April 17, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] M[redacted] Q[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, E[redacted] M[redacted] Q[redacted], expatriated himself on August 1, 1968 under the provisions of section 349(a)(6), (now section 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at [redacted]. 1/

The Department determined on August 25, 1969 that appellant had expatriated himself. He initiated this appeal on July 12, 1984. We confront, initially, the issue of whether the Board may entertain an appeal filed nearly 15 years after the Department approved the certificate of loss of nationality. It is our conclusion that the appeal was not filed within the limit allowed by the applicable regulations, and is therefore time barred. Lacking jurisdiction to entertain the appeal, we dismiss it.

1/ Section 349(a)(6), now Section 349(a)(5), of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

Section. 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 --

. . .

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of Section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of Section 349(a) as paragraph (5).

I

Appellant became a United States citizen through birth at [redacted] He also acquired Mexican citizenship through his father, a citizen of that country. A few days after his birth he was taken by his parents to Mexico where he has continuously resided.

The United States Consulate General at [redacted] issued appellant an identity card in 1964. On August 1, 1968 appellant called at the Consulate General stating that he wished to renounce his United States citizenship. In an affidavit executed that day, appellant gave the following reasons for wishing to terminate his United States nationality:

> I wish to adopt the nationality of my parents.
>
> I have realized my studies in Mexico and wish to continue my studies and career here.
>
> I wish to purchase property in Mexico.
>
> All my life I have lived in Mexico and I wish to continue living here.

In a memorandum to the Department, the Consulate General later reported that the seriousness of the contemplated act had been fully explained to appellant "but he maintained that he had arrived at this decision of his own free will." The Consulate General noted that since appellant was under the age of 18, he had been advised of the provisions of section 351(b) of the Immigration and Nationality Act. 2/ During the interview it trans-

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2/ Section 351 of the Immigration and Nationality Act, 8 U.S.C. 1483, provides:

. . .

> (b) A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2), (4), (5), and (6) of section 349(a) of this title.

Public Law 95-432, Note 1, supra, which repealed paragraph (5) of section 349(a), renumbered paragraphs (2), (4), and (6) as (2), (4), and (5) respectively.

spired that appellant had applied for a certificate of Mexican nationality on June 20, 1968, but he said he had not, as of that date, been issued a certificate. Appellant read the statement of understanding of the consequences of formal renunciation which was also verbally explained to him. After signing the statement of understanding in both English and Spanish, appellant subscribed to the oath of renunciation.

2/ Cont'd

Section 50.20 of Title 22, Code of Federal Regulations, 22 CFR 50.20, provides:

> Sec. 50.20 Retention of Nationality
>
> ...
>
> (b) Section 351(b) of the Immigration and Nationality Act. (1) A person who desires to claim U.S. nationality under the provisions of section 351(b) of the Immigration and Nationality Act must, within the time period specified in the statute, assert his claim to U.S. nationality and subscribe to an oath of allegiance before a diplomatic or consular officer.
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> (2) In addition, the person shall submit to the Department a statement reciting his identity and acquisition or derivation of U.S. nationality, the facts pertaining to the performance of any act which would otherwise have been expatriative, and his desire to retain his U.S. nationality.

Upon completion of the foregoing formalities, the Consulate General prepared a certificate of loss of nationality in appellant's name. 3/ The Consulate General certified that appellant acquired United States nationality by birth in this country; that he made a formal renunciation of his United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act.

The Department approved the certificate on August 25, 1969, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. The record shows that in response to an

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3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C., 1051, provides:

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.

inquiry by the Consulate General about the case of appellant and several others similarly situated, the Department advised the Consulate General on September 25, 1969 that:

> In the cases of the persons who expatriated themselves by the performance of an expatriating act prior to attaining the age of eighteen the approved certificate should be forwarded to the expatriate under cover of a communication informing them of the provisions of Section 351(b) of the Immigration and Nationality Act. They should also be informed of the appeals procedures as set forth in 8 FAM 224.21, Procedures.

The appeal was entered on July 12, 1984. The burden of appellant's case is summarized in the following letter he wrote the Board on September 7, 1984:

> I wish to emphasize that I, at that time I was taken into Mexico to live by my parents, had no free will to assert that I wanted to live in the United States. Had I had the mentality at the time of my birth, I would have so stated to my parents. But, consequently I was brought up in the city of Juarez where I received all of my education and the only times that I entered the United States where /sic/ for shopping or visits. I had no knowledge that I could pursue a different type of life outside the authority of my parents and it was only because they stated to me that in order for me to inherit in case of their death I had to renounce my citizenship, instructions which I at the time being under the age of eighteen and still under the authority of my father and mother and still living at home, did not question in any manner whatsoever. I at that time thought it was an ever-lasting act with all its consequences. I was not cognizant of the fact tht I could have, after the age of eighteen, appeal to you.

In rebuttal the Department filed a memorandum stating in part:

> ...We believe that his appeal is barred by the reasonable time requirement of the

Board's regulations: 22 CFR, Section 50.60 (1967). He has not provided any compelling reason why he waited fourteen years before filing the appeal that would excuse the unreasonable delay.

The Department has concluded that based on the evidence, Mr. Q[redacted] had intended to relinquish his claim to his United States citizenship when he made a formal renunciation on August 1, 1968. Although Mr. Q[redacted] was just under eighteen years of age, 4/ according to Section 351(b) of the Immigration and Nationality Act, he had six months after attaining his eighteenth birthday to assert his claim to U.S. nationality. Mr. Q[redacted] was advised of this right when his Certificate of Loss of Nationality was issued. He has refrained from any appeal until now, fourteen years later, when his circumstances have changed.

We have examined the case record and find that the holding of loss represents the Department's conclusion that Mr. Q[redacted] relinquished his United States citizenship when he renounced his nationality in Mexico. We see nothing in the record that causes us to question that conclusion.

II

At the outset, the Board must determine whether, in the circumstances of this case, an appeal taken nearly 15 years after approval of the certificate of loss of nationality, and appellant's right of appeal accrued, may be deemed to have been timely filed.

In August 1969 when the Department approved the certificate of loss of nationality that was issued in this case, the federal regulations then in effect prescribed that an appeal be taken with

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4/ Appellant was actually just under 17 years of age at that time. There is no evidence in the record that he took any action before March 8, 1970, 6 months after his 18th birthday, to claim United States nationality.

in a reasonable time after the affected party received notice of the Department's holding of loss of his or her nationality. 5/

The applicable regulations were amended and revised in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 6/

Believing that the current regulations shortening the time limit on appeal should not apply retroactively, we will apply the standard of "reasonable time" in the instant case.

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 a request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her

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5/ 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.

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

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 lack jurisdiction to consider it. Timely filing is thus a condition precedent to the Board's proceeding to consider an appeal.

On July 23, 1984, the Chairman of the Board advised appellant of the foregoing jurisdictional considerations.

III

Whether appellant's delay in taking an appeal was reasonable or not depends on several factors. Reasonable time must be determined in light of all the circumstances of the particular case, taking into account the interest in finality, the reason for delay, and prejudice to other parties. Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir., 1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F. 2d 928, 930 (5th Cir. 1976), quoting 11 Wright & Miller, Federal Practice and Procedure, Sec. 2866, at 228-29:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

The principal question to be answered is whether appellant "had some good reason for his failure to take appropriate action sooner."

Appellant does not squarely address this important point. In his letter to the Board of September 7, 1984 appellant said that in 1968 he thought his formal renunciation was "an everlasting act," and was not "cognizant" of the fact that after age 18 he could have taken an appeal.

He continued:

> Upon graduation from the School of Agriculture in [redacted] (att: No. 6) Mexico I was informed that in order for me to get my Title in Agricultural studies, I would have to prove that I was

> a Mexican citizen. It was at this time that for the first time I conscientiously thought about the future consequences of this action. I did not want to become a Mexican citizen since I throughout the years still considered myself a United States citizen because of my birth in the United States. I then started to ask questions to other persons in regards to this and went to the American Consulate in Ciudad Juarez where I was told that my case would have to go on appeal and that they could not assist me in any way at that department. I do not have such date in mind however but I do recall I went twice to their office at that period in my life....

It appears that in response to appellant's inquiry a consular officer informed him in December 1983 that he might have recourse to this Board. Appellant also stated that: "It was not until recently that because of my father's death /the record shows he died in March 1984/ and my mother's urging me to seek re-attainment of my citizenship since she had not been completely in favor at the time," that he initiated an appeal.

The Department instructed the Consulate General at Cuidad Juarez to inform appellant of his right of appeal. In the absence of contrary evidence, it may be assumed that the Consulate General duly carried out those instructions (Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951)). Appellant thus was on notice of his right of appeal sometime in 1969, yet took no action until 1984. He has adduced no evidence to show that constraints beyond his control prevented him from initiating an appeal sooner. Indeed, it appears from his own statement that he did not even think about taking an appeal until two years ago when he apparently considered it convenient or desirable to do so. The rule on reasonable time does not, however, contemplate that an appellant may, without justification, choose a time suitable to himself to assert a right. In re Roney, 139 F. 2d 175 (7th Cir., 1943).

The rationale for a limitation on appeal in loss of nationality proceedings, whether it be "within a reasonable time" or a specific period, is to afford an appellant sufficient time to assert his or her contention that the decision of the Department was contrary to law or fact, and to compel appellant to act while the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. That is not the situation here. The Department clearly would be prejudiced in

carrying its burden of proof after appellant, without legally sufficient justification, allowed so much time to pass before challenging the Department's holding of his expatriation.

The period of "within a reasonable time" commenced to run with appellant's receipt of notice of loss of nationality in 1969 and not several years thereafter when he belatedly discovered or believed that he might have grounds for an appeal. In our opinion, appellant's delay of nearly 15 years in taking an appeal was unreasonable in the circumstances of this case.

IV

Upon consideration of the foregoing, it is our conclusion that appellant did not file his appeal within a reasonable time after receiving notice of the Department's holding of loss of his United States nationality. The appeal is thus time barred, and the Board lacks jurisdiction to consider it. Accordingly, the appeal is hereby dismissed.

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

Alan G. James, Chairman

James G. Sampas, Member

G. Jonathan Greenwald, Member