

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B.A.H. -- Motion for Reconsideration -
Loss of Nationality

Decided by the Board April 30, 1987

Shortly after the Board on November 28, 1986 reversed the Department's determination that appellant expatriated herself, the Department informed the Board on December 23, 1986 that it intended to file motion for reconsideration of the Board's decision, indicating that the motion would be "forthcoming". It did not, however, state why it required an enlargement of time to file the motion.* The Board did not respond to the Department's memorandum immediately, but on January 29, 1987, after noting that the Department's motion had not yet been received, informed the Department that the time to file the motion would not be extended beyond February 13, 1987. The Board asked the Department to explain why it had been unable to file its motion within the prescribed limitation. Three weeks later (March 6, 1987) the Department filed its motion; by then more than 90 days had elapsed after the Department received notice of the Board's decision on this appeal. And even then the Department had not explained why it did not file within the allowable time. Two weeks later, after the Board had twice asked it to do so, the Department set forth the reasons why it had been unable to comply with the prescribed limitation.

HELD: The Department's motion was untimely. The Department's allegations of increased litigation, shortage of clerical help, and lack of work processing equipment were insufficient to excuse such protracted delay. That the Board had granted appellant four months to file a reply brief did not excuse the Department's unusually long delay. In appellant's

* Under federal regulations a motion for reconsideration may be filed by either party within 30 days after receipt of a copy of the Board's decision.

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case her counsel had shown good cause in timely fashion why the Board should grant an enlargement of time to file. The Department's excuse was both feeble and tardy. The Board believed that with marginally more effort the Department could have filed its motion at the latest by February 13, 1987. To allow the motion under the circumstances would, in the Board's view, neither be fair to appellant nor constitute orderly and timely disposition of the matter.

The Board denied the Department's motion for reconsideration.

The Board of Appellate Review on November 28, 1986 reversed the Department of State's administrative determination that B A H expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

On December 23, 1986 the Department of State sent the Board the following memorandum indicating that it intended to move for reconsideration of the Board's decision.

The Department would like to notify the Board that it intends to make a Motion for Reconsideration of the Board's decision in the above-mentioned case. 2/ Our Motion for Reconsideration will, with the Board's permission, be forthcoming.

1/ Prior to November 14, 1986, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read 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 --

(1) obtaining naturalization in a foreign state upon his own application,...

PL 99-653, approved November 14, 1986, (100 Stat. 3655), amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

2/ Section 7.9 of Title 22, Code of Federal Regulations, 22 CFR 7.9, provides as follows:

Sec. 7.9 Motion for reconsideration.

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By memorandum dated January 29, 1987, the Chairman of the Board advised the Department that:

As of this date, the Board has not received the Department's motion for reconsideration of the Board's decision on the above-captioned citizenship appeal. The memorandum under reference does not, in the Board's opinion, constitute a motion within the meaning of 22 CFR 7.9. [See note 2].

If the Department intends to file such a motion, the Board requests that, as customary, it be submitted through Deputy Assistant Secretary Coburn not later than February 13, 1987. The Board further requests that the Department explain why the motion could not have been filed within the limitation prescribed by 22 CFR 7.9

When the Board has received the Department's motion it will determine whether or not the motion may be deemed to have been timely filed.

2/ Cont'd.

The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.

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The Department did not file its motion for reconsideration until March 6, 1987. Thereafter, the Chairman of the Board informed the Department on March 12, 1987 as follows:

It will be recalled that the Board of Appellate Review requested that if the Department intended to file a motion for reconsideration of the Board's decision on the above-captioned citizenship appeal (Board memorandum of January 29th), the motion be filed by February 13, 1987 and that the reason why the Department did not file the motion within the limitation prescribed by the regulations be explained.

The motion, as submitted, does not address the issue of timely filing. The Board accordingly requests that the Department do so within 10 days or by March 27, [sic - March 22] 1987.

The Department replied to the Board's memorandum on March 25, 1987, expressing regret that "through a misunderstanding" it did not file its motion within the limitation prescribed by the regulations. The Department noted, however, that both the Department and appellants had on occasion informed the Board in advance that a motion for reconsideration would be late and that the Board had granted an extension of time to file without comment. The Department's memorandum continued:

Therefore, since the Board already was aware of the Department's increased litigation, lack of clerical assistance, and lack of word processors, the Department did not anticipate the Board's possible disapproval of our timely request for an extension in the above-captioned matter. Further, the Department had anticipated a reasonable extension of time in which to file our Motion, particularly in view of the delays in this case caused by Appellant herself.

As noted above, this case was previously delayed by Appellant's failure to make a timely submission of her reply brief, which the Board did not challenge. Although the Department filed its brief on February 25, 1985, Appellant's attorney did not notify the Board until April 24, 1985 of Appellant's desire to file a reply brief. The Board then granted a three month extension until July 5, 1985, to which the Department did not object.

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Section 7.5(d) of Volume 22 of the Code of Federal Regulations provides that reply briefs shall be filed within 30 days after the date the Department's brief is filed with the Board (in this case, 30 days would have been approximately March 25, 1985). Appellant waited an additional 30 days and then requested an extension, which the Board readily granted. Appellant then had an additional three months, a total of four months over the prescribed period.

Under these circumstances, therefore, the Department respectfully requests that the Motion for reconsideration in this case be considered to have been timely filed.

Counsel for appellant contended in a letter to the Board dated April 7, 1987 that the Department's motion was not timely and should be denied. We agree.

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Before proceeding, we must decide a threshold issue: whether the Department's motion for reconsideration of the Board's decision on Ms. H 's appeal may be deemed timely. For the reasons that follow, we conclude that the motion is time-barred and should be denied.

Federal regulations provide that either party may make a motion for reconsideration within 30 days after receipt of a copy of the Board's decision. 22 CFR 7.9 (text supra, note 2). The regulations also provide that the Board may, for good cause shown, enlarge the time for the taking of any action. 22 CFR 7.10.

As we have seen, the Department's motion was not filed until after the elapse of more than 90 days after it received a copy of the Board's decision.^{3/} The pertinent inquiry thus is whether the Department has proffered any reasons that would justify the Board in finding the Department's motion to be timely.

^{3/} The date the Department received a copy of the Board's decision has not been stipulated, but it certainly was no later than December 2 or 3, 1986.

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Less than 30 days after receiving a copy of the Board's decision, the Department requested, in effect, that the Board enlarge the time for filing a "forthcoming" motion for reconsideration, but stated no grounds for its request. Arguably, by its subsequent silence, the Board led the Department to believe that the Board acquiesced in the Department's request of December 23, 1986 for an open-ended enlargement of time. In this respect, the Board was perhaps remiss. However, any misconception the Department may have had about the Board's position surely was erased by the Board's memorandum of January 29, 1987 which made it clear that the Board would not extend the time for filing a motion beyond February 13, 1987 and that the reasons for the delay in filing should be explained. It was not until three weeks later that the Department filed its motion; it did not address the issue of timely filing until March 25th after the Board made a further request that it do so.

Increased litigation, shortage of clerical help, and lack of word processing equipment, if properly and promptly spelled out might, in certain instances, constitute "good cause" for a short delay in filing a motion for reconsideration. We are unable, however, to accept that such factors are sufficient to excuse a filing made more than 90 days after the Department received notice of the Board's decision. 4/

Nor do we find persuasive the other considerations which, in the Department's view, warrant our deeming the motion to be timely.

The Department is correct in stating that there have been occasions when both the Department and an appellant have notified the Board simply that a motion for reconsideration would be late, and the Board has acquiesced without comment. Those situations have been exceptional, however, and the two cases the Department cites, In re B.A.M., decided November 14, 1986, and In re J.A., decided December 8, 1986, are readily distinguishable from the one we are now considering.

4/ Here Judge Kaufman's observation about what constitutes "good cause" seems apposite; "...good cause shall not be deemed to exist unless the movant avers something more than the normal (or even reasonably anticipated but abnormal) vicissitudes inherent in the practice of law." United States v. Raimondi. 760 F.2d 460, 462 (2nd Cir. 1985).

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In B.A.M., the Department informed the Board exactly 30 days after receipt of the Board's decision that it would file a motion for reconsideration within one week. The Board did not, as it should have done, respond to that memorandum. But one week later the Department filed its motion, and the Board deemed it timely; although the motion was not filed within the allowable time, and no specific reason was given therefor, the delay in filing was at worst de minimis and not evidently unfair to the other party.

In the case of J.A., appellant requested within 30 days of receipt of a copy of the Board's decision that he be allowed some two months to present arguments why the Board should reconsider its decision on his appeal. The Board granted his request, reasoning that as a layman, without benefit of counsel and living in Germany, he had shown sufficient cause to warrant the Board's extending the time for filing his motion for reconsideration.

We see no rational connection between the fact that the Board allowed appellant about four months to reply to the brief of the Department and the Department's delay in submitting its motion for reconsideration.

Counsel for Ms. H requested on April 5, 1985 that the Board grant her a three-month extension of time to file a reply brief, basing her request on these grounds:

This letter is to confirm my telephonic request for an extension of time to submit a Reply Brief in the above-named case. Because of the appellant's residence in Canada and inability to travel to the U.S. at this time, we are requesting an extension of three months. Thank you for your consideration in this matter.

Counsel's request for an enlargement of time was made roughly within 30 days after receipt of a copy of the Department's brief. The Board found that counsel's request for an enlargement of time timely and her reasons sufficient to grant the request. Plainly, counsel showed due regard for the prescription of the regulations regarding timely filing.

In sum, we are of the view that with marginally more effort the Department could have filed a proper motion for reconsideration by February 13, 1987, as the Board requested it do.

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The fair, orderly and timely disposition of cases appealed to the Board depends in good measure on the compliance of both parties with the provisions of the applicable regulations regarding timely filing of briefs and motions. For us to deem this particular motion of the Department timely would neither be fair to Ms. H nor constitute orderly and timely disposition of the case.

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Upon consideration of the foregoing, we conclude that the Department's motion for reconsideration of the Board's decision on Ms. H 's appeal is time-barred. Accordingly, it is hereby denied.

Given our disposition of the matter, we do not reach the substantive issues presented by the Department's motion.

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member