

August 5, 1988

DEPARTMENT OF STATE  
BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J [REDACTED] F [REDACTED] B [REDACTED]

J [REDACTED] F [REDACTED] B [REDACTED] appeals an administrative determination of the Department of State that he expatriated himself on August 8, 1985 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/

The Department made a determination of loss of appellant's nationality on September 15, 1987. 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 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 it previously approved in appellant's name. We grant the Department's request.

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1/ In 1985 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".

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The record shows that B [REDACTED] acquired United States nationality by birth to United States citizen parents at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. After his dismissal during the air traffic controller's strike in 1981, [REDACTED] moved to Australia where he was employed as an air traffic controller. In 1985 the Australian government informed him that in order to retain his position he would have to acquire Australian nationality. On August 7, 1985 [REDACTED] inquired at the Embassy in Canberra about the implications for U.S. citizenship of Australian naturalization. The next day, August 8th, he executed an affidavit at the Embassy, asserting that it was not his intention to relinquish his United States citizenship upon acquiring Australian citizenship. "Please let it be known," he declared, "that I am acquiring Australian citizenship because of economic necessity and career mandate. I have no wish to loose [sic] my American citizenship." He also registered himself, his wife and his children as United States citizens. Then later, on August 8th he received a certificate of Australian citizenship after swearing the prescribed oath of allegiance that included renunciation of all other allegiance.

As prescribed by law, an officer of the United States Embassy at Canberra executed a certificate of loss of nationality in appellant's name on August 13, 1985. 2/

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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.

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Therein the officer certified that appellant acquired the nationality of the United States at birth abroad to U.S. citizen parents; that he acquired the nationality of Australia upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on September 15, 1987, approval 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). Appellant entered an appeal on March 24, 1988.

## II

The Acting Deputy Assistant Secretary of State for Consular Affairs (Passport Services) submitted a memorandum dated August 1, 1988 and the Department's record in the case. In its memorandum the Department set forth the grounds which in its view warranted the vacating of the certificate of loss of nationality that it had previously approved in appellant's name. The Department stated that:

At the time of Mr. [REDACTED] inquiry, a public information flyer was available to all individuals concerned with loss of citizenship. This flyer, unfortunately, was somewhat misleading, and those persons who elected to pursue another nationality received official misinformation. Specifically, the Department's flyer advised that a prior statement 'would be accorded substantial weight.' This was in conflict with another sentence later in the same flyer which cautioned that renunciatory language 'usually' results in a finding of loss of U.S. citizenship.

The Department took the position that given the foregoing considerations, it is 'necessary and equitable in cases of this nature' to reverse the holding of loss of nationality. 3/ Accordingly, the Department requested

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3/ The Board notes that the Department nonetheless adheres to the view that an oath which is renunciatory in nature with respect to the United States ordinarily will cause loss of United States citizenship when taken in

that the Board remand the case so that the Department might vacate the certificate of loss of nationality it had approved in appellant's name.

### III

Inasmuch as the Department submits that in the particular circumstances of this case it is not able to carry its statutory burden of proving by a preponderance of the evidence appellant's intent to relinquish his United States nationality, <sup>4/</sup> and in the absence of manifest errors of law or fact that would mandate a different result, we grant the Department's request that the case be remanded so that it may vacate the certificate of loss of nationality.

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3/ Cont'd.

connection with a foreign naturalization or other acts which are expatriative. The Department notes persons wishing to make "prior statements" of lack of intent to relinquish citizenship are now advised of this fact and cautioned that no final decision in a loss of nationality case can be given until an act of expatriation is performed and all evidence and information is reviewed.

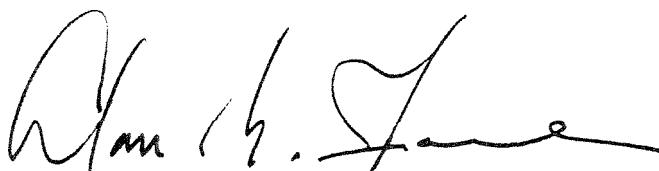
<sup>4/</sup> In loss of nationality proceedings the Government bears the burden under the statute <sup>a/</sup> of proving by a preponderance of the evidence that the party intended to relinquish his United States citizenship when he voluntarily performed a statutory expatriating act. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

<sup>a</sup> 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....

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The case is hereby remanded for further proceedings. 5/

  
Alan G. James, Chairman

  
Mary Elizabeth Hoinkes, Member

  
J. Peter A. Bernhardt, Member

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5/ Section 7.2(a) of Title 22, Code of Federal Regulations, 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.