

April 30, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J ■■■ Ma ■■■ d ■■■ l ■■■ R ■■■

This is an appeal from an administrative determination of the Department of State that appellant, J ■■■ Ma ■■■ d ■■■ l ■■■ R ■■■ expatriated himself on January 9, 1969 under the provisions of section 349(a)(4)(B) of the Immigration and Nationality Act by accepting employment with the Government of Venezuela. 1/

The Department of State determined on October 20, 1982 that d ■■■ l ■■■ R ■■■ expatriated himself by accepting a post at the Embassy of Venezuela in Beirut, Lebanon. It now submits, after further examination of the record, that it cannot prove d ■■■ l ■■■ R ■■■ knew he was a United States citizen when he accepted the aforementioned diplomatic post. Accordingly, the Department requests that the Board remand the case for the purpose of vacating the certificate of loss of nationality that was approved in appellant's name.

The Board will grant the request.

1/ Section 349(a)(4), 8 U.S.C. 1481(a)(4), reads 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 -

...

(4)(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or
 (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

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I

A consular officer of the United States Embassy at Caracas, [REDACTED] executed a certificate of loss of nationality in appellant's name on May 26, 1982. 2/ The officer certified that D. L. R. [REDACTED] acquired the nationality of [REDACTED] by birth there on [REDACTED]; that he acquired the nationality of the United States by virtue of his naturalization in 1943; that he accepted employment with the Government of [REDACTED] on January 9, 1969; and thereby expatriated himself under the provisions of section 349(a)(4)(B) of the Immigration and Nationality Act. 3/

2/ 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. 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.

3/ It is not clear why the consular officer applied sub-paragraph (B) of section 349(a)(4) to appellant's case. D. L. R. [REDACTED] was a Venezuelan citizen in 1969 when he accepted employment with the Venezuelan Government, and it would appear that section 349(a)(4)(A) should have been the grounds for the Embassy's action. Section 349 (a)(4) (B) is intended to apply to United States citizens who accept foreign government employment but do not hold or acquire the nationality of the foreign country.

The Department approved the certificate on October 20, 1982. De los Rios gave notice of appeal one year later. In December 1985 he finally perfected his appeal. 4/

On April 3, 1986 the Deputy Assistant Secretary for Consular Affairs submitted the administrative record upon which the Department's determination of loss of nationality was based and a memorandum in which the Department requested that the Board remand the case so that the Department might vacate the certificate of loss of appellant's nationality.

The Department's memorandum noted that the record showed that in 1967 the Embassy at Caracas executed a certificate of loss of nationality in appellant's name on the grounds that he had expatriated himself in 1965 by accepting a position with the Venezuelan Ministry of Mines and Hydrocarbons. The Department's memorandum continued:

4/ When it acknowledged appellant's notice of appeal in the fall of 1983, the Board requested that he submit additional information about his case. Appellant did not reply to the Board's letter. In July 1985 the Board advised appellant by letter sent to him through the Embassy at Caracas that it would terminate proceedings unless it heard from him promptly. Appellant responded to the Board that he had not received the Chairman's October 1983 letter. The Board accepted appellant's explanation for the delay in pursuing his appeal, and in December 1985 appellant submitted a proper appeal.

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Appellant's case was then referred to the Department for approval on May 19, 1967, shortly before the Supreme Court decided Afroyim v. Rusk, 387 U.S. 253 (1967), on May 29, 1967.

On September 12, 1967, Appellant was advised by the Embassy that his case had been referred to the Department for a determination in accordance with the Afroyim decision. At that time he was advised to use a Venezuelan passport with a U.S. visa to travel to the U.S....

On January 9, 1969 Appellant accepted a position as Minister Counsellor for Petroleum Affairs at the Venezuelan Embassy in Beirut, Lebanon.

The Certificate of Loss of Nationality was disapproved on October 29, 1969, because Appellant's 1965 government post was not of a sufficient level to cause expatriation under section 349(a)(4)(A). However, Appellant was not notified until December 5, 1969.

On November 13, 1969, Appellant accepted a position as Governor for Venezuela before the Organization of Petroleum Exporting Countries (OPEC) with the rank of Ambassador. When he was notified in December 1969 that his previous CLN had been disapproved, he was also notified that his passport and naturalization papers were not being returned because he was once again working for the Venezuelan Government in a higher capacity. Letter from Embassy Caracas to Appellant, dated December 5, 1969.

Appellant contacted the U.S. Embassy in December 1969, citing as improper the Department's failure to notify him in October 1969 that his U.S. citizenship was reinstated.

In September 1970 Appellant came to the Embassy to apply for a tourist visa for his Venezuelan tourist passport. Action on his visa application was suspended because his citizenship status had not been determined. He stated at that time that, because the Department had taken two years to determine his citizenship

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status previously, and because he needed to travel at once, that he would travel to the U.S. on his Venezuelan diplomatic passport.

From May 17, 1967, when his passport and naturalization papers were retained, until present, Appellant travelled exclusively as a Venezuelan....

Appellant did not communicate with the Embassy further until 1982, when renewing the passports of his sons. At that time, he was advised to clear up his own U.S. citizenship status. Appellant completed a questionnaire, "Information for Determining U.S. Citizenship" on May 12, 1982, accompanied by a five page Affidavit.

He stated in that Affidavit, 'I held then and still hold now, that until the US [sic] Embassy returns my US [sic] passport and Certificate of Naturalization, and keeps granting me visas to enter the US [sic] in my Venezuelan passport, thus considering me a US [sic] expatriate, I am free and have the right to act and conduct my life as a Venezuelan.' Appellant's Affidavit at 3, paragraph 23.

On October 20, 1982 the Department approved the Certificate of Loss of Nationality on the grounds that Appellant had expatriated himself on January 9, 1969, under section 349(a)(4)(B) of the INA of 1952, when he accepted the position of Minister Counsellor for Petroleum Affairs at the Venezuelan Embassy in Beirut, Lebanon.

The Department's memorandum concluded that:


Following a review of the facts of this case, the Department has determined that it cannot meet its burden to prove that Appellant knew he was a U.S. citizen at the time he accepted the post of Minister Counsellor for Petroleum Affairs at the Venezuelan Embassy in Beirut, Lebanon. The Department therefore respectfully requests the Board to remand this case to the Department so that steps can be taken to vacate the holding of loss.


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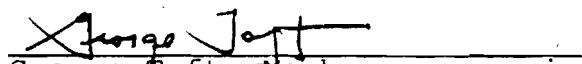
II

In loss of nationality proceedings it is the Department's burden to prove that a valid expatriating act was performed. 4/ Inasmuch as the Department has concluded that it is unable to prove that de los Rios knew he was a United States citizen when he performed the statutory expatriating act in 1969, and in the absence of evident errors of fact or law, the Board is agreeable to the Department's request that the cause be remanded in order that it may vacate the certificate of loss of nationality.

The case is hereby remanded for further proceedings. 5/


 Alan G. James, Chairman


 J. Peter A. Bernhardt, Member


 George Taft, Member

4/ Section 349(c) of the Immigration and Nationality Act 8 U.S.C. I481(c) provides in pertinent part that:

(c) 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....

5/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 CFR 7.2(a) provides in part that:

...The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it.