July 9, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] S[redacted] K[redacted]

L[redacted] S[redacted] K[redacted] appeals an administrative determination of the Department of State that she expatriated herself on February 3, 1977 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 determined on September 17, 1982 that appellant had expatriated herself. Notice of appeal was entered a year and a half later on March 28, 1984. The first issue to be decided is whether the appeal may be deemed to have been filed in a timely manner. For reasons stated below, we consider the appeal timely. With respect to the principal substantive issue for decision - whether appellant intended to relinquish United States nationality - we conclude that the Department has not carried its burden of proof that she had such an intent. The Department's holding of expatriation is accordingly reversed.

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, . . .

I

Appellant became a United States citizen by birth at [redacted]. She lived in various parts of the United States from birth to 1970 when her mother took her to Canada.

Appellant attended university in British Columbia. In her final undergraduate year, she applied for naturalization, and on February 3, 1977, after taking the prescribed oath of allegiance, was granted a certificate of Canadian citizenship. 2/ She was then 21 years old.

In 1978 appellant obtained a teaching certificate, and the following year was employed by a school district in British Columbia. From 1980 to 1982 she studied for a masters degree in education. In the autumn of 1982 she went to California, where in 1983 she received her masters degree from San Diego University.

It appears that when appellant inquired at the Consulate General in Vancouver in June 1982 about "visa procedures" (her words) to enter the United States to continue her graduate studies, the fact of her naturalization came to the attention of United States consular authorities. After receiving confirmation

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2/ The oath of allegiance prescribed by the Canadian Citizenship Act of 1976 reads as follows:

> I,..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> So help me God.

of appellant's naturalization from the Canadian citizenship authorities, the Consulate General handed appellant a letter on July 12, 1982, informing her that she might have lost United States citizenship by obtaining naturalization in Canada. As requested by the Consulate General, appellant completed a form, "Information for Determining U.S. Citizenship," to assist the Department in making a determination of her citizenship status. She was also interviewed by a consular officer.

Thereafter the Consulate General executed a certificate of loss of nationality in appellant's name on August 6, 1982. 3/ The Consulate General certified that appellant acquired United States citizenship at birth; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

In submitting appellant's case to the Department, the consular officer who interviewed her expressed the opinion that appellant had not intended to relinquish United States citizenship when she became a Canadian citizen. He therefore recommended that the certificate of loss of nationality not be approved.

The Department, however, did not agree with the opinion of the consular officer.

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.

In a telegram to the Consulate General dispatched September 17, 1982, the Department asserted that:,

> It thus appears that she was aware that she could lose her U.S. nationality by naturalization in Canada, that she no longer considered herself a U.S. citizen and that her act was performed voluntarily. Department believes that it can sustain the burden of proof that Ms. Kanevesky's naturalization in Canada was performed with intent of relinquishing U.S. nationality.

The Department approved the certificate on September 17, 1982, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

Appellant gave notice of appeal through counsel on March 28, 1984. Her principal contention is that she did not intend to relinquish her United States citizenship when she obtained naturalization in Canada upon her own application.

II

Before proceeding, we must determine whether the Board has jurisdiction to consider this appeal. Since timely filing is a jurisdictional issue, U.S. v. Robinson, 361 U.S. 220 (1960), the Board's authority to consider the merits of the case depends on whether the appeal was timely filed.

Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b), provides that:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under subpart C of Part 50 of this Chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

An appeal not filed within one year after approval of the certificate must be dismissed unless the Board determines, for good cause shown, that the appeal could not have been filed within the prescribed time. 22 CFR 7.5(a).

The appeal was entered on March 28, 1984, six months beyond the allowable period of time. 4/

The applicable regulations further prescribe that at the time a certificate of loss of nationality is forwarded to the person concerned, he or she must be informed of the right of appeal to this Board within one year after approval of the Certificate. 22 CFR 50.52. 5/

4/ On March 28, 1984 counsel for appellant wrote to the Board to request information regarding appeals, Although counsel did not submit formal notice of appeal until April 20, 1985, he captioned his letter of March 28, 1984 "Appeal from Loss of Nationality" and identified appellant by name. In the circumstances, the Board is prepared to deem that the appeal was initiated on March 28, 1984.

5/ 22 CFR 50.52 reads as follows:

See. 50.52 Notice of right to appeal.

When an approved certificate of loss of nationality or certificate of expatriation is forwarded to the person to whom it relates or his or her representative, such person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review (Part 7 of this Chapter) within one year after approval of the certificate of loss of nationality or the certificate of expatriation.

Notice of the right of appeal is customarily conveyed by information printed on the reverse of the certificate; 6/ the obverse bears the notation in bold type at the bottom: "See Reverse for Appeal Procedures."

The certificate of loss of nationality that was issued in this case was approved by the Department on September 17 1982. When appellant received a copy thereof on October 1, 1982 the reverse was blank. On January 11, 1983 appellant went to the Consulate General in Vancouver to request a copy of the appeal procedures. The Consulate General gave appellant a copy of an unexecuted certificate of loss of nationality on the reverse of which were printed details about taking an appeal to this Board. The information contained therein, however, cited the procedures that were in effect from November 29, 1967 to November 30, 1979. 7/

The appeal information set out on the sample certificate of loss of nationality given to appellant read in pertinent part as follows:

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.

6/ The information on appeal procedures reads in part as follows:

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review of the Department of State within one year after the approval of the certificate of loss of nationality. The regulations governing appeals are set forth at Title 22 of the Code of Federal Regulations, Part 7. /Emphasis added/

7/ On November 30, 1979 the regulations governing the Board were revised and amended.

Under the regulations in effect prior to 1979, a person who contended that the Department's administrative holding of loss of nationality in his case was contrary to law or fact was entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 22 CFR 50.60 (1967-1979).

Appehlant was therefore entitled to assume'that she had a flexible period of time - not one year - within which to seek relief from this Board. That she acted on that assumption is suggested by the following explanation she has given for her delay in taking the appeal.

> By the time she received the appeal procedure, Ms. K[redacted] had decided to study for her Master's Degree at San Diego State University. As the appeal would have delayed said study, she applied for and received a student visa (F-1). Once in San Diego, Ms. K[redacted]y focused on her graduate courses. Her graduate studies ended in August 1983.
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> At that time Ms. K[redacted] began work on a year of practical training in the area of gifted and talented education. To satisfy her immediate visa needs she obtained the required practical training extension on her student permit. Once the practical training terminated, Ms. K[redacted] initiated the appeal herein.

The failure of the Consulate General to inform appellant that she had one year to appeal, as mandated by 22 CFR 50.52, excuses her delay. The appeal is timely, and will be considered on the merits.

III

There is no dispute that appellant obtained naturalization in Canada upon her own application, and thus brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act-

In law one who performs a statutory expatriating act is presumed to have done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was done involuntarily. 7/

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

> ..,Except as other wise 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

Appellant contends that duress - economic pressures - forced her to seek naturalization in Canada. As she put it in the citizenship questionnaire she completed at the Consulate General in 1982:

> In 1977 I was 21 and in my final year of undergraduate study. My next goal was to find employment in British Columbia as I was not financially able to continue my studies, Canadian employers, then and now, have a policy against hiring non-Canadians if a suitable Canadian is available. Non-Canadians didn't find jobs with a minimum of relevant work experience. I needed to minimize any obstacles to obtaining a position.

In support of her argument that her naturalization was involuntary, appellant produced a statement from the school district in British Columbia by which she was employed after naturalization. The statement simply attests that it was the practice of that school district to employ Canadian citizens "where ever possible for any teaching vacancy which occurs."

To establish a case of economic duress, appellant must show that at least some degree of hardship would have ensued had she not performed the expatriative act. Richards v. Secretary of State, 752 F. 2d 1413 (9th Cir. 1985).

Appellant has submitted no evidence to support her contention that she would have been unable financially to continue her studies unless she could find employment. Nor has she shown that the only employment open to her was a position that required her to be a Canadian citizen. Indeed, the statement of the British Columbia school board suggests that it conceivably might have hired appellant as a non-Canadian, had she had the requisite professional credentials.

In brief, appellant's case of economic duress rests on unsubstantiated allegations. It is evident that she has not rebutted the statutory presumption that her acquisition of Canadian citizenship was voluntary. We therefore conclude that appellant obtained naturalization of her own free will.

> 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.

IV

Voluntary performance of a statutory expatriating act alone will not result in loss of nationality, for the question remains whether on all the evidence appellant intended to relinquish United States citizenship when she voluntarily became a citizen of Canada. Vance v. Terrazas, 444 U.S. 252 (1980) The Government must prove an intent to relinquish citizenship by a preponderance of the evidence, 444 U.S. at 267, Intent may be proved by a person's words or found as a fair inference from proven conduct. 444 U.S. at 260, The intent to be proved is the individual's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F. 2d 285, 287 (1981).

There is no direct evidence of appellant's intent with respect to United States nationality in 1977, save the act of naturalization and the swearing of an oath of allegiance to the British Crown, acts which, although suggestive of an intent to abandon United States citizenship, are insufficient in themselves to prove intent, 444 U.S. at 261.

The Department submits that appellant's intent is evidenced by her words and conduct after naturalization. According to the Department's brief:

> ...She has acted in all matters as a Canadian citizen and has not exercised any right of a United States citizen nor has she acted in any way to indicate that she retained her allegiance to the United States. When all of the evidence is considered in total, no other conclusion can be drawn. She has never been documented as a U.S. citizen, has never registered at the post, and has never consulted with the post about the possible consequences of her Canadian naturalization near the time of the act, It was not until Ms. K[redacted] wished to go to the United States to study that she had any contact with the U.S. Consulate, At that time, she requested a student visa, According to Ms. K[redacted] questionnaire, it was not until May 1, 1982, that she ever thought she might be a U.S. citizen, From the time she naturalized (February 3, 1977) until she applied for her visa (May 1, 1982) she regarded herself as a Canadian. Had she believed that she had not loss /sic/ her U.S. nationality, she would not have approached the Consulate as an alien.

Her lack of concern is revelatory of her indifference toward her U.S. nationality. The appellant's conduct indicates that she assumed, upon naturalizating in Canada, that; she had relinquished her U.S. citizenship. That now she says her intent was not *to* relinquish her U.S. citizenship indicates either a change of heart, or a change in circumstances and does not shed any light as to what her intent was at the time of her relinquishment.

Appellant's words, which the Department contends reveal an intent to relinquish United States citizenship, are found in certain statements appellant made in the citizenship questionnaire she completed at the Consulate General in July 1982. The pertinent parts of the questionnaire are ***set*** out below:

11. a. When did you first become aware that you might be a United States citizen? (Give approximate date.)

May 1, 1982

b. How did you find out you were a United States citizen? **(For** example did you always know you were a United States citizen? If not when did you learn about your citizenship? Did someone tell you you were a citizen?)

I called the U.S. Consulate to inquire about visa procedures as I will be returning to California as a graduate student in Aug. of 1982. I was told I needed to formally renounce my U.S. citizenship, I am not willing to do this if I may have dual (U.S./Canadian) citiship.

13. Did you know that by performing the act, described in item 7 above /naturalization in a foreign state7 you might lose U.S. citizenship? Explain your answer.

No. When I questioned various people, I was given the impression that dual citizenship was a possible option.

Appellant's answers to the foregoing questions are hardly pellucid expressions of one who was saying in 1982 that since 1977 she considered herself to be only a Canadian citizen.

Her answer to item lla is particularly puzzling. Did she mean that the first time she had been informed officially that she was a United States citizen was on May 1, 1982? It is hard to believe that she did not know much earlier that she was an American; she had lived in the United States for fifteen years and her father was a United States Naval officer. Or did she mean that from the time of her naturalization in 1977 to 1982 she was uncertain whether she might have lost her citizenship but had been informed in 1982 that she was still a citizen, pending a final determination of her citizenship status? We can only speculate. In any event, it would be straining to construe her answer to item lla as a clear indication that it was her intent in 1977 to relinquish United States citizenship.

Her statement that she went to the Consulate General to ascertain "visa procedures" does not unmistakably show she intended in 1977 to relinquish United States citizenship. For an American citizen to inquire about a visa rather than ask for a passport or other citizenship documentation does not necessarily show one considers herself to be an alien.

To presume intentional alienage from such an expression is to make no allowance for the possibility that she was simply inartful in the way she inquired about how she could legally enter the United States.

Appellant's phrase, "I was given to understand that dual citizenship was a possible option," could mean no more than that she hoped or intended to be a dual national after naturalization; not that she intended to be solely a Canadian citizen if dual nationality were not possible.

We are unpersuaded that appellant's ambiguous words reveal a specific intent to relinquish her United States citizenship.

Turning to appellant's conduct from 1977 to 1982, we note that it is characterized by inaction regarding her United States citizenship, rather than by acts expressly derogatory of United States nationality.

Appellant, who was 21 years old when she became a Canadian citizen, seems to have been preoccupied with pursuit of academic studies to prepare herself for a career in a specialized educational field. It is reasonable to assume that her foremost thought was to proceed with her training, oblivious to the desirability of documenting her United States citizenship and doing things that one should do as a citizen of the United States. One could properly criticize such conduct, but an intent to relinquish citizenship is not the only inference reasonable people might draw from it.

Appellant lived in Canada from the time she was a teenager, attended high school and university there. The Board does not consider it relevant to the issue of her intent with respect to her United States citizenship that she might have conducted herself in many ways like a Canadian. She might, understandably, have perceived no need in an evironment not greatly different from that of the United States, to register at the Consulate General in Vancouver or consult the Consulate about the consequences of naturalization. The Department has not convinced us that appellant conducted herself as she did because it was her intent in 1977 to forfeit United States citizenship. Unawareness, lack of prudence, absorption in her studies could just as likely account for passivity with respect to her United States citizenship.

Turning to the Department's contention that appellant's intent to relinquish United States citizenship is shown by her failure to discharge a range of American civic responsibilities, we must point out that appellant did not, as far as the record shows, obtain a Canadian passport, vote in Canada, or hold herself out to Canadian or United States officials solely as a Canadian citizen. (As discussed above, it is by no means clear that when appellant went to the Consulate General in 1982 she considered herself an alien toward the United States; the consular officer who interviewed appellant apparently did not consider that she came before him as an alien, having expressed the opinion that she lacked the specific intent to relinquish United States citizenship.)

In making an a posteriori determination of a citizen's intent, the trier of fact must be satisfied that the party's conduct

fairly supports a finding that the part willed loss of United States citizenship when the proscribed act was done. Fairness demands that only conduct reasonably free from ambiguities be the basis of a finding of intent to relinquish United States citizenship. Here, there is considerable reason to doubt that appellant knowingly and intelligently forfeited United States citizenship.

It is therefore our conclusion that the Department has not carried its burden of proving that appellant intended to divest herself of United States citizenship when she obtained naturalization in Canada upon her own application.

V

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated herself.

Alan G. James, Chairman

Mary E. Hoinkes, Member

George Taft, Member