August 31, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: W S H

This case is before the Board on appeal from an administrative determination of the Department of State that appellant, W S H , expatriated herself on December 10, 1975, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

I

The United States Consulate General at Toronto executed a certificate of loss of nationality in the name of W S H on July 25, 1979, The Consulate General certified that Mrs. H acquired United States citizenship by virtue of her birth at ; that she acquired the nationality of Canada on December 10, 1975, by virtue of naturalization; and that she had thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department of State approved the certificate on September 20, 1979, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board.

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

> 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, , . .

Appellant gave notice of appeal on January 15, 1982. She stated in her brief of June 4, 1982, that she had not filed an appeal earlier since she was awaiting the outcome of the Department's inquiry into the status of the nationality of her husband who had also obtained naturalization in Canada at the same time as she on December 10, 1975. 2/

Upon receipt of appellant's statement, the Board, on June 22, 1982, requested Passport Services to submit the case record upon which the administrative determination of loss of nationality was based and a brief in support of the Department's position. On August 25, 1982, the Deputy Assistant Secretary for Passport Services submitted the record and a memorandum, in lieu of a brief, requesting the Board to remand appellant's case to Passport Services for the purpose of vacating the certificate of loss of nationality which was issued in her name. The memorandum set forth with particularity points of law and fact in support of the Department's position, and concluded:

> It is therefore clear from the record that the Department's original determ of loss of U.S. nationality in *Mrs.* H

2/ The H naturalization in Canada came to the attention of the Consulate General in 1979 when Mrs. He inquired about registering their child, born in 1974, as a U.S. citizen. On July 25, 1979, the day the Consulate General executed a certificate of loss of nationality in Mrs. H name, the Consulate Ge parently initia nvestigation into Mr. H possible loss of citizenship. Mr. H s case was considered by the Consulate General and the Department between August 1979 and April 1981. The Department disapproved a certificate of loss of na ty in his name on April 17, 1981. In Mr. H case the Department concluded that it could not be established that he acquired Canadian citizenship with the intention of relinquishing U.S. citizenship. As the Department noted in its memorandum on *Mrs.* H appeal, the only factual difference between the two cases appears to be in the H reasons for obtaining naturalization in Canada. Mr. H did so in order to be able to practice law in Canada; Mrs. H joined in her husband's application merely, as she put it, "as a matter of natural convenience between married persons."

case was in error. The Department is unable to meet its burden to prove that Mrs. H[redacted]y had an intent to relinquish her United States nationality when she became naturalized in Canada. The Board is requested to remand the case for vacation of the Certificate of Loss.

II

The first question we must consider is whether the Board has jurisdiction to consider this appeal. Initially, the Board must decide whether the appeal has been timely filed before proceeding to consider the merits of the case. If the appeal was not filed within the prescribed period of time, the Board would lack jurisdiction over the case.

The regulations of the Department which were in effect when appellant's certificate of loss of nationality was approved provided that an appeal might be taken within a reasonable time after receipt of notice of approval of a certificate of loss of nationality. 3/ We consider this time limitation applicable in the instant case, not the provisions of the present regulations which stipulate that an appeal must be taken within one year of approval of the certificate or be denied. 4/

Mrs. H[redacted] took this appeal some two years after she presumptively received notice of the Department's approval of the certificate of loss of nationality which issued in her name. Appellant states that she did not appeal earlier because she had been awaiting the outcome of the Department's determination of the citizenship status of her husband, the circumstances of whose case were virtually identical to her own. We find appellant's explanation for the delay in taking her appeal plausible and valid; such delay as there may have been in taking the appeal is not unreasonable under the circumstances. Her appeal therefore is deemed to have been timely filed, and the Board has jurisdiction to entertain it.

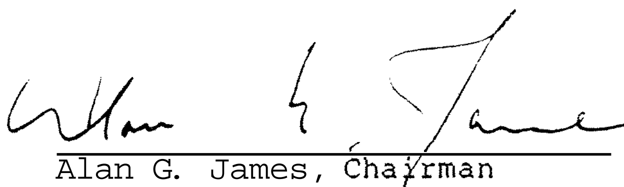
3/ Section 50.60, Title 22, Code of Federal Regulations (1979) 22 CFR 50.60.

4/ Section 7.5(a) of Title 22, Code of Federal Regulations (1981), 22 CFR 7.5(a).

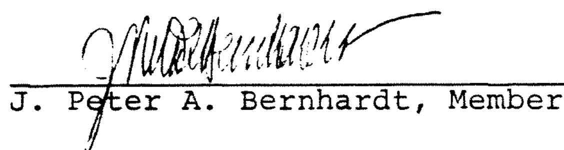
III

Upon review of the entire record before the Board and in light of Afroyim v. Rusk, 387 US 253 (1967) and Vance v. Terrazas, 444 US 252 (1980), we concur that the evidence of record fails to support a finding that appellant's expatriating act was accompanied by an intent to divest herself of her United States citizenship. We are, therefore, agreeable to the request for remand to vacate the certificate of loss of nationality.

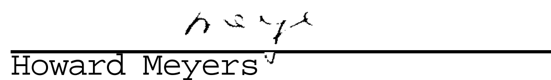
The case is hereby remanded to Passport Services for further proceedings. 5/



Alan G. James, Chairman



J. Peter A. Bernhardt, Member



Howard Meyers

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

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