

7 FAM 1230

ADMINISTRATIVE REVIEW AND APPEAL OF LOSS-OF-NATIONALITY FINDINGS

(CT:CON-289; 03-26-2009)
(Office of Origin: CA/OCS/PRI)

7 FAM 1231 INTRODUCTION

(CT:CON-289; 03-26-2009)

- a. Persons held to have lost (or not lost) U.S. nationality by performance of acts made expatriating by statute have the right to request *an* administrative review of the finding as part of the due process of law guaranteed by the Fourteenth Amendment of the U.S. Constitution. *INA 349(b) (8 U.S.C. 1481(b)) places the burden of proof "upon the party claiming that loss has occurred."*
- b. *On October 20, 2008, the Department of State published a Final Rule, Public Notice 6398 in Federal Register, Vol. 73, No. 203, pages 62196-62197 eliminating the Department's Board of Appellate Review in the Office of the Legal Adviser (L/BAR). The Rule revised 22 CFR 7 and 22 CFR 50 and authorized on a discretionary basis an alternative less cumbersome review of loss of nationality determinations by the Bureau of Consular Affairs (CA). The Interim Final Rule published at 74 FR 41256 July 18, 2008 was adopted without change.*
- c. The procedures for requesting *an* administrative review or appeal of the Department's administrative holding of loss of nationality are shown on the reverse side of Form DS-4083, Certificate of Loss of Nationality of the United States.
- d. The availability of *an* administrative review without time limitation does not constitute a mandatory procedure for administrative appeal. The passage of time does not preclude a review particularly since loss of U.S. nationality is an area of the law which has undergone substantial change and older cases are sometimes those most deserving of review.

7 FAM 1232 AUTHORITY TO CONDUCT ADMINISTRATIVE REVIEW OF LOSS DECISIONS

(CT:CON-289; 03-26-2009)

- a. Upon revision of the regulations, the Bureau of Consular Affairs, Directorate of Overseas Citizens Services, Office of Policy Review and Inter-Agency Liaison (CA/OCS/PRI) is solely responsible for *the* administrative review of previous findings of loss (or nonloss) of U.S. citizenship.
- b. 7 FAM 1234 provides guidance about procedures to be followed by CA/OCS/PRI in recording actions taken in loss-of-nationality cases in the American Citizen Services (ACS) System and the Passport Lookout and Support System (PLOTS).
- c. *Inquirers* should be advised to direct *a* written request for *an* administrative review to the following address and to include information regarding *their* intention to relinquish U.S. citizenship *at the time of the commission of the expatriating act* and the voluntariness of the expatriating act:

Express Mail:

Director
Office of Policy Review and Inter-Agency Liaison (CA/OCS/PRI)
Overseas Citizens Services
Bureau of Consular Affairs
U.S. Department of State
4th Floor
2100 Pennsylvania Avenue, N.W.
Washington, DC 20037
Phone: 202-736-9110
Fax: 202-736-9111
Email: ASKPRI@state.gov

Regular Mail:

Director
Office of Policy Review and Inter-Agency Liaison (CA/OCS/PRI)
Overseas Citizens Services
Bureau of Consular Affairs
U.S. Department of State
SA-29, 4th Floor
Washington, DC 20520

7 FAM 1233 FINDINGS OF LOSS OF NATIONALITY DECLARED

UNCONSTITUTIONAL BY THE U.S. SUPREME COURT

(CT:CON-289; 03-26-2009)

- a. If the statute under which the finding of loss of nationality was made has been declared unconstitutional by the U.S. Supreme Court, no formal administrative review of the case by CA/OCS/PRI is necessary.
- b. If a Consular Lookout and Support System (CLASS) CLASS reason code Q (questionable claim to U.S. citizenship) or CLASS reason code L (loss of nationality) occurs for one of the following reasons:

Expatriating Act	Section of Law	Notes
Deserting the armed forces of the United States at time of war, if and when convicted thereof by court martial and dishonorably discharged.	INA 349(a)(8) 8 U.S.C. 1481(a)(8) Section 401(g) Nationality Act of 1940 (NA)	Declared unconstitutional: Trop v. Dulles (1958) See 7 FAM 1200 Appendix B
Departing from or remaining outside of the United States in time of war or period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the armed forces of the United States.	INA 349(a)(10) 8 U.S.C. 1481(a)(10)	Declared unconstitutional: Kennedy v. Mendoza-Martinez (1963) See 7 FAM 1200 Appendix B
Naturalized citizen taking up residence in former country of origin	INA 352 8 U.S.C. 1484	Declared unconstitutional: Schneider v. Rusk (1964) See 7 FAM 1200 Appendix B
Voting in a foreign election	INA 349(a)(5) as originally enacted Section 401(e) NA	Declared unconstitutional: Afroyim v. Rusk (1967) See 7 FAM 1200 Appendix B

- c. *Domestic passport agencies/centers: The authorized passport specialist should delete the lookout and issue the passport.*
- d. *Posts abroad: Consular officers abroad are not authorized to remove CLASS entries; consequently, they should contact CA/OCS/PRI (ASKPRI@state.gov) to have the lookout removed.*
- e. *If a Certificate of Loss of Nationality (CLN) was approved for the case, CA/OCS/PRI (ASKPRI@state.gov) should be asked to retrieve the manual record and vacate the CLN. The PLOTS record should be updated accordingly.*
- f. If the "Q" lookout was entered in CLASS prior to 1990, when the administrative presumption that a U.S. citizen intends to retain U.S. nationality when he or she commits certain acts was adopted (see 7 FAM 1222), CA/OCS/ACS can review the case and remove the lookout as appropriate. This authorization relates to:
 - (1) INA 349(a)(1) naturalization in a foreign state;
 - (2) INA 349(a)(2) taking an oath of allegiance to a foreign state; and
 - (3) INA 349(a)(4) serving in a low-level position in the government of a foreign state.
- g. *CA/OCS/PRI presumes that one who has served in the military of a state not engaged in hostilities with the United States intends to retain one's U.S. citizenship.*

7 FAM 1234 RECORD KEEPING IN ADMINISTRATIVE REVIEW OF LOSS-OF-NATIONALITY CASES

(CT:CON-289; 03-26-2009)

- a. It is important that meticulous records be maintained of actions taken by the Department (CA and posts abroad) in loss-of-nationality cases.
- b. When a request for *an* administrative review of a previous finding of loss of nationality is received in CA/OCS/PRI, the previous case record will be retrieved from PLOTS and the Passport Issuance Electronic Records System (PIERS).
- c. The PRI attorney should complete the administrative review and prepare an advisory opinion on the case within 30 days of receipt, *or provide written notice to the post, requester or requester's attorney that additional time will be required:*
 - (1) The PRI attorney should prepare an interim response acknowledging receipt of the request for administrative review;

- (2) The office director should concur with the advisory opinion and the notification letter to the requester prepared by the attorney adviser. If necessary and appropriate, the Office of the Legal Adviser for Consular Affairs (L/CA) should be consulted;
- (3) The PRI attorney or office director will provide the ACS Office Director with a copy of the administrative review and advisory opinion, for appropriate feedback and follow-up within CA/OCS/ACS to ensure uniformity of ACS loss of nationality decision making;
- (4) If the finding of loss of nationality is reversed, the attorney adviser should ensure that the lookout is removed from CLASS via PLOTS; and
- (5) The correspondence should also be added to the PLOTS record to ensure that passport agencies and centers have access to the information. Not all Department offices have access to the ACS system.

7 FAM 1235 FACTORS TO BE CONSIDERED IN CONDUCTING ADMINISTRATIVE REVIEW OF PREVIOUS FINDINGS OF LOSS OF NATIONALITY

(CT:CON-289; 03-26-2009)

- a. Some cases in which the Department had previously held loss of nationality may be reversed administratively by the Department. Advantages of this procedure are that it is less expensive to the person appealing and more convenient. This is not a substitute for the person's right to appeal the decision in a court of law but is an option available in some cases.
- b. This procedure may be followed when:
 - (1) The law under which the holding of loss of nationality was made is later held unconstitutional; for example, a law concerning voting in a foreign election;
 - (2) A major change in the interpretation of the law on expatriation is made as a result of a U.S. Supreme Court decision; for example, the decision in *Afroyim v. Rusk* or *Vance v. Terrazas*;
 - (3) A major change is made in the interpretation of the law by the Department or is made by another agency and adopted by the Department. Most of these changes arose under previous statutes and prior to the decision in *Afroyim v. Rusk*; for example, cases involving naturalization of a minor; and

- (4) Substantial new evidence of involuntariness or intent, not previously considered but contemporaneous to the time when the potentially expatriating act was performed, is presented by the individual.
- c. CA/OCS/PRI will review a finding of loss of citizenship at any time at the request of the individual concerning whom the CLN has been approved, under the doctrine that an administrative agency has the ability to review its earlier decisions. In conducting an administrative review of a previous finding of loss of citizenship, CA/OCS/PRI examines whether the individual who expatriated herself or himself did so voluntarily with the intention of relinquishing U.S. citizenship and whether the appropriate procedures were followed in the particular case under review.

7 FAM 1236 REVIEWING THE RECORD

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- a. The first action CA/OCS/PRI will take is to retrieve the loss-of-nationality file, lookout and previous passport history of the applicant.
- b. CA/OCS/PRI will consider whether the *preponderance of the* evidence shows that it is more likely than not that the individual intended to lose U.S. nationality.
- c. CA/OCS/PRI will consider whether the individual has overcome the voluntariness presumption and demonstrated that it is more likely than not that the act was involuntary.
- d. The individual's signing of an Affidavit of Expatriated Person or Statement of Voluntary Relinquishment does not preclude the vacating of a previously approved CLN; however, in such an instance, it is incumbent upon the individual to present evidence of factors such as parental coercion, mental infirmity, misinformation provided by a consular officer, etc., that would refute the contents of the affidavit. All such evidence must relate to the time when the potentially expatriating act was performed and not to a subsequent "change of heart."
- e. Particular care should be given to reviewing "older" findings of loss of U.S. citizenship; i.e., those occurring prior to 1970 and, to a lesser degree, to cases decided in the period between 1970-1990. Bear in mind that during this period, the law of expatriation underwent radical changes as a result of a number of U.S. Supreme Court decisions. The net effect of these changes was to require that the Department find that the preponderance of the evidence establishes that an individual intended to lose nationality before approving a CLN. Please note that there was a significant lag during this period between (1) U.S. Supreme Court decisions on expatriation and (2) their full implementation by the

Department, and some U.S. consular officers may not have understood that they could not simply presume a person's intent to relinquish U.S. citizenship. Also be aware that, particularly before 1980, a person who had performed a potentially expatriating act usually was denied a U.S. passport while contesting a finding of loss of U.S. citizenship, and was not considered eligible to receive a visa to travel to the United States because that he or she had not yet been determined to be an alien. In cases when persons had an urgent need to travel to the United States (e.g., serious illness of a close family member) many have credibly recounted that they resolved this dilemma by relinquishing U.S. citizenship so that they could receive visas and make the trip.

- f. Contemporaneous evidence of intent: As noted in this section, the relevant intent is the person's intent at the time of the *commission of the* potentially expatriating act. Thus, evidence submitted generally should relate back to the time of the potentially expatriating act, i.e., the person's frame of mind at that time or circumstances which are illuminating with respect to the person's intent toward U.S. citizenship at that time. Persons providing affidavits, for example, generally should have first-hand knowledge of events at the time when the statutory act was performed rather than information based upon another's recounting of *them*. Note, however, that a person's behavior before or after the expatriating act can be relevant to the determination of the intent at the time of the act.
- g. Voluntariness and renunciation: Renunciation cases generally will involve the issue of voluntariness rather than intent. This is because a person renouncing U.S. nationality expressly attests to *an intention* to lose U.S. nationality by signing the Statement of Understanding and Oath of Renunciation (see 7 FAM 1280). However, if the intent was misinformed (based upon an error(s) of law or fact related by the consular officer *to the renunciant* at that time), it may be determined that the intent was not knowing and that therefore the intent required by law was not present.
- h. Mental illness or incompetence: Cases involving persons with a history of mental illness or developmental mental incompetence who have chosen to renounce U.S. citizenship, require careful review. It is not required that there be a showing of mental incompetence but rather that some impairment of judgment occurred such as to refute, by a preponderance of the evidence, the presumption of voluntariness which would otherwise apply (see 7 FAM 1290).
- i. Renunciation under the age of 18 or shortly after attaining age 18: Similarly, careful attention should be given to persons who renounced U.S. citizenship in the time period before, or shortly after, their 18th birthday. In many instances, and in many societies, it is not unusual for

such persons to be especially vulnerable to parental pressure despite contemporary denials of any such pressure. While persons may be legally emancipated, they may well be particularly subject to the undue influence of another, e.g., a parent (see 7 FAM 1290). *In such instances, it may be useful to obtain affidavits from the renunciant's parents indicating the absence of parental pressure.*

7 FAM 1237 INTERVIEWING THE PERSON SEEKING RECONSIDERATION

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CA/OCS/PRI may ask a consular officer to interview or convene a video teleconference with the individual residing abroad to obtain information regarding the voluntariness of the latter's actions in relinquishing her or his citizenship and/or her or his intentions with respect to the retention of U.S. citizenship at the time of the commission of the expatriating act.

7 FAM 1238 REVERSING FINDING OF LOSS OF NATIONALITY, VACATING CLN AND REMOVING CLASS LOOKOUT

(CT:CON-289; 03-26-2009)

- a. If CA/OCS/PRI decides to reverse the finding of loss of nationality and vacate the CLN, the individual's U.S. nationality is restored as of the date of the commission of the expatriating act that had served initially as the basis for the approval of the CLN.
- b. CA/OCS/PRI will communicate the decision to the individual and the post.
- c. CA/OCS/PRI will affix a specific stamp to the CLN reflecting that the CLN is vacated. The stamp notes the date of the decision, how the post and subject were notified of the decision, and bears the signature of the CA/OCS/PRI official making this determination.
- d. CA/OCS/PRI will remove the name from CLASS, close the PLOTS record, and update the ACS record. Copies of correspondence will be incorporated in the ACS and PLOTS records.
- e. CA/OCS/PRI will officially inform relevant federal agencies that the finding of loss has been overturned (see 7 FAM 1240).

7 FAM 1239 LACK OF SUPPORT TO REVERSE

PREVIOUS FINDING OF LOSS

(CT:CON-289; 03-26-2009)

If CA/OCS/PRI determines that there is inadequate support in the application and the record to reverse the CLN and that the finding of loss should in all likelihood be sustained, CA/OCS/PRI, after consultation with L/CA in appropriate cases, will notify the individual *and/or his/her representative*, and the post *as needed*, advising that additional evidence to support vacating the CLN should be provided and that failure to submit additional evidence within a prescribed time period will result in the filing of the application for overturning the loss of nationality.