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March 24, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: J[redacted] M[redacted] D[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, J[redacted] M[redacted] D[redacted], expatriated himself on February 24, 1950, under the provisions of section 401(b) of the Nationality Act of 1940 by taking an oath of allegiance to Mexico. 1/

I

Appellant D[redacted] acquired the nationality of the United States by virtue of his birth at S[redacted] A[redacted], T[redacted] on [redacted]. He also acquired the nationality of Mexico through his father, a Mexican citizen. According to an affidavit he executed on November 5, 1982, appellant was taken by his parents to Mexico when he was about one year old. At the age of seventeen, he was drafted into the Mexican Army, and began one year's compulsory military

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1/ Section 401(b) of the Nationality Act of 1940, 8 U.S.C. 801(b), reads:

Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . .

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state, . . .

service on January 1, 1950. 2/ On February 24, 1950, appellant took an oath of allegiance to Mexico as required by article 15 of the Mexican Military Law. He completed his compulsory service on December 27, 1950.

Appellant appeared at the United States Consulate at Monterrey on July 11, 1952, for purposes not stated in the record. He completed a questionnaire, to assist the Department to make a determination of his citizenship status, in which he stated that he had served in the Mexican Army and taken an oath of allegiance to Mexico. The Consulate prepared a certificate of loss of nationality in appellant's name as required by section 501 of the Nationality Act of 1940. 3/

The Consulate certified that appellant took an oath of allegiance to Mexico and thereby expatriated himself

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2/ In his affidavit of November 5, 1982, appellant stated that he protested his draft summons to the chairman of his Mexican draft board on the grounds that he was an American citizen.

3/ Section 501 of Chapter V of the Nationality Act of 1940, 8 U.S.C. 901, reads:

Sec. 501. 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 American nationality under any provision of chapter IV of this Act, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be 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 Department of Justice, for its 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.

under the provisions of section 401(b) of the Nationality Act of 1940. The Department did not approve the certificate until May 28, 1954, the delay apparently being attributable to the time required to obtain verification of the exact dates of appellant's service in the Mexican Army.

In accordance with the requirements of section 501 of the Nationality Act, the Department sent a copy of the approved certificate to the Consulate on July 6, 1954, for delivery to appellant.

Twenty-eight years later, on November 8, 1982, counsel for appellant brought this appeal on behalf of D[redacted]

Counsel contends that D[redacted] never received a copy of the approved certificate of nationality issued in his name; that he first saw the certificate in its approved form in his attorney[redacted]ce in July 1982. Counsel also contends that D[redacted] was not aware of his right to appeal until 1982, and in any event could not have taken an appeal based on lack of intention to relinquish his United States citizenship until the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980) "(or arguably, Afroyim.)" /Afroyim v. Rusk, 387 U.S. 253 (1967)/. Counsel further contends that appellant involuntarily took the oath of allegiance and that he did not intend to relinquish his United States citizenship.

The Department's position on this appeal may be summarized as follows: The appeal is time barred because appellant's delay of twenty-eight years in taking an appeal is unreasonable under the applicable regulations governing the time limit on appeal. The Board accordingly lacks jurisdiction and should dismiss the appeal.

On the substantive issues, however, the Department states that the evidence regarding appellant's oath of allegiance to Mexico is insufficient to support a finding of loss of nationality. The Department points out that appellant's service in the Mexican Army and his concomitant oath of allegiance occurred at a time when the Military

Service Agreement between Mexico and the United States was in force. 4/ In light of that Agreement, the Department argues, the circumstances of appellant's service and oath of allegiance do not permit any inference to be drawn that appellant intended to relinquish his United States citizenship. Further, the Department states, on March 31, 1959, the Department determined that an oath of allegiance to Mexico taken in the context of military service performed under the Agreement should not be deemed to be an expatriating act.

In sum, the Department believes that appellant did not perform an expatriating act and that further administrative action should be taken by the Department to vacate the certificate of loss of nationality.

4/ Military Service Agreement, January 22, 1943 - October 28, 1952. 57 Stat. 973; Executive Agreement Series 323. 9 Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949, 118. Paragraph I of the Agreement reads:

> The nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of the country of their residence on the same conditions as the nationals thereof....

II

The threshold question in this case is whether the Board has jurisdiction to entertain DeUrquidi's appeal.

In 1954 when the Department approved the certificate of loss of nationality in appellant's name the Board of Appellate Review did not exist. At that time there was in existence a Board of Review of 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 occurring 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, 1966, with respect to the Board of Review of 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." This "reasonable time" provision was adopted in the 5/

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

Department's regulations 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. 6/

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 regulations 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.

Under the reasonable time provision, 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

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6/ 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 Paw 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.

reasonable time after notice of the Department's determination of loss of nationality, the appeal would be time barred and the Board would have no alternative but to dismiss it for lack of jurisdiction. In brief, the reasonable time provision presents a jurisdictional question. 7/

The Chairman of the Board of Appellate Review informed counsel for appellant of the foregoing jurisdictional considerations by letter dated November 23, 1982.

What is reasonable time depends, of course, on the facts of a particular case. Unlike a fixed determinate

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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 the power ...to review actions taken long ago. 22 C.F.R. 56.60, 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.

limitation, it would not depend upon the fact that a certain period of time has elapsed. As the Department pointed out in its brief, "reasonable time" has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. In the case of Chesapeake and Ohio Railway v. Martin, 283 U.S. 109 (1931), the Supreme Court said "what constitutes a reasonable time depends upon the circumstances of a particular ease." "Reasonable" means reasonable under the circumstances, and that unnecessary, or unexplained delay, should not be tolerated. It does not mean that a party be allowed to determine a time suitable to himself. In re Roney, 139 F. 2d 175, 177 (1943).

Because of the passage of many years and the absence in the record of a receipt acknowledging appellant's acceptance of delivery of a copy of the approved Certificate, it is impossible to know with certainty what transpired in 1954. The Department duly complied with the requirements of section 501 of the Nationality Act of 1940 by sending a copy of the certificate to the Consulate for delivery to appellant. We agree with the Department that in the absence of evidence to the contrary it may be presumed that the Consulate complied with the law and sent a copy of the certificate to appellant. Boissonas v. Acheson, 101 F. Supp. 138 (1951); Webster v. Estelle, 505 F. 2d 926 (1974).

It would, however, be unprofitable to speculate about what may or may not have occurred in 1954, The facts are probably not ascertainable, and appellant's receipt or non-receipt of the certificate is moot.

The relevant inquiry is whether appellant had notice other than actual notice of the loss of his citizenship, and, if so, whether such notice was legally sufficient to give him knowledge thereof.

It is well established that implied notice of a fact may be legally sufficient to impute actual notice to a party. Black's Law Dictionary, 5th Ed. (1979).

There is little doubt that appellant was aware or at least on notice in 1952 of his loss or possible loss of his citizenship. He acknowledges in his affidavit of November 5, 1982, that the consul at Monterrey had informed him on July 11, 1952, "that I had lost my citizenship by

taking an oath of allegiance to Mexico." Although D[redacted] may not have had actual notice of loss of his citizenship, we believe that he had sufficient facts from 1952 onward to put him on his guard and to lead him to ascertain his actual citizenship status, regardless of any alleged lack of actual notice. There is no evidence that he made any effort to do so until thirty years after his visit to the Consulate in Monterrey.

We do not find persuasive appellant's contention that he did not know of his right to appeal until 1982. In 1954 there was no requirement, either statutory or regulatory, for notice of appeal rights. Appellant, who must be presumed to have been on notice that he had lost or might have lost his citizenship, could have inquired at any consular or diplomatic establishment in Mexico about his possible right to challenge the loss of his citizenship -- had he been sufficiently moved to assert a claim to United States citizenship. There is no evidence that he made such an effort.

Nor are we persuaded that appellant was justified in his long delay in taking an appeal because, as counsel asserted, he could not have reasonably appealed prior to the Supreme Court's decision in Terrazas, "(or arguably, Afroyim)". We agree with the Department that this is an insufficient explanation for appellant's delay. Appellant could properly have based an appeal on an allegation that he had been under duress to swear an oath of allegiance to Mexico, and thus performed the expatriating act involuntarily. The courts long ago held that loss of citizenship may only result from the voluntary performance of a statutory expatriating act in accordance with applicable legal principles, e.g., Perkins v. Elg, 307 U.S. 325 (1939).

It cannot be denied that appellant permitted a substantial period of time to elapse before taking an appeal. He has offered no persuasive explanation why he did not or could not take an appeal before 1982. There is no record that he showed any interest in reestablishing his claim to United States citizenship until 1982.

Appellant did not dispute his loss of United States nationality until he gave notice of appeal to this Board in November 1982, thirty years after he had been informed

by a consular officer at the Consulate at Monterrey that he had lost his United States citizenship. In our view, appellant's failure to take an appeal before **1982** demonstrates convincingly that his delay in seeking an appeal was unreasonable under the circumstances of his case. Whatever interpretation may be given to the term "reasonable time", as used in the regulations, we do not believe that such language contemplated a delay of twenty-eight years after the certificate of loss of nationality was issued in **1954**.

No good cause having been shown therefor, the Board is afforded no basis to exercise the discretion granted to it by the applicable regulations to enlarge the time for the taking of this appeal. 8/

III

On consideration of the foregoing, we are unable to conclude that the appeal was taken within **a** reasonable time, as prescribed in the Department's regulations in effect from the inception of this Board in 1967 until revised and amended in November 1979. Accordingly, we find the appeal barred by the lapse of time and not properly before the Board. The appeal is hereby dismissed.

Alan G. James, Chairman

J. Peter Bernhardt, Member

George Taft, Member

8/ Section 7.16, Title 22, Code of Federal Regulations (1981), 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.