February 24, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: M[redacted] F[redacted] P[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, M[redacted] F[redacted] P[redacted] expatriated herself on April 5, 1979, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

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[redacted]. P[redacted], was born at [redacted], t[redacted]y acquiring Un[redacted] According to her own submissions, she resided in the United States until 1963. 2/ In that year

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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, . . .

2/ Appellant's affidavit of July 5, 1982, submitted in support of her appeal, states that she became a landed immigrant (admitted to permanent residence) in Canada on August 3, 1963. The certificate of loss of nationality prepared in her name by the Consulate General at Toronto on June 2, 1981, however, states that appellant resided in the United States until August 3, 1964.

appellant moved to Canada where she has since resided. She is a barrister and solicitor.

Appellant was granted naturalization in Canada on April 5, 1979. On that occasion she affirmed she would bear true faith and allegiance to Queen Elizabeth the Second and that she would faithfully observe the laws of Canada and fulfil her duties as a Canadian citizen. 3/

It appears that in the Spring of 1981 appellant informed the Consulate General at Toronto of her naturalization. The record shows that the Consulate General requested confirmation from the Canadian authorities of appellant's naturalization and that it received such confirmation on March 31, 1981. The Consulate General then invited appellant to submit information to assist the Department in determining appellant's citizenship status. Appellant submitted a completed citizenship questionnaire on April 22, 1981. Therein, according to her affidavit of July 5, 1982, she stated that she intended to seek and obtain naturalization in Canada but did not intend to renounce her United States citizenship by so doing. 4/

As required by section 358 of the Immigration and Nationality Act, the Consulate General on June 2, 1981, prepared a certificate of loss of nationality in appellant's name. 5/

3/ The oath of allegiance did not, appellant points out, require appellant to renounce her previous nationality.

4/ Appellant stated in her affidavit of July 5, 1982, "I was asked by the said Consulate General to renounce my United States citizenship. I have not done so nor indicated any willingness to do so."

5/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

The Consulate General certified that appellant acquired the nationality of the United States at birth; that she acquired the nationality of Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on July 13, 1981, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board.

Appellant brought this appeal by letter dated July 2, 1982, and submitted a brief in support thereof. Appellant concedes that she voluntarily obtained naturalization in Canada, but contends that in so doing she did not intend to relinquish her United States citizenship.

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Upon receipt of appellant's submissions, the Board of Appellate Review, in accordance with section 7.5(d), 22 CFR, requested on July 14, 1982, the Department to submit a brief setting forth the Department's position on the appeal and the record upon which the Department's determination of loss was based. The Department's brief was due September 14, 1982. The Department did not submit a brief by the due date or offer any explanation for its failure to do so. In response to a memorandum from the Board dated September 30, 1982, inquiring about the status of the Department's brief, the Deputy Assistant Secretary for Passport Services informed the Board on October 15, 1982, that the Department was unable to locate appellant's record, but that renewed efforts were being made to retrieve it; the Board would be notified as soon as the file was found.

The Board informed appellant by letter dated October 19, 1982, that the Department could not locate her file. In reply, *Mrs.* P[redacted] wrote the Board on October 27, 1982, asserting that the Department had not shown good cause why it could not file its brief on or before September 14, 1982. She requested that the Board not enlarge the time for filing the Department's brief and proceed to consider her case without the Department's brief and the case record.

The Board forwarded a copy of Mrs. P[redacted] letter to the Deputy Assistant Secretary for Passport Services on November 4, 1982, requesting the Department's comments on Mrs. P[redacted] letter with the least possible delay. The Board added that it would appreciate being informed of the actual steps being taken to locate the file and the present status of the matter.

On November 29, 1982, the Board sent a memorandum to the Deputy Assistant Secretary for Passport Services requesting a reply to its memorandum of November 4, 1982, adding that the Board was at a loss to understand the failure of the Department to proceed in this case in a timely manner in accordance with the Department's regulations.

By letter dated December 16, 1983, (received by the Board January 3, 1983), Mrs. P[redacted] again maintained that the Department had failed to show good cause for the delay in submission of its brief within the prescribed time. As she had done previously, she requested that the Board proceed to consider her case and submit its decision on the basis of the record as presently filed with the Board. By memorandum dated January 12, 1983, the Board sent a copy of Mrs. P[redacted]' letter to the Deputy Assistant Secretary for Passpo[redacted]rvices.

On December 29, 1982, the Board informed Mrs. P[redacted] that since no reply had been received to its memoran[redacted] the Deputy Assistant Secretary for Passport Services of November 4 and November 29, 1982, the Board was prepared to proceed in the matter. To that end, the Board requested that she submit a copy of her certificate of loss of nationality. The Board sent a copy of this letter to the Deputy Assistant Secretary for Passport Services by memorandum dated December 29, 1982.

Mrs. P[redacted] submitted a signed copy of the approved certificate of loss of nationality by letter dated January 18, 1983. On February 3, 1983, the Board fo[redacted]d to Passport Services by memorandum, a copy of Mrs. P[redacted] letter and the certificate. The Board informed Passport Services that:

> Under section 7.10 of Title 22, Code of Federal Regulations, the Board may, for good cause shown, extend the time for the taking of any action under Part 7. Since the Department has shown no good cause why the time for filing Its brief on this appeal should be further enlarged, the Board is not disposed to extend the time for filing beyond February 18, 1983.
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> In the circumstances, the Board anticipates receiving the Department's brief on the appeal with the least possible delay, and, at the latest, by February 18, 1983.

> Failing the submission of the brief by that date, the Board, in accordance with 22 CFR 7.2(a), will proceed with its determination of the appeal on the basis of such record a5 is available.

The Department did not submit the brief by February 18, 1983, and again did not deem it necessary to respond to the Board or offer an explanation. In view of the fact that the Department had more than enough time since July 14, 1982, to submit a brief, and has shown no good cause for its failure to submit a brief in accordance with the applicable regulations, the Board has decided to proceed with its consideratic of the appeal.

III

The record before the Board on this appeal consists of the following documents:

1. Appellant's copy of the approved certificate of loss of nationality.

2. Optional Form 240 of the Consulate General at Toronto, submitted on December 23, 1982, in response to the Board's request for any and all information in the files of the Consulate General relating to Mrs. P[redacted]' case. The form records in summary form the Consulate General's official dealings with appellant from March 24, 1981 through October 19, 1981.

3. Appellant's letter of July 2, 1982, giving notice of appeal.

4. Appellant's legal brief, July 2, 1982.

5. Appellant's affidavit, July 5, 1982-

Our jurisdiction to entertain and decide this appeal cannot be in dispute. The appeal has been taken from an administrative determination of the Department of State that appellant expatriated herself. It was brought within one ye of the approval of the certificate of loss of nationality. Appellant has stated with particularity why she believes tha the Department's determination of loss of her nationality wa

contrary to law or fact. Thus, the preconditions for the Board to assume jurisdiction under sections 7.5(a) and (b), 22 CFR have been duly established.

The regulations require that the Board shall determine an appeal on the basis of the record of the proceedings. (Section 7.8, 22 CFR.) The record before the Board establishes that appellant was born a United States citizen; that she acquired the nationality of Canada upon her own application; and was thereby determined to have expatriated herself under section 349(a)(1) of the Immigration and Nationality Act.

Under section 7.5(d), 22 CFR, the Department shall submit a brief setting forth the Department's position on an appeal within sixty days after receipt of appellant's brief. It shall submit the case record upon which the determination of loss of nationality was based within 45 days of receipt of written request of the Board. The Board may, for good cause shown, enlarge the time prescribed for the taking of any action under the applicable regulations. (Section 7.10, 22 CFR.)

Despite repeated formal requests by the Board, the Department has failed to comply with the regulations, either by requesting an extension of time for good cause, or by submitting the Department's brief and the case record.

The Department's disregard for the regulations and the rights of appellant is cavalier and inexcusable. In the circumstances, the Board is constrained to proceed to consider and determine the appeal. 6/

IV

Appellant concedes that she obtained naturalization in Canada of her own free will. She contends, however, that in doing so she did not intend to relinquish her United States citizenship. In her opinion, the Department's determination of loss of her citizenship is not supported by a record "which supports the finding that the expatriating act was accompanied by an intent to terminate United States citizenship."

6/ Section 7.2, 22 CFR provides in part:

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

Only one issue is therefore presented for our determination: whether appellant's naturalization in Canada was accompanied by the requisite intent to give up her United States citizenship.

The Supreme Court held in Afroyim V. Rusk, 387, U.S. 253 (1967) that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that right", and Congress has no general power to take away an American's citizenship without his assent.

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court reaffirmed its decision in Afroyim by holding that to establish loss of citizenship the Government must prove an intent to surrender United States citizenship. An intent to relinquish citizenship must be shown by the Government whether the intent is expressed in words or is found as a fair inference from proven conduct.

In Terrazas, the Court made clear that it is the Government's burden to establish by a preponderance of the evidence that the expatriating act was performed with the necessary intent to relinquish citizenship.

Thus, under section 349(c) of the Immigration and Nationality Act, the Government bears the burden of proving, by a preponderance of the evidence, appellant's intent to relinquish her United States citizenship. 7/ It bears this burden without benefit of any presumption.

The Department has not met the burden here. On the contrary, the Department, by its failure to submit any pleadings to date and to act responsibly with respect to the appeal, has, in effect, elected not to assume its statutory burden of proving that appellant intended to terminate her United States citizenship when she was naturalized in Canada. Appellant's contention that she lacked the requisite intent to abandon her allegiance to the United States stands unrefuted. We find that the Department has not sustained its

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

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship.

V

On consideration of the foregoing and on the basis of the record before the Board, we are unable to conclude that appellant expatriated herself on April 5, 1979, by obtaining naturalization in Canada upon her own application. Accordingly, we reverse the Department's administrative determination of July 13, 1981, to that effect.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member