September 9, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] E[redacted] S[redacted]

This case is before the Board of Appellate Review c appeal taken by D[redacted] E[redacted] S[redacted] from an administra determination of the Department of State that she expatr herself on January 13, 1983 under the provisions of se 349(a)(2) of the Immigration and Nationality Act by maki formal declaration of allegiance to Mexico. 1/

A threshold issue is presented: whether the ap which was initiated six months to a year after the allo time for appeal, may be deemed timely. For the reasons forth below, we find the appeal timely. As to the merits o case, the sole issue for determination is whether the appe intended to relnquish United States nationality when she mad a formal declaration of allegiance to Mexico. Since we ax the view that the Department has carried its burden of pr that appellant had such an intent, we affirm the Departm determination of loss of appellant's nationality.

I

Appellant became a United States citizen by virtue of birth at [redacted] She also acqui.

1/ Prior to November 14, 1986 section 349(a)(2) of Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), rea follows:

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

. . .

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

Public Law 99-653, Nov. 14, 1986, 100 Stat. 3655, am subsection (a) of section 349 by inserting "volunt performing any of the following acts with the intentio relinquishing United States nationality:" after "shall lose nationality by;". It also amended paragraph (2) of subse 349(a) by inserting "after having attained the age of eig years" after "thereof".

Mexican citizenship by virtue of birth abroad to a Mexican citizen father. When appellant was two years old her father and mother took her to Mexico where she has since lived. The United States Embassy at Mexico City registered appellant as a United States citizen in 1964. In 1973 the Embassy issued her an identity card, and a passport in 1978. She states that for many years she also had a Mexican passport which she used to enter Mexico; allegedly she used her United States passport to enter the United States.

Appellant states that while she was a student at Anahuac University in Mexico City, "I was repeatedly requested to either pay quotas as a foreign student or to get proof of Mexican nationality." When her situation at university became what she described as "very difficult," she obtained advice from a friend who had a friend in the government and who in turn helped appellant by "giving me some papers to sign."

Appellant obviously refers to the application she made for a certificate of Mexican nationality (CMN) on November 12, 1982. The blank spaces on the application were filled in by typewriter. She was then a few months over 21 years of age. In the application she expressly renounced United States nationality and allegiance to the United States, and declared allegiance to the laws and authorities of Mexico. A CMN was issued in appellant's name on January 13, 1983. In July 1984 she obtained a Mexican passport. (Her United States passport expired in 1983.) Appellant went to the Embassy on August 2, 1983; whether it was to clarify her citizenship status, or to apply for a new passport, or for some other purpose is not disclosed by the record. In any event, the fact that appellant performed a statutory expatriating act in 1982 came to light at that time. As requested by the Embassy, she completed a form titled "Information for Determining United States Citizenship." Therein she acknowledged, inter alia, that she had made a declaration of allegiance to Mexico. She states that a consular officer assisted her to complete the form. After appellant's visit, the Embassy requested confirmation from the Department of Foreign Relations of appellant's acquisition of a CMN. The Department of Foreign Relations informed the Embassy by diplomatic note dated August 27, 1984 that appellant had obtained a CMN, and enclosed a copy of the certificate and appellant's application therefor.

Appellant returned to the Embassy at its request on October 31, 1984. She filled out an application for a passport (for information purposes) and executed an affidavit which reads in pertinent part as follows:

> When I was 10 years old I went to Mexico City where I was given a Mexican passport and an American passport to travel in and out of Mexico (my father is Mexican and my mother an American citizen). So until I was 18 years old I travelled with both

passports without a problem. But when I was (I'm 23 now) I wanted to go on vacation to U.S my Mexican passport had expired so I went to one and they dined [sic] it to me. So a la took care of this matter for me and my parents told me I would be able to have my both passp and he never told me I had to resign to one or other.

As required by law, a consular officer execute certificate of loss of nationality (CLN) in appellant's nam November 1, 1984, 2/ certifying that appellant acquired Un States citizenship by birth therein; that she made a fc declaration of allegiance to Mexico; and thereby expatri herself under the provisions of section 349(a)(2) of Immigration and Nationality Act. The consular officer forwa the CLN to the Department under cover of a brief memorandu which she expressed the opinion that appellant intended relinquish United States nationality, and accordi recommended approval of the CLN. The Department approved CLN on December 31, 1984, approval constituting administrative determination of loss of nationality from whi timely and properly filed appeal may be taken to the Boar Appellate Review.

In June 1986 counsel for appellant wrote to the Boar state that her firm represented appellant "in regards to appeal of loss of nationality." Counsel requested 60 day: prepare and file a brief in appellant's behalf. The B replied that the proper procedure was for counsel to inform Board in writing of the reasons for the appeal and file a b at that time or thereafter within the allowable time. Cou again wrote to the Board in December 1986, setting forth gro of the appeal, and stating that a brief would be filed withi days.

2/ Section 358 of the Immigration and Nationality Act, 8 U.! 1501, reads as follows:

Sec. 358. Whenever a diplomatic or consular officer the United States has reason to believe that a person while i foreign state has lost his United States nationality under provision of chapter 3 of this title, or under any provisior chapter IV of the nationality Act of 1940, as amended, he sh certify the facts upon which such belief is based to Department of State, in writing, under regulations prescribed the Secretary of State. If the report of the diplomatic consular officer is approved by the Secretary of State, a c of the certificate shall be forwarded to the Attorney Gener for his information, and the diplomatic or consular office which the report was made shall be directed to forward a copy the certificate to the person to whom it relates.

Appellant's brief was filed in February 1987. She contends that she lacked the requisite intent to relinquish her United States nationality; "her written declaration of allegiance to Mexico was not knowingly or understandingly executed."

II

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

Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

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

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

In this case, as we have seen, counsel for appellant informed the Board in June 1986 that her client intended to take an appeal from the Department's determination of loss of her nationality, but did not until six months later set forth her client's grounds of appeal. Assuming the appeal to have been filed in December 1986, that is, more than one year beyond the prescribed limitation on appeal, do the circumstances of the case warrant the Board's finding that there is good cause why we should consider the filing timely?

The applicable regulations mandate that at the time a certificate of loss of nationality is forwarded to the person concerned, he or she shall be informed of the right of appeal to this Board within one year after approval of the certificate.

22 CFR 50.52. 3/ Notice of the right of appeal is customa conveyed to the affected party by information printed on reverse of the certificate; 4/ the obverse bears the nota in bold type at the bottom: "See Reverse for Appeal Procedur

In sworn statements, both appellant and her mc declare that the CLN that she received from the Embass January 1985 was printed on one side only, although the bore on the obverse at the bottom the notation: "See rev for appeal procedures." The copy of the approved CLN in record submitted to us by the Department has appeal informa printed on the reverse. However, the information thereon c regulations and procedures that were in effect from November 1967 to November 30, 1979. 5/

The appeal information on the copy of the CLN in record reads in pertinent part as follows:

> Any holding of loss of United States nationa may be appealed to the Board of Appellate Revie the Department of State. The regulations gover appeals are set forth at Title 22 Code of Fed Regulations, Sections 50.60 - 50.72. The appeal

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3/ CFR 50.52 reads as follows:

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

4/ The information on appeal procedures reads in part follows:

> ***Any*** holding of loss of United States nationality may appealed to the Board of Appellate Review of Department of State within one year after the approva the certificate of loss of nationality. The regulat governing appeals are set forth at Title 22 of the of Federal Regulations, Part 7. [Emphasis added]

5/ On November 30, 1979 the regulations governing the Bo were revised and amended.

may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.

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

Whether appellant was given no information about taking an appeal or was given obsolete appeal information, it is clear that either the Department or its agent the Embassy at Mexico City did not perform its legal duty to give appellant correct, precise information about her right of appeal. The requirement of the federal regulations, 22 CFR 50.52, that an expatriate must be informed of the right to take an appeal within one year after approval of the CLN issued in his or her name is not precatory; it is imperative, and carries the force of law. The failure of the government to discharge the mandate of 22 CFR 50.52 excuses appellant's delay in taking the appeal and justifies our deeming the appeal timely. We will therefore consider it on the merits.

III

It is not disputed that appellant made a formal declaration of allegiance to Mexico, thereby bringing herself within the purview of section 349(a)(2) of the Immigration and Nationality Act. However, under the statute (supra, note 1) and the cases, nationality shall not be lost unless the citizen performed the expatriating act voluntarily with the intention of relinquishing United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980), and Afroyim v. Rusk, 387 U.S. 252 (1967). Appellant expressly concedes that she performed the expatriating act voluntarily. The single issue we are therefore called upon to decide is whether she intended to relinquish United States nationality.

Although appellant acted voluntarily, the question remains whether on all the evidence the Department "has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, supra, at 270. Under the Statute, 6/ the

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

government must prove a person's intent by a preponderance of the evidence. Id. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent that the government must prove is the party's intent when the expatriating act was done, in appellant's case her intent in 1983 when she obtained Mexican nationality. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Performing any of the enumerated statutory expatriating acts may be highly persuasive evidence of an intent to relinquish United States nationality; it is not, however, conclusive evidence of such an intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), (Black, J. concurring.)

The cases hold that a United States citizen who knowingly and intelligently makes a formal declaration of allegiance to a foreign state and simultaneously renounces United States citizenship demonstrates an intent to relinquish United States citizenship, provided there are no offsetting factors that would mandate a different result.

Plaintiff in Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981), made a formal declaration of allegiance to Mexico and simultaneously renounced United States citizenship. The Court of Appeals held that there was "abundant evidence" that the plaintiff knowingly and intelligently performed the proscribed act with the intention of relinquishing United States nationality. First, he was 22 years old, well-educated and fluent in Spanish when he applied for a certificate of Mexican nationality that contained an oath of allegiance to Mexico and a renunciation of United States citizenship. Second, the timing of plaintiff's actions cast doubt upon his intent. He applied for a certificate of Mexican nationality just after passing a selective service physical examination. Later he inquired of U.S. consular authorities about his citizenship status after his selective service deferrment was withdrawn and he was classified fit for service; when he was informed that he might have forfeited his citizenship, wrote to his draft board to state that he was no longer a citizen. Finally, plaintiff swore an affidavit stating that he had taken the oath of allegiance to Mexico and had done so voluntarily and with the intention of relinquishing United States nationality.

In Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985) the court held that the voluntary taking of an oath of allegiance to a foreign sovereign that includes an explicit renunciation of United States citizenship "is ordinarily sufficient to establish a specific intent to renounce United States citizenship." 752 F.2d at 1421. In Richards, plaintiff obtained naturalization in Canada upon his own application. He also swore an oath of allegiance to Queen Elizabeth the Second and declared that he renounced all other allegiance. He argued that he lacked the requisite intent because he never desired to

surrender his United States citizenship. Since he had no to become a Canadian citizen independent of a perceived nee advance his career, the necessary intent was lacking, asserted. The court disagreed, saying that if a citizen fr and knowingly chooses to renounce his citizenship and car out that decision, his choice must be given effect. In brie citizen's specific intent to renounce his citizenship does turn on motivation. The court further noted that plain characterized his intentions in a questionnaire he executed which he stated he did not want to relinquish his citizenship, "but as part of the Canadian citizen requirement did *so.*"

A "remarkably similar case" to Richards is Meretsky Department of Justice, et al., memorandum opinion, No. 86- (D.C. Cir. 1987. In Meretsky, plaintiff took an oath allegiance to Canada that explicitly required him to reno allegiance and fidelity to the United States. He argued tha should not be found to have had the requisite intent to reno his United States citizenship because he only became a Cana citizen so that he might be admitted to the practice of la Canada. Finding that plaintiff failed to produce evidence he took the Canadian oath under duress, the court adopted reasoning of the 9th Circuit in Richards to the effect tha United States citizen's free choice to renounce his citizen results in loss of that citizenship." The oath plaintiff t the Meretsky court declared, renounced his United St citizenship "in no uncertain terms." Memo. op. at 5.

In contrast to the foregoing cases, is the case Parness v. Shultz, memorandum opinion, Civil Action No. 86- memorandum opinion (D.D.C. July 1987). There plaintiff app for naturalization as an Israeli citizen. He testified after waiting in a long line at a government office, he stoo a clerk's counter to give oral answers to the clerk's quest as the latter filled *out* his application form. He stated he responded to what he was asked and did no more, that he never told he would have to renounce his U.S. citizenship, he did not knowingly or intentionally renounce his citizens and that he did not read the naturalization application, w stated in preprinted text that he renounced his citizens Plaintiff further testified that he did not cross out a sec of the application in which he could have exercised his righ an exemption, nor does he know who did. He acknowledged tha should have read the document but contends that his obv carelessness did not result from indifference to possibility, or knowledge, that he might lose his citizenship.

The unusually casual way in which plaintiff applied Israeli citizenship closely paralleled the manner in which form was completed by the Israeli clerk. The application

clearly incomplete, inaccurate and was not signed by any Israeli authority. After his application had been accepted, plaintiff swore an oath of allegiance to Israel. The oath made no mention of renunciation of other citizenship.

On the foregoing facts, the court concluded that plaintiff lacked the requisite intent to relinquish citizenship.

> In this case, acts, omissions, and statements of Parness strongly exhibit that his gross negligence endangered his U.S. citizenship;. . ..Nonetheless, the government has failed to show, as it must, by a preponderance of the evidence, that Parness ever specifically intended to relinquish his U.S. citizenship. Parness' overall testimony has been highly credible and most persuasive....The circumstances of his application for Israeli citizenship were unique; the testimony and much documentation in this case support plaintiff's position. The Court cannot conclude on these facts that Parness knowingly, intelligently, and intentionally renounced his U.S. citizenship.

In the case now before the Board, appellant made a formal delaration of allegiance to a foreign state and expressly renounced her United States citizenship and all allegiance to the United States. As the cases cited above hold, such conduct is highly probative of an intent to relinquish United States citizenship. The evidence thus is compelling that it was appellant's intent to surrender her United States citizenship.

Nonetheless, as triers of fact, we must be satisfied that appellant knowingly and intelligently forfeited her right to remain a United States citizen. The heart of appellant's case is that she did not act knowingly and intelligently. First, she alleges she believed she could continue to be a dual national of Mexico and the United States. She had been told, she stated in an affidavit executed in July 1986, by a friend studying the law and another friend who was an attorney that she could not lose her United States citizenship by formalizing her status as a Mexican citizen. Second, when she applied for a certificate of Mexican nationality "I never made any verbal or knowing renunciation of my U.S. citizenship." She continued:

> I was told to sign a paper in order to obtain my Mexican passport and very foolishly did not read the papers which had been prepared for me to sign. If I had known that I would jeopardize my U.S. Citizenship, I would never have signed the papers for Mexican citizenship.

In an affidavit executed in September 1986, appellar mother amplified her daughter's contention that she did not knowingly and intelligently when she made a formal declarat of allegiance to Mexico. The mother's affidavit reads pertinent part as follows:

> ...
>
> 5. My daughter, although of legal age, was st used to relying on her parents and other adults make necessary plans and arrangements for her listening to their advice. It is most probable in keeping with her character that she would s papers prepared for her by an attorney or not without reading those papers. My daughter told that she was told to sign a paper in order to her Mexican passport and that she signed the pa without reading it. She did not understand t she would be jeopardizing her U.S. citizenship signing the paper.

Appellant further asserts that she did not think could lose her United States nationality by documenting hers as a Mexican citizen; "I truly believed that I could be a c national of both Mexico and the U.S.A." "If I had known tha would jeopardize my U.S. citizenship," appellant stated in affidavit of July 1986, "I would never have signed the pap for Mexican citizenship." The conviction that she might lega hold both citizenships, she suggests, is evidence of a lack intention to relinquish United States nationality.

Appellant has not persuaded us that she unwittir subscribed to a formal declaration of allegiance to Mexico t included an express renunciation of United States citizenship,

We do not dispute that appellant sought the advice assistance of a government official who was a friend of a fri ana that the official prepared the application for a certific of Mexican nationality on appellant's behalf, filling in blank spaces with the words "United States" and "North Americ respectively, to identify the citizenship being renounced the country whose allegiance was being forsworn. But note t when she made application for a certificate of Mexi nationality she was over 21 years old, undeniably schooled fluent in the language in which the application was printed. Moreover, appellant has presented no evidence to substanti her claim that she did not read the papers that had b prepared for her to sign. Her mother's affidavit states mer that not reading the application for the certificate would consistent with her daughter's habits, adding that her daugh even at age 21 was inclined to defer to the advice of parents and other adults. Furthermore, the copy of h application for a certificate of Mexican nationality in record shows it was executed properly. It is short and

meaning of the words is certainly not obscure. In the absence of more convincing evidence, we are hard put to accept that appellant simply signed the form without giving it even a cursory glance. Furthermore, in the citizenship questionnaire appellant completed in August 1984 suggests that she was not unaware of the meaning of her actions. Therein, in response to a question whether she knew that by performing the expatriating act she might lose her United States citizenship she stated: "I knew I had to resign to my passport but because of school and that I would lose some rights. Also I was 18 and I didn't have a passport Mexican or American to go out of the country."

We now turn to appellant's contention that she cannot be considered to have acted knowingly and intelligently because she relied on the advice of two people whom she evidently considered knowledgable in United States and Mexican nationality law who allegedly told her she would not jeopardize United States citizenship by documenting herself as a Mexican citizen. Counsel for appellant contends that the Department's assertion that appellant's ignorance of the law is no excuse may be applicable in certain situations, but "it is clear that in this context, a mistake or wrongful act borne [sic] out of ignorance of the consequences of such an act is the total antithesis of the knowing and intelligent standard necessary to uphold the expatriation of a U.S. citizen." (Emphasis counsel's).

We do not agree with counsel.

We do not know what appellant was actually told by her alleged advisers about the effect on her United States citizenship of making a formal declaration of allegiance to Mexico, for she has neither identified her informants nor documented what they allegedly told her. But if they told her that she would not jeopardize her United States citizenship by pledging allegiance to Mexico, they obviously misled her. And appellant was ill-advised to rely on the advice she was given. We are unwilling to see appellant shelter behind incorrect non-official advice which suits her case when she clearly had the responsibility to ascertain her actual legal position from United States authorities. The Embassy with which she was not unfamiliar was readily accessible, yet she did not consult any consular official before acting.

Even if we could accept that she was given what she believed to be accurate information about her citizenship rights, we cannot accept that that perception excused her from reading carefully the language of the application for the CMN which plainly required that she renounce her United States citizenship. As to her belief that only formal renunciation of United States citizenship before a consular officer at a U.S. mission could effect of loss of citizenship, we can only reiterate that it was her responsibility to get the facts from United States authorities before acting.

Finally, we must consider whether there are any fact of sufficient probative weight to countervail the evidence of intent to relinquish United States citizenship manifested appellant's voluntary and knowing declaration of allegiance Mexico and express renunciation of United States citizens Our scrutiny of the record reveals none.

From birth to 1978 appellant, or her mother acting her, documented herself as a United States citizen. But a: her United States passport expired in 1983 she did not apply renew it. (Conceivably, she went to the Embassy in August for that purpose, but neither the record nor appella submissions disclose that that was indeed the object of visit.) Note, too, that the first documentation appel obtained after her United States passport expired was a Mex passport in July 1984. Moreover, there is no evidence appellant took any affirmative action that would lead one conclude that despite her formal declaration of allegiance Mexico she intended to retain United States nationality.

Appellant makes the curious argument that even aftei approved certificate of loss of her United States citizen was presented to her in January 1985 she nonetheless consid herself to be a United States citizen. She states that in A 1986 she entered the United States "as an American citizen," notes that in September of that year she applied for a Un States passport in Florida. Since she cannot have been u any illusion after January 1985 that she was an alien in eyes of the United States government, we cannot see relevance to the issue of appellant's intent in 1982 of purported belief that she never forfeited her United St citizenship.

Counsel for appellant correctly points out that dc raised by the record should be resolved in favor of continua of citizenship. In our view, however, the evidence is free reasonable doubt that she intended to relinquish United St citizenship. From this conclusion we are constrained conclude that the Department has carried its burden of prc that appellant intended to relinquish her United St nationality when she made a formal declaration of allegianc Mexico.

IV

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member