventh Circuit held as follows:

> Plaintiff's knowing and understanding taking an oath of allegiance to Mexico and an explicit renunciation of his United States citizenship is a sufficient finding that plainfiff intended to relinquish his citizenship. 8/

The record contains no evidence putting in question appellant's intent in 1974 when he signed a statement expressly renouncing his United States citizenship. On the contrary, there is abundant evidence of appellant's specific intent. On September 15, 1982, appellant signed a "Statement of Voluntary Relinquishment of U.S. Nationality" at the Embassy when he completed a form for determining his citizenship status. In that statement, appellant affirmed that he voluntarily performed an expatriating act with the intention of relinquishing his United States citizenship. In his reply brief he reiterated that he intended to relinquish his United States citizenship, although he also stated that: "I did not in reality intend to relinquish my U.S. nationality but this was a prerequisite of obtaining Mexican nationality."

While intent and voluntariness may be related, they are nonetheless distinguishable. Here appellant's intent is confirmed by his subsequent statements and is not vitiated by his perceived need to choose Mexican nationality for alleged economic exigencies.

Moreover, appellant's cessation of regular visits to the United States Embassy after he re-acquired Mexican nationality and his acquisition of a Mexican passport, which later contained a multiple entry visa to visit the United States, further document his intent.

We conclude that appellant consciously and understandingly intended to relinquish his United States citizenship when he became naturalized in Mexico, He does not maintain otherwise. The Department of State has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States citizenship when he obtained naturalization in Mexico upon his own application.

8/ Terrazas v. Haig, supra.

IV

On consideration of the foregoing and after reviewing the entire record before us, we conclude that appellant expatriated himself. Accordingly, we affirm the Department Of State's determination of March 18, 1983, to that effect.

Alan G. James, Chairman

Mary Elizabeth Hoinkes

George Taft, Member