DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] H[redacted] T[redacted]

This case is before the Board of Appellate Review on the appeal of P[redacted] H[redacted] T[redacted] from an administrative determination of the Department of State, dated October 23, 1985, that he expatriated himself on August 3, 1983 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The dispositive issue is whether appellant intended to relinquish his United States nationality when he performed the statutory expatriating act. For the reasons given below, we hold that the Department has proved by a preponderance of the evidence that appellant intended to surrender his citizenship. Accordingly, the Department's holding of his expatriation is affirmed.

1/ In 1983, Section 349(a)(2) of the Immigration and 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 --
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> ...
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> (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. No. 99-653, 100 Stat. 3655 (1986), 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;". The same public law also amended paragraph (2) of section 349(a) by inserting "after having attained the age of eighteen years" after "thereof".

I

Appellant was born at Mexico, D.F. on August 27, **1961.** By virtue of his birth of a United States citizen mother, he acquired United States nationality. He also acquired the nationality of Mexico by virtue of his birth therein. In April **1963** the United States Embassy at Mexico City issued a report of appellant's birth as a United States citizen. The Embassy issued him an identity card in **1970,** and in **1978** a passport, valid until **1983.**

On July 26, **1983,** appellant visited the United States Embassy. **An** entry on the passport and nationality card maintained by the Embassy on its dealings with appellant states that:

> Mr. [redacted] came to the Embassy to inquire about the implications of obtaining a Certificate of Mexican Nationality. He said he felt obliged to make a decision, as to his nationality, because he was going to be traveling soon and need a Mexican document to leave the country. He said he knew that obtaing [sic] a Mexican passport now that he was over **18,** would entail a formal renunciation of his U.S. citizenship. He also he's [sic] been advised by some friends that if he came to the Embassy to make a statement to the effect that he didn't want to lose his U.S. citizenship, it would improve his chances of not losing his U.S. citizenship. Mr. [redacted] stated he felt compelled to obtain a CMN because he was studying in Mexico and was currently recieving [sic] a subsidized tuition. He indicated that it ould [sic] be very expensive for him to continue his studies as a U.S. citizen. He said he was planning to go to SRE [the Mexican Department of Foreign Relations] this week to solocit [sic] a Mexican ppt. and he expected to sign the oath of allegiance to Mexico.

The entry was initialed by Consul Richard F. Gonzalez. In the case record there is an affidavit in Spanish signed by appellant and witnessed by Consul Gonzalez. The affidavit, which is undated, was probably executed on July 26, **1983** when appellant visited the Embassy, for an entry on his passport and nationality card

dated July 26, 1983 states: "See pending file for copies of ppt. and affidavit signed by Mr. [redacted] Appellant's affidavit reads in relevant part as follows:

> I hereby request information from the Consul of the United States regarding the renunciation of my U.S. citizenship. Circumstances have forced me to renounce my citizenship because I wish to live in Mexico and complete my university studies. I went before the Consul in order to request information, because I feel that the Embassy authorities should be aware of the various reasons why I am forced to renounce my U.S. citizenship, which I am not doing willingly. '[Emphasis appellant's]. 2/

Appellant executed an application for a certificate of Mexican nationality (CMN) on July 28, 1983. In the application, he declared that he expressly renounced his United States nationality and all allegiance and fidelity to the United States. He also declared "adherence, obedience and submission to the laws and authorities of the Mexican Republic." Shortly after he completed the application for a CMN, a Mexican passport was issued to him, valid for one year. A CMN issued in appellant's name on August 3, 1983. On August 11, 1983 the Department of Foreign Relations informed tho Embassy that appellant had obtained a CMN, and transmitted a copy of the certificate and appellant's application therefor.

Several months after receiving the Department's note, the Embassy wrote to appellant to inform him that he might have expatriated himself by making a formal declaration of allegiance to Mexico. He was asked to complete a form (in English) titled "Information for Determining United States Citizenship," and informed that he might discuss his case with a consular officer.

Appellant completed the citizenship questionnaire on December 21, 1983 and returned it to the Embassy. More than a **year** passed. In July 1985 he visited the Embassy to inquire about the status of his case, which it appears had lain dormant for a year and a half due to a filing error. Appellant completed a second citizenship questionnaire (in Spanish) and an application for a

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2/ English translation, Division of Language Services, Department of State, No. 126306-A, Spanish (1988).

passport. On July 23, 1985, he was issued a passport valid to October 21, 1985, "until case developed and sent to Dept. of State for approval or disapproval," according to an entry on his passport and nationality card. He obtained a second Mexican passport on July 19, 1985, valid to 1990.

A consular officer (not the one whom appellant consulted in July 1983) executed a certificate of loss of nationality in appellant's name on August 6, 1985, as required by section 358 of the Immigration and Nationality Act. 3/ Therein the officer certified that appellant acquired the nationality of both the United States and Mexico at birth; that he made a formal declaration of allegiance to Mexico on July 28, 1983; obtained a CMN on August 3, 1983: and thereby expatriated himself On August 3, 1983, under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Embassy forwarded the certificate of loss of nationality to the Department under cover of a memorandum in which the Embassy argued that appellant evidently lacked the intention to relinquish his United States nationality. The Embassy's memorandum reads in part as follows:

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.

> Mr. [redacted] came to this office on July 26, 1983 to talk about his need to obtain a CMN and his desire to retain U.S. citizenship (see his statement and Conoff's notes on OF-240, copies attached). The Department calls the taking of an oath containing renunciatory language 'substantial evidence' of an intent to relinquish U.S. citizenship. 7 FAM Exhibit 1208 states that 'substantial weight would be accorded to a written statement submitted in advance of performing a possibly expatriating act..." in any loss of nationality proceeding. Mr. [redacted] statement, undated but evidently made on July 26, 1983, and his interview of that date convinced the Consular Officer that Mr. [redacted] 'clearly stated in advance that it was not his intention to give up his U.S. citizenship' (from Conoff's notes in file dated January 5, 1984). 4/

4/ Consul Gonzalez executed an affidavit on August 26, 1988 in which he gave the following recollection of his meeting with appellant:

> ...I was on duty when Mr. [redacted] approached the Embassy concerning his plan to apply for his Certificate of Mexican Nationality, which entailed executing a renunciatory oath.
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> While I do not specifically recall speaking to Mr. [redacted], my notes of July 23, [sic] 1983 indicate only that he executed a sworn statement about his desire to retain his U.S. citizenship in spite of his commitment to obtain a CMN.
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> My policy and practice in dealing with such cases did not entail assuring such individuals that any sworn statement or declaration prior to applying for a CMN would guarantee that they would not lose their U.S. citizenship. I have no reason to believe that I counseled Mr. [redacted] otherwise.

...

Mr. [redacted] was issued a limited U.S. passport here on July 23, 1985. He had last entered the **U.S.,** according to a stamp in his **U.S.** passport, on August 1, 1983, four days after he had signed the application for a CMN, thus indicating an intent to retain **U.S.** citizenship.

Unless the Department's adoption of the Ninth Circuit Court's opinion in Richards [Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985)] has changed the value of a statement of intention made in advance of the performance of a possibly expatriative act, it would appear that Mr. [redacted] concern for keeping U.S. citizenship expressed at the Embassy on July 26, 1983, would counterweight the statement signed at the SRE on July 28, 1983. This was, at least, his hope and his expectation. If so, the post is of the opinion that a finding for retention of **U.S.** citizenship should be made since there is little else to indicate an intent to relinquish **U.S.** citizenship. A student, he has no income to report, born before 1962, he is not required to register for Selective Service in the **U.S.,** and though he voted in a Mexican presidential election, it must be admitted that there are many U.S. citizens abroad who are not ware [sic] of their right to vote in presidential elections. He had kept **us** [sic] his documentation as a U.S. citizen and has always entered the U.S. as **a U.S.** citizen.

The Department did not agree with the Embassy's opinion, and on October 23, 1985 approved the certificate of **loss** of nationality. Such action 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 received a copy of the approved certificate of loss of his nationality on

January 23, 1986. He initiated this appeal on December 29, 1986. 5/

II

The statute provides that a national of the United States shall lose his nationality by voluntarily making a formal declaration of allegiance to a foreign state with the intention of relinquishing his United States nationality. 6/

There is no dispute that when he applied for a certificate of Mexican nationality (CMN) appellant made a meaningful declaration of allegiance to Mexico and thus brought himself within the purview of the statute. We therefore turn first to the issue whether he acted voluntarily.

In law, it is presumed that one who performs a statutory expatriating act does so voluntarily, but the presumption may be rebutted upon a showing by a

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5/ The Department asserts that the Board should deny the appeal on the grounds that it was not filed within one year after approval of the certificate of loss of nationality, as prescribed by 22 CFR 7.5(b)(1).

We do not agree. The record makes it plain that the Department, not appellant, was responsible for the fact that the appeal was not timely filed. 22 CFR 7.5(b)(1) presumes that the Department will ensure that a a copy of an approved certificate of loss of nationality will be delivered promptly to the person affected. Here, more than two months passed after the Department approved the certificate before it was sent to Mexico City for the Embassy to deliver to appellant. See the Embassy's telegram to the Department dated January 9, 1986 informing the Department that the certificate had not yet reached Mexico City. Since the Department delayed sending the certificate to the Embassy, we refuse to penalize appellant for not filing his appeal within one year of approval of the certificate of loss of nationality that was executed in his name. The appeal is timely and accordingly will be decided on the merits.

6/ Text supra, note 1.

preponderance of the evidence that the act was involuntary. 7/ To prevail on this issue, therefore, appellant must adduce credible evidence that he was forced to act against his fixed will and purpose to do otherwise.

Appellant argues that merely because there were alternatives to obtaining a CMN, his applying for one and making a declaration of allegiance to Mexico should not be considered voluntary. "[T]o opt for not renouncing [United States nationality] would have cut short my professional studies, my possibility to continue living in Mexico with my family and my marriage to a Mexican." True, no one forced him physically to perform the proscribed act, he conceded. "But we must not forget that physical force is not the only form of subjection," he stated to the Board. Continuing, he stated that "In this case, it must be understood that I saw myself seriously forced to perform the act since I live in the Mexican Republic."

As we understand appellant's position, he contends that Mexican law coerced him against his will to renounce his United States nationality.

Coercion or duress connotes absence of the possibility to make a personal choice. "But opportunity

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7/ 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 the 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 section 349(b) but did not redesignate section 349(c), or amend it to reflect repeal of section 349(b).

to make a decision based upon personal choice is the essence of voluntariness." Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

In contemplation of law, appellant plainly was not compelled by Mexican law to renounce his United States citizenship. He was free to renounce United States nationality or not. If he decided that he wished to exercise the rights and privileges of his Mexican citizenship, however, Mexican law mandated that he affirmatively declare his Mexican nationality and forswear his other nationality. On the other hand, if he decided that he would prefer to be a United States national, Mexican Law simply required that he expressly renounce Mexican citizenship and adopt solely his United States nationality.

Appellant thus had opportunity to make a decision based on personal choice. Choosing between Mexican and United States citizenship may have posed an uncomfortable choice for him, but the sheer difficulty of the choice does not constitute duress. See Jolley v. Immigration and Naturalization Service, supra, at 1250, n. 10.

In any event, the duly enacted laws of a sovereign, civilized state, requiring a choice of nationality, cannot, as a matter of law, be deemed coercive, even though they may create difficult problems for those who wish to avail themselves of the benefits of tne citizenship of that state.

Furthermore, appellant must be charged with knowledge of the provisions of Mexican law regarding dual nationality. Although it may seem harsh to say so, he should have planned for the day when he would be required to choose between his two nationalities. That he confronted the requirement at the eleventh hour when faced with a higher university tuition is no one's fault but his own.

In brief, we do not agree that circumstances beyond appellant's control forced him to perform a statutory expatriating act. We therefore conclude that he has not rebutted the presumption that he voluntarily made a declaration of allegiance to Mexico.

III

Finally, there remains for determination the principal issue -- whether appellant intended to relinquish his United States nationality when he formally declared his allegiance to Mexico.

In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that a citizen who performed an expatriative act intended to relinquish his citizenship. Vance v. Terrazas, 444 U.S. 252, 270 (1980). An individual's intent may be expressed in words or found as a fair inference from proven conduct. 444 U.S. at 260. Intent is determined as of the time of the performance of the statutory act of expatriation. Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981). In the case before the Board, the intent that the government must prove is appellant's intent at the time he signed the application for a certificate of Mexican nationality in which he swore allegiance to Mexico and renounced United States citizenship.

Making a declaration of allegiance to a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship; it is not, however, conclusive evidence "of the voluntary assent of the citizen." The Supreme Court expressed the principle as follows in Vance v. Terrazas, supra,

> ..., we are confident that it would be inconsistent with Afroyim to treat the expatriating acts specified in section 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course', any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa v. Dulles, 356 U.S. 129, 139 (1959) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

444 U.S. at 261.

In cases, where, as in the instant one, a citizen expressly renounces United States nationality in the course of making a declaration of allegiance to a foreign state, the courts have held that such words constitute compelling evidence of an intent to relinquish United States citizenship. Indeed, such statements have been the principal factor supporting a finding of loss of nationality in the line of cases decided following Vance v. Terrazas, supra.

In Terrazas v. Haig, supra, plaintiff made a declaration of allegiance to Mexico and expressly renounced his United States nationality. The court

recognized that plaintiff's renunciatory declaration, standing alone, would not support a finding of intent to relinquish United States nationality when it stated:

> ..., we again have thoroughly reviewed the record and the district court's recent opinion and 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/
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> 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 l-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 the plaintiff characterized his true intentions in a questionnaire he completed several years after his naturalization when he stated that: "I did not want to relinquish my U.S. citizenship but as part of the Canadian citizenship requirement I did so." Id. at 1422. Although the court did not specifically evaluate other factors in the case, it noted in its recitation of the facts that after obtaining Canadian citizenship plaintiff obtained a Canadian passport and used it to enter the United States: enrolled in an American university as a foreign student: and obtained a second Canadian passport when he returned to Canada and travelled abroad on it.

In the same vein as Richards, is Meretsky v. Department of Justice et al., memorandum opinion, No. 86-5184 (D.C. Cir. 1987). There, the petitioner obtained naturalization in Canada and swore an oath of allegiance that included a declaration renouncing all other allegiance. In affirming the decision of the district court, the court of appeals declared that the oath the petitioner took renounced United States citizenship "in no uncertain terms." It should also be noted that the Court also took into account other evidence which it considered contradicted the petitioner's allegations that he always considered himself to be a United States citizen. 8/

8/ Cf. **Matheson** v. United States, 502 F.2d 809 (2nd Cir. 1976), cert. denied 429 U.S. 823 (1976). The citizen in Matheson made an oath of allegiance to Mexico while applying for naturalization: the oath at that time, however, did not require that the applicant renounce other citizenships. The court held that she did not manifest an intent to relinquish United States citizenship because the act was devoid of renunciatory character. Furthermore, the court found that there was a "wealth.. .of evidence"

Applying the rationales of the foregoing cases to appellant's case, the evidence that he intended to relinquish his United States citizenship when he pledged allegiance to Mexico seems virtually conclusive. Nonetheless, a further determination must be made: whether appellant not only voluntarily but also knowingly and intelligently made a formal declaration of allegiance to Mexico.

The record leaves no doubt that he made a deliberate decision to apply for a CMN and to comply with the conditions for the grant of such a certificate. When he applied for a CMN he was 22 years old, educated and fluent in Spanish. Furthermore, his own words (affidavit of July 26, 1983) attest that he knew he would be required to declare in the application for a CMN that he renounced United States nationality. We are therefore persuaded that appellant acted with full awareness of what he was doing and of the possible consequences of such act.

Finally, we must inquire whether there are any factors that would warrant our concluding that at the crucial time appellant intended to retain his United States citizenship.

Appellant asserts that two principal factors demonstrate that he did not intend to relinquish his United States citizenship. First, he made it clear to United States officials before he performed the expatriative act that when he applied for a CMN and declared he renounced United States nationality he would do so without the intention of relinquishing that nationality. Second, he submits that his consistent use of a United States, not Mexican passport to travel to the United States and abroad after he performed the expatriative act confirms that he lacked the requisite inten at the relevant time. Appellant states that he travelled on an expired U.S. passport with the approval of a U.S. consular officer, twice in **1983** and in **1984.** He also asserts that the issuance to him of a passport in **1985** (it was limited to three-month's validity) also shows that United States officials acknowledged his dual citizenship (and, he seems to imply) his lack of intent to relinquish U.S. citizenship.

8/ Cont'd.

indicating that after she performed the expatriative act she continued to believe herself to be, and represented herself as, a United States citizen. Id. at 812.

We find appellant's arguments with respect to his use of a United States passport inconclusive. Until a decision was made that he expatriated himself (in 1986), he was, of course, a U.S. citizen and entitled to hold and use a U.S. passport. His use of an expired passport with the acquiescence of a consular officer proves little, as that officer, Richard Gonzalez affirmed in an affidavit executed on August 26, 1988:

> I note that he places significance on my having advised him that he could travel to the United States on his expired U.S. passport. This was a common practice in such cases. In any event, he had not yet performed any expatriating act and was entitled to a full validitiy passport. Therefore, I fail to see the significance of his remarks. 9/

As to appellant's other point, it should be borne in mind, that it is appellant's intent when he performed the act that must be determined, and that evidence contemporaneous with performance of the act is the most probative on the issue whether one intended to relinquish United States nationality. We do not doubt that when appellant executed an affidavit at the Embassy on July 26, 1983 indicating that he would reluctantly comply with the requirement to acquire a CMN, he sincerely wanted to retain his United States citizenship. But in order for the Board to give a prior disclaimer of renunciatory intent probative weight there must be some unusual circumstance, for example, a showing that one was led by a consular officer to believe that executing such disclaimer would ensure that he would not Lose his citizenship. Here, the consular officer concerned stated in his affidavit of August 28, 1988 that it was not his practice to give any assurance that a prior statement of lack of intent would guarantee against loss of citizenship. We have no reason to believe otheiwise.

Barring the most unusual circumstances (and we find none here), what appellant said about his United States citizenship on the occasion of performing the expatriative act - not before - must be controlling. At that time not only did appellant make a formal declaration of allegiance to Mexico, but he expressly declared that he renounced his United States nationality and all allegiance to the United

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9/ See note 4 supra.

States. How can one declare, "I renounce my United States citizenship," if one does not intend to do so? By the same token, how can the Board guage appellant's state of mind at the relevant time other than by the evidence of what he actually said and did at that time?

Although we may agree that appellant performed the expatriative act reluctantly, such reluctance cannot countervail evidence of a renunciatory intent, as the court declared in Richards v. Secretary of State, supra:

> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been out-weighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carries it out, the choice must be given effect.

752 F.2d at 1421, 1422.

The preponderance of the evidence establishes that appellant intended to relinquish his United States citizenship. It therefore follows that the Department has sustained its burden of proof.

IV

Upon consideration of the foregoing, we hereby affirm the Department's determination that appellant expatriated himself when he made a formal declaration of allegiance to Mexico.

Alan G. James, Chairman

Warren E. Hewitt, Member

Gerald A. Rosen, Member