June 21, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted]e E[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, J[redacted] E[redacted] M[redacted], expatriated herself on September 28, 1981 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

Since appellant has conceded that she performed the statutory expatriating voluntarily, the sole issue presented is whether it was her intention to relinquish her United States citizenship. It is our conclusion that the Department has not sustained its burden of proving that appellant's naturalization was accompanied by the requisite intent to divest herself of American citizenship. Accordingly, we reverse the Department's holding of loss of nationality.

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 became a United States citizen by birth at [redacted]. She was educated in the United States, and in 1946 she married [redacted] whose appeal we also decide today. After their marriage, the couple lived in various parts of the United States until 1975 when they moved to Canada.

In all material respects the rest of the facts in this appellant's case are similar to those set out in the Board's decision in the appeal of Mr. M[redacted]. She obtained naturalization in Canada upon her own application on September 28, 1981, the same day as he. She completed the same forms for determining United States citizenship as did her husband, giving virtually identical information. 2/

On February 4, 1982, the Consulate General at Winnipeg executed a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, 3/ certifying that Mrs. M[redacted] acquired United States citizenship at birth; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself

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2/ In only one respect does appellant's case present a fact absent from her husband's case. In submitting the certificate of loss of nationality in Mrs. M[redacted]s name to the Department, the consular officer stated: "In a telephone interview with Mrs. M[redacted] /no date given/, the consular officer asked 'when you took up Canadian citizenship did you think it might have an effect on your U.S. citizenship?' Mrs. M[redacted] responded: 'I knew it canceled it out.'"

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

> 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.

under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on March 7, 1982, approval being an administrative determination of loss of nationality from which a properly filed and timely appeal may be taken to this Board.

Appellant entered her appeal with her husband on December 2, 1983. She conceded that she had become a Canadian citizen voluntarily, but stated that she performed the statutory expatriating act without the intention of relinquishing United States citizenship.

II

There is no dispute that appellant performed a valid statutory act of expatriation. She concedes that she did so voluntarily. Appellant thus does not undertake to rebut the legal presumption that one who performs an act prescribed by statute as expatriating has done so voluntarily, (section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c)). And there is nothing in the record to suggest that Mrs. M[redacted] did not willingly and readily accompany her husband in applying for and obtaining naturalization. We conclude that appellant became a citizen of Canada of her own free will.

The sole issue for decision in Mrs. M[redacted] appeal, as in her husband's, is whether she intended to relinquish United States citizenship.

Applying the same legal principles to essentially the same facts as in the appeal of Mr. M[redacted] it is our conclusion that the Department has not carried its burden of proving Mrs. M[redacted] had the requisite intent to relinquish United States citizenship when she obtained Canadian citizenship.

III

Upon consideration of the foregoing, the Board hereby reverses the Department's determination of loss of appellant's United States citizenship.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Dissenting Opinion

I cannot agree with the Board's majority conclusion that the Department has not sustained its burden of proving that appellant's naturalization was accompanied by the requisite intent to divest herself of American citizenship. In my dissent to the Board's decision in the matter of John Anthony Mollenhauer I have explained the reasons which underlie my position. These same reasons apply equally to the matter of Jeannette Elizabeth Mollenhauer.

Warren E. Hewitt

Warren E. Hewitt, Member