November 8, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] B[redacted]

This is an appeal from an administrative determination of the Department of State thst appellant, J[redacted] B[redacted], expatriated himself on September 23, 1985 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/ A single issue is presented: whether appellant intended to relinquish his United States nationality when he obtained naturalization in Australia. He maintains that he lacked the requisite intent.

Where the Department claims that a citizen has relinquished his citizenship by performing a statutory expatriating act, the burden falls on the Department to prove by a preponderance of the evidence that such act was performed with the intent to relinquish citizenship. In this case, the Department failed to file its brief in timely fashion and to explain why it did not or could not adhere to the deadline mandated by its own regulations on filing. In the circumstances, the Board has no justification to accept the Department's brief. Hence, not having pleaded the issue of appellant's intent, the Department has not met its burden of proof. We are, consequently, constrained to reverse the Department's holding that appellant expatriated himself.

1/ In 1985, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read 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,...

Pub. L. No. 99-653, 100 Stat. 3655 (1986), 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 the nationa ity of the United States by virtue of birth at [redacted] In 1965 he moved to [redacted] where he engaged in business. According to appellant, in L985 he acquired the remaining shares of a television network in which he had invested in 1979. Having previously been informed by the Australian authorities that he might not acquire more shares in television and radio in Australia unless he became an Australian citizen, appellant found in September 1985 that he "was under tremendous pressure'' to comply with the "requirements of the country and become a citizen of Australia." (Appellant's letter of November 8, 1985 to the U.S. Consulate General at Perth.)

Appellant was granted a certificate of Australian citizenship on September 23, 1985, having, presumably, first made the prescribed oath of allegiance. 2/

The Australian authorities informed the United States Embassy at Canberra on September 25, 1985 that appellant had acquired Australian citizenship and declined to surrender his United States passport so that the Australian authorities might, in accordance with usual procedures, forward it to the Embassy. Thereafter, in November 1985, at the request of the Consulate General at Perth, appellant completed a form titled "Information for Determining U.S. Citizenship." He also submitted a letter setting forth the circumstances surrounding his naturalization and the reasons why he believed a finding should be made that he did not intend to relinquish United States nationality.

2/ There is no copy in the record of the oath (or affirmation) of allegiance that appellant made. However, the Board takes notice that applicants for Australian citizenship in 1985 were required to make the following oatn or affirmation of allegiance:

> I, ..., renouncing all other allegiance, swear by Almighty God or solemnly promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

An officer of the United States Consulate General executed a certificate of Loss of nationality in appellant's name on November 29, 1985, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 3/ Therein the officer certified that appellant acquired the nationality of the United States by birth therein; that he acquired the nationality of Australia by naturalization upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Consulate General submitted appellant's case to the Department for decision, without making any recommendation as to its disposition. On June 18, 1987, one year and a half later, the Department approved the certificate of Loss of nationality. 4/

In informing the Consulate General of its decision, the Department maintained that the renunciatory oath of allegiance appellant made upon being granted Australian citizenship and the fact that he had not made a declaration of lack of intent to relinquish United States nationality prior to being naturalized outweighed the evidence of intent to retain citizenship appellant presented.

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

> 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.

4/ Evidently the delay was due to the fact that the Department could not locate appellant's file.

The Department's approval of a certificate of loss of nationality constitutes an administrative determination from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A timely appeal was entered through counsel and a brief in support of the appeal was submitted on June 15, 1988. Appellant conceded that he obtained Australian citizenship voluntarily but maintained that he did not intend to relinquish his United States nationality.

II

The Board forwarded appellant's brief to the Department under cover of a memorandum dated June 15, 1988. The Board requested that, in accordance with the applicable regulations (22 CFR 7.5(d)), the Department file a brief and submit the record upon which the Department based its determination of appellant's expatriation within 60 days, or by August 15, 1988. By memorandum dated August 12, 1988, the Department forwarded the record in appellant's case and requested that the Board extend the time for filing the Department's brief to September 5, 1988. The Department gave as the reason for its request "insurmountable scheduling conflicts." By memorandum dated August 15, 1988, the Board granted the Department's request and enlarged the time for the Department to file its brief to September 5th. 5/

On September 6th, the Department requested that the time for filing be further enlarged to September 8th, explaining that the office representing the Department on the appeal had temporarily lost part of its typing staff. On September 7th the Board granted the Department's request. The Department made no further requests for a continuance. Meanwhile, the time for filing the brief elapsed. The Department eventually forwarded its brief to the Board under cover of a memorandum dated September 13th, which the Board received on September 15th, one week after it was due. No justification for the untimely filing was offered.

III

Federal regulations prescribe that the Department shall file a brief within 60 days after receipt of a copy of the appellant's brief. 22 CFR 7.5(d). The regulations also prescribe that the Board may, for good cause shown, enlarge

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5/ September 5th being Labor Day, the Department's brief was not in fact due until September 6th.

the time for the taking of any action under Part 7 of Title 22. 22 CFR 7.10. Here, as we have seen, the Board twice granted the Department an extension of time to file its brief, but the Department did not make the required filing until one week after the final, agreed due date.

The provisions of the regulations regarding filing of briefs and other documents in loss of nationality proceedings are mandatory not precatory. It is incontrovertible that the prompt and orderly discharge of the Board's functions depends in good measure on the parties' making timely filing of briefs and other documents. Lawyers representing clients before the Board, virtually without exception, are careful to comply with the limitation on filing. That lay appellants not represented by counsel may not always do so cannot excuse the Department with its resources from scrupuously observing its own regulations. As the Department well knows, the Board has consistently shown understanding when the Department has explained in timely fashion that it was having difficulty in meeting a deadline. In the case now before the Board, however, the Department did not advise the Board that it was unable to meet the September 8th deadline, nor, when it finally filed the brief, did the Department even attempt to justify the late filing. 6/

In the circumstances and in the absence of a showing of good cause, we are afforded no basis to relieve the Department from filing the government's brief out of time. Accordingly, we are unable to accept its brief.

IV

The statute prescribes that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state with the intention of relinquishing United States nationality. 7/ There is no

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6/ After the Department filed its brief, the Board sent a copy to appellant's counsel so that appellant might reply. At that time the Board requested that in appellant's reply counsel address the issue whether the Board should entertain the Department's brief. The Board also requested that the Department submit a memorandum of law on that issue. Counsel for both parties made submissions on the issue of timely filing.

7/ Text supra, note 1.

dispute that appellant duly and voluntarily obtained naturalization in Australia. The sole issue presented therefore is whether he intended to relinquish his American citizenship.

The Supreme Court held in Afroyim v. Rusk, 387 U.S. 253 (1967) that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that right", and that Congress has no general power to take away an American's citizenship without his assent.

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court affirmed Afroyim, holding that to establish loss of citizenship, the government must prove that a citizen intended to relinquish his citizenship. Intent, the Court declared, may be proved by a person's words or found as a fair inference from proven conduct. 444 U.S. at 260. In Terrazas, the Court made it clear that under section 349(c) of the Immigration and Nationality Act the government bears the burden to establish by a preponderance of the evidence that the expatriative act was performed with the intention of relinquishing citizenship. Id. at 267. 8/ Thus, to prevail here, the Department must show by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained the nationality of Australia. The Department bears that burden without benefit of any presumption.

Inasmuch as the Board has concluded that the Department's brief supporting its original adverse decision in appellant's case ought not be made part of the record, it follows that the Department has not satisfied its burden of proving that appellant intended to relinquish his United States citizenship when he voluntarily obtained Australian citizenship. In our opinion, the Department, in effect,

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8/ Section 349(c), 8 U.S.C. 1481(c), reads in pertinent part as follows:

> (c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such Loss occurred, to establish such claim by a preponderance of the evidence.

waived its right to participate further in the proceedings on this appeal. Appellant's contention on appeal that he did not intend to relinquish his United States citizenship thus stands unchallenged and unrefuted.

V

Upon consideration of the foregoing, we conclude the Department's holding that appellant expatriated himself should be, and hereby is, reversed.

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member