July 11, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] G[redacted] C[redacted]

The Department of State made an administrative determination on September 8, 1983 that J[redacted] G[redacted] C[redacted] expatriated himself on July 22, 1983 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Malta upon his own application. 1/ [redacted] entered an appeal from that determination on January 14, 1988.

Since the appeal was not filed within the limitation on appeal prescribed by federal regulations (one year after approval of the certificate of loss of nationality that was executed in appellant's name, 22 CFR 7.5(b)(1)), the initial question to be decided is whether appellant has shown good cause why he could not have appealed within the one-year limit, thus enabling the Board to exercise jurisdiction over the appeal. For the reasons that follow, we conclude that appellant has not shown good cause why he could not have appealed within the prescribed limitation. We therefore dismiss the appeal for want of jurisdiction.

I

Appellant, J[redacted] G[redacted] [redacted], was born in [redacted], and so acquired United States nationality. As his parents were United Kingdom citizens (born in Malta, a colony of the United Kingdom), appellant also acquired British nationality at birth.

1/ In 1983, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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,...

Section 349(a)(1) of the Act, 8 U.S.C. 1481, was amended by Pub. L. No. 99-653, 100 Stat. 3658 (Nov. 14, 1986), as amended by Pub. L. No. 100-525, 102 Stat. 2619, 2622 (Oct. 24, 1988). It now reads:

Appellant's parents took him to Malta in 1925. In 1944 he obtained employment in Malta with the British War Office as a civilian clerk. In July 1961 appellant applied to be registered as a United States citizen at the Consulate in Valletta. At that time, the fact that he had been employed by a foreign government (a statutory expatriative act) came to light. Accordingly, as required by law, an officer of the Consulate executed a certificate of loss of nationality in appellant's name. 2/ The officer certified that appellant expatriated himself under the provisions of section 401(d) of the Nationality Act of 1940 by accepting employment under the government of a foreign state for which only nationals of such state were eligible. 3/ The Department of State approved the

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1/ (cont'd.)

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
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> > (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

2/ Section 501, of the Nationality Act of 1940, 8 U.S.C. 901, read as follows:

> 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 American nationality under any provision of chapter IV of this Act, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be 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 Department of Justice, for its 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.

3/ Section 401 of the Nationality Act of 1940, 8 U.S.C. 801, read as follows:

certificate on December 29, 1961. Upon appeal by [redacted] the Department's Board of Review on the Loss of Nationality of the Department's Passport Office on April 23, 1964 reversed the Department's holding of loss of appellant's nationality and restored appellant's United States citizenship. Meanwhile, in November 1963 appellant entered the United States as an immigrant, but returned to Malta in March 1964. In August 1964, the United States Consulate in Valletta executed another certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act of 1952. 4/ On that occasion, the Consulate certified that

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3/ (cont'd.)

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> . . .
>
> (d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible;....

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. 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.

appellant expatriated himself on December 12, 1953 under the provisions of section 349(a)(5) of that Act by voting in a political election in Malta. 5/

Appellant went to the United Kingdom in 1964. In 1966 he registered as a citizen of the United Kingdom and Colonies.

Appellant returned to the United States in the spring of 1967 on an immigrant visa, and took up permanent residence. In May 1967 the United States Supreme Court rendered its decision in Afroyim v. Rusk, 387 U.S. 253 (1967), the effect of which was to strike down section 349(a)(5) of the Immigration and Nationality Act as unconstitutional. In the summer of 1967 the State Department informed appellant of the Supreme Court's decision in Afroyim, and advised him that since it appeared that he had not performed any other expatriative act, he had not lost his United States citizenship. He was advised to communicate with the Immigration and Naturalization Service (INS) to adjust his status. In early 1970 the INS informed appellant that it had concluded that he had not expatriated himself under any provisions of the Immigration and Nationality Act.

Appellant left the United States in 1971 and went to the United Kingdom where he lived for the next five years. In 1976 he settled in Malta so he might be near an ailing, elderly widowed sister. He states that he was granted a residence permit on condition that he take no employment. 6/

5/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), read 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 --
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> . . .
>
> (5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;...

Section 349(a)(5) was repealed by Pub. L. No. 95-432, 92 Stat. 1046 (1978).

6/ Appellant was not a citizen of Malta in 1976, even though born of Maltese parents. He lost the right to retain Maltese citizenship in 1966 because he had not renounced his U.S. and

In 1983 the government of Malta refused to renew appellant's residence permit and ordered him to leave the country within a fortnight. According to appellant, he was given no reason for the order. After denial of his request that the order be withdrawn was denied, appellant decided he would have to become a Maltese citizen. "Having nowhere to go again," he informed the Board, "and being 60 years old, my only alternative was to expatriate myself and take Maltese nationality."

Appellant applied to be and was registered as a citizen of Malta on July 22, 1983 in accordance with section 3(1) of the Maltese Citizenship Act of 1965. Under that Act, applicants for naturalization in Malta were required to renounce any previous nationality not later than three months after the grant of Maltese citizenship, in appellant's case by October 21, 1983.

It appears that appellant visited the United States Embassy shortly after he obtained Maltese citizenship. He submitted a copy of his certificate of Maltese citizenship, and on August 5th completed a form titled "Information for Determining U.S. Citizenship." In the form he signed the following statement:

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> STATEMENT OF VOLUNTARY RELINQUISHMENT OF U.S. NATIONALITY
>
> 'I, J [redacted] G [redacted] [redacted] performed
> (Name)
> the act of expatriation indicated in Item 7 a,b [(a) was
> (a,b,c,d, or e)
> naturalized in a foreign state, (b) made an oath of allegiance to a foreign state] voluntarily and with the intention of relinquishing my U.S. nationality.'

6/ (cont'd.)

British nationalities within two years of Malta's independence, which occurred in 1964.

Under the Malta Constitution of 1964, a person who was born outside Malta of parents who were born in Malta and who on the day before independence was a United Kingdom citizen was considered a citizen of Malta. However, in order to retain Maltese citizenship, such a person was required to renounce British nationality and any other nationality within two years of independence.

In compliance with law, a consular officer executed a certificate of loss of nationality in appellant's name on August 19, 1983. (Note 4 supra.) Therein the officer certified that appellant acquired the nationality of the United States by birth therein; that he acquired the nationality of Malta by registration; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on September 8, 1983, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. It appears that sometime before October 21, 1983 appellant presented a copy of the approved certificate of loss of his nationality to the Maltese authorities, and so satisfied them that he was no longer a United States citizen.

[redacted] entered an appeal on January 14, 1988 from the Department's holding of loss of his citizenship. He contends that he did not expatriate himself willingly, but was forced by circumstances over which he had no control to perform the expatriative act.

II

As an initial matter, the Board must determine whether it may exercise jurisdiction over this appeal. Timely filing being mandatory and jurisdictional (see United States v. Robinson, 361 U.S. 220 (1961)), the Board's jurisdiction depends upon whether the appeal was filed within the limitations on appeal prescribed by the applicable federal regulations. The limitation on appeal to the Board is set forth in section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), which reads as follows:

> 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.

The regulations further provide 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. 22 CFR 7.5(a).

The Department of State on September 8, 1983 approved the certificate of loss of nationality that the Embassy in Valletta executed in appellant's name. Under the regulations, he had until September 8, 1984 to appeal the Department's holding. He did not enter the appeal, however, until January 11, 1988, three years and four months after the allowable time. Appellant's delay in seeking appellate review of his case may be excused only if he is able to show a legally sufficient reason for not acting within the prescribed time.

In a letter to the Board dated September 5, 1988, appellant gave this explanation for not appealing sooner:

> My answer to your question on why I did not appeal within one year after loss of nationality was communicated to me.
>
> This was indirectly said in my first letter of January 1988. I will make this more specific as it involves a piece of local Maltese politics. Last year, to be exact on May 13, 1987, there was a change of administration here in Malta. While previous Govt. had no intention of allowing dual nationalities, present govt. on the contrary is aiming to allow Maltese, with American nationality, to reside here and even work, if desired. I was given a residence permit for seven years before this was revoked. Only since last year, after May 1987, did it dawn on me that my position can be altered, and I applied to your Board, after some thought for your kind re-consideration of my case. Again I stress, only since last year and not before, I felt I was on solid ground for my plea to you can be effected.

At the Department's request, the Embassy in Valletta on December 1, 1988 cabled the following comment about the foregoing statement of appellant.

> The present Maltese Government has indicated it 'intends to introduce constitutional and other legislative amendments in Parliament to make it possible for Maltese emigrants to retain their Maltese citizenship if they also acquire the citizenship of their adoptive country'. How ever, no such legislation has, as yet, been presented in Parliament.

"Good cause" is a term of settled meaning. It is defined in Black's Law Dictionary, 5th ed. (1979), as "a substantial reason, one that affords a legal excuse. Legally sufficient ground or reason." What constitutes good cause depends upon the circumstances of the particular case. In general, to establish good cause for taking an action belatedly, one must show that circumstances which were largely unforeseeable and beyond one's control intervened to prevent one from taking the required action.

It is clear that appellant received a copy of the approved certificate of loss of his nationality (CLN) in the early autumn of 1983 and at that time received information about an appeal. On the reverse of the CLN was set forth information about the time limit on appeal and how to enter an appeal. Appellant accordingly was on notice of his rights from the first, yet he did not act until a number of years later. The key question is whether his reasons for not acting within the allowable time are sufficient to excuse the delay in taking the appeal.

Appellant's stated reasons for not appealing within the limitation are susceptible of two interpretations" (1) that until 1987 he believed he had no grounds to take an appeal; or (2) until he learned that the Government of Malta might seek constitutional and legislative changes to permit Maltese citizens to retain the citizenship of another country, he thought it might be risky to appeal; if he prevailed, he might jeopardize his Maltese citizenship.

If he believed he had no grounds to appeal until 1987, he was of course, mistaken. Arguably, he might have instituted an appeal based on the contention he now makes that he was forced against his will to obtain naturalization in Malta and thus to relinquish his United States nationality.

If, on the other hand, he maintains that it would have been risky for him to make an appeal while the Government of Malta held to a policy against dual nationality, his excuse for not appealing within the prescribed time is even weaker.

In short, however one interprets appellant's reason for not appealing within one year, it does not appear that any circumstances appellant could not foresee and over which he had no control prevented him from initiating a timely appeal to this Board.

It seems reasonable to assume therefore from what appellant has stated that he was fully aware that he might seek review of the Department's holding of loss of his United States nationality but consciously chose not to take an appeal. Knowing the limit on appeal, he acted at his peril in not moving within the allowable time.

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, is 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 someday, 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.

III

Since the appeal was not filed within one year after the Department approved the certificate of loss of appellant's 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.

In view of our disposition of the case, we find it unnecessary to make other determinations.

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member