

September 26, 1984

DEPARTMENT OF STATE
BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S [REDACTED] J [REDACTED] G [REDACTED]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, S [REDACTED] J [REDACTED] G [REDACTED], expatriated herself on October 2, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The Department of State determined on November 8, 1983, that appellant had expatriated herself. It now submits that, upon further examination of the administrative record, the evidence of record is insufficient to support a holding of loss of nationality. The Department therefore requests that the Board remand appellant's case so that the certificate of loss of nationality may be vacated.

The Board will grant the request for remand.

I

Appellant, a native born United States citizen, married a Canadian national and moved to Canada in 1970 where she obtained naturalization in 1975. In May 1981 appellant's husband was transferred to the New York branch of a Canadian bank. According to appellant's affidavit, her husband's employer obtained an L-1 visa (issuable to intra-company transferees) to enable him to work in the United States. The bank also obtained L-2 visas (issuable to dependants of an L-1 visa holder) for appellant and her children. Appellant did not immediately leave Canada for the United States but followed her husband later. Upon departing Canada appellant completed an I-94 card (arrival-departure record), indicating that she was an alien.

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

In September 1982, allegedly to clarify her citizenship status on the advice of counsel, appellant applied for a passport at the New York Passport Agency. The agent who interviewed appellant later reported to the Department that in his opinion appellant had voluntarily obtained naturalization in Canada with the intention of relinquishing her United States citizenship, and had therefore expatriated herself under section 349(a)(1) of the Immigration and Nationality Act.

A "memorandum to file", dated January 25, 1983, records that two officials of the Office of Citizens Consular Services in the Department had "thoroughly reviewed" appellant's case. "It was concluded," the memorandum stated, "that the evidence of record was sufficient to sustain a holding that Mrs. Garcia intended to relinquish her claim to United States citizenship." Appellant entered the United States on an L-2 visa which, the author of the memorandum stated, "clearly indicated that she is to be considered an alien and at that moment did not bring up the subject of her U.S. citizenship status and request an explanation as to why she must enter as an alien."

Appellant stated in an affidavit, dated December 29, 1982, that in accepting an L-2 visa she was merely following the instructions of her husband's employer and did not intend to enter the U.S. as an alien. She also stated that on other occasions when she visited her family in the U.S., she entered "as an American citizen."

It appears that in the Autumn of 1983 the Department instructed the Consulate General at Toronto to prepare and submit a certificate of loss of nationality in appellant's name. The instruction to the Consulate General was apparently conveyed by telephone; there is no written instruction in the record.

In compliance with the Department's instruction and the provisions of section 358 of the Immigration and Nationality Act, the Consulate General on October 5, 1983 prepared a certificate of loss of nationality. 2/ The Consulate General certified that appellant

2/ 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.

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became a citizen of the United States by birth in California; that she obtained naturalization in Canada upon her own application; and concluded that she thereby expatriated herself under section 349(a)(1) of the Act. The Department approved the certificate on November 8, 1983, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board. An appeal was filed through counsel on July 9, 1984.

On September 6, 1984 the Deputy Assistant Secretary for Consular Affairs submitted the administrative record upon which the holding of loss of nationality was based, and a memorandum requesting that the Board remand the case for the purpose of vacating the certificate of loss of nationality. The Department's memorandum stated the following grounds for the request.

In the case of Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court held that a person could not be found to have expatriated herself unless it is shown by a preponderance of the evidence that she had voluntarily performed an act declared by Congress to be expatriating with the intent thereby to relinquish her United States citizenship. Although the Department believes the appellant did voluntarily perform an expatriating act by her naturalization in Canada, upon reconsideration it has concluded that despite the fact appellant moved to the United States in an alien status, the preponderance of the evidence does not demonstrate an intent to relinquish United States citizenship. The Department requests therefore that the Board remand Mrs. G■■■■'s case for cancellation of the Certificate of Loss of Nationality.

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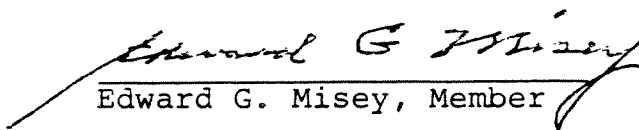
II

Inasmuch as the Department has concluded that it is unable to carry its burden of proving that appellant intended to relinquish her United States nationality, and in the absence of manifest errors of law or fact, the Board will grant the Department's request for remand. 3/

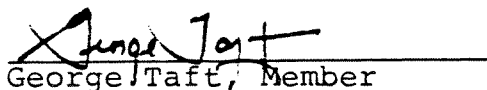
The case is hereby remanded for further proceedings. 4/



Alan G. James, Chairman



Edward G. Misey, Member



George Taft, Member

3/ Given our disposition of this case, we do not find it necessary to consider the validity of the certificate of loss of nationality issued by the Consulate General on October 5, 1983, and approved by the Department on November 8, 1983. Section 104(a)(3) of the Immigration and Nationality Act confers jurisdiction upon the Secretary of State to determine the nationality of "a person not in the United States." Although appellant here was in Canada when she obtained naturalization on October 2, 1975, the certificate of loss of nationality was issued and approved in 1983, several years later, while appellant was residing in the United States.

4/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 CFR 7.2(a) provides in part:

...The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it.