

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J ■ ■ ■ E ■ ■ ■

On Motion for Reconsideration

In a decision rendered on November 8, 1988, the Board of Appellate Review reversed the administrative determination made by the Department of State that appellant, J ■ ■ ■ E ■ ■ ■ 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. We concluded that the Department failed to satisfy its burden of proving that appellant intended to relinquish his United States citizenship when he voluntarily obtained Australian citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

The Board declined to accept the Department's brief on the appeal because it was untimely filed and no cause, good or otherwise, had been shown to permit the Board to enlarge the time prescribed for filing the brief. 1/

On December 6, 1988, the Department moved for reconsideration of the Board's decision. 2/ It asserted

1/ Pursuant to 22 C.F.R. 7.5(d), the Department was required to file its brief within 60 days after receipt of a copy of appellant's brief, or by August 15, 1988. The Board twice granted the Department's requests for extensions pursuant to 22 C.F.R. 7.5(d), which provides that an extension of time for submission of a reply brief may be granted by the Board for good cause shown. The agreed deadline for filing the brief was September 8, 1988. The Department forwarded its brief to the Board under cover of a memorandum dated September 13, 1988; the Board received it on September 15, 1988, one week after the deadline. No reasons were offered for the late transmittal.

2/ On December 8, 1988, the Board forwarded to appellant's counsel a copy of the Department's motion for reconsideration and informed him that under the regulations he might file a memorandum in opposition to the motion within 30 days of receipt of a copy of the motion. On December 13, 1988, an employee in the office of appellant's counsel signed a return receipt for the

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that the Board overlooked or misapprehended what constitutes "good cause shown" in explanation of a late filing, and also the regulations governing what constitutes the "record of proceedings" in a citizenship appeal. The Department further contended that there was no basis in the record to conclude that the Department "had abandoned its determination of **loss** in appellant's case." Finally, it believed that the "consequence invoked by the Board" for a brief submitted beyond the established deadline was not contemplated "either by the relevant statute or by the Board's regulations."

In light of the, foregoing, the Department concluded:

The Board ought to consider the Department's memorandum of October 26, 1988 as establishing good cause shown to receive the late filed brief. In the alternative, the Board ought to reverse its finding that the Department waived its participation on the ground that a seven day delay is not long enough to establish that conclusion, Finally, the Board ought to reverse its apparent conclusion that the Certificate of Loss of Nationality automatically fails if the Department files a submission to the Board seven days late.

In its memorandum of October 26, 1988, the Department attributed the delay to the "regrettable confluence of overwhelming caseloads and reduced support staff, combined with an error in judgment in not hand carrying the brief for its final approval and mailing...".

2/ Cont'd.

Department's motion for reconsideration On January 20, 1989, appellant's counsel requested an extension of time to file a memorandum in opposition to the motion, alleging that he had not previously seen the motion. The Board denied his request for an extension since no good cause had been shown why a memorandum in opposition could not have been filed within 30 days of receipt by his office of the Department's motion for reconsideration.

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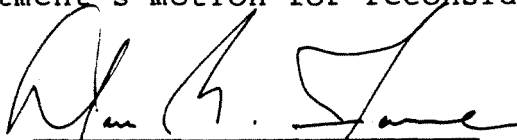
We do not consider the Department's ex post facto reasons sufficient to excuse the Department from filing its brief beyond the agreed deadline or to constitute "good cause shown" to grant a further extension. It is self-evident that good cause must be shown prior to the date for filing, not after that date has passed.

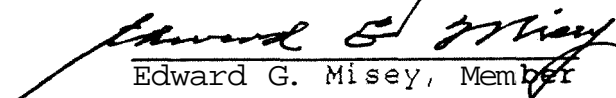
As to the conclusion of the Department that, in the alternative, the Board ought to reverse "its finding" that the Department waived its participation as a consequence of the seven day delay, we desire to point out that there was no such specific finding. The Board, at best, endeavoured to express the view that the Department by its failure to adhere to the deadline for filing a brief virtually gave up its right to be heard in argument except as the Board in its discretion might allow. 3/

With respect to the final conclusion that the Board reverse its "apparent" conclusion that a certificate of **loss** of United States nationality "automatically fails" as a consequence of a seven day delay, we believe the Department is mistaken. No such conclusion was reached or expressed in the Board's decision on the appeal.

After careful examination of the Department's motion for reconsideration, we are of the view that the motion does not disclose any facts or points of law that the Board may have overlooked or misapprehended in reaching its decision, or any new matters that would warrant reconsideration of its decision of November 8, 1988.

The Department's motion for reconsideration is hereby denied.


Alan G. James, Chairman


Edward G. Misey, Member


J. Peter A. Bernhardt, Member

3/ 22 C.F.R. 7.2(a) (1988) provides:

(a)...The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it.