January 13, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] A[redacted] M[redacted]

This case is before the Board of Appellate Review on the appeal of H[redacted] A[redacted] M[redacted] from an administrative determination of the Department of State, dated November 24, 1987, that he expatriated himself on September 17, 1979, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/ [redacted] entered a timely appeal from that determination.

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 his United States nationality when he obtained Canadian citizenship. The Department accordingly requested that the Board remand the case so that the certificate of loss of appellant's nationality might be vacated. We grant the Department's request.

1/ In 1978, 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. 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".

I

An officer of the United States Consulate General at Toronto executed a certificate of loss of nationality in appellant's name on October 7, 1987, pursuant to the requirements of section 358 of the Immigration and Nationality Act. 2/ The officer certified that appellant acquired the nationality of the United States by birth at Santurce, Puerto Rico on June 9, 1945: that he resided in the United States from birth to October 1972 when he went to Canada; that he was naturalized as a citizen of Canada on September 17, 1979; 3/ and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The consular officer recommended that the Department approve the certificate, asserting that appellant's entire course of conduct showed a clear decision to accept Canadian nationality while abandoning the privileges and obligations of U.S. citizenship. In support of this conclusion, the Consul noted that appellant failed to take positive steps to retain his U.S. citizenship, either by making inquiries prior to naturalization about retaining his U.S. citizenship, maintaining documentation as a U.S. citizen, or voting in U.S. elections or paying U.S. taxes. The Consul also laid stress on the fact that appellant

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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.

3/ Upon being granted a certificate of Canadian citizenship, appellant made a simple, non-renunciatory oath of allegiance to Queen Elizabeth the Second.

customarily used a Canadian passport to cross the U.S.-Canadian border. The Department approved the certificate on November 24, 1987, noting that it had been persuaded to do so by two facts: that Mr. [redacted] had failed to maintain any formal ties to the U.S., and after his 1979 naturalization, he had used a Canadian passport when crossing the U.S.-Canadian border,

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.

11

The Deputy Assistant Secretary of State for Consular Affairs (Passport Services) on January 3, 1989 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 gave the following rationale for requesting remand:

> In the Department's view, the record does not sustain a finding that Harley [redacted] intended to relinquish his U.S. citizenship. Taken as a whole, his conduct with regard to his rights and duties as a U.S. citizen was passive and consequently susceptible to varying interpretations, including indifference and ignorance, as opposed to clear decision making. Indeed, Mr. [redacted] explains, he did not pay U.S. taxes because had no U.S. income. And with respect to his failure to make prior inquiries about the effect of Canadian naturalization on his U.S. citizenship, he maintains that after talking to other dual nationals, he came to believe that there would be no problem with retaining both nationalities. Moreover, the fact that appellant used his Canadian passport as identification when crossing the

> U.S.-Canadian border appears to have been a matter of convenience; he explains that he used his Canadian passport because his U.S. documentation was no longer current. Thus, other than the act of naturalization itself, Mr. [redacted] statements that he had no intent to relinquish his U.S. citizenship, are the only record [of] evidence that bears unambiguously on intent. In sum, it is the Department's view, that there is insufficient evidence to sustain the burden of proving by a preponderance of the evidence that [redacted] intended to relinquish is U.S. citizenship, 4/

III

Inasmuch as the Department has concluded that it is unable to carry its burden of proving that appellant here intended to relinquish his 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.

4/ 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); Afroyim v. Rusk, 387 U.S. 253 (1967).

The case is hereby remanded for further proceedings. 5/

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

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.