June 15, 1987

DZPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] F[redacted]

This is an appeal from an administrativ[redacted]rmin[redacted] the Department of State that appellant, A[redacted] F[redacted] expatriated himself on August 2, 1983 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Oslo, Norway.&/

The Department determined on September 7, 1983 that appellant expatriated himself. He entered an appeal from that determination on January 12, 1986. A threshold issue is presented: whether the appeal may be deemed to have been filed within the limitation prescribed by the applicable regulations. For the reasons that follow, we conclude that the appeal is time-barred and accordingly dismiss it for want of jurisdiction.

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), 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 --

. . .

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State: . . .

PL 99-653, approved November 14, 1986, 100 Stat. 3655, amended subsection (a) of section 349 by inserting "voluntarily performing. any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

- I -

Appellant acquired United States citizenship by birth at [redacted]. Through his Norwegian citizen parents he also acquired their nationality. Appellant lived in the United States until 1964 when his parents cook him to Norway. He returned to the United States in 1971 and attended junior high school in California for one year. Thereafter he lived in Norway except for brief periods spent in the United Kingdom and Sweden. He obtained a passport from the United States Embassy at Oslo in 1973.

Appellant states" that in the summer of 1982 he saw an announcement about Fulbright grants for study in the United States in the academic year 1983-1984. The announcement made it clear that applicants had to be Norwegian citizens, but did not, he has stated, mention that dual nationals like himself were ineligible. 2/ He therefore considered himself eligible and applied to the United States Educational Foundation in Norway ("the Foundation") for a grant, making clear that he had been born in the United States. He was then an undergraduate at the University of **Oslo.** In May 1983 he was notified that the Board of Foreign Scholarships had approved a grant for him to study at Harvard from August 1983 to August 1984. "I accepted the fellowship in good faith," appellant stated to the Board; "[d]uring these ~~exchanges~~ [between him and the Foundation] nobody informed me that dual citizens were ineligible, nor did the terms of the award mention that the grantee could not be a United States citizen." (Emphasis appellant's.)

After accepting the grant, appellant went to the United States Embassy to obtain a visa in his Norwegian passport. He states that he was issued one on June 8, 1983 but that the next day the Embassy cancelled the visa because he was a United States citizen. 3/ He immediately telephoned the Foundation to see whether they could help accelerate procedures. 'Only then, on June 9, 1983,' appellant stated, "~~was I told that I as a~~ United States citizen could not be given the grant: In order

2/ Article 1 (1) of the United States-Norway Agreement of May 25, 1949 (TIAS 2000), as amended by the Agreement of March 16, 1964 (TIAS 5545), expressly provides for financing study by United States citizens in Norway and Norwegian citizens in the United States. It is silent, however, about any entitlement of dual citizens of the United States and Norway to study in either country.

3/ Presumably, he was also informed at that time that he would have to travel to the United States on a U.S. passport, for appellant applied for and obtained a passport on June 14, 1983.

to get this grant, I would have to renounce my United States citizenship." (Emphasis appellant's.)

At tnat point, appellant has stated, he had no real choice about whether to accept or decline the grant. He and his fiancee could not, he claimed, change their plans at that late date. When he returned to Oslo from a summer job in early August he again spoke to the Foundation, "and they repeated that they would only grant me the fellowship if I renounced my United States citizenship, I was therefore forced to make a formal renunciation of my United States nationality at the Embassy at Oslo, Norway."

The record shows that on August 2, 1983 appellant formally renounced his United States nationality at the Embassy in Oslo. Before the oath of renunciation was administered, appellant executed a statement of understanding in which he declared inter alia that: he had decided voluntarily to renounce his nationality; he realized renunciation would leave him an alien in relation to the United States; he had been afforded an opportunity to make a written statement explaining the reasons for his renunciation; the extremely serious consequences of renunciation had been explained to him by a consular officer and he understood those consequences. Thereafter the oath of renunciation was administered to appellant in the presence of two witnesses. He explained the reasons for his renunciation in a statement that reads in pertinent part as follows:

> ...The Fulbright Office has made quite clear to me that unless I renounce my American citizenship, I may not receive their grant, which amounts to NOK 35,000. Since I was told this only a short time before leaving for the U.S., I would not be able to get equivalent funding from other sources. And in order to live in the U.S. 1983-84, with my wife, we need this amount.
>
> My choice, then is to either keep my U.S. citizenship and be financially unable to study in the U.S. now or renounce my U.S. citizenship - and study in the U.S. with my wife.
>
> Faced with this choice I have decided to renounce the nationality of the United States for purely financial reasons.[Emphasis appellant's]

As required by law, the consular officer who administered the oath of renunciation executed a certificate of loss of nationality in appellant's name on August 2, **1983.** 4/ **The** officer certified that appellant acquired the nationality of both the United States and Norway at birth; that he made a formal renunciation of his United States nationality; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act. The official forwarded the certificate to the Department under cover of a memorandum stating that he had "fully apprised Mr. [redacted] of the seriousness and consequences of his action." The passport the Embassy had issued to appellant on June 14, **1983** *(see* note 3) was forwarded to the Department for cancellation. The Department approved *the* certificate on September 7, 1983, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant, who was then a doctocal candidate at Barvard, entered the appeal pro se on January 12, **1986.** He subsequently obtained legal counsel.

Appellant contends that his renunciation was involuntary, Had the Foundation , an agency of the United States Government, stated in plain terms at the outset, on the application form and at other times and places that United States citizens were ineligible for Fulbright grants to study in the United States, appellant would not have been faced at the last minute with the necessity to choose between his "professional and familial commitments" and renunciation of his citizenship. Absent public notification that dual citizens were ineligible, appellant acted reasonably, his reply brief states.

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4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

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. IE 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.

- II -

In order to consider and decide this case on the merits, we must be able to establish that the Board has jurisdiction to entertain the appeal. Jurisdiction depends on whether the appeal is found to be timely, f9r 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)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), pcovides as follows:

> 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 of the Department of the certificate of loss of nationality or a certificate of expatriation.

22 CFR 7.5(a) provides in pertinent part that:

> ...An appeal Eiled 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 that was issued in this case on September 7, 1983. The appeal was not entered until January 12, 1986, one year and four months over the allowable time to appeal. We must therefore determine whether appellant has shown good cause why he could not have taken the appeal within the limitation prescribed by the applicable regulations.

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 the 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 unforeseeable. 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 Wray v. Folsom, 166 F. Supp. 390 (D.C. Ark, 1958).

Upon filing the appeal, appellant explained briefly why he had not moved sooner:

> **I** must also briefly explain why I have not appealed the administrative determination of the Department of State before now, after the allowable time limit. The reason is that it is only since January 1986 that my wife and I see ourselves as able to repay the Fulbright Fellowship of $5,000 to the United States Government. Before this spring it has been impossible for us to save that amount of money.

In his reply brief, appellant expanded on the reason for his delay in taking the appeal:

> Mr. [redacted] has good cause for his delay. Mr. [redacted] indigent, unemployed, married, and has infant twins. He is of the belief that the Foundation will require repayment of the stipend should his citizeship be reinstated. This view is shared by Ms. Felicia Nelson of the Institute of International Education, the organization which administers the [redacted] llowship Program in New England. 5/ Mr [redacted] hesitated to submit his appeal-for fear that doing so would result in Legal action against him by the Foundation, termination of his studies, deportation, and severe economic and emotional dislocation for his family. After prolonged and difficult reflection, Mr. Follesdal decided that regaining his U.S. citizenship was more important to him than all such adverse consequences and submitted his petition. (See petitioner's affidavit.) Such reasons, involving important factors beyond his control, demonstrate that Mr. [redacted] has good cause for a delayed filing.

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5/ Telephone statement of Felicia Nelson to attorneys for the appellant, March **3**, 1987.

Since appellant has not contended otherwise, we may assume that he received the certificate of loss of nationality not long after the Department approved it. On the reverse of the certificate the time limit on appeal and procedures for taking an appeal are clearly set forth. Thus appellant was on timely notice not only of loss of his citizenship but also of the €act that a process was open to him to challenge the Department's adverse determination. He did not move until January 1986.

Appellant submits that if he had appealed sooner and prevailed, that is, obtained restoration of his United States citizenship, he might have become liable for a debt he could not pay, been Eorced to give up his studies, and Eaced deportation. We take his point that he might have had to repay his Fulbright stipend and leave the program, but it is illogical for him to suggest that restoration of his citizenship would result in his deportation.

It is apparent to us that appellant had the opportunity to make a Eree choice between two alternatives: to delay making an appeal for his own purpose and convenience, or move within the prescribed limitation and, if successful, risk incurring a financial burden. He deliberately chose the former course of action, placing monetary considerations ahead of the possibility that he might regain his United States citizenship. The cause of his delay was self-generated; he may not invoke a factor of his own making to excuse a tacdy appeal.

Petitioner in Ackerman v. United States, 340 U.S. 193 (1950), did not move within the time prescribed to appeal a judgment denaturalizing him, proffering reasons that clearly reflected personal convenience and advantage. The court held that his delay was inexcusable. Mr. Justice Minton speaking for the court said:

> ...Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, .... There must be an end to litigation someday, and free, calculated,

deliberate choices are not to be relieved from.

340 U.S. at 198.

In the case before us, appellant may not he relieved of the consequences of his choice simply because he preceived that the consequences of moving in timely fashion might he disadvantageous. Appellant knew from the first that he had the right of appeal. Nothing except his own reticence prevented him from acting in a timely manner.

- III -

The appeal not having been filed within the prescribed limitation and no legally sufficient excuse having been proffered therefor, we find the appeal time-barred. Accordingly, it is dismissed for lack of jurisdiction.

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

Alan G. James, Chairman.

Gerald A. Rosen, Member

Frederick Smith, Jr., Member