February 1, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] V[redacted] P[redacted]

This is an appeal from an administrative determination of the Department of State, dated January 24, 1984, that appellant, J[redacted] Va[redacted] P[redacted], expatriated himself on July 19, 1983 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Ottawa, Canada. 1/

For the reasons given below, we conclude that the appeal is time-barred and not properly before the Board. It is accordingly dismissed for lack of jurisdiction.

I

Appellant, who was born on [redacted] obtained United States nationality by virtue of naturalization before the Federal District Court for the Western District of Pennsylvania in Erie, on June 3, 1964. In July 1983, appellant left his home in Erie and went to Ottawa. There he visited the United States Embassy on July 19, 1983 for the purpose of renouncing his United States nationality. The record shows that appellant in the presence of two witnesses and a consular officer swore that he had had read to him a statement of understanding. In the statement he declared, inter alia,

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> 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 -
>
> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or ...

that he decided voluntarily to exercise his right to renounce his citizenship; acknowledged that he would thereby become an alien toward the United States; that he had been afforded an opportunity to make a separate written statement explaining his reasons for renouncing and chose to do so: that the extremely serious nature of his contemplated act had been explained to him, by a consular officer, and that he fully understood the consequences,

In a seven page statement explaining his reasons €or renunciation, which appellant described as a "formal denunciation of American citizenship,' he stated that a "major reason" was that President Reagan and the White House, through a subordinate, had informed him on July 13, 1983 that he was 'an unacceptable person," and was threatened with the White House secret service. He also complained that his constitutional rights had been violated in Erie, Pennsylvania over an extended period of time; that he had been the victim of more than twenty-five crimes; and discriminated against. He concluded by stating that:

> I have asked for permission to emigrate to Canada, Sweden, Mexico, and the Soviet Union. I have received no final response from any of those countries. However, it is an impossibility for me to stay in the U.S. under these conditions of deprivation and discrimination and crime.

After executing the statement of understanding, appellant made the oath of renunciation, which reads in operative part as follows:

> That I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(5) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely, renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

After the formalities of renunciation were completed, appellant returned to Erie. The consular officer who presided

executed a certificate of loss of nationality in appellant's name, as required by law. 2/ Therein the officer certified that appellant acquired United States nationality by virtue of naturalization; that he made a formal renunciation of that nationality; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act,

The Embassy forwarded the certificate to the Department under cover of a memorandum that read in pertinent part as follows:

> Consular officer recommends that the Certificate of Loss of Nationality be disapproved by the Department. Mr. P[redacted] gave the impression of being mentally unstable during his interview with the consular officer. He mentioned that he had been treated by Dr. Felix Simora from October 1982 until just recently. P[redacted] signed a privacy act waiver permitting Dr. Simora to release medical information regarding diagnosis and prognosis.
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> Consular officer telephoned the office of the Legal Attache in Ottawa and informed that office of the renunciation case. The office

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2/ 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.

> of the F.B.I. in Erie, Pennsylvania was also notified. F.B.I. office in Erie reported they have knowledge of P[redacted] and that the consular officer's observation of this person's mental instability was quite correct.. ..

On August 23, 1983, Dr. Felix S. Simora of Erie wrote to the Department to give the following diagnosis of appellant:

> While he [Mr. P[redacted] was under my care, [from October of 1982 through May 1983] he had been coherent and relevant and showed no gross psychotic symptoms when he was taking his medication. Lithium carbonate.
>
> However, without the medication it is possible that he could act incoherently and not necessarily know the entire meaning and consequences of his intention to give up his American citizenship.

On September 6, 1983, the Department informed the Embassy at Ottawa of the foregoing medical evaluation and stated that in light of that information it was not willing to take any action in the case for the time being. Appellant wrote to the Secretary of State on November 30, 1983 to inquire what decision he had made in his case. He wrote to the Department again on December 17, 1983, noting that he had been waiting for five months for the Department to make a decision in his case. He stated that more of his rights had been violated since he returned to Erie after his "denunciation." Concluding, he asserted that:

> I do not intend on recanting anything I stated in the written documents July 19th. If my denunciation is accepted, I will gladly leave. If my denunciation is denied I DEMAND A FORMAL INVESTIGATION INTO THE CRIMES COMMITTED AGAINST ME HERE IN ERIE, PENNSYLVANIA BY THE FEDERAL GOVERNMENT. [Emphasis in original.]

The Department replied on January 9, 1984 to appellant's letter to the Secretary of November 30, 1983. Noting that the consular officer who administered the oath of renunciation believed that appellant might have been under stress, the Department requested that appellant obtain a statement from his

doctor setting forth why he might have appeared in the condition stated by the consul, and why his reasoning might have been impaired.

In a letter dated January 17, 1984, appellant assured the Department that he was fully aware of the consequences of his actions when he "denounced" his U.S. citizenship in 1983. In addition, he emphasized the various difficulties he was experiencing with neighbors and law enforcement officials in Erie, Pennsylvania. He stated, "[u]nless I get a full investigation on the crimes committed against me here, I don't want to be a citizen of the United States."

After receiving the foregoing communication, the Department on January 24, 1984 approved the certificate of loss of nationality that had been executed in appellant's name. The Department so informed him by letter dated January 26, 1984. The Department concluded that "the evidence now of record is sufficient to establish that your renunciation of U.S. citizenship should be accepted despite the fact that you did not supply a medical statement as requested.' Appellant acknowledged receipt of the Department's letter with enclosed certificate of loss of nationality on March 20, 1984.

According to appellant, he subsequently applied for reinstatement of his Italian citizenship. His request was denied, however, due to the fact that he had claimed U.S. citizenship to avoid Italian military service. Therefore, he was denied an Italian passport until he had satisfied Italy's military requirements.

On October 15, 1984, appellant wrote to the Department requesting a "change of status" and reinstatement of his U.S. citizenship. The Department denied his request on October 24, 1984, stating that he had not presented sufficient evidence to warrant such an administrative review. On October 29, 1984, appellant submitted a letter from the Warren State Hospital, dated July 11, 1984, which stated that he had been admitted to the Hospital on June 22, 1984, almost one year after the expatriating act, and at that time was found to be non-psychotic. On November 9, 1984, the Department notified appellant that it was still unable to overturn its original decision.

Appellant gave notice of appeal to the Board of Appellate Review on December 5, 1984. Briefs were exchanged and July 22, 1984 was set for oral argument, as appellant requested. He, however, later waived oral argument. Then on October 25, 1985, the Board of Appellant Review advised the Department as follows:

> Appellant has informed the Board of Appellate Review that he wishes to withdraw his citizenship appeal. His telegrams to the Board of October 15 and October 18, 1985, copies attached, confirmed by his telephone call to the Chairman of the Board of October 23, 1985, constitute his formal request for withdrawal. The Chairman's telegram to appellant of October 22, 1985 is also attached.
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> In his telephone call on October 23rd, appellant stated that since the wrongs he alleges he has been subjected to since his renunciation have not been righted by the United States Government, he sees no point in trying to recover his United States citizenship.
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> In view of appellant's request, the Board has on this date removed his appeal from the docket and has apprised appellant of the Board's action by a copy of this memorandum. The Department's administrative record is returned herewith.

Nearly four years passed. On July 5, 1989, appellant wrote to the Board, stating that: "It has been a most discomforting set of years since I withdrew my original appeal.. .." He enclosed a petition "to re-open the original case of appeal."

In the "petition" appellant asserted, inter alia, that:

> The withdrawal of the original appeal was made in haste, as the Appellant saw the statute of limitations run out on prosecuting the very criminals for which were responsible for his original decision to renounce his US Citizenship; such a decision was a product of severe stress, and a product of 'lack of legal action by the US government.'

Acknowledging appellant's letter, the Chairman informed him that: 'Since you withdrew your original appeal, there is no question of reinstating it. You must begin anew." On July 25, 1989, appellant filed a new appeal.

II

As a threshold matter, we must determine whether this appeal, which was filed four and one half years after the State Department determined that appellant expatriated himself, may be deemed timely. 3/

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). Thus, if one, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for lack of jurisdiction. Costello v. United States, 365 U.S. 265 (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 determination 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

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3/ There is, of course, no dispute that the original appeal which was filed on December 5, 1984 was timely, for it was filed within the limitation prescribed by the regulations, i.e., one year after the Department approved the certificate of loss of nationality. 22 CFR 7.5(b)(1). However, there is no legal basis for us to "re-open" the appeal that was filed December 5, 1984. Appellant withdrew his appeal in October 1985 categorically and unconditionally. There is no evidence that appellant did not intend that it should be definitive. The Board therefore accepted withdrawal without condition.

Appellant's case must be distinguished from a situation provided for by the regulations where one does not prosecute an appeal. Under 22 CFR 7.5(1),* if an appellant fails to take any action required by the regulations, the Board may in its discretion terminate proceedings, subject to later reinstatement for good cause shown. That is not the situation here. Appellant, not the Board, terminated proceedings. He now wishes to reinstate proceedings because certain conditions which apparently led him to terminate the appeal were not met. To allow appellant to "re-open" the original appeal would in effect open the possibility of allowing any appellant to

> upon written request made within one year after approval by 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 in January 1984 approved the certificate that was issued in this case. The appeal was not entered until July 1989, three and one half years after the allowable time for appeal. We must therefore determine whether appellant has shown good cause why he could not take the appeal within the prescribed limitation.

"Good cause" is a term of settled import. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th Ed. (1979). It is generally accepted that 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.

3/ (Cont'd.)

dictate the Board's procedures and thus interfere with orderly adjudication of appeals.

Having terminated proceedings for his own convenience, appellant may not, without more, be permitted to re-open them.

* 22 CFR 7.5(1) provides that:

> Whenever the record discloses the failure of an appellant to file documents required by these regulations, respond to notices or correspondence from the Board, or otherwise indicates an intention not to continue the prosecution of an appeal, the Board may in its discretion terminate the proceedings without prejudice to the later reinstatement of the appeal for good cause shown.

Disputing the Department's contention that the appeal should be dismissed on the grounds that the Board lacks jurisdition to entertain it, appellant submits that:

> 1. Whether Appellant's appeal was timely filed.
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> a) The Appellant requests dismissal of this allegation, on the following grounds:
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> 1) The Board has already allowed the appeal, and the Department is simply grasping for straws.
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> 2) The original appeal was indeed timely filed, and the laws provide for the re-examination of any case under just cause, which the Appellant has already shown.
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> 3) As there was no official result from the original appeal, the Department has no justification to prevent the filing of this subsequent appeal, as the entire premise of the legal system is to achieve a result, decision, or ruling.
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> 4) Timely filing is not an issue in this case, and since the Appellant has already shown good cause, the Department is quite literally avoiding the issue.
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> The mentioning of Italian citizenship and other impertinent data by the Department is irrelevant to this case. The Department has gone to great lengths to avoid the issues, by claiming such nonsensical items in the context of legal papers. Certainly, a timely appeal has nothing to do with items mentioned by the Department.
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> Therefore, the Appellant requests that the Board STRIKE this issue, as it is irrelevant. [Emphasis in original]

The reasons appellant presents do not constitute good cause for a delay of four and one half years in seeking relief from the Department's January 1984 decision of his expatriation. Whether the delay be reckoned as from 1984 (one

year after the date of the Department's decision) or from 1985 the date of appellant's withdrawal of his original appeal, the delay has not been satisfactorily explained. it appears that in 1985 appellant considered it convenient and advantageous to himself to withdraw the appeal, that is, he found not being a United States citizen useful in ways not entirely clear to the Board. Only after certain things failed to eventuate did he decide in 1989 that it would be to his advantage to try to recover his lost citizenship. Nothing that appellant has adduced convinces us that he was justified in delaying for as long as he did to seek appellate relief from the decision of the Department. The federal regulations are explicit as to the time within which an appeal shall be entered. They are also reasonable and fair, giving one an opportunity to show wherein a delay in taking an appeal was warranted and therefore entitled to be excused, Under the regulations, the Board nas no discretion to allow an appeal. which is filed more than a year after approval of the CLN and where the party concerned has failed by any objective standard to show good cause why the appeal. could **not** have been entered within the limitation.

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. We find that the appeal is time-barred, and hereby dismiss it for lack o jurisdiction, 4/

Alan G. James, Chairman

Edward G. Misey, Member

Mary Elizabeth Hoinkes, Member

4/ The fact that the Board has dismissed an appeal for lack of jurisdiction does not in itself operate to bar the State Department from taking such administrative action as it may deem appropriate to correct manifest errors of fact or law. Memorandum of Davis R. Robinson, Legal Adviser, Department of State, December 27, 1982. Excerpted in 77 Am. J. of Int'l. L. 298 (1983).