American Immigration La
918 F Street, NW
Washington, DC 20004
www.aila.org

Expatriation: Overview and Special Renunciation Problems

By

Laurie Grossman and Leon Wildes

I. Introduction

Citizenship has been described by the U.S. Supreme Court as "the right to have rights," the deprivation of which is a "form of punishment more primitive than torture." 1 United States citizenship is particularly cherished and revered, representing the right to live in a free and democratic society, with the security and advantages it affords. Recognizing the precious nature of this privilege, our laws safeguard against its unwitting relinquishment or abandonment under coercion or duress.
Just as our laws protect against expatriation against the citizen's will, it is also well established that citizenship may not be imposed upon an individual against his or her will. Expatriation, legally defined as "the voluntary renunciation or abandonment of nationality and allegiance" 2 was recognized by the Buchanan administration in 1859 as a "natural right" protected under international law. 3 Congress gave legislative sanction to this view in the Expatriation Act of 1868, declaring that "the right of expatriation is a natural and inherent right of all people." 4
This article will provide a brief historical survey of the law of expatriation, describe the current evidentiary standards for review of these cases and will touch upon a few problem areas – notably, recent developments relating to renunciation of U.S. citizenship for tax avoidance purposes.

II. Authorities

A. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101-et seq. (hereinafter INA)
1. INA § 349 (a) describes the acts by which a national of the United States may lose nationality and (b) places the burden of proof in such matters on the person or party seeking to establish the loss, by a preponderance of the evidence.
2. INA § 358 describes the issuance of a Certificate of Loss of Nationality (CLN).
3. INA § 360 provides for judicial proceedings for a declaration of U.S. nationality.
B. Regulations at 22 CFR
1. 22 CFR Part 7 sets forth the applicable procedures for review of a loss of nationality by the State Department's Board of Appellate Review (BAR).
2. 22 CFR § 50.40 sets forth procedures for issuance of a Certificate of Loss of Nationality by the Department of State. 22 CFR § 50.40(a) describes the administrative standard of evidence now in effect.
3. 22 CFR § 50.50 sets forth the procedures for renunciation of U.S. citizenship.
C. 7 U.S. Department of State, Foreign Affairs Manual: 7 FAM § 1200 Loss and Restoration of U.S. Citizenship

1. 7 FAM § 1216 describes evidence of involuntariness.
2. 7 FAM § 1218.1 lists indicia of intent to relinquish U.S. citizenship.
3. 7 FAM § 1231 describes the procedure for administrative review of a Certificate of Loss of Nationality by the Department of State.
4. 7 FAM § 1232 describes the appeal process before the Board of Appellate Review.
5. 7 FAM § 1253 sets forth the requirements for renunciation.
6. 7 FAM § 1254 describes special renunciation problems.
7. 7 FAM § 1260 explains in detail the statutory bases for loss of nationality.

III. Key Considerations: Overview of the Law on Loss of Nationality

A. The Statutory Basis for Loss of Nationality

Section 349 of the INA provides that a person who is a national of the United States (whether by birth or naturalization) shall lose such nationality 5 by performing certain acts voluntarily, and with the intention of relinquishing U.S. nationality. 6 The statutory acts, in brief, include: 7

1. obtaining naturalization in a foreign state;
2. taking a formal oath of allegiance to a foreign state;
3. entering, or serving in, the armed forces of a foreign state as an officer, or while such foreign state is engaged in hostilities against the United States;
4. accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state;
5. making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state;
6. making a formal written renunciation of nationality in the United States in time of war, and;
7. committing any act of treason against the United States.

The statute places the burden of proof squarely on the shoulders of the person or party claiming that the loss occurred and creates a rebuttable presumption that a person who has performed one of the enumerated expatriating acts, has done so voluntarily. 8

A substantial body of federal court precedent is reflected in the current state of the law on deprivation of citizenship. For a loss of nationality to be found under INA § 349, findings of fact and law must be made with respect to three constitutionally mandated prerequisites:

1. that the individual validly performed a statutory expatriating act;
2. that such act was voluntarily performed; and
3. that such act was performed with a specific intent to relinquish United States citizenship.

B. Finding of Loss of Nationality

The following discussion centers on the body of case law which has evolved predominantly through decisions in the federal courts, the Board of Appellate Review (hereinafter BAR) and various State Department guidelines and pronouncements. Note that although jurisdiction to determine citizenship issues for persons in the United States may vest simultaneously with the Attorney General (arising in the context of a claim to U.S. citizenship in deportation proceedings), few recent decisions before the Board of Immigration Appeals specifically address loss of nationality issues.

The three prerequisites to establishing that a loss of nationality occurred will be addressed seriatim.

1. Performance of a Valid Expatriative Act

Pursuant to INA § 349(b) noted above, the party claiming the loss bears the burden of proving that the expatriating act was performed. Furthermore, in order for the act to have been a valid act, it must have been performed in conformity with applicable legal principles, since the right of citizenship should not be destroyed by an ambiguity. 9 Determining whether the expatriative act (e.g., obtaining naturalization in a foreign state or making a formal renunciation of nationality) was performed turns on a simple factual inquiry, and is therefore rarely the issue in loss of nationality cases.

2. Voluntariness of the Expatriative Act

Proving that the expatriative act was voluntarily performed has been held to be constitutionally required. 10 In Nishikawa v. Dulles, the issue of voluntariness was raised by a Japanese-American who was held to have lost U.S. citizenship by serving in the Japanese army during World War II. The Supreme Court held that the government had the burden of proving the voluntariness of the expatriating act by clear, convincing and unequivocal evidence. Congress subsequently amended INA § 349, creating a rebuttable presumption that the individual performing the expatriating act does so voluntarily, and shifting the burden back to the

party contesting the loss. The presumption of voluntariness may be rebutted by establishing, by a preponderance of the evidence, that the act was not freely performed. Lack of "free will" may result from coercion or duress, from lack of capacity to perform the act, or other circumstances bearing on voluntariness.

Establishing that an act was performed involuntarily is extremely difficult, and cases finding that the presumption of voluntariness has been adequately rebutted are rare. Absence of free will has been found in the following cases: where the individual lacked the mental capacity to perform a voluntary rational act at the time citizenship was renounced, 11 where a minor child renounced U.S. citizenship as a result of parental, religious and economic pressure amounting to duress, 12 and where the individual remained abroad, beyond the time permitted under prior citizenship law, in order to care for a terminally ill relative. 13

Perhaps the most frequent claim bearing on the voluntariness of an expatriative act, is that citizenship status was put in jeopardy (usually by naturalization in a foreign state) as the result of economic duress so extreme that the need for self-preservation robbed the act of its essential voluntary nature and negated free choice. Accordingly, most successful claims of economic duress have involved the type of dire economic plight imposed upon an individual as a result of the chaos of war, where an expatriating act was performed to obtain money "in order to live." 14 Few parties claiming economic compulsion have prevailed in recent years.

In finding that the presumption of voluntariness of the act has not been rebutted, decisions have frequently relied on the language of Jolley v. INS 15 that "opportunity to make a decision based upon personal choice is the essence of voluntariness." The Jolley decision distinguished the facts presented in Nishikawa v. Dulles 16 in which Nishikawa was forced by Japanese penal law to join the Japanese army, thus committing an expatriative act. In finding that Jolley's expatriating act was in no way compelled by law, but rather was based upon personal choice, the U.S. Court of Appeals for the Fifth Circuit found that his renunciation of U.S. citizenship (for the purpose of avoiding military service based on moral grounds) was purely voluntary.

The individual's failure to pursue alternatives to relinquishing U.S. citizenship has been given substantial weight in decisions in which the defense of duress was presented. For example, in Richards v. Secretary of State, 17 appellant Richards had applied for employment with the Boy Scouts of Canada. Upon being advised that he would be required to obtain Canadian citizenship as soon as he became eligible, he declared his intention to become a Canadian citizen, and subsequently naturalized to Canadian citizenship in 1971. The circuit court found that despite the fact that Richards was required to obtain Canadian citizenship in order to retain his job, he had not established that any hardship would result if he failed to attain Canadian citizenship, as he had other possibilities for employment. The court stated that:

. . .it does not appear that, upon becoming aware that he would have to renounce his United States citizenship in order to acquire Canadian citizenship, Richards made any attempt to obtain employment that would not require him to renounce his United States citizenship. Nor does it appear, based on his past employment history in Canada, that such an attempt would have been futile. . . . There was no evidence that he was under any particularly onerous financial obligations. In short, the evidence in the records amply supported the district court's finding that Richards became a Canadian citizen purely for the purpose of career advancement. In any event, it falls far short of establishing economic duress. 18

The Richards decision goes on to state as follows:

The cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.

We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly, simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship. 19

Similarly, appellants pleading economic duress before the BAR have experienced little success. For example, the decision in Matter of P-G-S- 20 involved an appellant who worked for a child care program funded by the Canadian government, which required him to obtain Canadian citizenship or lose his position. The appellant alleged that the child care job he held was the sole source of his income, that he

had no training to obtain a job in a different field, and that he did not have resources to return to the United States. Accordingly, he argued he had no viable alternative to obtaining naturalization in Canada. While acknowledging that economic duress may render an expatriating act void under the principles set forth in Stipa v. Dulles and Insogna v. Dulles, 21 the Board concluded that:

. . .the theory that merely some degree of economic hardship need be shown is totally inconsistent with the proposition, which we consider sound, that only the most exigent circumstances may excuse doing an act that places the priceless right of citizenship in jeopardy.

Accordingly, the Board found that:

. . .appellant's plight, if plight it was, fell short of "dire." In brief, it appears to us that, as a matter of law, appellant had a choice between jeopardizing his United States nationality and attempting to solve his economic and career problems in ways that would not have caused his expatriation. If one has a viable alternative to doing an expatriative act, there is no duress. 22

More recently, the BAR has found that the defense of duress was not sustained in a wide array of fact patterns presented by appellants, including: where considerable pressure to renounce citizenship had been brought to bear by the political party which had supported appellant's qualification as a candidate for the Guatemalan presidency, 23 where extreme duress was alleged as the result of marital devotion 24 and where an attorney alleged that he was required to renounce U.S. nationality in order to pursue his career as a public prosecutor in Germany. 25 In these and like cases, the BAR found that the pressures that allegedly forced appellant into renunciation were "entirely self-generated." 26

In one of the few recent cases in which voluntariness was found lacking, the case was remanded for vacation of the CLN where it was shown that at the time of renunciation, the individual was delusional as suffering from traumatic stress. 27 The State Department has also found economic, political and social duress to exist in the case of six individuals who had traveled to Israel in the 1970s under the belief that they would be granted Israeli citizenship. When such citizenship was refused, the individuals renounced U.S. citizenship in order to avoid deportation and separation from their families in Israel. The State Department vacated the CLNs. 28

3. Intent to Relinquish U.S. Citizenship: Pre-1990 Cases

Historically, the requirement that intent to relinquish U.S. nationality be proven has provided the most fertile area for litigation in loss of nationality cases. In response to a series of important cases which imposed an increasingly onerous burden on the government to prove subjective intent, in 1990, the Department of State radically altered its manner of assessing the issue of intent in these matters, creating a sharp division in the cases. Preliminarily, we will look at the cases prior to 1990, as they provided the legal foundation for this third prong of the test in loss of nationality cases.

Commencing in 1967 with the landmark Supreme Court case Afroyim v. Rusk, 29 an essential tenet of the law relating to expatriation has been that citizenship cannot be terminated unless the citizen "voluntarily relinquishes" citizenship. Afroyim held that under the 14th Amendment to the U.S. Constitution all persons born or naturalized in the United States are citizens of the United States, and that Congress lacks the power to deprive a citizen of this constitutionally bestowed right without his or her assent. A Statement of Interpretation by Attorney General Ramsey Clarke in 1969 further provided that, in accord with Afroyim, it was necessary to ascertain the citizen's intent at the time the expatriative act occurred. The Attorney General stated that Afroyim made it clear that an act:

which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States cannot be the basis for expatriation. . . ."Voluntary relinquishment" of citizenship is not confined to a written renunciation, as under section 349(a). . . of the Act. It can also be manifested by other actions declared expatriative under the Act, if such actions are a derogation of allegiance to this country. 30

Pursuant to the Attorney General's statement, guiding principles were developed to assist the Department of State in determining when an action was "in derogation of allegiance" to the United States. These guidelines, incorporated into the Foreign Affairs Manual, included a list of acts, the voluntary performance of which would be considered highly persuasive evidence of intent to relinquish citizenship. Those acts mostly paralleled the current statutory provisions, and included: naturalization in a foreign state, a meaningful oath of allegiance to a foreign state, service in the armed forces of a state engaged in hostilities against the United States, and service in an important political post in a foreign government. 31

Subsequent editions of the Foreign Affairs Manual expanded upon these examples of intent. The acts listed as evidencing intent to relinquish U.S. nationality included: registration with the authorities of the foreign country of residence as an alien or as a citizen of the foreign country or holding documents issued by the foreign country; indicia of intent to retain U.S. nationality included: registration or documentation as a

United States citizen, registration of one's children as United States citizens, consultation with a U.S. official regarding the effect of the expatriative act in question, and attempts to avoid performance of the expatriative act. 32

Any remaining doubts as to whether a specific finding of intent to relinquish citizenship was constitutionally mandated were eliminated by the Supreme Court decision in Vance v. Terrazas. 33 The Court reaffirmed that for loss of nationality to be found the ". . .trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish citizenship." 34 The Court went on to conclude that it was the government's burden to prove such intent, which could be "expressed in words or . . . found as a fair inference from proven conduct," by a preponderance of the evidence. 35

In the wake of the Terrazas decision, the Foreign Affairs Manual guidelines were revised yet again, adding that acts which would be considered to evidence intent to retain American citizenship included the continued use of a U.S. passport and the performance of rights and duties of a United States citizen, such as voting, filing and paying income taxes. On the other hand, evidence of intent to relinquish one's U.S. citizenship would be indicated by the exclusive use of a foreign passport or application for a U.S. visa, making statements denying U.S. citizenship in connection with tax, employment or financial records, taking part in the political life of the foreign state, failing to maintain documentation for one's self and one's children as U.S. citizens, and failing to fulfill the obligations of U.S. citizenship, such as filing taxes or registering for military service. 36

As Attorney General Clarke's statement indicated, the "intent" that must be proven by the party claiming the loss is the intent to relinquish nationality at the time the expatriative act is performed. Accordingly, as issues of loss of nationality have arisen perhaps most frequently in the context of naturalization in a foreign state, there has been a sharp division in the outcome of such cases depending on whether or not the foreign state demands the express renunciation of any previous allegiance. However, "knowing or believing that an act might result in loss of citizenship is not the same thing as intending to give up that citizenship." 37 The evidence which is most probative dates from the time period surrounding performance of the expatriative act. A formal statement renouncing United States citizenship which was made contemporaneously with the expatriative act would, therefore, be powerful evidence of intent to relinquish U.S. nationality.

With respect to naturalization in a foreign state where the oath of allegiance did not contain a renunciatory oath, judicial criteria have required a review of circumstantial evidence relating to intent. Thus, in cases prior to 1990, acts which were claimed to be inconsistent with United States citizenship – such as entering the armed forces of the foreign state, holding oneself out as a citizen of the foreign state, use of travel documents of the foreign country to the exclusion of a U.S. passport, etc. – were carefully and comprehensively reviewed, along with all other circumstances which might be relevant to the individual's intent at the time the expatriating act occurred.

The authority adjudicating the claim, whether in administrative or judicial proceedings, has also looked to the individual's failure to discharge or exercise duties and rights of United States citizenship subsequent to obtaining foreign citizenship. For example, a strong case of intention to retain U.S. citizenship may often be made out if the individual continues to discharge the obligations of U.S. citizenship (paying U.S. taxes, voting in U.S. elections, etc.) However, failure to discharge the duties of citizenship does not necessarily establish that intent to relinquish U.S. citizenship was present. 38 As noted by the BAR in Matter of R-A-R-

[i]n the Board's experience it is not atypical behavior for an American citizen who obtains the citizenship of a foreign country like Canada, to be negligent about the rights and responsibilities of United States citizenship. 39

On the other hand, naturalizing to foreign citizenship which included making an oath or declaration renouncing former nationality or allegiance, was generally deemed to be sufficient to establish the individual's intention to relinquish U.S. nationality. 40 The motivation for taking the renunciatory oath has been found to be irrelevant. 41 Furthermore, the renunciant's subsequent conduct did not ordinarily raise sufficient reasonable doubt about the intent manifested in making the oath to warrant a finding that U.S. nationality was retained. Thus, in nearly every pre-1990 BAR 42 case which involved foreign naturalization with a renunciatory oath, the Board found that the government had sustained its burden of proving that a loss of nationality had occurred, and that intent to relinquish was expressed by virtue of the appellant's declaration renouncing allegiance to the United States.

Occasionally, however, the renunciant's carelessness in important matters has worked to his or her advantage when alleging that a renunciatory oath lacked the requisite intent. For example, in Parness v. Shultz, 43 the court found that where an Israeli naturalization application had been completed for the appellant by a clerk, and where the appellant's personality and demeanor supported his testimony that he operated his personal life with "trust and naivete," the government had not borne its burden of proving intent to relinquish U.S. citizenship. The court found that appellant acted with "gross negligence" in taking a renunciatory oath, but that due to the unique circumstances of the case, the government's burden of proof had not been met. 44

4. The Evidentiary Standard Under the Department of State 1990 Cable

On April 16, 1990, the Department of State sent a cable to all diplomatic and consular posts which radically altered its procedures in the processing of loss of nationality cases. 45

Noting that "on one level, the general legal standard for deciding loss of citizenship cases is deceptively simple. . ." the Department nevertheless characterized the issue of proving intent as "inherently and uniquely difficult." Treating its manner of reviewing evidence in such cases as principally a "management issue," the Department explained that "changes in interpretation of citizenship law have made cases progressively more difficult to manage...we must look to substantial changes in the process if we are to provide equitable, timely and defensible decisions."

The heart of the cable is found at paragraph 5, which establishes a "uniform administrative standard of evidence" for the review of loss of nationality cases by the State Department. Essentially, it creates a presumption that U.S. citizens intend to keep their citizenship when performing certain expatriating acts. This assumption will be considered inapplicable only in five enumerated circumstances:

"– When the individual has taken a policy level position in a foreign state per Section 349(a)(4), INA;
– When the individual has formally renounced U.S. nationality before a U.S. consular officer as described in Section 349(a)(5), INA;
– When the individual has been convicted of treason per Section 349(a)(7), INA;
– When the individual has performed an act potentially expatriating by statute and when the proven conduct is so inconsistent with allegiance to the United States as to compel the conclusion that the intent to relinquish was present. (The Department states that it envisions cases in this category would be quite rare and would involve fact situations substantially beyond pro forma disavowals of allegiance to the U.S.); or
– When an individual has performed an act potentially expatriating by statute and formally advises the consular officer in writing that his or her intent was to relinquish U.S. nationality." 46

The effect this cable has had on this area of law is dramatic, as illustrated by the following statistics:

· The Board of Appellate Review (which in 1988 and 1989 issued over 20 decisions per year on loss of nationality) reported on some 16 cases before it in 1990: of these, three appeals were dismissed as time-barred, three vacated the CLN at the request of the Department of State based on the new evidentiary standards, eight reversed findings of loss of nationality and two affirmed findings of loss of nationality but were later reversed on motion.

· In 1991, the Board of Appellate Review reported only three cases: one appeal was dismissed as time-barred, one reversed the finding of loss and one (a case involving a child abductor) affirmed the finding of loss.

· An additional 23 cases were reported by the BAR between 1992 and mid-1998. These cases demonstrate that it is still possible, although difficult, to prove that loss of nationality occurred. For the nine individuals for whom specific findings of fact were made that they had expatriated themselves (i.e., not including dismissals of appeals as being time-barred), seven of them had made formal renunciations pursuant to INA §349(a)(5). 47 The other two, both of whom had obtained naturalization as Korean citizens, had made formal statements before a U.S. Consular Officer that the foreign naturalization was accomplished with the intention of relinquishing U.S. citizenship. 48

The losing appellants in these cases all fell within the stated exceptions to the new evidentiary standards. The principal argument made was that as the result of economic or other severe duress, the expatriating act was not voluntary. In affirming the Department's determination of loss of nationality in these cases, the BAR found that duress was not proven. 49 Moreover, the Board held, motivation does not negate intent as long as the individual has exercised a conscious purpose. 50

In conclusion, in the absence of a formal renunciation or statement before a consular officer (which is still an effective means of divesting oneself of U.S. nationality), it has become increasingly difficult to prove that loss of nationality has occurred. Indeed, in 1995, Secretary of State Warren Christopher found these loss of nationality cases to be so difficult for the government to prove that he suggested that:

. . .It is no longer possible to terminate [an] American's citizenship without the citizen's cooperation. The laws should be amended to reflect this reality. We intend to propose new legislation that would require American citizens to expressly renounce U.S. citizenship before a consul as the only means to divest themselves of U.S. citizenship in all cases other than those in which the individual assents to loss and thus allow the Congress to assess the policy dimensions of such a change. . . 51

Note that even in cases in which a formal renunciation of citizenship under INA § 349(a)(5) has taken place, the renunciant may still be able to show that the act was involuntary, or that due to a lack of capacity, it was performed without understanding and thus without the requisite intent. 52

C. Effective Date of Loss

The effective date of the loss of citizenship is the date on which the expatriating act occurred, if accompanied by the requisite intent to relinquish, regardless of when the CLN is issued. 53 However, the approval of a CLN by the Department of State constitutes a final administrative determination of loss of nationality which is subject to judicial review. 54

IV. Problem Areas

As former Secretary of State Warren Christopher noted, it is no longer possible to terminate an American's citizenship without his or her cooperation. 55 For the citizen who wishes to clearly manifest intent to relinquish U.S. nationality through a formal renunciation procedure, a prescribed procedure must be followed: The oath of renunciation must be executed (1) in the presence of a diplomatic of consular officer (2) outside the United States and (3) in the precise form prescribed by the Secretary of State. 56 Formal renunciation of citizenship presents some additional problems in the following areas:

A. Minors

There is no legal minimum age under which renunciation is not permitted. However, consuls adhere to the common law principal that a child under seven years of age is not capable of understanding. In addition, an arbitrary age limit of 14 years of age is set under which understanding must be proven by substantial evidence. For any minor (under age 18), the consular officer is advised to take special measures (such as by conducting a private interview with the minor) to ensure that the act is voluntary and not under duress of a parent or guardian. 57

B. Mental Incompetence

If the mental competency of a would-be renunciant is in question, the consular officer is directed to gather background information to ascertain mental state and assure voluntariness of the act. This includes medical statements, information from local authorities, family members and neighbors. 58

C. Prisoners

Consular officers are directed to explain to prisoners that renouncing U.S. citizenship will not exempt them from prosecution in the United States, and should explain prison transfer treaties. The oath should be administered on consular premises, rather than in prison. 59

D. Renunciation for Tax Avoidance

Individuals who give up their U.S. citizenship in order to avoid U.S. taxes may incur tax consequences under Internal Revenue Code § 877, which taxes certain former U.S. citizens on U.S. source income for a period of ten years after giving up their citizenship. 60 The Foreign Affairs Manual directs consular officers to apprise renunciants of this possibility and suggest they contact the Office of International Operations of the IRS for further information. 61

Furthermore, pursuant to the Health Insurance Portability and Accountability Act of 1996, 62 the reach of IRC § 877 was significantly expanded. The "expatriation tax" now applies to certain long-term residents whose U.S. residency has been terminated, 63 and the categories of income and gains that are treated as "U.S. source" income have been enlarged. The motive of tax avoidance is presumed for certain individuals of substantial means, and under the new rules, individuals giving up citizenship after February 5, 1995 must provide the following information to the IRS:

1. The person's tax identification number (usually his/her social security number);
2. The principal foreign residence mailing address;
3. The foreign country in which the individual is residing;
4. The foreign country of which such individual is a citizen; and
5. For individuals having a net worth in excess of $500,000, information detailing their assets and liability.

In addition to the above, immigration-related legislation passed in 1996 subjected these "taxpatriates" to rules affecting not just their finances, but their ability to enter the United States. The Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 64 (IIRAIRA) significantly expanded the grounds for excluding aliens from the United States. Among other provisions, it rendered excludable "any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation. . ." 65 This amendment applies only to individuals who renounced United States citizenship on or after the effective date of the Act, September 30, 1996.

From the outset, the State Department acknowledged that application of the new bar was ". . .beset with operational complications. At least three agencies play a role in the implementation of this section...The role of the Department and the consular officer is very limited in implementing this ground of ineligibility. . ." 66 Indeed, to date it does not appear that the DOS has refused any visas under § 212(a)(10)(E), nor has the INS written regulations to enforce the new provisions. Accordingly, it remains unclear how key terms such as "officially renounces" and "for the purpose of avoiding taxation" will be interpreted.

To implement the requirement that persons losing citizenship report certain information to the IRS, the State Department cabled all consular posts in November 1996, advising them to collect the required information (social security number, etc.) and to include it in any CLN package sent to the Department for review. 67 This cable also set forth the text of a new "Statement of Understanding" which all renunciants are now required to complete. It specifically acknowledges that if the renunciation is determined by the Attorney General to be motivated by tax avoidance, the renunciant may be found excludable. Subjects of loss of nationality are free to submit any supplemental statements they wish to make in the loss of nationality documentation process.

The cable further provides that it is the IRS that will determine whether an individual falls within one of the exempt categories under the tax law. Consular posts will not make that determination, nor will they determine whether tax avoidance was the motivation for loss of citizenship. If a final determination is made by the Attorney General that renunciation of U.S. citizenship was for the purpose of avoiding U.S. taxation, this determination will be placed in the computer system so that consuls and border posts have the information available to them. Note that, in accordance with the Health Insurance Portability and Accountability Act of 1996, the IRS already publishes a quarterly list in the Federal Register providing the names of individuals losing U.S. citizenship within the meaning of INA § 877(a).

As previously noted, the new tax provisions "presume" a tax avoidance motive for certain individuals. Under the IRS rules, an individual will be treated as having a principal purpose to avoid taxes if: the average annual net income of such individual for the period of five taxable years ending before the date of the loss of U.S. citizenship is greater than $100,000, or the net worth of the individual as of such date is $500,000 or more. 68

Tax avoidance will not be presumed if, within the one-year period beginning on the date of the loss of U.S. citizenship, an individual who meets any one of the criteria set forth below, submits a ruling request to the Internal Revenue Service to determine that such individual's loss of citizenship did not have as a principal purpose the avoidance of taxes:

· The individual became at birth a citizen of the U.S. and a citizen of another country and continues to be a citizen of such other country;

· The individual becomes (within a reasonable period after the loss of U.S. citizenship) a citizen of the country in which (i) such individual was born; (ii) such individual's spouse was born; or (iii) either of said individual's parents were born;

· The individual, for each year in the ten-year period ending on the date of loss of U.S. citizenship, was present in the U.S. for not more than 30 days; or

· The individual's loss of U.S. citizenship occurs before such individual attains the age of 18½. 69

It is important to recall that the new basis for a finding of inadmissibility under the Act applies only to those who have formally renounced U.S. citizenship after September 30, 1996 and other expatriates are not subject to this bar. Accordingly, former citizens who have committed expatriating acts that did not amount to a "formal renunciation" may try to prove that they expatriated themselves under one of the other statutory bases, for example by obtaining naturalization in a foreign state without formally renouncing U.S. nationality.

If presented with such a case, keep in mind that the burden of proof in loss of nationality cases is on the party claiming that the loss occurred. 70 This, coupled with the presumption that citizens intend to retain their citizenship in most instances 71 makes it difficult to meet the burden of proof for an individual trying to prove loss of citizenship in the absence of a formal renunciation. As previously noted, statements of intent which were contemporaneous with the expatriating act (but short of an "official" renunciation if

occurring after September 30, 1996) would be the best evidence such individuals could proffer. Circumstantial evidence may also be provided, such as the indicia of intent noted in the FAM. 72 In conclusion, given the gravity of the risk if a tax avoidance motive is found under INA § 212(a)(10(E), practitioners should be particularly cautious when advising clients who seek to renounce U.S. citizenship.