August 7, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: N[redacted] L[redacted] G[redacted]

This is an appeal by N[redacted] L[redacted] G[redacted] from an administrative determination of the Department of State that she expatriated herself on June 4, 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 certificate of loss of nationality that was issued in this case was approved by the Department in September 1975. The appeal was entered in 1985. As a preliminary matter, we are confronted with the issue of whether an appeal taken almost ten years after the Department determined that appellant had expatriate herself may be deemed to have been filed within the limitation prescribed by the applicable regulations. For the reasons set forth below, it is our conclusion that the appeal is untimely and should therefore be dismissed.

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;...

I

Appellant acquired United States citizenship by birth at [redacted], and the citizenship of Mexico by birth abroad to Mexican citizen parents. In September of 1957, appellant was taken by her parents to Mexico where she has since resided. There is no evidence that appellant was ever issued a United States passport, but the record shows that in September 1969 she was registered as a United States citizen by the United States Embassy at Mexico City and issued an identity card.

On June 4, 1975 Ms. G[redacted], then a few months over the age of 18, applied for a certificate of Mexican nationality (CMN). There is no copy in the record of appellant's application for a CMN, but there is a document ("Constancia") issued to appellant by the Department of Foreign Relations, dated July 9, 19[redacted] ch recites that in connection with applying for a CMN, Ms. [redacted] renounced her United States citizenship and all allegiance to the United States, and pledged adherence, obedience and submission to the laws and authorities of Mexico. The fact that she had applied for a CMN apparently sufficed to enable appellant to obtain a Mexican passport; she states that she was issued one on June 4, 1975.

Shortly after she applied for the CMN Ms. G[redacted] visited the United States Embassy. The record does not disclose why she went there, 2/ but it is clear that at that time the fact she had applied for a CMN had come to light. She executed an affidavit of expatriated person on July 11, 1975 in which she affirmed that she had made a formal declaration of allegiance to Mexico; had done so voluntarily; and that in making such pledge, she intended to relinquish her United States nationality. She also completed a form for determining U.S. citizenship and, for information purposes, a form for registration as a United States citizen. In the citizenship form she stated that she made the declaration of allegiance because: "All my family are Mexican citizens and plan to reside in Mexico the rest of my life. I was awared /sic/ I was relinquishing my American citizenship, since under Mexican law, I cannot keep dual nationality when I am ove /sic/ age."

2/ Possibly, the Department of Foreign Relations sent a copy of the "Constancia" to the Embassy and that office invited appellant to call.

In compliance with the requirements of section 358 of the Immigration and Nationality Act, the consular officer who handled appellant's case executed a certificate of loss of nationality in Ms. G[redacted]' name on July 11, 1975. 3/ The consular officer certified that appellant became a citizen of both the United States and Mexico at birth; that she made a formal declaration of allegiance to Mexico on June 4, 1975; and thereby expatriated herself on June 4, 1975 under the provisions of section 349(a)(2) of the Immigration and Nationality Act. The Department approved the certificate on September 30, 1975, and sent a copy to the Embassy to forward to appellant.

The record does not show that a CMN was issued to appellant as a consequence of her application of June 4, 1975. As she stated in the affidavit she executed on October 8, 1985,

> The certificate of Mexican nationality was not issued to me immediately, since I was requested to present the birth certificate not only of my father but also my mother. My mother never had a birth certificate, but a batismal certificate which had to be reconfirmed and certified by the authorities by /sic/ the State of Morelos. This procedure took a long time.

She has denied that she made any application for a CMN except the one of June 4, 1975. However, in the record there is a copy of an application for a CMN dated July 21, 1981 that bears what appears to be appellant's signature. In the record too is a copy of a CMN issued to appellant on August 4, 1981. There is also a copy of diplomatic note no. 7000547 dated February 25, 1982, from the Department of Foreign Relations to the United States Embassy,

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

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.

informing the Embassy that Ms. G[redacted] on July 21, 1981 applied for a CMN and renounced her United States nationality and declared allegiance to Mexico.

In October 1985 the Embassy sent a note to the Department of Foreign Relations, referring to that Department's note of February **1982**, and requesting that the Department inform the Embassy whether appellant's June 4, 1975 application ever resulted in issuance of a CMN. The Department replied in December 1985, stating simply that Ms. G[redacted] had been issued a CMN on August **4, 1981** as a consequence of her application of July **21,** 1981.

The Department takes the position that appellant should be deemed to have performed a statutory expatriating act on June 4, 1975, as attested by the "constancia" that was issued by the Department of Foreign Relations on July 9, 1976. The Department now considers the effective date of expatriation in cases involving making a formal declaration of allegiance to Mexico to be the date upon which the CMN was actually issued. Prior to February 11, 1976, however, the Department considered the effective date of expatriation to be the date upon which the person applied for a CMN and made a declaration of allegiance to Mexico. 4/ We agree with the Department that Ms. G[redacted] expatriated herself on June 4, 1375.

4/ In its brief the Department explained its position as follows:

> The Department conducted a study in 1975 regarding the date on which the declaration of allegiance to Mexico, taken in connection with an application for a Certificate of Mexican Nationality, is considered to become effective under Mexican law. On the basis of information received in the study, the Department determined that the date of loss of U.S. citizenship in such cases should be the date the declaration of allegiance has legal consequences in Mexico, which is the date the Certificate of Mexican Nationality is issued.
>
> This determination, made on February 11, 1976, further recommended that all future cases should indicate the date of loss of U.S. citizenship as the date the Certificate of Mexican nationality was issued by the Mexican Government rather than the date on which the application was completed.
>
> As you will note, in Miss G[redacted] case the Embassy was informed by the Government of Mexico on July 9, 1975 that Miss G[redacted] had applied for a CMN on June 4, 1975. On July 11, 1975, Miss G[redacted] visited the U.S. Embassy where she completed and

The Department's approval of the certificate of loss of nationality that was executed in appellant's name constitutes an administrative determination from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

On April 22, 1985 Ms. G[redacted] wrote to the Board to enter an appeal, based on the following grounds:

> At the time that I had to choose my citizenship (at age 18), it was not my intention to renounce my U.S. citizenship but I felt so pressured by my father, who more or less decided for me when I had to complete the forms at the Mexican Foreign Office and at the American Embassy, because I was sure that he would worry if I had problems in Mexico with my studies and my work. At that time I could not go against my father's will, but now that I feel that my decision on this matter does not make my father worry, I want to pray you to reconsider my case. 5/

4/ Con'td.

> signed an affidavit and questionnaire, stating that she had renounced her U.S. citizenship. Based on this evidence, the Department held that Miss G[redacted] had lost her citizenship. This holding of loss was made before the change in Department policy, and thus, was in conformance with current policy at that time.

5/ Appellant's father executed an affidavit in support of her appeal on April 9, 1985, stating that:

> This is to certify that because of my deep Mexican way of living, I feel responsible of my daughter N[redacted] L[redacted]'s decision in choosing Mexican Nationality at her age 18.
>
> N[redacted] L[redacted] was born in New Haven, Conn. when I was studying at Yale University with a schoolarship /sic/ the Mexican Government favored me, in order to obtain a Master in my studies. Most of my life I worked for the Mexican government. I am knowledgeable of Mexican law, to opt for one or other nationality at the age 18. By no means I wanted the youngest of my female children to meet any kind of problems at school or when she was ready

II

At the outset, we must determine whether the Board may assert jurisdiction over this appeal. Our jurisdiction depends on whether we find that 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 we find that the appeal was not entered within the applicable limitation and no legally sufficient excuse therefor has been presented, the appeal must be dismissed for want of jurisdiction. Costello v. United States, 364 U.S. 265 (1961).

Consistently with the Board's practice, we will apply here not the present limitation on appeal but the one prescribed by regulations in effect at the time the Department approved the certificate of loss of nationality issued in appellant's name, namely, section 50.60 of Title 22, Code of Federal Regulations (effective November 29, 1967 to November 30, 1979), 22 CFR 50.60. That section provided as follows:

> 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.

5/ Cont'd.

> To work. I did not want her to feel a foreigner at her home. I knew she was to /sic/ young to look for a life by herself in a country where she had no ties but being born there.
>
> Now my daughter N[redacted] L[redacted] is over age 18, and knows what she wants to do of her life. I ask of you to reconsider her case and to give her US citizenship back. I have to confess that at the time she had to take this decision, I was the one who, almost, forced her to opt for her Mexican nationality.

"Reasonable time" is to be determined in light of all the circumstances of the particular 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. Ashford v. Steuart, 657 F. 2d 1053, 1055 (1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F. 2d 928, 940 (5th Cir. 1976), quoting 11 Wright & Miller, Federal Practice and Procedures, Sec. 3866, at 228-29:

> 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.

Appellant submits that her appeal should be considered timely on the following grounds:

> The possibility of having my United States citizenship restored had not occured to me until recently because I thought it was not possible. There are many reasons for this, in 1975 when I was 18 years old my father insisted me that I should acquired /sic/ the Mexican citizenship so that I could continue living in Mexico and have the opportunity to study and work here. I was too young to disobey my father's wishes. It is the custom in Mexico for girls, to live with their parents until they're married. And unfortunately I had no close relatives in the United States with whom I could lived /sic/. Now my father understans /sic/ that in some way he was guilty of depriving me of the privilege of selecting my destiny.
>
> It was never called to me /sic/ attention that an appeal procedure was typed on the reverse side of the certificate of Loss of Nationality. You have to realize that at the time on receives /sic/ a certificate of this type a person is so confused and with mixed feeling that one does not read the small print on the reverse side.

We do not consider appellant's reasons to be legally sufficient to excuse a delay of nearly 10 years.

Obviously, Ms. G[redacted] duly received the certificate of loss of nationality that the Embassy was instructed to forward to her. And she concedes that on the reverse of the copy of that certificate the appeal procedures were spelled out. She was thus on notice from sometime in the autumn of 1975 that she had been found to have expatriated herself. She was also on notice that there was an appeal process by which she could challenge the Department's determination of loss of her nationality. Appellant's right to appeal accrued upon her receipt of the certificate of loss of nationality. As a matter of law, she had actual notice of her right of appeal even though, arguably, no one expressly pointed out to her that she might avail herself of the process. Nothing in our opinion stood in her way to file an early appeal. She suggests that deference to her father deterred her from acting sooner. That perhaps is a worthy filial sentiment but not an excuse for failing to act within a reasonable time. In effect, Ms. G[redacted] made a conscious choice not to appeal, and her situation is not dissimilar to that of petitioner in Ackerman v. United States, 340 U.S. 193 (1950). There Mr. Justice Minton said:

> ...Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong,.... There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from. 340 U.S. at 198.

Further, the delay of approximately ten years entailed in this appeal prejudices the ability of the Department to challenge appellant's allegation that she was pressured into performing the expatriating act. It would undoubtedly be difficult for the Department, so long after the event, to acquire information that would enable it to meet appellant's allegation of duress.

In short, appellant has not demonstrated that her case meets the criteria for determining whether an appeal was filed within a reasonable time. Whatever period of time is contemplated by the standard of reasonable time, we do not think it envisages a

delay of ten years where the record shows no viable reasons for the delay and there is arguably prejudice to the opposing party - the Department of State.

III

Upon consideration of the foregoing, it is our conclusion that the appeal was not filed within a reasonable time after appellant received notice that the Department had determined that she expatriated herself. The appeal is time-barred, and the Board is without jurisdiction to entertain it. The appeal is hereby dismissed.

Alan G. James, Chairman

Howard Meyers, Member

James G. Sampas, Member