November 13, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R W B

This is an appeal from an administrative determination of the Department of State holding that appellant, R W B, expatriated himself on September 29, 1975 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 decided in 1976 that appellant expatriated himself. He appealed that determination in 1985. The initial question we confront is a jurisdictional one - whether the Board may entertain an appeal that has been so long delayed. It is our conclusion that since no sufficient reason has been presented for the delay, the appeal must be deemed time-barred. Thus lacking jurisdiction, we dismiss the appeal.

I

B was born at on June 12, 1931, and so became a United States citizen. His mother, a Mexican citizen, took to Mexico in 1934, but his father, a United States citizen, did not follow. He apparently visited appellant and appellant's mother in Mexico in 1936 and returned to the United States where he later died. grew up in Mexico. He graduated from the National University of Mexico as a certified public accountant in 1957 and married a Mexican citizen in 1960. Four children were born.

After an amendment to the Mexican Law of Nationality and Naturalization came into effect on January 1, 1975 extending to alien husbands of Mexican citizens the right to obtain Mexican citizenship through naturalization, applied for

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

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 --

. * .

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; ...

naturalization. 2/ He attested that he was married to a Mexican citizen and had established a permanent residence in Mexico.

On September 29, 1975 a certificate of Mexican nationality was issued in his name.

In his statement of appeal, he gave the following reasons for seeking the certificate:

> The reason for accepting the expatriation was it was very difficult for me to get a job because of being a U.S. Citizen, and I had a family to support and take care of.
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> Mexican Labor Law establishes that only 10% of the personnel of a Corporation can be foreigner, thus big foreign companies reserve that 10% for their top executives. Also Mexicans are not very inclined to hire Americans, they don't like them.
>
> In the belief that having the Mexican Nationality would help me, I relinquished my U.S. Nationality, thinking that I would be treated as an equal and have the same opportunities, but having the appearance of an American, and also a foreign second name ([redacted] does not help at all, on the contrary there is some kind of discrimination.
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> I thought that after living practically all my life — in Mexico, I would never even think in /sic/ going back to the United States, but — years proved me wrong.

The Department of Foreign Relations informed the United States Embassy by diplomatic note dated November 3, 1975 that [redacted] had obtained a certificate of Mexican nationality; that in applying therefor he had expressly renounced allegiance to any foreign

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2/ Diario Oficial No. 41, December 31, 1974, effective January 1, 1975, amended Article 2(II) of the Law of Nationality and Naturalization to provide as follows:

> Article 2: These will be Mexican by naturalization
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> ...
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> II. - The alien woman or man who marries a Mexican man or woman and has or establishes residence in National Territory, provided he or she applies for naturalization ---

government; and that he had pledged allegiance to the laws and authorities of Mexico. On April 5, 1976 the Embassy wrote to [redacted] to inform him that by making a declaration of allegiance to a foreign state he might have expatriated himself. The Embassy offered him an opportunity to submit evidence for the Department to consider in making a determination of his citizenship status, and requested that he complete a form that was enclosed. In the form [redacted] explained as follows why he had sought Mexican citizenship:

> I have always admired the United States and I have been proud of being an American, but I have been living in Mexico since 1934 and my wife and children are Mexican. It became more and more difficult to find a job as an American. Thus I asked for Mexican nationality and relinquished U.S. citizenship. I do not like it, but I had no choice.
>
> I was born on June 12, 1931 at Kansas City, Missouri.
>
> I appreciate highly this opportunity to explain myself an /sic/ thank you for the amiability you had with me.

As required by law, a consular officer executed a certificate of loss of nationality in appellant's name on April 23, 1976. 3/ Therein the consular officer certified that [redacted] acquired United States nationality at birth; that he obtained Mexican nationality by virtue of marriage to a citizen of Mexico; that he made a formal declaration of allegiance to Mexico; and thereby expatriated himself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

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2/ Cont'd.

> renounces and takes the prescribed oaths to Mexico as provided in Article 17 and 18 of the law. The Secretariat of Foreign Relations would issue the appropriate order. The foreigner who would obtain naturalization through these means would retain Mexican nationality even after dissolution of the marriage.

Informal translation by U.S. Embassy, Mexico City.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides that:

> 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

In forwarding ,he certificate to the Dep rtment the consular officer checked a box on a pre-printed form indicating in the consul's opinion that appellant intended to transfer his allegiance from the United States to Mexico; the officer also noted that the Embassy's records indicated that appellant had been registered there since 1968. The Department approved the certificate on July 6, 1976, 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. A copy of the approved certificate was sent to the Embassy on July 6th for it to forward to [redacted] On the reverse of the certificate procedures for taking an appeal to this Board were set forth.

There is no record of further dealings between appellant and the United States authorities until November 1985 when he wrote to the Board to lodge this appeal which he based on the following grounds:

> Now, as it is known to everibody /sic/, Mexico is suffering a terrible economical crisis which worsens year after year, caused mainly by theexistence /sic/ of so many disloyal employees of the Mexican Government, and the Labor Unions which only worry is to sponsor laziness and do not care at all about productivity. Unemployment and subemployment are very high, and keep worsening.
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> This late I recognize my big mistake in loosing [sic] my U.S. Nationality and all it's privileges.

II

The first issue we must decide is whether the Board may entertain an appeal entered more than nine years after appellant was informed that the Department of State determined that he lost his United States nationality by performing a statutory expatriating act.

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3/ Cont'd.

> 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 Board's jurisdiction is dependent upon a finding that the appeal was filed within the limitation prescribed by the applicable regulations. This is so because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

In 1976 when the Department approved the certificate of loss of nationality that was issued in this case, federal regulations prescribed the following limitation on appeal:

> 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 4/

Consistently with the Board's practice in cases where a determination of loss of nationality was made prior to November 1979, we will apply the foregoing limitation in this case. 5/ Thus, under the applicable limitation, if we find that appellant did not initiate the appeal within a reasonable time, the appeal would be time-barred and the Board would be without authority to entertain it.

What constitutes reasonable time depends on the facts of the case, taking into account a number of considerations: the interest in finality, the reason for the delay, and prejudice to other parties. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice & Procedure section 2866 at 228-229:

> 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.

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4/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979) 22 CFR 50.60.

5/ On November 30, 1979 new federal regulations were promulgated for the Board of Appellate Review. 22 CFR Part 7. 22 CFR 7.5(b) provides that the limitation on appeal is one year after approval of the certificate of loss of nationality.

In response to the Chairman's invitation to explain why he had delayed so long in taking an appeal, [redacted] wrote as follows:

> Why have I waited so long in taking an appeal?
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> After relinquishing my nationality, I thought, maybe a year or more later, in doing something like an appeal, but I /sic/ was explained at the U.S. Embassy that the law gave only one year.
>
> I believe laws are to be complied and aplied /sic/, especially in the U.S. where most people are very respectful, so by that moment I thought I could do nothing about it.
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> But recently, that I had the chance to visit the U.S. for more than three months and I decided to try to get my nationality back, I contacted by letter Congressman Bill MacCollum, and he let me know I still could write to the Board of Appellate Review to present my case for consideration.
>
> On the other hand, my eldest doughter /sic/ has been living at Orlando, Florida for the last two and a half years, and has learned a lot about the United States, and she has explained to me what a great country she is living in. She is so convinced, that she decided to stay and study there,. ...
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> Also my situation of being jobless, the critical economic situation in Mexico, and the poor future my children have, are the very important factors that led me to appeal to the Board.

Appellant's stated reasons for his delay are legally insufficient to excuse it.

He does not deny he knew in the spring of 1976 that the Department had determined that he expatriated himself. It is also evident that he knew that he might appeal that determination to the Board of Appellate Review. Still, he took no action to challenge the loss of his citizenship until nine years had passed. If he believed the Department had erred in deciding that he expatriated himself, surely he would have moved sooner. We perceive no factors beyond his control that prevented him from doing so.

We think appellant is mistaken when he states that "maybe a year or more later" (presumably after his receipt of the CLN) he had been told by the Embassy that the limit on appeal was one year. As noted above, the one-year limitation did not enter intc force until November 30, 1979. Consular posts were not informed by the Department before that date that a change in the time limit on appeal was contemplated. In fact, it was not until early in 1980 that posts were advised of the change in the regulations regarding the limitation on appeal. Thus, it would seem that more than three years passed prior to appellant's alleged conversation (of which there is no record) with the Embassy occurred. However, we note that in October 1980, [redacted] obtained a non-immigrant visa at the Embassy. Possibly he was informed at that time that the limit on appeal was one year after approval of the certificate of loss of nationality, and may have been discouraged by a consular officer from appealing in 1980; we do not know the facts, for the record is silent on the matter. But he concedes that by 1985 he thought it worthwhile, despite his knowledge that there is now a one-year limit on appeal, to contest the Department's determination of loss of his nationality because his economic situation had worsened and he thought recovery of his United States citizenship would be desirable. Without taking a position on whether an appeal made in 1980 would have been timely, we must observe that had he been seriously concerned about loss of his citizenship, surely he would have pursued the matter aggressively at that time.

[redacted] is evidently a mature professional man. If he had been seriously concerned about loss of his nationality, one might imagine he would have communicated directly with the Board whose address was set out on the reverse of his certificate of loss of nationality to ascertain whether, in spite of what he may have been told, it would entertain an appeal. As appellant's submissions make clear, he gave no serious thought to an appeal until many years later when his circumstances had changed and it appeared to him propitious to try to recover his citizenship.

The rationale of a limitation on appeal is essentially two-fold: to compel the taking of an action within a limited period of time while the circumstances surrounding performance of an expatriating act are fresh in the minds of the parties, and also to allow an ex-citizen sufficient time to prepare a case showing wherein he believes the Department erred in determining that he expatriated himself. The rule on reasonable time does not contemplate that a party may determine a time suitable to himself. In re Roney, 139 F.2d 175 (7th Cir. 1943). Rather, the aggrieved party must move with all reasonable speed in challenging the Department's action. Appellant here allowed a considerable period of time to pass without ostensible justification. The events of 1975 when he applied for andobtained a certificate of Mexican nationality are inevitably obscured by the passage of time, and there is obvious prejudice to the Department which bears the over-all burden of proof on the issues of whether the act was voluntary