December 9, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] E[redacted] R[redacted]-R[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, [redacted] expatriated herself on December 5, 1983 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The sole issue presented is whether the Department has carried its burden of proving that Ms. R[redacted] intended to relinquish her United States nationality when she made a formal declaration of allegiance to Mexico. Having concluded that the Department has met its burden of proof, we affirm the Department's holding of appellant's expatriation.

I

Ms. R[redacted]-R[redacted] was born at [redacted] of a United States citizen mother and a Mexican citizen father. She acquired United States citizenship pursuant to section 309(c) of the Immigration and Nationality Act, 8 U.S.C. 1409(c). 2/ Through her birth in Mexico she also acquired the nationality of Mexico. When she was a few months old, appellant's mother took her to Tijuana. In an affidavit, executed in September 1984, appellant's mother stated that:

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

Section 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 --

. . .

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; ...

2/ Section 309(c) of the Immigration and Nationality Act, 8 U.S.C. 1409(c), provides that:

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

> After my return to [redacted] I had occasion to speak with American officials at the border regarding my daughter. They told me my daughter might have a claim to American citizenship if I could present to them a letter from the girl's father saying that he gave his permission for her to become an American citizen. Since her father and I had separated and since I did not know where he was, I could not get such permission, so I concluded that my daughter could not become an American citizen.

In an affidavit executed in July 1986 appellant's mother stated further that:

> ...my daughter did not cross the border into the United States from the time she was born until she was fourteen years of age. I was a citizen of the United States, but she was not a citizen and she had no documents with which to cross the border. When she was fourteen years of age, in early 1976, I took her to the INS border station at San Ysidro, California. At that time, I applied to the INS authorities for my daughter's boarder crossing card. 3/ I disclosed to the INS officials that I was a citizen of the United States and that I was residing in Tijuana, Mexico. No one at the INS office gave me even the slightest hint that my daughter might also be a citizen of the United States. They treated her completely as a citizen of Mexico, and they issued the border crossing card to her.

Several years later, in 1979, appellant's mother allegedly raised the issue of appellant's United States citizenship status with the United States Consulate General at Tijuana. In her September 1984 affidavit, Mrs. R[redacted] recalled her dealings with the Consulate General as follows:

> In approximately 1979, at the suggestion of some friends, I went to the American Consulate in Tijuana to see if my daughter had any chance of becoming an American citizen. All they would tell me at the

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3/ There is in the record a copy of a border crossing card issued to appellant on February 16, 1976.

> Consulate was that I needed to get a whole list of documents before they would tell me anything. Since I did not understand what the purpose of these documents was, and since many of the documents were either unavailable or very difficult to obtain, and since no one would give me a straight answer as to whether or not my daughter had a claim to citizenship, I did not pursue the matter further,...

On December 5, 1983 Ms. R[redacted]-R[redacted] applied for a certificate of Mexican nationality (CMN). In the application she expressly renounced United States nationality and all allegiance to any foreign state, especially the United States. She also made a formal declaration of allegiance to Mexico. According to a statement Ms. Ruiz-Rodriguez made subsequently, she applied for a CMN because "I was a student in Mexico and I could not get my license (Titulo) as an accountant without first applying for the nationality certificate." A CMN was issued in appellant's name on the same date she applied for it, December 5, 1983.

The next recorded event is her application on January 15, 1985 for a United States passport at San Diego. 4/ She indicated in the application that her permanent address was in San Diego and that she was an accountant, She also executed a form titled "Information for Determining U.S. Citizenship," in which she acknowledged that she had obtained a certificate of Mexican nationality and had made a declaration of allegiance to Mexico.

Ms. [redacted] passport application was referred to the Departmen[redacted]r After holding the application for six months the Department instructed the Embassy at Me[redacted] obtain from the Mexican authorities a copy of Ms. R[redacted]' application for a certificate of Mexican nationality, "to determine if she took an exclusionary oath of allegiance to Mexico at that time."

From January 1985 onwards counsel for appellant made several inquiries of the [redacted] to ascertain the status of the adjudication of Ms. [redacted]riguez' passport application. In each response to counsel's inquiries the Department indicated that it needed more time. Finally, in November 1985 counsel for appellant sought and obtained a summons and complaint against the Secretary of State for a writ in the nature of mandamus in the United States District Court for the Southern District of California to compel administrative action by the Department.

4/ According to appellant's mother, she consulted a lawyer in 1984 "who explained to me that my daughter might have a claim to citizenship. He told me she could apply to the American Government for a passport in order to have her claim adjudicated." Affidavit of September 1984.

On December 5, 1985 the Department of Foreign Relations informed the Embassy at Mexico City that appellant had been issued a certificate of Mexican nationality, and enclosed a copy of the application she had completed to obtain that document.

As instructed by the Department, the Passport Agency at Los Angeles then wrote to Ms. [redacted] on January 15, 1986 to inform her that:

> Your oath of allegiance to Mexico containing language renunciatory of United States citizenship in connection with the obtention of a Certificate of Mexican Nationality is presumed to have been voluntary. And while the motive for taking the oath was to obtain an accounting license, it does not alter the fact that you made a free and knowing choice to obtain a Certificate of Mexican Nationality. Therefore, based on the evidence of record, the Department of State believes that you may have lost your United States nationality under Section 349(a)(2) of the Immigration and Nationality Act of 1952.
>
> If you wish to present additional evidence to support your contention that you did not intend to relinquish your United States citizenship, we will be happy to consider your case further. If we do not hear from you within 30 days of your receipt of this letter, the Department will proceed to approve a Certificate of Loss of Nationality in your name under Section 349(a)(2) of the Immigration and Nationality Act of 1952.

Meanwhile, the Department instructed the Embassy at Mexico City to prepare a certificate of loss of nationality in appellant's name. In compliance with the Department's instructions and the requirements of section 358 of the Immigration and Nationality Act, 5/ the

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

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.

Embassy executed such a certificate on January 27, 1986. The Embassy certified that appellant obtained United States nationality by virtue of birth abroad to a United States citizen mother; that she made a formal declaration of allegiance to Mexico; and thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

Appellant did not submit evidence in support of her claim that she did not intend to relinquish her United States nationality when she made a formal declaration of allegiance to Mexico. Accordingly, on March 5, 1986 the Department approved the certificate that the Embassy had executed. Approval of the certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. An appeal was entered through counsel on March 21, 1986. Once the Department had determined appellant had lost her nationality, her mandamus action became moot and was dismissed on March 25, 1986.

II

Appellant concedes that she made a formal declaration of allegiance to Mexico and so brought herself within the purview of section 349(a)(2) of the Immigration and Nationality Act. But performance of a statutory expatriating act will not result in expatriation unless the act was done voluntarily with the intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

In law it is presumed that one who performs a statutory expatriating act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntarily. 6/ Appellant has not undertaken to rebut the legal

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.

presumption of voluntariness. We conclude therefore that she subscribed to the declaration of allegiance to Mexico of her own free will.

The question remains, however, whether on all the evidence appellant intended to relinquish her United States citizenship when she pledged allegiance to Mexico. Vance v. Terrazas, supra, at 270. Under the statute, 7/ the Government bears the burden of proving a person's intent and must do so by a preponderance of the evidence, 444 U.S. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent the Government must prove is the person's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

In support of its contention that Ms. [redacted] intended to relinquish her United States citizenship when she pledged allegiance to Mexico, the Department adduces the fact that she expressly renounced United States nationality and all allegiance to the United States.

The cases are absolutely clear that, provided no other factors are present which would warrant a different result, voluntarily, knowingly and intelligently renouncing United States citizenship in the course of performing a statutory expatriating act, evidences an intent to relinquish United States citizenship. Terrazas v. Haig, 563 F.2d 285 (7th Cir. 1981). There, the Court held that plaintiff manifested an intent to relinquish citizenship by voluntarily, knowingly and intelligently applying for a certificate of Mexican nationality that contained an oath of allegiance to Mexico and the renunciation of United States citizenship. See also Richards v. Secretary of State, 752 F.2d 1413, 1241 (9th Cir. 1985). The voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is "ordinarily sufficient to establish a specific intent to renounce United States citizenship Similarly, Meretsky v. Department of State, et. al., Civil Action 85-1985, memorandum opinion (D.C.C. 1985).

Appellant asserts that she did not do the expatriating act knowingly and intelligently, because, as she has stated, "she did not know of her claim to United States citizenship and did not, therefore, intend to lose her citizenship by making her application to the Mexican Government."

7/ Supra, note 6.

If one is unaware of being a United States citizen or having a valid claim to United States citizenship at the time the prescribed act was done, the act cannot be said to have been done knowingly and intelligently; scienter is absent. Rogers v. Patokowski, 271 F.2d 858 (9th Cir. 1959). As evidence of her unawareness appellant relies on the two sworn statements of her mother from which we have quoted above, and her own affidavit of July 11, 1986 which is essentially reiterative of her mother's averments. As noted above, appellant's mother asserts that on three different occasions she tried to clarify her daughter's citizenship status in 1961, 1976 and 1979. Appellant does not allege that she made any inquiries independent of her mother to verify her citizenship status.

In 1961, shortly after appellant's birth, her mother allegedly spoke to Immigration and Naturalization (INS) officials at [redacted] who informed her that her daughter might have a claim to United States citizenship if the child's natural father would give his consent. If this was the advice Mrs. [redacted] received it was of course erroneous because it was inconsistent with the provisions of section 309(c) of the Immigration and Nationality Act (text supra, note 2). But there is no evidence in the record to corroborate her claim that Mrs. R[redacted] raised the matter of her daughter's citizenship with INS officials in 1961 and received the above response.

In 1976 Mrs. [redacted] obtained or assisted her daughter, then aged 15, to obtain a border crossing card from the INS at San Ysidro. Border crossing cards are not issued to United States citizens. Appellant and her mother both assert that the INS knew the facts of her case but treated her as a Mexican citizen. Once again there is no evidence of record to corroborate the statements of mother and daughter.

Finally, in 1979 Mrs. [redacted] allegedly attempted to ascertain from the Consulate General at Tijuana whether her daughter, then aged 18, might be a United States citizen. She claims that she was confused by the Consulate's request for documents to support her daughter's case, and since she was unable to obtain a "straight answer," did not pursue the matter. "Thus, when my mother could not learn anything different from the American Consulate at [redacted] appellant stated in her July 1986 affidavit, "I had no reason to conclude that I might be a citizen of the United States." We have only appellant's mother's statement that she made inquiries at the Consulate General in Tijuana. Perhaps she did, but the Board has been informed in response to a request for information, that the Consulate General has no record of any discussion with appellant's mother about her daughter's citizenship status. Four years later, apparently without having made any further effort to find out whether she was a United States citizen or had a claim to citizenship, appellant applied for a certificate of Mexican nationality; in the process she expressly renounced United States citizenship and pledged allegiance to Mexico.

The crucial question is whether appellant's allegations and those of her mother to the effect that appellant was unaware in 1983 of being a United States citizen outweigh the direct evidence that in 1983 she indicated she knew or thought she might be a United States citizen by making an express renunciation of that citizenship before Mexican authorities.

Appellant has not addressed the Department's argument that her application for a certificate of Mexican nationality evidences an awareness that she was a United States citizen. She filled out the application form without evident reservation; she did not in 1983 make a matter of record any doubts she might have had that she was then a United States citizen.

In January 1985 when she applied for a United States passport, Ms. R[redacted]-R[redacted] completed a form for determining United States nationality. In response to the following question she gave the following answers:

...

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

Approximately 1979

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?)

Friends of my mother told her I might be a U.S. citizen. She went to the U.S. Consulate in Tijuana in about 1979 to see about it. However, she could not get the matter settled, and I was never sure that I really was a U.S. citizen.

It is apparent from the foregoing statements that appellant was aware in 1983 that she might be a United States citizen. Nonetheles she proceeded to make a formal declaration of allegiance to Mexico, holding herself out as a United States citizen.

We do not wish to impugn appellant's or her mother's sincerity, but it seems to us that appellant had enough knowledge that she had a claim to United States citizenship that had she harbored doubts, she would not have proceeded with the application for a certificate

of Mexican nationality until she obtained official advice about her citizenship status.

In 'sum, we are of the view that appellant knowingly and intelligently made a formal declaration of allegiance to Mexico.

It is therefore our conclusion that the Department has carried its burden of proving by a preponderance of the evidence that Ms. [redacted] intended to relinquish her United States citizenship when she made a formal declaration of allegiance to Mexico.

III

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Howard Meyers, Member