January 5, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] L[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, D[redacted] L[redacted], expatriated herself on August 2, 1982 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 threshold issue presented by the appeal is whether it was filed within the limitation prescribed by the applicable federal regulations. We find the appeal barred by the passage of time and therefore must dismiss it for lack of jurisdiction.

**I**

Ms. L[redacted] was born at [redacted] Since her father was a United States citizen, she acquired United States nationality at birth, Having been born in Mexico, she also acquired Mexican citizenship at birth. Appellant was extensively

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1/ Prior to November 14, 1986, section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1491(a)(2), read as follows:

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 --

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

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "Shall lose his nationality by"; and amended paragraph (2) of section 349(a) by inserting ",after having attained the age of eighteen years" after "thereof".

documented as a United States citizen by the Embassy at Mexico City. The Embassy executed a report of her birth in 1967 and issued her a card of identity. In 1972 and 1977 it issued her new identity cards. In 1977 Ms. [redacted] obtained a Mexican passport. She renewed it in 1981. In early July 1982 Ms. [redacted] visited the Embassy with her father for counseling regarding her citizenship status. On July 12th she executed an affidavit which read in pertinent part as follows:

> It is my earnest desire to maintain my American citizenship, however, certain regulatory pressures do not allow me to do so at the present.
>
> The nature of my father's job makes it imperative for my family to live in Mexico until he retires, which will be more or less in another four years. I do not wish to be separated from my family since I am morally and economically dependent upon them. This is the reason why I have never planned to continue my immediate education abroad.
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> The Universidad Iberoamericana in Mexico City, where I plan to continue my education, being my father a foreigner, requires presentation of one of these three:
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> 1) Mexican naturalization Certificate, which I would be able to obtain within one week.
>
> 2) Student visa.
>
> 3) Resident visa.
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> The proceedings to obtain the last two are very slow and, in the case of the latter, almost impossible to obtain at present.
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> The starting date at the University is August 4, 1982. They will wait three months for me to present the citizenship document.

On behalf of a total comprehension of my career I have been advised to work in an Industrial Designer's studio. I would not be able to do this with a student or resident visa.

Living with a student or resident visa, the Mexican Government will not officially recognize the conclusion of my studies.

It is important to emphasize that during the first five years of residence in Mexico under a resident visa, the maximum amount of time allowed out of the country, by the Mexican Government, is a total of 90 days during the last year, which would limit my opportunities for studying a Masters Degree abroad.

My utmost desire is to retain my American Citizenship. In view of the previous considerations, the circumstances force me to renounce under duress, which I feel is an unfair ruling against a minority.

A consular officer made the following report of appellant's visit to the Embassy on July 15th:

July 15, 1982--Dtr D[redacted] presented affidavit to effect that she believes she has no other choice but to apply for a CMN but does not wish to lose US citizenship. She had come in last week (July 8) for counseling along with her father. She is taking a course at a Mexican University which requires practical work experience. She wishes to study here in order to be with her family. She stated she had investigated and that if she attends university here on a student visa, the Mexican Government will not permit her to work, and that if she obtains an FM-2 on the basis of being dependent upon her parents, she also will not be permitted to work, which would mean that she would not be able to complete the course work requirements of the University. She further states that the FM-2 requirements for the last year before she could acquire full immigrant status would not allow her to be absent from Mexico for more than 90 days which would prevent her from studying outside of Mexico for a Masters degree during that year. Believe

> she is sincere in not wanting to lose US citizenship, although I am not sure that she would not be allowed to work on a student visa when such work is a requirement of the university course in order to obtain a degree as it appears that Americans studying medicine and engineering here are (or at least have been) allowed to do such required work. She may have been misinformed regarding this. On the other hand, she also said she did not wish to have to go through all the red tape necessary to obtain an "amparo" to permit her to work in her chosen field as a foreigner in Mexico. It would be necessary to obtain an amparo each year. as [The initials are those of consular officer Ann Sheridan].

On July 20, 1982 Ms. [redacted] applied for a certificate of Mexican nationality (CMN). In the application therefor she expressly renounced her United States nationality and all allegiance to the United States, She further declared her obedience and submission to the laws and authorities of Mexico. A CMN was issued in Ms, [redacted] name on August 2, 1982. The Department of Foreign Relations informed the Embassy on September 28, 1982 that Ms. [redacted] had acquired a CMN. Shortly before the Mexican authorities confirmed that appellant had obtained a CMN, she completed at the Embassy a form for determining United States citizenship and, for information purposes, an application for a passport and registration. A number of months passed while the Embassy sorted out details of appellant's case. Then on August 18, 1983 a consular officer executed a certificate of loss of nationality in appellant's name, as required by law. 2/ The consular officer certified that she acquired the nationality of both-the United States and Mexico at birth; that she made a formal declaration of allegiance to Mexico; and concluded that she thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act. A consular officer forwarded the certificate to the Department under cover of the following memorandum:

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2/ 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

> Ms. L[redacted] is currently studying in Mexico. To "round-out" her studies she wished to work part-time in her field. This was not part of her degree requirements, but did require her to either solicit a work visa as an American citizen, or to obtain the CMN. She was allegedly told by friends of her parents that it was very difficult to obtain a work visa. She therefore solicited the CMN.
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> She admits that it was not necessary to work in order to graduate, and she acknowledges that U.S. citizen students do get degrees in her field without renouncing their citizenship. Ms. L[redacted] had a choice between U.S. citizenship, and working to "round out" her degree studies. She chose the latter.
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> In view of the above, and despite Ms. L[redacted]'s contention that she 'was forced to renounce for reasons explained in the attached affidavit,' it is the Consular Officer's opinion that she intended to renounce U.S. citizenship at the time she solicited the CMN. In addition, given the alternatives available to her, the renunciation appears to be voluntary. Approval of the CLN issued in her name is therefore recommended.

The Department approved the certificate on September 27, 1983, 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. Ms. L[redacted] entered an appeal by letter to the Board dated May 13, 1985. She grounds her appeal on several considerations. She states that recently she learned that "perhaps all facts were not considered....I do not believe that the case was completely presented. I never wanted to transfer allegiance from the United States to Mexico." In asserting that she never intended to relinquish her United States citizenship she relies heavily on the fact that before she applied for a certificate of Mexican nationality she executed an affidavit asserting that she did not wish to lose her United States nationality, "but because of rulings by the Mexican Government, I must have a Certificate of Nationalization [sic] in order to complete and use my university studies and degree."

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2/ Cont'd.

the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the repor was made shall be directed to forward a copy of the certificate to th person to whom it relates.

II

In order to consider this case on the merits we must first establish that the Board has jurisdiction to entertain the appeal. Jurisdiction depends on our finding that the appeal was timely filed, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1961). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b)(1) of Title 22, code of Federal Regulations, 22 CFR 7.5(b)(1), provides as follows:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under subpart C of Part 50 of this Chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

22 CFR 7.5(a) provides in pertinent part that:

> ...An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

The Department approved the certificate of loss of nationality in this case on September 27, 1983. The appeal was entered on May 13, 1985, eight months beyond the allowable period. We must determine whether in the circumstances of this case Ms. [redacted] has shown good cause why she could not have taken an appeal within the permissible time.

It is settled that good cause means a substantial reason, one that affords a legally sufficient excuse. See Black's Law Dictionary, 5th Ed. (1979). Good cause depends on the circumstances of each particular case, and the finding of its existence lies largely in the discretion of the judicial or administrative body before which the cause is brought. Wilson v. Morris, 369 S.W. 2d 402, (Mo. 1963). Generally, to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforeseeable. Manges v. First State Bank, 572 S.W. 2d 104 (Civ. App. Tex. 1978), Continental Oil Co. v. Dobie, 552 S.W. 2d 193 (Civ. App. Tex. 1977). Good cause for failing to make a timely filing requires a valid excuse as well as a meritorious cause. Appeal of Syby, 66 N.J. Supp. 460, 167 A. 2d 479 (1961). See also Wray v. Folsom, 166 F. Supp. 390 (D.C. Ark. 1958).

After the Board received Ms. L[redacted]'s appeal, the Chairman wrote to her to acknowledge its receipt. He noted that timely filin presents a jurisdictional issue, and urged Ms. L[redacted] to explain why she was unable to take an appeal within the prescribed limitation. In reply she wrote as follows:

> You have requested that I further explain why I did not request this action during the prescribed time period. I can only answer that I did not realize that I had the chance of following such a procedure until the matter of my sister's citizenship was discussed with Miss Mary Gerber, Consul in Charge of the Citizenship Section of the U.S. Embassy in Mexico, during the early days of May, 1985. Miss Gerber brought to my attention the review and appeal actions mentioned on the reverse side of my certificate of loss of U.S. Citizenship; unfortunately this alternative had completely escaped my knowledge.

Embassy records show that a copy of the approved certificate of loss of nationality was mailed to Ms. L[redacted] on October 4, 1983. She had not alleged that she did not receive the certificate shortly after it was mailed to her. The time limit on appeal - one year after approval of the certificate - and the procedures for taking ar appeal to this Board were clearly set forth on the reverse of the certificate sent to Ms. L[redacted]. She was thus on legal notice of loss of her nationality and how she might challenge the Department's decision of her expatriation. She did not act until May 1985.

We are unable to accept her explanation as legally sufficient to her explanation for the delay. No unforeseen circumstances beyo her control prevented her from acting promptly. She was acquainted with the personnel of the consular section of the Embassy, and although understandably emotionally upset (as she observed in her initial submission by receipt of the certificate of loss of nationality), she may not be heard to contend that such disappointment in itself deterred her from taking prompt action to find out what she might do to protest loss of her nationality - assuming she really was confused by the information given her about appeal procedures.

In her reply to the brief of the Department of State appella states that "I do believe that there is good cause for the Board to consider this appeal as will be explained in issues b and c, which follows, in addition to the statements made in my letter to the Boa dated May 13, 1986 [sic - 1985]." Appellant thus suggests that because her claim is meritorious it should be heard despite her

failure to show good cause why she could not have appealed earlier. It is not sufficient that a cause arguably be meritorious; for the cause to be heard it must be timely. Appeal of Syby, 66 N.J. Super. 460, 199 A.2d 749 (1961). 22 CFR 7.2(a) provides that "the Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it." The Board's authority under section 7.2(a), however, may not be construed so as to nullify other preconditions established by 22 CFR Part 7 for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed under section 7.5(b), or comparable provisions of predecessor regulations, Once the Board determines that it lacks jurisdiction over an appeal as time barred, then the only proper course is to dismiss the appeal.

A limitation on appeal is not a capricious condition; nor is it designed to suit administrative convenience. Its purposes are practical and designed to ensure that an appeal will be judged fairly. A limitation on appeal gives a party who considers himself aggrieved sufficient time to prepare a case showing wherein the Department of State erred in determining that he expatriated himself; it also ensures that a request fbr review of the Department's decision will be made while all parties concerned have clearly in mind the events surrounding the party's performance of the expatriating act. In this case appellant knew from the first, or must be considered to have known from the first, that she had the right to take an appeal. Nothing prevented her from acting in timely fashion.

III

The appeal not having been filed within the prescribed limitation and no legally sufficient excuse for untimely filing having been presented, the Board finds the appeal time-barred and not properly before the Board. Accordingly, we dismiss the appeal for lack of jurisdiction.

Given our disposition of the case, we are unable to reach the substantive issues presented.

Ala G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member