DEPARTMENT OF STATE

BOARD OF APPELLATE **REVIEW**

IN THE **MATTER** OF: **R[redacted] J[redacted] C[redacted] - Upon Motion for Reconsideration**

R[redacted] J[redacted] Ca[redacted] filed a motion, pursuant to section 7.9, Title 22, Code of Federal Regulations, 22 CFR 7.9, 1/ for reconsideration of the decision of the Board of Appellate Review, dated March 20, 1985, affirming an administrative determination of the Department of State that he expatriated himself under the provisions of section 349(a)(1) of the

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1/ **22 CFR 7.9 provides that:**

> **The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.**

Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 2/

For reasons set out below, the Board denies the motion for reconsideration.

I

The Board's decision of March 20, 1985, on C[redacted]'s appeal followed an oral hearing on October 12, 1984, at which a question had arisen whether appellant could produce any evidence, such as affidavits by acquaintances, to support his contention that at the time of his Canadian naturalization he did not intend to relinquish his U.S. citizenship. At the hearing, appellant indicated that he could produce such affidavits and, at his request, the record of the hearing was left open for thirty days to permit their introduction. 3/

By letter of November 6, 1984, counsel for appellant submitted an affidavit by appellant dated October 31, 1984, in which appellant reiterated his contention that at the time of his Canadian naturalization he had not intended to relinquish his U. S. citizenship, but stated that he did not think he could obtain, so long after the event, affidavit evidence regarding his intent at that time, In his letter transmitting appellant's affidavit, counsel reiterated his argument made at the hearing that notwithstanding the absence of affidavit evidence of the nature discussed, the facts of appellant's case and other decisions by the Board dictated a decision in appellant's favor.

2/ 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 --
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> (1) obtaining naturalization in a foreign state upon his own application,...

3/ Transcript of Hearing, In The Matter Of R[redacted] J[redacted] C[redacted] Board of Appellate Review, October 12, 1984, pp. 72-77.

In the March 20, 1985 decision affirming the Department's holding that appellant had expatriated himself, the majority opinion, in discussing the evidence and arguments in the case, noted the failure of appellant to submit affidavit evidence and distinguished appellant's case from Board decisions cited by appellant and counsel as supporting appellant's position

II

On April 19, 1985 appellant, through counsel, moved for reconsideration of the Board's decision, The motion was grounded on the following contentions:

1) The Board's decision that evidence of appellant's expatriation is found in the pattern of his conduct after naturalization "is in conflict with prior decisions by the Board of Appellate Review, which are not cited or distinguished by the Board" in its opinion of March 20, 1985. The motion cited three prior decisions in which the Board found that "identical conduct" did not show an intent to relinquish United States citizenship.

2) "Appellant's failure to produce affidavits by others regarding the contemporaneous intent of the Appellant at the time of his Canadian naturalization cannot be, in and of itself, an act inconsistent with United States citizenship."

Counsel for appellant requested, and the Board granted, an extension of time to submit a memorandum and "other materials" in support of the motion.

In support of the motion, appellant on May 20, 1985 submitted a memorandum and three affidavits. The affidavits, all dated May 9, 1985, were executed by two business executives and a Canadian Government official, Therein the three individuals declared that they had known appellant before he applied for Canadian citizenship and thereafter; that they were well aware of his affinity for the United States and that he did not in any way wish to relinquish United States nationality when he became a Canadian citizen; that he only took that step in order to meet the requirements for practicing law in British Columbia; and that appellant's attachment to his American heritage was manifested in various ways, even after he assumed Canadian nationality.

III

The Department of State submitted a memorandum in opposition to the motion on June 20, 1985, which reads in part as follows:

> In his motion, Appellant points to three Board decisions which he asserts are in conflict with the decision in his case. These cases are clearly distinguishable from Appellant's. However, since the Board decides each case on its own merits, according to the individual facts and circumstances presented, its decisions do not have the precedential value of stare decisis. They can only be viewed as illustrative of the Board's approach.
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> In order to sustain a holding of loss of nationality, it must be shown that the Appellant intended to relinquish his nationality at the time he performed the expatriating act. Where there is no contemporaneous evidence, subsequent evidence must be presented from which the intent at the time can be inferred. In the three cases cited by Appellant as indistinguishable from his own where the Board held non-loss, there is indeed such evidence. In each case this added evidence, viewed as part of the constellation of evidence, has cast a different light on the evidence which is similar to the present Appellant's, thus calling for a different conclusion from the Board.

With respect to the three affidavits appellant submitted to evidence his intent to retain United States nationality, the Department observed:

> The affidavits of Appellant's acquaintences /sic/ should be given the weight due them as recollections from years ago. All three statements reflect the affiants' vagueness on the subject of Appellant's citizenship. Time has diminished their value as evidence supporting Appellant's position.

IV

Although appellant's motion is cast in terms of a motion to reconsider under 22 CFR 7.9, it appears it would be more accurate to call it a motion to reopen the case to permit the introduction of new evidence. That this result is not contemplated by section. 7.9 seems clear. Section 7.9 provides that the motion "shall state with particularity the grounds for the motion, including any

facts or points of law which the filing party claims the Board overlooked or misapprehended ..." and no oral argument on the motion is permitted. Notably, no mention is made of the introduction of evidence. If the motion is granted the Board shall review the record, and, upon reconsideration, affirm, modify or reverse its decision.

We view section 7.9 as providing for reconsideration by the Board of a previous decision on the basis of the existing record of the case, taking into account any written argument the parties may submit. We do not think it contemplates a reopening of the record to permit the submission of new testimony or other evidence.

On the other hand, it would be reasonable to construe the Board's discretionary authority under 22 CFR 7.2(a) 4/ as permitting the Board to entertain a motion to reopen. But for the Board to do so it would have to be established that the evidence upon which the motion was based - in this case, affidavits of three of appellant's acquaintances - was not discoverable with due diligence or available before the litigation was completed. It would seem that these or similar affidavits could have been submitted during the pleadings or before oral argument on October 12, 1984, Plainly, they could have been submitted within 30 days after the hearing, for the record was held open expressly to enable appellant to make such submissions, At the hearing, when asked whether there were people who knew him when he obtained naturalization who could attest to his specific intent with respect to relinquishment of United States citizenship, appellant replied that there were such individuals, although he was uncertain whether after the passage of some years they would be prepared to attest to his lack of intent to relinquish United States citizenship. And at the hearing his counsel undertook to obtain and submit such affidavits, In the end, as noted above, appellant chose not to submit affidavits.

Now, after the Board has rendered an adverse decision in his case, appellant asks the Board to receive in evidence affidavits which indisputably could have been obtained before the decision was rendered. It is well established that evidence that was discoverable with due diligence or available before a decision has been rendered is inadmissible, barring a showing of good cause why such evidence should be admitted, No such good cause has been shown by appellant's motion. We find no exceptions in the case law that would justify our departing from the general

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4/ 22 CFR 7.2(a) provides in pertinent part that:

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

rule. To reopen this case on the grounds addressed by appellant would plainly compromise the integrity of the Board's procedures. We can only regret that appellant did not see fit, for reasons not adequately explained, to submit such evidence when he had the opportunity to do so.

As a motion for reconsideration, appellant's motion does not state facts or points of law that the Board overlooked or misapprehended. In rendering its decision of March 20, 1985, the Board weighed carefully all the facts of record, applying the controlling case law.

With respect to appellant's contention that the Board's decision in his case is in conflict with previous decisions of the Board, the facts of which, in his opinion, are indistinguishable from those in his case, we note that there is no provision in the applicable regulations for the Board to designate selected decisions as binding on the Department or as precedent in all proceedings involving the same or similar issues.

The Board must decide each case appealed to it on its particular facts, having due regard, of course, for rational consistency in outwardly similar cases. The Board is under no obligation to cite and distinguish facially similar cases to the one under consideration, although we would note, parenthetically, that the Board's opinion of March 20, 1985, in this case, did in fact specify in considerable detail such distinctions with regard to two of the Board's previous decisions cited by counsel for appellant in his various submissions.

V

After careful examination of appellant's motion for reconsideration and the supporting memorandum, it is our conclusion that the motion fails to disclose any facts or points of law that the Board overlooked or misapprehended when it concluded on March 20, 1985 that the Department of State had carried its burden of proof that appellant intended to relinquish United States citizenship when he obtained naturalization in Canada upon his own application.

The motion to reconsider is hereby denied.

Alan G. James, Chairman

Howard Meyers, Member

Frederick Smith, Jr., Member