

May 6, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J [REDACTED] P [REDACTED]

J [REDACTED] P [REDACTED] appeals the Department of State determination that he expatriated himself on October 24, 1983, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The Department determined on November 20, 1986 that the appellant expatriated himself. After the appeal was entered, the Department re-examined the record and concluded that there was insufficient evidence to enable it to carry its burden of proving by a preponderance of the evidence that the appellant intended to relinquish his United States nationality when he performed the Statutory expatriating act. Accordingly, the Department requested that the Board remand the case so that it might vacate the certificate of loss of nationality that had previously been approved in the appellant's name. The Department's request is granted.

I

As prescribed by law and as directed by the Department, the Consul of the United States Consulate General at Calga executed a certificate of loss of nationality in [REDACTED] name.

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1/ In 1983 section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part as follows:

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 United States nationality by --

(1) obtaining naturalization in a foreign state upon his own application, ...

Pub. L. 99-653 (approved Nov. 14, 1986), 100 Stat. 3655 amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his United States nationality by".

on October 21, 1986. 2/ The Consul certified that P [REDACTED] acquired United States nationality by virtue of his birth on [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and that he acquired the nationality of Canada by virtue of naturalization, thereby expatriating himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 3/ The Department approved the certificate on November 20, 1986, approval

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2/ 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.

3/ In its initial report on [REDACTED] case to the Department in September 1986, the Consulate General at Calgary expressed the view that it would be very difficult to sustain a case that [REDACTED] intended to relinquish his United States citizenship when [REDACTED] obtained naturalization in Canada. The Consulate General's principal reason for taking that position was that several months prior to being granted a certificate of Canadian citizenship appellant informed the Consulate General at Winnipeg that he intended to obtain Canadian citizenship but wished to retain United States citizenship. In reply, that Consulate General informed [REDACTED] that although naturalization in a foreign state may be highly persuasive evidence of an intention to reinquish United States nationality "a written statement from you that you fully intend to maintain U.S. citizenship and will continue to respect the obligations of such citizenship notwithstanding your plans to obtain naturalization in Canada would be accorded substantial weight in any loss of nationality proceedings that may subsequently be conducted in your case."

constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. 22 CFR 7.3(a). Prater entered a timely appeal.

## II

The Deputy Assistant Secretary of State for Consular Affairs (Passport Services) submitted a memorandum on appellants' case to the Board on April 26, 1988. The Department could not locate the record upon which it based its determination of appellants' expatriation, but it submitted copies of several documents obtained after entry of the appeal from the Consulate General at Calgary. These include the correspondence of the Consulate General at Winnipeg with Prater prior to his naturalization.

In its memorandum, the Department stated that after carefully reviewing the evidence in ██████████ case it concluded that there was insufficient evidence to meet the Department's burden of proving by a preponderance of the evidence that Prater intended to relinquish his United States citizenship when he obtained naturalization in Canada upon his own application. 4

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3/ Cont'd.

The Consulate General at Winnipeg later advised Prater that if he proceeded with naturalization to "insure that you swear out an affidavit explaining your intentions ... the day before you are naturalized."

Although the Department acknowledged that the declaration made to the Consulate General at Winnipeg laid a "strong" basis of his intent not to relinquish citizenship, other evidence "show(ed) a preponderance to the contrary." The Department noted that the Consulate General had reported that ██████████ was active in Canadian government financial affairs and had been engaged in political activity there. In addition, Prater used a Canadian passport and crossed the border with a Canadian identification card or driver's license. Therefore, notwithstanding his letter to the Consulate General at Winnipeg, the preponderance of the evidence, in the Department's opinion, supported a holding that ██████████ intended to relinquish his United States citizenship. Accordingly, the Department instructed the Consulate General at Calgary to execute a certificate of loss of nationality in ██████████ name.

4/ In loss of nationality proceedings the Government bears the burden under the statute a/ of proving by a preponderance of the evidence that the party intended to relinquish his United States citizenship when he voluntarily performed a statutory expatriating act. Vance v. Terrazas, 444 U.S. 252

Although it took note that ██████ had been active in Canadian government and political affairs, the Department seemed to accept the earlier reasoning of the Consulate General at Calgary that such activities did not fall within the purview of section 349(a)(4)(A) or (B) of the Immigration and Nationality Act. By implication, the Department took the position that ██████ involvement in Canadian government matters was not persuasive evidence of an intent to relinquish his United States citizenship. The Department's memorandum continued:

Prior to his naturalization appellant consulted with the Consulate General in Winnipeg and carefully followed the instructions that he was given. He wrote to the Consulate and told them that he had to naturalize but that he certainly did not intend to relinquish his citizenship. He was very conscious of what he was doing and very concerned with its implications.

There is nothing in Dr. ██████ file to repudiate the validity of appellant's claim that he at no time had an intent to relinquish his U.S. citizenship when he naturalized. Accordingly, it is requested that this case be remanded in order that the Certificate of Loss may be vacated.

### III

Inasmuch as the Department submits that it is unable to prove that appellant had the requisite intent to relinquish his

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4/ Cont'd

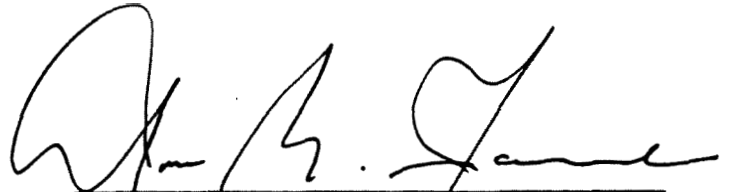
(1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

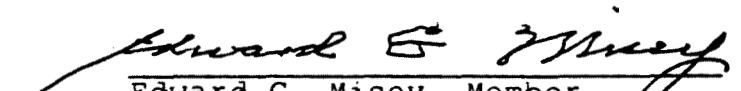
a/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), provides in pertinent part that:

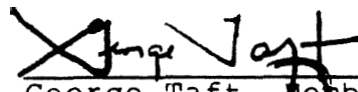
(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.

United States nationality when he performed a status expatriating act, and in the absence of manifest errors of : or law that would mandate a different result, the Board grants the Department's request that we remand appellant's case order that it may vacate the certificate of loss of nationality.

The case is hereby remanded for further proceedings. 5

  
Alan G. James, Chairman

  
Edward G. Mizey, Member

  
George Taft, Member  
George Taft, Member

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5/ Section 7.2(a) of Title 22, Code of Federal Regulations, CFR 7.2(a), provides in part that:

...The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it.