DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

THE MATTER OF: P[redacted] B[redacted] A[redacted]

P[redacted] B[redacted] A[redacted] appeals an administrative termination of the Department of State, dated August 11, 87, that he expatriated nimself on June 28, 1972 under e provisions of section 349(a)(1) of the Immigration and tionality Act by obtaining naturalization in Canada in *63* at the age of sixteen upon the application of his ther and thereafter failing to establish a permanent sidence in the United States prior to his twenty-fifth rthday. 1/

In 1972, section 349(a)(1) of the Immigration and tionality Act, 8 U.S.C. 1481(a)(1), read 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, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through tne naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: And provided further, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and admission to the United States as a non quota immigrant under the provisions of section 101(a)(27)(E);...

A single issue is presented here: whether appeliant ıtended to relinquish his United States nationality when e failed to establish a permanent residence in tne United :ates prior to his twenty-fifth birthday. For the reasons ıat follow, we conclude that the Department has carried :s burden of proving by a preponderance of the evidence ıat appellant intended to relinquish his United States ıtionality. Accordingly, we affirm the Department's :termination that appellant expatriated himself.

I

Appellant became a United States citizen by birth at [redacted] .ther was a native born United States citizen; his mother, native born Canadian citizen. When appellant was a few nths old, his parents took him to Canada where the family ved throughout appellant's childhood. When appellant was years old, his father, who had obtained naturalization Canada in 1953, petitioned for the naturalization of his n under section 10(5) of the Canadian Citizenship Act. Appellant stated in his opening brief that his turalization was instigated by his parents solely to able him to obtain a Canadian passport to accompany them a trip abroad. A certificate of Canadian citizenship

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Cont'd.

Pub. L. 99-653, Nov. 14, 1986, 100 Stat. 3658, amended bsection (a) of section 349 by inserting "voluntarily rforming any of the following acts with the intention of linquishing United States nationality:" after "shall lose s nationality by".

The same act amended paragraph 1 of subsection (a) of ction 349 by striking out ", upon an application filed in s behalf by a parent, guardian or duly authorized agent, through the naturalization of a parent having legal stody of such person" and all that follows through ection 101(a)(27)(E)" and inserting in lieu thereof "or on an application filed by a duly authorized agent, after ving obtained the age of eighteen years".

Section 10(5) of the Canadian Citizenship Act of 1946, amended, provided that the competent minister might at s discretion grant a certificate of Canadian citizenship a minor child of a person to whom a certificate of tizenship had been granted under the Act.

granted to appellant on July 11, 1963. On that date he e the prescribed oath of allegiance to Queen Elizabeth Second. 3/

From 1964 to 1968 appellant attended Williams ege, Williamstown, Massachusetts. Shortly after he me eighteen years of age, appellant registered for ed States Selective Service at the Embassy in Ottawa.

It appears that in 1968 appellant, who was living in da, received a delinquency notice from Local Board 100 eign) of the Selective Service System for failing to rt for an armed forces physical examination. On ary 16, 1369 appellant wrote to Local Board 100 eign), expressing the opinion that he had been operly classified. "Since the age of 16, he stated, "I been a Canadian citizen. I became a naturalized dian on July 11, 1963.' (He enclosed a statement from Canadian Citizenship Registration Branch, dated July 1968, attesting to that fact.) His letter continued:

> ...I did not register for the draft until the age of 18 – July 7, 1965, almost two years after my becoming a Canadian citizen. Had I better understood the situation at that time I would have realized that my registration was unnecessary because of my Canadian citizenship. My draft status has been incorrect all this time. I am a Canadian citizen living in Canada who has lived in Canada since the age of three months. Therefore as a non-resident of the United States of America and as a non-citizen of the United States of America, I appeal for a change in classification from 1A [available for military service] to 4C [alien].

Section 12 of the Canadian Citizenship Act of 1946, as ded, provided that the certificate of citizenship would take effect until the applicant subscribed to the owing oath of allegiance:

> I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> *So* help me God.

The Department of State subsequently instructed the mbassy to ascertain whether appellant had taken any oluntary steps to divest himself of United States itizenship. The Embassy was, however, unable to reach ppellant. Then on August 28, 1969 appellant visited the mbassy and inquired about his citizenship status. ccording to a report the Embassy made to the Department on ugust 29, 1969, appellant "stated that he believed he had ost his United States citizenship since the time he btained Canadian citizenship, July 11, 1963." He further eportedly stated that if the United States still onsidered him to be a U.S. citizen, he would renounce. ppellant completed a questionnaire to facilitate the etermination of his citizenship status, and executed an ffidavit wherein he stated that:

> The question will undoubtedly arise as to why I registered for the draft if I believed myself to be Canadian. The answer is tnis: I was enrolled at Williams College in Massachusetts and thought I therefore must register. I realize now that this procedure was not necessary, and in fact probably in error. Nevertheless I assumed that upon graduation and permanent return to Canada, I would lose my eligibility for selective service.

He declined to complete Form 176 (application for egistration/passport), the Embassy reported, "on the basis nat he believes himself not to be a U.S. citizen."

In response to the Embassy's request for its opinion n appellant's case, the Department informed the Embassy on ztober 31, 1969 in part as follows:

> ...The Certificate of Canadian Citizenship issued to [redacted] on July 11, 1963, when he was sixteen years old, was granted under section 10(5) of the Canadian Citizenship Act. It is not

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Children granted Canadian citizenship under section 0(5) of the Canadian Citizenship Act were not required to enounce their previous nationality. Letter from the Court f Canadian Citizenship, Ottawa, to the U.S. Embassy at ttawa, February 26, 1986.

> considered naturalization witnin the meaning of Section 349a(a)(1) of the Immigration and Nationality Act because he was under the age of twenty-one. However, the oath of allegiance to the Queen, which he voluntarily took on July 11, 1963 when he obtained a Certificate of Canadian Citizenship, is considered an affirmative act within the meaning of section 349(a)(2) of the Immigration and Nationality Act....

The Department instructed the Embassy to prepare a ertificate of loss of nationality in appellant's name, owing his expatriation under section 349(a)(2) of the migration and Nationality Act, with an effective date of ly 11, 1963. The Embassy executed such a certificate on vember 12, 1969. 4/ The certificate recited that pellant acquired United States citizenship by birth at ookline, Massachusetts; that he acquired the nationality Canada by naturalization; that he subscribed to an oath allegiance to Queen Elizabeth the Second on July 11, 63; and thereby expatriated himself under section 9(a)(2) of the Immigration and Nationality Act. The partment approved the certificate on December 18, 1969, d subsequently sent a copy of the approved certificate to e Embassy to forward to appellant.

Section 358 of the Immigration and Nationality Act, 8 S.C. 1501, provides that:

> 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.

It appears that in 1981 or 1982 appellant applied or a United States passport at the Consulate General in oronto. On February 9, 1982, appellant's Toronto olicitors wrote the Department's Passport Office inquiring ny their client had been advised that when he applied for passport, "the computer directs the consulate to 'hold' he application." In June 1983 the Department informed the onsulate General that it had been determined in 1969 that ppellant had expatriated himself. The Consulate General as instructed to inform him of the procedures to take an ppeal to tnis Board.

An appeal was entered through counsel on April 6, 984.

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The Board of Appellate Review rendered a decision on iat appeal on January 6, 1986. With one member .ssenting, the Board held that:

> ...appellant could not have lost his United States nationality in 1969, and therefore that no final determination of loss of nationality, from which an appeal may be taken, has, to date, oeen made in this case. The appeal is therefore dismissed. The Board, however, invites the Department to re-examine the case and take such action as may be appropriate in the circumstances.

By grounding appellant's loss of nationality on tne ovisions of section 349(a)(2), the Department ignored the ct that section 349(a)(1) of the Act specifically otected minors in the circumstances of appellant from the nsequences of naturalization that was obtained for tnem another, the Board stated. Section 349(a)(1), the Board ntinued, gave a person such as appellant until age 25 to do the expatriating effect of naturalization obtained for n by a parent. This being so, appellant had until 1972 negate the effect of his naturalization. Until such :e, the Department had no basis upon which to determine ether appellant had expatriated himself, the Board ncluded.

The Department filed a motion for reconsideration of e Board's decision in April 1986 which the Board granted. August 14, 1986, the Board addressed the Department's .ion. 5/ Noting that the Department was of the view

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22 CFR 7.10 provides that if the Board grants a motion reconsideration, it shall review the record and then irm, reverse, or modify its original decision.

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The Board modified its original decision as follows:

1. Although the Department's 1969 determination of oss of appellant's nationality was erroneous, it was a egitimate exercise of statutory authority granted to the ecretary of State to determine the citizenship of a person ot in the United States. The determination was voidable ot void ab initio and thus was a final determination from ich an appeal would lie.

2. The appeal was timely under the then-applicable mitation on appeal because there was doubt that appellant ceived actual notice that the Department had made a termination of loss of his nationality. 6/ Nor did he ve constructive notice of loss of his nationality.

3. The Department's 1969 determination that pellant expatriated himself in 1963 under the provisions section 349(a)(2) of the Immigration and Nationality Act s clearly wrong as a matter of law, as the Board had plained in its original decision.

The Board accordingly reversed the Department's lding that appellant expatriated himself. One member ssented.

III

Shortly after the Board reversed the Department's lding of loss of appellant's nationality, the Department cided that a determination should be made whether pellant expatriated himself by not establishing a rmanent residence in the United States prior to his enty-fifth birthday. 7/ Accordingly, in November 1986

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22 CFR 50.60 (1967-1979) provided that: "A person who ntends that the Department's administrative holding of ss of nationality or expatriation in his case is contrary law or fact shall be entitled, upon written request made hin a reasonable time after receipt of notice of such lding, to appeal to the Board of Appellate Review."

Appellant states that he established a permanent sidence in the United States in 1986 following the ard's August 1986 decision.

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The Board modified its original decision as follows:

1. Although the Department's 1969 determination of loss of appellant's nationality was erroneous, it was a legitimate exercise of statutory authority granted to the Secretary of State to determine the citizenship of a person not in the United States. The determination was voidable not void ab initio and thus was a final determination from which an appeal would lie.

2. The appeal was timely under the then-applicable limitation on appeal because there was doubt that appellant received actual notice that the Department had made a determination of loss of his nationality. 6/ Nor did he have constructive notice of loss of his nationality.

3. The Department's 1969 determination that appellant expatriated himself in 1963 under the provisions of section 349(a)(2) of the Immigration and Nationality Act was clearly wrong as a matter of law, as the Board had explained in its original decision.

The Board accordingly reversed the Department's holding that appellant expatriated himseif. One member dissented.

III

Snortly after the Board reversed the Department's holding of loss of appellant's nationality, the Department decided that a determination should be made whether appellant expatriated himself by not establishing a permanent residence in the United States prior to his twenty-fifth birthday. 7/ Accordingly, in November 1986

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7/ Appellant states that he established a permanent residence in the United States in 1986 following the Board's August 1986 decision.

the Department instructed the Embassy at Ottawa to execute a certificate of loss of nationality in appellant's name. The Department set forth in detail the grounds whicn in its view warranted a finding that appellant intended to relinquish his United States nationality by failing to establish a permanent residence in the United States prior to his twenty-fifth birthday.

The Embassy then asked appeliant to complete a form to facilitate determination of nis citizenship status. This appellant did in March 1987. On June 9, 1987 an Embassy officer executed a certificate of loss of nationality in appellant's name. 8/ The officer certified that appellant acquired United States nationality by virtue of his birth on June 28, 1947 in the United States; that as a minor he acquired the nationality of Canada in 1963 upon the application of his father; that thereafter he failed to establish a permanent residence in the United States prior to June 28, 1972, his twenty-fifth birthday; and thereby expatriated himself on June 28, 1972 under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on August 11, 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. An appeal was entered through counsel on January 26, 1988.

IV

In 1972 section 349(a)(1) of the Immigration and Nationality Act provided that a United States citizen who obtained foreign naturalization upon the petition of a parent would lose his American citizenship if ne did not establish a permanent residence in the United States prior to nis 25th birthday. 9/ Under section 349(c) of the Act, the government bears the burden of establishing that loss of nationality occurred, that is, that a citizen who allegedly performed an expatriative act brought himself within the purview of the applicable section of the statute. 10/

8/ See note 4 supra.

9/ See note 1 supra.

10/ 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

As an initial matter, the Department must prove (a) that appellant acquired naturalization in a foreign state upon the petition of a parent; and (b) that he did not establish a permanent residence in the United States prior to his 25th birthday, June 28, 1972. Clearly, the Department has carried this burden.

Appellant obtained Canadian citizenship in 1963 upon the petition of his father. He concedes that he did so, and the Canadian authorities have attested to that fact. The Department points out that there is no evidence of record that appellant established a permanent residence in the United States prior to June 28, 1972. Appellant has submitted no evidence that he established a permanent residence in the United States prior to June 28, 1972. He argues, however, that his continuous residence in the United States between 1964 and 1968 (while a studentat Williams) satisfied the requirements of the first proviso of section 349(a)(1) in that he maintained his principal place of abode in Williamstown as an American citizen within the meaning of section 101(a)(31) and section 101(a)(33) of the Immigration and Nationality Act. 11/

The Department maintains that appellant did not establish permanent abode in Williamstown, but went there solely to attend college. As the Department put it in its brief:

10/ Cont'd.

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

Pub. L. 99-653, Nov. 14, 1986, 100 Stat. 3658, repealed section 349(b) but did not redesignate section 349(c), or amend it to reflect repeal of section 349(b).

11/ Section 101(a)(31), 8 U.S.C. 1101(a)(31) and section 101(a)(33), 8 U.S.C. 1101(a)(33), read in part as follows:

> The statute clearly states that the relationship must be 'continuing or lasting' as distinguished from temporary. When the appellant went to school in Massachusetts, he knew that the interval was temporary. There was no eventuality about the termination of his stay; the time frame was known before he left Canada.

We agree, and therefore conclude that appellant brought himself within the purview of section 349(a)(1) of the Act as it read in 1972.

V

Long before the amendment of subsection (a) of section 349 of the Immigration and Nationality Act in November 1986 (see note 1 supra), it was settled that a citizen who performed a statutory expatriating act would not lose his nationality unless he performed the act voluntarily with the intention of relinquishing his United States nationality. Vance V. Terrazas, 444 U.S. 252 (1980); Afroyim V. Rusk, 387 U.S. 253 (1967); Nishikawa V. Dulles, 356 U.S. 129 (1958). Therefore, in addition to proving that an expatriative act was performed, the government is required by section 349 of the Immigration and Nationality Act to prove that the act was voluntary and done with the intention of relinquishing United States nationality. In the case of one like [redacted] what the government must prove is (a) that he voluntarily remained abroad, that is, that his failure to establish a permanent residence in the United States prior to his 25th birthday was not involuntary and (b) that he remained abroad and failed to establish such residence because it was his intention to relinquish his United States nationality. In

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11/ Cont'd.

> Sec. 101.(a) As used in this Act -
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> ...
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> (31) The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary.,...
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> (33) The term 'residence' means the place of general abode; the place of general abode means his principal, actual dwelling place in fact, without regard to intent.. ..

other words, whether appellant obtained Canadian nationality in 1963 voluntarily and at that time intended to relinquish his United States citizenship is irrelevant. The relevant act is appellant's failure on or about June 28, 1972 to meet the condition subsequent of the first proviso of section 349(a)(1), to preserve his United States nationality.

Under section 349(c) of the Act a person who performs a statutory expatriating act is presumed to have done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not done voluntarily. 12/ It is thus appellant's burden to show that his failure to establish a permanent residence in the United States prior to his 25th birtnday was not an act of free will, but was due to factors over which he had no control, and thus involuntary. He has made no such showing. We must therefore conclude that he made a free choice not to go to the United States and make a permanent residence there prior to June 28, 1972.

VI

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 citizensihp". Vance v. Terrazas, supra, at 270. The government (here the Department of State) must prove the party's intent and do 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. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). In this appellant's case, the relevant time is on or about June 28, 1972, his 25th birthday, when he voluntarily failed to establish a permanent residence in tne United States.

The Department submits that statements appellant made in 1969 prove that he intended to relinquish his United States nationality when in 1972 he did not establish a permanent residence in the United States. When he completed the questionnaire for determining U.S. citizenship in August 1969 at the Embassy, the Department notes, he wrote: "...I feel Canadian and have always felt Canada to be my native land. Therefore, at the age of sixteen, I officially became a Canadian. I can

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12/ See note 10 supra.

fulfill my obligation as a citizen to only one country. Canada is that country...." The Department also points out that appellant stated to Embassy officials in August 1969 that he believed that he had lost U.S. citizenship when he obtained Canadian citizenship in 1963, and that he further stated that if the U.S. still considered him to be a U.S. citizen, he would renounce. The Department's brief concludes as follows:

> In reviewing all the evidence, the file discloses nothing to indicate that Mr. [redacted] in his contacts with the U.S. Embassy meant to preserve his U.S. citizenship. He documented himself exclusively as a Canadian until his recent application for a U.S. passport. The only conclusion that can be reasonably drawn is tnat Mr. [redacted] intended to relinquish his United States citizenship when he naturalized in Canada and had no intention of establishing a permanent residence in the United States before his twenty-fifth birthday.
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> Now the situation has changed, and he desires to reclaim his United States citizenship. The priorities that existed in 1963-1972 have dissipated.

The Board also takes note that in January 1969 in a letter to Draft Board 100 (Foreign), appellant left no doubt that he had already transferred his allegiance from the United States to Canada when he became a Canadian citizen. "I am a Canadian citizen living in Canada who has lived in Canada since the age of three months," he wrote. "Therefore as a non-resident of the United States of America and as a non-citizen of the United States of America, I appeal for a change in classification from 1A to 4c."

While acknowledging that he made the foregoing statements, appellant maintains in an affidavit executed in December 1987 that his motive in making them was simply to avoid military service during the Viet Nam war. He said everything he could to Embassy officials to make them think he was Canadian (and thus avoid the draft), "but when pressured to renounce, I refused." Contrast the latter statement, however, with what the Embassy said in its August 1969 report to the Department: appellant had said "[I]f the United States still considers him to be a U.S. citizen he will renounce."

Absent contemporary evidence to support appellant's latter day explanations why he made the statements he did in 1969, we are constrained to take those statements at face value, and assume that he had no intention of re-entering into any kind of relationship with the United States.

We do not agree with appellant that because the statements are not precisely contemporaneous with appellant's non-establishment of a permanent residence in the United States in 1972, they are insufficient evidence of an intent to remain in Canada and not establish a home in the United States. The statements, which we cannot accept as mere smokescreen to avoid the draft, were made slightly less than three years before the crucial time. They are highly relevant, being the only expression of record of appellant's state of mind about the United States near the relevant moment. As the court observed in Terrazas v. Haig, supra, at 288: "...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."

Through counsel, appellant argues (reply brief) that the Department, "which issued the legally incorrect Certificate of Loss of Nationality [in 19691, should be estopped from asserting that the appellant should have returned to the United States to live permanently...." (Emphasis appellant's). Continuing, appellant's reply brief states:

> ...Clearly, had Mr. [redacted] sought a legal determination from the Government at this time, of his right to reside permanently in the United States, the existence of the Certificate of Loss of Nationality would have presented an absolute administrative bar to such residence. Accordingly, the Department should not be permitted to assert that Mr. [redacted] failure to return permanently to the United States should be regarded as forever extinguisning his right to retain his U.S. citizenship.

For the Department to be estopped, appellant must allege and prove not only that the Department made a misleading statement but that appellant actually believed and relied on it and was thereby misled to his detriment. By his own admission, until 1983 appellant never knew of or saw the certificate of loss of nationality that was

approved in his name in 1969. Obviously, he could not have relied on it to his detriment.

Appellant also argues that he had no reason to believe he had to go to the United States prior to June 28, 1972 in order to preserve his United States citizenship; had he known, he would have complied with tne statute. We are unable to accept that appellant would have come to the United States before nis 25th birthday, had he known the statute required him to do so to preserve his citizenship. The statements he made to American officials relatively close to the crucial time strongly suggest that he intended to sever his allegiance to the United States and believed he had indeed done so.

Finally, appellant argues that: "The Department's action in approving a second Certificate of Loss of Nationality, predicated upon the now repealed provisions of section 241(a)(1) [sic], is wholly inconsistent with the basic constitutional principles established by the Supreme Court of the United States and reaffirmed in the Foreign Affairs Manual of the Department of State." We do not agree. First of all, the 1986 amendment of section 349(a)(1) was not retrospective but prospective only. In 1972 appellant did not do what the statute required him to do to save his citizenship. He was therefore subject to the provisions of the Act as it then stood. In informing consular officers about the 1986 amendments to the Immigration and Nationality Act, the Department took the position that due to the prospective nature of the amendment to section 349(a)(1), consular officers must continue to develop cases where a person subject to tne first provision of section 349(a)(1) "as originally enacted" reached his 25th birthday and failed to enter the United States to establish a permanent residence before November 14, 1986. As a matter of law the Department's position, in our view, is sound. Therefore, it was legally permissible for the Department to determine in 1987 that appellant performed a statutorily proscribed act in 1972.

Reviewing the entire record, we find no factors of sufficient probative weight to impeach the persuasive evidence of an intent to relinquish United States nationality manifested by appellant's own statements. In our opinion, the Department has met its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality.

VII

Upon consideration of the foregoing. we hereby affirm the determination of the Department that appellant expatriated himself by obtaining naturalization in Canada

upon the petition of his father and thereafter failing to come to the United States to establish a permanent residence prior to his 25th birthday.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

George Taft, Member