December 12, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B[redacted] G[redacted] C[redacted]

B[redacted] G[redacted] C[redacted] appeals an administrative determination of the Department of State holding that he expatriated himself on July 4, 1977 by obtaining naturalization in Venezuela upon his own application. 1/

The Department decided in 1978 that appellant expatriated himself. He entered this appeal seven years later.

In the particular circumstances of this case, we do not find the appeal time-barred, For the reasons stated below, we conclude that the Department's determination of appellant's expatriation should be affirmed.

I

C[redacted] became a United States citizen by virtue of his birth at [redacted]. He married a United States citizen in 1943. In 1963 he moved to Venezuela where he worked as an oil rig supervisor. In 1965 he registered at the United States Embassy at Caracas and had his passport extended to 1968. He renewed his passport in 1968.

From 1971 to 1972 Chambers worked for Western Service and Supply, a Venezuelan company dealing in oil rigging equipment. After working for another oil company in 1972, Chambers returned to Western Service in 1973. The Embassy issued him a new passport in 1974.

On September 20, 1976 C[redacted] addressed a petition to the Minister of Interior of Venezuela in which he stated that he had "decided to acquire Venezuelan citizenship, for which purpose I

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides that:

> 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, . . .

swear allegiance to the Venezuelan Constitution." 2/ The Gaceta Oficial of the Republic of Venezuela on July 4, 1977 contained the announcement that C[redacted] had been granted Venezuelan citizenship.

He applied for a Venezuelan passport the following month, noting that he had been naturalized as a Venezuelan citizen on July 4, 1977. A passport, valid for five years was issued to him on September 13, 1977.

In December 1977 the Venezuelan authorities returned C[redacted] United States passport to the Embassy. Thus alerted to his naturalization, the Embassy wrote to C[redacted] by registered mail on January 10, 1978 to advise him that he might have expatriated himself by obtaining naturalization in a foreign state. The Embassy sent the letter to the address Ch[redacted] had given the Embassy in 1974 when he obtained a passport, He was invited to submit any information or evidence concerning his case that he wished the Department to consider in making a determination of his citizenship status. He was also asked to complete a form the purpose of which was to elicit details about the expatriative act he performed, and was informed that he might make an appointment to discuss his case with a consular officer. A postal receipt is attached to the copy of the Embassy's letter in the Department's record of [redacted]' case. It reads as follows:

> Venezuelan Mail Services R. No. 00768
> Receipt for Registered Mail
>
> Simple.
>
> Subject to Compensation.
>
> With Notice of Receipt.
>
> Signature of receiving employee: A.R.
>
> Keep this receipt. Without it, no claim will be possible. Registered mail is handled exclusively by number. Note name and address of addressee on the back,
>
> (*) The receiving employee must cross out the features that do not apply.

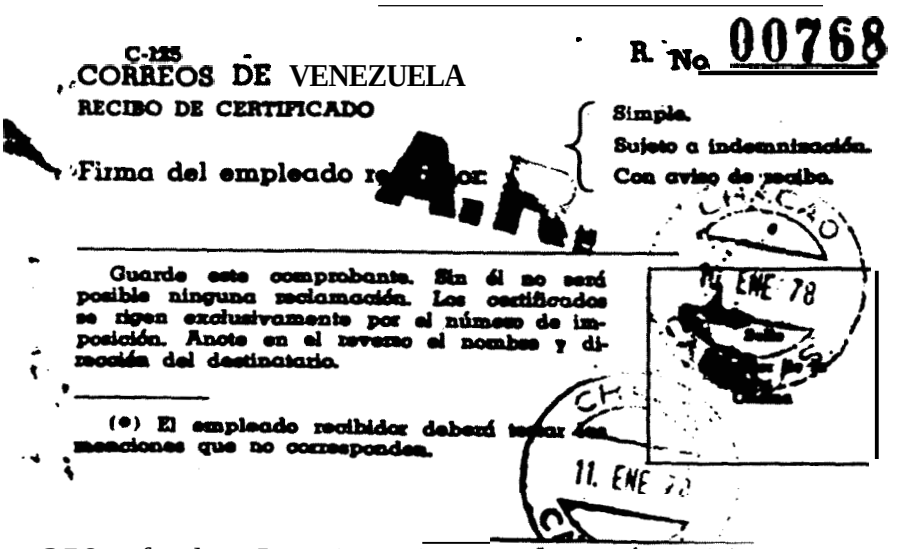
2/ English translation, Division of Language Services, Department of state, LS no. 118004, Spanish (1985).

[Stamp of receipt by post office dated January 11, 19781 3/

[redacted] did not reply to the Embassy's letter. Accordingly, a consular officer executed a certificate of loss of nationality (CLN) on March 20, 1978. 4/ The offical certified that [redacted] acquired United States nationality at birth; that he obtained naturalization in Venezuela upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The consular officer submitted no commentary on Chambers' case when he forwarded the CLN to the Department. Thereafter, on April 12, 1978 the Embassy issued Chambers a multiple entry visitors visa valid for six months. There is no indication in the record whether Chambers obtained the visa by mail or by visiting the Embassy.

3/ English translation, Division of Language Services, Department of State, LS no. 120386, Spanish (1986).

Below is a facsimile of the postal receipt.


C-225
CORREOS DE VENEZUELA
RECIBO DE CERTIFICADO
R. No 00768
Firma del empleado recibidor:
Simple.
Sujeto a indemnización.
Con aviso de recibo.
Guarde este comprobante. Sin él no será posible ninguna reclamación. Los certificados se rigen exclusivamente por el número de imposición. Anote en el reverso el nombre y dirección del destinatario.
(*) El empleado recibidor deberá tachar las menciones que no corresponden.
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4/ 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.

On April 14, **1978** the Department approved the CLN, an action that constitutes an administrative determination of loss of nationality from which **a** timely and properly filed appeal may be taken to the Board of Appellate Review, On April 14th the Department sen of the approved certificate to the Embassy to forward to Embassy records show that on May 2, **1978** a copy of the CLN was sent to However, there is no indication of the address to w as sent, or whether it was sent by registered mail or other secure means is no postal receipt in the record to indicate whether received it. Immediately below the entry recording the mailing of the CLN is a notation - "Notice to NIV [the non-immigrant visa section of the Embassy]."

obtained another multiple entry visitors visa from the Embassy on November 26, **1979** valid unti**11982 or 1983 (the** validity date on the copy of his Venezuelan passport made available to the Board is indistinct). In this instance as well we do not know whether appellant obtained the visa by mail or by visiting the Embassy. He obtained a two-year extension of his Venezuelan passport in **1982.**

In **1983** returned to the United States. On January 10, **1984** he applied for a United States passport at Albuquerque, New Mexico, exhibiting a cancelled issued to him in **1968.** At the request of the Department, on June **27, 1984** filled out a form to assist the Department in makin zenship determination in his case. In the questionnaire stated that he had never applied to be naturalized in a foreign state; had never sworn an oath of allegiance to a foreign state; but had obtained a Venezuelan passport, for the following reasons and under the following circumstances.

> I wanted very much to buy a company in Venezuela. The name of the company is Western Service Company, The main office was located in Ciudad Ojdea, Maracaibo, Venezuela. I was told that I could wholly own the company if I was to obtain a Venezuelan Passport.
>
> Mr. Angel Mendez, a friend, procured the passport for me. I never appeared in any Venezuelan Government office.
>
> I paid nothing to Mr. Mendez or to the Venezuelan government for the passport. I signed no application form or any other document whatsoever to obtain the passport. I received the passport on September **13, 1977** when it was delivered to me,

After receiving the completed questionnaire, the Department sent the following cable to the Embassy at Caracas on July 16, 1984:

> ...
>
> 2. Dept. file on CLN does not contain a citizenship questionnaire or any indication that Chambers was interviewed by consular officer prior to completion of CLN or that he received a copy of CLN from post. CLN based upon certified copy of Gaceta Oficial No. 2,056 Extraordinario, dated July 4, 1977. Further, Mr. C[redacted] claims he obtained a U.S. passport renewal from post in July, 1977.
>
> 3. Action requested: Do post registration records provide any further information on C[redacted], particularly related to issues in para 2 above? Also, can post inquire of GOV [Government of Venezuela] on informal basis if necessary, to obtain quick reply, whether GOV would provide Embassy with signed copy of oath of allegiance subscribed to by C[redacted] at time of his naturalization?....

The Embassy replied to the Department on July 18th as follows:

> 1. Subject was issued ppt no. Z1768147 on May 7, 1974. This passport was surrendered to Venezuelan immigration authorities and forwarded by them to the Embassy. Embassy passport section received C[redacted]' passport on December 8, 1977. This is how Embassy became aware that he had acquired Venezuelan citizenship.
>
> 2. On January 10, 1978 C[redacted] was sent uniform loss letter via certified mail; acknowledgement of receipt by Chambers was obtained by Embassy from Venezuelan post office. Copies of these items were forwarded to Department on March 20, 1978.
>
> 3. Embassy has contacted Venezuelan immigration authorities and they have agreed to provide Embassy with copies of C[redacted]' file. Preliminary information from that

office indicates it is highly unlikely [redacted] acquired a Venezuelan passport without naturalization. Post will advise Department of contents of [redacted] file as soon as it is received.

Five months later the Embassy reported to the Department on December 18th that:

> 1. Venezuelan immigration authorities have finally responded to our many requests for documentation of Mr. [redacted] acquisition of Venezuelan nationality by providing a photocopy of the application of [redacted] for Venezuelan passport executed August 11, 1977, and which bears a signature recognizably that of Mr. [redacted] By telephone, Venezuelan immigra o informed us that the appearance of his name in the official gazette is proof of his application for naturalization.
>
> 2. Under cover of a memo dated 12/17/84, we are forwarding the photocopy to the Department, along with a certified photocopy of our FS-558 card in Mr. [redacted] name. The final entry on that quote: May 2, 1978 notice to NIV end quote, Comment: non-immigrant visa records are maintained for only one year... and nit has no record of Mr. [redacted] Today, we believe Mr. [redacted] applied at that time for a non-immigrant visa, that the passport unit informed the NIV unit that Mr. [redacted] claim to U.S. citizenship had b solved and that the NIV unit could proceed with its consideration of his NIV application. A NIV issued to him then probably would have been valid for multiple applications for admission to the U.S. over several years. End comment.
>
> 3. We have reviewed our records of passports issued for June, July and August, 1977, and find no mention of subject's name.. .,

After the Department reviewed [redacted] case, it concluded that its original holding of loss of nationality should be affirmed. Accordingly, on February 15, 1985 the Department informed [redacted]

that his application for a passport was denied on the grounds of non-citizenship. On February 22, 1985 he obtained a one-year extension of his Venezuelan passport from the Venezuelan Consulate General at Houston, Texas. Counsel for C[redacted] gave notice of appeal by letter to the Board dated April 2, 1985.

II

Whether the Board has jurisdiction to hear and decide an appeal filed seven years after the Department determined that appellant lost his United States nationality is the first issue we must consider. The Board's jurisdiction is dependent upon a finding that the appeal was filed within the limitation prescribed by the applicable regulations. This is so because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

The present federal regulations (promulgated on November 30, 1979), prescribe that an appeal from an administrative determination of loss of nationality may be taken one year after approval of the certificate of loss of nationality. 5/ The Board must deny an appeal not filed within the prescribed time, unless it determines, for good cause shown, that the appeal could not have been filed within one year after approval of the certificate. 6/

In 1978 when the Department approved the certificate of loss of nationality that was issued in this case, federal regulations prescribed the following limitation on appeal:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 7/

The limitation of "reasonable time" will govern the instant appeal, for it is generally accepted that a change in the regulations shortening the time limit on appeal should apply prospectively not retroactively.

5/ 22 CFR 7.5(b).

6/ 22 CFR 7.5(a).

7/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60.

What constitutes reasonable time depends on the facts of the case, taking into account a number of considerations, including the interest in finality, the reason for the delay, and prejudice to other parties. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey V. Advance Abrasives Co,, 542 F.2d 928, 940 (5th Cir. 1976), citing II Wright & Miller, Federal Practice & Procedure, section 2866 at 228-229:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

For an excuse to be legally sufficient it must be shown that failure to file with minimal delay was the result of some event beyond one's control and which was to some extent unforeseeable,

Appellant contends that his appeal should be considered timely because he did not know until his application for a passport was denied in February 1985 that a determination of expatriation had been made in his case in 1978, He never, he asserts, received any communication from the Embassy about his case,

> The Department alleges that the U.S. Embassy in Caracas sent a uniform loss letter to appellant on January 10, 1978 via certified mail. The letter was supposedly addressed to appellant at: Campo Las Palmas, Anaco, Edo. Anzoategui. However, appellant had moved from Campo Las Palmas, a housing development of approximately 60 - 65 units, to Campo Anson, another location in Anaco, sometime in 1977. There was no effective provision at Campo Las Palmas to forward mail to the appellant. Appellant's method of receiving mail was at a post office box in Anaco which was used by all the employees of the company for which he worked. There was no lock on the box, and no method of limiting who had access to the box. See appellant's affidavit in the Appendix.
>
> The Department alleges that appellant received the letter on the basis of a postal receipt. However, the receipt does not evidence any signature, Considering the informality and unreliability of mail delivery in small towns in Venezuela, an

> unsigned postal receipt is certainly not proof that appellant received this incorrectly addressed letter. In his affidavit in the Appendix to this brief, appellant attests to the fact that other mail which was sent to him correctly addressed was not received, and that many people in Venezuela, including himself, refrained from sending checks and other important documents through the mail because of the Venezuelan postal service's reputation for unreliability.

In our opinion, it is doubtful whether [redacted] received the Embassy's January 10, 1978 letter. The original of the postal receipt in the record was not signed by appellant or even a postal employee. All the receipt indicates is that the letter was received on January 10, 1978 at the post office and returned to the Embassy on January 11, 1978. Not only did appellant probably not receive notice that he might have lost his citizenship, there is also substantial doubt in our minds that he ever received the certificate of loss of nationality that was mailed to him on May 2, 1978, particularly if, as seems probable, it was mailed to [redacted] at the same address as was the uniform loss of nationality letter. Furthermore, there is no indication in the Embassy's records whether the certificate was sent by registered mail or other secure means.

In brief, we are not prepared to accept that [redacted] had actual notice of possible loss of his citizenship. Of course, it could be argued that he had reason to believe he lost his citizenship. We have seen that in April 1978 he obtained a visa from the Embassy. Possibly he was told at that time that a certificate of loss of nationality had been executed in his name. We do not know what the visa section told him, for, as stated above, the records of the visa section have long since been destroyed. He might have been told about his loss of citizenship in November 1979 when he obtained another visa from the Embassy, for the visa section had been alerted in May 1978 by the citizenship section that a certificate of loss of nationality had been approved in [redacted] name. But once again, because the visa section's records no longer exist, we do not know for sure what, if anything, he was told about his citizenship status. Under these circumstances, we are unwilling to ascribe constructive notice to [redacted] He did, of course, perform a statutory expatriating act, and might have reasoned that his United States citizenship status was in jeopardy, and should therefore have made inquiries at the Embassy. He did not take any such action. However, in this case, the Embassy, not appellant, had the legal duty to ensure that he received notice of the holding of loss of his nationality. Since such notice cannot, with sufficient assurance, be ascribed to [redacted] before 1985, we will not find his appeal untimely. We therefore proceed to consider the merits of the appeal.

III

The statute prescribes that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. The evidence here makes it clear that [redacted] petitioned for and was granted Venezuelan citizenship. [redacted]n thus be no question that he brought himself within the reach of the applicable provision of the statute. Performing a statutory expatriating act will not result in expatriation, however, unless the act was done voluntarily with the intention of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

With respect to the issue of voluntariness, the statute prescribes that performance of any one of the acts specified in section 349(c) of the Immigration and Nationality Act shall be presumed to be voluntary, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 8/

[redacted] has not undertaken to rebut the legal presumption that he became a Venezuelan citizen voluntarily. The record makes it plain that he obtained naturalization in order to be able to purchase a foreign company. No one forced him to make that decision which obviously was calculated to promote his economic interests.

We conclude therefore that [redacted] acquired Venezuelan citizenship of his own free will.

IV

Even though we have concluded that appellant voluntarily obtained naturalization in Venezuela, "the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas,

8/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads:

(c) Whenever the loss of United States nationality is put in issu in any action or proceeding commenced on or after enactment of this su section under, or by virtue of, the provisions of this or any other Ac 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 expatriatic under the provisions of this or any other Act shall be presumed to hav done so voluntarily, but such presumption may be rebutted upon a showi by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

444 U.S. at 270. Under the statute, 9/ the Government must prove a person's intent by a preponderance of the evidence, Id. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

The intent the Government must prove is the person's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Evidence contemporary with performance of the expatriative act is, of course, the most probative of the actor's intent to relinquish or retain citizenship. Here there is limited contemporary evidence, but what there is is revealing about C[redacted]' intent with respect to his United States citizenship. He voluntarily obtained naturalization in a foreign state, swearing a concomitant oath of allegiance. Performing a statutory expatriating act is not conclusive evidence of an intent to relinquish United States citizenship, but it may be highly persuasive evidence of such an intent Vance v. Terrazas, 444 U.S. at 269, citing, Nishikawa v. Dulles, 35 U.S. 129, 139 (1958) (Black, J., concurring.). Moreover, Chambers also surrendered his still valid United States passport to Venezuel authorities when he applied for naturalization. Voluntarily surrendering one of a citizen's most important documents to foreign officials is an act full of symbolism, the significance of which surely could not have escaped C[redacted]. So to part with his passport in our opinion, evidences an intent to transfer allegiance from the United States to a foreign state.

Additional evidence of an intent to relinquish United States citizenship is to be found in C[redacted]' proven conduct after naturalization which reveals a number of acts inconsistent with an intention to retain United States citizenship. 10/ One month after his petition for naturalization was granted, C[redacted] applied for a Venezuelan passport. Around April 1978 he applied to the United States Embassy for a visa to be placed in his Venezuelan

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9/ Section 349(c) of the Immigration and Nationality Act. Text supra, note 8.

10/ In Terrazas v. Haig, supra, the 7th Circuit cited an earlier 9th Circuit case, King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972), for the proposition that where there is little direct evidence, circumstantial evidence may establish the requisite inten to relinquish citizenship. In King, the court stated that the Secretary of State may prove intent by acts inconsistent with United States citizenship, citing Baker v. Rusk, 296 F.Supp 1244 (C.D. Cal. 1969).

passport. He obtained a second visa in **1979.** Neither in **1978** nor **1979** apparently did he even inquire about his citizenship status, let alone try to recover his United States passport or otherwise document himself as a United States citizen. [redacted] used his Venezuelan passport to enter the United States at least once in **1983.**

In this conduct, we see acts inconsistent with an intent to retain United States citizenship, thus corroborating our conclusion that when he surrendered his passport in **1977** [redacted] intended **to** transfer his allegiance from the United States

Nothing of record leads us to doubt that [redacted] acted knowingly and intelligently when he applied fo[redacted]tained Venezuelan citizenship. Nor do we find in the record evidence of sufficient probative value to lead us to conclude that despite the acts cited above, [redacted] really did not intend to divest himself of United States c[redacted]ip. **As** far as one can tell from the record, [redacted] gave no thought to any rights and duties of United States citizenship from **1974** when he obtained his last United States passport until **1984** when he applied for a passport in the United States.

[redacted] protests that it was never his intention to relinquish his U[redacted]ates citizenship. We consider that these latter day protestations are entitled to little weight, in the face of the evidence of record and his own contradictory statements.

In an affidavit submitted with his opening brief [redacted] stated that:

> ...
> In **1977,** I became interested in the possibility of buying Western Service and Supply Company. I was informed that in order to do **so,** I had to obtain a Venezuelan passport. This was my only reason for obtaining a Venezuelan passport. I did not understand that obtaining this passport might mean that I could not continue being a United States citizen. I never intended to give up my citizenship, and I never declared intention to become a Venezuelan citizen.
>
> 3. I never filled out or signed any application to acquire Venezuelan citizenship nor did I authorize anyone else to do this for me. I am not aware of what the procedure for naturalization in Venezuela involves. But I never submitted a medical certificate, proof of good conduct, or a birth certificate. I did not even have an extra copy of my birth certificate. I had no knowledge that I was supposedly nationalized. I only thought that

> I was getting a passport so that I could buy Western Service and Supply....I received no benefits of Venezuelan citizenship nor did I try to receive any. I did sign a passport application, and I do recall being finger-printed for it. My understanding was that someone else would take care of all the details in getting the passport issued.

After the Board sent appellant's counsel a copy of [redacted] application for Venezuelan citizenship, appellant responded by affidavit which reads in pertinent part as follows:

> While I am not now in a position to deny that the signature that appears on this document is my own, I do deny that it was ever my intention to be naturalized, and I further deny that it was ever my intention to relinquish United States citizenship by way of any act that I have ever done at any time in the world. Specifically, any applications or other documents that I signed were signed in an effort to get a Venezuelan passport. I never appeared at a naturalization ceremony. I never was asked to participate in any ceremony, nor was I ever administered any form of oath of allegiance to Venezuela. I guess most importantly, I never took any oath diavowing my allegiance to the United States.
>
> All of the materials submitted by the State Department all presuppose an intention on my part to relinquish my United States citizen-ship and to become a Venezuelan citizen. Nothing could be further from the truth. I consider myself to be an American citizen in possession of a Venezuelan passport. I do not understand, if I did not disavow my allegiance to the United States, how any of these documents can purport to remove my United States citizenship.
>
> If I had ever been approached by any Venezuelan government official in any capacity and told that I would have to take an oath of allegiance and become a Venzuelan citizen in order to get a Venezuelan pass-port, I not only would have declined the opportunity to become a Venezuelan citizen, I would have refused the passport. What I was engaged in in Venezuela was a transaction to undertake in an effort to obtain the

> ability to buy a company. It had nothing whatsoever to do with any intent to relinquish United States citizenship, nor did I have any intention of becoming a Venezuelan citizen. All I wanted was a Venezuelan passport.

Appellant's actions speak louder than his words.

On all the evidence it is our conclusion that the Department has carried its burden of proving by a preponderance of the evidence that [redacted] intended to relinquish his United States citizenship when he obtained naturalization in Venezuela upon his own application.

V

Upon consideration of the foregoing, we hereby affirm the Department's administrative determination of April 14, 1978 that appellant expatriated himself.

Alan G. James, Chairman

Mary E. Hoinkes, Member

George Taft, Member