DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B[redacted] R[redacted], [redacted]

B[redacted] R[redacted], [redacted] also known now as B[redacted] R[redacted] R[redacted], appeals an administrative determination of the Department of State that he expatriated himself on December 16, 1974 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 Managua, Nicaragua. 1/

The Department approved the certificate of loss of nationality that was [redacted] in this case in January 1975. The appeal was entered in October 1982. For the reasons stated below, we find that the appeal was not entered within the limitation prescribed by the applicable regulations and therefore is time-barred. Lacking jurisdiction,we dismiss the appeal.

I

R[redacted] was born on [redacted] in [redacted] [redacted] of [redacted], and thus became a citizen of the United States. He also acquired the nationality of [redacted] by virtue of his birth in its territory.

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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigradion and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

The United States Embassy at Managua issued a report of appellant's birth as a United States citizen in 1955. He obtained United States passports in 1955, 1962 and 1967.

According to appellant's submissions, he resided in Nicaragua from birth to 1966. In 1966 he took up residence in Florida and attended high school there. Thereafter, appellant became involved in drugs and was convicted of attempted possession of heroin in June of 1971 in Palm Beach County, Florida. Appellant was placed on probation, which was to terminate if appellant surrendered his United States passport and returned to Nicaragua.

In 1971 appellant returned to Nicaragua without surrendering his United States passport. The record does not show any contact with the Embassy at Managua until December 1974, when appellant approached the Embassy to discuss the renunciation of his American nationality. Appellant made a formal renunciation of American citizenship on December 16, 1974 at the Embassy before a consular officer. He was then 21 years old. He also executed and signed a statement of understanding in which he acknowledged that the serious nature of and consequences flowing from his act of renunciation had been fully explained to him, that he had voluntarily chosen to exercise his right of renunciation, and that it was his intention to relinquish his United States citizenship. Moreover, appellant also executed a supplemental sworn statement in which he stated that he felt himself to be "pure Nicaraguan"; that he did not wish to return to the United States; that the consular officer had "done his best" to dissuade him from renouncing his American nationality; and that he had decided on his own to renounce his United States citizenship.

Thereafter the consular officer executed a certificate of loss of nationality. 2/ He certified that appellant acquired

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2/ 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.

United States nationality at birth; 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 January 16, 1975, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The Department sent a copy of the approved certificate to the Embassy in Managua on January 16, 1975 for forwarding to appellant.

In May 1982 the Embassy cabled the Department to report that:

> 1. Embassy was [redacted] who made inquiry regarding the status of his alleged attempt to have his United States citizenship restored.
>
> According to subject, he was born to two U.S. citizens, both of whom were registered and documented with this post until their deaths. Subject claims to have been issued a consular report of birth abroad and documented as a USC at birth. However, Embassy files do not contain any of said documents.
>
> WWH /sic/ in or around 1975, at agee /sic/ 22, subject executed a renunciation of citizenship. That renunciation was reportedly done at this post, but no record of any action of this sort was located in files. Subject further claims that approximately one year ago, he approached an Embassy consular officer who is no longer at post and discussed the possibilities of re-gaining citizenship on the basis of having renounced it under emotional pressures. Subject indicates that conoff took information and statement and forwarded all to Department for a review. Embassy records, however, do not contain evidence of the foregoing, or of any decision reached by Department on case.
>
> 3. Action requested:

> A) Please review subject's file and advise status of case. If renunciation was properly executed, please advise if subject has initiated any appeal of loss or if, otherwise, subject could at this date pursue such an appeal.

The Department replied to the Embassy in June 1982 as follows:

> 1. [redacted] renounced U.S. citizenship at Managua on Dec. 16, 1974. CLN approved by Dept. on Jan. 16, 1975. Copies of CLN, related documents, passport applications and report of birth being pouched.
>
> 2. A consular officer's statement, per para. 2 of reftel allegedly sent to the Dept. has not been located. Board of Appellate Review has no record of having received an appeal of the loss finding.
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> 3. FYI, a review of the documents attached to the CLN, particularly a separate statement made by [redacted] setting forth the reasons for his renunciation, reveals no hint of [redacted] at the time he renounced.
>
> 4. The Board of Appellate Review's current regulations on submission of appeals are contained in airgrama-0155 /sic/ of Jan. 18, 1980, a copy of which is being pouched in the event it is not readily available at post....

In October 1982 appellant wrote to the Board to take an appeal. He maintains that his renunciation of United States nationality was involuntary; his elderly, domineering father forced him to renounce his United States nationality. After the family returned to Nicaragua in 1974, appellant states, his father was convinced that there was no need for him to retain United States citizenship, "now that in his idea I was no longer going to leave Nicaragua." He added:

> My mother objected considerably to my father's persistance /sic/ in the

matter. But since my father was always the voice of athority /sic/ in our house we always had to do exactly what he desired. My father was not very flexible. At times he was too strict and overrulling /sic/.

...

My mother said that I could surely have dual nationality but father insisted that I renounce my American nationality. As always, since I depended so much on my father /sic/ judgment I never had the opportunity to stand alone...and make my own firm decisions. My father was always the one to take care of legal matters in our family.

...

Mr. William W. Struck, the American Counsul, /sic/ at the time, in the American Embassy in Managua, did his duty to his fullest in convincing me that what I was doing was very wrong and that I should reconsider my decision. In my mind I had a great controdictin /sic/ conflict. I did not have enough courage to realy /sic/ explain to Mr. Struck my whole life history, including the heroin case, as I am doing with you. I'm sure it would have helped. This lack of confidence with Mr. Struck and the preassure /sic/ from my father caused me to unfortunately take the wrong decision which I now regreat /sic/ very much. All this happened in December of 1974 as your archives reveal.

II

The Board may not proceed without first deciding whether it has jurisdiction to consider an appeal entered approximately eight years after the Department of State determined that appellant expatriated himself.

In 1975 when the Department approved the certificate of loss of nationality issued in this case, the regulations governing appeals to the Board of Appellate Review provided that a person contending that the Department's holding of loss of nationality in his case was contrary to law or fact might appeal to the Board of Appellate Review "within a reasonable time" after receipt of notice of the Department's holding. 3/ We are of the view that the limitation in effect in 1975, rather than the present limitation of one year after approval of the certificate of loss of nationality, 4/ should govern in the case before us.

3/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, provided that:

> 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.

4/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b), provides that:

(b) Time limit on appeal (1) 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.

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 his request for review within a reasonable time after receipt of notice of such determination. Accordingly, if a person did not initiate his or her 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 mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). 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. See Costello v. United States, 365 U.S. 265 (1961).

In determining whether an appeal has been taken within a reasonable time, the holding of the court in Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981) is pertinent:

> What constitutes "reasonable time" 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, 1967-68 (10th Cir. 1980).

In appellant's opening brief, the following argument is made in support of appellant's contention that his appeal is timely:

> As stated in the facts, it was his father and not the appellant himself who handled the legal matters in the matter of the renunciation. Therefore, the certificate of Loss of Nationality was always in the custody and keeping of the father. Appellant had no actual knowledge of the Certificate of Loss of Nationality until after the death of his father in 1980.

> He did not appeal prior to his father's death due to the same fear and respect that made him renounce. The circumstances of duress prevailed for five years after the issuance of the Certificate until his father's death in 1980.
>
> Appellant wrote his first letter of appeal on December 9, 1980, ten months after the death of his father. It was not until this time that he began to realize the full extent of his father's influence, and [redacted] over his act of renunciation. Mr. [redacted] became convinced, in reviewing his legal documents for the first time, that he had been coerced, albeit with his best interests in mind, by his elderly and dogmatic father. In light of these circumstances, appellant's appeal was brought within a reasonable time.

A preliminary question is whether it is material that prior to 1980 appellant may not have seen a copy of the approved certificate of loss of his nationality which carried on the reverse procedures for taking an appeal. It would appear, however, that the Embassy received a copy of the approved certificate of loss of nationality and sent it to appellant's address; this is indicated by appellant's own statement that after his father's death (which the record suggests occurred in early 1980), he discovered many legal papers in his father's files relating to his renunciation. It would be reasonable to assume that a copy of the approved certificate of loss of nationality was in those legal papers and that the Embassy thus discharged its statutory responsibilities.

Appellant argues that not only did he not see the certificate of loss of nationality until 1980 but also that he was not aware of any appeal procedure until at least that time. As he stated in his letter to the Board of October 15, 1982:

> ...I personaly /sic/ never had any knowledge of these laws. As I explained in my letter, at that time my father was the one in dealing with these leagal /sic/

> matters. At the time of my renouncement Mr. Struck, then consul of the American Empassy, /sic/ must have told me the laws conserning /sic/ the appeals of loss of nationality, but with all the tension and stress I was going through I am sure I was not putting enough attention to what he was telling me. At the moment I can honestly say that I don't remember any of the discussions I had with Mr. Struck at the time of my renouncement. Until two years ago after my parents /sic/ death I began looking into this matter as I have explained in my letter of appeal....

Nonetheless, it is clear that appellant was wholly cognizant of the fact that he had formally renounced his United States citizenship and therefore had cause to believe that that act would be ratified by the Department of State. Even if he did not receive a copy of the certificate of loss of nationality because his father held it from him, he had knowledge of facts which would have led an ordinarily prudent man to make further investigation of the possibilities of challenging the Department's determination. If in such circumstances one has facts sufficient to lead him to make inquiry about right of recourse but does not do so, he is chargeable with knowledge of facts which an inquiry would have disclosed. Nettles v. Childs, 100 F. 2d 952 (4th Cir. 1949).

The record does not bear out the assertion in appellant's opening brief that he did not appeal sooner because he was constrained from doing so by his father. That contention is at best inferential. The affidavits appellant submitted from people who knew him and his family in 1974 do not state explicitly that appellant did not appeal because of the same fear and respect that led him to renounce his citizenship. The declarations appellant offered address only the circumstances surrounding his renunciation and the alleged domination of his father over him at that time. In brief, there is no firm evidence that appellant was deterred from taking earlier action to recover his citizenship.

Five years after his renunciation appellant wrote to the Embassy on December 9, 1980 "to be helped to regain my American citizenship." He was moved to do so, he states, for the following reason:

> After the death of my parents I felt a stronger urge in Finding /sic/ the way to resolve the case of my loss of nationality. As I began serching /sic/ all the stored files of my father I came across my letter of renouncement of nationality, I found the courts Statement which I have mentioned, and many other legal papers which began to form in my mind the idea that my renouncement was an error due to all the causes already stated in this letter and case that can be corrected.

Having received no reply to the foregoing letter, which he states a consular officer told him she would forward to the Department for review, appellant allegedly called at the Embassy periodically over the next year to inquire whether a reply had been received and what action could be taken in his case. Finally, in June 1982, as noted above, the Department responded to the Embassy's inquiry, stating that it had no record of appellant's December 1980 letter and instructing the Embassy to inform appellant of the right of appeal to the Board.

Appellant's December 9, 1980 letter was not addressed to the Board, but simply to whom it may concern. It did not specifically state grounds for an appeal. Nonetheless, the Board is prepared to accept that that letter expressed a sincere interest in contesting the Department's determination of loss of his nationality. We are unable, however, to consider that it is a timely filing, even if it were considered to be notice of appeal. Five years had by then transpired. As the foregoing discussion indicates, appellant has produced no sufficient reason for delaying so long to act. By his own admission he acted in 1980 because he at last realized he may have made a mistake in 1974 and because he had developed into maturity and responsibility - commendable evolution in his persona but hardly legally sufficient to excuse a five-year delay. In effect, he chose a time convenient to himself to appeal, something that is not contemplated by the rule on reasonable time. See In re Roney, 139 F. 2d 175 (7th Cir. 1943).

In legal contemplation, a limitation on appeal is designed to allow an aggrieved person sufficient time to prepare a case to show wherein the Department erred in determining that he expatriated himself. The limitation presupposes that one will proceed with the diligence of an ordinary prudent person. Appellant knew from 1974 of the grounds of loss of his nationality - he was the author of the loss; he had sufficient facts to ascertain whether he had recourse, even if the means of redress had not actually been

spelled out for him in 1975. But he did not act until 1980, if we accept that his letter of December 9, 1980 was the equivalent of notice of appeal.

Two interests, in addition to those of appellant himself in his lost citizenship, must be weighed here; possible prejudice to the opposing party - the Department of State - and the interest in finality and stability of administrative decisions.

At this distance from appellant's renunciation there is little doubt that the Department would be hard pressed to address appellant's contention that his father, now deceased, coerced him into making a formal renunciation of United States nationality. Appellant's mother too is deceased. And, as noted above, appellant conceded that: "I don't remember any of the discussions" he had with the consular officer in charge of his case.

Judging from appellant's own statements and the testimonials he has submitted from associates with whom he deals in business, appellant is now a responsible, conscientious person. And there is evident sincerity in his statements.

We may not, however, weigh those considerations in determining whether he has initiated a timely appeal. He has offered no legally sufficient excuse for his delay of at least five years in appealing. Furthermore, there is, at a minimum, colorable prejudice to the Department by the delay.

In our view, the interests in finality and stability of administrative decisions must, in the circumstances of this case, be given great weight.

III

Upon consideration of the foregoing, it is our conclusion that the appeal is untimely and therefore barred. Lacking jurisdiction to hear it on the merits, the appeal is hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member