DEPARTMENT OF STATE November 19, 1991

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W[redacted] A[redacted] L[redacted]

This is an appeal from a de[redacted]ination of the Department of State that W[redacted] A[redacted] L[redacted] expatriated himself on June 26, 1975, th[redacted] ovi[redacted]ns of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1 The Department made its determination of **loss** of L[redacted] nationality on October 14, 1988. Eight months later, through counsel, he entered an appeal from that determination.

After carefully weighing all the evidence, we are of the view that the Department has not carried its burden of proof on the sole issue presented by the appeal - whether or not L[redacted] intended to relinquish his United States citizenship when [redacted] became a Canadian citizen. Accordingly, we reverse the Department's holding of loss of his nationality.

**I**

L[redacted] became a United States citizen by virtue of his birth at [redacted]. He received a B.A. degr[redacted] University f[redacted]uls[redacted]n 1967 and around that time, married an American citizen. Upon graduation from university, he enlisted in the United States Army (Medical Corps), and subsequen[redacted]y was sent to Viet Nam where he served as a combat medic. L[redacted] returned to the United States on compassionate leave in June 1969, because his grandfather who reared him was severely ill.

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

> Sec. 349. **(a)** A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
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> (1) obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years: ...

L[redacted] requested a change of duty station from Viet Nam to Oklah[redacted] so that he might remain with his ailing grandfather, but his request was denied. His request for reconsideration of that decision was also denied. Late in July 1969 he made an application for discharge from the Army on compassionate grounds which evidently was also denied. Thereafter, he deserted and in August 1969 went to Canada with his wife. [2]

In Canada, L[redacted] continued his education at the University of Calgary. He and his wife were divorced in the spring of 1975. One month later, on June 26, 1975, L[redacted] was naturalized as a Canadian citizen. On that occasion he made the required oath of allegiance which read as follows:

> I swear that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen, so help me God.

In late 1975, L[redacted], who was living in Canada and continues to do so, began the process to obtain a discharge from the United States Army. With respect to the background of the discharge which he subsequently received, the Chief of the U.S. Army Deserter Information Point at Fort Benjamin Harrison on July 30, 1991, responsed as follows to an inquiry of the Department of State;

> Mr. L[redacted] records have been requested several times from the National Archives and Records Administration, St. Louis, but to date the records have not been received.
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> On April 15, 1974, Mr. L[redacted]s name was entered in a file of Absentee and Deserter Control Cards which are still retained in this Center. The card shows him to be a citizen of

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2. It seems odd that L[redacted] should leave his grandfather and go to Canada after he had [redacted]ed for and been given compassionate leave to go to his side and thereafter made strenuous efforts t[redacted] persuade the Army to station him close to his grandfather. L[redacted]'s incongruous behavior is not, however, germane to our disposition of his appeal.

> Canada with a date of 26 [redacted]ne 1975. It is presumed that Mr. L[redacted] was informed, by certified mail, that he was in a status of absence without proper authority and/or desertion, and that he was advised to return to military control to resolve his military status. At that time he may have been advised that if he was a citizen of Canada, he would be eligible for discharge in absentia as an alien. The circumstances surrounding his discharge cannot be determined until a review is made of his military records.

Persons situated like L[redacted] in 1975 were eligible for discharge under a directive issued by the Assistant Secretary of Defense for Manpower and Reserve Affairs on November 25, 1974, entitled "Eligibility of Alien /Military/ Absentees for Presidential Clemency Program." Alien military absentees who fled the United States, or remained outside during their unauthorized absence, and were then outside the United States were, the directive stated, excludable aliens under 8 U.S.C. 1182(a)(22), Section 212(a)(22) of the INA . 3 Such absentees were therefore ineligible for the President's program. The directive continued:

> ...Such an Absentee, in the discretion of the Secretary of the military department concerned or his designee, may be discharged in absentia by reason of prolonged unauthorized absence. In the event, however, that such an alien absentee returns to U.S. military control outside of the United States he should be processed in accordance with standard procedures. If the alien absentee is otherwise eligible for the President's program, he should be processed for an administrative discharge.

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3. Section 212(a)(22), INA, 8 U.S.C. 1182, in 1975 read in' pertinent part as follows:

> Sec. 212(a) The following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the U.S.:

The directive concluded with the following statement of policy regarding U.S. citizens who deserted and obtained foreign citizenship.

> **5.** Former citizens who have acquired alien citizenship. Military absentees who have obtained citizenship in a foreign state will be treated in accordance with the foregoing guidance for aliens. Questions concerning citizenship and eligibility for entry into the U.S. will be referred to the Department of State or the **INS** for resolution as appropriate.

According to answers L[redacted] gave on April 16, **1991** to written interrogatories propo[redacted]ed by the Department of State, **a** relative who is an attorney wrote him in the fall of **1975** to suggest that he resolve his status with the United States Army, and undertook to represent him to obtain a discharge. Through this attorney, L[redacted] requested that he be given an other than dishonorable [redacted]charge and adduced various mitigating and extenuating reasons. L[redacted] prefaced his request by declaring: 'In August of 1969, I d[redacted]rted from the United States Army. In July of this year /sic, presumably he meant 1975/ I became a Canadian citizen. I understand that I am eligible for discharge in absentia and that the type of discharge certificate remains to be determined.'

The military authorities informed L[redacted] through his counsel at the end of 1975 that there was [redacted]ufficient evidence to substantiate his being discharged under honorable conditions. He was therefore given an undesirable discharge effective December **15**, 1975.

It appears that sometime thereafter the military authorities informed the Department of State that L[redacted] had been discharged in absentia and had obtained Canadi[redacted]

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3. (Cont'd.)

> (22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants: or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency.

citizenship, for the record shows that in April 1977 L[redacted]s name was entered into the Department's Automated Visa Lookout System under Code 22, i.e., section 212(a)(22) of the Immigration and Nationality Act (INA), excludable as an immigrant because of permanent ineligibility for United States citizenship. 4

When his case was processed in 1988 by the Consulate General at Calgary, appellant stated in a questionnaire that he obtained a Canadian passport in 1987. He stated further that since his arrival in Canada he had used a Canadian passport to visit the United States as well as to visit Mexico and Holland. To that statement, he consular officer appended a note: "States /presumably L[redacted] stated to the Consul7 3-4 trips as visitor during peri of 1975-1987 on Canadian passport to the U.S."

In a sworn statement (Oct. 8, 1989), L[redacted] made the following statements regarding his possession and use of a Canadian passport:

> I was discharged from the United States Army on December 15, 1975, and since that date I have made a number of trips to the States. Initially these were visits to the home of my mother and step-father in Ardmore. I do not clearly recall the circumstances surrounding these entries into the States. I have never had a United States passport, but I do not remember that my right to enter was questioned on any of these trips. I presume that I must have filled out forms stating that I was a Canadian citizen, which was true: but I am quite certain that I never filled out any form or made any statement negating my American citizenship.

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4. See note 3 supra.

On what legal basis the Department could make a determination that L[redacted] had expatriated himself without first adjudicating the issues of voluntariness and his intent to relinquish citizenship is not apparent. At that Stage, the Department surely could do no more than alert its agents in the field and the INS that L[redacted] case was one of putative loss of citizenship, to be d ped and adjudicated in the future.

There is no indication in the record that L[redacted] knew his name had been entered in the Department's lookout list as excludable.

> I would not knowingly have done that. In essence I entered as a Candian /sic/ citizen simply because it was convenient to do so. I had no greater intention of renouncing my U.S. citizenship by entry into the States as a Candian /sic/ citizen than I had in taking the oath of allegiance to the Queen.
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> I have traveled through the States with my present wife on two wintertime vacation trips to Mexico, and on those occasions we used our Canadian passports. My wife and I also traveled to Brussels last year on our Canadian passports, but I gave no thought to the implications which might be drawn from this. My use of a Canadian passport was again merely an act of convenience.

And, in reply to written interrogatories of the Department of State, L[redacted] gave this answer to the question why he used a Canadian passport to enter the U.S. when he knew that U.S. citizens do not need a passport for travel to and from Canada:

> The question assumes a fact which I do not believe exists. I have no recollection of using a Canadian passport to enter the United States and do not believe I did so. Neither United States or /sic/ Canadian citizens need a passport to travel back and forth between the two countries. I have used the only passport I have, a Canadian passport, for travel to Mexico and Holland.

The Department observes (supplementary brief) that President Carter's Proclamation of Pardon applied to draft evaders but not deserters. The Department and INS, however, agreed in 1977 that INS might exercise its parole authority on behalf of aliens who lost U.S. citizenship and are inadmissible solely under section 212(a)(20) (lack of valid entry document) and the second part of (22) of the Immigration and Nationality Act.

The Department continued:

> Appellant thereafter could lawfully enter the U.S. as a 'nonimmigrant visitor,' which he claims he did, only under parole authority of the INS. Appellant is thus

> correct when he states that he entered the U.S. 'as a Canadian citizen simply because it was convenient to do so.' He could not lawfully enter the U.S. otherwise.
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> Canadian citizens, of course, are not required to obtain visas to enter the U.S. It is thus unlikely that appellant would be stopped and questioned about his citizenship or excludability by the INS on most of the occasions he sought entry.
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> By October 1977, INS had lifted the ineligibility for visas under section 212(a)(22) INA to all persons covered by the pardon, i.e., draft evaders, but not deserters. Appellant /Lang/ could thus lawfully enter the U.S. as a nonimmigrant visitor only on parole, and he could qualify for permanent resident status after parole only under formal immigration procedures.

L[redacted], who is a consulting psychologist, entered into a partnership in 1984 with three other professionals, all Canadian citizens, to develop training programs on suicide prevention and related matters.

In 1987 L[redacted] partnership was awarded a contract by an agency of the State of California to develop a state-wide training program on suicide prevention. According to the sworn statement of one of the partners, Dr. Tierney, they understood (incorrectly) that a letter from the California state agency would suffice to permit them to enter and train in California. When Tierney went to California in the spring of 1987, however, he learned that the partnership would have to obtain an H-1 visa or authorization. (An H-1 visa may be issued to a qualified temporary worker of distinguished merit and ability.) Accordingly, he made an H-1 visa applic ion on behalf of himself and the other partners, including L[redacted], at Sacra to on June 1, 1987. The partners received H-1 status and L[redacted] and **tho** others entered California several times to execute the contract. 5

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5. The Department expressed the view (supplemental brief) that L[redacted] did not travel to the united States with an actual H-1 v . Since Canadians are not required to obtain visas, he most likely entered the U.S. on an INS form **1-95**, Departure Record, which noted INS approval of his H-1 visa application.

L[redacted] acknowledges that he availed himself of H-1 authorization, stating that once the authorization was obtained, he used it several times to enter California to conduct training, most recently in 1988. It appears that in June 1988 his entry under H-1 authorization was challenged. He elaborated:

> Once I learned that such entry might confuse my status as a United States citizen, I undertook to establish my status in the most timely fashion possible. Sometime in June of **1988,** an Immigration official at the Calgary International airport questioned my use of the H-1 visa. Immediately thereafter, a relative who is a lawyer helped me to to /sic/ find a lawyer specializing in citizenship issues who lived in a location reasonably close to Calgary. . .He. . .advise/d/ me to apply for a united states passport. I applied for a passport....

Thereafter, the Consulate General at Calgary processed his case as one of possible **loss** of nationality. He completed forms for determining U.S. citizenship, was interviewed by a consul, and applied for a passport. On August 16, 1988 a consular officer executed a certificate of loss of nationality (CLN) in L[redacted] name, as required by law. 6

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6. Section **358,** I.N.A., **8 U.S.C.** 1501, provides:

> 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.

Therein the consul stated that L[redacted] became a citizen by birth in the United States; that he acquired the nationality of Canada by naturalization upon his own application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act ('INA'). In recommending approval of the CLN the Consulate General made the following observations:

> It should be noted that Mr. L[redacted] had deserted from the U.S. Army and fled to Canada in 1969. He received an Undesirable Discharge from the Army in 1975. He states that his pattern of behaviour is characheristic [sic] of someone apprehensive of U.S. authorities. ...
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> [A]lthough the applicant has claimed he did not know he would lose his United States citizenship by naturalization in canada, he applied for and was issued an H-1 visa to the United States for later temporary work in the U.S. When asked why he would have applied for the H-1 if he thought he was still a U.S. citizen, he offered no reply except that others he was going to work with also were applying for H-1s.
>
> Mr. L[redacted] also has a Canadian passport which by his own admission he had used to travel into the United States.
>
> Mr. L[redacted] stated that he filed his U.S. income tax forms in 1987 as that was the first year that he found out that he was supposed to file. He was asked to submit copies of the tax forms he filed. Department will note that on the copies of the 1040 that he submitted he listed himself as 'exempt: Canadian citizen/ residing in Canada.'
>
> The consular officer is satisfied that at the time he naturalized, W[redacted] L[redacted] was well aware that naturalization was an expatriating act and that he intended to relinquish his united States citizenship. Evidence of an intent to relinquish at the time of naturalization includes his desertion from the U.S. Armed Forces and his subsequent behavior which--although

> not occurring at the time of his naturalization--provides evidence of his frame of mind regarding his U.S. citizenship at that time and thereafter. Such subsequent behavior includes entering the United States on a visa after claiming to be a foreigner and filing U.S. income tax returns claiming to be exempt due to Canadian citizenship. It appears that now that times have changed and he no longer will have the responsibilities of U.S. citizenship including military service, he would like to reclaim the rights of a United States citizen....

The Department agreed with the Consulate General's recommendation, although it did not apparently consider that his desertion from the U.S. Army was an appropriate factor to be weighed in determining whether he intended to relinquish citizenship. The Department approved the CLN on October 14, 1988, approval constituting an administrative determination of loss of nationality from which a timely appeal was entered in 1989 by Counsel on [redacted] behalf. The case was briefed within the time prescribed [redacted] he regulations, but its disposition was delayed while the Department formulated and propounded written interrogatories to appellant and members of his family and researched the circumstances surrounding appellant's discharge from the United States Army and his entry into the United States in H-1 status.

II

By obtaining naturalization in Canada upon his own application in accordance with applicable Canadian law, [redacted] brought himself within the purview of section 349(a)(1), [redacted]. Performance of a statutory expatriative act will not work loss of citizenship, however, unless it be proved that the actor performed the act voluntarily with the intention of relinquishing United States citizenship. Section 349(a)(1), INA. Since [redacted] has acknowledged that he became a Canadian citizen of his own volition, the dispositive issue in the appeal is whether he obtained naturalization with the intention of relinquishing his United States citizenship.

Naturalization in a foreign state may be persuasive evidence of an intent to relinquish American citizenship, but it is not conclusive evidence of that fact.

> /I/t would be inconsistent with Afroyim /Afroyim V. Rusk, 387 U.S. 253 (1967)/ to treat the expatriating acts specified in sec.

> 1481 (a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course,' any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa v. Dulles, 356 U.S. 129, 139 (Black, J., concurring). But 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 his citizenship.

Vance v. Terrazas, 444 U.S. 252, 261 (1980).

In loss of nationality proceedings, it is the burden of the party claiming that loss of citizenship has occurred, namely the government, to prove that claim by a preponderance of the evidence. Section 349(b), INA, 8 U.S.C. 1481(c). The latter section does not, however, direct a presumption (although it does so with respect to the issue of the voluntariness of the expatriative act), that the act was done with intent to relinquish United States citizenship. "That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence." Vance v. Terrazas, 444 U.S. at 268. Intent with respect to one's American citizenship may be proved by a person's own words or found as a fair inference from his proven conduct. Vance v. Terrazas, 444 U.S. at 260.

It is the party's intent at the time he did the expatriative act - not his subsequent state of mind - that the government must prove. See Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). In affirming the decision of the district court that petitioner expatriated himself, the Court of Appeals for the 7th Circuit declared: "...[T]he district court's Memorandum Decision reveals that the court was aware of the need to establish plaintiff's intent at the time he committed the voluntary expatriating act." Here the government (Department of State) must prove that when L[redacted] obtained naturalization in Canada in 1975 he intended t relinquish his United States citizenship.

The most probative evidence of the intent of one who performs a statutory expatriative act is, of course, direct evidence contemporaneous with the act which expresses unmistakenly the will and purpose of the actor. For example, if one obtained foreign naturalization and simultaneously made an oath renouncing citizenship or allegiance to the United States, such a declaration would be strong evidence of an intent to terminate United states citizenship. But direct,

. . .contemporaneous evidence of the party's intent is often lacking. As the United States Court of Appeals for the 7th Circuit observed in Terrazas v. Haig, supra, at 288: "Of course, a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent *to* relinquish citizenship. 4" /Footnote omitted./

Proof by a preponderance of the evidence requires the government to establish that it is more probable than not that L[redacted] intended *to* relinquish United States citizenship when he V[redacted]ntarily acquired Canadian citizenship.

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence. 12/ Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability.
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> 12/ See Model Code of Evidence Rule 1(3): 'Burden of persuasion of a fact' means the burden which is discharged when the tribunal which is to determine the existence or non-existence of the fact is persuaded by sufficient evidence to find that the fact exists;' 1(5): 'Finding a fact' means determining that its existence is more probable than its non-existence . . .' See also Morgan, Some Problems of Proof, supra n. 1 at 84-85.

McCormick on Evidence (3rd ed.), Section 339.

In answer to appellant's opening brief, the Department n[redacted] that there is no direct evidence contemporaneous with L[redacted] naturalization in Canada on which to base a d[redacted]mination of intent to relinquish citizenship. He did not, the Department points out, make an oath renouncing United States citizenship, nor did his actions at that time overtly and directly manifest such an intention.

> In these circumstances, the judgment as to appellant's intent must be based on circumstantial evidence -- Mr. Lang's conduct before, at the time of, and

. . . following his naturalization and the meaning that can most reasonably be drawn from it -- and on the weight to be accorded to appellant's more recent assertions as to his subjective intentions.

In its supplemental brief submitted a year later, the Department asserted:

> /T/he revised statemant of facts /produced by written i erro-gatories answered by L[redacted] and others and the Department's research7 shows that there is contemporaneous evidence of Appellant's intent to relinquish his citizenship, as well as his motive for doing so, that is sufficient to support the Department's position in this appeal.

This is the Department's chief argument:

> In view of the alienage requirement to obtain a discharge in absentia, appellant's request to the U.S. Army as a Canadian citizen (an alien) for such a discharge shortly after his Canadian naturalization is inconsistent with U.S. citizenship and is thus dispositive evidence of his intent to relinquish U.S. citizenship. King v. Rogers, **463** F.2d 1188 (9th Cir.) 1972. Appellant evidently knew through counsel he had to become an alien (i.e., not a citizen of the U.S., as defined in Sec. **101(a)(3)** INA) to qualify for discharge in absentia, and did **so** to achieve his objective of a discharge from the Army without admission of any wrongdoing in violation of the **UCMJ.**
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> Appellant's 1975 discharge request, moreover, concludes with the hope only that his discharge could facilitate his ability to visit in the U.S. He makes no mention of being a U.S. citizen, of intending to retain U.S. citizenship or of wanting to return to live in the U.S. He evidently did not care to retain U.S. nationality or live in the U.S. He had become a Canadian citizen, as he stated, and thus transferred allegiance to Canada where he lived,

worked, paid taxes and eventually married a Canadian citizen.

The circumstances under which L[redacted] obtained his discharge are not clear. Although the Department sought to obtain copies of Lang's military records after initial briefs had been exchanged, the Army could not locate them. All that has been established is the following.

Sometime in the fall of 1975, appellant's attorney-cousin wrote to the military authorities to inquire about the procedure for [redacted] to obtain a discharge. The military authorities seem to have informed L[redacted] cousin on November 14, 75 that more documentation would be required to process L[redacted]s case. Neither of those two pieces of correspondence i in the case record. On November 28, 1975, the cousin submitted various documents, including a statement by L[redacted] in which the latter acknowledged that he had deserted from the Army and had become a Canadian citizen, and further stated that he understood he qualified for discharge in absentia. L[redacted] also set forth considerations mitigating his desertion which he believed merited his being given an other than dishonorable discharge. Shortly afterwards, the Army informed L[redacted] through his counsel that he had been given an undesirable discharge. Some time thereafter, the Army apparently informed the Department of State that L[redacted] was a Canadian citizen and [redacted] discharged in absentia. As noted above, in 1977 the Department entered Lang's name in the visa lookout system as ineligible for an immigrant visa, i.e., permanently ineligible for citizenship, due to discharge on the grounds of alienage in time of war.

There seem to be two propositions in the Department's argument that L[redacted]'s intent to relinquish his United States citizenship is manifested by the fact that he obtained a discharge from the Army in absentia. The first is that L[redacted] wanted a discharge from the Army and realized he could not obtain [redacted] unless he was an exile. He therefore acquired Canadian citizenship in order to achieve that status.

There is no evidence to support the theory that L[redacted] obtained Canadian naturalization to expatriate himself so that he might obtain a discharge in absentia. Indeed, there is not a shred of evidence contemporaneous with that event to establish what his true intent was. To suppose that he obtained naturalization in order to avail himself of a discharge which was available to American citizens who went abroad and obtained foreign citizenship is, considering the state of the record, rank speculation. We have no cause to gainsay L[redacted]'s averment that it was his attorney cousin, not he, who in the fall of 1975 (after he had obtained Canadian citizenship) raised the matter of regularizing his status with the U.S. Army. It is therefore as reasonable to believe that

L[redacted] became a Canadian citizen for reasons that have nothing to do with his status as a deserter as it is to believe that he calculatingly obtained naturalization so that thereafter he could hold himself out as an alien and thus obtain an in absentia discharge,

The second element in the Department's argument is that knowledge may fairly be imputed to L[redacted] that an in absentia discharge was available only to pers[redacted] like himself who had lost th[redacted] united States citizenship and that because he knew thay fact, L[redacted] acted in a manner inconsistent with United States citizenship, thereby demonstrating that five months earlier his real, if undisclosed, intention was to divest himself of American citizenship.

We find the second prong of the Department's case no more persuasive than the first.

We do not know what the Army told L[redacted] through counsel in the fall of **1975** about the conditions under which he might be discharged in absentia. **U.S.** Army Deserter Information Point cannot shed light on L[redacted] discharge, for the reason we have noted. In writing to the Department, that office could only speculate:

> It is presumed that Mr. L[redacted] was informed, by certified mail, that he was in a status of absence without proper authority and/or desertion, and that he was advised to return to military control to resolve his military status. At that time he may have been advised that if he was a citizen of Canada, he would be eligible for discharge in absentia as an alien.

Phrases like "it may be presumed' and 'he may have been advised' make what the Deserter Information Point told the Department hi[redacted]y 'iffy." It is therefore unwarranted to assert that L[redacted] acted in the knowledge that if he accepted an in absentia d[redacted]arge, he would be branded as an alien, and from that to infer that in June 1975 he [redacted]tended to relinquish United States citizenship. In short, L[redacted]s request for an in absentia discharge cannot possibly be d[redacted]ositive evidence of his intent five months previous.

Indeed, his words and conduct contrast markedly with those of appellee in King V. Rogers, **463** F.2d 1188 (9th Cir. **1972),** a case which the Department considers apposite. In King, the appellee obta[redacted]d naturalization in the United Kingdom in **1954,** like L[redacted], and made an oath of allegiance which contained no renu[redacted]iation of previous allegiance or

citizenship. But in 1954, King returned his draft card to the U.S. Selective Service System, indicating that he considered himself an alien and as such was not liable for service. And again in 1954, King told a consular official that he had obtained British nationality, and declared:

> I made no formal statement of renunciataion of my American citizenship then, since I assumed it was unnecessary and that my becoming a British subject was all that was necessary. I am perfectly willing to make a formal renunciation of United States citizenship, if this is what will simplify my status.

King's statements, said the 9th Circuit, indicated that while he never formally renounced his United States citizenship, he intended to do so when he became [redacted]turalized in Britain. In the circumstances of his case, L[redacted]s conduct can scarcely be considered dispositive of the issue of his intent. In King, the court could fairly find that the appellee's conduct permitted of no reasonable conclusion but that he intended to terminate his United States citizenship. Plainly, such is not the state of the evidence in L[redacted] case.

Other considerations argue against the Department's position. Under any fair reading of L[redacted]s statement, it is evident that he made no admission of a[redacted]age. He did say he hoped the Army's decision would facilitate his travel to the United States to visit his grandparents who could not because of ill health travel to Canada, and that he wished nothing else from the United States but an opportunity to see them. The Department has interpreted L[redacted] statement as indicating a[redacted] of interest in U.S. citize[redacted]p. We find, however, L[redacted] present counsel's construction of his statement no less p[redacted]ble.

> Taken in its context as a request for an other than dishonorable discharge, isn't it more likely to be taken as an assurance that he was not seeking benefits as a veteran? What a senseless business it would have been to say to an officer of the U.S. Army that I care nothing about the United States or being a citizen of your country, but please give me an other than dishonorable discharge. Good sense compels an interpretation calculated to further the ends sought, not to repel them.

The Department further contends that L[redacted] and his attorney-cousin must have known that his being discharged from the Army in absentia would make him ineligible to enter the United States, except by waiver and permanently ineligible to regain U.S. citizenship. In this respect, too, we are impressed by the riposte of L[redacted]'s present counsel.

> /A/ssuming that the Department is correct in its statement that Appellant's discharge made him ineligible to reenter the United States that gives no support to the argument that Appellant obtained Canadian citizenship for the purpose of becoming eligible for discharge on the ground of alienage. If anything, it denigrates that argument.
>
> Appellant has at all times earnestly and consistently asserted his desire to be able to visit his grandparents, mother and brother in the United States. Prior to his discharges from the Army he could not enter the United States without the risk of certain arrest and trial as a deserter. After his discharge he made a number of trips to Oklahoma to visit his grandparents and other relatives. These visits continued until his right to enter was questioned a short time before he initiated his efforts to prove his American citizenship, In the light of these facts what sense does it make to say that he knew that he had to relinquish his American citizen /sic/ to qualify for a discharge as an alien and that in doing so he knew he would be ineligible to reenter the United states,...

In brief, we are of the view that the Department has adduced insufficient circumstantial evidence to show that in June 1975 when he obtained naturalization in Canada, L[redacted] intended to relinquish United States citizenship. L[redacted] never said it was his intent to divest himself of United States citizenship. And the inferences that might be drawn from his obtaining an in absentia discharge from the Army do not demonstrate with a sufficient degree of probability that he

purposefully conducted himself as an alien when he sought and accepted an in absentia discharge.

The Department adduces additional circumstantial evidence to try to establish that at the relevant time L[redacted] intended to relinquish his United States citizenship: other conduct which on its face is incompatible with a claim of U.S. citizenship, specifically, that he entered and worked in the United states on a program for the state of California under H-1 authorization.

The question is whether L[redacted]'s acceptance and use of H-1 authotization establishes, more probably than not, as the Department argues, that he so acted because he considered himself an alien, having intentionally expatriated himself in 1975. The principal evidence of record concerning Lang's H-1 visa [redacted]horization is the sworn statement of Dr. Tierney, one of L[redacted] partners, who applied for and obtained H-1 auth[redacted]ation on behalf of partners in June 1987 at Sacramento.

The state of California official who coordinated the suicide prevention training program can contribute little to shed light on the attendant circumstances. He informed the Department on May 28, 1991: "...It is unfortunate that the details of this paperwork is for the most part lost to me. I have not retained any copies of the materials I may have held during this time concerning the applications for the H-1 visas for several members of the RTTL partnership...." He recalled that information for the H-1 application was provided to him by one of the partn[redacted] by correspondence and telephone, but he could not say how L[redacted] came to be identified as a Canadian citizen on the form He confirmed that Dr. Tierney visited the local INS office, but could recall no date and said he had no further knowledge of Tierney's activities.

Plainly, L[redacted] was not present at Sacramento in June 1987. Tierney st[redacted]d that an INS officer who examined the documentation Tierney presented, observed that Lang must have been naturalized in Canada. In reply, Tierney said he assumed so but did not know. Allegedly, nothing more was said on the subject.

Copies of the documentation Tierney presented to the INS pertaining to Lang have not been introduced. L[redacted] avers that he did not give Tierney any information about his citizenship status. In any event, it is clear that L[redacted] had no direct part in procuring H-1 authorization. If L[redacted] had been present at that interview, possibly he would have been alerted to the adverse inference to be drawn from the application in his behalf for H-1 authorization, and if he had persisted in the application thereafter, his citizenship claim might properly be impugned. That, of course, is not the situation.

The pertinen[redacted]estion therefore is whether one might fairly infer from L[redacted]s use of the H-1 authorization in 1987 and 1988 that he consciously intended [redacted] act contrary to a claim of United States citizenship. L[redacted] submits that one should not draw that inference.

> Prior to the California project, we had not trained outside of Canada and initially it did not occur to us that we would need any kind of documentation to enter and conduct the training. Since the Suicide Intervention Training Program was the first out-of-state and out-of-country contract ever let by the California State Department of Mental Health, they were not familiar with the procedures either. We were terribly busy trying to complete the new materials for the program as well as pursuing are /sic/ other work. (For all of us, suicide prevention work is added on top of other full-time professional work.) The planning for the training waited until we were certain that we could finish the materials. As we completed the materials and finalized the dates to start training, it finally occurred to us that we should seek some advice on these issues.
>
> ...
>
> Once the visa was obtained, I used it several times to gain entry to conduct training in California during the first part of 1988. This use was motivated solely by convenience. I believed that I was a United States citizen and therefore had a right to enter the United States, but I did not know how to establish that right or how long it would take. Establishing my right would not help my partners, and without them, the project could not go forward. This was the most immediate concern. The visa provided me with a way to enter to conduct the training. Once I learned that such entry might confuse my status as a United States citizen, I undertook to establish my status in the most timely fashion possible....

Dr. Tierney confirms that the partners were dilatory about obtaining the proper documentation to enter and work in California; until virtually the last minute they gave no thought to such matters, due to their inexperience of documentation for travel outside Canada.

It seems to us that L[redacted] claim that he used H-1 authorization solely as a matter of convenience is, given the exigencies of the partners' situation, not implausible. Granted, he should have applied for a United States passport from the first rather than succumbing, as he put it in his opening brief, to the expedient of using the H-1 authorization "so readily at hand." He maintained that expediency not alienage led him to use the H-1 authorization.

> Unfortunately, however, human nature is such as to lead many of us to procrastinate and *to* follow the course of expediency. The use of the visa in this case is evidence of nothing more than of this common human frailty. It is not realistic to regard it as evidence of a conscious intention to act contrary to a claim or /sic/ American citizenship or as an affirmation of an intent formed twelve years previously to renounce such citizenship. 7

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7. To a layman, availing oneself of H-1 authorization procurred by another might not seem blatantly inconsistent with a claim of United States citizenship. Such authorization is different, and presumably would be so regarded by a layman, in scope and degree from consciously using, applying for, or inquiring about the issuance of an immigration visa. L[redacted] situation must therefore be distinguished from that of plaintiff in Meretsky **v. U.S.** Department of Justice, 86-5184, Memorandum Opinion (D.C. Cir. 1987), **a** case cited by the Department in support of its contention that his use of an H-1 authorization demonstrates a prior intent to relinquish citizenship. In Meretsky, the plaintiff obtained naturalization in Canada and later inquired about obtaining an immigration visa. Such an act, the Court of Appeals stated, contradicted Meretsky's claim that he always regarded himself as a United States citizen. Note, however, that Meretsky not only obtained naturalization in Canada but at that time made an oath of allegiance renouncing all other allegiance.

All variables considered, L[redacted] use of H-1 authorization in 1987, twelve years after his naturalization in Canada, seems to us at best very marginal evidence of an intent many years before to relinquish United States citizenship.

Appellant's obtaining and travelling on a Canadian passport is, in the Department's opinion, further evidence that he intended to relinquish his United States citizenship in 1975.

L[redacted] volunteered that he obtained a Canadian passport in 1987, apparently the first one he he[redacted] He concedes he never held a United States passport. L[redacted] states that he visited the United States several times after 1975. Whether he used his Canadian passport to identify himself to United States officials on such occasions is not clear; he has made rather confusing statements in that regard. It seems unlikely, however, that he did **so.** **As** the Department surmises, L[redacted] was not likely to be stopped and questioned about his excludability upon entering the United States, since Canadians do not need visas to enter the United States, and usually cross over with little difficulty. Furthermore, L[redacted] has stated that he knew Canadians might enter the United States without a visa and without a passport. It was therefore unnecessary for him to use a Canadian passport to enter the United States. He may have used a Canadian passport to transit the United States to Mexico, but such use is not manifestly incompatible with United States citizenship.

Granted, using a foreign passport to enter the United States may be evidence that one considers oneself not to be a United States citizen. But there is doubt that L[redacted] did **so.** In any event, he duly became a Canadian citizen a[redacted] was legally entitled to use that country's travel document on trips to destinations other than the United State[redacted] It is, in our opinion, therefore **as** plausible to consider L[redacted]'s use of the Canadian passport a matter of convenience as it is to regard it as gesture manifesting alienage.

Finally, we advert to [redacted] other considerations which the Department claims prove L[redacted] prior intent to relinquish citizenship: **(a)** statements [redacted]ade in the 1987 United States Federal Income **Tax** return he filed in 1988; and (b) his neglect of the **.rights** and duties of United States citizenship.

The Department takes the position that certain entries made by appellant on his Individual Income Tax Return (Form 1040) for 1987 are inconsistent with a claim of U.S. citizenship. The reference is to lines **48** and **49** on page two of Form 1040 which relate respectively to liability for 'Self-employement tax' and 'Alternative minimum tax.' **AS** to

each of these he stated in the form: 'Exempt: Canadian citizen/residing in Canada.'

to the entry regarding liability for self-employment tax, L[redacted] asserts that his statement

> is no more than a reference to the fact that /sic/ taxpayer, as a Canadian citizen residing in Canada, was subject to the social security system of that country and, as a United States citizen, he was exempt from self-employment tax on income earned in Canada. It was not in any sense a disclaimer of American citizenship but was in essence a statement that as a citizen of both he was not subject to double taxation. Neither would he be entitled to benefits under both systems.

Given the nature of appellant's income exemptions and deductions, he could not, as he indicates, have owed any money to the United States by way of Alternative Minimum Tax. There was therefore no occasion, he stated, for him to make any entry on line 49 of his return. 'The superfluous statement of appellant on line 49 that he was a Canadian citizen residing in Canada was true, and he gained no benefit from it. Neither can it be regarded as a disclaimer of American citizenship.'

The Department maintains, however, that L[redacted] assertion of Canadian citizenship in respect of Self-Employment-Tax and Alternative Minimum Tax are gratuitous. '/T/hese superfluaus references to Canadian citizenship are yet other strands of evidence relevant to a determination of appellant's intent.'

Piling his first U.S. income tax return in many years in 1988 is not necessarily an affirmative act showing that he lacked the intent to relinquish his United States citizenship. Perhaps, as the Department asserts, L[redacted] was simply trying to make a record. But would he witti[redacted]y decide to 'make a record' and at the same time proclaim that he was exclusively a Canadian citizen? He may have been counseled to file a return [redacted] 1987 - 'for the record' - but it does not appear that a qualified tax preparer assisted him. Can one be reasonably sure that he did not complete the form as he did because he did not understand U.S. tax law with respect to Self-Employment Tax and Alternative Minimum Tax, and simply wanted to ensure that he could avoid tax liability? To interpret his tax return (form 1040 to be filed by U.S. citizens) as a consciously executed document in which [redacted] wanted to deny and did deny a claim to American citize[redacted]p strikes us as illogical.

We do not gainsay that over many years [redacted] failed to exercise the rights and perform the duties of [redacted]ed States citizenship. For example, he filed only one income tax return between 1969 and **1988**; he has not voted in federal presidential elections.

In appeals such as [redacted]'s we have often asked rhetorically how probative a prior intent to relinquish United States citizenship is such non-feasance. And we have repeatedly taken the position that failure to do the things expected of a model citizen ought not be interpreted as exemplary of the individual's state of mind at the relevant time. It is commonplace that people fail to do things they ought to do for a variety of reasons, or for no particular reason, without necessarily intending that their failure to act should be [redacted]rpreted as having some particular significance. ***So*** while [redacted] conduct after naturalization does not bespeak a conscient[redacted] United States citizen, we cannot accept that an intent to relinquish United States nationality is the only fair, or necessarily most probable, inference to be drawn from that fact. 8

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**8.** In this respect, it is instructive to refer to the recent case of Parness **v.** Shultz, 669 F. Supp. 7 (D.D.C. 1987). In Parness, the plaintiff, who did not seek advice of any U.S. official before the event, obtained naturalization in Israel in 1974. He made no oath renouncing United States citizenship, but failed to cross out a section of the application for naturalization in which he could have exercised the right to be exempt from declaring that he renounced United States citizenship. Thereafter, he voted in Israeli elections (but evidently not in United States elections), and (like L**ang**) travelled abroad on an Israeli passport. Finally, in **1979 he** decided to try to renew his united States passport and then discovered that he might have expatriated himself.

The court did not weigh the plaintiff's non-feasance of the rights and duties of United States citizenship in determining whether he intended to relinquish U.S. citizenship when he became an Israeli citizen. Rather, the court focused on the circumstances surrounding his Israeli naturalization which it concluded demonstrated **gross** negligence rather than a renunciatory intent.

III

The Department has essayed its burden of proof by marshaling a variety of circumstantial evidence (much of it obtained subsequent to its 1988 determination of loss of [redacted] citizenship) from which it infers that [redacted] intended in 1975 to relinquish his United States citizensh

The only evidence submitted by the Department on the issue of [redacted] intent at the time of his naturalization which might be considered contemporaneous with that event is the fact that five months after naturalization he obtained a discharge in absentia from the United States Army. Contrary to the Department's contention that his obtaining such a discharge is dispositive of the issue of intent, that "contemporaneous" evidence cannot be conclusive on the issue of [redacted] probable intent. It may have been the practice of the [redacted]ary in 1975 to advise citizen deserters abroad to return to military control, and to warn them that if they applied for discharge in absentia it might be presumed that they had expatriated themselves. But there is no proof that appellant was actually **so** advised and warned. Documents that might substantiate the Department's case have not been produced. Speculation as to what happened will not make the Department's case.

[redacted] has not shown that he lacked the requisite intent to relinquish his United States citizenship: his case would, of course, be bolstered if he were able to establish that it was his will and purpose to retain citizenship, despite doing an expatriative act. But he does not bear the burden of proof on the issue of intent. And the central fa[redacted]f this case is that the record is devoid of evidence that [redacted] ever expressly repudiated his American nationality. Negligence, inadvertence, inertia, lack of knowledge, lack of the will to seek knowledge are insufficient to support a finding of intent.

It is axiomatic that the Board as trier of fact is required to mak[redacted] judgment on all the evidence wh[redacted]r the government has [redacted]tisfied its burden of proof that [redacted] more probably than [redacted] performed the expatriative act with the requisite intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. at 270. For the trier of fact, the preponderance of the evidence is what the trier believes to be the preponderance of probability. The Board must therefore evaluate the Department's evidence, factoring in whatever legitimate doubts i[redacted]find, and then decide whether the fact to be proved ([redacted] intent to relinquish citizenship) is more probable than [redacted]n-existence. There is no mathematical formula to ease the difficulty of making a rational decision. In the final analysis, the Board must make its own judgment, based on itsassessment of all the evidence, whether the Department's submissions are more compelling than other factors which argue for retention of citizenship.

Given the nature of the evidence before us, we are left in doubt about [redacted] probable state of mind in 1975 when he obtained natura on in Canada upon his own application. we therefore conclude t epartment has not carried its burden of proving that [redacted] intended *to* relinquish his United states citizenship when obtained naturalization in Canada upon his own application. Accordingly, we reverse the Department's decision of loss of his nationalit

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Member

J. Peter A. Bernhardt, Member