November 26, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M S M d M

This is an appeal from an administrative determination of t ent of State that appellant, M S M d M expatriated herself on Septem 24 u th p of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

For reasons stated below, we conclude appellant made that declaration voluntarily and with an intent to abandon her United States citizenship, Accordingly, we affirm the Department's determination of appellant's expatriation.

I

ame a United States citizen by birth at , . Through her Mexican citizen the nationality of Mexico, When she was about three years old, she was taken by her parents to live in Mexico.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2) provides:

Section 349, (a) Prom 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..,,

According to appellant, she knew from an early age that she was a United States citizen, and held herself out as such. She submitted evidence, for example, that when she was employed in Mexico City in 1962 and 1963 she gave her nationality as "Americana" on work contracts.

In 1967 she married a Mexican citizen. Before marriage she decided she should clarify her citizenship status since it was contemplated that she would accompany her husband to Belgium where he planned to study. She states that when she consulted the United States Embassy she was told she could be documented as a United States citizen, but that in order to return to Mexico and reside there permanently she would have to obtain permission from the Mexican authorities. (As she put it: "They kept telling me that I was a U.S. citizen and that I had to ask the Mexican Government for a license to be in Mexico.") She went to the Embassy another time but did not complete an application for a passport, allegedly because she wanted more, clearer information. Apparently she became discouraged, and feared she might not be able to obtain authorization to remain in Mexico as a United States citizen; her plans to marry and accompany her husband to Europe would thus be frustrated. "In those circumstances of fear and nervousness and a lack of good reliable information I decided to change eventhough /sic/ it was not really my desire."

On October 10, 1966 appellant completed an application for a certificate of Mexican nationality in which she expressly renounced her United States nationality and allegiance to the United States, and declared allegiance and fidelity to the laws and authorities of Mexico.

Nearly a year later on July 20, 1967, appellant applied for a Mexican passport, stating to the authorities that she had previously renounced her United States citizenship, and wished to obtain a passport urgently. A passport was issued to her a few days later. She accompanied her husband to Belgium where, she states, they spent one year, returning to Mexico in 1968. There she has since resided.

A certificate of Mexican nationality was issued to appellant on September 23, 1974, eight years after she had made application therefor. 2/ The certificate recited that appellant

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2/ The delay was apparently due to the fact that her Mexican father's birth certificate was destroyed in court house fire and it was some time before she could produce satisfactory evidence of his Mexican nationality.

acquired Mexican nationality by birth in California to a Mexican citizen father; and that she had declared obedience and submission to the laws and authorities of Mexico; and had expressly renounced the nationality of and allegiance to the state which had recognized her as its national.

Many years later when appellant visited the United States Embassy in 1983 to clarify her citizenship status, she was interviewed by a consular officer, and completed an application for registration as a United States citizen and issuance of a passport. She also filled out a form for determining United States citizenship.

It appears she informed the Embassy that she had obtained a certificate of Mexican nationality, for the Embassy sent a note to the Department of Foreign Relations requesting a copy of appellant's application for a certificate of Mexican nationality and the certificate. Upon receipt of those documents, the consular officer aoncerned executed a certificate of loss of nationality in appellant's name on August 30, 1983, 3/ He certified that appellant obtained United States citizenship by birth therein; that she acquired the nationality of Mexico by birth abroad to a Mexican citizen father; that she made a formal declaration of

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3/ 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 the 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.

allegiance to Mexico on October 10, 1966; that a certificate of Mexican nationality was issued to her on September 23, 1974; and that she thereby expatriated herself on September 23, 1974 under the provisions of section 349(a)(2) of the Immigration and Nationality Act. 4/

In forwarding the certificate to the Department the consular officer made the following observations about appellant's case:

> Mrs. M[redacted] has three children. She has no[redacted]o register any of them as U.S. citizens. She has voted in Mexico, but not in the U.S., and she has returned to the Embassy only to solicit visas to visit the States. When asked why she has made no attempt to benefit from the services to whic[redacted]citizen is entitled, Mrs. M[redacted] explained that she had "already[redacted]a path."
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> Mrs. M[redacted] actions over the past 17 years[redacted]that she acts as and considers herself to be a Mexican citizen. In view of this, and given the fact that she had the opportunity to select U.S. citizenship but opted for what she describes as the "easier and more rapid" alternative of being documented as a Mexican citizen, the Consular Officer must conclude that she intended to relinquish U.S. nationality at the time she signed the renunciatory oath. Approval of the CLN in her name is therefore recommended.

4/ The Mexican Government considers the declaration of allegiance to Mexico executed in connection with an application for a Certificate of Mexican Nationality to be effective upon issuance of the Certificate, which constitutes full proof of Mexican nationality. Based upon this policy, the Department of State regards the declaration of allegiance to Mexico to affect United States nationality when the Certificate of Mexican Nationality is issued, not when the declaration is made....

The Department approved the certificate on September 27, 1983, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal lies to the Board of Appellate Review. A copy of the certificate was mailed to appellant by the *Embassy* on October 4, 1983. A short time later appellant visited the Embassy to discuss an appeal, which she filed on August 29, 1984.

Appellant maintains that she made a declaration of allegiance to Mexico involuntarily - under pressure of circumstances. She also contends, by indirection, that she did not intend to relinquish her United States nationality.

II

The statute prescribes that a national of the United states shall lose his nationality by making a formal declaration of allegiance to a foreign state. 5/ The courts have declared, however, that nationality shall not be lost unless the proscribed act was validly and voluntarily performed, and accompanied by an intention to relinquish United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967); Nishikawa v. Dulles, 356 U.S. 129 (1958); Perkins v. Elg, 307 U.S. 325 (1939).

5/ Supra, note 1.

There is no question that appellant duly made a meaningful declaration of allegiance to Mexico, and thus brought herself within the purview of the statute. She contends, however, that she did not make the declaration voluntarily.

In law, it is presumed that one who performs a statutory expatriating act does so voluntarily, although the presumption may be rebutted by the actor upon a showing by a preponderance of the evidence that the act was not voluntary. 6/

Since appellant contends that she made a formal declaration of allegiance involuntarily, she bears the burden of proving that the act was coerced by adducing evidence that she acted against her will to do otherwise.

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

> 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.

Appellant claims that she made a declaration of allegiance in order to ensure that she would be able to travel abroad with her husband and return to Mexico to live, suggesting that if she had obtained clear information from the United States Embassy in 1966 about how she could retain United States citizenship and still live in Mexico, she might not have performed an expatriating act. In effect, she seems to argue that circumstances beyond her control forced her to make the choice of Mexican citizenship. She also states that:

> At the same time I also thought of the future, if I was married to a man that travel alot /sic/ I thought that I could have an economic security, in case of an accident, if I had the citizenship of my husband, I could keep my house, goods and whatever benifits, /sic/ it could not be the same if I Was-a U.S. citizen.

We are unable to find in appellant's submissions any basis to conclude that she was subjected to duress. The circumstances in which she found herself in 1966 were in no way extraordinary in the sense posited by the court in Doreau v. Marshall, 170 F. 2d 721, 724 (3rd Cir. 1948): "If by reason of extraordinary circumstances amounting to true duress, an American citizen is forced.../to perform an expatriating act/ the sine qua non of expatriation is missing."

In 1966 appellant found herself in the position of many dual nationals of the United States and Mexico who, because of various needs or interests, wish to enjoy the rights and privileges of Mexican nationality. The inescapable inference to be drawn from appellant's submissions is that she found it more convenient to declare allegiance to Mexico, an act that required her to sever her allegiance to the United States, than to assert her United States citizenship. We do not fault her for making that choice, but that she made a deliberate choice is absolutely clear.

Duress connotes absence of choice. In law, appellant had an alternative to choosing her Mexican nationality and thus placing in jeopardy her United States citizenship: she could have obtained documentation as a United States citizen. To have chosen that course would have meant that she would have had to leave Mexico and obtain permission to return and remain as a resident alien.

We recognize that choosing United States citizenship over Mexican might have presented appellant with a number of practical difficulties and possibly a great inconvenience, but we cannot accept that from a legal perspective, she could not have done otherwise. She has offered no evidence that her marriage and travel plans would have been frustrated, and we are not prepared to speculate that her husband would not have been understanding had she opted for American citizenship.

Thus it is clear that appellant had the opportunity to make a personal choice and freely did so. As the cases hold, where one has the opportunity to choose one course of action as opposed to another, there is no duress. See Jolley v. Immigration and Naturalization Service, 441 F. d2 1245, 1250 (5th Cir. 1971):

> ...But opportunity to make a decision based upon personal choice is the essence of voluntariness. Such a choice was unavailable to Nishikawa, for he was forced by Japanese penal law to engage in what was then termed an expatriating act. The duress he felt was not of his own making. Jolley's expatriating act, on the other hand, was not compelled by law. He had the alternative to obey the dictates of the Selective Service System, an alternative he found impossible solely because of his own moral code. His renunciation was therefore the product of personal choice and consequently voluntary. 10/
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> 10/ /Foot note omitted./

We dismiss as without merit appellant's point that she declared allegiance to Mexico to secure her economic future. An expatriative act performed to gain economic advantage, without more, is presumptively uncoerced.

Appellant has not, in our opinion, rebutted the legal presumption that she made a formal declaration of allegiance to Mexico voluntarily.

III

Although we have determined that appellant voluntarily made a formal declaration of allegiance to Mexico, the issue remains

as to whether she did so with the intention of relinquishing her United States citizenship. It is well established that expatriation will not occur 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.

In Terrazas, the Court reiterated that section 349(c) of the Immigration and Nationality Act requires that the government prove by a preponderance of the evidence that the citizen intended to divest himself of United States citizenship. 444 U.S. at 261. Such intent, the Supreme Court stated may be discerned from a person's words or be found its a fair inference from proven conduct. Id. at 260.

Intent is to be determined as of the time the expatriating act was performed. Terrazas v. Haig, 653 F. 2d 685 (7th Cir. 1981).

While making a formal declaration of allegiance to a foreign state can be highly persuasive evidence of one's intent to relinquish American nationality, standing alone, it is not conclusive evidence of such intent. Vance v. Terrazas, 444 U.S. at 252.

In the case before us, appellant stated on October 10, 1966 in applying 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 governments 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....

Making an express renunciation of United States nationality before a foreign official does not in itself result in expatriation. As appellant has correctly implied, formal renunciation of United States nationality may only be made before a consular officer of the United States in the form prescribed by the Secretary of State. Making such a renunciatory statement, however, is highly expressive of one's intent with respect to United States citizenship. And the courts have made clear what the legal consequences are of making such a statement.

In Terrazas v. Haig, supra, the plaintiff made a similar declaration of allegiance to Mexico and made an explicit renunciation of his American nationality. There the Court concluded:

> Plaintiff's knowingly and understandingly taking an oath of allegiance to Mexico and an explicit renunciation of United States citizenship is a sufficient finding that plaintiff intended to relinquish his citizenship, 653 F, 2d at 288.

Taking of an oath which contains both an express affirmation of loyalty to the country where citizenship is sought and an express renunciation of loyalty to the country where citizenship has been maintained "effectively works renunciation of American citizenship because it evinces an intent by the citizen to so renounce." Richards v. Secretary of State, CV 80-4150, C.D. Cal. (1982), aff'd 752 F. 2d 1413 (9th Cir. 1985).

Appellant was 26 years old when she made the declaration of allegiance to Mexico. She appears to have held responsible positions before then. On all the evidence, we have no reason to doubt that she knowingly and intelligently made the pledge of allegiance to Mexico that included an explicit undertaking to surrender her other nationality.

As we must do, we have examined the record carefully to determine whether there may be other factors that would warrant a finding that appellant lacked the requisite intent to relinquish her United States nationality.

Nothing of record, however, indicates that appellant performed any subsequent act that would cast doubt on the meaning of the declaration of allegiance she made to Mexico. She accepted the certificate and enjoyed the benefits conferred on her. She took no action for many years to assert a claim to United States citizenship. In fact, she travelled to the United States as an alien and for many years she held herself out as a Mexican citizen only. Arguably, she would have preferred to hold both nationalities, but knew she might not do so. Reluctance to surrender United States nationality expressed many years after the event does not, in the face of the unambiguous language of the application for a certificate of Mexican nationality, vitiate her intent as expressed in the words she signed on the application for the certificate.

In short, appellant's words and conduct manifest an intention to transfer her allegiance from the United States to Mexico. Her oath of allegiance to Mexico placed her in a position where she was no longer able legally to enter or perform the rights and duties of a United States citizen.

On all the evidence, we believe that the Department has shown that appellant intended to relinquish her United States citizenship when she made a formal declaration of allegiance to Mexico and expressly renounced her United States citizenship.

IV

Upon consideration of the foregoing and the entire record, we conclude that appellant expatriated herself on September 23, 1974. Accordingly, we affirm the Department of State's determination of loss of appellant's nationality.

Alan G. James, Chairman

James G. Sampas, Member

Frederick Smith, Jr. Member