February 7, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: H[redacted] T[redacted]

This case is before the Board of Appellate Review on an appeal taken by H[redacted] T[redacted] from an administrative determination of the Department of State that she expatriated herself on April 18, 1955, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Venezuela upon her own application. 1/

I

Appellant, H[redacted] T[redacted], n[redacted] M[redacted], acquired the nationality of the United States by virtue of her birth at [redacted] According to an affidavit she executed on May 18, 1982, *Mrs.* T[redacted] parents took her to Russia in 1917, where [redacted]d for five years. In 1922 her parents took her to [redacted] She went to [redacted] in 1932 and there married [redacted]. In her affidavit appellant further states that in 1942 the [redacted] deported her, her husband

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

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, . . .

and baby daughter to Germany where Mr. T[redacted] was forced to work for the Nazi regime. After the [redacted]ppellant and her family lived in displaced persons camps and were documented by the occupation authorities as stateless persons. Mrs. T[redacted] avers that she and her husband tried for three [redacted] to obtain visas for any country that would receive them, hoping, in particular, to be admitted to the United States. She alleges that she was informed by officials of the United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organization (IRO) that since she had been born in the United States, she was ineligible for a visa to enter the United States; and further, that by marrying a foreigner in **1938**, she had lost her United States nationality.

In **1948** the Venezuelan Government issued appellant and her family immigration visas whence they travelled in July **1948** on provisional exit permits issued by the United States Milit[redacted]vernment for Germany. These documents described the T[redacted] family as stateless.

Several years later appellant's husband applied for Venezuelan citizenship for them both. She explained the circumstances in her affidavit of May **18, 1982**, as follows:

> In **1955** my husband made an application for Venezuelan citizenship for both of us, for it was considered that we had no citizenship of any kind, that we were stateless. I remember that he brought the application to our home and I signed it without reading, the more so that my command of the Spanish language was and is very poor.

The record shows that appellant's application for Venezuelan citizenship was actually made on August **28, 1952**. In her application appellant recited, inter alia, that she had lost her ties with her country of origin and spoke the Spanish language well. On April 18, **1955**, number **24.722** of the Official Gazette of Venezuela announced that appellant and her husband had been granted naturalization by presidential decree number **219**, dated April **16, 1955**, in conformity with article 1 of the Law of Naturalization.

Appellant's affidavit of Play **18, 1982**, further states:

> In **1955** we asked for a tourist visa to travel to the USA. I remember that I was given a number of papers to sign at the American Embassy, which 1 signed without reading or understanding nor knowing their content, as their meaning was not explained to me, they were not translated to me, and I do not know the English language. I was shown a document which I apparently signed on October 20, **1955,** in which I recognized my American citizenship and renounced it. I do not remember that document, and never signed it consciously knowing its contents. By what I recall, it must have been one of the many documents I was given to sign when we applied for a tourist visa. I firmly believed that I was not a citizen of the United States after the assertion's of the UNRRA and IRO officers in Germany.

The record shows that the document to which appellant refers and which she signed on October **20, 1955,** was an affidavit of expatriated person. In it Mrs. T[redacted] stated that she acquired United States nationality by birth; that she had been naturalized as a citizen of Venezuela upon her own application; and that she realized that by such naturalization she could lose any claim to American citizenship.

As required by section **358** of the Immigration and Nationality Act, the Embassy at Caracas prepared a certificate of loss of nationality in appellant's name on November 17, **1955.** 2/

2/ 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.

The Embassy certified that appellant acquired the nationality of the United States by virtue of her birth ther that she acquired the nationality of Venezuela upon her own application; and thereby expatriated herself under the provi sions of section 349(a)(1) of the Immigration and Nationalit Act. The Department approved the certificate on December 1 1955, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board. The record shows that on January 2, 1956, the Department sent a copy of the approved certificate to the Embassy, which in accordance wi section 358 of the Immigration and Nationality Act, the Embassy was required to forward to appellant,

The record shows no further contact between appellant and any official United States agency until nearly twenty-six years later when on September 18, 1981, appellant applied for a passport at the State Department Agency at San Francisco. On December 1, 1981, the Office of Passport Services of the Department informed appellant that her application for a passport had been denied on the grounds that she had expatriated herself in 1955.

Appellant initiated this appeal through counsel on December 28, 1981. She alleges that she never received a c of the approved copy of the certificate of loss of national that was issued in her name and thus did not formally know that she had lost the United States citizenship she did not know she possessed; that she did not have the intention to relinquish her United States citizenship when she obtained naturalization in Venezuela as evidenced by her conviction that she believed she had previously lost her American nationality and that she was stateless at the time she applied for Venezuelan naturalization.

Upon receipt of appellant's brief, the Board of Appellate Review on May 13, 1982, requested that Passport Services submit a brief in support of the Department's position on the appeal and the administrative record upon which the determination of loss of appellant's nationality was based. The Deputy Assistant Secretary for Passport Services on August 12, 1982, submitted the record and a memorandum in lieu of a brief stating with particularity points of law and fact which in the judgment of the Department warranted that appellant's case be remanded to Passpor Services for the purpose of vacating the certificate of los of nationality.

The Department argues that, although a delay of twenty-six years in taking an appeal would in most cases be considered unreasonable and the appeal be deemed time barred, this appellant's delay should not be considered unreasonable. Even if appellant received a copy of the certificate of loss of nationality and notice of her right to appeal, the Department reasons, she may not have understood the meaning of the certificate of loss, and therefore could not have exercised her right to challenge it. "She therefore could not be held accountable for hef failure to appeal," the Department asserts.

The Department's memorandum continues:

> Alternatively, if the Board does not believe that this appeal was made within a reasonable time, the Board is invited to exercise its discretion under 22 C.F.R. 7.2(a) and waive the time requirement on the ground that equity would be served by asserting jurisdiction and remanding the case for cancellation of the Certificate. 3/

3/ Section 7.2(a), Title 22, Code of Federal Regulations (1982), 22 CFR 7.2(a), provides in part:

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

The Board does not have authority under this section to disregard the other preconditions established by the same regulations for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed. If the Board determines that it lacks jurisdiction to consider an appeal, the Board has no alternative but to dismiss it.

The memorandum concludes:

> The evidence before Board demonstrates that Mrs. T did not have an intent to relinquish her United States nationality when she became a Venezuelan citizen by naturalization. In view of the merits of the case, the Board should take jurisdiction and reverse the Department's original decision. The Board is requested to remand the case for cancellation of the Certificate of Loss of Nationality.

III

Before the Board may properly act on the Department's request for remand we must determine whether we have jurisdiction to consider the appeal. We must, therefore, first reach a judgment on whether the appeal was timely filed. If the appeal was not filed within the time prescribed by the applicable regulations, the Board would lack jurisdiction over the case and would have no authority to remand it as the Department has requested.

In 1955 when the Department approved the certificate of loss of nationality in this case the Board of Appellate Review did not exist. At that time there was in existence a Board of Review on Loss of Nationality in the then Passport Division of the Department of State. That Board had jurisdiction over all cases where the Secretary of State had made an administrative determination of loss of United States citizenship or nationality which had occurred under laws administered by the Secretary of State. Prior to 1966 no prescribed time limit on taking an appeal from an administrative determination of loss of United States citizenship was specified in the rules of procedure of the Board of Review.

The first mention of a time limit on entering an appeal from a determination of loss of nationality appeared in the regulations of the Department promulgated on October 30, 19 with respect to the Board of Review on Loss of Nationality within the Passport Division. The regulations provided that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 4/ This "reasonable time" Provision was adopted in the Department's regulations

4/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

promulgated in 1967 for the then newly established Board of Appellate Review and remained in effect until the regulations were revised and amended on November 30, 1979. 5/

The current revised regulations require that an appeal be filed within one year after approval of the certificate of loss of nationality. Believing that the current regulation as to the time limit on appeal should not apply retrospectively, we are of the view that the Department's regulations on time limitation which were in effect prior to November 30, 1979, should govern in this case.

Under the "reasonable time" provisions, a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file his request for review within a reasonable time after he has received notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be time barred and the Board would lack jurisdiction to consider it. In brief, the reasonable time provision presents a jurisdictional issue. 6/

5/ Section 50.60, Title 22, Code of Federal Regulations, (1967-1979), 22 CFR 50.60, provided:

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/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

The Secretary of State did not confer upon the Board the power. ..to review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972.

As we have seen, the Department sent a copy of the approved certificate of loss of nationality to the Embassy at Caracas in January 1956 for delivery to Mrs. T[redacted] The record does not show whether the Embassy rece[redacted]e certif[redacted] or if received, whether it was sent to Mrs. T[redacted]. In the absence of evidence to the contrary, it may be presumed that the certificate did reach the Embassy and that the Embassy duly complied with the requirements of section 358 of the Immigration and Nationality Act by sending a copy thereof to Mrs. T[redacted]. A presumption of regularity has long attached to th execution of the official duties of Government officials, absent evidence to the Contrary. Boissonas v. Ackeson, 101 F. Supp. 138 (1951) and Webster v. Estelle, 505 F. 2d 926 (1974). 7/ Because of the passage of so much time and the absence in the record of proof of Mrs. T[redacted] receipt of the certificate, it is impossible to know with certainty what transpired after the Department dispatched the certificate to Caracas. It would be unprofitable to speculate. In our view, appellant's receipt or non-receipt of notice of the Department's holding of loss of her United States citizenship is moot.

7/ It is also relevant to note that in 1954 the Department called the attention of all diplomatic and consular posts to the requirement of section 238.1 of the Foreign Affairs Manual entitled "Advice Regarding Making of Appeals." Under this section diplomatic and consular posts were required to inform an expatriate of his or her right to appeal to the predecessor of the Board of Appellate Review, t Board of Review on Loss of Nationality. CA 5733, April 12, 1954. There is no reason to believe, in the absence of evidence to the contrary, that the Embassy did not comply with this injunction.

The relevant inquiry is whether appellant had notice other than actual notice of the loss of her citizenship and if so whether such notice was legally sufficient to give her knowledge thereof. Appellant's unsupported allegation that she did not have actual notice of the Department's determination of loss of her citizenship until she received the Department's letter of December 1, **1981**, denying her passport application may not excuse her from failing to take a timely appeal if she was, or may reasonably be deemed to have been, aware long before 1981 that she was an expatriate, or at least that there existed a substantial question about her citizenship status.

Appellant stated in the affidavit of expatriated person which she signed on October 20, **1955**, that she had been born an American citizen, and she acknowledged that her naturalization in Venezuela could result in loss of any claim to United States citizenship. Appellant may have had valid grounds to believe she was stateless in 1953 when she applied for naturalization in Venezuela and in August **1955** when she was accorded Venezuelan nationality. Her meeting at the United States Embassy in October **1955**, however, should have convinced her that at that time she had a valid claim to United States nationality.

But appellant alleges that she did not knowingly sign the affidavit and that it was not translated from English (which she did not and does not understand) into Spanish (which she alleges she understood and still understands poorly.)

Appellant's husband appears to have accompanied her to the Embassy on October 20. ("In 1955 we asked for a tourist visa to the USA", appellant stated in her affidavit of May 24, **1982.**) Appellant described Mr. T[redacted] in her naturalization application as an electrical engi[redacted]nd property owner. It would not be unreasonable to assume that Mr. T[redacted] was an ordinarily prudent man and as such would have insisted that his wife be made aware of the significance of the document she was executing. We have no way of knowing whether the affidavit was translated from English into Spanish. In May **1982**, however, a consular official of the Embassy at Caracas informed the Department that it had always been the custom of the Consular Section to translate verbally into Spanish any affidavit written in English if the applicant's knowledge of E[redacted] is limited. And we note that three years before Mrs. T[redacted] signed the affidavit she alleged in her naturalization application that she spoke Spanish well.

The only extant contemporary evidence of record about what transpired at the United States Embassy on October 20, 1955, is the affidavit of expatriated person which Mrs. Tarch signed. There is nothing else of record which would shed light on the circumstances under which she signed the affidavit. We have only appellant's statements made twenty-seven years later which purport to show that she did not know the nature of the document she was signing and did not sign it consciously, thus attempting to demonstrate that as of that date she did not know she had a claim to United States citizenship and did not know that by becoming naturalized in Venezuela she might have forfeited that claim.

However sincere appellant's statements, they are self-serving and cannot be accorded a weight equivalent to that of the formal document she signed on October 20, 1955. In our view appellant cannot have been unaware in 1955 that she might have had a claim to United States citizenship. Not until twenty-seven years later did she assert a claim to her birthright.

Whether an appeal has been filed within a reasonable tim depends on the circumstances of a particular case. Chesapeak and Ohio Railway v. Martin, 283 U.S. 209 (1931). Unlike a fixed determinate limitation, it would not depend upon the fact that a specified period of time elapsed.

Generally, reasonable time means reasonable under the circumstances. It has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the *partiesand the circumstances of the case will allow. This does not mean, however, that a party will b allowed to determine a "time suitable to himself." In Re Ron 139 F. 2d 175 (1943).

The rationale for giving a reasonable time to appeal an adverse decision is to allow an appellant sufficient time upon receipt of such decision to assert his or her contention of law or fact against the Department's holding of loss of nationality. Further, it should be noted that the period of a "reasonable time" begins to run with the receipt of notice of the Department's holding of loss of nationality, and not at some subsequent time, years later, when appellant, for

whatever reason, may seek belatedly to restore his United States citizenship status. 8/

8/ Appellant contends that the first formal notice she had of her loss of United States citizenship was when she received the Department's letter of December 1, **1981,** denying her passport application. In response to appellant's counsel's letter regarding this appeal dated January 15, 1982, the then Chairman of the Board of Appellate Review informed counsel as follows:

> Since your letter indicates that your client did not receive notice of her loss of citizenship until December 1, **1981**, the Board...will consider that the time period within which the appeal should be filed runs from that date.

The Chairman apparently had not been aware on January 15, however, that a certificate of loss of nationality in appellant's case had been approved by the Department in **1955** not **1981.** The present Chairman by letter dated March **12, 1982,** so informed counsel for appellant. The Board therefore considers that the period of "reasonable time" should run from sometime in early **1956,** i.e., from a date on which appellant may be presumed to have received notice of loss of her nationality.

It can hardly be denied that a substantial period of time transpired before appellant took this appeal, She has offered no explanation why she could not have taken an appeal before **1981**, save her unsubstantiated allegations that she did not receive actual notice that the Department had approved a certificate of loss of nationality in her name in **1955** and that she did not know until **1981** that she had a claim to United States citizenship.

Appellant did not dispute her loss of United States nationality until she gave notice of appeal to this Board in December **1981**, twenty-six years after she performed an expatriating act. In our view, appellant's failure to take appeal before **1981** demonstrates convincingly that her delay in seeking an appeal was unreasonable under the circumstance of her case. Whatever interpretation may be given to the term ''reasonable time", as used in the regulations, we do nc believe that such language contemplated a delay of twenty-si years after the certificate of loss of nationality was issue in **1955**.

Furthermore, after so long a time facts inevitably become clouded and memories hazy. It is generally recognize that the principal purpose of a limitation provision is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against stale and belated appeals that could more easily have been resolved. when the recollection of events upon which the appeals are based is fresh in the minds of the parties involved and. records are available. Here, the recollection of events is not fresh, and the documentation is sparse.

No good cause having been shown therefor, the Board is afforded no valid basis to exercise its discretion to enlarge the time for the taking of this appeal. 9/

9/ Section **7.10**, Title 22, Code of Federal Regulations (198 22 CFR 7.10, reads in part:

> **...**The Board, for good cause shown, may in its discretion enlarge the time prescribed by this part for the taking of any action.

IV

Since the appeal before the Board was not filed within a reasonable time after appellant may be presumed to have been on notice that at the very minimum she had placed her United States citizenship in jeopardy by obtaining naturalization in Venezuela, it is time barred and the Board is without jurisdiction to consider it. The appeal is dismissed. 10/

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member

10/ With respect to possible further administrative review, the Legal Adviser of the Department of State held in an opinion dated December 27, 1982:

> ...where the Board of Appellate Review has dismissed an appeal in a citizenship case as time barred, that fact standing alone does not preclude the Department from taking further administrative action to vacate a holding of loss of nationality. This continuing jurisdiction should be exercised, however, only under certain limited conditions to correct manifest errors of law or fact, where the Circumstances favoring reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions. Such circumstances usually would involve cases where the Supreme Court has declared unconstitutional the particular section of law under which a loss was thought to have occurred. In other circumstances, where evidentiary questions of "voluntariness" or "intent" are raised, an applicant's unreasonable delay in seeking relief generally will impair the Department's ability clearly to establish the facts and circumstances necessary to resolve those questions. In such cases, further administrative consideration should be denied under the doctrine of laches.

Memorandum of the Legal Adviser of the Department of State, Davis R. Robinson, to the Chairman of the Board of Appellate Review, "Requests for Remand by the Department of Cases Before the Board of Appellate Review", December 27, 1982.