April 21, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: C[redacted] M[redacted] W[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, C[redacted] M[redacted] W[redacted] expatriated herself on June 11, 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 appeal having been entered nine years after the Department determined that appellant expatriated herself, a threshold issue arises: whether the Board has jurisdiction to hear and decide the case. Upon consideration of all the evidence, we conclude that the appeal is untimely and must be dismissed.

I

Mrs. W[redacted] (nee M[redacted] was born at [redacted] of United States citizen parents. She thus acquired at birth the nationality of both the United States and Mexico. The Embassy at Mexico City issued a report of appellant's birth in 1958. She attended American schools in Mexico City. In 1972 the Embassy issued her a card of identity. In the same year she acquired a Mexican passport, limited in validity to one year since she was then nearly 18 years of age.

1/ Prior to November 14, 1986, section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), read 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 --

. . .

(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 99-9[illegible] (approved November 14, 1986) amended subsection (a) of section [illegible] by inserting "voluntarily performing any of the following acts w[illegible] 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."

From September 1973 to April 1975 appellant attended the United States International University at San Diego, California. While living in California she obtained a United States passport at Los Angeles in March 1975. She returned to Mexico in the spring of 1975 and in May executed an application for a certificate of Mexican nationality (CMN). In the application she made a formal declaration of allegiance to Mexico, pledging adherence and submission to the laws and authorities of Mexico, and expressly renounced her United States nationality and allegiance to the United States. A CMN in appellant's name was issued on June 11, 1975. A month later the Mexican Department of Foreign Relations informed the Embassy that appellant had obtained a CMN and enclosed a copy thereof. In the Spring of 1976 the Embassy seht a copy of the diplomatic note to the Department of State. Appellant married [redacted] on July 9, 1976.

The Department instructed the Embassy to determine whether Mrs. W[redacted] "had lost her United States citizenship" (presumably to process her case as one of possible loss of nationality). Accordingly, on September 15, 1976 an Embassy official wrote to Mrs. W[redacted] to inform her that she might have lost her citizenship; to request that she complete an enclosed form to facilitate determination of her citizenship status; and to invite her, if she wished to do so, to discuss her case with a consular officer. Mrs. W[redacted] visited the Embassy in early October 1976 where she was interviewed and surrendered her United States passport. She returned to the Embassy on October 22, 1976. At that time she executed under oath two sets of forms to facilitate determination of her citizenship status, spelling out the circumstances surrounding her acquisition of the CMN. She also completed, for information purposes, an application to be registered as a United States citizen. Her passport was returned to her, amended to reduce its validity to January 1977.

The consular officer who interviewed Mrs. [redacted] executed a certificate of loss of nationality in her name on October 29, 1976 in compliance with the requirements of section 358 of the Immigration and Nationality Act. 2/ The consular officer

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 the certificate shall

certified that Mrs. W[redacted] acquired the nationality of both the United States and Mexico at birth; that she made a formal declaration of allegiance to Mexico; and thereby expatriated herself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The consular officer forwarded the certificate to the Department under cover of a memorandum which reflected careful, comprehensive development of her case. It read in pertinent part as follows:

> On October 22 Mrs. [redacted] returned to execute the forms under oath. Mrs. [redacted] states quite emphatically she did not intend to relinquish her U.S. citizenship even though she fully understood she was making a declaration of allegiance to Mexico. She states that she did not believe her act was expatriating because of information she had received in the American community of Mexico City and because an information sheet published by the American Chamber of Commerce corroborated this belief. The latter information sheet was carefully reviewed with Mrs, [redacted] by the consular officer and as a result she agreed she had misread it; that in fact it quite clearly states that 'the oath of allegiance to Mexico coupled with a renouncement of U.S. nationality performed in completing an application for a certificate of Mexican nationality is ordinarily considered highly persuasive evidence of an intent to relinquish U.S. citizenship,'
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> Further in the Questionnaire it is noted that *Mrs,* [redacted] states, 'It was important that I retain Mexican citizenship at that time because I was planning to work and live here for several more years. . .I could not work here if I were not a Mexican citizen,' Further on in the Questionnaire [sic - we note?] Mrs. W[redacted]'s statement that, 'As I did intend to live in Mexico permanently when I did make the declaration, I did not opt for the alternative of refusing to make the declaration.. .'

2/ Cont'd.

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 personn whom it relates,

> In the consular officer's opinion, although Mrs, [redacted] undoubtedly mis-interpreted the American Chamber of Commerce information sheet, her other statements regarding her intent towards her U.S. citizenship at the time she made a meaningful declaration of allegiance to Mexico, are negated by her unequivocal statements that she was strongly motivated to preserve her Mexican citizenship in order to continue residing and working in Mexico, She states that she plans to remain in Mexico and work for approximately another year, and it is imperative that she do so as a Mexican citizen for the purpose of working, The consular officer inquired what Mrs. [redacted] would do about her Mexican citizenship should her U.S. citizenship be restored to her, She stated that until she and her husband are ready to leave Mexico, she will try not to use her Mexican nationality in any way other than the privilege it furnishes of working in Mexico,
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> ...
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> The Department's attention is called to the fact that the Embassy is processing the case of Mrs. [redacted] husband, H[redacted] [redacted] [redacted] simultaneously with her case. [The Department approved certificate of loss in his case on May 11, 1977.]
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> In the consular officer's opinion, the enclosed Certificate of Loss of Nationality should be approved.

The Department approved the certificate of loss of nationality on May 23, 1977, and the next day sent a detailed memorandum to the Embassy explaining why it decided that the certificate should be approved; essentially the Department agreed with the consular officer's analysis that the evidence of record supported a finding that Mrs. [redacted] intended to relinquish United States nationality. The Department's memorandum stressed that Mrs. [redacted] "should be fully informed of the appeal procedures, should she wish to contest the Department's finding."

The Embassy sent the approved certificate to Mrs. [redacted] on July 1, 1977, quoting in its covering letter the Department's memorandum and spelling out the procedures for taking an appeal to the Board of Appellate Review,

The Department's approval of the certificate of loss of nationality constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board. Mrs. W[redacted] entered the appeal on May 21, 1986.

Mrs. [redacted] contends that she signed the application for a CMN involuntarily; she had no choice but to get a Mexican passport. "At that point in my life, I could not give up my Mexican citizenship." She further alleges that she never intended to relinquish United States citizenship. "If I had intended to relinquish my U.S. citizenship I could have done so truly 'formally' in the presence of a U.S. consular officer."

II

Before proceeding, we must determine whether the Board has jurisdiction to hear and decide this appeal which was entered nine years after the Department approved the certificate of loss of nationality that was issued in this case. Timely filing is mandatory and jurisdictionl. United States v. Robinson 361 U.S. 220 (1960). If an appellant fails to comply with a condition precedent to the Board's going forward to determine the merits of his claim, i.e., does not bring the appeal within the applicable limitation and adduces no legally sufficient excu therefor, the appeal must be dismissed' for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

In May 1977 when the Department approved the certificate of loss of nationality that was executed in this case, the limitation on appeal was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality, 3/ Consistently with the Board's practic

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3/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60, 1967-1979, 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.

in cases similar to the one now before us, the standard of "reasonable time" will govern in this case rather than the present limitation of one year after approval of the certificate of loss of nationality which became effective in November 1979. 4/

Thus, under the time limitation that we find controlling, appellant was required to initiate her appeal within a reasonable time after receipt of notice of the Department's holding of loss of nationality. If appellant failed to take an appeal within a reasonable time, the appeal would be time barred and the Board would lack jurisdiction to consider and determine it.

Whether an appeal was taken within a reasonable time depends upon the circumstances in a particular case. A reasonable time means reasonable under the circumstances. Courts have held that a reasonable time means as soon as circumstances permit and with such promptitude as the situation of the parties and the circumstances of the case allow. This does not mean, however, as the courts have stated, that a party be allowed to appeal at a time of his or her own choosing. A protracted delay that is prejudicial to either party is generally fatal. Reasonable time begins to run from the date an expatriate received the certificate of loss of nationality, not sometime later when it becomes convenient to appeal. Although the question of a reasonable time will vary with the circumstances, it is clear that it is not determined by a party to suit his or her own purpose and convenience or when a party, for whatever reason, takes an appeal several years later after notice of his right to take an appeal. 5/ Limitations are designed to encourage the prompt ascertainment of legal rights and to afford protection against stale actions as a consequence of an unreasonable delay.

4/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b), November 30, 1979, provides as follows:

> (b) Time limit on appeal. (1) 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....

5/ See Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Ronev. 139 F.2d 175 (7th Cir. 1943); Appeal of Syby, 460 A.2d 749 (1961). See also Ashford v. Stewart, 657 F.2d 1053 (9th Cir. 1981):

> What constitutes reasonable time depends upon the facts of each 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. See Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1967-68 (10th Cir. 1980).

657 F.2d at 1055.

The record shows that *Mrs.* [redacted] received her certificate of loss of nationality in June 1977. Although she did not appeal until 1986, she asserts that she sought relief from the Department' adverse action in her case within a reasonable time after she received notice of the Department's action. First of all, she states that in June 1977 her husband, [redacted] went to Washington to discuss their cases with the Department and to request that the Department review its decision in their cases. (The Department determined in 1977 that [redacted] also expatriated himself in 1975 by making a formal declaration of allegiance to Mexico.) On June 23, 1977 Mr. [redacted] saw an official of the Bureau of Consular Affairs who noted in a memorandum for the record that: "I spoke with *Mr.* [redacted] who said he had been 'shocked' by the Department's decision in both his case and that of his wife, [redacted] He had come to Washington, he said, as soon as he could, to see if somehow the decision might be reversed."

It is evident from the record in *Mr.* W[redacted]'s case that from the outset the Department regarded his and his wife's cases as so closely related as to warrant handling them as one. 6/

After considering the cases of appellant and her husband for nearly three years, the Department declined to reverse its original decisions. In May 1980 it instructed the Embassy to inform the [redacted] that if they wished to contest the Department's determinations of loss of their nationality, they should take an appeal to the Board of Appellate Review. The Embassy sent a communication to that effect to Mr. W[redacted] on May 29, 1980. *Mrs.* [redacted] acknowledges that "we" received the Embassy's letter. She submits that the three years between 1977 and 1980 during which the Department had their cases under review should not be ,counted in reckoning the delay in taking her appeal. As she observed to the Board:

> ...A full three years had elapsed between the receipt of our certificates of loss and the final decision as to the administrative review and/or appeal for our case. I consider these first three then, as an admissable [sic] lapse of time without having initiated any appeal as we were "on hold" for this period of time; and in contact with the State Department directly and through the Embassy.

6/ In its brief the Department observ[redacted] all the documentation from the Department submitted by *Mrs.* [redacted] was written solely to her husband. The Department wondered why she never received any letters. Appellant correctly pointed out in her reply to the Department's brief that "we were assuming our case was being treated as one."

Even granting that *Mrs.* [redacted] through her husband, endeavored for three years to obtain an administrative review of her case, we are faced with the question of whether her further delay of six years (from 1980 to 1986) before filing an appeal is reasonable.

Mrs. [redacted] submits that her further delay of six years in filing an appeal is excusable because "three dramatic changes took place in our lives within one year and the emotional and financial strain was severe." In June 1979, she states, her husband was offered an opportunity to open a restaurant and they were required to move to Cozumel.

> ...It was a good opportunity in the long run financially, [she stated in her opening submission] but the first couple of years were very difficult for us, money-wise. We left our home since birth, which was Mexico City, and made a drastic change in our lives just by simply changing our place of residence. Along with this important change, came the stress and uncertainty of'opening a new business with very little experience in the restaurant business, as my husband had only worked for the chain less than a year. .Thirdly, we had our first and only son in March 1980.

She then amplified why she felt inhibited from acting sooner to ask the Board to review her case.

> Also while in Cozumel from 1979 through August of 1985, we were very isolated and had no available contact with any U.S. consular office or embassy and travelled to Mexico City very rarely in the beginning.
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> The first three years of our life in Cozumel then, were very time consuming, financially and emotionally unstable, and quite frankly, the thought of working on an appeal to the State Department on our citizenship case was quite far from our minds.

She was also influenced in not taking an appeal sooner, she said, by the statement on the certificate of loss of nationality indicating that unless she had new or additional evidence to submit, the chances that her appeal would be successful were slim. "This was obviously a very discouraging state of affairs", she wrote,

"and with our lack of funds and the emotional strain we were going through, the issue of an appeal was put aside for the time being."

From 1983 to 1986, when finally she had the time and funds to initiate an appeal, her husband's behavior became irrational and irresponsible. He felt "threatened and paranoid when any mention was made of a possible renewal of efforts to get our citizenship back, as he understood this to mean my desire was to move to the U.S." Her husband did not want to leave by then a successful business. "This meant, of course, that I would have had to initiate....an appeal in secret from him which would have been difficult, if not impossible."

In July 1985 after she and her husband had decided they would return to Mexico City, appellant reportedly visited the Embassy where she spoke to a consular officer. After reviewing her file that official suggested an appeal, "but referred to a possible time bar because so many years had elapsed."

We are not indifferent to the evidently stressful period of appellant's life from 1980 to 1986. We do not, however, find the considerations she has adduced legally sufficient to excuse a further six-year delay in taking the appeal.

Appellant knew from 1977 onward that she had expatriated herself, and that an appeal procedure was available to her to contest the Department's determination of loss of her nationality. Appellant has, with apparent conviction, stated that she always attached the highest value to her United States nationality. She thus had knowledge and reason to act in timely fashion to protest loss of her citizenship. In the first three years after 1980 appellant concedes she was too busy to pay much attention to recovering her United States nationality. This simply is not a legally sufficient reason to excuse a delay in taking an appeal. In the last three years, 1983-1986, she alleges that her husband's negative attitude toward appealing and his mental and physical problems deterred her from acting. Appellant was not, however, without alternatives in such a situation. She had the choice of mollifying him by not acting, as she apparently did for several years, or she could have risked antagonizing him by making up her own mind and initiating an appeal. She has not shown that her husband prevented her from so acting by force or threat of force. We must, on the evidence presented, therefore assume that as a matter of law she was free to initiate an appeal, had she really been determined to do so. In any event, she could at least have written to the Board and entered a timely appeal, asking leave to move slowly in prosecuting her appeal because of her husband. At bottom, appellant, not forces over which she had no control, bears the responsibility for delay in taking an appeal.

In our opinion, it is arquable that the delay of six years is prejudicial to the Department-because if we were to allow the appeal,

the Department would undoubtedly have difficulty in carrying its burden of proof. Appellant has raised certain matters that on their face are relevant to the issue of her intent to relinquish United States nationality. Among these are her allegations that she was sent the application for a certificate of Mexican nationality by mail and executed it without giving it much thought; the fact that she applied for and obtained a United States passport only two months before she applied for the certificate of Mexican nationality; and that she was treated unfairly by the Mexican Department of Foreign Relations and the United States Embassy. The Department's ability to address the foregoing matters nine years after the relevant time is obviously seriously diminished. So, in the circumstances, we believe the interest in finality and stability of administrative decisions should be served in this case.

In sum, there has been no showing that appellant required nine or six years to frame and present a proper appeal, or that she was constrained by forces over which she had no control from making a timely application to the Board. In the circumstances, we find that the delay whether measured as nine years or six years to be unreasonable.

III

Upon consideration of the foregoing, we conclude that the appeal is time-barred and not properly before the Board. It is hereby dismissed. Given our disposition of the case, we do not reach the substantive issues that are presented.

Alan G. James, Chairman

Edward G. Misey, Member

G. Jonathan Greenwald, Member