March 26, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: N[redacted] E[redacted] B[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, N[redacted] E[redacted] B[redacted], expatriated himself on July 2, 1958 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The Department approved the certificate of loss of nationality issued in this case on February 3, 1983. On August 30, 1985, approximately two and a half years later, Baurn entered an appeal from that decision. A threshold issue is presented: whether in the circumstances of this case, the appeal may be deemed to have been filed within the limitation prescribed by the applicable regulations, thus enabling the Board to assert jurisdiction and consider the case on the merits. For the reasons stated below, it is our conclusion that the appeal is untimely and therefore barred, Lacking jurisdiction, we dismiss the appeal.

I

B[redacted] became a United States citizen by birth at [redacted]. In 1938 his parents took him to Canada where he has since [redacted]d. In 1952 he sought to enlist in the United States Navy at New York City, but was not accepted.

[redacted] states that he reluctantly returned to Toronto, and, afte: working for about a year, found that he still wanted to pursue a military career. Accordingly, he enlisted in the Royal Canadian Air Force in 1954. His enlistment in the RCAF led to [redacted] obtain. ing naturalization as a Canadian citizen, the circumst surroun· ing which he has described as follows:

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S 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 naturaliza tion, shall lose his nationality by --

(1) obtaining naturalization in a foreign· state upon his own application,...

> One of the prerequisites for being accepted into the Royal Canadian Air Force in 1954 was to be a Canadian citizen. At that time I was 19 years old so could not be processed in that manner. As a result, I was asked to sign a "Declaration of Intent" to become a Canadian citizen upon reaching my 21st birthday.
>
> At the time of my 21st birthday, I was employed as an Air Defence Squadron fighter pilot. I was flying the CF 100 which was Canada's top all weather fighter with highly classified equipment on board. Within days of my birthday, I received a message from Air Force Headquarters to the effect that I must now take the necessary steps to obtain my Canadian citizenship. I had been living in Canada for a period of 19 years and therefore had no difficulty in obtaining the certificate.

He was granted a certificate of Canadian citizenship on July 2, 1958. Although there is no copy in the record of the pledge of allegiance B[redacted] subscribed to, the following oath was required to be taken upon being granted Canadian citizenship.

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen.
>
> I swear that I will be faithful and bear true allegiance to her Majesty, Queen Elizabeth the Second, her heirs and successors, according to law and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen, so help me God, 2/

2/ In 1958 Canadian citizenship laws and regulations prescribed that applicants for naturalization, save certain Commonwealth citizens, should make this declaration and oath of allegiance.

Twenty-four years later B[redacted] naturalization came to the attention of the United States Consulate General at Toronto when in 1982 his daughter, who married a United States citizen, applied for a visa to enter the United States, informing the consular authorities that her father had been born in the United States and had been naturalized in Canada.

On June 23, 1982 the Consulate General wrote to B[redacted] to inform him that he might nave lost his United States citizenship by obtaining naturalization in Canada. He was asked to complete a form for determining U.S. Citizenship and invited to discuss his case at the Consulate General. Although he received the Consulate General's letter, he did not repiy, As he explained it to the Board, he was still serving in the Canadian Armed Forces and "felt that I could not process my citizenship documents while I was still in the Armed Forces.

On November 22, 1982 the Consulate General executed a certificate of loss of nationality in appellant's name. 3/ It certified that he became a United States citizen at birch; that he obtained naturalization in Canada upon his own application and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act,

In forwarding the certificate to the Department the Consulate General made the following report:

> Mr. B[redacted] failed to respond to the Information for Determining United States Citizenship form sent to him on June 23, 1982. Enclosed is the signed postal receipt returned by the Canadian postal authorities.
>
> Mr. [redacted] intent to relinquish United States citizenship is established as a fair inference from his failure to offer any evidence to the contrary despite having been afforded ample opportunity to do so. Accordingly, the Consulate General requests the approval of the Certificate of Loss of Nationality.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 15 reads:

Sec. 358. Whenever a diplomatic or consular officer of the Uni States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapt 3 of this title, or under any provision of chapter IV of the Nation ality Act of 1940, as amended, he shall certify the facts upon whic such belief is based to the Department of State, in writing, under

The Department approved the certificate on February 3, 1983, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to the Board of Appellate Review.

[redacted] entered an appeal from the Department's determination on August 30, 1985. He makes the following statements concerning the voluntariness of his act and his intent upon acquiring Canadian citizenship:

> I therefore became a Canadian citizen voluntarily, except in the sense that it was mandatory in order to remain in the Royal Canadian Air Force.
>
> I would like to stress at this time that I was under the impression that I would not lose my American Citizenship as I had heard of others who had held a dual citizenship. I also again state that I had absoluteiy no intention of giving up my American Citizenship because it was, and still is very important to me.
>
> I really did not express any of these views to my fellow pilots or my Commanding Officer. I felt that this attitude might be construed as being disloyal. I was determined to have a successful military career and I did not wish to jeopardize it. Perhaps I was wrong, but nevertheless, that is the way that I thought it best,

II

In order to consider this case on the merits we must first establish that the Board has jurisdiction to entertain the appeal. Jurisdiction depends on our finding that the appeal was timely filed, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1961). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b) of Title 22, Code of Federal Regulations provides as follows:

3/ Continued.

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,

> 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.

Section 7.5(a) of the same regulations provides in pertinent part that:

> ...An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

The Department approved the certificate of loss of nationality in this case on February 3, 1983. The appeal was entered on August 30, 1985, two and one half years later and one and one half years beyond the allowable period. We must determine whether in the circumstances of this case, [redacted] has shown good cause why he could not have taken an appeal within the permissible time.

It is settled that good cause means a substantial reason, one that affords a legally sufficient excuse. See Black's Law Dictionary, 5th Ed. (1979). Good cause depends on the circumstances of each particular case, and the finding of its existence lies largely in the discretion of the judicial or administrative body before which the cause is brought. Wilson v. Morris, 369 S.W. 2d 402, (Mo. 1963). Generally, to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforseeable. Manges v. First State Bank, 572 S.W. 2d 104 (Civ. App. Tex. 1978), Continental Oil Co. v. Dobie, 552 S.W. 2d 193 (Civ. App. Tex. 1977). Good cause for failing to make a timely filing requires a valid excuse as well as a meritorious cause, Appeal of Syby, 66 N.J. Supp. 460, 167 A. 2d 479 (1961). See also [redacted] 166 F. Supp. 390 (D.C. Ark. 1958).

[redacted] does not dispute that he received a copy of the approved certificate of loss of his nationality shortly after it was approved. Nor does he contend that the procedures for taking an appeal to this Board including the limitation on appeal were not set forth on the reverse of the certificate he received. Clearly then he was on legal notice of a right to contest the Department's holding that he expatriated himself.

[redacted] retired from the R.C.A.F. in 1984. In his submissions he maintains that until he retired he felt he "could not get involved in citizenship matters while I was still in the Canadian Forces." He continues:

> ...I know now that I was mistaken and that I should have responded in accordance with the request from the American Consulate.
>
> In any event, I retired from the service effective September 22, 1984. After a period of rehabilitation, and geting /sic/ my second career underway, I started to put my personal affairs into order. The first item of business was to ascertain my status as an American, When I went to the Consulate in Toronto, I was advised that it was too late and the /sic/ I should have told them in 1983 of my status in the forces and. my intentions pertaining to citizenship. I agree, but I could not return to 1983 and correct my mistake. As I have stated, I signed the papers because I did not know what else to do.

Baum is forthright in explaining that he made a conscious decision not to appeal until he finally did so. He chose to delay filing an appeal for reasons he considered good and sufficient, and we will not tax him for making the decision he did. But it is absolutely clear that the reasons he did not appeal sooner were totally unrelated to factors outside his control. He knew from the f that he might appeal but chose not to do so. Nothing but his own reticence barred a timely appeal. It is therefore our conclusion that [redacted] has not shown good cause why he could not have taken an appeal within one year of approval of the certificate of loss of nationality that was executed in his name,

III

Upon consideration of the foregoing, we find the appeal time-barred. Accordingly, we deny it for want of jurisdiction,

Given our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

G. Jonathan Greenwald, Member