

DEPARTMENT OF STATE
BOARD OF APPELLATE REVIEW

IN THE MATTER OF: T [REDACTED] F [REDACTED] K [REDACTED]

T [REDACTED] F [REDACTED] R [REDACTED] entered an appeal on March 19, 1987 from an administrative determination of the Department of State, dated April 22, 1980, that he expatriated himself on December 4, 1979 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Venezuela upon his own application. 1/

Since the appeal was not filed within the prescribed limitation and appellant has not shown good cause why the prescribed time for filing should be enlarged, the Board denies the **appeal** for lack of jurisdiction.

I

[REDACTED] was born at [REDACTED] on [REDACTED] of a United States citizen father. He

1/ In 1979 section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, read in pertinent part as follows:

Section 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. 99-653 (approved Nov. 14, 1986, 100 Stat. 3658, 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;".

- L -

thus acquired the nationality of both the United States and Venezuela at birth. 2/

██████████ was brought to the United States in 1936, grew up and was educated in New York City. In 1951 he was drafted into the United States Army from which he was honorably discharged in 1953. CCNY awarded him a bachelor of mechanical engineering degree in 1959. Shortly thereafter he went to Puerto Rico where he earned and engaged in business. In the late 1970's he allegedly "suffered severe economic hardship;" the recession in the United States was, appellant stated, much more acute in Puerto Rico, and his business "went to zero in short order." He lived off the proceeds of his farm which was practically his only income. He therefore had to seek work. Not finding work in Puerto Rico, he responded to an invitation from friends and relatives in Venezuela to look into employment possibilities there. He went to Venezuela in 1979, travelling on a United States passport issued in Puerto Rico in 1978.

As set forth in his brief, ██████████ applied to the Venezuelan authorities 'for recognition of his mechanical engineering degree..., and for the granting of a Professional Engineer's License necessary to work as an engineer in Venezuela." He further states that in order to have his credentials validated he was asked to present a national identify card. To satisfy this requirement ██████████ applied to "revitalize his Venezuelan citizenship which was acquired at birth, but never affirmed, as was his U.S. citizenship at the age of majority."

The record shows that on December 4, 1979 ██████████ addressed a communication to the Minister of Interior which read as follows:

2/ ██████████ acquired United States nationality pursuant to the provisions of section 1993 of the Revised Statutes which at the time of his birth read as follows:

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

- 3 -

I, B. [REDACTED] [REDACTED] [REDACTED] of this domicile, of legal age, of United States citizenship, born in Caracas, parish of San Jose, Venezuela, on December 4, 1930, respectfully appear before you to state that:

I hereby formally declare that I wish to recover my Venezuelan nationality by birth, which I lost by voluntarily choosing another citizenship, in accordance with Article 40 of the Venezuelan Constitution in force. To that end, I am enclosing the documents required for such purposes. I also swear to observe and respect the Venezuelan Constitution and all other Laws of the Republic of Venezuela. 3/

[REDACTED] signed the document before two witnesses and a notary who authenticated it and a few days later gave it to [REDACTED]. Since the Venezuelan authorities had suggested that [REDACTED] show the United States Embassy his application to reacquire Venezuelan nationality for "information purposes," he went to the Embassy for that purpose on December 11th. Upon arriving there, [REDACTED] was referred

3/ English translation, Division of Language Services, Department of State, LS No. 125523, 1988 (Spanish).

In its brief, the Department observes (p.2, note 31 that:

The Venezuelans do not recognize dual nationality. A citizen who is a dual national does not have to formally make a choice between the two nationalities. However, any affirmative act, showing a preference for one of the countries will be interpreted as a choice. The affirmative action can be as simple as acquisition of a passport. (See Venezuela Constitution Article 39(1) and Article 40.)

[REDACTED] informed the Board that he assumed he lost his Venezuelan citizenship upon affirming his United States citizenship by serving in the United States Army.

- 4 -

to the passport section. 4/ After he explained to a clerk why he was there, she took his passport and his application for Venezuelan nationality. When she returned she told [REDACTED] that 'I had already expatriated myself, and, that it wouldn't be too momentous a thing since I had children in the United States who could claim me at any time I wanted to return to the United States....' Rosado continued:

Sometime later, and it must have been quite a bit later, because I don't remember, but there was quite a lot to do in that office at that time, I was ushered into an office that was empty and I was told to wait and I guess in a couple of minutes a gentleman walked in and stood behind the desk and identified himself as the Consul and asked me if this declaration, the original of this declaration, if it was mine, and I said, "Yes, sir," and he gave me documents to sign and told me to raise my right hand and identify myself and everything to swear the truth, and after that was done he left the room and I was given a receipt for my passport and the original documents and they told me I should return to the Venezuelan authorities. 5/

The document the consular officer presented to [REDACTED] was an affidavit of expatriated person. In it [REDACTED] acknowledged that: "I expatriated myself by opting for the Venezuelan nationality." He swore that "the act mentioned above was my free and voluntary act..., and that "it was done with the intention of relinquishing my United States citizenship.'

On December 12, 1979 [REDACTED] application to reacquire his Venezuelan nationality was approved and on the same day he was issued an identity card which acknowledged him to be a Venezuelan citizen.

4/ Transcript of Hearing in the Matter of [REDACTED] Board of Appellate Review, [REDACTED] 21, 1988 (hereafter referred to as "TR"). TR 48, 49.

5/ TR 49.

- 5 -

On December 21, 1979, as required by law, a consular officer executed a certificate of loss of nationality in Rosado's name. ^{6/} Therein he certified that Rosado acquired the nationality of the United States by virtue of birth abroad to a United States citizen father; that he obtained Venezuelan nationality upon his own application, and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department of State approved the certificate on April 22, 1980, approval being 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 acknowledges that he received a copy of the approved certificate in June 1980.

Rosado applied at the Embassy in Caracas for an immigration visa in late 1983 and entered the United States (Puerto Rico) in December 1983, thus beginning his residency to obtain United States naturalization for which he made application in March 1988. On March 19, 1987 he entered the appeal pro se and later retained counsel. Oral argument was heard on April 21, 1988.

With respect to the substantive issues presented by the appeal, appellant through counsel argues that in a constructive sense his obtaining Venezuelan citizenship was involuntary. He was misinformed about his legal

^{6/} 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.

- 6 -

status when he went to the Embassy on December 11, 1979, that is, he was told he had already expatriated himself, although he had not yet presented his application for Venezuelan citizenship to the authorities of that country. ██████ believed what he had been told, however, and after his passport had been taken and he had been given a paper to sign, he signed it, without benefit of counsel. He was given no advice by the Embassy, no alternatives to obtaining permission to work in Venezuela without obtaining its citizenship. ██████ thus performed an expatriative act under false information. He would not have obtained Venezuelan naturalization had he believed he had an alternative way to work legally in his profession in Venezuela.

As to whether ██████ intended to relinquish his United States nationality, he denied such intent, despite his having signed a statement that he acted with such intention. He only signed the Affidavit of Expatriated Person because he was acting under false information.

He argued further that there were defects in the way his case was handled at the Embassy in December 1979. He was not asked to complete a questionnaire that would have elicited facts about his performance of the expatriative act; he was offered no advice by the Embassy. Because of these procedural defects ██████ was prejudiced.

After the hearing, the Board requested that the Department address appellant's argument that he had been prejudiced by the Embassy officer's handling of his case. The Department submitted a memorandum dated August 10, 1988 which read in pertinent part as follows:

Due to the length of time that has passed since Mr. ██████ naturalized, it is difficult to verify the statements that were made to Mr. ██████. Officers assigned to the Embassy in Caracas have long since moved on to new posts, retired, resigned or died.

Mr. ██████ was aware of his appeal rights and contends that until he learned that becoming a Venezuelan citizen was unnecessary, there was no question of appeal. Appellant wanted to be a citizen of Venezuela to maintain his job. Whatever the order of events were he still would have become a citizen. He contends that there was something he could have done to retain his **U.S.** citizenship and

- 7 -

obtain his Venezuelan citizenship. The Department is unaware what appellant is referring to and therefore, believes that Mr. [REDACTED] would have naturalized because [REDACTED] was no alternative method.

The fact that the appellant executed the affidavit one day before he filed his application with the Venezuelan authorities is a harmless error which has been cured not only by the fact that he had notice **of** his appeal rights as mentioned above, but also by the lapse of time between his loss of citizenship and the filing of this appeal.

II

As an initial matter, the Board must determine whether it has jurisdiction to entertain this appeal. The Board's jurisdiction depends on whether the appeal was filed within the applicable limitation, 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)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

A person who contends that the Department's administrative holding 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 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 that was issued in [REDACTED] name on April 22, 1980. He did not enter the appeal [REDACTED] March 1987, six years beyond the allowable time. Such a delay in seeking relief from the Department's decision can only **be** excused if [REDACTED] is able to show good cause that he could not

- 8 -

have moved within one year after the Department approved the certificate of loss of nationality. He maintains that the appeal should be deemed timely because the following considerations establish good cause for his not appealing sooner.

After he received the certificate of loss of nationality, he did not think about taking an appeal because, as his counsel put it, "for years, he went under the assumption that there was nothing at all wrong with the procedure as it happened and due to his stupidity he had blundered into doing an act which caused him to lose his citizenship." 7/ He could not have appealed within a year of April 22, 1980 "because the U.S. Embassy's misrepresentation of the correct law regarding appellant's situation promoted an ignorance on his part which blinded him to the possibility of restoring his U.S. citizenship." 8/

Only in 1983, when he applied for an immigrant visa, did he learn from an Embassy official that he had been misinformed in 1979 and that "there was no reason why he had to have lost his U.S. citizenship." 9/ Had he appealed in 1983, however, the appeal would have halted consideration of his application for permanent residence in the United States. "Because of the certainty of receiving permanent residence status in the U.S., the interviewing official at the U.S. Embassy recommended that appellant wait to appeal until his permanent residence status was granted." 10/ The Embassy told him that it could take up to two years to obtain a hearing on a citizenship appeal and that he would probably have to remain in Venezuela while waiting for a hearing. 11/

As we have seen, appellant was granted permanent residence status in December 1983. In 1984 he allegedly discussed his case with an attorney in the Immigration and Naturalization Service who said he would have to take

7/ TR 9.

8/ Appellant's Motion to Hear Delayed Appeal, June 12, 1977.

9/ TR 10.

10/ Motion to Hear Delayed Appeal.

11/ TR 98.

- 9 -

up the matter with the State Department. "She suggested that I do that here in Washington since some time had passed already, that any more time added unto that would not materially affect things if I could make the appeal myself." ^{12/} He moved to the Washington area in 1986 and entered the appeal in 1987.

"Good cause" is a term of settled meaning. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th Ed. (1979). 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. 1977). Mere convenience of a party is not good cause under a statute for extending the time within which an act must be performed. Becker v. Smith, 299 N.W. 620, 621, 237 Wis. 322.

We are not persuaded that appellant has made a showing of good cause.

Appellant concedes that in June 1980 he received a copy of the certificate of loss of nationality that was approved in his name. On the reverse of that certificate was information about the time limit on appeal to this Board and how an appeal might be entered. Appellant said that he read the certificate, but does not remember reading about the appeal procedures. ^{13/} Possibly appellant did believe for several years after 1980 that his case was correctly handled in 1979, but we cannot accept that that perception "blinded" him to the possibility of recovering his citizenship. He was on actual notice that an appeal process was available to him. If he did not read the information about how he could obtain a review of the Department's decision, he may not fault anyone but himself.

Assume, arguendo, that he did not understand until 1983 that his case had not been properly processed in 1979, and thus believed he had no grounds to appeal before then. In **1983**, by his own admission, the possibility of taking **an** appeal became clear to him. Yet, he did not act then because he **had** reportedly been told by an Embassy

^{12/} TR 91.

^{13/} TR 86.

-10-

official that an appeal could materially delay action on his request for permanent residence status. By deciding not to allow an appeal to impede his permanent residency application, appellant made a deliberate, voluntary choice to defer the appeal.

The holding of the Supreme Court in Ackerman v. United States, 340 U.S. 193, 198 (1950) that the petitioner had not made a timely motion to set aside an adverse judgment, seems apposite here:

...Petitioner made a considered choice not to appeal,.... 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 some-day, and free, calculated, deliberate choices are not to be relieved from.

In the case before the Board, too, there must be an end to litigation.


Even after he had gained permanent residence status in the United States (December 1981) appellant waited three more years to take the appeal. He was unjustified to rely on the advice of the INS official about the taking of an appeal to this Board; had he been prudent he would have then at least have written to the Board to inquire how he might proceed, and thus tolled the limitation on appeal.

III

Since the appeal was not filed within one year after the Department approved the certificate of loss of [REDACTED] United States nationality and since he has failed to show good cause why the Board should enlarge the prescribed time for taking the appeal, the Board has no discretion to allow the appeal. It is time-barred and must be, and hereby is, denied for lack of jurisdiction.

- 11

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


Alan G. James, Chairman


Gerald A. Rosen, Member


George Taft, Member