February 25, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] [redacted] P[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, S[redacted] D[redacted] P[redacted], expatriated himself on April 22, 1972 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon the petition of his father while under the age of twenty-one years and residing in Canada thereafter through his twenty-fifth birthday. 1/

The certificate of loss of nationality that was issued in this case was approved by the Department on April 3, 1974. The appeal was entered on March 22, 1984. The threshold issue presented here is whether the Board has jurisdiction to consider an appeal that was taken ten years after the Department's determination of loss of appellant's nationality. It is our conclusion that the appeal is time barred. Lacking jurisdiction to entertain the appeal, we must dismiss it.

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

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, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: . . .

I

Appellant, who became a United States citizen by birth at [redacted], was taken by his parents to Canada in 1949 at the age of two. In 1958 appellant's mother registered him as a United States citizen at the Consulate General at Montreal. At age eighteen appellant registered for Selective Service at the Consulate General.

According to the Canadian Department of Citizenship and Immigration, appellant took an oath of allegiance to the British Crown on November 27, 1967 (he was then twenty years and seven months old) and was granted Canadian citizenship under section 10(5) of the Canadian citizenship Act of 1964. That section provided that citizenship might be granted to a minor child of a person to whom a certificate of citizenship had been granted, under the Act, upon the application of the said person. It appears that appellant's father made the required application on appellant's behalf.

On December 19, 1967 appellant wrote the following letter to Local Board (100) of the Selective Service System:

> Enclosed is your notice of classification for Selective Service.
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> On Nov. 27, 1967 I was sworn in as a citizen of Canada with my father, Mr. [redacted] in the city of Montreal and am no longer a citizen of the United States. I have lived in Canada 18½ years as has my father and since we expect to continue to live here we decided to renounce our American citizenship & become citizens of the country we have lived in for so long.
>
> Please erase my name from your records.

Appellant's letter led Board 100 to inquire of the Department of State about appellant's citizenship status. The Department in turn instructed Consulate General Montreal on January 12, 1968 to investigate whether appellant had obtained naturalization in Canada or taken other voluntary steps to divest himself of United States citizenship.

The Canadian authorities having advised the Consulate General that appellant had acquired Canadian citizenship, the

Consulate General prepared and forwarded to the Department, as required by section 358 of the Immigration and Nationality Act 2/, a certificate of loss of nationality in appellant's name, dated February 12, 1968, on the grounds that he had expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada. The Department, however, advised the Consulate General in March of 1969 that it would defer action on the certificate of loss of

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2/ 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.

nationality, pending completion of consulations with the Department of Justice on how the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967) should be applied to specific loss of nationality statutes.

Appellant, meanwhile, received a B.S. degree from McGill University in Montreal in 1968, and in the same year entered that university's medical school.

In October 1969, the Department instructed the Consulate General to obtain an affidavit from appellant stating fully all the facts and circumstances about his performance of the expatriating act, particularly his intent to transfer or abandon allegiance to the United States, citing in this respect the previously circulated Attorney General's Statement of Interpretation of Afroyim. 3/

On December 19, 1969, the Consulate General wrote appellant to inform him that the Department had requested that he execute the above-described affidavit. Appellant was asked to call at the Consulate General at his early convenience to execute the affidavit, and was advised that unless a reply was received

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3/ 42 Op. Atty. Gen. 397 (1969). The statement emphasized that in each case, the administrative authorities must make a judgment, based on all the evidence, whether an individual has both committed [illegible] and voluntarily relinquished nationality.

within sixty days from the date of the letter, it would be assumed he had no interest in pursuing the matter further, and a decision would be made by the Department of State on the basis of the evidence of record. At the hearing on appellant's appeal, on December 5, 1984, counsel for appellant acknowledged that appellant had received this letter and had not replied to its request for an affidavit. 4/

Somewhat belatedly, the Department realized that since appellant was not twenty-one when he acquired Canadian citizenship, section 349(a)(1) of the Immigration and Nationality Act was as yet inapplicable in appellant's case. Since he had, however, taken an oath of allegiance to Canada, the Consulate General was instructed to prepare a new certificate of loss of nationality pursuant to section 349(a)(2) of the Act. 5/

4/ Transcript of Hearing In The Matter Of [redacted] Board of Appellate Review, December 5, 1984 (hereinafter referred to as "TR"), p. 7.

5/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), 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 of naturalization, shall lose his nationality by --
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> . . .
>
> (2) taking an oath of making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or . . .

As instructed, the Consulate General in April 1970 prepared another certificate of loss of appellant's nationality on the grounds that he had expatriated himself by making an oath of allegiance to a foreign state. In the end, this certificate too was disapproved, as the Department informed the Consulate General on May 26, 1970, for the following reasons.

> The Department has recently concluded, in consultation with the Immigration and Naturalization Service that persons who are naturalized in Canada under Section 10(5) of the Canadian Citizenship Act are, in fact, naturalized on the petition of their parent and as minors are subject to the proviso of section 349(a)(1) of the Immigration and Nationality Act. The oath of allegiance is considered an inseparable incident to that naturalization and is not expatriating....Mr. Potoker should be informed that he is subject to the proviso of section 349(a)(1) of the Immigration and Nationality Act and will expatriate himself on his twenty-fifth birthday should he fail to comply with the provisions to retain his United States citizenship.

On June 5, 1970 the Consulate General informed appellant of the foregoing, citing section 349(a)(1) and spelling out the fact he would expatriate himself on his twenty-fifth birthday, if he failed to comply with the requisite provisions for retention of his United States citizenship. He was then twenty-three years of age and resident in Canada.

From December 15, 1971 through February 29, 1972, appellant held a clinical clerkship in Florida at Mount Sinai Medical Center In March 1972 he resumed his medical studies at McGill and received a degree in medicine in May 1972.

The record shows that in the fall of 1973 appellant inquired about immigration to the United States in order to assume a medical residency in dermatology in New York. The Consulate General, by letter of November 2, 1973, informed him that he would not be eligible for a visa until a final determination had been made of his United States citizenship status in light of his naturalization in Canada. The Consulate General referred to its earlier notification to appellant in June 1970 that he was then still a citizen of the United States, but would have to establish residence in the United States prior to his twenty-fifth birthday to retain that citizenship, as required by section

349(a)(1) of the Immigration and Nationality Act, a copy of which had been sent to him. The letter asked appellant to state where he had resided between June 1970 and April 22, 1973, appellant's twenty-fifth birthday (a factual error, since the actual date was 1972).

On December 3, 1973 appellant wrote to the Consulate General stating that between June 5, 1970 and April 22, 1973 he lived in Montreal.

The Consulate General prepared a third certificate of loss of nationality in appellant's name on January 24, 1974. The Consulate General certified that appellant acquired United States nationality at birth; that he acquired the nationality of Canada by naturalization while under the age of twenty-one years; that he thereafter resided in Canada through his twenty-fifth birthday; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved this certificate on April 3, 1974, approval being an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board.

A copy of the approved certificate of loss of nationality was sent to the Consulate General on April 5, 1974 to be forwarded to appellant. Appellant has acknowledged receiving the certificate, but cannot recall reading the information regarding his right to appeal this determination, which was printed on the back of the certificate of loss of nationality. 6/

According to appellant, he then entered the United States on a J-1 visa and pursued his residency in dermatology in New York for three years, from 1974 to 1977, returning then to Montreal to engage in medical practice.

In September 1982, appellant informed the Consulate General that he wished to appeal the Department's determination of loss of his nationality. In response to the Consulate General's inquiry about what the record showed regarding appellant's intent to relinquish his United States citizenship, the Department advised the Consulate General to inform appellant of the provisions of the relevant regulations regarding an appeal to this Board. In November 1982 counsel for appellant addressed a letter to the

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6/ TR 48. 49.

Office of Citizens Consular Services (not to the Board), stating that her client wished to take an appeal, and requested access to the administrative record in his case. Counsel's letter was routed to this Board which in turn referred it to the Office of Citizenship Appeals and Legal Assistance. The Board informed counsel that her letter had been referred to the competent office of the Bureau of Consular Affairs and stated that if her client wished to take an appeal to the Board, he should follow the procedures set forth in the federal regulations, a copy of which was enclosed.

The appeal was entered through counsel on March 22, 1984. Appellant contends that "all the evidence taken in toto suggests a series of omissions and ambiguities as to intent to involuntarily relinquish citizenship." A hearing was requested and held on December 5, 1984.

II

The Board may consider this appeal on the merits only if we are able to conclude that the Board has jurisdiction to consider an appeal lodged formally almost ten years after the Department of State approved the certificate of loss of nationality in this case.

In April 1974, when the Department approved the certificate of loss of nationality, the regulations then in effect provided that an appeal from a holding of loss of nationality or expatriation might be taken within a reasonable time after the affected person received notice of such holding. 7/

The current regulations provide that such appeal should be made within one year after approval by the Department of the

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7/ 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.

certificate of loss of nationality 8/. However, it has been the practice of the Board, where the holding of loss of nationality was made prior to 1979, to apply to the appeal the time limitations prescribed by the regulations in effect at that earlier time. It is the Board's view that applying the current limitation on appeal would be contrary to the generally accepted view that a change in the regulations shortening a limitation period should not be applied retroactively, in order to avoid injustice by disturbing a right acquired under former regulations. Accordingly, the standard of "reasonable time" will govern in the instant case. If we find that this appeal was not filed in writing within a reasonable time after appellant received notice of the Department's holding of loss of his nationality, then his appeal will be time-barred and the Board will lack jurisdiction to entertain it, for the "reasonable time" provision is mandatory and jurisdictional. 9/

8/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b), promulgated November 30, 1979, provided:

> (b) 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 written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

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9/ United States v. Robinson, 361 U.S. 220 (1960). See also Attorney General's Opinion (case of Claude Cartier, File CO-340-P, February 7, 1973), to effect that the jurisdictional basis of the Board requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a certificate of loss of nationality, and that the Board has not been conferred power to review actions taken long ago.

The definition of "reasonable time" has been specified in exhaustive detail by courts and commentators 10/, and is generally considered to encompass the following elements: It is such length of time as may be fairly and properly allowed or required, under the particular facts and circumstances in each case, having regard for the nature of the act or duty or the subject matter. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. Whether an appeal has been filed within a reasonable time depends on whether a legally sufficient reason has been presented for any delay. A protracted and unexplained delay, particularly one that is prejudicial to the interests of the opposing party, is fatal to the appeal. The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact, the requisite basis for appeal established by 22 CFR 50.60 (1967-1979) and continued in the current regulations. At the same time, the rule presumes that one will prosecute an appeal with the diligence of an ordinarily prudent person. Reasonable time begins to run from the time an appellant received notice of the Department's holding of loss of nationality -- not at some later time when, for whatever reason, appellant is moved to seek restoration of citizenship.

10/ See: Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); Ashford v. Steuart, 657 F. 2d 1053 (1981); In re Roney, 139 F. 2nd 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp, 9 F. 2nd 733 (1926); Smith v. Pelton Water Wheel Co., 151 CA. 393 (1907); Appeal of Syby, 460 A. 2nd 749 (1961); Black' Law Dictionary, 5th Ed., 36 Words and Phrases (1962).

As we have seen, the certificate of loss of nationality in this case was approved on April 3, 1974, and the Department of State's records show that a copy was sent to Consulate General Montreal on April 5, 1974 for forwarding to appellant. The record does not show when appellant received the certificate, but he acknowledges that he received it in 1974. 11/

Appellant did not contest his loss of nationality until, at the earliest, November 2, 1982 when his counsel requested copies of the documents in the file under the Privacy Act, to facilitate the filing of an appeal. The actual appeal was filed with this Board on March 22, 1984. In writing to the Board on that date, counsel stated that, having tried without success to resolve the matter administratively with the Department of State, the appeal was now filed with the Board.

At the hearing on December 5, 1984, appellant was asked why he had taken no action to appeal the determination of loss of his nationality between 1974 and 1982, since he had admitted both in his counsel's brief and during the hearing that he had been on notice that he had lost his citizenship and had the right to appeal this determination. Appellant replied as follows:

> ...Basically because of all the events in my life. From '74 to '77 I was in New York. I had this J-1 visa. No one was actually bothering me in terms of communication between departments, immigration. I was busy studying. The residency program is extremely hard. I came back at the end of June. July 1, 1977 I had to get a place, an office. I was busy writing exams for a year. There are different sets of exams and requirements in Canada, whereby my American exams weren't good enough. And for the specific problems that I work in, they even have an extra set of exams. And I was busy setting up an office, establishing a practice, et cetera, et cetera. 12/

11/ TR 48.

12/ TR 51-52.

Asked why he decided to contest the loss of his citizenship in 1982, appellant replied: "Maybe basically I wasn't that content in Canada practicing medicine. And I was thinking of setting up and doing it in the States at that point in time." 13/

Without more, such contentions hardly constitute good cause for a long delay in taking an appeal.

Counsel for appellant has argued, both in briefs and at the hearing, that the eight-year delay between the issuance of the certificate of loss of nationality in April 1974 and her November 2, 1982 letter to the Department was in fact reasonable in the particular circumstances of this case. Counsel contends that the informal manner of the various communications to appellant from the Department through the Consulate General led appellant to believe that his expatriation was not permanent or that at least the appeal period was still "viable."

We do not find this argument a persuasive excuse for appellant's delay.

True, a certificate of loss of nationality was prepared in 1968, but it was not approved. Appellant was asked in 1969 to submit an affidavit regarding his intent to relinquish citizenship. He did not respond to that request. The certificate of loss of nationality prepared thereafter in 1970 was disapproved. Finally, in 1970 the Department instructed the Consulate General at Montreal to inform appellant that if he did not comply with the citizenship retention requirements of section 349(a)(1), first proviso, by his twenty-fifth birthday he would lose his citizenship.

Appellant acknowledged that he received the letter the Consulate General sent him on June 5, 1970, informing him of the retention requirements of the statute. Thus, in 1970 appellant knew that he was still a citizen of the United States and precisely what he would have to do to retain citizenship.

The third and final certificate of loss of nationality, the only one of the three that was sent to appellant informed him in clear, precise terms that he had definitively expatriated himself by failure to comply with the condition subsequent of the statute. The procedures to take an appeal to this Board were spelled out on the reverse side of the certificate. Although he did not remember reading the information regarding an appeal, at the time, 14/ he must, in contemplation of law, be held to have received due notice of his rights.

13/ TR 52.

In further support of appellant's contention that the appeal was timely filed, his counsel cites Matter of S.B.S., decided by the Board on April 25, 1984. There the Board concluded that a seven-year delay in taking the appeal was not unreasonable in the circumstances of the case.

In Matter of S.B.S. appellant pressed for reconsideration of her case three years after she received the certificate of loss of her nationality; a meticulous record was then developed by a consular officer, and credible evidence of appellant's intent to retain citizenship was introduced. Nine months later the Department affirmed its original holding of loss of nationality. Two years later appellant, who mistakenly (but, the Board believed, genuinely) believed that she had actually taken an "appeal" (and thus exhausted her administrative remedies), retained legal counsel. Another year passed while the Department processed counsel's Freedom of Information Act request for access to her administrative record. Shortly after counsel received the record, the appeal was entered.

The Board found that although appellant's efforts to contest her loss of nationality were somewhat uneven, the Department had suffered no prejudice because there was a full record, including persuasive evidence of appellant's lack of intent to relinquish her citizenship dating from close to the time she performed the expatriative act. Furthermore, appellant had shown consistent and continuing concern about loss of her citizenship; she had not belatedly asserted a claim when she found it convenient to do so.

The lack of similarity between the case before us and Matter of S. B. S. is so apparent as to merit little discussion. Appellant in the case we are now considering showed no concern about the loss of his nationality until nearly eight years after he was informed of his expatriation, and did so only then, by his own admission, because he decided he would prefer to practice medicine in the United States rather than in Canada.

Appellant's counsel has also raised, as relevant to the issue of timely filing of the appeal, the Department's failure to obtain from appellant a sworn statement regarding his intent to relinquish United States citizenship, either in 1970 when appellant was twenty-three, or prior to his twenty-fifth birthday. Counsel argues that this omission by the Department contributed to appellant's belief that his expatriation was not permanent. We find no merit in that argument for reasons previously stated.

In sum, we conclude that appellant was duly apprised of his nationality status before he attained his twenty-fifth birthday, and of the legal consequences if he did not take designated action. He was also advised in 1974 of the administrative determination of loss of his United States nationality and of the procedures to appeal that determination. He chose instead to enter the United States on a visa to advance his medical education from 1974 to 1977; in those three years he did nothing to contest the loss of his United States nationality. He returned to Canada and set up practice there in 1977 and again made no inquiries about an appeal until the Autumn of 1982 when, in his own language, he was basically not content with medical practice in Canada, and hence thought of purchasing a practice in the United States. And we do not agree that appellant had cause to believe, because of the variously conflicting positions the Department had earlier taken regarding his citizenship status, that his loss of citizenship was not "permanent", and could be contested whenever he chose to do so. While it may have been convenient for appellant to appeal when he did, his convenience does not meet the tests of "reasonable time" described earlier. He has offered no legally sufficient reason to excuse his delay in filing an appeal, whether the delay be reckoned as eight and one-half years or nearly ten.

III

On consideration of the foregoing and our review of the entire record, we conclude that the appeal was not filed within a reasonable time as prescribed by the Department of State's regulations in effect at the time the certificate of loss of nationality was issued on April 3, 1974. Accordingly, we find the appeal time barred. Lacking jurisdiction, we hereby dismiss it.

In light of our disposition of this case, we do not reach the other issues presented. 15/

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member

15/ An issue, novel for the Board, has been raised in this case: whether the Department must prove an intent to relinquish United States citizenship on the part of one who, prior to age twenty-one obtained naturalization in a foreign state upon the application of a parent and did not establish a permanent residence in the United States by his twenty-fifth birthday, as required by the first proviso of section 349(a)(1) of the Immigration and Nationality Act for retention of United States citizenship.

The Foreign Affairs Manual, 8 FAM 225, April 10, 1970 stated that in those cases involving derivation of foreign nationality by a person under the age of twenty-one as a result of naturalization of a parent or naturalization obtained on behalf of such minor by a parent or guardian, loss of nationality does not occur by reason of failure to comply with the United States residence provisos of section 401(a) or section 349(a)(1), "unless it is clear that the subject wilfully failed to comply with those provisos with the intention of transferring or abandoning allegiance." The foregoing specific language does not appear in the current FAM (7 FAM 1260, March 30, 1984).

Since the Board did not reach the merits of appellant's case, we are not required to decide whether the Department must prove appellant's intent to relinquish citizenship when he failed to comply with the condition subsequent of the statute for retention of citizenship. We simply observe that the Department's position set forth in 1970 in 8 FAM 225 does not seem inconsistent with the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980).