January 31, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] Ma[redacted] X[redacted]

A[redacted] M[redacted] X[redacted] appeals an administrative determination of the Department of State that she expatriated herself on January 6, 1969 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining the citizenship of the United Kingdom and Colonies upon her own application. 1/

The Department determined on July 24, 1972 that appellant expatriated herself. The appeal was entered on February 14, 1985. In response to appellant's brief, the Department stated to the Board that there was insufficient evidence to enable it to satisfy its burden of proof that appellant intended to relinquish her United States nationality when she became a citizen of the United Kingdom and Colonies. The Department therefore requested that the Board remand the case for the purpose of vacating the certificate of loss of nationality.

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

(1) obtaining naturalization in a foreign state upon his own application; . . .

The Board concludes that the appeal is time-barred and must be dismissed for want of jurisdiction. The fact that the Board has dismissed the appeal as time-barred does not in itself, however, bar the Department from taking action to correct manifest errors of fact or law.

I

Mrs. X[redacted], nee Y[redacted] T[redacted], became a United States citizen by birth of Chinese citizen parents at Oakland, California on August 11, **1924**. In **1926** her mother took her to China.

Appellant visited the United States Consulate General at Shanghai in August **1946** to register as a United States citizen, with the stated purpose of travelling to the United States the following year to continue her studies. Appellant executed an affidavit, explaining her protracted residence abroad, and asserting that she had not performed any statutory expatriating act. The Consulate General submitted appellant's application to the Department for an advisory opinion. A year and one half later on January **23, 1948** the Department informed the Consulate General that:

> In view of the general circumstances of the case, particularly the applicant's age, dual nationality status and long residence abroad, the Department is of the opinion that the applicant should not be registered as an American citizen for continued residence abroad. The application under acknowledgment is accordingly disapproved.
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> If the applicant should apply for a passport for travel to the United States and should overcome the presumption of expatriation which has arisen under Section **402** of the Nationality Act of **1940** 2/ a limited passport may be issued when arrangements have been completed for the journey, provided you are satisfied as to her identity.

2/ Section **402** of the Nationality Act of **1940**, 8 U.S.C. **802**, reads in pertinent part as follows:

> Sec. 402. A national of the United States who was born in the United States, or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United

Appellant states that she left China in 1954 and went to Hong Kong. In 1962 she married a citizen of Portugal,

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2/ cont'd.

> States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the indificual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe....

Subsections (c) and (d) of section 401 of the Nationality Act of 1940, 8 U.S.C. 401(c) and (d), read as follows:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . .
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state (54 Stat. 1169; 8 U.S.C. 801); or
>
> (d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible (54 Stat. 1169; 8 U.S.C. 801); or...

A [redacted] F [redacted] X [redacted], who died three years later. By virtue of her marriage, appellant acquired Portuguese nationality. 3/ She subsequently applied for naturalization as a citizen of the United Kingdom and Colonies, and in January **1969** was issued a certificate of British nationality in Hong Kong. In the summer of **1970** appellant applied for a United States passport at Hong Kong, which the Department disapproved, asserting that appellant expatriated herself by obtaining British citizenship. A certificate of loss of nationality was prepared by the Consulate General on February **9, 1972.** 4/

3/ The record shows that the Portuguese Consulate General at Hong Kong issued a Portuguese passport in **1962** and **1973** to appellant.

4/ 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 Consulate General certified that appellant became a citizen of the United States by birth therein; that on January 6, 1969 she obtained the citizenship of the United Kingdom and Colonies upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on July 24, 1972, approval being an administrative determination of loss of nationality from which an appeal, timely and properly filed, may be taken to the Board of Appellate Review. On November 7, 1972 the Consulate General at Hong Kong sent appellant a copy of the approved certificate and informed her of her right to appeal the Department's determination to this Board within a reasonable time after receipt of the certificate of loss of her nationality.

Appellant gave notice of appeal in February 1985. She contends that she lacked the requisite intent to relinquish her United States nationality when she obtained naturalization as a citizen of the United Kingdom and Colonies.

In its reply of December 20, 1985 to appellant's opening brief, the Department submitted that it could not meet its burden of proving, by a preponderance of the evidence, that appellant intended to relinquish her United States citizenship when she obtained naturalization as a citizen of the United Kingdom and Colonies. Stating that in 1948 appellant had been denied the right to register as a United States citizen, the Department asserted:

> If the appellant was denied the right to register as a U.S. citizen because it was believed that she might have expatriated herself under Section 402, /of the Nationality Act of 1940/. 5/ It was reasonable for her to conclude that she was not a citizen. In 1970 when the appellant naturalized in Hong Kong as a British subject, she could not have possessed the intent to relinquish her U.S. citizenship if she did not think she was a United States citizen.

5/ Supra, note 2.

The Department accordingly requested that the Board remand the case in order that the certificate of loss of nationality might be vacated. In the alternative, the Department stated, if the Board found that it lacked jurisdiction to consider the case, it intended to vacate the certificate.

II

At the outset, a basic issue must be decided: whether the Board may consider an appeal entered nearly thirteen years after accrual of appellant's right to appeal the Department's determination of loss of nationality.

In 1972 when the Department held that appellant expatriated herself, the limitation on appeal was "within a reasonable time" after receipt by the affected party of notice of the Department's adverse nationality decision, 6/ Consistently with the Board's practice in cases where an appeal is taken from a holding of loss of nationality made prior to November 30, 1979 (the effective date of the present regulations) the limitation of "reasonable time" will apply in the case now before us. Thus, if we find that appellant failed to enter an appeal within a reasonable time after she received a copy of the approved certificate of loss of her nationality, the appeal would be barred and the Board would lack jurisdiction to consider the case on the merits. This is so because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960).

6/ 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.

What constitutes reasonable time has been exhaustively defined by the courts. 7/ The definition of the United States Court of Appeals for the Ninth Circuit in Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981), perhaps most succinctly sums up the rule:

> 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, 1067-68 (10th Cir. 1980).

Reasonable time begins to run with receipt of notice of the Department's adverse holding, not some later time when a person may decide that entering an appeal might be convenient or advantageous.

Appellant submits that her appeal should be considered timely because the delay was not unreasonable in the circumstances of her case. She has explained that she sought legal representation in the United States even before a final determination of loss of her nationality had been made, but

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7/ See, for example, Ackernan v. United States, 340 U.S. 193 (1950); Klapprott v. United States, 335 U.S. 601 (1949); Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); United States v. Karahalis, 205 F. 2d 331 (2nd Cir. 1953); In re Roney, 139 F. 2d 175 (7th Cir. 1943): Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (2nd Cir. 1926).

she was unable to pay the fee demanded by the attorney she consulted. Further, she did not consider it practical to seek the assistance of a Foreign Service Officer in connection with her appeal, as she allegedly had been advised by the American Consulate General at Hong Kong. Such an official would have been unlikely, she stated, to assist her vigorously in prosecuting a claim against the Department. "Having twice been refused recognition of her U.S. citizenship," appellant's brief continues, "and further being totally unfamiliar with the present substantive law and procedures, appellant reasonably concluded that any appeal she might prosecute on her own behalf would be fruitless." Only in **1985** when she consulted the attorney who represents her in this appeal did appellant learn that thanks to the clarification of the legal issues in her case by the Supreme Court in Vance v. Terrazas, **444** U.S. **252 (1980)** her present counsel would be able to represent her for a modest fee. "The financial restraints on her ability to prosecute the present appeal having thus been overcome," her brief states, "appellant immediately retained present counsel to bring this appeal."

Appellant also asserts that since the record is "full and adequate," the Department would suffer no prejudice if, despite the delay, the Board were to assert jurisdiction and consider the appeal.

The reasons appellant gives for not prosecuting a claim to United States citizenship until **1985** are not, in our opinion, legally sufficient to excuse a delay of approximately thirteen years. That appellant could not afford to retain counsel is not a viable excuse for not taking a timely appeal. Legal representation, although provided for in the applicable regulations, has never been a prerequisite to enter and prosecute an appeal before the Board of Appellate Review. If appellant could not afford counsel or if she felt herself ill-equipped to present an appeal, she should have communicated with the Board of Appellate Review and sought advice. Had she done *so,* she would have learned that she might appear pro se and that no legal competence was required to do so. Having been informed in November **1972** about appeal procedures and presumably that there was a time limit on appeal, appellant must bear the consequences of not having sought redress expeditiously.

To accept appellant's excuse for not having moved sooner would result in the anomalous situation where an appellant is allowed to determine a time to appeal convenient to himself. As the cases make clear, the rule on reasonable time contemplates nothing of the sort. See In re Roney, 137 F. 2d 175 (7th Cir. 1943).

A limitation on appeal is designed not only to allow an aggrieved person sufficient time to prepare an appeal but also to compel the exercise of the right of recourse within a specified or more flexible period of time. Even though there may be no prejudice to the Department resulting from an appellant's protracted delay, respect for orderly appellate procedures requires that we insist on appeals being filed with the time prescribed by the applicable regulations, barring persuasive evidence of why an appeal could not have been filed sooner.

Here, nothing beyond appellant's control prevented her from seeking a hearing before the Board in timely fashion.

In the circumstances of this case, it is our conclusion that appellant's waiting for nearly thirteen years to challenge the Department's determination of loss of her nationality was without legal justification. Her appeal is time-barred and is hereby dismissed for lack of jurisdiction. 8/

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

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

8/ The fact that the Board has determined that the appeal is time-barred and has dismissed it on the grounds that it lacks jurisdiction, does not in itself bar the Department from taking further administrative action as may seem appropriate in the circumstances, i.e., vacate the certificate of loss of nationality, as it informed the Board it proposed to do.

> ...where the Board of Appellate Review has dismissed an appeal in a citizenship case as time barred, that fact standing alone does not preclude the Department from taking further administrative action to vacate a holding of loss of nationality. This continuing jurisdiction should be exercised, however, only under certain limited conditions to correct manifest errors of law or fact, where the circumstances favoring reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions.

Opinion of Davis R. Robinson, Legal Adviser of the Department of State, December 27, 1982. Excerpted in American Journal of International Law, Vol. 77 No1 2, April 1983.