November 3, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This case is before the Board of Appellate Review on an appeal brought by C[redacted] J[redacted] E[redacted] from an administrative determination of the Department of State that she expatriated herself on May 30, 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/

The first issue for decision is whether the appeal, brought more than four years after the Department approved the certificate of loss of nationality that was prepared in appellant's name, was filed within the limitation prescribed by the applicable regulations. We find the appeal time barred. Thus lacking jurisdiction, we must dismiss it.

I

Appellant, whose father was an American citizen and mother a cit[redacted]s nationality by birth at [redacted]

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 --
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> . . .
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> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof;". . .

Appellant states that in 1975 she left California to visit her grandmother in Mexico. It appears that having been engaged to do television commercials, appellant was advised that she might avoid heavy taxes and payroll deductions if she were to obtain a birth certificate showing that she was a Mexican citizen. Appellant states that she took this advice, and with the assistance of a relative obtained a birth certificate stating that she had been born at Acapulco, Mexico, in 1957.

Appellant alleges that she entered and won several beauty contests. By then, she explains, she felt she could not turn back, although she knew it was not right to continue to use a false Mexican birth certificate. Expecting to be sent abroad by her sponsors, appellant sought a Mexican passport, because, as she has stated, she did not think it right to travel on an American passport. (She had been issued one in September 1971.)

In order to obtain a Mexican passport, appellant was required to obtain a certificate of Mexican nationality. After making application (and evidently supporting it with the false Mexican birth certificate), appellant was issued a certificate of Mexican nationality on May 30, 1977.

The Department of Foreign Relations informed the Embassy at Mexico D.F., on July 4, 1977, that a certificate of Mexican nationality had been issued to appellant. The Department's note stated that appellant had been born at Acapulco on October 29, 1957, of an American citizen father that on March 30, 1976, she had renounced her United States nationality and made a formal declaration of allegiance to Mexico. 2/

The United States Embassy informed appellant on August 10, 1977, that she might have lost her United States nationality by making a declaration of allegiance to Mexico,

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2/ Diplomatic Note No. 103818, Department of Foreign Relations to the United States Embassy, Mexico, D.F., July 4, 1977.

She was invited to call at the Embassy to discuss her case. Appellant appeared at the Embassy on August **29**, and on September 12 filled out a short questionnaire, indicating that she had voluntarily applied for a certificate of Mexican nationality, but without the intention of relinquishing her United States citizenship. She informed the Embassy that she did not wish to submit any evidence,

In her submission of May **1983**, appellant explained the circumstances of her appearance at the Embassy in **1977** as follows:

> I was already so very deeply in a rut, I was confused and frightened what could happen were my situation found out. During this time I was called to the American Embassy...but I was in a state of total confusion I did not try to defend myself....I never told my consular /sic/ at the Embassy in Mexico City anything.

The Embassy again wrote to appellant on July **3, 1978,** inviting her to call at her earliest convenience to discuss her citizenship status. Appellant did not respond to that letter. Accordingly, on September **9, 1978,** the Embassy informed her that a preliminary finding of loss of her nationality had been made and that she might, within sixty days, submit evidence to rebut that finding. Appellant acknowledged receipt of that letter but did not respond. Accordingly, on January **29, 1979,** as required by section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name. 3/

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 part III of this subchapter, 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 United States nationality by birth at San Fransisco; that she acquired the nationality of Mexico by virtue of birth to a Mexican father 4/; that she made a formal declaration of allegiance to Mexico; and thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Department of State approved the certificate on February 28, 1979, approval constituting an administrative determination of loss of nationality from whish an appeal, properly and timely filed, may be brought to this Board. The record shows that the Department sent a copy of the approved certificate to the Embassy on February 28 for delivery to appellant.

It appears that three and one half years passed before appellant had any further dealings with the United States Government. She states that in October 1982 she went to the Embassy at Mexico City "to straighten my papers out, realizing my error." She added: "I had wanted to previously but had been advised in Mexico not to move anything to avoid a public scandal."

4/ This statement is in error. The certificate of appellant's Girth at San Francisco indicates that her father was born in Illinois. And an affidavit her father executed on December 16, 1982, states that he has always been a United States citizen,

Appellant brought this appeal on May 20, 1983.

Appellant contends that she did not willingly make a declaration of allegiance to Mexico. She argues, by inference, that an error of fact (issuance to her of a certificate of Mexican nationality on the strength of a false certificate of birth) warrants restoration of her citizenship,

The Department of State asserts that the appeal is time barred and that the Board lacks jurisdiction to entertain it. The Department submits, however, that there is insufficient evidence that appellant intended to relinquish her United States citizenship when she obtained a certificate of Mexican nationality. The Department therefore states that if the Board dismisses the appeal, it intends to vacate the certificate of loss of nationality. Alternatively, if the Board finds that it has jurisdiction, the Department requests that the case be remanded for the purpose of vacating the certificate of loss of nationality.

II

The threshold issue is whether this appeal was filed within the limitation prescribed by the applicable regulations.

In February 1979 when the Department approved the certificate of loss of appellant's nationality the regulations then in effect prescribed that an appeal from a determination of loss of nationality might be brought within a reasonable time after receipt of notice of the Department's holding of loss of nationality. 5/

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

In November 1979 the regulations governing appeals to the Board of Appellate Review were amended and revised. They provide that an appeal from a determination of loss of nationality shall be filed within one year of the Department's approval of a certificate of loss of nationality. 6/

It is our view that the current regulations should not be applied retrospectively. Therefore the limitation of "within a reasonable time" will govern this appeal.

Under the limitation of "reasonable time", a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after 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 barred and the Board would

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6/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

lack jurisdiction to consider it. The reasonable time provision is jurisdictional. 7/ The Chairman of the Board of Appellate Review advised appellant of the foregoing jurisdictional considerations by letter on June 20, 1983.

7/ 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 /of Appellate Review/ 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-340-P, February 7, 1973.

Although the term "reasonable time" is by definition indefinite, the courts have laid down guidelines for determining what is a reasonable time. 8/

Whether an appeal was lodged within a reasonable time depends on the circumstances of the particular case. It has been held to mean as soon as the circumstances and with such promptitude as the situation of the parties will permit and party may not be allowed to determine a time suitable to him or herself. Further, the rule presumes that an appellant will pursue an appeal with the diligence of an ordinary prudent person. 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.

By way of explanation for the delay in bringing an appeal appellant stated in her letter to the Board of May 20, 1983,

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8/ *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. 2d 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1907); ~~Appeal of Syby~~, 66 N.J. Super. 460, 169 A. 2d 74 (1961).

that she first learned a certificate of loss of nationality had been approved in her name when she visited the United States Embassy at Mexico City in October 1982. She elaborated as follows:

> I was informed at the Embassy that I had been sent in the mail (to an old address) a notice of loss of nationality (which I cannot recall) and I was issued /presumably in October 1982/ a copy of the certificate.

That appellant may not have received actual notice of the Department's determination of loss of her nationality and of her right of appeal does not, in our view, constitute error sufficiently material to excuse her delay in bringing an appeal.

It may be presumed, in the absence of evidence to the contrary, that the Embassy received a copy of the approved certificate of loss of nationality and, as required by section 358 of the Immigration and Nationality Act, delivered or attempted to deliver a copy to appellant. 9/ Indeed, appellant confirmed this presumption. She stated that when she called at the Embassy at Mexico City in October 1982 she was shown the letter the Embassy had sent to a former address of appellant in the spring of 1979. That she did not receive the letter is to be attributed to her negligence, not the Embassy's. She ought to have kept the Embassy

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9/ A presumption of regularity attaches to the performance by public officials of their official duties, unless the contrary is shown. Webster v. Estelle, 505 F. 2d 926 (1974).

informed of her correct mailing address, or to have left a valid forwarding address with the local post. It is evident that she did neither.

In any event, it is our view that appellant had sufficient notice even before 1979 that she had probably lest her United States nationality, The Embassy so informed her in August 1977 by letter and presumably at the interview she had in September of that year. The Embassy's "preliminary finding of loss of nationality" letter of September 1978, which she received but to which she did not respond, made plain that she might have expatriated herself.

It is well established that implied notice of a fact may be legally sufficient to impute actual notice to a party. Implied notice is a presumption of fact relating to what one can learn by reasonable inquiry and arises from actual notice of circumstances, It exists where the fact in question lies open to knowledge of the pasty, so that the exercise of reasonable observation and watchfulness would not fail to apprise him of it, although no one has told him in so many words. 10/

10/ Black's Law Dictionary, 5th Ed. (1979). See also U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); McDonald v. Robertson, 104 F. 2d 845 (1939); Nettles v. Childs, 100 F. 2d 952 (1939); Mossler Acceptance Co. v. Johnson, 109 F. supp. 158 (1952).

Appellant's knowledge of the possible loss of her United States citizenship should have led her to make a prompt inquiry at a United States diplomatic or consular establishment in Mexico about her actual citizenship status. Had she done so within a reasonable time after she had been informed by the Embassy in September 1979 that a preliminary finding of loss of her nationality had been made and that a recommendation would be made that the Department approve the certificate of loss of nationality, she would have ascertained the facts in her case, and thus have been in a position to bring a timely appeal.

It seems clear that the real reason appellant delayed in finding out about her actual citizenship status and in bringing a timely appeal was that she feared public embarrassment and possible legal consequences if she were to disclose that she had used a false birth certificate to obtain a certificate of Mexican nationality. But her reticence over more than three years to face reality is hardly a legally sufficient excuse for her delay in appealing. Her delay was the product of personal choice, not the consequence of a circumstance over which she had no control.

Since there has been no showing of a requirement for an extended period of time to prepare an appeal, or any external constraint on bringing one in timely fashion, we are unable to deem appellant's delay of four years reasonable.

III

On consideration of the foregoing, we conclude that the appeal was not brought within a reasonable time after appellant may be presumed to have had notice of the Department's holding of loss of her United States nationality. Accordingly, we find the appeal barred and not properly before the Board, The appeal is hereby dismissed. 11/

11/ The fact that the Board of Appellate Review has dismissed the appeal on the grounds that it lacks jurisdiction does not in itself bar the Department from taking such further administrative action as may seem appropriate in the premise. Opinion of the Legal Adviser of the Department of State, Davis R. Robinson, December 27, 1982. See American Journal of International Law, Vol. 77 No. 2, April 1983.

Given our disposition *of* the case we do not reach the other issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member