October 23, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: T[redacted] G[redacted] E[redacted]

This is an appeal from an administrative determination the Department of State that appellant, T[redacted] G[redacted] [redacted] expatriated himself on September 19, 1984, under the provisi of section 349(a)(2) of the Immigration and Nationality Act, making a formal declaration of allegiance to Mexico. 1/

The principal issue for the Board to decide is whet appellant intended to relinquish his United States national when he made a formal declaration of allegiance to Mexico. the reasons that follow, we conclude that the Department has carried its burden of proving that appellant had such inte and, accordingly, reverse the Department's determination of 1 of nationality.

1/ When appellant made a formal declaration of allegiance Mexico, section 349(a)(2) of the Immigration and National: Act, 8 U.S.C. 1481, read as follows:

Section 349. (a) From and after the effective date this Act a person who is a national of the United States whet by birth or naturalization, shall lose his nationality by --

. . .

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

Pub. L. No. 99-653, 100 Stat. 3655 (1986), amenc subsection (a) of section 349 by inserting "voluntari performing any of the following acts with the intention relinquishing United States nationality:" after "shall lose h nationality by;". Pub.L. No. 99-653 also amended paragraph (of subsection (a) of section 349 by inserting "after havi attained the age of eighteen years" after "thereof".

I

Appellant was born in Mexico on [redacted]. By virtue of his birth of a United States citizen mother, he acquired United States nationality. Since he was born in Mexico, he also acquired the nationality of that state, and thus was a dual national.

Resident in Mexico since birth, appellant was registered as a United States citizen at the Embassy in Mexico City and periodically was issued cards of identity and U.S. passports. He also received Mexican passports from the Mexican authorities.

According to appellant, he spent many holidays with his mother's family in Iowa, attended YMCA camps there for nine years, registered with the Selective Service System in September 1985, and completed a year of studies at Des Moines Area Community College in May 1986.

On May 21, 1984, in anticipation of reaching his eighteenth birthday (two months thence), appellant, accompanied by his mother, visited the Embassy. He informed a consular officer of his wish to retain his United States citizenship, notwithstanding any declaration of allegiance to Mexico that he might be required to make upon reaching age eighteen. 2/ He executed an affidavit to that effect which reads as follows:

> I hereby declare that I wish to retain the privilege of being a citizen of the United States of America.

2/ Mexican law does not permit one to retain dual nationality after majority. The government of Mexico tolerates dual nationality until the individual reaches the age of eighteen, freely issuing a Mexican passport to enter and re-enter Mexico as a Mexican citizen. Upon attaining the age of eighteen a dual national must elect either Mexican or his other nationality. If such person wishes to exercise the rights of Mexican nationality, he must possess a certificate of Mexican nationality, application for which must be made one year after his eighteenth birthday. To obtain a certificate of Mexican nationality the applicant must expressly renounce previous nationality and make a declaration of allegiance to Mexico.

> Should economic circumstances, due to curre economic problems, force me to pledge allegiance a foreign country to facilitate furthering education, it will be under protest. I sincere wish to remain an American citizen and serve in i armed forces if necessary.

On September 19, 1984, appellant applied for and obtain a certificate of Mexican nationality. In the application 1 expressly renounced United States nationality, as well as a submission, obedience, and loyalty to the government of t United States, and swore adherence, obedience, and submission the laws and authorities of the Mexican Republic. On Novemb 1, 1984, the Mexican authorities issued him a new Mexic passport; it contained a notation to the effect that appellat was issued a certificate of Mexican nationality on September 1 1984.

Later that autumn, appellant also applied for a new U.S passport. After examining his recently issued Mexican passpo and receiving authorization from the Department, the Embas issued him, on November 27, 1984, a limited passport, valid f three months, pending confirmation from the Mexican authoriti that appellant had applied for and been issued a certificate Mexican nationality. After his U.S. passport expired February 1985, appellant applied for a further extension. Sinc official confirmation that he had obtained a certificate Mexican nationality had not yet been received by the Embassy and since appellant wanted to go to the United States to atte college (for which, the Embassy noted, he would have to prove was a United States citizen), the Embassy asked the Departme for authorization to extend his passport. The Embassy phras its request as follows:

> It would appear that upon receipt of SRE's [t Department of Foreign Relations] confirmation oath-taking the Department would find that, in vi of the care Mr. [redacted] has taken to establish hi intent to retain U.S. citizenship, it would unable to establish an intent to the contrary. Th post would like the Department's permission extend Mr. [redacted] passport to full validity, or least for a year to enable him to plan his academi year in the U.S.

On March 13th, after receiving the Department' authorization to do so, the Embassy extended appellant' passport to full validity, to expire November 26, 1994.

By diplomatic note dated April 19, 1985, the Mexic Department of Foreign Relations confirmed that appellant appli for and received a certificate of Mexican nationality September 19, 1984. Meanwhile, appellant had gone to the Unit6

States where he was attending college in Iowa. The Embassy communicated with appellant and requested that he complete two citizenship questionnaire forms to facilitate making a determination of his United States citizenship status. This he did on May 31, 1985. It also appears that he was interviewed that same day by a consular officer. On June 11, **1985** the latter submitted a report to the Department on appellant's case and forwarded the pertinent documents, including his affidavit of May 21, 1984, and the two completed questionnaires. The consular officer asked for the Department's decision and expressed the opinion that:

> In view of the care Mr. [redacted] has taken to preserve his U.S. citizenship despite his expressed concern for being discovered to be in violation of Mexican law, it is the consular officer's opinion that it was not his intention to relinquish U.S. citizenship when he signed the application for a CMN [certificate of Mexican nationality].

Upon review of the record, the Department, on January **3,** 1986, advised the Embassy it was of the view that appellant voluntarily performed an expatriating act when he applied for the certificate of Mexican nationality and that he did so with the intent of relinquishing United States citizenship. The Department instructed the Embassy to prepare a certificate of loss of United States nationality.

As instructed, the Embassy prepared a certificate of loss of nationality in appellant's name on March 16, **1986,** in compliance with the provisions of section **358** of the Immigration and Nationality Act. 3/ The consular officer concerned

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3/ 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.

certified that appellant acquired United States nationality virtue of his birth abroad of a United States citizen mott acquired Mexican nationality by virtue of his birth in Mexi made a formal declaration of allegiance to Mexico on Septen 19, 1984; and thereby expatriated himself under the provisi of section 349(a)(2) of the Immigration and Nationality Act.

The Department approved the certificate on May 9, 19 approval constituting an administrative holding of loss nationality from which an appeal, properly and timely filed, be taken to this Board. The Embassy delivered a copy of approved certificate of loss of nationality to appellant on May 22, 1986, under cover of a letter informing him of his ri of appeal to the Board of Appellate Review. The Embassy a cancelled appellant's U.S. passport.

This appeal followed. Appellant argues that 1 expatriating act was not done voluntarily. Principally, contends that he did not intend to relinquish his United Stat citizenship when he executed an application for a certificate Mexican nationality, swearing allegiance to Mexico and express renouncing United States citizenship.

The record upon which the Board decided this case is t one maintained by the Embassy at Mexico City. The Departme informed the Board that it was unable to locate the Department case record, but "stipulated" that the Embassy's record is duplicate of the official case record on which the Department decision of loss of nationality was based.

II

Section 349(a)(2) of the Immigration and Nationality A prescribes that a person who is a national of the Unit States shall lose his nationality by voluntarily taking an oa or making an affirmation or other formal declaration allegiance to a foreign state with the intention relinquishing United States nationality. 4/ There is dispute that appellant duly swore allegiance to Mexico in an application for a certificate of Mexican nationality. He thu brought himself within the purview of the statute.

4/ Text supra, note 1.

Under the provisions of section 349(c) of that Act, a person who performs a statutory act of expatriation is presumed to have done so voluntarily. 5/ Such presumption, however, may be rebutted upon a showing, by a preponderance of the evidence, that the act was not done voluntarily.

Appellant contends that his expatriating conduct was done under duress. In his affidavit of May 21, 1984, executed four months prior to his application for a certificate of Mexican nationality, appellant stated, as we have seen, that should economic circumstances force him to pledge allegiance to a foreign country to facilitate furthering his education, it would be done under protest. Appellant also stated in his citizenship questionnaire, dated May 31, 1985, that he declared allegiance to Mexico "under duress and protest" and that he "couldn't get out of Mexico without a passport." Further, in his letter of appeal to the Board, dated May 21, 1986, appellant mentioned financial difficulties that his parents were experiencing because of "severe economic problems in Mexico."

Although appellant does not elaborate on the circumstances said to have forced him to act, he is, in effect, asserting that his act of expatriation was done involuntarily, that is, under some form of economic duress. He has offered no evidence, however, to support his allegations.

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

> 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.

Pub. L. No. 99-653, 100 Stat. 3655 (1986) repealed subsection 349(b) but did not redesignate subsection 349(c) or amend it to delete reference to subsection 349(b).

It is recognized that a defense of duress is available persons who have performed an act of expatriation; loss United States citizenship may result only from the citize voluntary action. Vance v. Terrazas, 444 U.S. 252 (198 Afroyim v. Rusk, 387 U.S. 253 (1967).

For a defense of duress to prevail, however, it must shown that there existed "extraordinary circumstances amount to a true duress" which "forced" a United States citizen follow a course of action against his fixed will, intent, efforts to act otherwise. Doreau v. Marshall, 170 F.2d 721, (3rd. Cir. 1948). In cases involving so-called economic dure compelling circumstances involving a matter of survival must shown in order to support a finding of involuntariness. St v. Dulles, 233 F.2d 551 (3rd Cir. 1956); Insogna v. Dulles, F.Supp. 473 (D.D.C. 1953).

The alleged economic circumstances confronting appell do not present an extraordinary situation involving his survi or show that he was faced with a dire economic situation. F all that appears of record, appellant applied for a certific of Mexican nationality "to facilitate furthering his educati (possibly to benefit from lower tuition as a documented Mexi citizen) and to obtain a Mexican passport in order to leave enter Mexico, as required of Mexican citizens. The explanati given by appellant do not support a finding of duress as matter of law.

Appellant, in our view, made a free choice for perso reasons, educational opportunities, and perceived econor advantage, and cannot be legally considered to have acted unc the compulsion of an overwhelming extrinsic force when confirmed his Mexican citizenship status in his application a certificate of Mexican nationality by renouncing his Unit States nationality and swearing allegiance to Mexico. There no evidence that he made any effort to act in a manner otherwi than he chose. The opportunity to make a decision based up personal choice is the essence of voluntariness. Jolley Immigration and Naturalization Service, 441 F.2d 1245 (5th Ci 1971), cert. denied 404 U.S. 946 (1971). Admittedly, appellar at age eighteen, was confronted with a difficult choice, b once having exercised his choice, he may not be relieved fr the consequences flowing from it.

As noted, appellant bears the burden of rebutti by a preponderance of the evidence the statutory presumpti that his naturalization was voluntary. In our opinio appellant has not met his burden of proof. We conclu therefore that his declaration of allegiance to Mexico was his own free will.

III

There remains for determination the principal iss whether appellant intended to relinquish United Stat

citizenship when he made a formal declaration of allegiance to Mexico.

With respect to the issue of intent, the Supreme court declared in Afroyim v. Rusk, 387 U.S. 253, 268 (1967), that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." The Court did not define what conduct constitutes a "voluntary relinquishment" of citizenship, but two years later the Attorney General issued a statement of interpretation of Afroyim to guide administrative authorities in loss of nationality proceedings until the courts clarified the scope of Afroyim. Attorney General's Statement of Interpretation Concerning Expatriation of United States Citizens. 42 Op. Atty. Gen. 397 (1969). The Attorney General stated that in applying the Immigration and Nationality Act, executive branch officials should be guided by the principle that voluntary relinquishment of citizenship is not confined to formal renunciation of citizenship, as provided by the Act. "It can be manifested by other actions declared expatriative under the Act if such actions are in derogation of allegiance to this country. Yet even in those cases, Afroyim leaves it open to the individual to raise the issue of intent." Id at 400.

The opportunity to clarify Afroyim was presented to the Supreme Court by Vance v. Terrazas, 444 U.S. 252 (1980). Afroyim emphasized, the Court said, that loss of citizenship requires the individual's assent, 387 U.S. at 257, in addition to his voluntary commission of the expatriating act. "It is difficult to understand that 'assent' to loss of citizenship," the Court declared, "would mean anything less than an intent to relinquish citizenship,..." 444 U.S. at 260. That understanding of Afroyim, the Court observed, "is little different from that expressed by the Attorney General in his 1969 opinion explaining the impact of that case." Id. at 261. Continuing, the Court stated that in loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the individual intended to relinquish citizenship. Id. at 270. The individual's intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

Section 349(a) of the Immigration and Nationality Act, as amended (supra, note 1) reflects the interpretation and application of the above-cited Supreme Court decisions on the issue of intent. Under section 349(a), a person, who is a national of the United States by birth or naturalization, shall lose his nationality by voluntarily performing any of certain specified expatriating acts with the intention of relinquishing United States nationality.

A person's intent is determined as of the time of the performance of the statutory act of expatriation; the person's own words or conduct at the time the expatriating act occurred are to be looked at in determining his or her intent to

relinquish citizenship. Terrazas v. Haig, 653 F.2d 235 Cir. 1981). In the case e the Board, the intent that government must prove is [redacted] intent at the time he signed application for a certificate of Mexican nationality in whicl swore allegiance to Mexico and renounced United St citizenship.

Making a declaration of allegiance to a foreign state be highly persuasive evidence of an intent to relinquish Un States citizenship; it is not, however, the equivalent of, conclusive, evidence "of the voluntary assent of the citizen.' As the Supreme Court expressed the principle in Vance Terrazas, supra,

> ..., we are confident that it would be inconsist with Afroyim to treat the expatriating a specified in section 1481(a) as the equivalent or as conclusive evidence of the indispensa voluntary assent of the citizen. 'Of course', of the specified acts 'may be highly persuas evidence in the particular case of a purpose abandon citizenship.' Nishikawa v. Dulles, U.S. 129, 139 (1959) (Black, J., concurring). the trier of fact must in the end conclude that citizen not only voluntarily committed expatriating act prescribed in the statute, also intended to relinquish his citizenship.

444 U.S. at 261.

In cases, where, as in the instant case, a citi expressly renounces United States nationality while making declaration of allegiance to a foreign state, the courts ha held that such words constitute compelling evidence of an int to relinquish United States citizenship. Indeed, su statements have been the main (but not sole) factor supportin finding of loss of nationality in a number of cases after Var v. Terrazas, supra. The same cases make it clear that in orc to find an intent to relinquish United States citizenship, t trier of fact must also conclude that the individual act knowingly, intelligently and voluntarily, and that there are other factors that would justify a different result; that is say, in no material respects did the citizen manifest a will a purpose to retain citizenship that was sufficiently persuasi to neutralize the renunciatory declaration.

In Terrazas v. Haig, supra, plaintiff made a declarati of allegiance to Mexico and expressly renounced his Unit States nationality. The court recognized that plaintiff renunciatory declaration, standing alone, would not support finding of intent to relinquish United States nationality wh it stated:

> ..., we again have thoroughly reviewed the reco and the district court's recent opinion a

> conclude that the government established by a preponderance of the evidence that, at the time plaintiff acquired the Certificate of Mexican Nationality, he specifically intended to relinquish his United States citizensip. Of course, a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But, circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship. 4/
>
> 4/ Footnote omitted.

653 F.2d at 288.

The court found "abundant evidence" that plaintiff intended to relinquish his United States citizenship when he declared allegiance to Mexico "willingly, knowingly, and voluntarily." Id. First, the court noted, plaintiff was 22 years old and fluent in Spanish when he executed the application for a certificate of Mexican nationality which contained an oath of allegiance to Mexico and the renunciation of United States citizenship. Second, the timing of plaintiff's actions cast "some doubt" upon his intent. He executed an application for a certificate of Mexican nationality just one week after passing a Selective Service physical examination, and later approached United States authorities about his citizenship status after he had been classified 1-A. Moreover, when informed that he might have expatriated himself, plaintiff immediately informed his draft board that he was no longer a citizen. Finally, he executed an affidavit stating that he had taken the oath of allegiance to Mexico voluntarily with the intention of relinquishing United States nationality.

Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985), involved the naturalization in Canada of a United States citizen who swore an oath of allegiance and made a concomitant declaration renouncing all other allegiance. The Court of Appeals for the Ninth Circuit agreed with the district court that "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." 753 F.2d at 1421. Nonetheless, the court recognized that the totality of the evidence should be weighed in reaching its conclusion when it stated: "We also believe that there are no factors here that would justify a different result." Id.

The court of appeals agreed with the district court that the plaintiff wished to become a Canadian citizen and would have liked also to remain a United States citizen, but because Canada required relinquishment of his other citizenship, he chose to renounce United States citizenship in order to obtain Canadian citizenship. Indeed, the court found that plaintiff

characterized his true intentions in a questionnaire compleded several years after his naturalization when he stat that: "I did not want to relinquish my U.S. citizenship but part of the Canadian citizenship requirement I did so." Id. 1422. Although the court did not specifically evaluate oth factors in the case, it noted in its recitation of the fac that after obtaining Canadian citizenship, plaintiff obtained Canadian passport and used it to enter the United State enrolled in an American university as a foreign student; a obtained a second Canadian passport when he returned to Cana and travelled abroad on it.

In the same vein as Richards, is Meretsky v. Departme of Justice et al., memorandum opinion, No. 86-5184 (D.C. C: 1987). There the petitioner obtained naturalization in Can and swore an oath of allegiance that included a declarat renouncing all other allegiance. In affirming the decision the district court, the court of appeals declared that the o the petitioner took renounced United States citizenship "in uncertain terms." But it should be noted that the court a took into account other evidence which it conside contradicted the petitioner's allegations that he alw considered himself to be a United States citizen. 1/

The plaintiff in Parness v. Shultz, memorandum opini Civil Action 86-1456 (D.D.C. 1987), then 38 years old, signe statement in an application for naturalization in Isr renouncing United States citizenship. Distinguishing the c before it from leading cases on loss of nationality, the cc observed at page 10 that: "Citizenship cases are generally f specific and can only be decided after scrutiny of the evidence..." The court concluded that the government had proved by a preponderance of the evidence that the plaint intended to relinquish his citizenship. His negligence executing the naturalization application, which, due also to carelessness of an Israeli clerk was incomplete and inaccura the credibility of his testimony at trial; his obv sincerity; and general conduct, showed that he lacked requisite renunciatory intent, the court concluded.

1/ Cf. Matheson v. United States, 502 F.2d 809 (2nd Cir. 19 cert. denied 429 U.S. 823 (1976). The citizen in Matheson an oath of allegiance to Mexico while applying naturalization; the oath at that time, however, did not req that the applicant renounce other citizenships. The court that she did not manifest an intent to relinquish United St citizenship because the act was devoid of renuncia character. Furthermore, the court found that there wa "wealth...of evidence" indicating that after she performed expatriative act she continued to believe herself to be, represented herself as, a United States citizen. Id. at 812.

In the case before us, the Department argued in its brief that appellant's formal statement of renunciation should carry a great deal of weight in judging whether he intended to relinquish citizenship. "The unequivocal language of the oath speaks for itself," the Department asserted, "and should ordinarily be accepted as the manifestation of his intent." The Department discounted the significance of the affidavit appellant executed shortly before he declared allegiance to Mexico. The Department pointed out that the required oath of allegiance contained renunciatory language which was not optional and which had to be sworn to as an integral part of it. Citing Richards v. Secretary of State, supra, the Department asserted that the meaning of the words appellant subscribed to must be taken at their face value. Continuing, the Department stated that: "Although Mr. [redacted] did express a preference for retaining U.S. citizenship, the Mexican oath required that he make a choice as part of its terms. The record shows that he did make a choice, albeit a difficult one. The Board must give effect to that choice."

At the Board's request, the Department made a supplemental submission on the issue whether the inference of intent to relinquish United States citizenship, which ordinarily arises when an expatriating act is accompanied by a renunciation of other allegiance, may be negated by an individual's prior assertion of lack of intent to relinquish citizenship if he were to take a renunciatory oath. The Department's memorandum cited the reasoning of the court in Richards v. Secretary of State, supra, as "directly applicable to other expatriating acts which include formal renunciatory statements as part of the act." The Department pointed out that although the plaintiff in Richards made no statements regarding a lack of intent to relinquish citizenship to United States consular officials prior to taking the Canadian oath, he argued that at the time he took the Canadian oath that he had no wish to forfeit his United States citizenship. The district court held, and the court of appeals affirmed, that although the record showed the plaintiff would have liked to remain a United States citizen, he nonetheless took a renunciatory oath freely and knowingly. The court held that plaintiff's choice would have to be given effect. 8/ The

8/ In a footnote, the Department cited the court's statement in Richards at 1420, note 5,:

> ...Some expatriating acts may be so inherently inconsistent with United States citizenship that persons performing them may be deemed to intend to relinquish their United States citizenship even in the absence of statements that they *so* intended the acts, or, indeed, even despite contemporaneous denials that they so intended the acts. [Emphasis provided by Department.]

The Department observed that although the court did not give examples of such inherently inconsistent acts, the Department considered that an oath to a foreign country accompanied by renunciatory language "is an act that the court would determine to be inherently inconsistent with united States citizenship."

Department therefore expressed the view that the court's find of fact in Richards concerning the plaintiff's state of m before he took the renunciatory oath was the analogue of written declaration made by [redacted] before he signed application for a certificate of Mexican nationality. Thus, Department argued, prior statements of lack of intent relinquish citizenship "do not preclude a conclusion that person intended the evidentiary effect of such an oath; s statements are to be weighed as part of the evidence determining whether an individual had the requisite intent."

Returning to the case we are now considering, it indisputable that appellant's declaration of allegiance Mexico and express renunciation of his United States citizensl constitute highly persuasive evidence (but, of course, n conclusive evidence) of an intent to relinquish United Stat nationality. Furthermore, we have determined that he perforr the expatriating act voluntarily; by his own words he also act knowingly, although with explicit reservations. But does t record disclose other elements which are sufficiently weighty justify a different result from the one reached by t Department?

On May 21, **1984,** as noted, appellant visited the Embas in Mexico City and told a consular officer that he wished retain his United States citizenship even though he might take an oath of allegiance to Mexico. He also executed an affidat declaring his intention to remain a United States citizen in t event he should be required to make a declaration of allegiar to a foreign country in furtherance of his education. On th occasion, the consular officer gave him a copy of a stateme prepared by the Department, entitled "Advice About Possible Lc of U.S. Citizenship". It read, in part, as follows:

> ...It is not possible to state in advance that person will or will not lose U.S. citizenship that person becomes a citizen of a forei country. There are also no specific steps one c take in advance of a foreign naturalization th will guarantee retention of U.S. citizenship.
>
> However, a written statement submitted to t Embassy or Consulate in advance, expressing intent to maintain U.S. citizenship and to contin to respect the obligations of U.S. citizenshi despite one's plans to obtain naturalization in foreign country, would be accorded substanti weight in a loss of nationality proceeding. 0th facts taken into consideration as evidence of intention to retain U.S citizenship inclu continued use of a U.S. passport, continuous filir of U.S. tax returns and voting in U.S. elections.
>
> A statement made or signed in connection wi foreign naturalization that reflects renunciatic

> of present citizenship would be considered strong evidence of an intent to relinquish U.S. citizenship and would usually support a finding of loss of citizenship.

Appellant submitted a copy to the Board showing underscoring of the passage relating to the substantial weight that would be given to a prior written statement disclaiming intent to relinquish citizenship. Not underscored, however, was the part of the statement to the effect that renunciation of prior citizenship would usually support a finding of loss of nationality. It is not clear whether appellant understood that the Department would likely give less weight to a statement of lack of intent to relinquish citizenship where one later expressly renounced citizenship than it would give to such a statement made by one who later obtained foreign naturalization but did not make a renunciatory declaration. Nor do we know what the consular officer told appellant on that occasion (May **1984).** The former's record of the conversation states simply that:

> "Mrs. [redacted] and son Tomas came to Embassy to express a desire on the part of Tomas to retain American citizenship even though he may take an oath of allegiance to Mexico. Tomas executed affidavit to this effect. He retained original and we retained a copy. We also gave them a copy of the Dept's hand out re: dual citizenship and Loss."

Did the consular officer encourage appellant to believe that he might protect his United States citizenship by making a declaration before he performed an expatriative act? Appellant hints that he did *so.* He told the Board (his letter **of** November **6, 1986)** that: "It was my expectation that there would be no loss found and I was assured of this by all the consuls here." (Emphasis added). The fact that appellant did not visit the Embassy again until after he had performed the expatriative act suggests that he left the Embassy on May 21, 1984 satisfied that he had taken effective steps to safeguard his United States nationality in the event that he should find himself required to make a declaration of allegiance to Mexico.

We accept that a statement disclaiming an intent to forfeit United States nationality, made prior to signing a renunciatory declaration is not necessarily dispositive of the issue of the person's intent with respect to United States citizenship. Nonetheless, such a prior declaration is a factor that is entitled to appropriate evidential weight, as the Department recognizes. Here, appellant's prior declaration is expressive of his state of mind very shortly before he performed an expatriating act, and it supports the plausible inference

that he performed the act with serious mental reservations.

Appellant's pre-expatriative act statement is cred and evidentially significant because it is consistent with illustrative of his subsequent conduct. 10/ In the citizen: questionnaire he completed in May 1985, he stated that he obtained a certificate of Mexican nationality "as I wished retain dual citizenship as the American government permits." then set forth specific factors in support of his claim that never intended to relinquish his United States citizenship. noted that he had obtained Mexican passports but had never use

9/ Appellant might be reproached for his conduct toward Mexican government. As the record shows, he can have been in doubt that under Mexican law a dual national who opts Mexican citizenship makes a solemn commitment to divest hims of all other nationalities. We must, however, make determination of his intent to retain or relinquish Uni States citizenship solely on the basis of United States law interpreted by United States courts. So, whether his acti were reproachable or not, if we find that appellant lacked requisite intent that will be the end of the matter under Uni States law.

10/ See Kahane V. Shultz, 653 F.Supp. 1486 (E.D.N.Y. 198 The plaintiff made several statements immediately bef performing an expatriative act to the effect that he would the proscribed act - take a seat in the Israeli Parliament - had no intention of relinquishing his United Sta citizenship. In evaluating the plaintiff's prior declarati of lack of intent to relinquish his citizenship, the court sai

> The government analogizes intent to relinqu citizenship to intent to commit a cri Concededly, intent is a necessary element criminal convictions, and yet a person may convicted of a crime even though he stated, wh committing the crime, that he had no intent to so. Nevertheless, the court finds the anal unsatisfying. It is possible--indeed, likely-- a criminal to lie about his intent, because wishes to avoid punishment. Thus, he misreprese what he intended to do to his victim, if he is murderer, or to the community, if he is a evader. But an actor who states that he wishes remain a citizen is making a statement about 1 own status. In this context, it may be impossil to 'tell a lie,' just as a voter who registers w: the Democratic Party despite his Republic sympathies is a Democrat. This court is inclin to believe that the statement 'I wish to remain citizen' cannot be a 'lie' and that an actor w made the declaration contemporaneously with t expatriating act would automatically preserve h citizenship. [Emphasis in original

them to travel to the United States. There seems little doubt that he used the full validity U.S. passport issued to him in March 1985 to enter the United States to attend college in 1985-1986 and that he enrolled as an American not a foreign student. He stated that he never voted in Mexico, earned money or paid taxes there. In the questionnaire, he stressed that he has close ties to the United States. "My mother's entire family lives in Iowa where we spend many holidays." He noted that he attended YMCA camp in Iowa for nine years and registered for United States Selective Service in September 1985. We find the latter act meaningful, since he registered well before there was any indication that the Department might decide he had expatriated himself. In sum, appellant conducted himself consistently as a United States citizen, showing in word and act that he was prepared to accept the responsibilities of that citizenship. We find his statements credible. They are not contradicted by the Department.

Appellant asserts he was confident that he had taken effective precautions to preserve his United States citizenship. In addition to his contemporaneous statements that he lacked the intent to relinquish United States citizenship, there are the alleged assurances given to him by consular officers. In his letter of appeal to the Board, dated May 21, 1986, appellant stated that, at the time he completed the citizenship questionnaire on May 31, 1985, he was told "that should be sufficient to prove to the U.S. State Dept. that I wished to remain a U.S. citizen." He also stated that the same consular officer who gave him that assurance "denied" it a year later when she handed him the approved certificate of loss of his nationality. Also in his letter to the Board of November 6, 1986, noted above, appellant wrote that: "It was my expectation there would be no loss found and I was assured of this by all the consuls here."

At the Board's request, the consular officer who processed appellant's case after January 1985 executed an affidavit on September 15, 1987, in which she recounted her discussions with appellant. She recalled speaking to appellant and his mother "on several occasions," but had made no record of those discussions. However, on May 31, 1985, she states, she explained to appellant that:

> ...it was very likely, considering the care he had taken to preserve his U.S. citizenship, especially by trying to make his intent clear before signing the application for a certificate of Mexican nationality, that the Department would find that it could not establish by a preponderance of the evidence that he had performed this action with the intent of relinquishing his U.S. citizenship. I informed him that it was my understanding that it was the Department's practice to consider that a prior statement of intent to retain U.S. citizenship made before a U.S. consular officer counter-balanced a statement of renunciation made

> later for a Mexican official, and the decisio
> to loss or retention of citizenship was then
> on the basis of other indicia of intent. [Emph
> **added]** 11/

The consular officer added, as we have already seen, on June 11, 1985 when she submitted appellant's case to Department for an opinion, she expressed the view that appel did not intend to relinquish his United States citizenship.

In her affidavit, the consular officer called atten to an earlier case that involved a very young dual nationa the United States and Mexico, who, like appellant here, mac formal declaration of allegiance to Mexico and renounced United States citizenship. Matter of A.M.-E., decided by the Board on April 22, 1987. The appellant in Matter of A.M made several declarations of lack of intent to relinquish United States citizenship before he actually declared allegi to Mexico and expressly renounced his United States citizens he also performed a number of obligations of United St citizenship, including registering for United States Selec Service. With respect to A.M.-E.'s case, the consular off observed that the Department had maintained:

11/ The consular officer observed that the foregoing apprc of the Department "came to an end" with the Departmen adoption of the court's opinion in Richards v. Secretary State, 752 F.2d 1413 (9th Cir. 1985).

The Board notes that in guidance sent to all posts on J 9, 1985, the Department took the position, in light of Richar that prior statements of lack of intent to relinqu citizenship do not preclude a conclusion that the per intended the evidential effect of a renunciatory declarat made in connection with performance of a statutory expatriat act. Such prior statements are to be considered as part of evidence, that is, to be weighed along with other evidence, th **guidance** stated.

> ...that my explanation [to A.M.-E.] of the significance to the Department of acts and statements of appellant included incorrect interpretations of the Department's published guidelines on the procedures for determining loss of citizenship. The Department thought my statements to appellant 'may have prejudiced him in his presentation of his case during the time before the certificate of loss of nationality was approved' and that these statements must be considered 'misinformation.'
>
> On this rationale the Department asked that the case be remanded to them so that the certificate of loss of nationality might be vacated. A comparison of the two cases would seem to indicate that similar action is warranted in the case of Mr. [redacted] 12/

The dispositive inquiry in [redacted] case is this: which of the following sets of factors is entitled to greater evidential weight: appellant's declaration of allegiance to Mexico and renunciation of United States citizenship or his pre-expatriative act statement of intent to retain United States citizenship and his subsequent conduct manifesting such intent?

12/ In a later case, Matter of D.B., decided by the Board June 1, 1987, the appellant visited the United States Embassy at Mexico City on May 13, 1985 to ask for advice in order that she would not lose her citizenship if she were to make a declaration of allegiance to Mexico. D.B. was advised by the same consular officer who handled the case of appellants in the matter before the Board and appellant in Matter of A.M.-E. that she might make an affidavit which explained her intention. She executed such an affidavit, explaining her need to apply for a certificate of Mexican nationality, and stated that it was her intention to retain her U.S. citizenship, despite the contrary oath she expected to sign and did in fact sign the following day, May 14th. Ms. B.'s actions and statements, the Department stated to the Board, "are fully credible and uncontradicted by any evidence. Accordingly, it is requested that this case be remanded in order that the certificate of loss may be vacated." The Board remanded the case.

Expressly renouncing United States citizenship befor foreign official in the course of performing a statut expatriating act plainly is an act in "derogation of allegia to this country." 42 Op. Atty. Gen., supra, at 400. It is act that arguably leaves "no room for ambiguity" as to intent of the citizen. United States v. Matheson-, 400 F.Su 1241, 1245 (S.D.N.Y. 1975); aff'd. 502 F.2d 809 (2nd Cir. 19; cert. denied 429 U.S. 823 (1976). But making a renunciat oath of allegiance to a foreign state is not the end of matter. In loss of nationality proceedings, the trier of f must scrutinize all the evidence in order to make a f determination of the issue of the individual's intent relinquish United States citizenship.

In the case before the Board, there is credible evide that appellant consistently believed himself to be, represented himself as, a United States citizen. He made statements attesting that he did not intend to relinquish United States citizenship, one a few months before he perfor the expatriative act, and one several months afterwards. He behaved throughout as a United States citizen. Furthermore, is relevant that he was assured by at least one consular offi that his May 1984 declaration of lack of intent to relinqu United States nationality might be sufficient to enable him retain United States citizenship, and that the Departm authorized the Embassy to extend his passport to full validi Appellant might, with some justification, claim that Department and its agents encouraged him to believe that words and conduct would outweigh the renunciatory oath he m to Mexico.

Beyond the point we have now reached in Ennis' case, courts furnish "no touchstones of ready application." As tr of fact, the Board must therefore make a judgment on the is of appellant's specific intent without benefit of additio judicial guidelines. The Attorney General recognized that the final analysis the administrative authorities would have determine the issue of a person's intent by making a perso evaluation of the probative weight of the evidence. In his 1 opinion on the impact of Afroyim, which, as we have seen, Supreme Court noted with approval, Vance v. Terrazas, supra, 261, the Attorney General stated that: 'In each case administrative authorities must make a judgment on all evidence, whether the individual comes within the terms of expatriation provision and has in fact voluntarily relinquis his citizenship." 42 Op. Atty. Gen. supra, at 401.

In order to obtain a certificate of Mexican nationali appellant signed a statement renouncing his United Sta citizenship, and did so apparently without demur, at least at tl particular moment. Categoric and portentous though renunciatory statement may be, it is not conclusive eviden standing alone, of appellant's intent. The evidential value what appellant subscribed to is logically determined by t other evidence in the case. Such ancillary evidence may bolsl

or diminish the probative character of the renunciatory declaration. 13/ As we have shown above, there is credible evidence in this case that appellant wanted to remain a United States citizen, and, with a sole exception, so conducted himself. So, what on its face is an unqualified act in derogation of United States citizenship becomes one of less certain purport when examined against other evidence. Put differently, the evidence before and after appellant performed the expatriative act introduces a significant element of uncertainty about the true state of mind of this eighteen-year old on September 19, 1984. If the record is not reasonably free from uncertainty it is incumbent upon the Board to resolve uncertainty in favor of continuation of appellant's citizenship. Where deprivation of the "precious right of citizenship" is involved, "the facts and the law should be construed so far as is reasonably possible in favor of the citizen." Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); citing Schneiderman v. United States, 320 U.S. 118, 122 (1943).

It is the government's burden to establish by a preponderance of the evidence that the expatriating act was performed with the necessary intent to relinquish citizenship. In our judgment, the Department has not satisfied its burden of proof.

13/ The Board hears a good many appeals from determinations of loss of nationality where, as in the case at bar, a dual national of the United States and Mexico has made a declaration of allegiance to Mexico and renounced United States citizenship. The Board has held that the renunciatory oath manifested an intent to relinquish citizenship, and accordingly affirmed the Department's holding of loss of nationality. The Board reached such a conclusion in the absence of persuasive evidence tnat would countervail the renunciatory oath; none of the appellants did or said anything (beyond expressing an abstract wish to remain a United States citizen) that evidenced an intent to retain United States citizenship.

Over the past three or four years, the Department has requested that the Board remand half a dozen or so cases for the purpose of vacating the certificate of loss of nationality on the grounds that it was unlikely to be able to carry its burden of proof on the issue of the individual's intent. Matter of D. B., supra, note 12, is an example. The Board has agreed to remand those cases without passing on the merits of the Department's case, noting simply that there were no manifest errors of fact or law that would require a different disposition.

IV

Upon consideration *of* the foregoing, we are unable to conclude that appellant expatriated himself on September 19, 1984, by making a formal declaration of allegiance to Mexico, and, accordingly, reverse the Department's administrative determination of May 9, 1986, to that effect.

Alan [redacted] James, Chairman

Edward G. Misey, Memb

George Taft, Member