August 19, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] V[redacted] R[redacted]

This is an appeal from an administrat[redacted]er[redacted]n the Department of State that appellant, Er[redacted] V[redacted] R[redacted] c[redacted], n[redacted] T[redacted], expatriated herself on December 28, 1961 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 United States nationality before a consular officer of the United States at Cuidad Juarez, Mexico. 1/

The certificate of loss of nationality that was issued in this case was approved on May 24, 1962. The appeal was entered on January 5, 1985, The considerable period of time that has elapsed between approval of the certificate and entry of the appeal raises a threshold issue: whether the Board may entertain an appeal so long delayed. We conclude that the appeal is barred by the passage of time and must 'therefore be denied for want of jurisdiction.

1/ Section 349(2)(6), now section 349(a)(5), of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads:

> 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 --
>
> . . .
>
> (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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).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 was born in [redacted] of an [redacted] A [redacted]d [redacted] was issued on September 2, 1940 by the Consulate at [redacted]

According to appellant's brief, she was employed as a stewardess by Aeronares in 1961, and frequently entered and left the United States on a Mexican passport with a temporary visa issued by the Embassy at Mexico City. In December 1961 (her brief continues),

> Appellant travelled with her fiance, Mr. B[redacted] R[redacted], to [redacted] on route to Los Angeles, California to be married in the Los Angeles Temple of the Church of Jesus Christ of Latter-day Saints. 2/ This religious marriage at that time could only be performed in the United States. The Church of Jesus Christ of Latter-day Saints did not have any temples in Mexico where the kind of marriage ceremony Appellant and her fiance were planning could be performed.
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> ...
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> Appellant and her future husband were travelling to Cuidad Juarez and then to Los Angeles anticipating entering into the most important convenant they had ever made in their lives.
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> Upon arrival at the border in El Paso, Appellant was informed by the INS /Immigration and Naturalization Service7 inspector that she could not enter the United States

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2/ The record shows that appellant and Mr. [redacted] had been married in a civil ceremony in Mexico on October 2, 1961.

> with the temporary visa she used as a stewardess. She was told that she had to obtain a visitor's visa from the American Consulate in Ciudad Juarez to enter the United States, At American Consulate, Appellant and Mr. R were informed that Appellant could not be issued a temporary visa because she was a United States citizen. At the same time, Appellant was informed that she could not enter the United States as a citizen because she lacked formal proof of her United States citizenship, When Appellant stressed the importance of travelling to Los Angeles to be married in the Temple where all the arrangements had been made for the ceremony, she was informed that the only way the Consulate would grant her permission to enter the United States was upon her renunciation of her United States nationality. Appellant protested the choice offered her, but when Consular officers refused to allow her to enter the United States and insisted upon the renunciation, she involuntarily signed an Oath of Renunciation of her United States Nationality on December 28, 1961.

The record shows that on December 28, 1961 Ernestina Victoria aylor-Ulloa made an oath of renunciation of United States nationlity at Cuidad Juarez in the form prescribed by the Secretary of tate.

The officer who administered the oath of renunciation later eported to the Department that appellant had appeared at the onsulate to apply for a visitors's visa "as a citizen of Mexico." he consular officer's report continued:

> ...During the interview it, however, developed that she might have acquired American citizenship under Section 1993 of the Revised Statutes, as amended, by birth abroad of an American-citizen father who prior to her birth had resided in the United States and that she might still have a claim to United States citizenship.
>
> It will be noted that the applicant, a dual national since birth, reported having secured documentation as a citizen of

Mexico only after having been informed that she no longer had a claim to United States citizenship. 3/

Miss Taylor was informed of the possibility that she might still be entitled to United States citizenship. Provisions of Sections 301(b) and (c) of the 1952 Act were explained to her and she was told of the documents she would have to present. 4/ She, however, expressed a desire to proceed to Los Angeles, California, as planned since she had already made all of her travel arrangements for that evening and furthermore, added that in any event, even should she still be a United States citizen she could not arrange her affairs in order to be able to commence her physical presence in the United States prior to her twenty-third birthday, just two and a half months off.

She, therefore, executed an oath of renunciation of United States nationality, whereupon she was issued a visitor's visa by the Consulate.

3/ The Consular officer apparently referred to an affidavit appellant executed on December 28, 1961 in which she declared that:

> I applied for a Mexican passport after having been told by our family lawyer, Lic. Orozco of Guadalajara, Jalisco, Mexico, that I no longer had a claim to United States citizenship through my father. Lic. Orozco was informed by the American Consulate, at Guadalajara, Jalisco, when he telephoned there, that I already had passed the age. On September 6, 1961, I was issued Mexican passport No. 41346-67953 at Mexico, D.F. I now wish to proceed to Los Angeles, California. My travel plans have already been made.

4/ Subsection 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), provided that a person born outside the United States of parents, one of whom is an alien and the other a citizen of the United States, would lose his citizenship unless he came to the United States prior to his 23rd birthday and was physically present here for at least five years. Subsection 301(c) of the Act made the provisions of subsection 301(b) applicable to persons born after May-24, 1934.

Subsection 301(b) was repealed in 1978 with prospective, not retroactive effect.

The Consulate on January 3, 1972 referred appellant's case to the Department.

On January 6, 1962 appellant and Mr. R[redacted] were married in the Mormon Temple at Los Angeles.

The Department instructed the Consulate on April 5, 1962 to prepare a certificate of loss of nationality in appellant's name. Since appellant resided in the consular district of the Embassy at Mexico City, that office executed the certificate on May 11, 1962. 5/

The Embassy certified that appellant acquired United States citizenship at birth; that she made a formal renunciation of United States nationality on December 28, 1961; and thereby expatriated herself 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 May 24, 1962 and sent a copy to the Embassy to forward to appellant. Appellant stated in her brief that she received a copy of the certificate of loss of nationality and that the Embassy had informed her in a covering letter that she had a right to appeal the Department's determination to the Board of Review on the Loss of Nationality of the Passport Office of the Department of State.

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

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ions, 31 F. R. 13539,

When the Board of Appellate Review was established in 1967, federal regulations promulgated to govern its activities pted the "reasonable time" limitation of the previous regula- ns. 22 CFR 50.60; 32 F.R. 16359, November 29, 1967.

On November 30, 1979 the regulations governing the Board were ised and amended. They prescribe that an appeal shall be filed hin one year after approval of the certificate of loss of nation- ty. 22 CFR 7.5(b).

As to the applicable limitation on appeal, we believe the norm "reasonable time" should govern. Plainly, it would be unfair to ly the present limitation of one year; an amendment shortening time for appeal is usually considered to apply prospectively not roactively. And in conformity with the common law rule that re no time limit on appeal is specified, it is customary to uire that an appeal be made within a reasonable time after entry the decision complained of.

Whether appellant's delay of twenty-three years in challenging Department's determination of loss of her United States citizen- p was reasonable in the circumstances of her case is therefore first issue we must consider.

The factors to be evaluated in determining whether an appeal been filed within a reasonable time after the affected person had ice of the decision are succinctly stated in Ashford v. Steuart, F. 2d 1053, 1055 (9th Cir. 1981);

> What constitutes "reasonable time" depends upon the facts of each case, taking into considera- tion 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, 1967- 68 (10th Cir. 1980).

As noted above, appellant has stated that she received from Embassy at Mexico City a copy of the certificate of loss of her ionality under cover of a letter informing her of her right to e an appeal to the Board of Review on the Loss of Nationality of Passport Office of the Department of State. Her husband stated an affidavit executed December 27, 1984 that it was he who eived the letter, dated May 31, 1962. He took it to his wife h whom he proceeded to Tuscon, Arizona on a previously planned it. Both allege that they believed they could obtain informa- n there "about what should be done." Appellant's husband stated

in his affidavit that: "Although the letter did not say that she /appellant/ had a limit of time for appealing, we thought it was a good idea to do it as soon as possible, and we guessed that we could do that in Tuscon in that particular summer /1962/."

According to appellant's brief, appellant and her husband visited the office of the Immigration and Naturalization Service in Tuscon.

> ...At that office, an Immigration Service Officer informed them that the question of Appellant's loss of Nationality /sic/ and her right to appeal the State Department decision were irrelevant since Appellant had reached her 23rd birthday on March 14, 1962. Appellant was informed that by law she had to reside in the United States for five consecutive years prior to her 28th birthday to retain her U.S. citizenship and since she had not taken up that residence before her 23rd birthday, it was impossible to comply with the retention requirements for citizenship then in effect, She was informed that even if she had not voluntarily renounced her nationality, she had lost her citizenship by operation of law. An appeal would be futile. Appellant was told that she was in the same position as any other foreign person in the world. She had irrevocably lost her United States nationality. Appellant accepted this explanation by the Immigration Service Officer as a conclusive statement by an official of the United States Government that she had lost her United States citizenship, that there was nothin she could do to regain it, and that it would be futile to pursue an appeal of the decision regarding her loss of nationality.

Appellant concedes that the length of time she delayed in taking an appeal "might ordinarily create a presumption that the Appellant was unconcerned about the decision or accepted the decision on the merits." She maintains, however, that:

> ...if the facts establish that the Appellant was informed by a responsible Government Official in authority to make decisions regarding nationality, that an appeal was

> futile because loss of nationality had been irrevocably established, then the length of time in which the appeal is taken is not determinative, The affidavits submitted in evidence establish that Appellant's failure to take her appeal after notice of the right to appeal was sent, was in fact based upon official communication from an officer of the Immigration Service,

Although there is no evidence in the record that appellant did in fact seek advice about her appeal rights from an Immigration Service officer, we will accept that she did so and that she may have received a discouraging opinion. But why she should have raised the question of an appeal with that official and not at an American Foreign Service office or the Board of Review on the Loss of Nationality is mystifying, The Immigration officer may have been knowledgeable about nationality law and practice but he had no authorization to make official rulings on matters within the exclusive jurisdiction of the Department of State.

There is no copy in the record of the letter the Embassy sent appellant about her appeal rights, It is reasonable to assume, however, that it was in the form of the letter set out in the Foreign Affairs Manual, 6/ The advice consular officers

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6/ 8 Foreign Affairs Manual, 224.21(a), April 20, 1962, provided that:

> 224.21 Appeals Procedure in Loss of Nationality Cases
>
> a, Advice Regarding Making of Appeals
>
> When an approved certificate of expatriation or an approved Certificate of Loss of Nationality is given to the expatriate, he shall be notified in writing of his privilege to make an appeal to the Board of Review on the Loss of Nationality of the Passport Office. The notification shall be in the following form:

were to give an expatriate was that they had a right of appeal; the grounds on which an appeal should be based; and how the appeal might be presented, i.e., through an American Foreign Service Office or a duly authorized attorney or agent in the United States. Clearly, an expatriate was invited to pursue an appeal through authorized representatives of the Department of State, If appellant had questions about how to proceed, she should have inquired at the Embassy at Mexico City or written directly to the Board of Review on the Loss of Nationality. Even if she had been given to believe by the Immigration Service officer that she had no chance to recover her citizenship, there was no reason why she should have stopped there; she could have

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"You are hereby notified that you have the privilege of appealing to the Board of Review on the Loss of Nationality in the Passport Office, Department of State, with regard to the decision that you have lost your United States nationality. If you have new or additional evidence to submit or if you have a legal basis for believing that a reversal of the decision in your case is warranted in that the law was misinterpreted or that the decision was contrary to the evidence which you submitted you may present an appeal through an American Foreign Service Office or a duly authorized attorney or agent in the United States, It should be emphasized that unless your sppeal is based on these grounds it will not be entertained.

"Your appeal must state clearly the basis upon which you claim that the Department's holdings of loss of United States nationality should be reversed. If you appeal contains allegations of facts and circumstances which you did not mention when you previously presented your case or which do not agree with allegations or admissions you have previously made you should support the new allegations with the best evidence obtainable, in the form of copies of official records, statements from officials of the foreign government or affidavits by persons who have personal knowledge of the facts.

"No formal application for reconsideration need be made but a statement should be submitted preferably under oath giving the grounds of appeal and should be supported by such documentary evidence as may be available."

ırsued the matter through Departmental channels. For appellant
› maintain that the officer was a "responsible Government
'ficial in authority to make decisions regarding nationality,"
, plainly incorrect. The Immigration and Naturalization
:rvice had no part to play in appellant's loss of nationality,
› appellant should have understood. We are therefore unable to
›nsider that the negative opinion of the Immigration officer
ıstified appellant in not taking an earlier appeal.

The Board is not indifferent to appellant's argument that
ıother reason why the Board should decide the appeal is that:

> This appeal relates to more than the loss of one U.S. citizen's nationality. It reaches important policy decision /sic/ regarding the rights a U.S. citizen has to retain her nationality, and the limits which United States Government officials have to strip foreign born citizens of their nationality.
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> ...
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> Government officials should never be allowed to arbitrarily strip a United States citizen of her nationality by coercion or arbitrary, untenable choices placed before a citizen, The Consular Officer had no right to require Appellant to renounce her nationality as a condition to enter the United States. This appeal should be decided to vindicate Appellant's right to retain her nationality and safeguard it from arbitrary agency action.

The uncontroverted fact, however, is that appellant was
:fforded an opportunity in 1962 or within a reasonable time
ıereafter to present a claim that she had been misled into making
formal renunciation of United States nationality. She did not
› so until years later. Any obstacle to her taking an earlier
›peal was, as a matter of law, of her own making.

The requirement that an appeal be filed within a reasonable
ıme after a party received notice of the Department's holding of
›ss of nationality was not designed for administrative convenience.
:s essential purposes were twofold: to allow the affected party
ıfficient time to prepare a case showing wherein the Department
:red in making its determination; and to compel the exercise of a
ight of action within a flexible, but not unlimited period of
ime, so as to protect the adverse party against a belated claim
ıat might have been more readily adjudicated when the recollection

of events upon the claim was based was fresh in the minds of the parties involved. The events of 1961-1962 may be fresh in the minds of appellant and her husband, but the Department has no such recollection and plainly is prejudiced by the delay.

In the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare a case or any obstacle to appellant's moving earlier, the interests of finality must be given decisive weight.

In our view appellant's delay of over twenty years in entering the appeal was unreasonable.

III

For the foregoing reasons, we conclude that the appeal was not taken within a reasonable time after appellant was advised that the Department had confirmed her own act of alienage and her right to contest the Department's holding accrued. Accordingly, we find the appeal barred by time and not properly before the Board, The appeal is hereby denied.

Given our disposition of the case, we are unable to reach the other issues presented.

Alan G. James, Chairman

Howard Meyers, Member

James G. Sampas, Member