June 10, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W[redacted] I[redacted] R[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, W[redacted] I[redacted] R[redacted], expatriated himself on January 25, 1971 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 determined on August 9, 1972 that appellant had expatriated himself. The appeal was entered on July 31, 1984. The threshold issue presented is whether the appeal was taken within the limitation prescribed by the applicable regulations. It is our view that the appeal is not timely. Consequently, the Board lacks jurisdiction to consider it. The appeal is dismissed.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), provides:

Sec 349. (a) From and after the effective date of this Act a person who is a national of the United States 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....

I

Appellant was born at [redacted] of an American citizen father, thus acquiring the nationality of both the United States and Mexico at birth.

He registered as a United States citizen at the Embassy in Mexico City in 1965 and was issued an identity card. He obtained a United States passport in 1967 and a Mexican passport in 1968. According to appellant, he attended school in Mexico and finished high school at the Texas Military Institute in San Antonio in 1970. Thereafter, he reportedly entered St. Edwards University at Austin, Texas, graduating in 1974.

Appellant applied for a certificate of Mexican nationality on January 25, 1971. Although there is no copy of his application in the record, the Department of Foreign Relations attested on July 8, 1972 in a document apparently sent to appellant that appellant applied for a certificate on January 25, 1971 and incident thereto renounced United States nationality and all allegiance to any foreign government, especially the United States of America. The certificate of Mexican nationality that was issued on April 14, 1971 stated that appellant was a citizen of Mexico by virtue of his birth there.

In the summer of 1972 the fact that appellant had obtained a certificate of Mexican nationality came to the attention of the Embassy at Mexico City. Although the administrative record does not indicate how this fact became known, appellant gave the following version to the Board:

> During summer of 1972, having no knowledge of the legality of nationality, my Grandfather (Mexican) urged me to adopt Mexican Nationality in return for a job in his enterprise to handle his interests. He then made an appointment with an officer at the SECRETARIA DE RELACIONES EXTERIORES. Here I was told that I could not apply for Mexican citizenship, UNLESS I RELINQUISH MY U.S. CITIZENSHIP. Thus, I had to go to the U.S. consul and obtain a letter directed to the Secretaria

> confirming my relinquishment. The which /sic/ I had to do. Here, I had to turn in my U.S. ID card and sign the agreement in front of the U.S. consul. I was not asked to SWEAR in any form. We then returned to the SECRETARIA DE RELACIONES EXTERIORES were /sic/ I was given a certificate (copy enclosed) and sign a form of receipt. I did not pledge allegiance in a verbal form to my new status. /Emphasis in Original/

Although appellant has apparently confused the sequence of events, it would appear that it was he who approached the Embassy in the summer of 1972. In any event, the record shows that on July 11, 1972 he filled out a questionnaire to assist the Department in making a determination of his citizenship status. In it appellant made the following statement about why he made a declaration of allegiance to Mexico: "I wanted to be a Mexican since I will be working and living in the future in Mexico." He did not, he stated, try to avoid making the declaration, "because I wanted to be Mexican."

On July 11th, appellant also executed an affidavit of expatriated person, swearing that he made a formal declaration of allegiance to Mexico on January 25, 1971, and that he did so voluntarily and with the intention of relinquishing United States citizenship.

In compliance with the provisions of section 358 of the Immigration and Nationality Act the responsible consular officer executed a certificate of loss of nationality in appellant's name on July 11th. 2/

The Consul certified that appellant acquired the nationality of the United States and Mexico at birth; that he made a formal declaration of allegiance to Mexico on January 25,

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2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Section 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 provisions 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.

1971; and thereby expatriated himself on that date under the provisions of section 349(a)(2) of the Immigration and Nationality Act. 3/

The Department approved the certificate on August 9, 1972, an action that constitutes an administrative determination of loss of nationality from which a properly filed and timely appeal may be taken to this Board. A copy of the certificate was sent to the Embassy on the day it was approved for forwarding to appellant.

On January 30, 1980 appellant applied for a United States passport at Austin, Texas. The Department denied appellant's application on the grounds that he had expatriated himself in 1971. He was advised that "you have the right to appeal your loss of United States citizenship" to this Board.

Appellant gave notice of appeal on July 31, 1984. He contends that he performed the expatriating act involuntarily due to pressure from his grandfather who offered to employ appellant in his business if he would declare for Mexican nationality. Appellant does not explicitly argue that he did not intend to relinquish United States citizenship.

3/ The consular officer was wrong. The date of appellant's expatriation is April 14, 1971, the date of issuance of the certificate of Mexican nationality.

The Mexican Government considers the declaration of 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. The Department of State accordingly 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. See appellant's brief in Vance v. Terrazas, 444 U.S. 252 (1980).

II

At the outset we must decide whether the Board has jurisdiction to consider the merits of this appeal. The Board's authority to proceed depends on whether the appeal was filed within the limitation prescribed by the applicable regulations, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant fails to comply with a condition precedent to the Board's going forward to determine the merits of his claim, i.e., does not bring the appeal within the applicable limitation and adduces no legally sufficient excuse therefor, the appeal must be dismissed for want of jurisdiction. Costello v. United States, 365 U.S. 265 (1961).

Under the federal regulations presently in effect, an appeal must be taken within one year after approval of the certificate of loss of nationality. 22 CFR 7.5(b). In 1972, when the certificate was approved in the case before us, however, the limitation of appeal was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality. 22 CFR 50.60 (1967-1979).

Since a change in regulations shortening the period of time allowed for appeal customarily is intended to operate prospectively, we believe it fair to apply the limitation in effect in 1972, not the present one.

What constitutes "reasonable time," the court said in Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981):

> ...depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co., 542 F. 2d 928, 930-31 (5th Cir. 1976): Security Mutual Casualty Co. v. Century Casualty Co., 621 F. 2d 1062, 1067-68 (10th Cir. 1980).

Appellant explains his delay in taking the appeal as follows:

> After my expatriating act in 1972, I returned to the United States to continue

> my university studies. I graduated in May of 1974. I then returned to Mexico and started to work. Since I was working, I was uncertain that if I appealed for my U.S. citizenship I would infringe the law. I consulted this with the Secretaria de Relaciones Exteriores and was told that I would infringe the law. Untill /sic/ I was working for myself as my own boss in 1978, then I appealed at the U.S. Embassy. After complying with what I was asked for, I was told this would take from 3 to maybe 6 years. With this in mind I decided to wait. I had no knowledge that I could do this directly with the Department of State. Untill /sic/ now was when I presented myself at the U.S. Embassy and was told that nothing had been done. That they had no papers concerning my request. Please understand that the delay was not intentional but there was lack of information between us.

There is nothing in the record to corroborate appellant's allegation that he communicated with the Embassy at any time about taking an appeal from the Department's holding of loss of his nationality. It would appear, rather, from appellant's statements quoted above, that in 1978 he inquired about the possibility of immigrating to the United States and was told that there would be a long wait until a visa number would be available. The record thus suggests that for twelve years appellant did nothing to challenge the loss of his nationality. Indeed, as far as the period from 1971 to 1978 is concerned, appellant concedes that he made a deliberate decision to do nothing to recover United States citizenship. Plainly, he did not act like a person concerned about the loss of United States nationality, and equally plainly sat on his appeal rights for an excessive period of time. Appellant's reason for the delay is legally insufficient.

Not only has appellant presented no adequate justification for a twelve-year delay in taking the appeal, but he is also chargeable with laches. It is incontestable that the Department would be hard pressed at this late date to address appellant's contention that he was forced by family and economic pressures to make a declaration of allegiance to Mexico. The Department's position is thus prejudiced by the appellant's failure to appeal earlier.

The purpose of the limitation of "within a reasonable time" was threefold: to allow an aggrieved party sufficient time to prepare a case showing wherein the Department erred in its holding of loss of nationality; to compel the exercise of the right of appeal while the events upon which the appeal was based were still fresh in the minds of the parties; and to give administrative determinations of loss of nationality stability and finality after the passage of a fair period of time.

Appellant had more than sufficient time to prepare his case. The events of 1971 are patently not fresh in the minds of appellant or the Department's officials. Because the time for appeal in this case must be considered to have passed, the interest in finality must be given great weight.

III

Upon consideration of the foregoing it is our conclusion that the appeal was not filed within a reasonable time after appellant received notice of the Department's holding of loss of his United States citizenship. The Board therefore is without jurisdiction to consider the merits of the appeal, and we hereby dismiss it.

Given our disposition of the case, we do not reach whatever merits may be presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member