November 18, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M[redacted] P[redacted] N[redacted]

This case is before the Board of Appellate Review on the appeal of M[redacted] P[redacted] N[redacted] from an administrative determination of the Department of State that he expatriated himself on February 13, 1986 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 sole issue to be decided is whether appellant intended to relinquish his United States nationality when he made a pledge of allegiance to Mexico. For the reasons given below, we conclude that the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to surrender his United States nationality. Accordingly, we affirm the Department's holding of loss of appellant's nationality.

I

Appellant was born at [redacted] on [redacted] of a Mexican citizen father. He thus

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1/ In February 1986, 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". Pub. L. No. 99-653 also amended paragraph (2) of subsection 349(a) by inserting "after having attained the age of eighteen years'' after "thereof".

acquired the nationality of both the United States and Mexico at birth. He lived in the United States until 1973 when his parents took him to Mexico. In 1982 he obtained a United States passport at the Consulate General at Guadalajara. A few weeks after his 18th birthday he registered for United States Selective Service.

Appellant states that in July 1984 he applied for admission to the Autonomous University of Guadalajara. It appears he learned that to qualify to pay the tuition charged Mexican students (a fee considerably lower than that charged foreign students) he would have to present a certificate of Mexican nationality (CMN) to the university authorities. Accordingly, he applied for such a certificate on August 28 or 29, 1984. 2/ In the application he expressly renounced his United States nationality and all allegiance to the United States, and made a formal declaration of allegiance to Mexico. He was then nearly 19 years old.

On August 28, 1984, appellant also addressed a communication to the Department of Foreign Relations in which he requested that a CMN be issued to him, and declared he had never renounced his Mexican nationality, This document evidently sufficed (at least initially) to enable appellant to qualify for the tuition charged Mexican citizen students.

A year and a half later the Department of Foreign relations informed the Embassy at Mexico City by note dated March 4, 1986 that Appellant had been issued a CMN on February 13, 1986 and had applied therefor on January 14, 1986. 3/ Attached to the note were copies of Appellant's August 28, 1984 application for a CMN, the certificate itself and [redacted] U.S. passport.

2/ The record copy of appellant's application for a CMN is difficult to read. The month, August, and the year, 1984, are legible, but the day is not: it appears to be either the 28th or 29th.

3/ It is not apparent why the Mexican authorities required appellant to apply for a CMN in January 1986, inasmuch as he had made a prior application in August of 1984.

At the hearing on August 19, 1988, Appellant explained that since the CMN did not issue after his August 1984 application, he had to go to the Department of Foreign Relations several times because the University authorities warned him that if he did not produce a CMN by the end of the semester, he would not be permitted to start the next one. Sometimes the Department gave him papers to sign, he

Shortly thereafter, the Embassy wrote to Appellant to inform him that he might have expatriated himself. In response to the Embassy's letter he visited the consular section on May 6, 1986. He stated to a consular officer that although he applied for the CMN voluntarily, he did not intend to relinquish his United States citizenship. A few days later he completed a form for determining United States citizenship and gave the Embassy a copy of his registration for U.S. Selective Service. As required by law, a consular officer then executed a certificate of loss of nationality in appellant's name on May 19, 1986. 4/ He certified therein that: Appellant acquired the nationality of both the United States and Mexico at birth; made a formal declaration of allegiance to Mexico on January 14, 1986; received a certificate of Mexican nationality on February 13, 1986; and thereby expatriated himself on February 13, 1986 under the provisions of section 349(a)(2) of the Immigration and Nationality Act,

The Department approved the certificate on July 29, 1986, approval constituting an administrative determination

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3/ Cont'd.

said. He therefore guessed that in January 1986 he had been asked to sign a second application for a CMN. January was the beginning of a new semester: he was sure that at that time he was still trying to obtain a CMN.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads a5 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.

of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A copy of the approved certificate was not sent to the Embassy until October 23, 1986 to forward to appellant, who meanwhile had gone to Texas to look for work.

In February 1987 appellant applied for a passport at the New York Passport Agency. In May 1987 his application was denied on the grounds that he had expatriated himself. A copy of the approved certificate of loss of his nationality was at that time enclosed in the Agency's letter.

Appellant entered an appeal on September 26, 1987 and requested oral argument which was heard on August 19, 1988. 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 United States nationality. 6/

There is no dispute that appellant duly declared his allegiance to Mexico in the course of applying for a CMN, and thus brought himself within the purview of the statute. Moreover, he conceded during oral argument that he acted voluntarily when he made the declaration of allegiance to Mexico. 7/ The sole issue for determination therefore is

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5/ The limitation on appeal to this Board is one year after Departmental approval of a certificate of loss of nationality, 22 CFR 7.5(b)(1), unless the Board determines for good cause shown that the appeal could not have been taken within the prescribed time. 22 CFR 7.5(a). Although the appeal was filed more than one year after the Department approved the certificate, we deem it timely. 22 CFR 50.52 prescribes that a person who is the subject of a certificate of loss of nationality shall be informed that he may take an appeal to the Board of Appellate Review within one year of approval of the certifice. Since the Department did not send the certificate to the Embassy until nearly three months after it was approved, appellant did not have timely notice of the limitation on appeal. His three-month delay in taking the appeal is therefore excusable.

6/ See note 1 supra.

7/ Transcript of Hearing in the Matter of [redacted] Jr., Board of Appellate Review, August 19, 1988 (hereafter referred to as "TR"). 42.

whether he performed the proscribed act with the intention of relinquishing his United States nationality.

In loss of nationality proceedings, the Department of State bears the burden of proving by a preponderance of the evidence that the citizen 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 to be 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 acquired a certificate of Mexican nationality in applying for 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, the equivalent or conclusive evidence "of the voluntary assent of the citizen" as the Supreme Court declared 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.

The courts have consistently held that making an express renunciation of United States nationality while pledging allegiance to a foreign state is strong evidence of an intent to relinquish United States nationality and ordinarily warrants a finding of loss of nationality. Terrazas v. Haig, supra; Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985); Meretsky v. Department of Justice, et al., memorandum opinion, No. 86 5184 (D.C. Cir. 1987).

Appellant here expressly renounced his United States nationality and all allegiance to the United States while

pledging allegiance to a foreign state. The evidence is very compelling therefore that at the relevant time he intended to transfer his allegiance from the United States to Mexico. The cases cited above also hold, however, that in loss of nationality proceedings a finding of intent to relinquish citizenship is only warranted if the trier of fact determines that the citizen acted knowingly and intelligently, as well as voluntarily, and that there are no other factors that would mandate a different result.

Although young when he performed the expatriative act, appellant was of legal age, and in the eyes of the law had the capacity to expatriate himself. Furthermore, he appears to have had an adequate education, and presumably was able to understand the significance of pledging allegiance to Mexico and at the same time renouncing his United States nationality. He evidently executed two applications for a CMN; one in August 1984 and a second in January 1986, the latter having been cited in the March 1986 note of the Foreign Relations Department to the Embassy. Appellant thus twice expressly renounced his United States nationality, leaving little doubt that he acted knowingly in his quest for a CMN which would bring him tangible benefits in reduced university tuition.

Asked at the hearing whether he was not given pause by the statements in the application for a CMN about renunciation of his U.S. nationality and allegiance, he conceded that they raised a red flag. He had asked himself: [A]m I going to lose my U.S. citizenship." 8/ He asked his parents for guidance. They, however, told him not to worry. "You were born in the United States. You know your mother is an American. You're a U.S. citizen, you know, and they said there's nothing wrong with you getting a Mexican certificate." 9/ Looking back, he stated he felt he had been misled by his parents. "I wish someone would have left that little red flag up," he said. 10/ He conceded he should have paid more attention instead of listening to the advice he was given. 11/

We thus note that when he saw the renunciatory language appellant appreciated that he was taking a step

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8/ TR 45.

9/ TR 46.

10/ Id.

11/ TR 47.

that could at least engender problems for his U.S. citizenship; he proceeded, nevertheless, without clarifying his situation with United States authorities, as he belatedly conceded he should have done. Of age, he should not have relied on the ill-informed guidance of his parents that applying for and obtaining a CMN would not have adverse consequences for his citizenship.

In sum, we are satisfied that appellant knew and understood what he was doing. If indeed he was misled, he alone is at fault.

We conclude with an inquiry into other factors in the case, seeking to determine whether or not they are sufficiently probative of an intent: to retain citizenship to outweigh or at least counterbalance the evidence of an intent to relinquish citizenship manifested by appellant's declaration to Mexican authorities that he renounced his United States citizenship.

Appellant asserts that he never intended to relinquish his citizenship, and urges the Board to take account of several considerations that in his opinion indicate his true intent: his love for and loyalty to the United States; registering for selective service; indoctrination in the American way: having personal and family ties to the United States.

The foregoing considerations show that appellant has an admirable attachment to the United States. They are not, however, really probative of the decisive issue here: whether he intended to relinquish his United States citizenship at the time he performed the expatriative act. He voluntarily, knowingly and intelligently decided to seek benefits of his Mexican nationality. He knew that in order to obtain those benefits he would have to place his United States citizenship at risk. He may have had mental reservations about doing so and would have preferred to keep both citizenships. We can gauge his state of mind at the relevant time, however, only by what he said and did at that time. He stated to the Mexican authorities that he surrendered his United States citizenship in favor of Mexican citizenship. Only the most unusual circumstances could cast doubt on the specific intent of appellant in subscribing to a declaration of allegiance to Mexico. His words and actions at the time must be controlling on the issue whether he intended to retain or relinquish United Staes citizenship.

That appellant sincerely wishes to recover his United States citizenship we do not doubt. For him and other young appellants who have come before the Board we have sympathy. He and they faced difficult choices. Mexican law prescribes

that dual nationals who wish to exercise the rights and privileges of Mexican nationality shall renounce their other nationality and pledge allegiance to Mexico. And United States law prescribes expatriation if one pledges allegiance to a foreign state voluntarily with the intention of relinquishing citizenship. The decision we must reach in this case is therefore clear, once it has been established, as it has been, that appellant acted voluntarily and wittingly in declaring allegiance to Mexico and renouncing United States nationality.

For the above reasons, we conclude that the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he pledged allegiance to Mexico.

III

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member