September 24, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] J[redacted] N[redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, H[redacted] J[redacted] N[redacted], expatriated himself on February 7, 1979 by obtaining naturalization in Canada upon his own application. 1/

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

The Department of State determined on June 6, 1983 that appellant had expatriated himself. 2/ It now submits that after further examination of the record, and on the basis of new information presented by appellant, the preponderance of the evidence does not support a finding that appellant intended to relinquish his United States citizensihp. Accordingly the Department requests that the Board remand the ease for the purpose of vacating the certificate of boss of appellant's nationality.

The Board will grant the request.

2/ The certificate of loss of nationality in the record, however, bears the approval date of December 16, 1982. In a memorandum to the Board of August 13, 1984, the Department explained the discrepancy as follows:

> ...it /the certificate7 was signed on June 6, 1983, and not on December 16, 1982. Normally as a clerical matter, a CLN is stamped "APPROVED" upon its receipt in the Department, but the date is not stamped on until and unless it is in fact approved, In this case, the date was inadvertently stamped on at the time the "APPROVED" stamp was added. Due to lengthly /sic7 period of adjudication in this case, the approving officer apparently elected to sign the antedated CLN rather than require the consular officer in Toronto to execute a new one, causing even more delay. The appellant would have been in no way prejudiced by this action since the loss itself would date back to the date of naturalization, not to the date on the CLN, and appellant's appeal period would run from the date of service of the CLN, as was the case here. However, the Department greatly regrets any appearance of impropriety this procedural error may have given the appellant and would like to apologize therefore. As a result of his case new procedural safeguards have been instituted to prevent this error from happening again.

I

On November 24, 1982 the Consulate General at Toronto prepared a certificate of loss of nationality in appellant's name. The Consulate General certified that appellant acquired United States nationality "by virtue of her /sic/ birth in the [redacted] that he obtained the nationality of Canada" tu er /sic/ naturalization in Canada; and thereby expatriated himself under the provisions of section 349 (a)(1) of the Immigration and Nationality Act.

For the next 7 months the Department sought more information from appellant about his naturalization. The Department finally approved the certificate on June 6, 1983, approval being an administrative determination of loss of nationality from which a properly and timely filed appeal may be brought to this Board. A copy of the approved certificate, showing the approval date incorrectly as December 16, 1982, was received by appellant on June 24, 1983. Appellant entered the appeal through counsel on June 8, 1984.

On August 13, 1984 the Deputy Assistant Secretary for Consular Affairs submitted the administrative record upon which the Department's holding of loss of appellant's nationality was based, and a memorandum requesting that the Board remand the case for the purpose of vacating the certificate of loss of nationality. The Department's memorandum stated the following grounds for requesting remand:

> In the case of Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court held that a person could not be found to have expatriated himself unless it is shown by a preponderance of the evidence that he had voluntarily performed an act declared by Congress to be expatriating with the intent thereby to relinquish his United States citizenship. The Department has re-examined the record in this case in light of new evidence presented by the appellant with his brief. It has concluded that, although the expatriating act was performed voluntarily,

the preponderance of the evidence does not demonstrate an intent to relinquish United States citizenzhip. It is especially persuaded by the affidavit of Arthur Shumacher and of appellant and his wife in that they demonstrate appellant's concern about transferring his allegiance to Canada at the time he naturalized.

II

It appears that appellant consulted counsel shortly after he received a copy of the approved certificate of loss of nationality, and that counsel was under the impression that the limitation on appeal would expire in December $983, one year after the incorrect date cf approval shown on the certificate For that reason his office telephoned an official of the Office of Overseas Consular Services, apparently in the summer of 198 to inquire how the regulations were to be interpreted. His office was advised, counsel continued, "that the filing of the appeal within one (1) year from the date of service /of the certificate would be proper." 4/ Relying on that advice, counsel informed

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3/ Section 7.5(b) of Title 22, Coae of Federal Reguiations, 22 CFR 7.5(b) provides:

A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon writing request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

4/ It may be observed that the regulations that were in effect from 1967 to 1979 (22 CFR 50.60) provided that an appeal might be brought within a reasonable time after receipt of notice by the affected person of the Department's holding of loss of nationali

Board that he was filing appellant's brief on June 8, 1984.

Counsel further submitted that:

> ...we respectfully request the Board of Appellate Review to excuse any late filing since it would solely be the fault of counsel and not the citizen, and because the arguments of the citizen have such great merit. Furthermore, the Department of State in the four (4) months delay between the approval of the certificate and its service upon Mr. N[redacted], continued to seek information from him to try to substantiate the case for loss of nationality. Since the Department benefited by this passage of time it should have no complaint, I would imagine, about extending to Mr. N[redacted]n the benefit of one (1) full year from the time that the final action was taken: the service of the Certificate of Loss of Nationality upon the citizen.
>
> We do feel that we were entitled to rely on the advice of the Department about the proper filing date.

In the premises the delay in filing the appeal was de minimis, and the Board clearly has jurisdiction to consider the appeal.

The Board must, however, emphasize that the one-year limitation on appeal begins to run from the date of approval of the certificate of loss of nationality, not from the date on which a copy of the certificate is received by the person to whom it relates. This, the regulations make quite plain.

III

Inasmuch as the Department has concluded that it is unable to carry its burden of proof that appellant intended to relinquish his United States citizenship, and, in the absence of manifest errors of law or fact, the Board is agreeable to the request of the Department that the case be remanded for the purpose of vacating the certificate of loss of nationality.

The ease is hereby remanded for further proceedings. 5/

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

5/ Section 7.2(a) of Title 22, Code of Federal Regulations, 2 CFR 7.2 (a) provides in part:

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

CONCURRING OPINION

I fully concur in the Board's decision to grant the Department's request for remand in this case. However, that part of the decision which discusses the Board's jurisdiction and concludes that the Board does have jurisdiction to consider the appeal leads me to add this separate statement. I do not agree that, in dealing with a request for remand as presented by the Department in the present case, the Board must first satisfy itself that it has jurisdiction. In my view, the Board may properly decide upon the request for remand as a preliminary, separate matter of procedure. At this stage in the proceedings, the question of the Board's jurisdiction to consider the appeal does not arise.

Warren E. Hewitt

Warren E. Hewitt, Member