August 13, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal from an administrative determination of the Department of State that appellant, [redacted], expatriated herself on September 12, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon her own application. 1/

The Department held on February 26, 1976 that *Mrs.* [redacted] expatriated herself. She instituted this appeal on June 24, 1985. At the outset, we must resolve a jurisdictional question: whether the Board may entertain an appeal taken more than eight years after Mrs. [redacted] received notice that the Department determined she expatriated herself. For the reasons stated below, we conclude that the appeal is not timely and must be dismissed.

I

Appellant was born at [redacted], and so became a United States citizen. In July 1972 she applied for and obtained a United States passport at Honolulu, exhibiting a passport issued in 1967. In the application she gave her surname as Tanielu, and listed her occupation as librarian. As to her travel plans, she stated that she intended to move to Australia and live there permanently.

In the fall of 1972 she married M[redacted] R[redacted], an Australian citizen, and in December 19[redacted]ve[redacted]h him to Australia. Sometime in 1973 she applied for naturalization under what she alleges was the "extreme coercion" of her husband. She particularized the circumstances under which she applied for naturalization as follows:

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

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 --

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

> At the time I was extremely ill with a gall bladder operation scheduled in a few days. I didn't want to naturalize but Mr. R[redacted] threatened to abandon me in Sydney without any funds and too ill to work until after the operation. I telephoned the American Consulate, told them my situation and they said there was no need to worry since the Australian Government was required to take my passport when I applied for naturalization and return it to them--at which time they would send me a letter asking me if I was sure I wanted to give up my citizenship; I would then have 30 days to reply before losing my U.S. citizenship. This was a great relief to me so I went ahead with the Australian naturalization application, the gall bladder operation and eventually the naturalization ceremony--all the while waiting for the letter from the U.S. Consulate. It never came and so far as I can ascertain from Consulate records, it was never sent....

The record shows that on September 5, 1973 the Minister of State for Immigration issued a certificate of Australian citizenship in appellant's name. The certificate stated that the grant of citizenship would become effective upon her swearing or affirming allegiance to Queen Elizabeth the Second. On September 12, 1973 at Sydney appellant made the following affirmation and was granted Australian citizenship:

> I, ..., renouncing all other allegiance, swear by Almighty God or solemly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfill my duties as an Australian citizen. 2/

2/ There is no copy in the record of the text of the affirmation appellant made. However, Schedule 2 of the Australian Citizenship Act of 1948-1969, as amended, required that applicants for naturalization make the above-quoted oath or affirmation.

After naturalization, appellant states that she attended teachers college in Sydney. A Passport and Nationality Card (form FS **558)** relating to appellant maintained by the Consulate General at Sydney bears the following notation: "March 18, **1974:** Subject took Aust. naturalization in September **1973** while living in Bondi. She has now moved to Qld. /Queensland/ and requests file to be sent to Brisbane when ltr. from Dept. Immigration arrives." Under the foregoing entry appears the following notation: **"1/3/74:** Address: Griffiths Uni. Library, Brisbane, Qld." The Consulate General at Sydney apparently instituted no loss of nationality proceedings on the basis of appellant's visit or telephone call **of** March **18, 1974.**

The next recorded development in appellant's case occurred in Brisbane. According to a report the Consulate at Brisbane later made to the Department, appellant called at the Consulate on May 19, **1975** and inquired whether she might have her United States citizenship restored "because she had obtained Australian nationality through naturalization on September **12, 1973."** At the time of her naturalization, the Consulate reported, she was resident in New South Wales, which is in Sydney's consular district.

The Consulate's report continued:

> Since she stated she had not received any notice concerning possible loss of nationality of the United States, we asked the Consulate General in Sydney to ascertain from the Department of Immigration regarding her status and received the attached letter and documents.
>
> This consulate is holding Mrs. R[redacted]'s passport No. C **1262404** issued on [redacted]0, **1972** at Honolulu under F[redacted] L[redacted] T[redacted] and subsequently amended to read in married name, F[redacted] L[redacted] R[redacted] on October 19, **1972** in Honolulu.

Attached to the Consulate's report were: a copy of appellant's certificate of Australian citizenship; an undated letter from the Department of Immigration to the Consulate General at Sydney (received by the latter office on June **17, 1975),** confirming appellant's naturalization and transmitting appellant's U.S. passport which she had surrendered to the Australian immigration officials; and a certificate of loss of United States nationality

executed on July 9, 1975 in the name of "F[redacted] L[redacted] R[redacted]- [redacted] formerly T[redacted]." 3/

On September 2, 1975 the Department sent the following instruction to the Consulate at Brisbane:

> Mr. /sic/ R[redacted], at the time she visited the Consulate, should have been requested to complete a citizenship questionnaire. She should be invited to again visit the Consulate and sign a Uniform Loss of Nationality Letter. If this is not possible a letter should be mailed to her.

Brisbane replied as follows on November 25, 1975:

> Mrs. R[redacted] stated during her visit to the Consulate that she would come in person within three months to check on the status of her case, but to date she has not appeared. We inadvertently did not record her complete mailing address on Form FS-558, therefore, we are unable to contact her and have her comply with the Department's instructions.
>
> Unfortunately, her current whereabouts is unknown to all of our contacts.

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 fore state has lost his United States nationality under any provision chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the fac 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 b the Secretary of State, a copy of the certificate shall be forwar to the Attorney General, for his information, and the diplomatic consular office in which the report was made shall be directed tc forward a copy of the certificate to the person to whom it relate

The Department pointed out to the Consulate in December 1975 that the letter from the Department of Immigration confirming appellant's naturalization had given an address for her in New South Wales. The Consulate accordingly wrote to that address, but reported to the Department in January 1976 that it had been unable to reach appellant there. 4/ On February 26, 1976 the Department approved the certificate of loss of nationality that the Consulate at Brisbane had executed in appellant's name. Approval Of the certificate constitutes an administrative determination

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4/ In a letter to the Board, dated November 17, 1985, appellant made the following comments about the way her case had been handled in Sydney and Brisbane:

> ...if Mr. Morimoto [Consul at Brisbane] had:
>
> 1. told me when I first went into his office that I had not yet lost my citizenship until a Certificate of Loss was sent to me
>
> 2. had asked me to complete a citizenship questionnaire (see operations memorandum to him of September 2, 1975)
>
> 3. had taken some action to verify (or disprove) my claim that I had never had a [redacted] to reply to a query that I was entitled to receive with regard to my intentions, since I never received it
>
> 4. had taken proper clerical action to get a contact address for me in Brisbane (or bothered to find out from Sydney Consulate that they knew I was at Griffith University--where I was for over a year or used my Brisbane post office box which shows on a copy of a consulate card--undated)

none of this would have happened. I could have sorted the matter out back in 1974 or 1975. I would never have lost my citizenship, this appeal would not be necessary nor would the debate about jurisdiction be necessary. Of course, going back to the real beginning, if the Sydney Consulate had sent the 'letter' as required, on time, in the first place there would be no situation at all. I actually was at the address known to the Consulate for several months after naturalizing.

of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The Department dispatched a copy of the approved certificate to Brisbane for the Consulate to forward to appellant. The Consulate received the certificate in April 1976, and noted on appellant's FS 558 form: "Could not send out as we have no address. Held in files. Ppt. destroyed. ot /presumably "ot" stands for initials of consular officer or employee who made the entry/."

Appellant states that in December 1975 she felt desperate because she seemed to be getting nowhere with her efforts to get her United States citizenship restored. Accordingly, she asked an American citizen son in Taiwan to sponsor her for immigration to the United States. An immediate relative petition was approved, but appellant did not avail herself of the petition "because seven months later I moved to Taiwan and intended to take up the citizenship restoration fight from there...."

In August 1976 appellant visited the United States Embassy at Taipei to discuss her citizenship case. The Embassy informed the Consulate General at Sydney (copying Brisbane and the Department) that appellant had approached the Embassy regarding possible loss of her United States nationality, and "if citizenship has indeed been lost, about applying for an immigrant visa as the parent of an American citizen." Appellant, the Embassy said, was travelling on an Australian passport. The Embassy added that to appellant's knowledge, no certificate of loss of nationality had been prepared. The Embassy requested that it be informed of the status of appellant's case.

Brisbane informed Taipei that the Department had **approved** a certificate of loss of nationality which had been retained at Brisbane since her whereabouts were unknown. Brisbane sent the case file and appellant's copy of the certificate to Taipei later in August. Appellant acknowledges receiving the certificate under cover of a form letter from the consul at Brisbane in which the procedures for taking an appeal to the Board of Appellate Review were set forth.

Shortly after she received the certificate she left Taiwan and spent the rest of the year travelling in Asia, returning to Australia in 1977. She was then employed by the Australian Public Service in Darwin. Her marriage to R[redacted] was terminated, and in 1980 she married R[redacted] C[redacted], an Australian citizen.

There is no record of any official dealing between appellant and United States authorities from August **1976** until April 1985 when Mrs. [redacted] visited the Consulate General at Sydney to inquire about taking an appeal. She entered an appeal on June **24, 1985.**

II

The first issue we must decide is whether the Board may entertain an appeal entered more than eight years after appellant was informed that the Department of State determined that she lost her United States nationality by performing a statutory expatriating act. 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 suficient 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. 5/

Consistently with the Board's practice in cases where a determination of loss of nationality was made prior to November **1979,** the foregoing limitation will govern in this case. 6/ 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.

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

6/ 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.

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.

In her reply to the Department's brief Mrs. C[redacted] contended that her appeal should be deemed to have been filed within a reasonable time after she was notified of the Department's determination of her expatriation. Her experience with the consular offices involved in her case had convinced her that "no matter what I did I would receive shabby treatment and negative results." 7/ It therefore appeared reasonable to her that she should give up hope until something new happened "to encourage me again." Her statement in reply to the Department's brief continues.

7/ She amplified this assertion as follows:

> It was my sincere belief that the appeal process was useless, since it is a very complex procedure and I had failed several times in 1973, 1974, 1975 and 1976 to achieve restoration of my citizenship through what seemed to be a straight forward sorting out of clerical and postal errors and problems.
>
> Consulates in Sydney, Brisbane and Taipei had let me down by acknowledging and documenting (the proof is in your own records) my claim of never receiving the 'letter' but had not taken any steps to sort out the original problems and perhaps solve it. I was very disgruntled with them.
>
> It is not 'unreasonable' then, that I failed to approach their parent organization, the State Department with an appeal that I believed to be useless.

> Not only did I not get any assistance, but through communications problems, which may have been no one's fault, the American government failed to keep me adequately informed as to what they were doing, where I stood and what I could do to help myself.
>
> Given this background and given my disappointment and shock when I was handed the Certificate of Loss of Nationality in Taiwan, instead of the help I had been led to expect at that point that I was going to get at last; coupled with my difficult personal, emotional, financial, residential and employment circumstances that lasted for some time---it seems 'reasonable' to me that I had a very negative reaction and judged the situation to be hopeless and gave up.

From September **1976** to January **1977** she was travelling in Asia to try to find a place to live so that she would not have to return to Australia. "I was not in a settled situation where I could make an appeal." From **1977** to **1984** she was "thousands of miles from the nearest consulate (although I did make a few attempts to open up the matter again with phone calls to the Melbourne and Sydney Consulates (Brisbane being closed)." Since she was allegedly forced by circumstances to retain her Australian citizenship in order to hold her job with the Australian Government, "I made no further substantial moves toward restoration of citizenship until **1985**." By **1985**, however, she states, Australian citizenship was no longer a requirement to hold the kind of job she occupied; she could contemplate retiring on a pension in two more years; her husband finally agreed to retire with her in the United States; her son, a lawyer with the United States Department of Justice, advised her she might have a valid case for appeal.

So, appellant stated:

> I went to Sydney in April **1985** and was able to see a sympathetic and helpful consular officer, who for the first time encouraged me to appeal and for the first time provided me with a record of my contacts with their office and Brisbane, so I could begin to put the picture together with some understanding and logic.

We do not find persuasive appellant's reasons for not seeking earlier relief from the Board; her reasons do not, in our

judgment, constitute good cause for the delay. Good cause is defined as a substantial excuse, one that affords a legal excuse. Good cause depends on the circumstances of the particular case, and finding its existence is in the main a matter for the discretion of the body before which a proceeding is brought. Black's Law Dictionary, 5th Ed. To excuse a delay an appellant must show he was confronted with an event beyond his immediate control that to some extent was unforeseeable. Wray v. Folsom, 166 F. Supp. 390 (D.C. Ar. 1958); Manges v. First State Bank and Trust Co., 572 S. W. 2d 104 (Tex. Civ. App. 1978); Syby v. Department of Civ. Serv., 66 N.J. Super. 460, 169 A. 2d 479 (1961) Becker v. Smith, 237 Wisc. 322, 296 N.W. 620 (1937).

At the time she was informed of the Department's determination that she had expatriated herself, Mrs. C[redacted] was also informed of her right to take an appeal to this Board. She took no action to assert that the Department's action was contrary to law or fact until over eight years later, allegedly on the grounds that it would be futile to challenge the Department's decision. That is hardly a viable excuse. Plainly, Mrs. C[redacted] was not inhibited by forces over which she had no control from taking timely action. Any obstacles that stood in her way were solely of her own making. She had no basis for assuming that the Board could not or would not judge her complaint fairly.

The period of reasonable time began to run in Mrs. C[redacted]'s case in August 1976 when she received the Certificate of loss of nationality, not nine years later when she finally decided it would be advantageous to take an appeal. The rule on reasonable time posits that one will act within a flexible but circumscribed period of time, account being taken of the need for adequate time to prepare an appeal. But the rule does not countenance that a party may decide for himself when to take an appeal. See In re Roney, 139 F. 2d 175 (7th Cir. 1943). To paraphrase the holding of the court In re Roney, a party's right to take a particular action must be exercised within the period provided for (in that case, as here, within a reasonable time after the occurrence of a certain event); at the expiration of that period the right is extinquished. "Any other construction would preclude finality in determining the right of the parties; in fact it would leave the gates wide open for litigation without end." 139 F. 2d at 177. If in 1977 or 1978 she sincerely believed her case had been mishandled by the several consulates she should have acted promptly while the recollection of the events leading to the Department's determination of her expatriation was fresh in the minds of all concerned.

Not only has appellant produced no supportable reason for the delay in taking an appeal, but also the delay raises the issue of prejudice to the opposing party - the Department of State. If we were to allow the appeal, the Department would be called upon to carry an unfair burden of proof. Appellant alleges, among other things, that she was prejudiced by the way the consular offices concerned processed her case, and that she was coerced to become an Australian citizen. Nine years after the Department decided that she had expatriated herself and eleven years after her naturalization, the Department's ability to carry its burden of proof-to attempt to refute appellant's claims - is indisputably made more difficult precisely because appellant has, without colorable justification, delayed so long to assert a claim to United States citizenship.

In the particular circumstances of this case, the interest in finality and stability of administrative determinations must be accorded decisive weight. Where an appellant, who from the beginning knew she had lost her nationality and that she might appeal the determination of that loss, belatedly comes forward without adducing convincing reasons for the delay and requests that the Department's decision be reviewed, the Board has no valid basis for entertaining that request.

III

It is our conclusion that the appeal was not entered within a reasonable time after appellant received notice that the Department had determined that she expatriated herself. Since the appeal is time-barred, the Board is without jurisdiction to hear and decide it. Accordingly, we dismiss the appeal.

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member