DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] Ma[redacted] D[redacted]

J[redacted] M[redacted] D[redacted] asks the Board of Appellate Review to review an administrative determination of the Department of State denying his application for a passport on the grounds that he failed to comply with a statutory condition for retaining the United States citizenship he derived from his United States citizen father when he was born abroad of an alien mother.

At the outset the Board is confronted with the issue of whether it has jurisdiction to entertain [redacted] request. For the reasons set forth below, it is our conclusion that the Board lacks jurisdiction to consider [redacted] case,

I

D[redacted] was born at P[redacted], [redacted], [redacted]. Through his father a United States citizen, [redacted] acquired United States citizenship under section 1993 of the Revised Statutes of the United States, as amended by section 1 of the Act of May 24, 1934. 1/

In 1940 [redacted] became subject to the provisions of the Nationality Act of 1940, for retention of his United States citizenship. Section 201(h) of that Act provided that in order to retain United states citizenship a person born abroad of one citizen parent and one alien parent would have to reside in the United States or its outlying possessions for five years between the ages of thirteen and twenty-one - in [redacted] case between 1949 and 1957.

1/ Section 1 of the Act of May 24, 1934, read as follows:

Citizenship of Children Born Abroad; Renunciation of Citizenshi Naturalization of Spouses of Citizens; Repeals

Sec. 1. That section 1993 of the Revised Statutes is amended to re as follows:

Sec. 1993. Any child hereafter born out of the limits and juris diction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citi zenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United states and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday he or she shall take an oath of allegiance to the United States of America as prescribed by the Immigration and Naturalization Service. (48 Stat. 797; 8 U.S.C.. 6.)

However, with enactment of the Immigration and Nationality Act (INA) in 1952, [redacted] became subject to new provisions for retention of citizenship. Section 301(b) of the INA prescribed that a person like [redacted] would have to come to the United States before reaching age twenty-three and be continuously physically present for five years. Section 301(c) of the INA made section 301(b) applicable to persons born after May 24, 1934. Public Law 92-584 (Oct. 27, 1972, 86 Stat, 1289) amended the foregoing provisions of the INA to reduce the residence period to retain citizenship to two years. The amendment applied retroactively to persons born after May 24, 1934. 2/ Thus, to retain his United States citizenship, [redacted] would have to establish that he was continuously physically present in the United States for a period of not less than two years between the ages of fourteen and twenty-eight, i.e., between the years 1950 and 1964,

In 1983 [redacted] applied for a United States passport at the Embassy in Santo Domingo. The Embassy referred his application to the Department for final decision under cover of a memorandum that reads in pertinent part as follows:

> The applicant, born to a United States citizen father who had previously resided in the United States, acquired United States citizenship under Section 1993 of the Revised Statutes as amended by the Act of May 24, 1934.
>
> There is no indication that the applicant has performed a statutory act of expatriation. It appears that he has, however, failed to comply with the retention requirement of Section 301(b) of the INA of 1952 for residence in the United States, The applicant claims he has been aware of his claim since he was very young (1943-1944). Although he resided in the United States prior to his application for passport on July 26, 1983, it would appear that he did not have the required 5 years [sic] of residence to comply with Sec. 301(b). Application is therefore disapproved.

The Department informed the Embassy in July 1984 that it would require additional information in order to make a decision on [redacted] passport application. Accordingly, the Department instructed the Embassy as follows:

> 1. ... He may have satisfied the retention requirements of section 301(b) [of the INA], as amended in 1972 and applied retroactively to persons born after 1934 pursuant to section

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2/ Sections 301(b), (c) and (d) of the INA were repealed by Public Law 95-432 (Oct. 10, 1978, 92 Stat. 1046). Repeal was prospective in nature only.

> 301(c). It is necessary to demonstrate that he maintained a continuous physical presence in the United States for two years between the ages of 14 and 28 to satisfy this provision. Aggregate absences of less than 60 days would not break the continuity of his physical presence.
>
> 2. Post should closely examine applicant's physical presence in the U.S. during his high school years and any other periods that might satisfy the two year requirement prior to age 28, If Mr. D[redacted] departed the United States for 60 days or more, between school years, he would not satisfy the continuous presence test,

The Embassy informed the Department in December 1984 of the results of its further inquiry into [redacted] case:

> Mr. D[redacted] submitted a Secondary School transcript for 1951 through 1954 which establishes that he attended that school for 3 years. His Dominican passport shows consecutive entries to the U.S. from 1951 through Aug. 29, 1955 but, since it does not show entries to the Dominican Republic nor to other countries, it does not establish that the applicant maintained a continuous physical presence in the U.S. for two years.

The Department agreed with the Embassy's conclusion that D[redacted] had not proved continuous physical presence in the United States for two years between the ages of 14 and 28. If additional evidence were to become available, the Department stated in a telegram in January 1985, it would reconsider D[redacted]'s case, "but absent such evidence [the Department] considers Mr. D[redacted] has failed to comply with section 301(b)."

The Embassy informed the Department in April 1985 that D[redacted] had submitted no additional evidence. Accordingly, on May 29, 1985 the Embassy informed D[redacted] by letter that the Department had disapproved his application for a passport. On May 28, 1986 counsel for D[redacted] submitted an appeal to this Board and requested that the Board review the Department's denial of a passport. Counsel summarized appellant's case as follows:

> Appellant James M. D[redacted] appeals from the decision of the United States Consul, presiding in Santo Domingo, Dominican Republic, denying Appellant a United States passport for failure to comply with the retention requirement of Section 301(b) of the Nationality Act of 1952.

> Appellant states as his reason for appeal, that the decision is incorrect as a matter of law.
>
> The Consul decided this matter according to the retention requirements of the Nationality Act of 1952, which required an applicant to have resided in the United States for a period of five years between ages 14 and 28.
>
> This matter is properly governed by the Nationality Act of 1940, 54 Stat. **1138,** and the retention requirements, as amended in 1972. 8 U.S.C. sec. 1401(b). Pursuant to the Act and 1972 Amendments, Appellant perfected his claim to American citizenship through residence in the United States for a continuous period of two years between ages 14 and 28.

II

A threshold question is presented here: whether the Board may review an administrative determination of the Department denying a passport to appellant on the grounds that he was not a United States citizen because he failed to establish that he retained his United states citizenship of birth by complying with a stautory condition for retention of citizenship,

The Department argues that under the applicable federal regulations the Board lacks jurisdiction to review the Department's action and should deny appellant's request. "The Department maintains," its brief stated, "that Appellant's remedy is reapplication for a U.S. passport, making sure to provide the Passport Office with the exhibits submitted to the Board. If Appellant can demonstrate that he fulfilled the necessary retention requirements, he will not encounter further difficulties."

Counsel for appellant argued that the Board has jurisdiction under the applicable regulations to hear and decide appellant's case. We do not agree,

The jurisdictional basis of the Board is section 7.3 of Title 22, Code of Federal Regulations, which provides as follows:

> Sec. 7.3 Jurisdiction.
>
> The jurisdiction of the Board shall include appeals from decisions in the following cases:
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> (a) Appeals from administrative determinations of loss of nationality or expatriation under Subpart C of Part 50 of this chapter.

(b) Appeals from administrative determinations denying, revoking, restricting or invalidating a passport under sections 51.70 and 51.71 of this chapter.

(c) Appeals from final decisions of contracting officers arising under contracts or grants of the Department of State, not otherwise provided for in the Department of State contract appeal regulations (Part 6-60 of Title 41).

(d) Appeals from administrative determinations under sec. 64.1(a) of this chapter, denying U.S. Government assistance to U.S. nationals who do not comply with the Fair Labor Standards [applicable to U.S. persons doing business in South Africa] in sec. 61.2 of this chapter.

(e) Appeals from administrative decisions of the Department of State in such other cases and under such terms of reference as the Secretary of State may authorize.

22 CFR 7.3(c) and (d) obviously are inapplicable here. As to 22 CFR 7.3(e), the Secretary has given the Board no authorization to hear and decide any appeals except those enumerated above,

The Board's jurisdiction under 22 CFR 7.3(a) is expressly qualified by Subpart C of Part 50 (22 CFR 50.40 through 50.52) which relates to loss of nationality and prescribes procedures that consular officers shall follow in processing cases involving loss of nationality and reporting them to the Department for decision, as required by section 358 of the Act. 3/

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

Section 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 entitled to forward a copy of the certificate to the person to whom it relates.

The cases that consular officers are required to report to the Department, in compliance with section 358, are those involving performance of one of the expatriating acts in Chapter 3 of Title III - "Loss of Nationality" - of the Immigration and Nationality Act of 1952, that is those in section 349(a) of the Act, 4/ or any provision of Chapter IV - Loss of Nationality - of the Nationality Act of 1940, as amended. 5/

Thus it is evident that the Board's jurisdiction under 22 CFR 7.3(a) is limited to hearing appeals from determinations of loss of nationality.

The Board's jurisdiction to consider appeals from an adverse decision with respect to a passport unaer 22 CFR 7.3(b) is expressly limited to appeals from denial, revocation or restriction of a passport on the grounds enumerated in 22 CFR 51.70 and 51.71, which, generally stated, are that a party is under some form of legal restraint warranting denial, revocation or restriction of a passport. 22 CFR 51.80 expressly excludes administrative review, or appeal to this Board from denial of a passport on grounds of non-citizenship,

Counsel for appellant points out that under 22 CFR 50.42 the Department shall determine that a person in the United States has lost his American citizenship while abroad only in connection with an application for a United States passport. From this, counsel argues that:

> In this case the Department determined, in connection with an application for a United States passport, that appellant lost his claim to United States citizenship through his failure to comply with the retention requirements of the Nationality Act of 1940. (8 U.S.C. sec. 1401(b).)
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> As the Department's action in this case was pursuant to the authority of 22 C.F.R. sec. 50.42, it falls within the jurisdictional limits of review by the Board. (22 C.F.R. sec. 7.3(a).)

4/ Under section 349(a), paragraphs (1) through (7), 8 U.S.C. 1481(a)(1) through (7), a national of the United States shall lose his nationality by performing any one of the 7 enumerated acts.

5/ Section 401 through 410 of the Nationality Act of 1940, as amended, 8 U.S.C. 801 through 810, prescribed ten acts that worked loss of nationality.

The Department took issue with counsel's position:

> Section 50.42 of Title 22 of the CFR does not provide the Board with jurisdiction to entertain this matter. Section 50.42 refers only to a limitation on the Department of State's jurisdiction to decide loss of citizenship within the United States. The Immigration and Naturalization Service has primary jurisdiction over any citizenship case which arises when an individual is in the United States. The Department of State has primary jurisdiction over such cases when the individual is outside the United States, with the following exception. The Department of State may consider the citizenship claim of an individual who is in the United States if that individual has made an application for a U.S. passport. Such an application brings the citizenship determination within the jurisdiction of the Department of State.
>
> Therefore, it is clear that section 50.42 does not, as Appellant alleges, stand for the proposition that any citizenship determination made by the Department of State pursuant to a passport application may be appealed to the Board.

The Board finds the Department's position sound and agrees with the Department that 22 CFR 50.42 may not be construed to confer jurisdiction on the Board to hear and decide a case like that of Doorly.

III

Upon consideration of the foregoing, we conclude that the Board has no jurisdiction to hear this case.

Alan G. James, Chairman

Edward G. Misey, Member

Warren E. Hewitt, Member