June 10, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State that appellant, [redacted], expatriated himself on March 14, 1974 u th is of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

For the reasons that follow, the Board reverses the Department's holding that appellant expatriated himself.

I

Appellant states that he acquired United State: nationality by birth at Burlington, Iowa on June 11, 1945 and that he lived in the United States until July 1968 when he moved to Canada. He reportedly married a Canadian citizen and has one child. According to appellant's submissions, he became a Canadian citizen on March 14, 1974 in order to be hired as a school teacher. The Board takes notice that at that date applicants for naturalization in Canada were only required to make simple oath of allegiance to the Queen of Canada; the declaration of renunciation of all other allegiance that was required from 1947 was annulled in April 1973.

1/ In 1974 when appellant obtained Canadian citizenship, 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 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 nationality by".

Appellant's brief continues that he visited the United States Consulate General at Toronto in 1986 to inquire about his United States citizenship status; that he was subsequently informed he might have expatriated himself by obtaining naturalization in a foreign state; and was then asked to complete a form "Information for Determining United States Citizenship." He did not return the form. On or about February 15, 1987, his brief states, he received a certificate of loss of nationality executed on December 8, 1986 and approved by the State Department on February 10, 1987. 2/ Approval of such certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant entered a timely appeal through counsel on October 5, 1987. A brief in support of the appeal was submitted in March 1988.

II

Upon receipt of appellant's brief, the Board of Appellate Review, in accordpnce with section 7.5(d) of Title 22 Code of Federal Regulations, 22 CFR 7.5(d), requested on March 3, 1988, that the Department submit a brief and the record upon which the holding of loss of nationality was based within 60 days or by May 4, 1988.

2/ A consular officer obviously had executed the certificate in compliance with the provisions of section 358 of the Immigration and Nationality Act which 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.

On May 17, 1988, thirteen days after the Department's brief was due, the responsible office of the Departmer addressed the following memorandum to the Board:

> While this office has prepared the Department's memorandum in this case, timely submission has been delayed by the Deputy Assistant Secretary for Passport Services, pending consultation with CA/OCS/CCS on cases which the Department is required to request a remand.
>
> Hopefully we will be able to submit the [redacted] memorandum and administrative thin a few weeks.
>
> I regret that the foregoing circumstances precluded the submission of the Department's brief within prescribed regulatory deadline; and for those reasons request an extension of time in filing the [redacted] [sic] case.

On May 19th, the Board granted the Department until June 1, 1988 to make the required filing. As of the close of business June 9, 1988, the Department had neither submitted the brief and record nor requested a further extension of time to file with a showing of good cause. In view of the fact that the Department has had ample opportunity to file its brief and the record and has failed to show good cause why the time for such filings should be further enlarged, the Board, pursuant to its discretionary authority, has decided to proceed to render its decision on the appeal. 3/

III

The only documents before the Board consist of appellant's statement of September 20, 1987, asserting that a certificate of loss of nationality was approved by the Department in his name on February 10, 1987; appellant's opening brief; and the Department's memorandum of May 17, 1988 which, in

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3/ 22 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.

effect, concedes that a certificate of loss of nationality was issued and approved in appellant's name and that the Department was in the process of addressing the issues presented by his appeal.

Appellant asserted in his brief that the Department's holding of loss of his nationality was contrary to law or fact.

There is no question that the Board has jurisdiction to hear and decide the appeal under the provisions of 22 CFR 7.3(a) and 7.5(b). The Department is required by 22 CFR 7.5(d) to submit a brief with the Department's position on appeal and the record upon which the holding of loss was based within 60 days of a request from the Board for such submissions. The Board may, for good cause shown enlarge the time for the taking of any action. 22 CFR 7.11. The Department made one request for an enlargement of time to file which the Board granted. Eight days have passed since the filing was due. In the circumstances, the Board is not disposed to countenance further unexcused delay.

IV

It is not disputed that appellant obtained naturalization in Canada and brought himself within the purview of section 349(a)(1) of the Immigration and Nationality Act. Appellant contends, however, that he did not act voluntarily with the intention of relinquishing United States nationality within the meaning of section 349(a)(1) of the Act. Under the statute, section 349(c), there is a legal presumption that one who performs a statutory expatriating act does so voluntarily but the presumption may be rebutted. 4/ Appellant alleges that he was forced to obtain Canadian citizenship because as an American he found it hard to locate a teaching position in light of a "hire Canadian" policy.

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

Appellant adduces no evidence to support his contentic that he was forced to obtain Canadian citizenship b circumstances which he really could not control; in a word, h has not shown that he had no alternative to obtaining Canadia citizenship. He has not therefore overcome the presumption tha he acted voluntarily when he applied for and accepted Canadia citizenship.

The sole issue for determination therefore is whethe appellant intended to relinquish his United States nationalit when he became a Canadian citizen.

The Supreme Court held in Afroyim v. Rusk, 387, U.S. 25 (1967) that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that right", and Congress has no general power to take away an American's citizenship without his assent.

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court reaffirmed it5 decision in Afroyim by holding that to establish loss of citizenship the government must prove an intent to surrender United States citizenship. An intent to relinquish citizenship must be shown,by the government whether the intent is expressed in words or is found as a fair inference from proven conduct.

In Terrazas, the Court made clear that 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.

Thus, under section 349(c) of the Immigration and Nationality Act, the government bears the burden of proving, by a preponderance of the evidence, appellant's intent to relinquish his United States citizenship. 5/ It bears this burden without benefit of any presumption.

4/ Cont'd.

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

Pub. L. 99-653, (approved 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).

5/ See note 4 supra.

The Department clearly has not met its burden of proof in this case. By failing to submit any pleadings to date, the Department has, in effect, elected not to assume its statutory burden of proving that appellant intended to relinquish his United States nationality when he obtained naturalization in Canada. His allegation that he lacked the requisite intent therefore stands unrefuted. It must therefore follow that the Department has not carried its burden of proof.

V

Upon consideration of the foregoing, we are unable to conclude that appellant expatriated himself by obtaining naturalization in Canada upon his own application. Accordingly, we reverse the Department's administrative determination to that effect.

Alan G. James, Chairman

/Edward G. Misey, Member

George Taft, Member