August 12, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] L[redacted] L[redacted] H[redacted]

This is an appeal from an administrative determination [redacted] amborn H[redacted], expatria provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The Department determined on August 18, 1978 that appellant expatriated herself. The appeal was entered on July 13, 1984. At the outset we must resolve a jurisdictional issue: whether the appeal 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 time-barred and that the Board lacks jurisdiction to hear and decide it. Accordingly we dismiss the appeal.

I

Mrs. H[redacted], n[redacted] L[redacted], was born in [redacted] of an American citizen father and a Mexican citizen mother, so acquiring the nationality of both the United States and Mexico at birth. A report of appellant's birth as a United States citizen was issued by the United States Embassy on February 2, 1954.

Shortly after her birth she was taken by her parents to the United States where she was reared and educated. In 1974 appellant's parents were divorced. Her mother moved to Mexico.

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

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; . . .

Appellant had just completed her third year at the University of Miami. She visited her mother in 1975 and later that year met her future husband, W[redacted] H[redacted], a citizen of Mexico. They decided to marry on June 26, 1976. Shortly before the wedding was to take place, an allegedly unexpected hitch developed in their plans. In her initial submission to the Board appellant described the difficulty as follows:

> On the day before the wedding I was notified by the government official that I could not be married unless I have /sic/ up my American citizenship. Complete and final preparations had been made for the wedding. I resisted the requirement and some thought was given to the idea of crossing the border to Texas where the ceremony could be performed, without any problem. However I did sign certain papers, and made certain statements that the government officials requested. The marriage ceremony was performed on June 26, 1976.

In oral argument on March 19, 1986 appellant described the problem that had arisen about her citizenship status in slightly different terms, the gist of which follows: 2/

> Two days before the wedding an official called Mr. H[redacted] to say that since appellant's birth certificate showed that she had been born of a United States citizen father, she would have to document formally her Mexican citizenship in order for the judge to be able to perform the civil ceremony that would precede the church ceremony. The official told Mr. H[redacted] that his wife-to-be would have to go to the Department of Foreign Relations to obtain the necessary documentation. Accordingly, on June 25th the day before her wedding appellant went to the Department of Foreign Relations. She thought she signed some papers but did not recall making an oath. The business did not take long. The official she saw said he would speak to the judge and tell him appellant had been there.

2/ [redacted]script of hearing in the Matter of P[redacted] L[redacted] L[redacted] H[redacted] March 19, 1986, Board of Appellate Review (hereafter r[redacted] to as "TR"). pp. 28-29.

In her June 10, 1986 affidavit appellant asserted that: "I did not appear at the United States Embassy to state that I had just received the 'ULN letter'. I understand that 'ULN' means Uniform Loss of Nationality, according to Mr. Bernsen /appellant's counsel/." She further stated that she never received FS-176 and FS-176S forms or the questionnaire.

No subsequent communication between appellant and the Embassy is recorded. On July 7, 1978 a consular officer of the Embassy executed a certificate of loss of nationality in appellant's name. 3/ He certified that appellant acquired the nationality of both the United States and Mexico at birth; that

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3/ 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.

dispatched a copy of the approved certificate to the Embassy, 5/ for consular officer McKee noted on appellant's FS-240 card as well as on the Embassy's file copy of the CLN that the CLN had been approved on August 18, 1978 and mailed on August 30, 1978. There is no indication in the Embassy's records of the address to which the CLN was mailed or whether it was sent by registered mail. Appellant has consistently maintained that she never received the CLN or the information about appeal rights that is customarily set forth on the reverse of the certificate. 6/

At the hearing Mrs. H[redacted] stated that sometime in 1978 she took her daughter Paulina (born May 8, 1977) to the Embassy to register her. TR 33. The following exchange took place on the matter between appellant and her counsel:

5/ The original of the approved CLN is not in the record that was submitted to the Board; there is only a photocopy which shows: Approved: August 18, 1978, Director Passport Office, Department of State, By: Francis G. Rando." At the bottom of this CLN is the notation "See Reverse for Appeal Proceedures." The reverse of the CLN in the file was not, however, photocopied. Counsel for appellant pointed out in appellant's opening brief that there is nothing on the copy of the CLN to show that it is a true copy of the signed original or that it was otherwise authenticated. Although it is deplorable that the Department's file copy of the CLN has not been located, we do not consider this fact vitiates the Department's determination of loss of appellant's nationality or constitutes material error. In the totality of the circumstances of the case, there can be little practical doubt that the CLN produced in the record is a copy of the signed original.

6/ The record does not show whether the copy of the CLN purportedly sent to appellant on August 30, 1978 had the appeal procedures set forth on the reverse.

Q And what happened when you tried to register your daughter at the American Embassy at Mexico City?

A I was told that I was not entitled to register her because I was no longer a citizen of the United States.

Q Were you given any documents or any papers?

A No.

Q Do you remember who you talked to?

A No, I don't.

Q Do you remember what month it was that you went to the American Embassy to register your daughter in 1978?

A No, I don't.

TR 34.

Appellant stated that the person to whom she spoke checked something and then observed that she had three sisters who were American citizens but that she no longer was one. Appellant allegedly asked about the possibilities of appeal and was told that she might not appeal; the one-year limitation on appeal had expired. TR 51.

Allegedly very concerned about the loss of her nationality, appellant turned to her father who said he would write to Senator Moynihan and Congressman Ben Gilman. Mr. Lamborn evidently wrote to the Senator, for in the record is a copy of a letter from the Assistant Secretary of State for Congressional Relations, dated November 24, 1978, acknowledging receipt of the Senator's letter of October 26 on behalf of Mr. Albert G. Lamborn concerning the citizenship of his daughter Patricia. The Department's letter stated that after Mrs. [redacted] file could be reviewed, the Department would comment on her citizenship status and "provide more information on steps she must take in order to regain United States citizenship." There is no record of any further communication between the Department and Senator Moynihan, or of any letter from the Senator to Mr. Lamborn.

Mr. Lamborn wrote to Congressman Gilman on September 11, 1978, requesting that the Congressman write Ambassador Lucey at Mexico City to ask him to give P[redacted] all possible assistance in

recovering her United States citizenship. The Congressman wrote Ambassador Lucey on October 24, 1978. The latter replied to Mr. Gilman on November 21, 1978, stating that the Embassy would invite Mrs. H[redacted] to call to inform her of the procedures for taking an appeal and to offer her "any assistance and guidance she might require" to take an appeal. On December 5, 1978 Consul Nancy McKee wrote to appellant at the Cuernavaca address to which the uniform loss of nationality letter (and presumably the CLN) had been sent. She noted Congressman Gilman's interest in Mrs. H[redacted]'s case and offered to assist her in filing an appeal. Ms. McKee enclosed information about appeal procedures.

Appellant has stated that as far as she knew her father did not receive a response from either Senator Moynihan or Congressman Gilman. TR 39. In counsel's letter to the Board of June 17, 1986 he observed that "obviously" Mrs. H[redacted] did not receive Ms. McKee's letter of December 5, 1978, "as she struggled for several years to be allowed to appeal."

The appeal was entered on **July 13, 1984.**

II

Whether the Board may entertain an appeal filed six years after the Department of State determined that appellant lost her United States nationality by performing a statutory expatriating act is the first issue we must consider. 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 1978 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. 6/

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

Consistently with the Board's practice in cases where the determination of loss of nationality was made prior to November 1979, the foregoing limitation will govern in this case. 7/

What constitutes reasonable time depends on the facts of the case, takina into account a number of considerations, including 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.

When she filed her appeal, appellant qave the followinq reasons for her delay:

> ...I have made several attempts to try to reqain my nationality, but I was told I had already lost it, and lost the opportunity of the time qiven by the United States Government to appeal. I was not aware of the one year time limit...

In a subseauent communication she stated that:

> I was told in 1978 at the American Embassy that there was a time limit of one year to appeal the loss of citizenship, and that nothinq could be done.

7/ 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.

> On one of my father's trips to Mexico in 1980 we returned to the Embassy and we were told the same thing.
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> In 1982 I contacted a lawyer in the United States, I gave him my documents, which he kept for many months, and I got the same answer.
>
> Not being satisfied and with the desire in regaining my country, I returned in July 1984 to the American Embassy. I spoke to the Counsel of the United Stated /sic/, Mr. Richard F. Gonzalez. It was not until then that I was told I could try to appeal. At that moment I wrote to you expressing my desire to regain my American citizenship.

In September 1985 the Board wrote appellan to request that she explain what attempts she had made to regain her nationality; and from whom she received the information that she had only one yeas in which to file her appeal. On November 27, 1985 appellant wrote to the Board. Her letter states in relevant part as follows:

> ...I went several times to the American Embassy. I remember speaking to Ms. Nancy McGee /McKee/. I think she was probably the one to discourage me the most on regaining my citizenship. She told me of the one year time limit. I believe another person I remember speaking to was Mr. John Fogarty. My father accompanied me at that time.
>
> I was told I was too late to do anything...
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> ...It was not until I spoke with Mr. Gonzalez, that I was given hope, it was on July 13, 1984, when I spoke to Mr. Gonzalez, and at that same moment, I wrote to you....

We find unpersuasive the reasons appellant gives for her delay in taking an appeal. The record shows that the Department sent a copy of the approved certificate of loss of nationality to the Embassy and that the Embassy forwarded it to appellant. Both the Department and the Embassy discharged their statutory duty. Appellant denies she received the CLN. Arguably she did not. However, even if appellant did not receive a copy of the approved certificate of loss of nationality with the appeal

procedures set out on the reverse, she nonetheless learned in the same year the CLN was approved that a determination had been made of loss of her nationality. By her own admission sometime in 1978 she had been informed orally but officially that she was no longer a United States citizen. The fact that appellant asked her father to help her further attests that she knew a determination of loss of her nationality had been made and that she acted upon that information.

The limitation period in this case began to run from the time appellant received oral notice of loss of her nationality. It can hardly be denied that "notice" of loss of nationality under the provisions of 22 CFR 50.60 may be conveyed orally as well as by the usual means of a CLN. We therefore hold that Mrs. [redacted] was on notice sometime in 1978 that she had lost her United States citizenship. We are at a loss to understand appellant's contention that the official who informed her in 1978 she was no longer a United States citizen also informed her that the limitation on appeal was one year and that the year had passed for her. The only limitation on appeal was, as previously stated, "within a reasonable time" after the affected party received notice of the Department's holding of loss of nationality. That limitation had been in effect since 1967, and it is a reasonable presumption that consular employees, local and American, knew what the limitation on appeal was and would have informed appellant accordingly.

We cannot accept appellant's unsupported claims that Embassy personnel discouraged her from appealing and repeatedly told her her appeal was time-barred. Perhaps appellant did not receive Consul McKee's letter of December 5, 1978 offering her assistance in framing an appeal. But if, as she states, she called on Ms. McKee several times after learning of the loss of her nationality, how explain Ms. McKee's allegedly uncooperative attitude in the face of the hard evidence that Ms. McKee had previously offered every assistance to appellant? It is simply not credible that a consular officer would be obstructionist after being directed by her Ambassador to offer every assistance.

Not only has appellant failed to demonstrate that she was justified in delaying for six years in coming to this Board, but also there plainly would be prejudice to the Department if we were to allow the appeal. The Department bears the overall burden of proof in loss of nationality cases, although it benefits from a rebuttable statutory presumption that performance of statutory expatriating acts is presumed to have been voluntary. To allow the appeal would place the Department in the obviously difficult position of attempting to rebut appellant's contentions that she was forced against her will to make a formal declaration of

allegiance to Mexico. Since the Department must also prove a party's intent to relinquish United States citizenship as of the time the expatriacting act was done, the Department would now face an unusually exacting burden of proof because of the passage of time.

A limitation on appeal is designed to afford an aggrieved person sufficient time to prepare a case showing wherein the Department erred in law or fact in determining that one had lost United States citizenship. A limitation is also intended to compel the exercise of the right of recourse within a restricted period of time while the recollection of the events involved is fresh in the minds of both appellant and the agents of the Departme of State. Here, there has been no showing of a need for six years to prepare an appeal to the Board. Furthermore, as of the time the appeal was filed, eight years had transpired from the time appellant performed the statutory expatriating act. The possibilities of reconstructing accurately the events of eight years ago are now remote, especially since so little evidence contemporary with appellant's performance of the expatriative act is now available.

A further consideration leads us to conclude that the appeal was not entered within a reasonable time after appellant knew she had been found to have expatriated herself. The interest in finality and stability of administrative determinations is entitled to weight in this case where there has been no showing of a sufficient reason for a delay and colorable prejudice to the opposing party. There must be an end to litigation at some point.

III

It is our conclusion that appellant's delay of six years in taking an appeal is unreasonable in the circumstances of her case. The appeal is therefore time-barred. Lacking jurisdiction to consider a time-barred appeal, we dismiss it.

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

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member