April 21, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] A[redacted] D[redacted]

This case is b[redacted] th Bo[redacted] Appellate Review on an appeal brought by D[redacted] A[redacted] D[redacted]e from an administrative determination of the Department of State that she expatriated herself on August 11, 1977, under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/ This appeal was filed more than four years after the Department approved the certificate of loss of nationality that was issued in appellant's name.

The initial issue presented is whether the appeal was filed within the limit prescribed by the applicable regulations. We find that the appeal was not timely filed and is therefore barred. The appeal will be dismissed.

I

Appellant, D[redacted] A[redacted] D[redacted], acquired the nation- the United States by virtue of her birth at [redacted] Through her father she also acquired the nationality of Mexico. Appellant lived in the Uniited States until 1968 when she was taken by her parents to Mexico where she has since resided. In 1968 appellant obtained a passport at the United States Consulate General at Monterrey. She did not renew it when it expired.

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 subdivision thereof; . . .

In 1972 appellant entered the University of San Luis Potosi to study law. In June 1975 she applied for a certificate of Mexican nationality. In her application for the certificate, appellant made a formal declaration of allegiance to Mexico and of renunciation of her United States citizenship, as required by Mexican law. 2/

A certificate of Mexican nationality was issued to appellant on August 11, 1977. 3/ She graduated from the University in 1978 and subsequently was licensed to practice law in Mexico.

Upon learning from the Mexican authorities that appellant had obtained a certificate of Mexican nationality, the Consulate General at Monterrey wrote appellant on February 22, 1978, to inform her that by making a formal declaration of allegiance to Mexico she might have expatriated herself. She was invited to fill out a questionnaire to assist the Department in making a determination of her citizenship status, and to submit any evidence she might wish to be considered in that regard. Appellant was informed that if she did not respond to the Embassy's letter within sixty days, it would be presumed that she did not wish to submit any evidence in her case. Appellant acknowedged receipt of the Embassy's letter on March 1, 1978. She did not, however, reply to it within the sixty-day deadline, or thereafter. Accordingly, as required by section 358 of the Immigration

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2/ Note number 105701 of the Mexican Department of Foreign Relations to the United States Embassy at Mexico, October 20, 1977.

3/ Id.

and Nationality Act, the Consulate General on June 2, 1978, prepared a certificate of loss of nationality in appellant's name. 4/

The Consulate General certified that Deborah Dauajare-Johnson acquired the nationality of the United States by virtue of her birth at Chicago, Illinois, on June 19, 1954; that she acquired the nationality of Mexico by virtue of her birth of a Mexican father; that she took an oath of allegiance to Mexico and thereby expatriated herself on August 11, 1977, under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Department approved the certificate on June 20, 1978, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to the Board of Appellate Review. As required by section 358 of the Act, the Department on June 20 sent a copy of the approved certificate to the Consulate General at Monterrey for delivery to appellant.

4/ Section 358 of the Immigration and Nationality Wet, 8 U.S 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.

Appellant initiated this appeal by letter to the Board dated August 12, 1982. She explained that she applied for a certificate of Mexican nationality in order to have her law degree registered by the Minister of Education and to obtain a license to practice law in Mexico. In a questionnaire executed at the Embassy at Mexico on August 11, 1982, appellant summarized her position on appeal as follows:

> My only worry was to get my law degree registered before the Mexican Minister of Education and I didn't realize I was in danger of loosing /sic/ my American citizenship because I was born in United States and my mother, brothers and sister are Americans. I always figured when I planed /sic/ on moving back to USA I would turn in my Mexican passport and nationality certificate. However the act I performed was completely voluntary, but my intent in performing such act wasn't of loosing /sic/ forever my American citizenship.

II

Before proceeding we must determine whether the Board has jurisdiction to consider the appeal. Our jurisdiction is dependent upon a finding that the appeal was filed within the limit prescribed by the applicable regulations. If we find that the appeal was not timely filed, we would lack jurisdiction and would have no alternative but to dismiss the appeal.

Under the current regulations of the Department the time limitation on 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 time. The current regulations were, however, promulgated on November 30, 1979, more than a year after the certificate of loss of nationality had been approved in appellant's name. In June 1978 when the Department approved the certificate that was issued in this case, the regulations provided as follows:

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

> 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 6/

It is generally recognized that a change in regulations shortening a limitation period is presumed to be prospective, not retrospective, in operation, since retrospective application would disturb a right acquired under former regulations. We are therefore of the view that the limitation in effect in June 1978 should apply in the appeal before us.

The rule on reasonable time is well settled. 7/ Whether an appeal was taken within a reasonable time depends on the circumstances of the particular ease. It has been held to mean as soon as the circumstances and with such promptitude as the situation of the parties will permit. A party may not be allowed to determine a time suitable to him or herself. Further, the rule presumes that an appellant will pursue am appeal with the diligence of an ordinary prudent person. A protracted and unexplained delay, particularly one which is prejudicial to the interests of either party cannot be permitted. Where an appeal has been long delayed it has been held that the appellant must show a valid excuse. Reasonable time begins to run with receipt of notice of the Department's holding of loss of citizenship, not at some later date when the appellant for whatever reason may seek to restore his or her citizenship.

6/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CPR 50.60.

7/ See, for example, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 393 (190 Appeal of Syby, 66 N.J. Super. 460, 169 A. 2d 749 (1961).

In the case before the Board the Department approved the certificate of loss of nationality on June 20, 1978. Appellant brought her appeal more than four years later.

The record shows that the Department sent a copy of the approved certificate to the Consulate General at Monterrey on June 20 for delivery to appellant. Appellant has not contended that she did not receive a copy of the certificate, or that she was not on notice from sometime close to June 20 that the Department had determined that she had expatriated herself. Furthermore, she was also on notice from date of her receipt of the certificate of her right to appeal to the Board of Appellate Review within a reasonable time, as indicated on the reverse of the certificate.

The rationale for allowing an appellant a reasonable time to take an appeal is to permit him or her an adequate period within which to prepare a case to support his or her contention that the Department's holding of loss of citizenship was contrary to law or fact.

In our view appellant had ample time to prepare an appeal. She has offered no explanation why she did not do so until more than four years had passed after she had notice of the Department's holding of loss of her citizenship. Her letter of August 12, 1982, which constituted her brief on appeal, was silent on the reason for her delay in filing an appeal. Although the Chairman of the Board of Appellate Review pointed out to her in his letter of September 7, 1982, that whether her appeal had been timely filed was a jurisdictional issue which the Board would have to determine ab initio, appellant did not thereafter address the issue. Nor did she file a brief in reply to that of the Department wherein the Department argued that her failure to taken an appeal before four years had elapsed was an unreasonable delay and accordingly her appeal should be barred.

Nothing in the record indicates that appellant was prevented by forces beyond her control from taking a timely appeal. As far as we can determine appellant, for reasons best known to her, simply found it convenient in 1982 to take an appeal at that time. She has made no attempt to show that her delay was reasonable in the circumstances of her case.

The Board is therefore of the opinion that appellant's unexplained delay of four years in bringing this appeal to the Board is unreasonable.

III

On consideration of the foregoing and our review of the entire record, we are unable to conclude that the appeal was filed within the time limitation of the applicable regulations. Accordingly, we find it barred, and the Board lacks jurisdiction to consider it. The appeal is dismissed.

Given our disposition of the case, we do ndt reach the other issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member