June 6, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] J[redacted]

This is an appeal from an administrative determination the Department of State that appellant, Lupe Jaskiewic expatriated herself on March 15, 1978 under the provisions section 349(a)(2) of the Immigration and Nationality Act making a formal declaration of allegiance to Mexico. 1/

For the reasons that follow, we conclude that appellar voluntarily performed a valid expatriatory act with tl intention of relinquishing her United States nationality. Ti Department's determination of loss of her United State nationality accordingly is affirmed.

I

Appellant acquired United States nationality by virtue o birtn at [redacted]. As ner mother wa a Mexican citizen, also ac red the nationality of Mexic at oirth. Appellant lived in tne United States until 1966 whe her mother took her to Mexico. There she was educated and stil lives.

1/ Prior to 1986, Section 349(a)(2) of the Immigration anc Nationality Act, 8 U.S.C. 1481(a)(2), read as follows:

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

....

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

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 nationality by;". It also amended paragraph (2) of section 349(a) by inserting "after having attained tne age of eighteen years" after "thereof".

Appellant states that after completing her studies in chemical engineering and having been hired by Industrias Reistol, her employer asked her to prove that she had been awarded a university degree. In order to receive her degree and be able to sit for her professional examination, she was required to obtain a certificate of Mexican nationality (CMN). Accordingly, on February 16, 1977 she completed an application for a CMN. In the application sne expressly renounced her United States nationality and all allegiance to the United States. Sne aiso declared adherence, obedience and submission to the laws and authorities of Mexico. The fact that she had applied for a CMN apparently sufficed for appeliant to receive her degree and to take her professional examination. The next year, on March 15, 1978, a CMN issued in appellant's name.

Seven years later, in April 1985, appellant went to the United States Embassy at Mexico City to apply for a passport in order to "regularize my situation in Mexico as an American citizen," and to apply to register her children as United States citizens. 2/

At the request of the Embassy, appellant completed a form titled "Information for Determining U.S. Citizenship," and, for information purposes, an application for a United States passport. In response to the Embassy's inquiry, the Department of Foreign Relations confirmed that appellant had been issued a certificate of Mexican nationality. On December 2, 1985 a consular officer of the Embassy executed a certificate of loss of nationality in the name of L[redacted] J[redacted] 3/ The

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2/ Appellant married Manuel Gutierrez, a Mexican citizen, in 1981. They have two children, both born in Mexico.

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 nas reason to believe that a person wnile 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

officer certified that appellant acquired the nationality o both the United states and Mexico at birth; that she made formal declaration of allegiance to Mexico on February 16, 19 and received a certificate of Mexican nationality on March 1 1978, thereby expatriating herself on March 15, 1978 under th provisions of section 349(a)(2) of tne Immigration ar Nationality Act. The Department approved the certificate c April 11, 1986, approval constituting an adninistrativ determination of loss of nationality from which a properly file and timely appeal may be taksn to the Board of Appellate Review. Appellant filed pro se an appeal in March 1987 and suosequentl retained counsel.

II

The statute provides that a national of tne United State shall lose his nationality by voluntarily naking a forma declaration of allegiance to a foreign state witn the intentio of relinquishing United States nationality. 4/ The statute further provides that the party contending that loss o nationality has occurred shall bear the burden of proving suc claim by a preponderance of the evidence. 5/ In support of

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3/ Cont'd.

> 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.

4/ Text note 1 supra.

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

> (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. 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 nay be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

its claim that appellant performed a valid statutory expatriating act, the Department submits the diplomatic note of the Mexican Department of Foreign Relations attesting to the fact that appellant applied for and obtained a certificate of Mexican nationality as well as copies of (a) the certificate itself and (b) appellant's application tnerefor in which she expressly renounced her United States nationality and declared allegiance to Mexico.

A.

Appellant acknowledged that she signed an application for a CMN, but argued that she did not make "a formal declaration of allegiance to a foreign state" within the meaning of section 349(a)(2) of the Immigration and Nationality Act. The application form "is not a meaningful document which diminishes appellant's allegiance to the United States." She simply renounced the protection or rights of her other nationalities and made a simple pledge of allegiance to Mexico of which she was also a national, states her reply brief. To be meaningful, she argues, the affirmation or formal declaration of allegiance "must rise to the level of an oath as preceived in our culture?.'

Appellant's position is legally unsound. The declaration of allegiance that appellant made constitutes an expatriative act within the meaning of section 349(a)(2). See Terrazas v. Vance, No. 75-2370, memorandum opinion (N.D. Ill. 1977). In Terrazas, the plaintiff made precisely the sane declaration of allegiance as appellant did in this case. Holding tnat such declaration was meaningful and brought plaintiff Terrazas within the purview of the statute, the district court deciared:

> ...while the oath of allegiance, per se, has been abolished in Mexico, the declaration of allegiance contained in the Application and the Certificate serves as the equivalent of an oath under Mexican law.
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> ...under sec. 349(a)(2) of the Act, 8 U.S.C. sec. 1481(a)(2), it is the form of the substantive statements of

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5/ Cont'd.

Pub. L. 99-653 (Nov. 14, 1986), 100 Stat. 3655, repealed section 349(b) but did not redesignate section 349(c) or amend it to reflect repeal of section 349(b).

> allegiance to a foreign state as opposed to the adjectival description of the statement itself which is determinative and most relevant in deciding matters of expatriation. Thus, under the statute, any meaningful oath, affirmation or declaration which 'places the person [making] it in complete subjection to the state to which it is taken,' III Hackworth, Digest of International Law, 219-220 (1942) may result in expatriation. See also, Savorgnan v. United States, 338 U.S. 491 (1950).
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> The particular declaration made by plaintiff in his Application contained not only his declaration of allegiance to Mexico, but also an express renunciation of his United States citizenship as required by the 1949 amendment to the Mexican Nationality and Naturalization Act....As noted by the court in United States v. Matheson, 400 F.Supp. 1241, 1245 (S.D.N.Y. 19751, aff'd., 532 F.2d 809 (2nd Cir.). Cert. denied, 45 L.W. 3250 (1976), the declaration of allegiance to a foreign state in conjunction with the renunciatory language of United States citizenship 'would leave no room for ambiguity as to the intent of the applicant.'
>
> We therefore hold that the declaration and renunciation made by plaintiff in his Application constituted a meaningful oath within the purview of sec. 349(a)(2) of the Act, 8 U.S.C. 1481(a)(2).

In subsequent litigation neither the Court of Appeals for the 7th Circuit nor the Supreme Court found the district court in error in reaching the foregoing conclusion.

B.

Appellant further argues that her act was not expatriatory "since it was taken as a concomitant and inseparable part of another independent expatriative act which was not sufficient to cause a loss of United States citizenship." Her argument runs as follows: Appellant was

subject to the provisions of section 350 of the Immigration and Nationality Act which provided that a person who acquired at birth the nationality of the United States and a foreign state and who had sought the benefits of his foreign nationality would lose his United States nationality if he resided for three years after the age of 22 in the foreign state, unless he took an oath of allegiance to the United States, 6/ Appellant was 22 and one-half years old on February 16, 1977-when she made an oath of allegiance to Mexico. Her application for a certificate of Mexican nationality "could well be....the claim of benefits of her foreign nationality sufficient to trigger Section 350." Her brief continues:

> ...Hence, the three year period in which Appellant was required under Section 350 to make an oath of allegiance to the United States was running. However, Section 350 was repealed prospectively on October 10, 1978, thereby eliminating this statutory ground of expatriation. Since Section 350 was an independent expatriative act and since the declaration of allegiance was done as a concomitant and inseparable part of that act, the declaration of allegiance is non-expatriative. Immigration Law Service Sec. 31.65 citing: INS Interp. 349.1(h); INS Interp. 349.3(b)(2). Re. Ydn Uno Esselstrom, A14 732 526 (Dept. of State, May 27, 1969); Re. Oscar Tavarez, A14 124 394, June 26, 1969.

Appellant's argument is too facile.

6/ Section 350 of the Immigration and Nationality Act, 8 U.S.C. 1482, read as follows:

> Sec. 350. A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which is is a national by birth at any time after attaining the age of twenty-two years unless he shall --
>
> (1) prior to the expiration of such three-year period, take an oath of allegiance to the

The principle stated in INS Interpretation 349.1(h) . unexceptionable:

> ...Even though an oath of allegiance to a foreign state is taken under conditions which would cause citizenship loss under the general principles of expatriation considered heretofore, such oath becomes nonexpatriatory when it is taken as a concomitant or an inseparable part of another independent expatriative act which, in itself for one reason or anotner, is ineffective in causing a loss of United States citizenship....

The foregoing principle has no application in the case now before the Board, however.

Appellant's oath of allegiance to Mexico obviously was an integral or concomitant part of her 'seeking the benefits of her Mexican nationality. Nonetheless, for the reasons that follow, the subsequent repeal of section 350 could not conceivably vitiate the expatriative character of her declaration of allegiance to a foreign state.

6/ Cont'd.

> United States before a United States diplomatic or consular officer in a manner prescribed by the Secretary of State; and
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> (2) have his residence outside the United States solely for one of the reasons set forth in paragraph (1), (2), (4), (5), (6), (7), or (8) of section 353, or paragraph (1) or (2) of section 354 of this title; Provided, however, That nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States fur twenty-five years after having attained the age of eighteen years.

Section 350 was repealed by Pub. L. 95-432 (approved Oct. 10, 1978), 92 Stat. 1046. Repeal was prospective; it did not restore citizenship to persons who lost citizenship pursuant to its provisions.

Responding in 1977 to the request of the Chairman or the Committee on the Judiciary of the House of Representatives for the views of the Department of Justice on proposed repeal of certain sections of the Immigration and Nationality Act, Assistant Attorney General Wald made the following statements about section 350:

> Although no court has yet considered this provision, it may experience difficulty in light of the decision of the Supreme Court in Afroyim V. Rusk, supra [387 U.S. 253 19671 to the extent that the statute does not contemplate voluntary relinquishment of citizenship [i.e., 'intent' to relinquish citizenship]. Its validity might also be attacked under the principle set forth in Schneider V. Rusk, 377 U.S. 163 (1964), since it imputes diminished allegiance to one class of citizens solely on the basis of foreign residence.
>
> In applying section 350, administrative authorities now hold that a dual national is not subject to expatriation under this section unless there is a persuasive showing of an intent to relinquish American citizenship or that the act performed was in derogation of allegiance to the United States. Consequently, in numerous administrative cases since Afroyim it has been neld that expatriation under section 350 did not occur because there was no showing that citizenship had been voluntarily relinquished..,.

In effect, a finding of loss of nationality under section 350 was only made if a citizen who sought the benefits of his foreign nationality were to perform an act that per se was expatriative.

In the instant case, appellant sought a benefit of her Mexican nationality, a CMN. Obtaining a CMN required that she make not only a declaration of allegiance to a foreign state but also a declaration of renunciation of her United States nationality and allegiance to the United States. On its face,

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7/ Letter to Hon. Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, December 12, 1977, from Assistant Attorney General Patricia M. Wald. Quoted in H.R. Rep. No. 1493, 95th Cong., 2nd Sess., 7 (1978).

such action was in derogation of allegiance to the Unit States. When appellant obtained her CMN, section 350 was, effect, meaningless. As tne House Committee on the Judicia observed in its report recommending repeal of section 35 citing the reasons stated by Assistant Attorney General Wal that provision "was greatly restricted in operation and longer serve[d] a useful purpose." 8/ Appellant's performan of a statutory expatriating act was fact, however. Repeal section 350 could not therefore nullify an act designated expatriating by section 349(a)(2) of tne Immigration a Nationality Act.

Appellant's formal declaration of allegiance to Mexi thus was a valid expatriative act. Whether it was expatriator: however, depends on whether it was done voluntarily with tl intention of relinquishing her United States citizenship.

III

We now turn to the issue wnetner appellant's declaratio of allegiance to Mexico was voluntary.

Section 349(c) of tne Act prescribes a legal presumptio that one who performs a statutory expatriating act does s voluntarily, although the actor may rebut the presumption upon a showing by a preponderance of the evidence tnat he acte involuntarily. 9/

Appellant's case that she acted involuntarily rests o the allegation that she was forced by economic circumstances t perform an expatriating act. Sne had to support herself and he elderly mother, who was without means after her mother and her step father separated, Employment was offered to her but it was conditional upon submitting proof of her professional qualifications. In order to receive her degree and qualify professionally she first had to obtain a CMN. In the course of obtaining a CMN she performed an expatriating act.

Duress connotes absence of opportunity to make a personal decision based on choice. See Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971); cert. denied, 404 U.S. 946 (1971). To prevail, appellant must show that circumstances beyond her control denied her opportunity to make a personal decision based on choice. Her conclusory

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8/ H.R. Rep. No. 1493, 95th Cong., 2d Sess., 4 (1978).

9/ Text note 5 supra.

allegations of duress are insufficient to demonstrate that she had no choice but to perform an act that could result in her expatriation.

For one thing, she offers not a shred of proof that she made any effort to explore alternatives that would have met her economic needs and professional ambitions without jeopardizing her United States citizenship. Moreover, she has not demonstrated, as the leading cases require her to do, that she faced such economic plight that she was justified in doing an expatriative act. See Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956), and Insogna v. Dulles, 116 F.Supp. 473 (D.D.C. 1953).

Counsel urges the Board to construe any evidentiary ambiguities as far as possible in appellant's favor, citing Nishikawa v. Dulles, 356 U.S. 129 (1958). The judicial mandate to resolve doubts in favor of continuation of citizenship presupposes, however, that the evidence is susceptible of reasonable doubt that appellant did an expatriation of her own free will. Here we perceive no ambiguities. The evidence is clear that appellant acted without being subjected to extrinsic factors; at least she has not established, as she has the burden to do, that she could not act differently and **had** no choice but to do the proscribed act.

We thus conclude that appellant acted of her own free will when she made a declaration of allegiance to Mexico.

IV

Although we have concluded that appellant's declaration of allegiance to Mexico was voluntary, 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**. The government (here the Department of State) must prove the party's intent and so by a preponderance of the evidence. Id. at **267**. Intent may be expressed in words or found as 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 when she voluntarily performed the proscribed act. Terrazas v. Haig. **653 F.2d 285, 287** (7th Cir. 1981).

The record shows that appellant made a declaration of allegiance to Mexico. We have concluded that making that declaration constituted **a valid expatriating act** within the meaning of the statute. The Supreme Court has held that 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). Appellant not only made a formal declaration allegianice to Mexico, but at the same time also expres renounced her United States nationality and all allegiance the United States.

The case law is clear about the legal consequences i one's United States citizenship if one makes a form declaration of allegiance to a foreign state and abjur allegiance to the United States. Subscribing to su undertakings will result in loss of United States citizenshi if it be shown that the party performed the act voluntarily, knowingly and intelligently, and provided there are no facto that would mandate a different result.

In Terrazas v. Haip, supra, the court found abunda evidence of the petitioner's intent to relinquish United State citizenship in the fact that **he** willingly, knowingly a voluntarily made a declaration of allegiance to Mexico tha included renunciation of his United States citizenship, and i his subsequent conduct. 653 F.2d at 288. In Richards v Secretary of State, 752 F. 2d 1413, **1421** (9th Cir. **1985),** th court held that "the voluntary taking of a formal oath **c** allegiance that includes an explicit renunciation of Unite States citizenship is ordinarily sufficient to establish specific intent to renounce United States citizenship," provide that there are no factors that would justify a differen result. **752** F.2d at **1421.** Similarly, Meretsky, v. U.S. Department of Justice, et. al., CA No. 85-01985, memorandu opinion (D.C. Cir. 1986).

In the case before the Board the evidence is highl persuasive that appellant intended to relinquish her Unitec States nationality when she made a formal declaration of allegiance to Mexico. Appellant, however, denies that she had the requisite intent at the crucial time. "Hers was legally a routine exercise of the prerogatives of her foreign citizenship," states her reply brief, citing United States v. Matheson, 532 **F.2d 809** (2nd Cir. **1976),** cert. denied. **429** U.S. 823 **(1976).** It is clear that appellant exercised far more than a routine privilege of Mexican nationality. Mexican law does not permit one to retain dual ationality 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, hold a Mexican passport, for example, he or she must possess a CMN. To obtain such a document the applicant must expressly renounce previous nationality and make a declaration of allegiance to Mexico.

One who is a citizen of the United States and a foreign state may, without expatriatory consequences, make an oath of

allegiance in order to obtain a right or privilege of tne foreign state, provided the oath is not renunciatory. See Jalbuena V. Dulles, 254 F.2d 379, 382 (3rd Cir. 1958). Petitioner in Jalbuena, a dual national of the United States and the Philippines, swore an oath of allegiance to the Philippines in connection with an application for a passport. The oatn did not contain a declaration renouncing other nationality. "It follows," stated the court, "that, because nothing done by Jalbuena can fairly be viewed as a renunciation of the United states citizenship he enjoyed simultaneously with Philippine citizenship, section 401(b) [of the Nationality Act of 1940] cannot properly be read as applying to him." See also United States V. Matheson, 400 F.Supp. 1241 (S.D.N.Y. 1975). There the court said the citizen's intent was not explicit on the face of her application for a certificate of Mexican nationality. (No renunciation of previous allegiance was required by Mexico at the date the citizen executed it). "This is true," the court said, "because an oath expressly renouncing United States citizenship [as required by a later Mexican regulation)....would leave no room for ambiguity as to the intent of the applicant." 400 F.Supp. at 1245. Wnen the second circuit affirmed the holding of the district court, it did not take issue with the dictum of the district court. United States V. Matheson, supra. That dictum was also cited by the district court in Terrazas V. Vance, No 75-C 2370, memorandum opinion, (N.D. Ill. 1977) and by the Court of Appeals for the Seventh Circuit in Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981).

That appellant here acted knowingly and inteiligently when she made a formal declaration of allegiance to Mexico seems clear. She was then 23 years old; educated and fluent in Spanish, the language in which the application for a CMN is printed. She contended in her appeal statement that she was unaware of the consequences of making a declaration of allegiance to Mexico, We find it difficult to credit that statement, for surely she could have had little difficulty in realizing what the phrase "I expressly renounce my United States nationality" signifies.

The final inquiry is whether there are any factors in the case that would warrant our concluding that more likely than not appellant lacked the intent to relinquish her United States nationality. She suggests that the Board should consider certain factors that raise doubts whether she intended to relinquish her United States nationality.

In her appeal statement she alleged that before applying for a certificate of Mexican nationality sne went to the United States Embassy in late 1976

> to explain my problem, but before I could finish explaning [sic], I was asked to fill out a form but wasn't told for why

> or what the form was for. I asked for more information but they refused to answer my questions until I had filled out the forms. At that time, nothing was put in my file with respect of my situation. Ignorant of the possible consequences I didn't fill out and nand in the form and I did not return to the Embassy. On the advice of friends, relatives and above all due to the lack of information, I applied for Mexican Citizenship.

It is suggested (but the thought is not developed) tha such action on appellant's part indicates a lack of intent t relinquish her United States nationality. Although there i nothing of record to confirm that appellant sought advice fro the Embassy before she performed the expatriative act, we wil not gainsay that she did do so. Yet, we fail to see that makin such a visit is indicative of anything more than margina concern about ner aileged diiemma. She showed littl persistence if her aim was to make clear that she was concerne about endangering her United States citizensnip, for she apparently gave up when confronted with a simple request to fil out some forms.

Counsel submits that appellant's actions after she performed the expatriative act suggests a will in 1977-78 to retain her United States citizenship. She did not seek a visa to travel to the United States, or obtain a Mexican passport, he stated; and when she applied for a United States passport in 1985, she also tried to register her children as United States citizens. As the cases make clear, intent is to be determined as of the time the expatriative act is performed. It might be argued that a pattern of proven conduct both before and after the expatriative act evidencing an intent to retain citizenship would suffice to overcome the very compelling evidence of an intent to relinquish citizensnip expressed in tne application for a certificate of Mexican natinality. Here, however, there is only the scantiest evidence of a will on appellant's part to retain citizenship. We perceive no pattern of conduct sufficiently clear to raise doubts in our minds about her true will and purpose at the crucial time.

On all the evidence, we are of the opinion that tne Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship wnen she made a formal declaration of allegiance to Mexico.

V

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

Alan G. James, Chairman

Warren E. Hewitt

Frederick Smith, Jr., Member