October 6, **1988**

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: G[redacted] A[redacted]

G[redacted] A[redacted] appeals an administrative determination of the Department of State, dated August 21, 1987, that she expatriated herself on August 15, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

After the appeal was entered, the Department re-examined the record and concluded that there was insufficient evidence to enable the Department to meet its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she obtained Canadian citizenship. The Department accordingly requested that the Board remand the case *so* that the Department may vacate the certificate of loss of appellant's nationality. We grant the Department's request.

I

An officer of the United States Consulate General at Toronto executed a certificate of loss of nationality

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1/ In 1973, 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 (1986), 100 Stat. 3658, 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".

in appellant's name on July 24, 1987, as required by law. 2/ The certificate recited that appellant acquired United States nationality by virtue of her birth at [redacted]; that she resided in the United States from birth to 1959 when she moved to Canada; that she acquired the nationality of Canada upon her own application on August 15, 1973; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. In submitting the certificate to the Department, the Consulate General expressed the opinion that appellant's entire course of conduct demonstrated her clear decision in 1973 to accept Canadian nationality while at the same time abandoning the privileges and obligations of United States citizenship. The Consulate General placed emphasis on appellant's failure to take positive steps that could have indicated a claim to United States citizenship, e.g., voting in a federal U.S. election or filing U.S. income tax returns. The Consulate General therefore recommended tnat the Department approve the certificate. This the Department did on August 21, 1987. Informing the Consulate General that it approved the certificate, the Department stated that it had been persuaded appellant intended to expatriate herself by the fact that she travelled and identified herself with a Canadian passport and that she had not attempted to register her Canadian-born children as United States citizens.

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.

Approval of the certificate constitutes an administrative determination of loss of United States nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A timely appeal was entered.

II

The Acting Deputy Assistant Secretary of State for Consular Affairs (Passport Services) on September 30, 1988 submitted the record upon which the Department's holding of loss of appellant's citizenship was based and a memorandum in which the Department requested that the Board remand the case so that the certificate of loss of nationality might be vacated.

The Department's memorandum set forth the foilowing grounds for the request for remand:

> Upon review we do not agree that the evidence of record sustains a holding that Mrs. [redacted] intended to relinquish her citizenship. Why Mrs. [redacted] remained passive with respect to her rights and duties as an American citizen is unclear. Her explanations in this regard reflect indifference or ignorance, rather than evident decision-making. As a result, but for the taking of the oath itself [she made a simple oath of allegiance to the Queen of Canada; in April 1973 the Federal Court of Canada declared ultra vires the requirement that applicants for naturalization make a declaration renouncing all other allegiance] her statements asserting no intent to relinquish are the only evidence that bear unambiguously on intent. Nor was her exercise of Canadian citizenship necessarily inconsistent with an intent to retain U.S. citizenship. Specifically, the fact that she may have identified herself at U.S. border crossings with a Canadian passport does not evince clearly a decision to relinquish her citizenship. Rather, other explanations such

as reasons of convenience seem equally plausible. 3/

III

Inasmuch as the Department has concluded that it is unable to carry its burden of proving tnat appellant here intended to relinquish her United States nationality, and in the absence of manifest errors of fact or law that would mandate a different result, we grant the Department's request that the case be remanded so that the certificate of loss of appellant's nationality may be vacated.

The case is hereby remanded for further proceedings. 4/

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

3/ In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the citizen intended to relinquish United States nationality when he or she performed the expatriative act in question. Vance v. Terrazas, 444 U.S. 252 (1980), affirming and extending the reach of Afroyim v. Rusk, 387 U.S. 253 (1967).

4/ 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.