DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on appeal by [redacted] from an administrative determination of the Department of State that she expatriated herself on March 12, 1976 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon he own application. 1/

The certificate of loss of nationality issued in this case was approved on September 23, 1977. The appeal was filed on June 11, 1984. The Department of State has requested that the case be remanded for the purpose of vacating the certificate of loss of appellant's nationality. The threshold issue for the Board's determination is whether the appeal was filed within the limitation prescribed by the applicable regulations, thus permitting the Board to assert jurisdiction and entertain the Department's request to remand the case. It is the Board's conclusion that the appeal was timely, given the particular circumstances of this case. We will therefore grant the Department' request for remand.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a0(1), provides that:

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, . . .

I

The United States Consulate General at Toronto prepared a certificate of loss of nationality in appellant's former name, [redacted] 2/ The Consulate General certified that appellant was born at [redacted] that she obtained naturalization in Canada on March 12, 1976 upon her own application; and concluded 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 23, 1977, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. Appellant entered the appeal pro se on June 11, 1984.

Appellant contends that she did not know until April 1983 that she had expatriated herself. She further maintains that it was not her intention to relinquish United States citizenship when she obtained naturalization as a citizen of Canada.

The Department initially argued in its reply memorandum of August 29, 1984 that the appeal was not timely, and concluded, after reviewing the administrative record in appellant's case, that its holding of loss of her nationality was supportable substantively as a matter of law.

Appellant retained counsel in the fall of 1984, and, through counsel, submitted a brief, with supporting evidence, in reply to the Department's memorandum. Upon further consideration of

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

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.

appellant's case, the Department of State informed the Board by memorandum dated January 16, 1985, that it was unable to bear its statutory burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship when she obtained naturalization in Canada. 3/ The Department therefore requested that the Board remand appellant's case for the purpose of vacating the certificate of loss of nationality that was approved in her case.

3/ The Department's memorandum stated in part as follows:

> According to the Supreme Court, Appellant cannot be found to have expatriated herself unless it can be shown by a preponderance of the evidence that she voluntarily naturalized in Canada with the intent to relinquish her United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980). In expatriation cases, consciously performed acts are statutorily presumed to have been performed voluntarily. The appellant has the burden to rebut this presumption by a preponderance of the evidence. 8 U.S.C. 1481(c). The Department, in contrast, carries the burden of proving Appellant's intent to relinquish her U.S. Citizenship by a preponderance of the evidence. 44 U.S. 252.
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> Our review of the submissions made by Appellant in this appeal indicates that the Department cannot carry this burden of proof. While the Department still maintains that Appellant's evidence was not substantial enough to rebut the presumption of voluntariness, it is now persuaded that she did not intend to relinquish her U.S. citizenship when she naturalized in Canada.

II

At the outset, the Board must consider whether, in the circumstances of this case, an appeal, taken nearly seven years after approval of the certificate of loss of nationality, and appellant's right of appeal accrued, may be deemed to have been timely filed.

In September 1977 when the Department approved the certificate of loss of nationality that was issued in this case, the federal regulations then in effect prescribed that an appeal be taken within a reasonable time after the affected party received notice of the Department's holding of loss of his or nationality. 4/

The regulations of the Board of Appellate Review were amended and revised in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 5/

4/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, provided:

> 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.

5/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply in the instant case.

Under the limitation of "reasonable time", a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file a request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. Timely filing is thus a condition precedent to the Board's proceed to consider an appeal.

On November 18, 1983, the Chairman of the Board advised the attorney then representing appellant of the foregoing jurisdictional considerations when counsel inquired about the procedures appellant should follow to take an appeal.

III

Whether appellant's delay in taking an appeal was reasonable or not depends on several factors. Reasonable time must be determined in light of all the circumstances of the particular case, taking into account the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. Ashford v. Steuart, 657 F. 2d 1053, 1055 (1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F. 2d 928, 930, quoting 11 Wright & Miller, Federal Practice and Procedure, Sec. 2866, at 228-29:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

Appellant submits that she did not take an appeal earlier than she did because she did not know she had expatriated herself until 1983 when her application for a passport was refused on the grounds of non-citizenship. She concedes that she receiv

[illegible] from the Consulate General dated March [illegible] 1977 informing her that she might have lost her citizenship and inviting her to submit evidence to assist the Department in determining her citizenship status. Appellant has explained that she did not reply to the Consulate General's letter because she was suffering from depression over familiy problems.

As to the certificate of loss of nationality, however, she denies ever having received a copy. The records of the Consulate General show merely that on October 12, 1977: "CLN fwd to subject under covering letter." There is no mention that the certificate was sent to appellant by registered mail or other secure means, and there is no postal receipt in the record to indicate that appellant received the certificate. The absence of a receipt lends support to appellant's contention, as does her explanation of her conduct after she left Canada in 1979 to return to the United States to live, although that conduct is largely undocumented. It is thus arguable that appellant was unaware for a number of years of the Department's determination of loss of nationality. Accordingly, we will resolve the issue of timely filing in appellant's favor.

IV

Inasmuch as the Department has concluded that it is unable to carry its burden of proving that appellant intended to relinquish her United States nationality when she obtained naturalization in Canada, and in the absence of manifest errors of law or fact warranting a different disposition, the Board is agreeable to the Department's request for remand of the case for the purpose of vacating the certificate of loss of nationality.

The case is hereby remanded for further proceedings. 6/

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member

6/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 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."