December 1, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal from an administrative determination of the Department of State, dated July 8, 1987 that [redacted] expatriated herself on October 27, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The dispositive issue presented is whether the Department has met its statutory burden of proving that appellant intended to relinquish United States nationality when she obtained naturalization in Canada. For the reasons given below, it is our conclusion that the Department has satisfied its burden of proof. Accordingly, we affirm the Department's holding of loss of appellant's United States citizenship.

I

Appellant, [redacted], acquired United States nationality by birth at Tallyho Township, North Carolina on May 26, 1937. She was educated in North Carolina, and in 1958 married [redacted] in 1964, appellant accompanied him.

"I decided to become a teacher," appellant informed the Board (statement of November 28, 1988.)

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides that:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
>
> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

> ...and, in order to enroll in the Faculty of Education, University of Toronto in 1966, I had to swear a declaration of intent to become a Canadian citizen. After completing the year of teacher training, I was hired by the North York Board of Education in Ontario, Canada with a probationary certificate. I was told that I must become a Canadian citizen to get a permanent certificate

Appellant applied for naturalization in Canada, and on October 27, 1970 was granted a certificate of Canadian citizenship pursuant to the provisions of section 10(1) of the Canadian Citizenship Act. Appellant's husband whose appeal we also decide today also obtained Canadian citizenship on October 27, 1970.

There is no copy of the oath of allegiance appellant made upon being granted Canadian citizenship, but the Board takes note that persons naturalized pursuant to section 10(1) of the Canadian Citizenship Act in 1970 were required to subscribe to the following declaration and oath of allegiance:

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen.
>
> 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.

In 1987 appellant's husband terminated his service with the Canadian subsidiary of the American corporation for which he worked. At that time, appellant states, they began to think about moving back to the United States or possibly working abroad. Accordingly, she and her husband visited the United States Embassy at Ottawa. Her naturalization in Canada thus came to the attention of United States authorities. Appellant was interviewed, completed a form titled "Information for Determining U.S. Citizenship," and applied

for a passport. On June 10, 1987 an officer of the Embassy executed a certificate of loss of nationality in appellant's name, as required by law. 2/ The certificate set forth that appellant acquired United States nationality by birth in North Carolina and that she obtained naturalization in Canada upon her own application, thereby expatriating herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on July 8, 1987, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

The United States Embassy at Ottawa by registered letter, dated August 6, 1987, forwarded to appellant a copy of the certificate of nationality that was approved in her name. The letter was signed for by someone at appellant's last known Canadian address on August 19, 1987. It appears that sometime previously appellant had moved with her husband to Lesotho where he had obtained a work contract.

On November 28, 1988 appellant addressed a letter to the Board of Appellate Review from Maseru, stating that she wished to appeal the Department's holding of loss of her citizenship.

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.

II

As an initial matter, The Board must determine whether it may exercise jurisdiction over this appeal. Timely filing being mandatory and jurisdictional, see United States v. Robinson, 361 U.S. 220 (1961), the Board's jurisdiction depends upon whether the appeal was filed within the limitations on appeal prescribed by the applicable federal regulations. The limitation on appeal to the Board is set forth in section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), which reads as follows:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

The regulations further provide that an appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time. 22 CFR 7.5(a).

The Department made a determination of loss of nationality in this case on July 8, 1987. The appeal was entered on November 28, 1988, slightly more than four months after the limit on appeal expired. The issue is whether we may allow the appeal.

The reasons appellant adduces for her delay are identical to those adduced by her husband, William Charles [redacted] whose appeal we also decide today. For the reasons set forth in our opinion on [redacted] appeal, we conclude that Mrs. [redacted] appeal should be deemed timely. We therefore proceed to consider it on the merits.

III

It is undisputable that appellant duly obtained naturalization in Canada upon her own application and thus brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act. The Act provides, however, that citizenship shall not be lost unless the expatriative act was performed voluntarily with the intention of relinquishing United States nationality. The first issue is whether appellant became a Canadian citizen voluntarily.

In law it is presumed that one who performs a statutory act of expatriation does so voluntarily, but the actor may rebut the presumption upon a showing by a preponderance of the evidence that the act was involuntary. 3/ Appellant has not undertaken to refute the presumption that she acted voluntarily. She has merely alleged that she obtained naturalization because it was a condition of holding a permanent teaching certificate in the province of Ontario, but does not argue that the condition constituted duress.

It is therefore our conclusion that appellant became a citizen of Canada voluntarily.

IV

Even though appellant has not met her burden of proof that she became a Canadian citizen involuntarily, it remains to be determined whether she intended to relinquish United States citizenship when she obtained naturalization in Canada.

Intent to relinquish citizenship is an issue that the government must prove. Vance v. Terrazas, 444 U.S. 252 (1980). Intent may be proved by a persons's words or found as a fair inference from proven conduct. Id. at 260. The standard of proof is a preponderance of the evidence. Id. at 267. Proof by a preponderance means that the government must show that it was more probable than not that appellant intended to forfeit her United States nationality when she acquired Canadian

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3/ Section 349(b) of the Immigration and Nationality Act, 8 U.S.C. 1481(b), reads as follows:

> (b) 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. 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.

citizenship. 4/ The intent the government must prove is the party's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department submits that appellant's oath of allegiance to Canada and declaration renouncing all other allegiance speak for themselves. Ordinarily such statements should be accepted as a manisfestation of the citizen's intent to relinquish United States nationality, argues the Department, noting that appellant's words at the critical time are the only contemporaneous evidence of her specific intent.

If a United States citizen voluntarily obtains naturalization in a foreign state, such an act may be persuasive evidence of an intent to relinquish United States nationality, although it is not conclusive evidence of such intent. Vance v. Terrazas, supra, 444 U.S. 252, 261. And if a citizen also makes an express declaration of renunciation of all other allegiance, the courts have held that such words constitute very strong evidence of an intent to relinquish citizenship. The rule was clearly stated in Richards v. Secretary of State, 752 F.2d 1413, 1417 (9th Cir. 1985). "[T]he voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship." See also Meretsky v. U.S. Department of Justice, et al., No. 86-5184. Memorandum Opinion (D.C. Cir. 1987). There the plaintiff made a declaration of allegiance identical to that made by appellant "The oath he took renounced that [United States] citizenship in no uncertain terms." At 5.

In short, the case law makes it clear that adverse legal consequences usually will ensue if one voluntarily makes an express renunciation of United States nationality while performing a statutory expatriating act. Nonetheless, the trier of fact may not conclude from such acts that a

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4/ "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence. 12/ [footnote omitted] Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability."

McCormick on Evidence (3rd ed.), Section 339.

citizenship-claimant intended to relinquish citizenship, unless satisfied that the person acted not only voluntarily but also knowingly and intelligently, and that there are no other factors that would warrant a finding that there was a lack of intent to relinquish citizenship. Terrazas v. Haig, supra; Richards v. Secretary of State, supra.

Appellant suggests that she did not knowingly and intelligently forfeit her United States nationality. "I have never denied my American citizenship nor did I express an exclusive allegiance when I became a Canadian citizen." she stated in her letter to the Board of November 28, 1988. We are puzzled that appellant should make such an assertion when, as is well-known, applicants for naturalization in Canada in 1970 under the provisions of section 10(1) of the Canadian Citizenship Act were required to make a declaration renouncing all other allegiance and fidelity and pledge allegiance to Queen Elizabeth the Second. Absent evidence to the contrary, we must presume that appellant made the required renunciatory declaration. Furthermore, appellant was 33 years of age in 1970, evidently well-educated, and presumptively capable of appreciating the significance and consequences of making a renunciatory declaration and oath of allegiance to a foreign state.

A careful review of the record indicates no factors of sufficient evidential weight to offset the highly persuasive evidence of an intent to relinquish citizenship manifested by the renunciatory declaration of citizenship and oath of allegiance to a foreign sovereign. Appellant has family and personal ties to the United States and evidently owns property here. These factors do not in themselves outweigh the evidence contemporary with appellant's performance of the expatriative act.

In sum, the evidence of a renunciataory intent at the relevant time is strong and persuasive; the evidence of lack of intent at best is marginal. There simply is not sufficient qualitative evidence to cast doubt on appellant's probable intent in 1970. As a consequence, the Board has no latitude under the law and applicable court decisions to accept her contrary contentions, however sincerely they are put forward.

We are thus led to the conclusion that the Department has carried its burden of proving that appellant intended to relinquish her United States nationality in 1970 when she obtained naturalization in Canada upon her own application.

V

Upon consideration of the foregoing, we hereby affirm the Department's holding that appellant expatriated herself.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member