November 24, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE 'OF: M[redacted] O[redacted]

This case is before the Board of Appellate Review on appeal by Ma[redacted] O[redacted] from an administrative determination of the Depar t State that he expatriated himself on February 19, 1977, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Japan upon his own application. 1/

I

Appellant, M[redacted] O[redacted], also known as R[redacted] M[redacted] O[redacted], was born at Y[redacted] d States citizen father and a Japanese He thus acquired United States citizenship

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

> 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, . . .

at birth under the provisions of section 201(g) of the Nationality Act of 1940. 2/

2/ Section 201(g) of the Nationality Act of 1940, reads in pertinent part:

Sec. 201. The following shall be nationals and citizens of the United States...

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States ....

Since, at the time of O[redacted] birth, his father was residing abroad solely or primarily in the employment of the Government of the United States (he w[redacted] a civilian employee of the United States Forces, Japan) O[redacted] was exempt from the requirement of section 201(g) of five years residence in the United States for retention of United States citizenship.

From birth to 1977, O[redacted] was regularly documented as a United States citizen by the Embassy at Tokyo and the Consulate General at Yokohama. He was educated at Japanese schools and graduated from Meiji University in **1973.**

In an affidavit executed December 4, 1981, O[redacted] stated that although he had studied for the law, he found that as a United States citizen he was prohibited from taking the Japanese bar examination. He therefore sought other employment, but found, he contends, that the companies to which he applied rejected his applications on learning that he was not a Japanese citizen. In **1973** O[redacted] parents sent him to Colorado University where he pursued a masters degree in marketing. Although he was within a[redacted]ew months of completing the requirements for a degree, O[redacted] left Colorado in early 1975 and returned to Japan, allegedly because his father's resources were insufficient to maintain him at graduate school in the United States and to finance the education of his two younger brothers.

O[redacted] alleges he still found the job market closed to him becaus[redacted] he was not **a** Japanese citizen. 3/ It seems, however, that he found a position with the Singer Corporation and was hired on a temporary basis, allegedly on the understanding that his employment would be made permanent if he were to acquire Japanese citizenship.

3/ Appellant's father, S[redacted]i O[redacted], endeavors to corroborate his son's contention abou[redacted] di[redacted]iculty of non-Japanese finding employment in Japan. In an affidavit executed on June 15, **1981,** the senior Ono stated:

> Upon graduating from the local Japanese universities they /his sons: appellant, and appellant's two younger brothers who also applied for naturalization in Japan some years after appellant had done so/ applied for jobs in the local Japanese communities. To their amazement Americans were not welcomed. This situation was true even with American affiiiated companies. Therefore, my sons under the prevailing desperate situation applied for naturalization in Japan to attain their livelihood.

In August 1975, C[redacted] apparently inquired at the United States Embassy at Tokyo about the consequences for his United States citizenship if he were to become naturalized in Japan. The Embassy's record of official business with C[redacted] on consular matters (FS-558) shows that on August 5, the Embassy gave C[redacted] a memorandum concerning naturalization in Japan, and advised him that "naturalization in a foreign state is highly persuasive evidence of intent to relinquish USC [United States citizenship]". 4/

4/ The record does not disclose why C[redacted] was given this advice by the Embassy. Since it is not likely that the Department gave the Embassy specific instructions so to inform persons similarly situated, it is reasonable to assume that C[redacted] himself solicited this advice.

Sometime thereafter (no date appears in the record), [redacted] applied for naturalization in Japan. 5/ As he explained in his affidavit of December 4, 1981:

> Knowing that "dual citizens" were accepted unaer the "SOFA" /Status of Forces Agreement/, I applied for Japanese citizenship.

5/ There is no copy in the record of [redacted] application for naturaiization. However, according to [redacted] eport from the Embassy (Tokyo telegram No. **4178,** March 12, **1982);**

1. Applicant for Japanese naturalization over 15 years old must swear that he will become a good law-abiding Japanese citizen. The text of the oath reads: "I swear that I will become a good citizen of Japan, abiding by its laws." It must be signed by the applicant with his seal and signing date.

2. Since Japanese Justice Ministry is well aware of Sec. 349(a)(1) of INA, US citizen naturalization applicants are not required to submit any official statement regarding expatriation from US by Japanese naturalization. During processing of naturalization, applicant is informed he must divest himself of his foreign nationality. Article 4, subsection (5) of Japanese Nationality Law provides "that one has no nationality, or one's acquisition of Japanese nationality will cause one to lose one's nationality," as a prerequisite for naturalization.

Apparently [redacted] was not asked to fill out a citizenship questionnaire to assist the Department in determining his status; nor is there in the record any account by a consular officer of [redacted] visit to the Embassy on May 17.

On May 17, in accordance with the requirements of section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality [redacted] 8/ The Embassy certified that [redacted] was born at [redacted], on [redacted]; that he acquired the nationality of the United States by virtue of birth abroad of a United States parent; that he acquired the nationality of Japan upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

8/ 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 part III of this subchapter, 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.

The Embassy forwarded the certificate of loss of nationality to the Department on May 17 without an explanatory note regarding the circumstances under which [redacted] executed the affidavit of expatriated person; nor did the consular officer concerned indicate whether [redacted] had commented, or been asked by the consular officer to comment, on why he had applied for naturalization in Japan.

The Department approved the certificate on July 14, 1977, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. The Embassy received a copy of the approved certificate on August 15 and the same day forwarded a copy to [redacted].

[redacted] father attempted to lodge an appeal on behalf of his [redacted]n on June 15, 1981. Since the father's statement did not constitute a proper appeal, the Board advised [redacted] to submit his own appeal. This he did on December 4, 1981.

Appellant contends that his action in applying for naturalization was forced on him by economic circumstances, i.e., his inability to find employment unless he were to become a Japanese citizen. "It all resulted", he has stated, "from 'life' or 'death' struggle. ...I maintain it would fall under the terms of 'duress'."

Appellant further asserts that in becoming naturalized in Japan he had no intention of relinquishing his United States citizenship.

II

At the outset, the Board is confronted with the question whether the appeal taken here was timely filed.

Under the current regulations of the Department, which were promulgated on November 30, 1979, the time limitation for filing an appeal is one year after approval of the certificate of loss of nationality. 9/ The regulations further provide that an appeal filed after the time limit shall be denied unless the Board for good cause shown determines that the appeal could not have been filed within

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9/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFH 7.5.

the prescribed time. The current regulations, of course, were not in force at the time the Department approved the certificate of loss of nationality that was issued in this case.

The Department's regulations, which were in effect on July 14, 1977, the date on which the Department approved C[redacted] certificate of loss of nationality, provided as follows:

> 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 made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 10/

Believing that the current regulations regarding the time limit on appeal should not apply retrospectively, we consider that the time limitation stipulated by the regulations which were in effect in 1977 should apply in this case.

Tnus, under the governing time limitation, a person who contends that the Department's holding of **loss** of nationality is contrary to law or fact is required to appeal such holding to the Board within a reasonable time after receipt of notice of the holding of **loss** of nationality. If a person does not initiate his or her appeal to the Board within a reasonable time, the appeal would be barred and the Board would be without authority to entertain it.

What is a reasonable time depends, of course, on the facts of each particular case. Unlike a fixed determinate limitation, it would not depend upon the fact that a certain period of time had elapsed. Although the term "reasonable time" cannot be defined in the abstract, the criteria for determining whether an appeal **has** been taken within a reasonable time have been well established by judicial decisions.

10/ Section 50.60 of Title **22**, Code of Federal Regulations, (1977), **22** CFR. 50.60.

Whether an appeal has been timely filed depends on the circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1431). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow. This does not mean, however, that a party will be allowed to determine a "time suitabie to himself". In re Roney, 135 F. 2d 175 (1943). Nor should reasonable time be interpreted to permit a protracted and unexplained delay which is prejudicial to either party. Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1907).

The rationale for allowing a reasonable period of time within which to take an appeal from a determination adverse to one's citizenship status is pragmatic and fair. It is intended to allow an appellant sufficient time to prepare a case showing that the Department's holding of loss of citizenship was contrary to law or fact. It presumes, however, that an appeliant will prosecute his or her appeal with the diligence and prudence of an ordinary person. Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (1926). At the same time allowance is made for circumstances beyond an appellant's control which may impede him or her from promptly petitioning the Board. Where there has been a delay in taking an appeal the appellant is required to show a valid excuse. Appeal of Syby, 66 N.J. Super. 460, 169 A.2d 749 (1961). Further, reasonable time begins to run with receipt of notice of the Department's hoiding of loss, not at some subsequent time years later when appellant for whatever reason may seek to restore his or her United States citizenship status.

In the appeal before the Board, the Department approved the certificate of loss of nationality on July 14, 1977. Barely a month later the Embassy at Tokyo, by letter dated August 17, 1977, sent Ono a copy of the approved certificate, which, it may be presumed, he received a few days later. This appeai was initiated on December 4, 1981, more than four years after appellant had been notified of the Department's administrative determination of loss of his United States citizenship.

The Department of State contends that appellant's delay of four years in lodging an appeal is unreasonable and that his appeal should therefore be deemed time barred.

In his letter of May 18, 1982, which constitutes his reply brief, appellant concedes that his delay in taking an appeal was a iong one.

> I realize that from all reasonableness that four years is too long a waiting period for this appeal.

But he asserts:

> where the established procedures for an appeal are unknown and where one ,ismisinformed on the subject of naturalization and subsequent **loss** of United States citizenship, the circumstances should warrant an exception to the term "reasonableness".

It is difficult to accept appellant's contention that he did not know the established procedures for taking an appeal. On the back of the certificate of **loss** of nationality these procedures are clearly spelled out. The expatriate's attention is called to them by a statement in bold type at the bottom of the first page: "See Reverse for Appeal Procedures." Further, the Department's Foreign Affairs Manual (*8* **FAM** 224.21, 1977) requires that when an approved certificate of **loss** of nationality is delivered to the expatriate, the latter shall be informed in writing of entitlement to appeal to the Boar of Appellate Review. We have seen that the Embassy sent o a copy of the approved certificate of **loss** of nationality on August 17, 1977. Although there is no copy in the record of a letter showing that appellant was informed specifically of his right of appeal, it may be presumed, in the absence of evidence to the contrary, [redacted] his se [redacted] 11/

11/ See Boissonas v. Acheson, 101 F. Supp. 138 (1951), wherein the court held that, absent evidence to the contrary, public officials are presumed to execute their official duties in accordance with law and regulations.

Appellant was, it may reasonably be assumed, therefore clearly on notice from sometime in August 1977 of his right to take an appeal to this Board and of the correct manner of doing so.

[redacted] failure to avail himself before 1981 of the appeal procedure is the more difficult to understand since he was no stranger to the Embassy and the Consulate General at Yokohama, having visited these establishments periodically for various consular services. True, he showed commendable awareness of his responsibility as a United States citizen by registering for Selective Service. Yet he was not moved to inquire promptly about how he could seek redress from a determination that he had abandoned his citizenship, a right which he evidently valued highly.

Appellant's assertion that he was misinformed about the subject of naturalization and its possible consequences for his United States citizenship is, in our opinion an insubstantial explanation of his failure to initiate a [redacted] in [redacted] e, or at least jeopardize, his citizenship by becoming naturalized in Japan. Yet, in the face of this admonition, he proceeded to apply for naturalization, Writing in his reply brief about the Embassy's warning, appeliant simply noted:

> The memorandum of August 5, 1975, advising me that naturalization in Japan is highly persuasive evidence of an intent to relinquish U.S. citizenship can not be located in my files. Therefore, I have no comments in respect to this issue.

The foregoing contentions aside, appellant has offered no explanation for a delay of four years in taking an appeal. He has adduced no evidence to show that circumstances beyond his control prevented him from petitioning for restoration of his United States citizenship; nor has he alleged that he required such a period of time in order to prepare his appeal, An educated man; by his sworn statement fluent in English: and with ready access to the American Embassy, [redacted] had the motivation and the means to ascertain the true facts about appeal procedures and to act on the basis of information he had previously been given or could have readily obtained.

In our view, appellant did not exercise the diligence of a reasonably prudent person to pursue an appeal. His failure to petition this Board until four years had elapsed from the time he had been notified of the Department's determination of loss of his American citizenship is, in the circumstances of his case, unreasonable.

No good cause having been shown therefor, the Board is without authority to enlarge the time for the taking of this appeal. 12/

III

Upon consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time, as prescribed in the Department's regulations in effect in 1977 until revised in 1979. Accordingly, we find the appeal, barred by the passage of time and that as a consequence the Board is without jurisdiction to entertain it.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Gerald A. Rosen, Member

12/ Section 7.10, Title 22, Code of Federal Regulations, 22 CFR 7.10, reads in part:

...The Board, for good cause shown, may in its discretion enlarge the time prescribed by this part for the taking of any action.