April 24, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This appeal has been brought to the Board of Appellate Review by [redacted] from an administrative determination of the Department of State that he expatriated himself on September 22, 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 Department approved the certificate of loss of nationality issued in this case in June 1978. The appeal was not entered until April 1983.

The threshold issue to be determined is whether the appeal was filed within the limitation prescribed by the applicable regulations, namely, within a reasonable time after appellant received notice of the Department's holding of loss of his citizenship. It is our conclusion that appellant's delay of nearly five years in taking an appeal was unreasonable. The appeal thus being time barred, it will be dismissed.

I

Appellant acquired United States nationality under section 1993 of the Revised Statutes of the United States by birth of an American citizen father at Mexico, D.F. on [redacted]. He also acquired the nationality of Mexico by virtue of his birth in that country.

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 subdivisioon thereof; . . .

He states that he was educated in Mexico at American schools, and that he went to the United States to work when he was nineteen years old. It appears that he returned to Mexico after a year where he resided until 1977.

In the summer of 1977, appellant formed a corporation to export coffee to the United States. Allegedly using all his savings for the venture, he bought a large quantity of coffee and shipped it to Tijuana, Mexico, in mid-September 1977, hoping to sell it in the United States. It appears that appellant intended to conduct the business in Chula Vista, California, rather than in Tijuana, a few miles across the border, where the coffee was warehoused, because he considered it more convenient and comfortable for his prospective buyers to meet him in Chula Vista.

According to appellant, he went to the United States Embassy in September to obtain documentation to enter the United States. He states that he was told there might be a considerable delay in establishing his right to a U.S. passport. 2/ Since he considered the sale of the coffee an urgent matter, ("my situation was desperate"), appellant decided not to pursue issuance of a passport at the Embassy, but instead applied for a Mexican passport, having allegedly done so without difficulty or delay on a number of previous occasions. This time, however, the Mexican authorities reportedly refused to issue him a passport unless he obtained a certificate of Mexican nationality. This information, appellant says, came as a complete surprise to him. Nevertheless, he applied for a certificate of Mexican nationality on September 20, 1977. A certificate and passport were issued to him on September 22, 1977.

The certificate of Mexican nationality recited that appellant expressly renounced any other citizenship and all allegiance to any foreign government, and declared his allegiance to Mexico. Thereafter, appellant states, he obtained a visa, and entered the United States on September 27, 1977. It appears that he conducted his business and went back and forth between Mexico and the United States, having by then apparently established his domicile in Chula Vista.

2/ The Embassy's record of official contacts with U.S. citizens (form FS 558) bears no notation of any such visit or inquiry by appellant at the time in question,

Appellant was unable to get his coffee into the United States because he could not, for reasons beyond his control, obtain the necessary export permits from the Mexican authorities. The coffee was later impounded and liable to imminent confiscation in May 1978. By this time, appellant's U.S. visa had expired. He therefore went to the Embassy at Mexico, D.F. on June 1, 1978, to renew it. He states that he was informed that he might not be issued a visa "unless," as he put it, "I signed some papers to clear my status..."

The papers appellant filled out were: (1) a questionnaire to facilitate the determination of his citizenship status, wherein he acknowledged that he had taken an oath of allegiance to Mexico and obtained a Mexican passport; and (2) an affidavit of an expatriated person, wherein he swore that he had made a formal declaration of allegiance to Mexico voluntarily and with the intention of relinquishing his United States nationality.

Appellant states that he immediately obtained a U.S. visa in his Mexican passport, and a few days later obtained the release of his coffee, thereby recouping part of his investment.

Meanwhile, the Embassy had prepared a certificate of loss of nationality in appellant's name on June 1, 1978, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 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 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 birth abroad to an American citizen father; that he had made a formal declaration of allegiance to Mexico; and thereby expatriated himself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Department approved the certificate on June 23, 1978, approval being an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

On July 12, 1978, the Embassy mailed a copy of the approved certificate of loss of nationality to appellant, as required by section 358 of the Immigration and Nationality Act.

In January 1983, appellant applied for a United States passport at Los Angeles, stating that he wished to visit Mexico for thirty days. The Department informed appellant on March 14, 1983, that his application for a passport had been denied on the grounds that he had expatriated himself in 1977.

Appellant lodged this appeal by appearing in person at the offices of the Board on April 5, 1983. He contends that he performed the expatraitive act under economic duress at a time of mental and physical stress, and that he did not intend to relinquish his United States citizenship. He further contends that he lacked notice of loss of his nationality until March 1983, never having received a copy of the approved certificate of loss of nationality that the Embassy mailed to him in July 1978.

Appellant requested an oral hearing before the Board which was held on February 10, 1984, appellant appearing pro se.

II

Under the existing regulations of the Department, the time limitation for filing an appeal to the Board of Appellate Review is one year after approval of the certificate of loss of nationality, unless the Board for good cause shown determines that the appeal could not have been filed

within the prescribed time. 4/ These regulations, however, were not in force in 1978 when the Department approved the certificate of loss of nationality issued here.

The regulations that were in effect prior to the current regulations required that an appeal be filed within a reasonable time after receipt of notice of the Department's holding of loss of nationality. 5/ We are of the view that

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4/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFR 7.5. The existing regulations relating to the Board of Appellate Review were promulgated on November 30, 1979 (22 CFR, Part 7; 44 FR 68825, November 30, 1979).

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

> 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.

this time limitation of "within a reasonable time" rather than the existing time limitation of one year after approval of the certificate of loss of nationality should govern in this case. As a general rule, in the absence of a clearly manifested intention to the contrary, a change in regulations shortening a limitation period is construed as operating prospectively and not retroactively.

Thus, under the time limitation that we find controlling, appellant was required to initiate his appeal within a reasonable time after receipt of notice of the Department's holding of loss of nationality. If appellant failed to take an appeal within a reasonable time, the appeal would be time barred and the Board would lack jurisdiction to consider and determine it.

Whether an appeal was taken within a reasonable time, depends upon the circumstances in a particular case. A reasonable time means reasonable under the circumstances. Courts have held that a reasonable time means as soon as circumstances permit and with such promptitude as the situation of the parties and the circumstances of the case allow. This does not mean, however, as the courts have stated, that a party be allowed a time of his or her own choosing or a protracted delay that is prejudicial to each party. Although the question of a reasonable time will vary with the circumstances, it is clear that it is not determined by a party to suit his or her own purpose and convenience or when a party, for whatever reason, takes an appeal several years after notice of his right to take an appeal. 6/ Limitations are designed to encourage the prompt ascertainment of legal rights and to afford protection against stale actions as a consequence of an unreasonable delay.

6/ See Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 71931); Ashford v. Steuart, 657 F. 2d 1053 (1981); In re Roney, 139 F. 2d 175 (1943); Appeal of Syby, 460 A. 2d 749 (1961).

In the instant case, the Department determined in June 1978, that appellant expatriated himself in 1977, under the provisions of section 349(a)(2) of the Immigration and Nationality Act by subscribing to a declaration of allegiance required by Mexican law. On July 12, 1978, the Embassy at Mexico D.F. forwarded a copy of the approved certificate to appellant. The Embassy's records show no contact thereafter with appellant.

Appellant contends that he never received the copy of the approved certificate. He argues, therefore, that he was unaware of his loss of nationality until he received the Department's letter of March 14, 1983, denying his application for a passport on grounds of non-citizenship.

It must be presumed that the Embassy mailed the certificate to appellant in the manner best calculated to reach him, to the address in Mexico City appellant gave the Embassy on June 1, 1978. For there is a legal presumption that public officials perform their duties in accordance with law, regulations and their instructions. Boissonnas v. Acheson, 101 F. Supp 138 (1951).

At the hearing appellant explained that the address he had given the Embassy on June 1st was that of his daughter whose residence appellant used for personal mail. He stated that between July 1, and July 28, 1978, he and his family were travelling in the United States. If the Embassy sent the certificate to his daughter's home, no one would have been there to receive it, and speculated that "that letter was misplaced or lost or something." 7/ He stated that for business mail he used an address in Acapulco, where he had once lived. 8/

7/ Transcript of Proceedings In the Matter of [redacted], Board of Appellate Review, February 10, 1984 (hereinafter referred to as "TR"). TR 37.

8/ TR 36.

It was incumbent on appellant to ensure that any communication from the Embassy about a matter so vital as his citizenship was directed to an address where it would likely reach him. The Embassy did all it was required to do under law; if appellant did not receive the certificate of loss of nationality, it was his fault and his alone.

But whether appellant received the certificate is not dispositive in this case.

He has shown no good cause why, in light of certain undisputed facts in his possession in June 1978, he took no action to assert a claim to United States citizenship until entering this appeal five years later. The following unambiguous facts should have alerted appellant to the probable loss of his citizenship.

1. He renounced any foreign citizenship and declared allegiance to Mexico when he applied for a certificate of Mexican nationality. 9/

2. He executed an affidavit of expatriated person at the United States Embassy in June 1978 conceding that he had pledged allegiance to Mexico voluntarily and with the intention of relinquishing his United States citizenship.

9/ Although the record does not contain a copy of appellant's application for a certificate of Mexican nationality, the Board takes administrative notice of the fact that under Mexican law an applicant for such a certificate who is a dual national of Mexico and another state must expressly renounce his other nationality, specifying it by name.

Appellant may have acted hastily in applying for a certificate of Mexican nationality, not having realized what a portentuous step he was taking by expressly renouncir his United States citizenship. "Really and truly I did not consider it of any relevance." 10/ And, as he stated at th hearing, he may have been under pressure on June 1, 1978, tc get a visa so that he could wind up the business with his impounded coffee. "I was in such desperate state of mind I was desperate to put an end to that situation and get my vis I guess I would have signed and filled out my death warrant.

He may not, however, excuse these two acts by protestations of haste or inadvertence. He signed both the application for a certificate of Mexican nationality and an affidavit of expatriated person. As a matter of law, he must be presumed to have understood the import of the statem he made, and may not now come before us and argue that not until March 1983 did he realize he had lost his United State citizenship.

A person who has knowledge of the probable loss of nationality may not absolve himself of all responsibility an rest passively on an unsupported allegation that he never received written notice of a holding of loss of nationality from the Department.

Appellant had a duty in the circumstances of this case make timely inquiry about his United States citizenship stat before 1983. If a person has actual knowledge of facts whic 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 t all the legal consequences."

10/ TR 39, 40.

11/ TR 29.

Appellant was less than prudent in not having ascertained, long before he finally did so, whether or not he was still a United States citizen. Knowledge of the Department's holding of loss of his United States citizenship must be imputed to him as from a reasonable time after July 1978.

Appellant stated at the hearing that in 1979 he tried to clarify ("confirm") his United States citizenship through his son-in-law who was acquainted with an official of the United States Embassy at Mexico City. He said his son-in-law called the Embassy official who said that appellant "would have to bring me a lot of papers." 12/ Appellant did not follow through. "I considered that I had no problem. I could go back and forth /between Mexico and the United States7....I probably procrastinated." 13/

Appellant adduced no evidence that he made an effort in 1979 to "confirm" his United States citizenship status. The records of the Embassy contain no mention of such an approach. Even if appellant did make such an inquiry through his son-in-law, his failure to follow through at a time when his claim to United States citizenship could more easily have been adjudicated, is prejudicial to the Department.

It is difficult for the trier of fact, six years after an expatriating act has been performed, to determine a case, where the record is incomplete. Here there are no contemporary accounts of what transpired when appellant visited the Embassy on June 1, 1978, to obtain a visa in his Mexican passport. Appellant's recollection of the events on that day may be clear, but the record before us sheds no light on the matter. The Department's record available at this time consists only of: the affidavit of expatriated person signed by appellant; the citizenship questionnaire he completed: and a copy of his certificate of Mexican nationality.

Appellant's delay disadvantages the Department which must, under the law and judicial interpretation, prove by a preponderance of the evidence that appellant intended to relinquish his United States citizenship when he applied for and obtained a certificate of Mexican nationality.

12/ TR 32.

13/ Id.

Appellant permitted five years to elapse before filing an appeal in 1983. His failure to take any action until then persuades us that his long delay was unreasonable. The principal reasons for granting a reasonable time within which to appeal a Department's holding of loss of nationality are to afford an appellant sufficient time to assert his or her contentions that the decision is contrary to law or fact, and to compel an appellant to take such action when the recollect: of events upon which the appeal is grounded is fresh in the minds of the parties involved. The limitation period of "within a reasonable time" commences to run with appellant's notice of the Department's holding of loss of nationality, which we consider he had as of June or July 1978, and not several years thereafter when appellant considers it propitiou to take an appeal.

III

On consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant had notice of the Department's holding of loss of United State citizenship. Accordingly, the appeal is barred by the passage of time. It is hereby dismissed.

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

/Edward G. Misey, Member

James G. Sampas, Member