7 FAM 1260 GROUNDS FOR LOSS OF U.S. CITIZENSHIP

(TL:CON-5; 3-30-84)

7 FAM 1261 NATURALIZATION

a. Immigration and Nationality Act (INA)

(1) Section 101(a)(23) INA defines naturalization as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." Acquisition of nationality after birth constitutes naturalization under this definition. For example, automatic acquisition of a foreign nationality by marriage to a citizen of that country is a naturalization under law. Nevertheless, Section 349(a)(1) INA, by its express terms is identical with Section 401(a) NA, but unlike Section 2 of the 1907 Act, provides for loss of nationality only by naturalization upon application. Therefore, persons naturalized in a foreign state by automatic operation of foreign law do not perform an act made potentially expatriating by Section 349(a)(1) INA.

(2) It is not necessary that the application required by Section 349(a)(1) INA be in a particular form. A request that the foreign nationality be granted meets the statutory requirement. Some foreign states have provisions and procedures termed "naturalization," "registration," "declaration," "reintegration," or similar words for persons in special classes. The terminology used is not determinative; the important factors are whether the person acquires the foreign nationality after birth and whether an application is made. If these factors are present, a potentially expatriating act has been performed.

(3) Section 349(a)(1) INA also applies to naturalization upon the application of a parent, guardian, or duly authorized agent, but such cases are rare. This naturalization is potentially expatriating only if the person making the application was authorized to do so by the person being naturalized. The laws of a few countries, primarily in the Arab world, provide that a married woman may be naturalized there only upon her husband's petition.

(4) The first proviso to Section 349(a)(1) INA can cause loss of nationality by a person naturalized through the naturalization of a parent or on an application on the person's behalf while under age 21 only if the person fails to enter the United States for permanent residence before age 25. The act made potentially expatriating by law is completed only when a person attains age 25 or older.

b. Nationality Act (NA)

(1) Section 401(a) NA states that a national of the United States, whether by birth or naturalization, shall lose U.S. nationality by:

> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: Provided, however, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship;

(2) No particular form of application was required in becoming naturalized "upon his own application," but it was held that persons who performed this voluntary act abroad would be subject to Section 401(a) if they had attained age 21. Section 401(a) is also applied to persons naturalized abroad while minors through the application of a parent or guardian. Persons would not lose U.S. citizenship between January 13, 1941, and December 24, 1952, the dates the NA was in effect, unless they failed to enter the United States prior to their 23rd birthday. On or after December 24, 1952, Section 349(a)(1) INA has applied.

(3) Minors naturalized through the application of their parents before January 13, 1941, had until that date to return to the United States to keep their U.S. citizenship. Because of World War II, this date was changed to October 15, 1946. A person in this category who became age 21 after passage of the Nationality Act had until attaining age 23 to establish residence in the United States. Fulfilling this condition later prevented these minors from losing their U.S. citizenship.

(4) In Perkins v. Elg, 307 U.S. 325(1939), the U.S. Supreme Court held that a person born in the United States whose parents returned to their native country while the child was a minor and whose parents reacquired the nationality of that country would not lose U.S. nationality if the minor elected for U.S. citizenship when attaining majority. Persons making election could not be affected by the Section 401(a) provision no matter where they were on or after January 13, 1941. No retention provisions were applicable. A person who had "elected" U.S. citizenship prior to the Act of March 2, 1907 would be held not to have lost U.S. citizenship.

c. Act of March 2, 1907

(1) Section 2 of the Act of March 2, 1907 dealt with naturalization of U.S. citizens who became naturalized in or took an oath of allegiance to a foreign state. Voluntariness was necessary, and a person could not be expatriated in wartime. Naturalization between April 6, 1917, and July 2, 1921, did not result in loss of nationality. Because the Act was continuing in nature, expatriation occurred at the end of the war. The Department held that foreign naturalization performed in the United States became effective if the person later departed this country.

(2) Automatic acquisition of the nationality of a foreign state was not expatriating under the law unless there was an oral or written declaration or an overt act clearly showing acceptance of the other nationality. The Department held that except between 1960 and January 21, 1963, acts of acceptance included:

(a) Accepting and using the passport of a foreign state;

(b) Voting in the elections of a foreign state;

(c) Joining an organization open only to nationals of that state;

(d) Making an oral or written declaration manifesting an intention to accept foreign nationality.

These and other acts were considered acceptance in loss of nationality cases under this law. No act performed after January 13, 1941 (the effective date of the NA) would be considered as an act of acceptance.

(3) The Department holds that:

(a) Voluntary naturalization, in itself, is probative evidence of intent to relinquish U.S. citizenship; and

(b) The possibility of expatriation under Section 2 through "acceptance" by automatic acquisition of foreign nationality arises only if the foreign nationality was accepted, as above, and the subject did not inject the issue of intent or, if such issue was injected, the Department was able to prove by the preponderance of evidence that the person intended to transfer allegiance to the foreign state or abandon allegiance to the United States.

7 FAM 1262 OATH OF ALLEGIANCE TO FOREIGN STATE

a. Section 349(a)(2) INA

(1) Taking an oath of allegiance or formally declaring allegiance to a foreign state or political subdivision is potentially expatriating. The oath need not be in any particular form to be subject to this section of law. It may be oral or written. Its words and meaning must express actual allegiance or fidelity to the foreign state or subdivision or to its government, sovereign, constitution, or similar concepts. However, a simple pledge to carry out the duties of a certain job, or similar statement, even though subscribed under oath, is not potentially expatriating.

(2) An oath that specifically renounces allegiance to the United States or that renounces allegiance to any state of which the person may be a citizen is strong evidence of an intent to relinquish citizenship. The Department views similarly oaths that clearly exclude allegiance to any other state. Oaths that are not renunciatory or exclusive are not usually indicative of an intent to relinquish U.S. nationality, but the circumstances in which the oath is taken can change this determination.

(3) An oath of allegiance to a foreign state may be taken in connection with naturalization, military service, or some other act that is also, in itself, potentially expatriating. Loss of nationality results from the principal act, for example, the naturalization, rather than the oath. If the principal act is not potentially expatriating in itself, Section 349(a)(2) makes the oath potentially expatriating.

(4) An oath or affirmation of allegiance to another state taken while in the United States can result in loss of U.S. citizenship when the person establishes a foreign residence. An oath or affirmation of allegiance taken before a person's 18th birthday may result in expatriation under this subsection. See Section 351 INA discussed in section 7 FAM 1271 .

b. Section 401(b) NA

(1) Section 401(b) NA, stated that a person who is a national of the United States, whether by birth or naturalization, would lose U.S. nationality by:

> ... Taking an oath making an affirmation or other formal declaration of allegiance to a foreign state;

(2) To be expatriating under this section, the form and meaning of the oath or affirmation must be such that it affirmed undivided allegiance to the foreign state. The oath would ordinarily contain particular or general renunciatory language. Emphasis was placed on its intended meaning rather than mere form in determining the quality and degree of the oath. See Acheson v. Maenza, 202 F. 2nd 453, 457 (1953). An oath or affirmation of allegiance taken while in the United States was held to be expatriating when and if the person took up a foreign residence. An oath or affirmation of allegiance taken by a person under age 18 was not expatriative.

(3) The Department has generally held that loss of nationality resulted from the principal act rather than from the oath when the oath was required as part of another act, such as naturalization in a foreign state, which in itself was expatriating. The naturalization, not the oath, was the principal act.

(4) An oath or affirmation of allegiance not authorized or accepted by a foreign state was not expatriating under Section 401(b). An oath of allegiance in conjunction with employment by a private organization when there was no official requirement for the oath would not have been considered as coming within the scope of Section 401(b). An oath of allegiance taken as a routine privilege of a nationality additionally possessed was not usually considered expatriating.

(5) In Jalbuena v. Dulles, 254 F. 2d 379 (1958), the U.S. Circuit Court of Appeals held that Jalbuena had not expatriated himself by taking an oath of allegiance to the Philippine Government in order to apply for a Philippine passport. Jalbuena, a native-born U.S. citizen, was also a Philippine national when he took the oath of allegiance although it appeared that he was unaware that he possessed U.S. nationality. The court held that Jalbuena had merely had merely exercised a "routine privilege" of Philippine citizenship in obtaining and using the Philippine passport. The court did not appear to have questioned the fact that the oath was an oath of allegiance to a foreign state within the meaning of Section 401(b). The court held that by taking the oath, Jalbuena had not altered, added anything to, or otherwise changed the fidelity already owed to that Government by virtue of possessing its nationality. The court added:

> It is not and could not reasonably be argued that the mere obtaining and using a Philippine passport was in derogation of the American aspect of Jalbuena's dual citizenship. And the form of oath he was required to execute as part of his passport application declared no more than his undertaking "to support and defend the Constitution of the Philippine Islands" and his "allegiance" to that fundamental law. Certainly this citizen of the Philippines, residing in that country, was bound loyally to support and defend the fundamental law of that land just as he would be bound in this country to support and defend our Constitution.

(6) Oaths of allegiance taken to pass medical or legal requirements in a foreign state are not expatriating unless they contain renunciatory language or are otherwise incompatible with allegiance to the United States.

c. Section 2, Part 2, Act of March 2, 1907

(1) Requirements for Expatriation. An oath of allegiance to a foreign state under Section 2 is expatriating only if it is taken voluntarily by a person who has attained age 21. An oath taken in wartime is not expatriating unless the person failed to return to the United States for permanent residence within a reasonable time. An oath taken in the United States was not expatriating unless the person permanently departed the United States soon thereafter.

(2) Minor's Oath. Although the Department held that a minor's oath could be confirmed and be expatriating by certain acts performed after attaining majority, court decisions stated that minors lacked capacity to expatriate themselves by taking an oath of allegiance except as prescribed in a treaty. Therefore, by taking an oath, a minor could no longer lose U.S. nationality under Section 2.

(3) Effect of Afroyim and Terrazas on Section 2, Part 2. Proof by the preponderance of evidence that the person had intent to relinquish citizenship is necessary for expatriation. Such proof is difficult to obtain except in clear-cut cases in which the person desires expatriation because oaths are usually taken in connection with other acts. Examples of such acts include entry into the armed forces of another country or obtaining a medical degree. The reasons for taking oaths are often obscured by the need to complete the other act. Frequently there is not enough evidence to hold expatriation.

7 FAM 1263 FOREIGN MILITARY SERVICE

a. Authorization to Serve

Specific written authorization to serve in the armed forces of a foreign state (see sections 349(a)(3) INA and 401(c) NA) will not be granted by the Secretary of State unless the service is found to be in the national interest of the United States. Service while the United States is at peace is considered not to be in the national interest because it could create difficulties in our friendly foreign relations with third countries. Authorization to serve will be granted only for service with friendly nations when the United States is at war or during a national emergency proclaimed by the President. In practice, it appears never to have been granted.

b. Service With Armed Forces Engaged in Hostilities Against the United States

The Department holds that voluntary service in the armed forces of a foreign state engaged in hostilities against the United States is strong evidence of intent to relinquish U.S. citizenship.

c. In United States ex rel. Marks v. Esperdy, 315 F. 2nd 673 (1963),

the court held that service in the Cuban rebel forces during the Castro revolution fell into the category of service in the armed forces of a foreign state when the revolution succeeded in overthrowing the Batista Government. Service in a rebel force or similar organization is not potentially expatriating because it is not with a foreign state. A person who serves in the rebel force and continues to serve after the rebels form a new government becomes subject to the provisions of this section.

d. Section 349(a)(3) INA

(1) Unlike Section 401(c) NA, Section 349(a)(3) INA does not require the person to be a national of the foreign state in whose armed forces the person is serving. This section mentions both entry and service in the armed forces of a foreign state. Either is potentially expatriating. Persons who entered the armed forces of a foreign state before December 24, 1952, and who did not perform acts made potentially expatriating by the NA may have performed an act made potentially expatriating by Section 349(a)(3) INA because their service continued after that date.

(2) Only active duty service in a regular or reserve component is potentially expatriating under Section 349(a)(3). If the foreign law requires a reservist to perform periodic training or military duty, that service constitutes active duty service.

e. Section 401(c) NA

(1) An oath of allegiance taken after January 13, 1941, for military service performed before that date is considered to have been part of the service and not expatriating unless the oath was renunciatory or the service was in the armed forces of a country at war with the United States. If the service started after January 13, 1941, the oath would not be considered expatriating but the military service could be considered a possible act of expatriation.

(2) For dual nationals and military service, Section 401(c) NA provides that a person who is a U.S. citizen, whether by birth or naturalization, shall lose U.S. citizenship by:

> Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.

(3) Loss of nationality is limited to nationals who were also nationals of the foreign state in whose armed forces they served. No loss took place while the person was within the United States or any of its outlying possessions (see section 403(a) NA). No person under age 18 at the time of entry into the service could be subject to expatriation under its provisions (see section 403(b) NA).

(4) Military service in a foreign state beginning before January 13, 1941, and continuing after that date did not result in expatriation under Section 401(c) NA unless, at the time the NA became effective or shortly thereafter, the person's continued military service is shown to have been voluntary.

(5) Voluntary service in the armed forces of a foreign state resulted in loss of nationality. Determination of voluntariness is a question of fact to be found from consideration of all circumstances surrounding entry and service. All laws and regulations concerning the service are of significance in determining whether loss of nationality occurred. Voluntary service in the military reserves of a foreign state is not expatriating. However, active duty during a reserve status must be so considered.

(6) It is not sufficient for a claimant to U.S. nationality merely to state that the act of expatriation was performed involuntarily. To inject the issue of involuntariness in the case, the person must show what conditions, circumstances, and pressures were part of the act. Persons unable to show they protested against induction or otherwise tried to avoid service should show that they were conscripted into the foreign armed forces pursuant to a conscription law, with sanctions, and that had it not been for the law and sanctions they would not have served. When claimants assert under oath facts and circumstances which, if proved, would establish that the military service was performed involuntarily, they have placed the act of voluntariness in issue. The Department must then either assume the burden of establishing by the preponderance of evidence that service was voluntary or concede that it was involuntary and that the claimant has not lost U.S. nationality.

(7) It was held that service in the armed forces of an unrecognized state could cause loss of U.S. nationality under section 401(c) NA. This is based on the language of the Act that was understood not to require that the foreign state or its government be recognized by the United States. The holding found support in Hackworth's Digest of International Law, Volume I, which states that "the existence, in fact, of a new state or a new government is not dependent upon its recognition by other states."

7 FAM 1264 EMPLOYMENT WITH FOREIGN GOVERNMENT

a. Section 349(a)(4) INA

(1) This section establishes two separate and distinct prerequisites, one of which must be satisfied before a particular type of government employment can be considered potentially expatriating. Section 349(a)(4)(A) provides for loss of nationality by a person who has or acquires the nationality of the foreign state. Section 349(a)(4)(B) provides for loss of nationality by a person who accepts a position for which an oath of allegiance is required for that employment. The Department has held that a person may obtain a position with a foreign government if the position does not require one of these two prerequisites. Compliance with either of them renders the person subject to the provisions of this law.

(2) As discussed in Section 401(d) NA, employment directly under the foreign government or any of its political subdivisions is potentially expatriating under Section 349(a)(4). However, employment with an international organization, even if the person is hired as a foreign national, is not potentially expatriating because such organization is not a foreign state.

(3) Employment in an important political post with a foreign government is strong evidence of intent to relinquish U.S. citizenship. A position that involves significant policy making functions for the foreign state as contrasted with one that is purely administrative or local in nature, meets this definition. Normally, heads of state, cabinet or subcabinet level officers, some heads and chief executive officers of government agencies, and members of the national legislature will be considered as holding important political positions. Teachers, clerical employees, postal workers, and other lower level government positions are not considered to be occupying important political posts, and their employment is not indicative of intent to relinquish U.S. citizenship.

b. Section 401(d) NA

This section provides that a person who is a U.S. citizen, whether by birth or naturalization, shall lose U.S. citizenship by:

> Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible.

(1) Under this section “a foreign state or political subdivision thereof” has been taken to include bureaus or corporations owned or controlled by the foreign state. Employment must be restricted to nationals of the foreign state; if an alien may hold such a position, even if none were actually employed, the employment is not expatriating.

(2) A finding of expatriation can be made if and when the person departs the United States and establishes residence abroad (see section 403(a) NA). No national under age 18 can be expatriated under this section in light of Section 403(b) NA.

(3) Although certain countries, notably Japan and Italy, were occupied by allied forces during and after World War II, it was held that employment by the government of such countries came within the meaning of the law during the time they were occupied (Furano v. Acheson, 106 F. Supp 776 (1952)).

7 FAM 1265 FOREIGN RESIDENCE

a. Section 340(d) INA

Section 340(d) of the Immigration and Nationality Act provides that any U.S. naturalized citizen who takes up permanent residence abroad within 5 years after naturalization may have the order admitting that person to citizenship revoked and the certificate of naturalization canceled by court action. Under the statute, the establishment of such permanent residence abroad is prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing the petition for naturalization. In the absence of countervailing evidence, the order admitting that person to citizenship and the naturalization certificate may be revoked as having been obtained by concealment of a material fact or by willful misrepresentation. Under Section 340(d) a consular officer is required to investigate, as described in subsection b, whether: (1) a permanent residence has been established abroad and (2) whether there exists countervailing evidence which would rebut the presumption that the naturalization was fraudulent.

b. Presumption of Permanent Residence Abroad

(1) Relevant Information. When a consular officer learns that a U.S. citizen residing abroad left the United States before the expiration of 5 years from the date of naturalization, the officer should seek all relevant information by requesting the person to complete a passport or registration application, Form OF-178, and an OF-178A supplementary application (see 7 FAM 1323 Exhibit 1323.1 and 7 FAM 1339 Exhibit 1339.1a). The person should write in detail the reasons for the foreign residence. If the person declines to complete the application, the case must be investigated to determine whether the foreign residence was established within the 5-year period.

(2) Examples Following are examples showing permanent residence established abroad within the meaning of Section 340(d) INA:

(a) Disposition of property held or owned in the United States at time of naturalization;

(b) Marriage and rearing a family abroad;

(c) Lack of family ties in the United States;

(d) Permanent nature of a person's activities overseas.

(3) Affidavit on Permanent Residence Abroad. Statements that a naturalized person established a permanent residence abroad within 5 years after naturalization are to be prepared strictly in accordance with 7 FAM 1265 Exhibit 1265b(3) . The officer who prepares the affidavit signs each copy of the affidavit in the presence of another officer who has authority to administer an oath. The latter officer completes the jurat and affixes the seal of office to each copy of the affidavit. The person's residence should be shown correctly because the last residence in the United States determines the court in which the action will be instituted. The original and 2 copies of the affidavit are sent to the Department (Attention: CA/OCS/CCS). The final copy is kept at the post.

c. Presumption of Permanent Residence Not Established

(1) Section 340(d) does not apply if permanent residence abroad has not been established. For example, if a person is residing abroad to be with an ill family member, to resolve an estate problem, or is there temporarily for business purposes, no permanent residence has been established. If the consular officer is satisfied that the reason for the residence is temporary rather than permanent, revocation of citizenship should not be considered.

(2) Following are examples of countervailing evidence:

(a) Severe illness originating after naturalization;

(b) Severe illness of a close family member originating after naturalization requiring the person's care and attendance;

(c) Transfer of employment abroad in the interest of the person's employer;

(d) Marriage occurring after naturalization;

(e) Transfer of residence to a foreign country by the person's U.S. citizen spouse, if the person's foreign residence is with the spouse;

(f) Change in marital status by death of spouse, divorce, or legal separation, occurring within 5 years of a person's naturalization;

(g) Inheritance of business or investment property through a family member whose death occurred after the person's naturalization, particularly where the inherited property is being managed personally by the naturalized citizen.

(3) In determining the sufficiency of evidence to overcome the presumption arising under Section 340(d), the consular officer should be aware of the U.S. Supreme Court decision in Luria v. U.S., 231 U.S. 9 (1911), which stated:

> No doubt the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are aware of the opinion that as the intervening time approaches five years, the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a substantial and convincing explanation.

(4) The following guidelines should be used to determine the sufficiency of countervailing evidence:

(a) When a permanent foreign residence is established within 1 year after naturalization, substantial and convincing documentary evidence accompanied by a credible statement is needed to rebut the presumption arising under Section 340(d).

(b) When a permanent foreign residence is established between the second and fifth year after naturalization, documentary evidence as may be obtained and/or a credible statement will be sufficient to rebut the presumption.

(5) The guidelines in paragraph 7 FAM 1265 c(4) emphasize the diminishing need for strong countervailing evidence with the passage of time. They are intended as an aid but not a substitute for the consular officer's judgment. The officer assesses all factors in deciding whether the presumption is overcome. In a case where a foreign residence is established 3 years after naturalization, the officer may believe or may doubt that there was intent to reside abroad permanently. Each case should be investigated, documented, and evaluated to resolve the issue of presumptive fraud.

(6) If satisfied after investigation of all the evidence that the person's statement shows there was no fraudulent naturalization, the consular officer sends only a short report to the Department. An Affidavit Regarding Permanent Residence Abroad (see 7 FAM 1265 Exhibit 1265b(3)) need not be submitted.

d. Section 404 NA

(1) Text. Section 404 NA provided that:

> A person who has become a national by naturalization shall lose his naturalization by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof.
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.

(2) Schneider v. Rusk. The above sections were declared unconstitutional in Schneider v. Rusk, 377 U.S. 163, (1964). Applications of persons applying for documentation should be handled similarly to those arising under Sections 401(e), (g), and (j).

e. Exemptions for Employment Abroad

(1) Section 405 NA provided that Section 404 does not apply to a person:

> (a) Who resides abroad in the employment and under the orders of the Government of the United States; or
>
> (b) Who is receiving compensation from the Government of the United States and residing abroad on account of disability incurred in its service.

(2) The above exemptions are not applicable in cases arising under the Schneider v. Rusk decision because they are exemptions to Sections 404(a), (b), and (c).

f. Exemptions for Residence Abroad

(1) Section 406 NA provided that Subsections (b) and (c) of Section 404 shall have no application to a person:

(a) Who shall have resided in the United States not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty-five years when the foreign residence is established;

(b) Who is residing abroad upon the date of the approval of this Act, or who is thereafter sent abroad, and resides abroad temporarily solely or principally to represent a bona fide American educational, scientific, philanthropic, religious, commercial, financial, or business organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(c) Who is residing abroad on account of ill health;

(d) Who is residing abroad for the purpose of pursuing studies of a specialized character or attending... school, provided that such residence does not exceed five years;

(e) Who is the wife, husband, or child under twenty-one years of age, and is residing abroad for the purpose of being with, an American citizen spouse or parent who is residing abroad for one of the objects or causes specified in section 405 or subsections (a), (b), (c), or (d) hereof.

(2) The above exemptions are not applicable because they are exemptions to Sections 404(a), (b), and (c), which are considered unconstitutional in view of the Schneider v. Rusk decision.

7 FAM 1266 VOTING IN A FOREIGN ELECTION

a. Former Section 349(a)(5) INA

This section provided for loss of U.S. citizenship when a person voted in a foreign political election or plebiscite to determine the sovereignty over foreign territory. Former Section 349(a)(5) was rendered unconstitutional by the decision of the Supreme Court in Afroyim v. Rusk. Persons who vote in foreign elections do not jeopardize their U.S. citizenship by that action alone. However, voting may be among the factors considered as indication of intent to relinquish U.S. citizenship.

b. Section 401(e) NA

(1) This section provided that a person who is a citizen of the United States, whether by birth or naturalization, shall lose U.S. citizenship by:

Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;

(2) The decision of the U.S. Supreme Court in Afroyim v. Rusk declared that Section 401(e) NA was unconstitutional (see section 7 FAM 1207). Persons previously held to have lost citizenship under Section 401(e) should be asked to apply for citizenship documentation, and it should be determined at that time whether any other acts of expatriation are outstanding. For example, if a person entered the armed forces of a foreign state after voting in a foreign election but before the Certificate of Loss of Nationality (CLN) was approved, Section 401(c) NA would apply. It should then be handled as if serving in the armed forces was the first voluntary act of expatriation.

7 FAM 1267 MARRIAGE OF WOMEN TO ALIENS

a. Act of March 2, 1907

Section 3 of the Act of 1907 provided that U.S. citizen women who married aliens lost their U.S. citizenship. From March 2, 1907, to September 22, 1922, women who married aliens or married aliens ineligible for citizenship between March 2, 1907, and March 3, 1931, lost their citizenship. If the marriage was performed during war, between April 6, 1917, and July 2, 1921, it was expatriative only if the marriage continued after July 2, 1921 and the husband remained an alien. If the marriage ended or the husband became naturalized during the war, there was no expatriation. A U.S. citizen woman who married in the United States lost U.S. citizenship if she later established residence abroad with her husband before September 22, 1922, or March 2, 1931, depending on the eligibility for naturalization of the alien.

b. Effect of Afroyim and Terrazas on Section 3

(1) Marriage of a U.S. citizen woman to an alien is expatriative under Section 3 only if there is persuasive evidence of an intent to relinquish U.S.citizenship. There is persuasive evidence of affirmative intent to relinquish U.S. citizenship, for example, when one or more of the following has occurred:

(a) The marriage was accompanied by a voluntary renunciation of U.S. citizenship;

(b) There was a declaration of allegiance to the foreign state;

(c) There is a statement by the U.S. citizen woman that she intended to relinquish U.S. citizenship.

(2) These cases must be referred to the Department (Attention: CA/OCS/CCS) for an advisory opinion. Under the Terrazas guidelines, it has been difficult to establish by the preponderance of evidence that the person intended to relinquish U.S. citizenship except in cases cited in section 7 FAM 1267 b(1)(c).

7 FAM 1268 EXPATRIATION OF MINORS

a. Perkins v. Elg

Until May 29, 1939, the Department held that minors expatriated themselves by their father's voluntary naturalization in a foreign state. The Attorney General supported this view in the Ingrid Therese Tobiassen case, 8 Op. Att. Gen. 535, on January 16, 1932. However, the U.S. Supreme Court held in Perkins v. Elg, 307 U.S. 325 (1939), that U.S. citizenship of a minor born in the United States continues despite the parent's action unless the minor voluntarily shows a transfer of allegiance in conformity with legal principles then in effect or through the operation of a treaty. This decision was followed until the enactment of the Nationality Act of 1940.

b. Nationality Act (NA)

(1) Section 403(a) and (b)

(a) This section provided that: (a) Except as provided in subsections (g) and (h) of section 401, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of the conditions specified in this section if and when the national thereafter takes up a residence abroad.

(b) No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

(b) A national of the United States under age 18 could not be expatriated under subsections (c) to (f), inclusive, of Section 401 NA. The Department construes Section 403(b) strictly so that, if the U.S. national lacked even the shortest time in having attained age 18, the person was held not to have become expatriated under one of the subsections limited by this section.

(2) Section 407

(a) This section provided that:

A person having American nationality, who is a minor and is residing in a foreign state with or under the legal custody of a parent who loses American nationality under Section 404 of this Act, shall at the same time lose his American nationality if such minor has or acquires the nationality of such foreign state: Provided, That, in such case, American nationality shall not be lost as the result of loss of American nationality by the parent unless and until the child attains the age of twenty-three years without having acquired permanent residence in the United States.

(b) This section was considered unconstitutional in view of the Schneider v. Rusk decision.

7 FAM 1269 TREASON AND FAILURE TO PERFORM MILITARY SERVICE

7 FAM 1269.1 Treason

a. Section 349(a)(7) INA (former Section 349(a)(9) INA) provides for loss of U.S. citizenship if a person commits treason against or attempts to overthrow by force the Government of the United States. Loss of citizenship, however, can occur only after a person has been convicted of this crime.

b. Section 401(h) NA provided that a person who is a U.S. citizen, whether by birth or naturalization, shall lose U.S. citizenship by:

Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. Treason is levying war against the United States or adhering to its enemies, thereby giving them aid and comfort. It may be committed against the country by a national residing within its territorial limits or outside such limits. Loss of nationality could result only after the person had been convicted by a court martial or by a court of competent jurisdiction. There was virtually no administrative discretion possible in its

application by the Department. Upon conviction under this law, loss occurred as of the date of the act for which the person was convicted.

7 FAM 1269.2 Desertion

a. Section 401(g) NA provided that a person who is a U.S. citizen, whether by birth or naturalization, shall lose U.S. citizenship by:

> Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by court martial...

This section was declared unconstitutional by the U.S. Supreme Court in Trop v. Dulles 356 U.S. 86 (1958).

b. Former Section 349(a)(8) INA generally provided for loss of nationality for a person who was convicted of deserting the armed forces of the United States in time of war. This section was rendered unconstitutional as a result of Trop v. Dulles 356 U.S. 86 (1958) and was repealed effective October 10, 1978. The court held that this law went beyond the war powers of Congress. A person who is convicted of desertion will not thereby jeopardize U.S. nationality.

7 FAM 1269.3 Evasion of Military Service

a. Former Section 349(a)(10) INA provided for loss of nationality for persons departing or remaining outside the United States in wartime to evade military service. The U.S. Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), held this section unconstitutional on grounds that it constituted punishment without affording Fifth and Sixth Amendment procedural safeguards. This section was repealed effective October 10, 1978.

b. Section 401(j) NA provided that a person who is a U.S. citizen, whether by birth or naturalization, shall lose U.S. citizenship by:

> Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

This section was declared unconstitutional by the U.S. Supreme Court on February 18, 1963, in Kennedy v. Mendoza-Martinez. The person should be requested to apply for documentation as a U.S. citizen and it should be determined whether any act of expatriation was performed between the acts thought to have been expatriative under the section now held unconstitutional and the date the CLN was approved.

7 FAM 1265 Exhibit 1265b(3)

(TL:CON-5; 3-30-84)

Sample of an Affidavit Regarding Permanent Residence Abroad

AFFIDAVIT REGARDING PERMANENT

RESIDENCE ABROAD

United States of Brazil)
(Country))
)
State of Sao Paulo)
(State, province, etc.))
) ss:
Sao Paulo)
(City))
)
Consulate General of the)
United States of America)
(Name of consular post)

I, James A. Rivera, Vice Consul, of the United States of
(Name) (Title)
America at Sao Paulo, Brazil , being duly sworn according to law,
(Place)
depose and say as follows:

That Jose Monteiro , a native of Brazil , who was naturalized
(Name) (Country)
before the U.S. District Court at San Francisco, California ,
(Name of court) (Location of court)
on May 5, 1981 , and who is now residing at Sao Paulo, Brazil
(Date) (Place)
established a permanent residence in Sao Paulo, Brazil ,
(Place)
a foreign country, on or about June 3, 1983 , that is, within
(Date)
5 years after naturalization as a citizen of the United States.

That this affidavit is based on the following facts:

Mr. Monteiro departed the United States on June 3, 1983 pursuant to an employment contract he signed on February 3, 1981, in which he promised to return to Brazil to live and work as a sales representative in Sao Paulo. His long term employment, purchase of a home, and severing of ties with the United States indicate his establishment of a permanent residence in Brazil.

That, upon the basis of these facts, good cause exists for

the institution of a suit under section 340 (d) of the Immigration

and Nationality Act of 1952 (8 U.S.C. 1451 (d)), to revoke and

set aside the order admitting Jose Monteiro to citizenship and to
(Name)

cancel the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation.

The last residence of Jose Monteiro (Name) in the United States was at 1425 Main Street, San Francisco, California 94105 (Complete last known address).

His present foreign address is reported to be Rua Augusta, 53, Sao Paulo, Brazil. (Foreign address)

This affidavit is executed pursuant to section 340 (d) of the Immigration and Nationality Act.

/s/ [illegible]
(Signature)

James A. Rivera
(Typed name of officer)

Vice Consul of the United States of America
(Title)

Subscribed and sworn to before me this fifteenth day of September, 1983

/s/ [illegible]
(Signature)

Mary J. Jones
(Typed name of officer)

SEAL
Service No. 1827
No fee prescribed
(Item No. 73)

Consul of the United States of America, at
(Title)

Sao Paulo, Brazil
(Location)

Guide for Preparation of Affidavit Regarding Permanent Residence Abroad

Statements that a naturalized citizen has established a permanent residence abroad within 5 years after naturalization shall be prepared in quadruplicate in the form of an affidavit strictly in accordance with the form shown on page 1 of this exhibit. The original and 2 copies of the executed affidavit shall be forwarded to the Department and one copy filed at the post. The consular officer should:

1 Complete the venue (see 7 FAM 816.1). If the city is not located in a province, state NONE (not N/A, which needlessly raises questions about when it is applicable) or omit the line altogether. the abbreviation “ss.” stands for “Subscribed and sworn to.”

2 Show the name, title, and post of assignment of the officer executing the affidavit.

3 State the name of the subject of the affidavit in the second paragraph.

4 Identify the court before which the subject was naturalized and the date of naturalization.

5 State where the subject is now residing and where outside the United States the subject has established a permanent residence (the 2 are not always the same).

6 State the date, or approximate date, when the subject established a permanent residence abroad.

7 Set forth a concise statement of the material facts in the case upon which the executing officer based the conclusion that the person concerned acquired a permanent foreign residence within 5 years after the issuance of the certificate of naturalization. This statement shall be limited to the circumstances relating to the foreign residence upon which the officer’s conclusion is based and shall not be in the form of a discussion of all circum-stances of the case which were considered by the executing officer in reaching the conclusion. It shall not contain irrelevant or immaterial statements or references to departmental instructions. Include only facts supporting the conclusion that a permanent residence abroad was established. The opinion of the consular officer is not properly a part of this paragraph.

8 State the legal basis for institution of a suit to revoke the naturalization and repeat the name of the subject of the action.

9 Repeat the subject’s name and state the subject’s last address in the United States and present foreign address, as fully as possible. Because the subject’s last residence in the United States determines the court in which the action should properly be instituted, it should be states as accurately as possible.

10 Specify the section of law under which the affidavit is executed.

11 Complete the affidavit with the signature and typed name of the executing officer.

12 Include a line showing that the affidavit was executed before another officer and the date of execution of the affidavit.

13 Complete the jurat with the signature, typed name, and post of assignment of the administering officer.

14 Impress the affidavit with the embossed seal of the post and fill in the service number.

THE TEXT OF THE CERTIFICATE (ITEMS 1 THROUGH 10) MAY BE TYPED SINGLE-SPACED, WITHOUT UNDERSCORING OF ENTRIES, ON SIZE 8 1/2" x 11" PAPER.