DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: C[redacted] M[redacted] S[redacted]

The Department of State determined on January 17, 1989 that C[redacted] M[redacted] S[redacted] expatriated himself on December 14, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ S[redacted] filed a timely appeal.

After pleadings were completed and before a date was set for oral argument, the Department of State informed the Board of Appellate Review on May 18, 1990, that it considered it appropriate to re-examine S[redacted] case in light of the new evidentiary standards for adjudicating loss of nationality cases which were promulgated on April 16, 1990 (see section II infra). On June 6, 1990, the Department informed the Board that after careful review, the Department concluded that there was insufficient evidence to sustain its burden of proving by a preponderance of the evidence that appellant intended to relinquish his U.S. citizenship at the time he naturalized in Canada. The Department therefore requested that the case be remanded to permit the Certificate of Loss of Nationality (CLN) to be vacated. We grant the request.

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

I

An officer of the United States Consulate General at Vancouver executed a CLN in appellant's name on February 1, 1988, in compliance with law. 2/ Therein the officer certified that appellant acquired the nationality of the United States by virtue of his birth at [redacted], [redacted] and that he obtained naturalization in Canada upon his own application on December 14, 1973, thereby expatriating himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 3/

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/ The following are additional relevant facts about this case:

-- Appellant deserted from the United States Navy and went to Canada in 1968. When he obtained Canadian citizenship he made an oath of allegiance that did not contain a declaration of renunciation of previous allegiance.

-- He lived in Canada until 1977 when President Carter declared a general amnesty for deserters and draft evaders. Thereafter he renewed ties to

The Department approved the certificate on January 17, 1989, approval constituting an administrative determination of loss of nationalit from which appellant might take an appeal to tne aoard of Appellate Review. Appellant initiated this appeal on December 22, 1939.

II

Appellant and the Department filed oriefs. Oral argument was requested and a date under consideration when on May 18, 1990 the Department informed tne Board that it believed it appropriate to re-examine appellant's case in the light of new evidentiary standards for adjudicating loss of nationality cases whch were promulgatsd on April 16, 1990.

On June 6, 1990, the Deputy Assistant Secretary of State for Consular Affairs (Passport Services) submitted a memorandum requesting that the Board remand appellant's case so that the CLN might be vacated. The memorandum stated the following grounds for the request:

> Section 349(a)(1) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1481(a)(1), prescribes that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state upon his own application with the intention of rslinquishing united States nationality.
>
> It is undisputed that appellant obtained naturalization in Canada, bringing

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3/ (Cont'd.)

> the United States and eventually took up residence in the United States.
>
> -- In 1985 appellant was advised by the Consulate General at Vancouver that he might still have a claim to United States citizenship. In 1987 he applied for a passport, asserting that he never intended to relinquish his American citizenship. His application was denied and a CLN was approved in his name in January 1989.

himself within the purview of Section 349(a)(1). Mr. S[redacted] also freely admits that his action was entirely voluntary. The only issue for disposition, therefore, is whether appellant intended to relinquish his U.S. nationality in obtaining naturalization in Canada.

The Department bears the burden of proving that a U.S. citizen who has performed an expatriative act did so with the intention of relinquishing his/her citizenship. Vance v. Terrazas. 444 U.S. 252, 261 (1980). The claim must be established by a preponderance of the evidence. 8 U.S.C. 1481(b). The intent that must be proven is appellant's intent when he/she performed the expatriating act. Terrazas v. Haig, 653 F.2d 285, *287* (7th Cir. 1981).

. . .

A 'uniform evidentiary standard within the Department' was recently promulgated to simplify and make more uniform the judgment of intention in determining possible loss of citizenship where a U.S. citizen has performed certain potentially expatriating statutory acts. The new standard presumes intention to retain citizenship when a U.S. citizen obtains naturalization in, declares allegiance to, or accepts a non-policy level position in, another state. In those circumstances, the presumption is considered inapplicable only:

> '-- when ... the proven conduct is so inconsistent with obligatipns to the United states as to compel the conclusion that the intent to relinquish was present (we envision cases in this category would be quite rare and would involve fact situations substantially beyond pro forma disavowals of allegiance to the U.S.)', or

> '-- when an individual ... formally advises the consular officer in writing that his or her intent was to relinquish U.S. nationality.'

Applying this evidentiary standard to the facts *of* the present appeal, it is manifest that the evidence does not overcome the presumption that Mr. S[redacted] intended to retain his U.S. citizenship when he naturalized in Canada,

There is no direct, contemporaneous evidence of appellant's intent at the time of his naturalization. His intentions must be inferred from the surrounding circumstantial evidence available.

The relevant circumstances include: Mr. S[redacted] flight from the United States, his inability to return without criminal prosecution, his naturalization in Canada virtually as soon as eligible, his failure to seek to preserve his U.S. nationality or even to inquire, his exercise of the rights and responsibilities of Canadian and not U.S. citizenship over some time, his apparent effort to obtain a U.S. visa, and his statement that he thought he may have expatriated himself.

When considered together, this evidence can be said to be probative of an intention to give up U.S. nationality. However, in the judgment of the Department, such a conclusion, resting solely on inference and contradicted by appellant's subsequent direct statements of intent, cannot be said to overcome pursuasively the presumption of State 121931 that citizens ordinarily intend to retain their American citizenship even when acquiring foreign nationality. As the record is devoid of other tangible evidence probative of an intent to relinquish, the Depart-

> has concluded that it could not meet its burden of proving the requisite intent in this appeal.

III

Inasmuch as the Department has concluded that it is unable to carry the 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.

The case is hereby remanded for further proceedings. 4

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member

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.