March 28, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] J[redacted] L[redacted]

The Department of State made a determination on November 12, 1986 that J[redacted] J[redacted] L[redacted] expatriated himself on October 8, 1981 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application, [redacted] appeals that determination. 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 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 1981, 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 Calgary executed a certificate of loss of nationality in the name of [redacted] on October 31, 1986, 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 Rockville Center, New York on September 16, 1947: that he resided in the United States from birth to 1975 when he went to Canada: that he was naturalized as a citizen of Canada on October 8, 1981: 3/ and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on November 12, 1986, approval being 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. On December 6, 1987 appellant wrote a letter to the

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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.

Board stating grounds of appeal, and handed it to the Consulate General at Calgary to forward to the Board. 4/

II

The Deputy Assistant Secretary of State for Consular Affairs (Passport Services) on March 21, 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:

> It is the Department's burden to prove by a preponderance of the evidence that Mr. [redacted] intended to divest himself of U.S. citizenship when he naturalized in Canada on October 8, 1981. 5/ The intent to be shown is the inent [sic} at the time of the expatriating act. The Attorney General in his Statement of Interpretation Concerning Expatriation of United States Citizens, 42 Op. Atty. Gen. 397 (1969) pointed out that the voluntary performance of certain of the statutory acts of expatriation can be highly persuasive evidence of intent to relinquish citizenship. Naturaliza-

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4/ The record shows that the Consulate General at Calgary mailed a copy of the approved certificate to appellant and that he signed a postal receipt for it on December 12, 1986, one month after the Department approved the certificate. Given the delay in the certificate's reaching appellant, we do not consider it fair to penalize him for entering the appeal three weeks more than one year after approval of the certificate, as prescribed by the applicable regulations, 22 CFR 7.5(b)(1).

5/ 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 an expatriative act. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

tion in a foreign country is one such act, but this is not enough to prove intent. Id. at 400.

The evidence that has been submitted in support of the Department's case is a Questionnaire for Determining U.S. Citizenship. The consular officer who conducted the interview, more than likely in response to Mr. [redacted] answers, amended the questionnaire. The questionnaire, when completed by the appellant, was sworn to. Unfortunately, the officer did not have Mr. [redacted] initial the changes or indicate [redacted] he was aware that the questionnaire had been altered after he had completed and signed it.

Since the administrative file in this case consists of documents from 1981 on, there is no evidence except the questionnaire that pertains to Mr. [redacted] intent at the time of the expatriating act and nothing to repudiate the validity of appellant's claim that he never intended to relinquish his U.S. citizenship when he naturalized. Because of the changes on the questionnaire, the Department feels that it cannot use the questionnaire as evidence of appellant's intent.

III

Inasmuch as the Department has concluded that it is unable to carry the burden of proving that appellant intended to relinquish his United States nationality, and since we perceive no grounds that would warrant our denying the Department's request, we hereby remand the case so that

the the Department may vacate the certificate of loss of appellant's nationality. 6/

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member

6/ 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.