

February 23, 1987

## DEPARTMENT OF STATE

## BOARD OF APPELLATE REVIEW

IN THE MATTER OF: N [REDACTED] E [REDACTED] D [REDACTED]

This is an appeal from an administrative determination of the Department of State holding that appellant, N [REDACTED] E [REDACTED] D [REDACTED] expatriated herself on June 8, 1981 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Iraq upon her own application. 1/

For the reasons stated below we will affirm the Department's determination that Mrs. D [REDACTED] expatriated herself.

## I

Mrs. [REDACTED] became a United States citizen by birth at East [REDACTED]. In 1951 she married an [REDACTED] citizen. A child was born in the United States. In 1953 appellant's husband took her and the child to Iraq. There appellant has since lived. Three more children were born in Baghdad. The records of the then-U.S. Interests Section of the Embassy in the 1970's contain the following information about her citizenship status:

Jan. 7, 1972 application for new passport

6/16/72 Passport No. Z1503439 issued on March 20, 1972 at Tehran, Iran to Mrs. D [REDACTED] and including her two sons, [REDACTED]

3/29/77 Passport No. Z2697937 issued on 3/29/77 at Baghdad to Mrs. N [REDACTED] E. D [REDACTED] only

1/ Prior to November 14, 1986, Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read 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, . . .

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 14, 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".

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Applied for Iraqi citizen [sic] 1978 after husband's death in that year for financial reasons.

Mrs. D [REDACTED] later told an officer of the Interests Section that when she first applied for Iraqi naturalization she had encountered difficulties in realizing her plans and for the time being had abandoned the effort.

In early 1980 Mrs. D [REDACTED] applied for naturalization under the provisions of section 5(a) of Decision no. 180 of the Revolutionary Command Council (RCC) of February 2, 1980. 2/

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2/ Section 5(a) of the RCC Decision reads as follows:

5. (a) The Minister of the Interior may approve the naturalization of an alien female married to an Iraqi citizen provided that they have been married for three years; that she has been living in Iraq during those three years; and the marriage was valid up to the time of application.

Section 5(b) and (c) and section 6 read as follows:

- (b) An alien female who is married to an Iraqi citizen and who has been residing in Iraq for five years, may not be allowed to continue to reside in Iraq. She must, within the time that this Decision is in force [for 6 months from February 2, 1980] declare her intention to acquire her husband's Iraqi citizenship or leave Iraq.
  - (c) An alien female who is married to an Iraqi citizen, must chose between acquiring Iraqi citizenship or leaving Iraq after three years in accordance with paragraph (a) of this section. She must depart Iraq if a period of five years has elapsed without her acquiring Iraqi citizenship.
6. Any alien who has acquired Iraqi citizenship in accordance with this Decision must take an oath of allegiance to the Iraqi Republic in the presence of the appropriate director of immigration within one month following notification of this requirement. A person shall be considered an Iraqi citizen upon taking such oath.

She explained her action in her initial submission as follows: "The law requiring non-Arab foreigners married to Iraqis who wished to remain in the country was issued in 1980. I received the Iraqi citizenship in 1981. I asked for the Iraqi citizenship to be able to stay in Iraq with my children and grandchildren." A certificate of Iraqi citizenship was issued in her name on June 8, 1981 which stated that she acquired Iraqi citizenship under section 5-A of the Iraqi Nationality Law 180 of 1980.

On June 9, 1981 appellant visited the U.S. Interests Section, apparently because the Iraqi authorities insisted that she produce evidence that her United States passport had been cancelled or surrendered before they would deliver a certificate of citizenship to her. The fact that she had obtained naturalization thus came to the attention of United States authorities. Mrs. D [REDACTED] surrendered her United States passport and apparently received a letter to that effect to show to the Iraqi authorities so that she might receive her certificate of naturalization.

Mrs. D [REDACTED] was interviewed by a consular officer, completed a questionnaire titled "Information for Determining U.S. Citizenship, and, for information purposes, an application for a passport/ registration. She also executed an affidavit of expatriated person, stating therein that she had voluntarily acquired naturalization in Iraq with the intention of relinquishing United States citizenship. Thereafter, as required by law, the consular officer executed a certificate of loss of nationality in appellant's name on June 20, 1981. 3/ The certificate recited that appellant became a United States citizen at birth; that she acquired the nationality of Iraq upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. Four months later the consular officer forwarded the certificate to the Department under cover of a memorandum which read in part as follows:

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3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

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.

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2. When Mrs. [REDACTED] appeared before the Consular Officer she was asked whether she would feel comfortable executing an affidavit of expatriated person. Without hesitation, after reading the sample, she agreed. The Department will also note that she indicated in Item 9 of the citizenship questionnaire that she voluntarily and with the intention of relinquishing U.S. nationality naturalized as a citizen of Iraq. Where she indicated on June 9 that she would be naturalized immediately, she did not realize that she already had been. The Iraqi authorities simply did not give her the nationality certificate until they received proof that she had surrendered her United States passport to us.

3. When asked why she was naturalizing voluntarily and with the intent to relinquish US citizenship in contrast to the American citizen wives of Iraqis with whom the Consular Officer had spoken, she replied that she had lived in Iraq for many years and had family and property here. It was further intimated to the Consular Officer that Iraqi citizenship would facilitate some inheritance problems in this country.. ..

The consular officer recommended approval of the certificate and requested that if the Department concurred in his recommendation, a copy of the latest appeal procedures be sent to Baghdad to be affixed to the certificate "before Mrs. [REDACTED] is given the CLN."

The Department approved the certificate on October 21, 1981, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A copy of the approved certificate was sent to the Interests Section on October 22, 1981 to forward to appellant, together with information about taking an appeal.

Over three years later Mrs. [REDACTED] visited the United States Embassy at Baghdad on January 31, 1985 (diplomatic relations between the United States and Iraq were restored in November 1984) to obtain a visa in her Iraqi passport for a visit to the United States. Since she had been born in the United States, the consular officer to whom she spoke assumed she was a dual national of the United States and Iraq. Mrs. [REDACTED] told him, however, that she had surrendered her United States passport in 1981 to the U.S. Interests Section and that she believed she was no longer a United States citizen.

After discussing her case with the consular officer, Mrs. D [REDACTED] executed an affidavit on February 11, 1985 in which she set forth grounds of appeal. She contends that her naturalization was not voluntary in that she had no choice but to conform to Iraqi-law if she wished to remain in Iraq.

## II

Before proceeding, we must determine whether the Board may assert jurisdiction over this appeal. Timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960) The Board's authority to consider the merits of the case therefore depends on whether we are able to conclude that the appeal was filed within the limitation prescribed by the applicable regulations.

Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), reads as follows:

(b) Time Limit on Appeal.

(1) A person who contends that the Department's administrative determination 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 by the Department of the certificate of loss of nationality or a certificate of expatriation.

22 CFR 7.5(a) provides that:

(a) Filing of Appeal. A person who has been the subject of an adverse decision in a case falling within the purview of section 7.3 shall be entitled upon written request made within the prescribed time to appeal the decision to the Board. The appeal shall be in writing and shall state with particularity reasons for the appeal. The appeal may be accompanied by a legal brief. 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.

The Department must inform the affected person of the right of appeal to the Board of Appellate Review at the time the certificate of loss of nationality is forwarded to him or her. 22 CFR 50.52 provides that:

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When an approved certificate of **loss** of nationality or certificate of expatriation is forwarded to the person to whom it relates or his or her representative, such person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review (Part 7 of this chapter) within one year after approval of the certificate of **loss** of nationality or the certificate of expatriation.

Notice of the right of appeal and appeal procedures are set forth on the reverse of the certificate of loss of nationality. The Department approved the certificate of **loss** of nationality that was issued in this case on October 21, 1981. The appeal was entered on February 11, 1985, three years and four months after approval of the certificate.

As the above-cited provisions of the applicable regulations make clear, the sole issue for the Board to determine is whether Mrs. [REDACTED] has shown good cause why her appeal could not have been filed within the prescribed time.

"Good cause" means a substantial reason, one that affords a legally sufficient excuse, Black's Law Dictionary, 5th Ed. (1979). Good cause depends on the circumstances of each particular case, and the finding of its existence lies largely within the discretion of the judicial or administrative body before which the case is brought. Wilson v. Morris, 369 S.W. 2d 402, 407 (Mo. 1963). Generally, to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of an event beyond his immediate control which was to some extent unforeseeable. Manges v. First State Bank, 572 S.W. 2d 104 (Civ. App. Tex. 1978); and Continental Oil Co. v. Dobie, 552 S.W. 2d 183 (Civ. App. Tex. 1977). See also Wray v. Folsom, 166 F. Supp. 390 (D.C. Ark. 1958). Good cause for not making a timely filing requires a valid excuse as well as a meritorious cause. Appeal of Syby, 66 N.J. Supp. 460, 1967 A.2d 479 (1961).

Mrs. [REDACTED] claims that she did not appeal sooner because she never received a copy of the approved certificate of loss of nationality and was not informed that she had the right of appeal. When she visited the U.S. Interests Section in June 1981 she was asked, she states, to return in three or four months, i.e., in September or October. She does not say why she was told to return. Perhaps the consular officer expected that the Department would have made a decision in her case by then; that he would be able to inform her of the decision and, if it was adverse, hand her the certificate of **loss** of nationality and inform her about appeal procedures. The foregoing is, of course, pure speculation in the absence of official records indicating what the consular officer actually told

Mrs. D [REDACTED]. However, she asserts that the Embassy (and, by implication, the former U.S. Interests Section) "is not in the habit of mailing correspondence to citizens in Baghdad. They will call the person concerned and then transact any necessary business on the premises."

Mrs. D [REDACTED] did not return to the Interests Section because as she explained:

The compelling reason (which apparently the Board does not understand) was protection of my family. As I have explained I had and still have a son in the Army whose position might have been jeopardized with continued going back and forth. My late son-in-law was a high ranking Army officer (equivalent rank Maj. Gen.) fighting in the front lines; my other son, who is a doctor and now doing his selective service, was at the time a student. I am sure you have read the nature of ill-feeling towards the American Government and nationals that various countries go through. With Iraq in a state of war; a great deal of anti-American feeling in the country; actual air raids and occasional bullets flying through the air my family advised me to wait until the situation quieted down.

Mrs. D [REDACTED] alleges that the first time she knew that the Department had decided she expatriated herself and that she had the right to appeal the Department's decision was January 1985 when she went to the Embassy to obtain a visa to visit the United States. After she was granted a visa, she asked to speak to a consul. "He drew out my file and informed me that I had lost my U.S. citizenship and why hadn't I made an appeal for retention of my American citizenship as had the other women [U.S. citizens who married Iraqi citizens and who had obtained naturalization]." The consular officer to whom she spoke has confirmed Mrs. D [REDACTED]'s account of what occurred in January 1985. "After searching files," he later informed the Department, "a folder relating to Mrs. D [REDACTED] and containing an approved certificate of loss of nationality was located." The consular officer also told her, he reported to the Department, "that since she had not physically received a copy of the certificate of loss of nationality prior to January 31, 1985, it might be possible for her appeal to be considered, even though more than one year had passed since the certificate's approval." The consular officer added in his report that he was "convinced Mrs. D [REDACTED] was not aware of the appeal procedure prior to the day she was given the certificate."

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The Department takes the position that the appeal is time-barred because Mrs. [REDACTED] has not presented a legally sufficient excuse for her delay in taking an appeal. The Department states that it

...questions the CLN that was found in Appellant's file and her contention of non-receipt. It is customary for a post to keep a copy of the CLN in its file, and the Department questions whether or not this CLN was the post's file copy. In addition, a CLN could have been mailed, and Mrs. [REDACTED] may have forgotten receiving it.

Appellant was aware that she was losing her U.S. nationality when she naturalized in Iraq. She willingly [sic] signed the Affidavit of Expatriated Person....

Whether appellant received a copy of the CLN or not is not relevant. She was on notice as of June 9, 1981 when she met with the consular officer, signed the Affidavit, completed her questionnaire, and returned her passport for cancellation that she had, or probably had, lost her citizenship.

The Department contends that if the loss of citizenship was a serious concern of Mrs. [REDACTED] she would have done something about it. She had a duty to retain her U.S. nationality or at least to be concerned. Her inaction in the face of such a potentially momentous event might easily be interpreted as an agreement or approval that her U.S. citizenship would be lost.

We do not agree with the Department's position. In our opinion, there is doubt whether Mrs. [REDACTED] received a copy of the approved certificate of loss of nationality, with the accompanying appeal information, before 1985. As we understand the statement of the consular officer who interviewed Mrs. [REDACTED] in 1985, he was of the view that it was her copy of the certificate of loss of nationality in the files. We must assume that the consular officer knew whether the certificate in the files was the Embassy's copy or not. It seems unlikely the certificate was mailed to her, given local circumstances in 1981. Plainly, she did not return to the Interests Section after June 1981, although she would have been advised to have made inquiries about her case through some safe means. Possibly there was an understanding

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between her and the consular officer that she would return to find out what action the Department had taken in her case, but there is no confirmation of this supposition in the record. Although Mrs. ██████ should have inquired much earlier, we cannot agree that she had a legal duty to do so. The legal duty rested on U.S. authorities (a) to inform her of her loss of nationality (section 358, Immigration and Nationality Act), and (b) to inform her of the right of appeal to this Board. (22 CFR 50.52).

Given the uncertainties involved and the absence of any indication in the Interests Sections's records either that a certificate of **loss** of nationality was actually mailed to Mrs. ██████ or she agreed to return to the Interests Section for the specific purpose of ascertaining what action the Department had taken on her case, we are constrained to conclude that the appeal is not untimely.

### III

The statute 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. <sup>3/</sup> There is no dispute that Mrs. ██████ applied for and was granted naturalization in Iraq. Whether she did so voluntarily is the first issue we must determine.

In law, it is presumed that a person who does any of the prescribed statutory expatriating acts does so voluntarily. The presumption may be rebutted, however, upon a showing by a preponderance of the evidence that the act was involuntary. <sup>4/</sup>

<sup>3/</sup> Section 349(a)(1) of the Immigration and Nationality Act. Text supra, note 1.

<sup>4/</sup> Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), provides that:

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. Except as otherwise provided in subsection (b), 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.

Public Law 99-653, approved November 14, 1986, repealed section 349(b) but did not, however, redesignate section 349(c).

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Mrs. [REDACTED] asserted in her initial submission to the Board that she did not want to lose her United States citizenship, but that "if I wanted to stay with the children and grandchildren I had to conform with the law and take out Iraqi citizenship." In brief, she contends, she did not act of her own free will because the laws of Iraq required her to become a citizen if she wished to reside there.

Duress of course voids an expatriative act. Doreau v. Marshall, 170 F.2d 721 (2nd Cir. 1948).

If by reason of extraordinary circumstances amounting to true duress, [the court said in Doreau, supra, at 724] an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is no authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country.

We see little in Mrs. [REDACTED] situation that was extraordinary, except perhaps the fact that presumably relatively few American women have married Iraqi citizens and decided to reside in that country. Iraqi legislation presented her with an uncomfortable dilemma: become an Iraqi citizen or leave the country. The question arises, however, whether as a matter of law Mrs. [REDACTED] can be said to have acted against her fixed will by factors which were not of her making.

In enacting Decree no. 180, the RCC exercised a prerogative of national sovereignty; it set conditions under which a certain class of alien residents might be permitted to continue to live in Iraq. Mrs. [REDACTED] made what we must assume was a free decision in 1953 to make her life there. Any dilemma that faced her as a result of the enactment of Decree no. 180 was, in a very real sense, self-generated; if she wished to continue to live in Iraq she would have to conform to the duly enacted laws of that state.

Although the choice offered her may have been difficult, it was, in the eyes of United States law, a choice: she could comply with the decree and thus place her United States citizenship in peril; or she could restructure her life and return to the United States, making plans to visit her family in Iraq as occasion permitted. There is no evidence that in a material sense her family in Iraq was dependent upon her. Furthermore, all her children were adults by 1981. Quite naturally she preferred to continue to live near her children and grandchildren. But many parents and grandparents are led by a variety of circumstances to live most of the time at a distance from their children and grandchildren. In the

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circumstances, she made a personal choice. If one has the opportunity to make a choice, there is no duress. Jolley v. Immigration and Naturalization Service, 441 F.2d 12—50— (5th Cir. 1971). The mere difficulty of the choice does not constitute duress. Prieto v. United States, 298 F.2d 12 (5th Cir. 1961).

Finally, we note that on June 9, 1981, one day after the date upon which she acquired Iraqi nationality, Mrs. [REDACTED] signed, ostensibly voluntarily, statements at the Interests Section in which she declared that she had sought and obtained Iraqi citizenship of her own free will. We find nothing in the record to call into question the validity of those statements.

The only sustainable conclusion is that Mrs. [REDACTED] became an Iraqi citizen of her own free will, unimpelled by the influence of another.

## IV

The remaining issue for decision is whether Mrs. [REDACTED] intended to relinquish her United States nationality at the time she obtained naturalization in a foreign state.

It is the Government's burden to prove by a preponderance of the evidence that appellant intended to relinquish her United States nationality. Vance v. Terrazas, 444 U.S. 252, 270 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260. The intent the Government must prove is the party's intent at the time the statutory expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive evidence of an intent to relinquish United States nationality, but it is not conclusive evidence of such intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 365 U.S. 129, 139 (1958) (Black, J. concurring.)

Mrs. [REDACTED] contends that she never intended to relinquish her United States citizenship. Yet the evidence of record dating from the moment she obtained naturalization contradicts this latter day contention. As we have seen, when she visited the U.S. Interests Section in June 1981 she completed a form for determining United States citizenship. The form contained one item which stated that if she voluntarily performed the act of naturalization with the intention of relinquishing United States citizenship, "you may sign the statement below." A facsimile of that statement follows:

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**STATEMENT OF VOLUNTARY RELINQUISHMENT OF U.S. NATIONALITY**

"I, Nancy [REDACTED] performed the act of expatriation indicated  
 (Name)  
 in Item 7 1 voluntarily and with the intention of  
 (a, b, c, d, or e)  
 relinquishing my U.S. nationality."

Signature Nancy [REDACTED] Date June 9, 1981

Moreover, as we have noted above, the consular officer asked Mrs. [REDACTED] if she would "feel comfortable" executing an affidavit of expatriated person. By subscribing to the following statement she indicated that she intended to relinquish her United States citizenship.

I further swear that the act mentioned above [naturalization in Iraq] was my free and voluntary act and that no influence, compulsion, force, or duress was exerted upon me by any other person, and that it was done with the intention of relinquishing my United States citizenship.

The contemporary evidence thus amply documents Mrs. [REDACTED] intention to transfer her allegiance to Iraq. And we have no reason to doubt that she knew precisely what she was doing, that is to say, that she acted knowingly and intelligently. She had, on her own admission, attempted to obtain naturalization several years before and surely understood the significance of the naturalization process. The comments the consular officer made to the Department a [REDACTED] interviewing Mrs. [REDACTED] in 1981 leave no doubt that Mrs. [REDACTED] was fully a [REDACTED] the important step she had taken.

Mrs. [REDACTED] seemed pleased and relieved [the officer wrote] that she was finally able to accomplish naturalization in Iraq. She is also somewhat interested in receiving confirmation of the loss of her United States citizenship.

In her submissions to the Board four years after her naturalization Mrs. [REDACTED] protests that she never intended to relinquish her United States citizenship. She contends that in 1981 when she visited the U.S. Interests Section she was told that she might not be a dual national, and, in effect, that she had, without more, lost her citizenship. We will not gainsay the sincerity of her recent

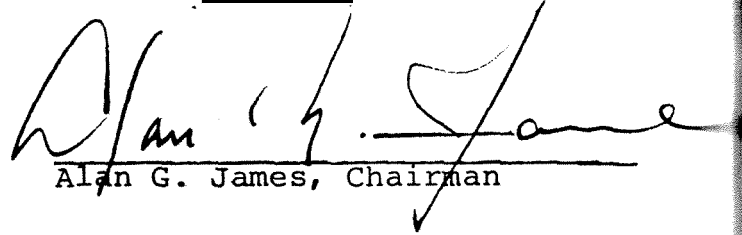
statements, but they were made long after the relevant time for determining a party's intent to relinquish or retain United States citizenship, and there is no evidence contemporaneous with her naturalization to corroborate them. Essentially, she asks the Board to accept a subjective test of intent to relinquish citizenship. This, the cases make quite clear, we may not do. Intent to relinquish or retain citizenship must be documented by objective criteria. words or conduct at or near the time the expatriative act is done are vastly more probative of intent than later statements, however sincere, with no concrete evidence to support them.

Finally, we find nothing in her conduct after she became an Iraqi citizen that would warrant our concluding she lacked the will and purpose in 1981 to relinquish United States citizenship.

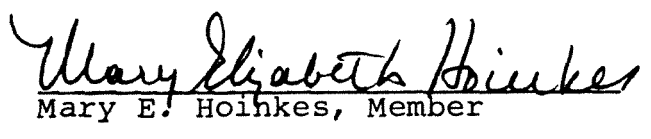
On all the evidence, the Department has carried its burden of proving that Mrs. [redacted] intended to divest herself of United States citizenship when she obtained naturalization in Iraq upon her own application.

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upon consideration of the foregoing, the Board hereby affirms the Department's determination that Mrs. [redacted] expatriated herself.

  
 Alan G. James, Chairman

  
 J. Peter A. Bernhardt, Member

  
 Mary E. Hoinkes, Member