DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF C[redacted] C[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, C[redacted] C[redacted] expatriated himself on May 1, 1948, under the provisions of section 401(d) of the Nationality Act of 1940 (the "NA"), by accepting permanent employment in the Italian Ministry of Public Works. 1/

The initial issue presented on appeal is whether appellant performed an act of expatriation. We find that the Department failed to sustain its burden of proving that an expatriating act was performed under the provisions of section 401(d) of the NA, and, accordingly, reverse the Department's determination that appellant expatriated himself.

I

Appellant was born at [redacted] on [redacted] thus acquiring United States citizenship at birth He also acquired [redacted] nationality through his father who was an Italian citizen. 2/ In 1919, his parents took him to [redacted] where he has since resided.

1/ Section 401(d) of the Nationality Act of 1940 (54 Stat 1137; 8 U.S.C. 907) read:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: (54 Stat. 1168; 8 U.S.C. 801)
>
> > (d) Accepting, or performing the duties of any office, post or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible (54 Stat. 1169; 8 U.S.C. 801);...

2/ Article 1 (1) of the Italian Nationality Law of June 13, 1912, provided that the son of an Italian citizen is a citizen by birth

United Nations Legislative Series, ST/LEG/SER.B/4, Laws Concerning Nationality, 267 (1954).

During World War II, appellant was an officer in the Italian Royal Navy. He served from 1940 until his release in August 1944. In connection with this service, he took an oath of allegiance to Italy. In 1941, he obtained a degree in architecture at the University of Rome.

Following the war, appellant accepted temporary employment with the Ministry of Public Works (the "Ministry") in Rome. On May 1, 1948, his employment status became permanent and, thereafter, he took a second oath of allegiance to Italy, which, he asserts, was obligatory in order to continue his employment. He served with the Ministry until he retired on December 31, 1977. He held the title of "Diregente Superiore" ("Senior Manager") on the date he retired.

Appellant stated that he accepted permanent employment in 1948 because of the grave economic conditions that prevailed in Italy, and that he was compelled, for family and financial reasons, to continue such employment until retirement. He described his work at the Ministry as being exclusively in the field of city planning. He informed the Board that, after passing a competition in the field of architecture in 1955, he worked as a chief of offices dealing with territorial planning, and, that in 1974, he was made a counselor in the "Consiglio Superiore dei Lavori Pubblici", the highest technical-administrative organ for city planning. This body, he said, among other matters, issued technical opinions on city planning and construction projects. He considered the nature of his city planning work to be purely cultural rather than political or administrative.

On March 16, 1982, appellant executed at the American Embassy (the "Embassy") at Rome an application for a United States passport. In a supplemental application statement, he stated that he had no plans concerning travel to the United States, but was submitting the passport application because he would like his two children, born in Rome in 1947 and 1952, to take up residence in the United States.

In a citizenship information form that he completed at the Embassy's request on the same day, he stated that he always had been aware of his United States citizenship status and that "in or about 1945" he had called the Embassy to inquire about it. He said that he was advised at that time to obtain his birth certificate and other documents and "to file a formal application." Appellant stated that he did not pursue the matter further because he had found employment with the Ministry and had decided to remain in Italy indefinitely.

The Embassy referred appellant's application for a passport and supporting documents to the Department for decision in April 1982. The Department was of the opinion that it would be difficult

to sustain a holding of loss of nationality, based on appellant's military service and oath of allegiance to Italy during World War II, under the provisions of sections 401(b) and 401(c) of the NA. It believed, however, that, when appellant became a permanent employee of the Ministry in 1948, he lost his United States citizenship under the provisions of section 401(d) of the NA. The Department, accordingly, instructed the Embassy in June 1983 to issue a certificate of loss of nationality based on section 401(d).

On August 18, 1983, the Embassy prepared a certificate of loss of United States nationality in accordance with section 358 of the Immigration and Nationality Act (the "INA"). 4/ The consular

---

3/ Sections 401(b) and 401(c) of the Nationality Act of 1940 (54 Stat. 1137) read:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:(54 Stat. 1168; 8 U.S.C. 801.)
>
> ...
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state (54 Stat. 1169; 8 U.S.C. 801); or
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or requires the nationality of such foreign state (54 Stat, 1169; 8 U.S.C. 801); ...

4/ 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 officer in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates,

officer at the Embassy certified that appellant acquired United States citizenship by virtue of his birth in the United States; that he acquired the nationality of Italy by virtue of his birth in the United States of an Italian father; that he entered upon permanent employment as an official in the Ministry of Public Works of Italy on May 1, 1948, on which date he possessed Italian nationality; and that he thereby expatriated himself under the provisions of section 401(d) of the NA.

The Department approved the certificate on April 17, 1984, approval constituting an administrative determination of loss of nationality from which an appeal, timely and properly filed, may be taken to the Board of Appellate Review. Appellant gave notice of appeal on February 14, 1985.

II

Section 401(d) of the NA, which was in effect on May 1, 1948, the date on which appellant was found to have expatriated himself, provided that a United States national shall lose his nationality by accepting, or performing the duties of, any office, post or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible. To be considered potentially expatriating, the particular employment must be under the government of a foreign state or political subdivision thereof and must be one for which only nationals of that foreign state are eligible.

The Immigration and Nationality Act (INA), effective December 24, 1952, has a comparable provision relating to employment under the government of a foreign state or a political subdivision thereof. 5/ Section 349(a)(4)(A) provides for loss of nationality

5/ Prior to November 14, 1986, section 349(a)(4) of the Immigration and Nationality Act, 8 U.S.C. **1481**, read:

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 --

...

(4)(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or ...

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved Nov. 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the

by a person who has or acquires the nationality of the foreign state; section 349(a)(4)(B) provides for loss of nationality by a person who accepts a position for which an oath of allegiance is required for that employment. The express language of section 401(d) of the NA requiring the employment to be that "for which only nationals of such foreign state are eligible" does not appear in section 349(a)(4) of the INA. 6/

5/ Cont'd.

intention of relinquishing United States nationality:" after "shall lose his nationality by". The amendments also amended subparagraphs (A) and (B) of subsection 349(a)(4) by inserting "after attaining the age of eighteen years" after "foreign state or political subdivision thereof" in both subparagraphs (4)(A) and (4)(B).

6/ The omission of such language in section 349(a)(4)(A) of the INA may be attributed to the views expressed by the Senate Committee on the Judiciary regarding the language of section 401(d) of the NA requiring the employment to be that "for which only nationals of such state are eligible." The Senate Committee, on whose recommendations section 349(a)(4)(A) of the INA was based, made the following comment:

> This subsection [section 401(d) of the Nationality Act of 194 is highly technical and has been the subject of much discussion an interpretation, Generally, expatriation does not result where the restriction as to "nationals only" is not generally enforced. Likewise, if nonnationals are permitted to take such employment after an official of the foreign state has stated that no national are available, expatriation does not result. It does not apply to those who have merely applied for employment, where the position i open to nationals only, or to temporary employment thereafter made permanent, where permanent employment is restricted to nationals on The fact that a person may be a national of the foreign state is irrelevant if the position is open to other than nationals. The section does not, therefore, in many cases, affect dual nationals, and therefore has been ineffective in making such persons elect American citizenship exclusively. The subcommittee is recommending cha in this subsection which, is felt, will strengthen the law and mak for a determination of citizenship and an elimination of dual citi zenship. *** (Footnotes omitted.) (S. Rep. No. 1515, 81st Cong., 2d Sess. 749-750 (1950).)

Section 401(d) of the NA and section 349(a)(4)(A) of the INA have generally been read restrictively. 7/ Following the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967) and the Attorney General's interpretation of that decision, the scope of these statutory provisions was narrowed. 8/ Afroyim laid down the rule that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." 387 U.S. at 268. The Attorney General's interpretation of that decision suggested that an individual's acceptance of an "important political post" in a foreign government or political subdivision thereof would be highly persuasive evidence of voluntary relinquishment of citizenship. Thus whether the acceptance of a position or employment under a foreign state or political subdivision thereof will result in expatriation will also depend on whether the position or employment is regarded as an important political post.

In light of Afroyim and the administrative guidelines set forth in the Attorney General's statement of interpretation of that decision, the Department of State and the Immigration and Naturalization Service of the Department of Justice have agreed that the voluntary performance of service in an "important political post" is considered highly persuasive evidence of an intention to relinquish citizenship and will normally result in expatriation. 9/ The voluntary acceptance of any position other than an "important political post" can result in loss of nationality only if the position was accepted with the intent to transfer allegiance to the foreign state or abandon allegiance to the United States.

Under the law, the burden of proof is on the government to establish that an act of expatriation occurred and that the act was performed with the necessary intent to relinquish citizenship. Section 349(c) of the INA provides that, whenever the loss of United

---

7/ 3 Gordon and Rosenfield, Immigration Law and Procedure, Sec. 20.10g (rev. ed. 1976).

8/ Attorney General's Statement of Interpretation, 42 Op. Atty. Gen. 397 (1969).

9/ Department of State Circular Airgram, CA-2855, dated May 16, 1969, to all American diplomatic and consular posts; see also Vol. 8, Citizenship and Passports, Foreign Affairs Manual, Section 224.5, Interpretations, 8 FAM 224.5 (6/20/72), 224.5a (4/10/70), and 224.5b (4/10/70).

States nationality is put in issue, the burden shall be upon the party claiming that such loss occurred to show such loss by a preponderance of the evidence. 10/ In proving expatriation, the expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252 (1980).

III

The initial issue to be determined in the instant case is whether appllant performed an act of expatriation under the provisions of section 401(d) of the NA. If such an act was performed, there then would remain the issue of intent - whether appellant voluntarily performed the act with the necessary intent to relinquish citizenship.

As noted above, the Department has the burden of affirmatively proving by a preponderance of the evidence that appellant's acceptance of permanent employment in 1948 with the Ministry was "employment under the government of a foreign state or political subdivision thereof" and one "for which only nationals of such state are eligible." The term "burden of proof" is not to be confused with "prima facie case." If the evidence of record does not sufficiently establish such employment, it follows that appellant cannot be held to have committed an expatriating act within the meaning of section 401(d). The absence of evidence cannot be made the basis for a conclusion of fact.

The evidence of record with respect to appellant's acceptance of employment "under the government of a foreign state for which only nationals of such state are eligible" consists principally of three items. The first is the citizenship information form, titled "Information for Determining U.S. Citizenship", which appellant completed on March 16, 1982, at the request of the Embassy. In response to a question on the form, he stated:

10/ 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 law 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.

> I was employed with the Italian Ministry of Public Works ("Ministero dei Lavori Pubblici") from Oct. 6, 1945 to Dec. 31, 1977. Non-Italian citizens are ineligible for that employment.

He further stated on the form that he was an architect and served as such during the period from 1945 to 1977, that his position became permanent on May 1, 1948, and that, in that connection, he later took an oath of allegiance to Italy. It should be noted that these admissions are not under oath and can hardly be said to constitute satisfactory evidence of the performance of an expatriating act. The unsworn admissions are unsupported by documentary proof, and, therefore, provide a poor foundation for the Department's burden of proof.

That the Department relies on appellant's written statements on the unsworn citizenship information form is demonstrated by the Department's approval of the certificate of loss of nationality that the Embassy issued. As evidence of appellant's expatriation, the Embassy stated on the certificate that it consists of appellant's written statement that:

> 1. He was employed October 6, 1945-December 31, 1977 with the Italian Ministry of Public Works;
> 2. His position became permanent May 1, 1948.
> 3. In or about 1945 he inquired at American Embassy Rome about his citizenship status but abandoned his claim after obtaining employment.

The second item in the record bearing upon appellant's employment is the Embassy's memorandum of April 8, 1982, transmitting appellant's case to the Department for consideration. The Embassy stated that appellant "was employed with the Italian Ministry of Public Works, in executive capacity, for a period of about 33 years." The Embassy also stated that, according to a 1978 statement issued by the Ministry,

> Mr. C[redacted] an architect by trade, began employment with the Ministry of Public Works in Rome on October 6, 1945; his position was temporary until May 1, 1948 when his appointment became permanent. He took an oath of allegiance to the Italian State shortly thereafter. He terminated his employment on Dec. 31, 1977; at the time of retirement his rank was that of "Dirigente Superiore" (Managing Director)... 11/

11/ The official English translation of the title "Dirigente Superiore" is that of "Senior Manager." See English translation of statement of Office of Personnel and General Affairs, Ministry of Public Works, dated January 19, 1978, Division of Language Services, Department of State, LS No. 121379 (PH/AO, Italian) 1987.

It is readily apparent that the Embassy's memorandum by itself is of slight, if any, evidentiary value with respect to appellant's employment within the meaning of section 401(d) of the NA. The memorandum merely recites in substance the sketchy employment information appellant offered in his unsworn citizenship information form and that contained in a 1978 statement of the Ministry, attached to the Embassy's memorandum.

The Ministry's statement is the third item of record regarding appellant's employment under the government of a foreign state. Upon examination, the statement is essentially a computation of pension benefits awarded to appellant based on his military service, military campaigns, temporary and permanent employment with the Ministry, university studies, and certain other entitlements. With respect to appellant's employment, the statement shows simply that he was on temporary service with the Ministry from October 6, 1945 to April 30, 1948, and on permanent service from May 1, 1948, to December 31, 1977. It also shows that on the date he retired that he held the title of "Dirigente Superiore" ("Senior Manager").

The statement on pension benefits was prepared by the Ministry's Office of Personnel and General Affairs on January 19, 1978, following appellant's retirement at the end of 1977. Although the record does not show how this document came into the Embassy's possession, it appears most likely that appellant himself submitted a copy of the statement to the Embassy in 1982, when he sought documentation as a United States citizen. It is noted that the copy of the Ministry's computation of pension benefits in the record has not been certified as a true copy of the original by a consular officer at the Embassy, as required by the Department's instructions concerning documentary proof of an expatriating act. 12/ More significantly, the Ministry's statement on pension benefits does not establish appellant's employment within the meaning of section 401(d) of the NA.

Apart from appellant's own written statement to the effect that he served as an architect with the Ministry and that his position was one for which only nationals of Italy were eligible, we find, little, if anything, of evidentiary value in the Embassy's memorandum or the Ministry's computation statement of pension benefits that would establish what position appellant held in 1948, whether such employment was under the government of a foreign state or a political subdivision thereof and whether it was one for which only nationals of such state were eligible. Evidence of such matters, generally speaking, is best established by official written statements of the foreign government involved, official journals, official publications, official records and the like, and by reference to the relevant provisions of the constitution, laws, and regulations, as the case may be.

12/ Vol. 8, Citizenship and Passports, Foreign Affairs Manual, Section 224.20(d); 8 FAM 224.20(d) (3/21/77).

In this connection, it may be observed that in a case involving loss of citizenship under section 349(a)(4)(A) of the INA, the Board of Immigration Appeals declared that evidence of employment under the government of a foreign state or a political subdivision thereof should be established by properly authenticated documents which refer to the pertinent portion of the constitution, laws, and regulations of that foreign state. 13/

The Department's instructions on establishing loss of United States nationality set forth clearly the required documentary proof that will satisfy evidentiary requirements. The instructions that were issued prior to 1984 pointed out the necessity of documenting the act of expatriation "by official written statements of the foreign government concerned whenever possible." If such documents cannot be secured, the responsible consular officer must certify that fact in each individual case and then endeavor to obtain secondary evidence of the act in official journals or whatever other official publication or source documents may be available at an embassy or consular office, or certified copies of official documents submitted by the individual concerned. If the foregoing documents are not obtainable and that fact is demonstrated in writing on the record "then, and then only may the consular officer and the Department rely solely on the admissions of the person involved." Such admissions are to be in affidavit form. 14/

13/ Matter of Hernandez, 10 I & N. Dec 298 (BIA 1963)

14/ Vol 8, Citizenship and Passports, Foreign Affairs Manual, Section 224.20(d); 8 FAM 224.20(d) (3/21/77).

The current instructions, promulgated in March 1984, regarding documentation of potentially expatriating acts are:

> 1214 Documentation of Potentially Expatriating Acts.
>
> A potentially expatriating act should be documented by statements from the foreign government. This is necessary to meet the evidentiary requirements of U.S. courts. When official documentation is not available, the consular officer must so certify in an affidavit and then seek secondary evidence. This procedure will help the Government prepare a foundation for submission of secondary evidence in proving acts of expatriation.

Vol. 7, Consular Affairs, Foreign Affairs Manual, Section 1214; 7 FAM 1214 (3/30/84).

It is apparent that the Department did not heed its own instructions regarding the documentary evidence needed to prove that appellant committed an expatriating act. Nor did the Department address this issue in its brief to the Board. It had concluded, nonetheless that appellant's acceptance of employment with the Ministry fell within the purview of section 401(d) of the NA. According to a communication to the Embassy, dated April 17, 1984, giving its approval of the certificate of loss of nationality, the Department stated that in reaching that conclusion, it took into consideration appellant's permanent employment in 1948 "in an executive capacity" with the Ministry, that his employment was open only to Italian nationals, that his employment required an oath of allegiance to Italy for promotion to permanent status, and that his employment increased in responsibility until he "exercised the position of general managing director of the Ministry of Public Works, an important division of the Italian Government

The record, however, as we have seen, it devoid of any substantial evidence regarding appellant's position with the Ministry in 1948 when he acquired permanent employment status, or that would support a finding that his employment was one for which only Italian nationals were eligible. As to the oath of allegiance said to be required for promotion to permanent status on May 1, 1948, the record indicates that appellant did not take such an oath until September 1953. 15/ Although evidence regarding appellant's position in 1977 is slight, it appears that on the date he retired from the Ministry he held the title of Dirigente Superiore ("Senior Manager" but that upon retirement, because he was a veteran, his pension benefits were calculated at the salary level of Direttore General ("General Manager"). There is however, no evidence of record that would establish that he exercised the position of general managing director of the Ministry, as the Department maintained.

On the basis of the record, we find the evidence insufficient to establish that appellant's acceptance of permanent employment with the Ministry on May 1, 1948, was an "office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible." In our view, the Department has failed to sustain its burden of proving by a preponderance of the evidence that appellant performed an expatriating act under section 401(d) of the NA.

15/ In response to the Board's request of November 26, 1986, for the text of the oath of allegiance appellant allegedly took in or around 1948 when he obtained permanent employment status, the Department transmitted on March 4, 1987, a copy of an undated statement of the Ministry of Public Works. According to the statement, appellant, an architect of the special temporary list group A of the Civil Engineers, had taken the oath of allegiance on September 1953. The text of the oath (in translation) read:

> I C[redacted]
> "swear to be faithful to the Italian Republic and to its Head, to loyally observe the laws of the State, to fulfil all my duties, without disclosing office information in the interest of the Administration and for the common good."

IV

Upon consideration of the foregoing, the Board hereby reverses the Department's determination that appellant expatriated himself.

Given our disposition of the case, we find it unnecessary to make other determinations with respect to this case.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member