April 27, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: B[redacted] L[redacted] V[redacted] H[redacted] d[redacted] G[redacted]

This is an appeal from an administrative holding of the Department of State that appellant, B[redacted] L[redacted] V[redacted] H[redacted] d[redacted] G[redacted], expatriated herself on September 27, 1971, under the provisions of section 349(a)(2) of the Immigration and Nationality Act, by taking an oath of allegiance to the United States of Mexico. 1/

I

Appellant, B[redacted] L[redacted] V[redacted] H[redacted] d[redacted] G[redacted] was born at Pasadena, California, on November 21, 1928, thus acquiring United States citizenship at birth. Appellant states that she received a B.S. degree from the University of California at Los Angeles and travelled to Monterrey, Mexico in September 1952, to study medicine. 2/

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), provides:

> 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 --
>
> . . .
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political sub-division thereof; . . .

2/ It is possible that appellant is confused about the year in which she went to Mexico, for the record shows that when she applied for a passport at San Francisco on August 17, 1956, she stated that she had never had an American passport; had made no trips outside the United States in the previous twelve months; and that she proposed to study in Mexico for two years.

Appellant married a fellow medical student, D[redacted] A[redacted] G[redacted], a Mexican citizen, on September 23, 1959. Shortly thereafter appellant and her husband departed for the United States where, appellant states, they spent several years in pursuit of their medical studies. Upon completion of her training in the United States in **1965,** appellant returned to Monterrey, because, as she has put it:

> we both felt that we owed our alma mater, the Mexican Medical School, the benefit of our training as teachers for young unspecialized physicians.

Although appellant was apparently licensed to practice medicine in the State of Neuvo Leon, she has stated that she could not do so legally unless she were to become a Mexican citizen. Nevertheless, about a year after returning to Monterrey, appellant "reconciled myself to working illegally", and took a teaching position at the State University Medical School.

On November 13, **1968,** appellant applied for registration as an American citizen at the Consulate General at Monterrey. She was duly registered and issued a passport. Sometime thereafter, possibly early in 1971, appellant received, as she expressed it, "an offer to become a Mexican citizen". She described her reaction to this offer as follows:

> This represented protection for myself as a professional working "illegally", as I was, and protection for myself and my children at the border. I went through 8 months of indecision, but as the political situation became more caotic (sic) I accepted.

On September 27, **1971,** the Secretariat of Foreign Relations issued a certificate of Mexican nationality in the name of B[redacted] L[redacted] Vo[redacted] H[redacted] d[redacted] G[redacted]. The certificate stated that [redacted] had been a Mexican citizen from the date of her marriage to D[redacted] A[redacted] G[redacted] Mo[redacted] a Mexican citizen, on September **23, 1959,** that she had taken an oath of allegiance to Mexico, and renounced her right to any other nationality and her obedience to any foreign government, especially the one to which she formerly owed allegiance.

In possession of a new Mexican passport, appellant in July 1972, applied at the Consulate at Monterrey for a border crossing card. The Consul refused this request and instead issued her a visa. The record contains no official account of this visit by appellant to the Consulate, but she alleges that the Consul "looked puzzled" when she explained to him the circumstances under which she acquired her Mexican passport. The Consul did not, she avers, imply she was doing anything incorrect, "certainly not jeopardizing my American citizenship."

Upon renewal of her Mexican passport, appellant again visited the Consulate (presumably in early 1976) to apply for another visa. She has given the following account of that visit. (In this instance too there is no account in the record before us by a consular official about appellant's visit.)

> ....The Consulate was heavily guarded with a generally strained atmosphere. The Consul asked me how I got a Mexican passport. 1 repeated the story as I had for his predecessor (appellant presumably refers to her 1972 visit to the Consulate.) He then accusingly asked me if I had signed some forms: which not only had I not signed, I didn't even know they existed. He then informed me that by having become a Mexican citizen I had lost my American citizenship.... and that I had to sign the forms or else the State Department and the IRS (sic) would "take action" against me.

Appellant has further stated that she did not want to sign the forms which she did not understand, but alleges that the Consul told her she "must" sign them. According to her own account, appellant put off for two months a decision on whether or not to sign the forms. Finally, on May 6, 1976, she called at the Consulate and signed an affidavit of expatriated person. Thereafter, the Consulate on May 20,

1976, prepared a certificate of loss of nationality in appellant's name in accordance with section **358** of the Immigration and Nationality Act. 3/

The Consulate certified that appellant was born at Pasadena, California, on November 21, **1928;** that she acquired the nationality of the United States by virtue of her birth in the United States of America; that she acquired the nationality of Mexico by virtue of her marriage to a Mexican citizen, D[redacted] A[redacted] G[redacted], and establishing residence in Mexico; "that she took an oath of allegiance to Mexico, a foreign state, on September 27, 1971;" and that she thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act. 4/. On June 21, 1976, the Department approved the certificate of loss of nationality, which constitutes the administrative holding from which an appeal lies to the Board of Appellate Review.

Appellant initiated this appeal through her attorney on November 14, 1980. Her unsworn statement prepared on or about that date constitutes her brief.

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

> 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/ See Note 1, supra.

Appellant alleges that in applying for a certificate of Mexican citizenship she did not intend to relinquish her United States citizenship; that she had not been advised that becoming a Mexican citizen could endanger her United States citizenship; and that she had been misled and/or coerced into signing an affidavit of expatriated person, a document the meaning of which she did not understand.

II

Before the Board may properly act on this appeal, we must first determine whether the Board has jurisdiction to consider it.

Under the current regulations of the Department, which were promulgated on November 30, 1979, the time limitation for filing an appeal is one year after approval of the certificate of loss of nationality. 5/ The regulations further provide that an appeal filed after the time limit shall be denied unless the Board, for good cause shown, determines that the appeal could not have been filed within the prescribed period of time. The current regulations were not, obviously, in force at the time the Department approved the certificate of loss of nationality that was issued in this case.

The Department's regulations which were in effect on June 21, 1976, the date the Department approved appellant's certificate of loss of nationality, provided as follows:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 6/

5/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFR 7.5.

6/ Section 50.60 of Title 22, Code of Federal Regulations (1976), 22 CFR 50.60.

The Chairman of the Board of Appellate Review informed appellant's counsel on January 15, 1981, that since Dr. de G[redacted] apparently received her certificate of loss of nationality in 1976, the previous regulations governing the time limit of appeal would apply. Thus, under the governing time limitation, a person who contends that the Department's administrative holding of loss of nationality is contrary to law or fact is required to appeal such holding to the Board within a reasonable period of time after receipt of notice of the holding of loss of nationality. If a person does not initiate his or her appeal within a reasonable period of time, the appeal would be time barred and the Board would be without authority to entertain it.

The criteria for determining whether an appeal has been filed within a reasonable time are well established. Whether an appeal has been timely filed depends on the circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow. This does not mean, however, that a party will be allowed to determine a "time suitable to himself". In re Roney, 139 F.2d 175 (1943). Nor should reasonable time be interpreted to permit a protracted and unexplained delay which is prejudicial to either party. Smith v. Pelton Water Wheel Co., 151 Cal. 393 (1907).

The rationale for allowing a reasonable period of time to appeal a decision adverse to one's citizenship status is pragmatic and fair. It is intended to allow an appellant time to prepare a case showing that the Department's holding of loss of citizenship was contrary to law or fact. It presumes, however, that an appellant will prosecute his or her appeal with the diligence and prudence of an ordinary person. Dietrich v. U.S. Shipping Board Emergency Fleet Corp., C.C.A.N.Y. 9 F.2d 733 (1926). At the same time allowance is made for circumstances beyond an appellant's control which may impede him or her from promptly petitioning the Board. Where there has been a delay in taking an appeal the appellant is required to show a valid excuse. Appeal of Syby, 66 N.J. Super. 460,' 169 A.2d 749 (1961). Further, reasonable time begins to run with receipt of notice of the Department's holding of loss, not at some subsequent time years later when appellant for whatever reason may seek to restore his or her United States citizenship status.

In this case the Department approved a certificate of loss of nationality in appellant's name on June 21, 1976. The record does not indicate when appellant received notice of the Department's holding, but it must be presumed that the Consulate General at Monterrey promptly dispatched notice to her upon receipt of the Department's instructions to do so. 7/ Furthermore, appellant has not contended that she did not receive notice.

This appeal was initiated on November 14, 1980, more than four years after appellant's presumed receipt of notice of her loss of nationality. The first question we face therefore is whether a delay of four years in taking an appeal is a reasonable period of time. Granted that in October 1979, appellant demanded all documents relating to her case under the Freedom of Information Act. Such action, however, does not constitute an appeal. Even were we to accept that by seeking the relevant documents appellant took a purposeful step toward asserting a claim to have her citizenship restored, the fact remains that even at that moment more than three years had elapsed.

Appellant has offered no explanation why she did not or could not take an appeal before November 1980. It is not likely to have been because she was not aware that she might appeal. She was on notice in 1976 that an appeal process was available to her, for the appeal procedure was clearly set forth on the reverse side of the copy of the certificate of loss of nationality which was sent to her.

Nor does counsel for appellant address the issue of delay in a meaningful way. In a letter to the Board he contended:

> I submit that the facts, the Terrazas development, the delay of the Department in determining how Terrazas will be implemented in the aggregate constitute good cause for the delay under 22 CFR regulations published November 30, 1979.

7/ In the absence of any indication that the Consulate General did not follow the proper procedures, the presumption of official regularity should apply. Boissonas v. Acheson, 101 F.Supp. 138 (1952).

In a subsequent letter to the Board, in lieu of a reply brief, counsel further argued:

> If she is guilty of unreasonable delay, we may properly assume that it was not until Terrazas became public that she felt she had a chance. Recall that your Department required a long period before publishing its view on the implementation, say, of Afroyim v. Rusk, and that decision seemed simplicity itself compared to that in Terrazas.

We do not consider counsel's explanation for appellant's tardiness in taking this appeal responsive to the requirement that a valid excuse be shown for a delay. His point that it was not until the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980) became public did appellant think she had a chance to prosecute a successful appeal, has little merit. Believing one might not have a chance of winning a reversal of the Department's holding is insufficient justification for not promptly challenging the loss of an American's most precious right.

Briefly, appellant has not shown good cause why she could not have filed an appeal before four years had elapsed. Had she for some unexplained reason not been aware of her right to appeal, she could have ascertained that she had such recourse by making a routine inquiry at any diplomatic or consular post in Mexico.

In the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare an appeal or any obstacle beyond appellant's control to act expeditiously, the norm of "reasonable time" cannot be considered to extend to a delay of four years.

Since the Board is of the view that the elapse of four years clearly constitutes an unreasonable delay in taking an appeal, we find that the appeal initiated on November 14, 1980, was not filed within a reasonable time after receipt by appellant of the notice of the Department's holding of her loss of nationality, and therefore is time barred. As a consequence, the Board is without jurisdiction to entertain the appeal.

Given our disposition of the case, we do not reach the substantive issues presented. 8/

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member

8/ Although the Board did not reach the substantive issues presented in this case, we are constrained to observe that the absence in the record of any official contemporary account of Dr. d G [redacted] visits to the Consulate General in Monterre i 1972 d especially in 1976, when she signed an affidavit of expatriated person, shows a regrettable disregard for established procedures. The Department's instructions to all diplomatic and consular posts regarding reporting and full development of all citizenship cases are clear and categorical. Department of State Circular Airgram, No. CA 2855, May 16, 1969. There is no evidence before us that the Consulate General secured, for example, "an affidavit in the applicant's own words stating all the facts, circumstances, motives, purposes and intent which contributed to or led to the performance of the expatriative act in order to assist in determining whether or not the transfer or abandonment of allegiance has occurred." Id. We have been left throughout with only appellant's unsworn statement written a number of years later about the circumstances surrounding those events.