July 13, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

The Department of State determined on December 30, 1988 that M[redacted] B[redacted] [redacted] expatriated himself on May 22, 1984 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/ S[redacted] filed a timely appeal.

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 Australian 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.

I

An officer of the United States Embassy at Tokyo executed a certificate of loss of nationality in Selby's

---

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

name on December 14, 1988, pursuant to the provisions of section 358 of the Immigration and Nationality Act. Therein the officer certified that appellant acquired the nationality of the United States by virtue of his birth at [redacted]; that he resided in the United [redacted] 1979; that he acquired the nationality of Australia by virtue of naturalization on May 22, 1984; and thereby expatriated himself on that date under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 2/

The Department of State approved the certificate on December 30, 1988, approval constituting an administrative

---

2/ in its memorandum requesting remand, the Department set forth these additional facts about the case:

> -- Appellant moved to Australia in 1979. Upon obtaining naturalization in Australia, he made an oath of allegiance which included renunciation of all other allegiance, and relinquished his U.S. passport.
>
> -- In June 1984 he informed the U.S. Consulate General at Sydney that he had obtained naturalization in Australia, but asserted that he had not intended to relinquish his United States citizenship. He did not then pursue the matter. in 1985 after the Australian authorities informed the United States authorities in Australia that he had obtained naturalization, the Embassy tried without success to communicate with appellant; it seems he moved to Japan in late 1984 with his Japanese citizen wife, travelling on an Australian passport.
>
> -- In 1988 his case came to the attention of the U.S. Embassy at Tokyo. In the processing of his case he alleged that he had obtained naturalization in Australia solely for convenience and security. Although the consular officer who handled appellant's case expressed the view that appellant lacked the requisite intent to relinquish citizenship, the Department disagreed, and approved the certificate of loss of nationality that was executed in his case.

determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. The appeal was entered through counsel on December 7, 1989.

II

The Deputy Assistant Secretary of State for Consular Affairs (Passport Services) on June 5, 1990 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 bases its request forremand on the following grounds:

> 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 relinquishing United States nationality.
>
> It is undisputed that appellant obtained naturalization in Australia, bringing 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 Australia.
>
> 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 obligations 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 Australia.

Mr. S[redacted] statement to the U.S. Embassy /sic/ in Sydney, contemporaneous with his naturalization, that he did not intend to relinquish U.S. nationality, effectively negates the expatriatory implications of his Australian affirmation 'renouncing all other allegiances', The record is devoid of other tangible evidence probative of an intent to relinquish.

> Accordingly, the Department 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 intended to relinquish his United States nationality, we hereby remand the case so that the Department may vacate the certificate of loss of appellant's nationality. 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.