March 15, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case comes before the Board of Appellate Review on an appeal brought by [redacted] from an administrative determination of the Department of State that she expatriated herself on July 30, 1973, 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 Department of State approved the certificate of loss of nationality in this case on December 23, 1974. Appellant entered an appeal therefrom on March 23, 1983.

The threshold issue presented is whether the appeal, which was brought more than eight years after the Department approved the certificate of loss of nationality, was entered within the limitation prescribed by the applicable regulations, to wit, within a reasonable time after apellant received notice of the Department's holding of loss of her nationality.

It is our conclusion that appellant's delay in bringing the appeal was unreasonable. The appeal is therefore barred. Lacking jurisdiction, we dismiss.

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 --

. . .

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

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Appellant was born at [redacted] New York of a Mexican citizen father on [redacted], and thus acquired the nationality of both the United States and Mexico at birth. 2/

She resided in the United States until 1959 when her parents took her to Mexico. According to her appeal brief, when she became eighteen years old (1973) the Mexican authorities advised her that she "must immediately" renounce her United States citizenship; should she not do so and declar her allegiance to Mexico, she would have to leave Mexico, "and thus her parents' home." Appellant's brief continues:

> 3. The Applicant was a young girl, just turned eighteen, and completely dependant (sic) on her parents' care. She had no choice but to comply with the instructions of the Mexican authorities.
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> 4. The Applicant took an oath of allegiance of some sort to Mexico. To this day, the Applicant has no recollection of who the oath was given to, or even if the oath was taken before a competent official of the Mexican government.

The Mexican authorities informed the United States Embassy on March 20, 1974, that appellant had applied for a certificate of Mexican nationality on July 30, 1973; that in so applying, she had expressly renounced her United States citizenship and all allegiance to the Government of the United States of America, and formally declared her allegiance

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2/ Appellant's name at birth was [redacted]. It appears tha later she became known or held herself out as [redacted]; her mother's maiden name was [redacted]. She apparent1 became [redacted] after she married, probably sometime between 1973 and 1977.

to Mexico; and that she had been issued a certificate of Mexican nationality on January 9, 1974. 3/

It appears that the Embassy communicated with appellant regarding her having made a declaration of allegiance to Mexico and asked her to call at the Embassy to clarify her citizenship status.

As appellant pull it in her appeal brief:

> The Applicant recalls an appearance at the American Embassy in Mexico City, but as the Applicant spoke only Spanish, she does not recall any of the proceedings, which took place in English.

The record shows that appellant appeared at the Embassy in the Fall of 1974. She was interviewed by a consular officer. On October 31, 1974 she filled out a questionnaire to facilitate the determination of her citizenship status, and executed an affidavit of expatriated person.

The questionnaire appellant filled out was a pre-printed form in English. She answered the questions in English. To one - why had she taken an oath of allegiance to a foreign state - she replied: "Because I live in Mexico and I am a Mexican citizen and I knew I had ceased my allegiance to the United States." She swore that she understood the questions and had answered them truthfully. The affidavit of expatriated person was also a pre-printed document in English. She

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3/ Diplomatic Note No. 103298, March 20, 1974, from the Department of Foreign Relations to the United States Embassy at Mexico, D.F.

executed it too in English. Therein she swore that she had made a formal declaration of allegiance to Mexico voluntarily and with the intention of relinquishing her United States citizenship. She also swore that she understood the contents of the affidavit.

On the basis of the foregoing, the consular officer on October 31, 1974, prepared a certificate of loss of nationalit in the name of Linda Lasky Marcovich, in compliance with the requirements of section 358 of the Immigration and Nationality Act. 4/ He certified that appellant had acquired the nation-

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4/ 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.

ality of the United States and Mexico at birth; that she had made a formal declaration of allegiance to Mexico on July 30, 1973; and concluded that she thereby expatriated herself on July 30, 1973, under the provisions of section 349(a)(2) of the Immigration and Nationality Act. 5/

The Department approved the certificate on December 23, 1974, approval being an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

The record shows that an December 23, 1974, the Department sent a copy of the approved certificate to the Embassy

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5/ The consular officer erred. He should have certified that appellant expatriated herself on January 9, 1974. As the Government stated in its brief in the case of Vance v. Terrazas, 444 U.S. 252 (1980):

> The Mexican Government considers the declaration or /sic/ allegiance to Mexico executed in connection with an application for a Certificate of Mexican Nationality to be effective upon issuance of the Certificate, which constitutes full proof of Mexican nationality ... Based upon this policy, the Department of State regards the declaration of allegiance to Mexico to affect United States nationality when the Certificate of Mexican Nationality is issued, not when the declaration is made. Cf. III G. Hackworth, Digest of International Law 218 (1942).

The Board does not consider the consular officer's error to be material to our disposition of this case, however. Rectification of the error is within the competence of the Bureau of Consular Affairs.

for delivery to appellant, as required by section 358 of the Immigration and Nationality Act. 6/ The record does not disclose, however, whether the certificate reached the Embassy or if it did, whether the Embassy forwarded a copy to appellant. There is no postal receipt in the record showing that appellant acknowledged delivery of the certificate.

According to appellant's submissions, she left Mexico with her husband in 1977 to reside in Toronto, Canada, where she still lives. She has stated that in August 1982 she "contacted my lawyer to determine if I was still an American citizen." Thereafter, she states, she communicated with the United States Consulate General at Toronto to clarify her citizenship status. On December 20, 1982, the Consulate General informed appellant's counsel by letter that a certificate of loss of nationality in appellant's name had been approved by the Department on January 23rd, 1974. (As noted above, the Department approved the certificate on December 23, 1974.) Counsel was also advised of the applicable appeal procedures. Appellant alleges that: "At no time did I receive prior notice that a Certificate of Loss of Nationality was ever approved."

Appellant gave notice of appeal through counsel on March 23, 1983. She contends that she made a formal declaration of allegiance to Mexico under duress and that she did not intend to relinquish her United States citizenship.

6/ Note 4, supra.

II

Before proceeding we must decide whether this Board has jurisdiction to consider an appeal brought more than eight years after the Department of State approved the certificate of loss of nationality that was issued in this case.

In December 1974, when the Department approved the certificate of loss of nationality, the regulations then in effect provided that an appeal from an adverse determination of nationality might be brought to the Board within a reasonable time after the affected person received notice of the Department's holding of loss of his nationality. 7/

Where an appeal has been brought from a holding of loss of nationality made prior to November 30, 1979, 8/ it is the practice of the Board to apply the limitation prescribed by the regulations that were in effect at the time of the holding of loss of nationality.

7/ Section 50.60 of 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.

8/ On November 30, 1979, new regulations were promulgated for the Board of Appellate Review. Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) provides:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

Accordingly, the standard of "reasonable time" will govern in the instant case. Thus, if we find that the appeal was not entered within a reasonable time after appellant had notice of the Department's holding of loss of her nationality, the appeal would be time barred and the Board would be without jurisdiction to entertain it, for the "reasonable time" provision is mandatory and jurisdictional. 9/

The rule on "reasonable time" which has been exhaustively defined by the courts and commentators, 10/ is generally considered to encompass the following elements.

Reasonable time is such length of time as may be fairly and properly allowed or required, having regard for the nature of the act or duty, or the subject matter, and the attending circumstances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. Whether an appeal has been filed within a reasonable time depends on whether a legally sufficient reason has been presented for any delay. A protracted and unexplained delay, particularly one that is prejudicial to the interests of the opposing party, is fatal.

The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact. At the same time, the rule presumes that one will prosecute an appeal with the diligence of an ordinary prudent person. Reasonable time begins to run from the time an appellant received notice of the Department's holding of loss of nationality -- not sometime later when for whatever reason a person is moved to seek restoration of his or her citizenship.

9/ United States v. Robinson, 361 U.S. 220 (1960).

The Attorney General in an opinion rendered in the citizeship 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-agc 22 C.F.R. 50.60, the jurisdictional basis of the Board, requir 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.

10/ See generally Black's Law Dictionary, 5th Ed.; 36 Words and Phrases (1962); Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); Ashford v. Steuart 657 F. 2d 1053 (1981); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Boar Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Wat Wheel Co., 151 Ca. 393 (1907); Appeal of Syby, 460 A. 2d 749 1961).

Appellant contends that her appeal should be considered to have been timely filed because she did not receive notice of the Department's holding of loss of her nationality until December 1982 when the Consulate General at Toronto sent her counsel a copy of the approved certificate of loss of nationality. It was the responsibility of the Department of State, she contends, to ensure that she received notice of her loss of nationality so that she would know of it and be able to frame an appeal. Since there is no evidence that a copy of the approved certificate was sent to her, it is evident, she maintains, that the Department and/or the Embassy failed to act.

Under law, the Department must forward a copy of the approved certificate to the diplomatic or consular post concerned and instruct the latter to forward it to the person to whom it relates. 11/ The Department recorded on the original certificate that a copy thereof was sent to the Embassy on December 23, 1974. What occurred thereafter, the record does not tell us. But it may be presumed that a copy of the certificate reached the Embassy and that that office forwarded a copy to appellant. This is so because there is a legal presumption that public officers perform their official duties in the manner required by law and regulations. As

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11/ Note 4, supra.

the Supreme Court said in U.S. v. Chemical Foundation, 272 U.S. 1, 14-15 (1926):

> The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

Similarly, Sabin v. U.S., 44 F. 2d 70,76 (1930):

> It is presumed that public officials act correctly in accordance with the law and their instructions, until the contrary appears.

Counsel for appellant argues that where constitutional rights are at stake, the presumption is reversed: the Department must therefore prove that the certificate was sent to appellant and that she received it. 12/ The burden of

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12/ Counsel cites a recent New Jersey Supreme Court decision in support of this proposition: South Burlington County N.A.A.C.P. v. Mount Laurel Township, 456 A. 2d 390 (1983).

The case is inapposite.

There, Mount Laurel Township had enacted an ordinance th effectively excluded low income citizens from public housing on its face a violation of the New Jersey State Constitution, The record also showed that the Township had previously enact a similar discriminatory ordinance. In the circumstances, th Court said, the rule of presumptive validity of municipal ordinances should be modified. "Mount Laurel's actions not only make such a presumption inappropriate, but, given the importance of the constitutional obligation, require just the reverse.. ."

At the same time, the Court observed that: "The excepti is a rare one, for the presumption goes deep and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question."

proving irregularity, however, rests on appellant, as the court made clear in Boissonnas **v.** Acheson, 101 F. Supp. 138, 153 (1951), an action instituted by an expatriate for a judgment declaring her to be a United States citizen. The District Court cited U.S. v. Chemical Foundation (supra) and Sabin **v.** U.S., (supra), and said:

> No evidence was offered by plaintiff to overcome this presumption [that the French officials had handled plaintiff's naturalization in conformity with prescribed French law and regulations].

The only evidence appellant, Mrs. Fevreiski, submits to overcome the presumption that a copy of the approved certificate of loss of nationality was duly sent to her is an affidavit she executed in 1983 (more than eight years after the Department approved the certificate of loss of her nationality), in which she made an unsupported allegation of non-receipt. We find this evidence totally inadequate to rebut the presumption that the Department and the Embassy actually executed their legal responsibilities. To accept appellant's bare allegation years after the event as "evidence" would be mischievious, for it would, on the basis of only a self-serving statement, call into question the correctness of a routine ministerial act that is performed day in, day out by the Department and Foreign Service posts. 13/

13/ "The official duty and the habit of honesty and accuracy supply the element of special trustworthiness." C. McCormick, Law of Evidence, 291 (1954).

Assuming, arguendo, that appellant did not receive a copy of the approved certificate of loss of her nationality, she still has not shown good cause why, in light of unambiguous facts she knew in October 1974, she took no action to inquire about her actual citizenship status until eight years later.

The following facts should have alerted appellant to the probable loss of her United States citizenship:

(1) She renounced her United States citizenship and declared her allegiance to Mexico when she applied for a certificate of Mexican nationality.

(2) She conceded in the citizenship questionnaire she executed at the Embassy that she had pledged allegiance to Mexico and knew she "ceased my allegiance to the United States."

(3) She swore in the affidavit of expatriated person, also executed at the Embassy, that she had made a declaration of allegiance to Mexico voluntarily and with the intention of relinquishing her United States citizenship. 14

14/ Appellant maintains that the proceedings at the Embassy in October 1974 were conducted in English and that since she spoke only Spanish, she does not recall what actually transpired. She has not, however, supported her alleged ignorance of English in 1974 with any evidence, and has thus failed to rebut the presumption that she understood the import of the documents she acknowledged under oath.

Furthermore, the consular officer who handled her case, Richard J. Marroquin, spoke Spanish and had served at posts in seven Spanish-speaking countries between 1948 and 1974. Biographic Register, Department of State, July 1974, p. 217. It would not be unreasonable to assume that if he had suspected appellant did not understand English he would have translated for her.

It would have been understandable had appellant made no inquiries about her citizenship status until a reasonable period of time, say, a year or so, had elapsed after her visit to the Embassy in the Fall of 1974. But it is difficult to understand why she did not do so at least by 1977 when, as she has stated, she and her husband moved to Canada. Moving to a new country of which appellant was not apparently a citizen was an event that logically should have caused appellant to consider matters relating to her citizenship status. There is no indication in the record that appellant made any inquiries about her United States citizenship status either in Mexico before she left that country, or any time after taking up residence in Canada until 1982.

Although the Department has a legal duty to inform an expatriate of his or her loss of nationality (and in this case we have no reason to believe that it and the Embassy failed to carry out their obligations correctly), a person who has knowledge of the probable loss of nationality cannot absolve herself of all responsibility and rest passively on an unsupported allegation that she never received notice of a holding of loss of nationality from the Department.

Appellant had a duty in the circumstances of this case to make timely inquiry about her United States citizenship status long before 1982. If a person has actual knowledge of facts which would lead an ordinary prudent man to make further investigation, the duty to make inquiry arises and the person is charged with knowledge of facts which inquiry would have disclosed. Nettles v. Childs, 100 F. 2d 952 (1939). Similarly, Hux v. Butler, 339 F. 2d 696 (1964), where the court stated: "...where anything appears which would put an ordinary man upon inquiry, the law presumes that such inquiry was actually made and fixes notice upon the party as to all the legal consequences."

Appellant was less than prudent in not having ascertained, long before she finally did so, whether or not she was still a United States citizen; she was also arguably indifferent to that status until a number of years had passed. Knowledge of the Department's holding of loss of her United States citizenship must be imputed to her as from a reasonable time after she learned the facts about her probable expatriation from the Embassy at Mexico City in the Fall of 1974.

It is clear that appellant permitted a substantial period of time to elapse before taking an appeal. There is no record that appellant showed any interest in United States citizenship from 1974 until 1982. We find her failure to take any action until then convincing evidence that her delay in bringing this appeal was unreasonable. An inquiry about her status either in Mexico in 1975 or at the latest upon her arrival in Canada in 1977 could have resulted in a timely appeal and thus ensured fair adjudication of the issues while the facts of the case were still fresh in the minds of the parties involved and all the records were available. Appellant's delay of nearly nine years, however, makes it virtually impossible for the trier of fact fairly to adjudicate the substantive issues presented by the appeal. At this distance from the events of 1975 there is no way of establishing the validity of appellant's allegation that she applied for a certificate of Mexican nationality under duress; that she did not understand the proceedings at the Embassy when she filled out the citizenship questionnaire and signed the affidavit of expatriated person: and that she lacked the requisite intent to relinquish her United States nationality.

In sum, although, in the absence of proof to the contrary, we believe appellant received actual notice of the Department's holding of loss of her nationality sometime in 1975, she had a duty to make timely inquiries about her actual citizenship status in light of unambiguous facts in her possession. Her failure to do so until eight years had passed is inexcusable neglect.

No good cause having been shown why the appeal could not have been entered before eight years had transpired, we are unable to consider that a delay of that length is reasonable within the meaning of the applicable regulations.

III

On consideration of the foregoing and our review of the entire record, we conclude that the appeal was **not** filed within a reasonable time **as** prescribed by the Department's regulations that **were** in effect from 1967 until revised in 1979. Accordingly, we find the appeal time barred. Lacking jurisdiction, we dismiss it.

In light of our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member