February 2, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

L[redacted] R[redacted] R[redacted] appeals an administrative determination of the Department of State holding that she expatriated herself on February 21, 1961 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 Department determined in 1964 that appellant had lost her nationality. She entered an appeal from that determination in 1985. Initially we must decide whether the Board may assert jurisdiction over an appeal that has been so long delayed. It is our conclusion that the delay was unreasonable and that the appeal is therefore barred. Lacking jurisdiction to consider the appeal, we will dismiss it.

I

Appellant acquired United States citizenship by birth at [redacted]. By virtue of her birth abroad to Mexican citizen parents she also acquired Mexican nationality at birth. When she was 8 years old her parents took her to Mexico. She has resided there since. Appellant married A[redacted] R[redacted], a citizen of Mexico, in 1947.

In August 1960 Mrs. F[redacted] applied at the Embassy in Mexico City to be registered as a United States citizen. Much later she explained why she sought registration. 2/

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 99-653 (approved November 14, 1986) amended subsection (a) of 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 ".

2/ Affidavit of March 11, 1986.

> I did not have any kind of citizenship document, either Mexican or American, and the increasing problems which I was having with the authorities made it clear that I should make some effort to obtain a citizenship document. Therefore, I applied to the American government. After I made my application, the person at the American Embassy who was handling my case told me that I would have to wait until they completed some sort of an investigation. 3/ When I later inquired about the case, [November 1960], I was told that the investigation was still pending, I was told that I would be notified by someone at the American Embassy when the investigation was completed and that there was nothing further for me to do.

The Department approved appellant's application for registration in December 1960 and sent authorization to document appellant as an American citizen to the Embassy by air priority. Appellant states, however, that she was never notified by the Embassy of the results of the investigation, "I never received any notice whatsoever that they had approved my application. I never received any notice whatsoever that they had denied my application," 4/.

Lack of response from the United States [redacted]thorities left her confused about her citizenship status, Mrs. R[redacted] asserts, She was, she states, under increasing pressure to do something to get her papers in order. "Since the American government did not respond to my application, I felt myself forced to resort to the Mexican government, and I filled out the application for the Mexican certificate of nationality. My application was approved, and I received my papers sometime in 1961." 5/

In the autumn of 1963 the fact that Mrs. R[redacted] had obtained a certificate of Mexican nationality came to the a[redacted]ntion of the Embassy. (The record does not disclose how this came about,) On December 9, 1963 the Embassy sent a diplomatic note to the Department of Foreign Relations, requesting information about Mrs. R[redacted], whose citizenship status, the Embassy stated, was under conside[redacted]tion at the Embassy. The Department of Foreign Relations replied by diplomatic note dated February 10, 1964, stating that Mrs. R[redacted] had applied for

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3/ Appellant is correct, The record shows that an investigation of several months ensued to establish appellant's identity and her claim to United States citizenship.

4/ Affidavit of March 11, 1986.

5/ Id.

a certificate of Mexican nationality on February 21, 1961; and that in making application she had renounced her United States nationality and pledged obedience to the laws and authorities of Mexico. A certificate of Mexican nationality was issued to Mrs. R[redacted] on July 11, 1961, the note further stated.

An Embassy officer executed a certificate of loss of nationality in appellant's name on February 16, 1964. 6/ The officer certified that appellant acquired United States citizenship by birth in the United States; that she acquired Mexican nationality by birth abroad to Mexican citizen parents; 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 Embassy dispatched the certificate to the Department together with the note of the Department of Foreign Relations and a copy of appellant's certificate of Mexican nationality.

On April 27, 1964 the Department sent the following instruction to the Embassy:

> Mrs. R[redacted] is considered to have lost the nationality of the United States on February 21, 1961 under the provisions of section 349(a)(2) of the Immigration and Nationality Act. The provision of section 349(b) of the Act is also applicable.

6/ 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.

> The determination should be considered as a preliminary determination of loss of nationality. The Embassy is requested to follow the pertinent procedures in the enclosed circular of new procedures which are applicable in this case, 7/

In accordance with the provisions of the aforementioned circular, the Embassy sent the following letter to Mrs. R[redacted] on April 30, 1964:

> The Department of State has made a preliminary decision that you lost nationality of the United States on February 21, 1961, under the provisions of section 349(a)(2) of the Immigration and Nationality Act.
>
> The decision reached by the Department is supported by evidence that you took an oath of allegiance to Mexico on February 21, 1961, thereby expatriating yourself under the cited section of the law. Such evidence consists of a copy of your certificate of Mexican nationality and a note from the Ministry of Foreign Affairs stating that you took an oath of allegiance to Mexico on the above mentioned date.

7/ The reference is to circular instruction, CA-11496, May 6, 1964, to all diplomatic and consular posts. In submitting a copy of the circular on November 12, 1986, in response to the Board's request, the Department stated that:

> The Board will note that this circular was approved on April 21, 1964 but was officially transmitted to posts on May 6, 1964. In the meanwhile since Mrs. R[redacted]'s case had come to the Department's attention an advance copy of the instructions was sent directly to the post, The Board will also note that, according to the hand written remark on the top of the first page, this circular was cancelled on June 11, 1965 by TL:CP-15 which incorporated the instructions into the Foreign Affairs Manual.
>
> This circular established a new procedure of sending notice of a Preliminary Decision of a holding of loss of nationality inviting the person to present evidence or make statements prior to a final decision. The person was to be told that he or she had 60 days in which to provide this to the post.

> You are informed that you have sixty (60) days from the date of this communication to submit any additional information or evidence which in your opinion would warrant consideration before a final determination is made in your case. If you do not intend to oppose the decision, you should so advise the Embassy which will be glad to receive any reply or comments you desire to make.
>
> In the event you fail to submit the information or evidence specified, or give notice of your intention to do so, the decision in your case shall become final.

The Embassy informed the Department on July 6, 1964 that Mrs. R[redacted] had not replied to its April 30th letter. Accordingly, the Embassy recommended that the Department approve the certificate of loss of nationality previously submitted. The Department approved the certificate on July 20, 1964 and on the same day sent a copy of the approved certificate to Mexico City for the Embassy to forward to Mrs. Romo.

Eighteen years later, on December 28, 1982, an attorney representing Mrs. R[redacted] wrote to the Passport Services of the Department to request release of records pertaining to her citizenship. "We seek," the attorney wrote,

> a certified copy of any records relating to any determination that my client has lost her United States citizenship or a certificate of non-existence of such record, if applicable.
>
> My client was born in the United States, but has resided most of her life in Mexico. Due to numerous changes in the state of the law, we are unclear whether or not she remains a United States citizen today. In order to explore her citizenship claim, I will need to know the existence of any records which might exist on the issue.

Passport Services replied on February 22, 1983 as follows:

> A serach [sic] of our card files fails to show any record regarding M[redacted] L[redacted] R[redacted] R[redacted].
>
> American citizens in general **may** remain abroad idefinitely [sic] without losing their United States citizenship. Under nationality laws in

> effect at the present time, citizenship is not lost solely by foreign residence, The voluntary acts which may cause loss of citizenship are enumerated in section 349(a) of the Immigration and Nationality Act of 1952.
>
> The Department of State recommends that all United States citizens residing abroad register at the nearest American consular office in order that they may be informed of any change in the laws affecting their citizenship.

On April 2, 1985 Mrs. R[redacted] applied for a passport at San Diego. She attested that she had'not performed any of the statutory acts of expatriation listed on the reverse of the passport application, and presented a Mexican passport as proof of her identity. [4]

The Department denied her application by letter dated September 3, 1985. The Department stated that it had reviewed the brief she submitted in support of her application, and had concluded that its 1964 decision that she expatriated herself should stand. She was advised that if she was interested in appealing the Department's determination of loss of her nationality, she might direct inquiries *to* the Board of Appellate Review,

An appeal was entered on November 25, 1985 by new counsel for appellant,

II

A threshold issue is presented here: whether the Board may entertain an appeal entered twenty-one years after the Department of State determined that appellant lost her United States nationality.

The Passage of so many years might, of itself, warrant our dismissing the appeal. as untimely. Nonetheless, we are prepared to consider whether there might be any extenuating reasons why we should entertain the appeal.

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 1964 when the Department determined that Mrs. [redacted] had expatriated herself, the Board of Appellate Review did not exist. There was, however, a Board of Review on the Loss of Nationality of the Passport Office which had jurisdiction to hear and decide appeals taken by individuals who had been found to have expatriated themselves.

In 1964 there was no specified time limit on appeals to the Board of Review on the Loss of Nationality. But in 1966 federal regulations were promulgated which prescribed that an appeal might be taken "within a reasonable time" after the person affected received notice of the Department's determination of his expatriation. 8/

When the Board of Appellate Review was established in 1967, federal regulations promulgated for the new Board also prescribed the limitation of "reasonable time." 9/ Consistently with the Board's practice in cases where determination of loss of nationality was made prior to November 30, 1979, the effective date of the present regulations, 10/ we will apply the norm of reasonable time in the case now before us.

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 and Procedure section 2866 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.

Mrs. R[redacted] contends that her appeal should be deemed timely inasmuch as she was never informed of the Department's determination of loss of her nationality and of the right to take an appeal from that determination. In an affidavit executed on March 11, 1986 she asserted that:

> Apart from this 1964 letter [from the Embassy advising her that a preliminary decision of expatriation had been made] I did not receive any other communication regarding my citizenship from the American government. Especially, I did not receive a so-called Certificate of Loss of Nationality from the

8/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1966).

9/ 22 CFR 50.60 (1967-1979).

10/ Present regulations promulgated on November 30, 1979, provide a limitation of one year after approval of a certificate of loss of nationality. 22 CFR 7.5(b)(1).

> Embassy. I have reviewed a copy of such a document which forms part of the State Department record in my citizenship case. This copy was in the possession of my present attorney, Mr. Mautino. After reviewing the copy in Mr. Mautino's file, I can say without hesitation that I never received any such document from the American Embassy nor from any other American government source, I had the impression from my friends that the decision on my loss of citizenship was final and that there was nothing I could do to fight the decision.

Counsel for appellant expanded on Mrs. Romo's allegations in a supplementary brief filed December 12, 1986:

> The Department's Airgram [of May 6, 1964, supra, note 7] states that if a Certificate of Loss of Nationality (CLN) is approved "the procedures stated in 8 **FAM** 224.9 and 224.21 shall be followed," We do not know what those procedures were, but we have to assume that they related to steps designed to inform the applicant of the final decision in his/her case and of any appellate rights. 11/ It seems pretty clear from the record that these steps were not taken....she had received no CLN, and her previous counsel attempted to ascertain whether or not such a document had ever been issued.
>
> ...

11/ The Department subsequently informed the Board that:

> Section 8 FAM 224.9 instructs the post that if a Certificate of Loss is approved, the post should treat applications for citizens services, that is passport and registration applications, as disapproved, Section 8 FAM 224.21 instructs the post to notify a person for whom a Certificate of Loss has been approved that there was an appeal available to the Board of Review on the Loss of Nationality. This information was to be transmitted to the person in writing at the same time as the approved Certificate of Loss was transmitted.

> The point here is that Mrs. [redacted] testimony as to the receipt of the Embassy's letter and nonreceipt of any further information or documents is credible. She admits receiving the Embassy's letter [of April 30, 1964], and a copy of that letter is in the record. She states that she received nothing further from the Embassy, and the record contains no evidence of any attempt by the Embassy to inform her that the CLN had been approved and that she had certain appellate rights. In fact, ignorance as to whether or not a CLN had been issued gave rise to the efforts of Mrs. R[redacted]'s previous counsel to get the matter resolved. The only reasonable conclusion to be drawn from the record is that the Embassy did not inform Mrs. R[redacted] of the approval of the CLN nor of her appellate rights....The Department of State and the Embassy, being better informed on citizenship matters than Mrs. R[redacted], should be charged with the knowledge and the responsibility to follow correct procedures. It is clear that Mrs. [redacted] was not informed of her right to appeal. How could she, a layman, be expected to know about appellate rights unless the Department of State or the Embassy so informed her?
>
> The failure to follow correct procedures and to inform Mrs. [redacted] of her right to appeal effectively deprived her of that right. Her ignorance on that subject is chargeable to the Department and the Embassy, both of which failed in their duty to inform her of her appellate rights.
>
> Mrs. [redacted] failure to file an appeal earlier than she did was excusable in view of the Department's and the Embassy's failure to act properly to inform her of her rights.

The Department responded to appellant's supplemental brief as follows:

> Appellant states today that she received neither a copy of the approved Certificate of Loss nor notification of appeal procedures. Counsel insists that since this is a credible statement it follows that the responsible Department official did not comply with

established procedures, The file does not contain copies of post correspondence which would establish that the approved certificate and an informational letter were sent to Appellant. However, in the absence of direct evidence, there is no warrant for concluding that an officer acted improperly. In fact, the presumption is, to the contrary, that an official properly executes his or her office unless there is evidence to show otherwise. Boissonas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951)., Because the file is silent and there is no way at this late date the Department can recreate this part of the record, the presumption must stand that the notification procedures were carefully followed.

Appellant knew from the letter she received that the Department was considering her citizenship status. As an ordinary prudent person, she had a duty to inquire as to the outcome of the Department's consideration. Nettles v. Childs, 100 F.2d 952 (4th Cir. 1949). That she did not inquire makes her chargeable with the information she would have discovered, She had notice in 1964 and declined to act upon it until now. Her present, very late appeal is therefore time-barred.

The record shows that the Department sent the CLN to the Embassy on July 20, 1964 to forward to Mrs. [redacted]. There is no evidence that the Embassy forwarded the CLN to appellant. However, it is reasonable to presume that the Embassy forwarded the CLN to appellant's last known address, i.e., the address to which the Embassy had sent its April 30, 1964 letter informing her of the Department's preliminary determination of loss of her nationality. It is also reasonable to presume that the Embassy wrote to appellant to advise her of the way to enter the appeal, as prescribed by departmental guidelines, 8 FAM 224.21, supra, note 11. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951) which stands for the proposition that public officials are presumed to execute their official duties faithfully and correctly, absent evidence to the contrary.

At this distance from 1964 it is unlikely that we will ever know whether the CLN and information about appeal rights reached Mrs. R[redacted]. Assume, arguendo, that despite the Embassy's best efforts, those documents did not reach her. The pertinent question then becomes

whether in the particular circumstances of this case, non-receipt is sufficient grounds to excuse her delay of over twenty years in seeking relief from the Board. We do not think it is.

As we have seen Mrs. [redacted] received an official comunication from the Embassy dated April 30, 1964, stating that unless she were to submit persuasive evidence warranting a different conclusion with a specified period of time, the Department's preliminary determinatic that she had expatriated herself would become final. Mrs. [redacted] has acknowledged that she received the Embassy's April 20, 1964 letter. She asserts, however, that:

> I have spent all of my adult life in Mexico. I have never, since childhood, been able to speak, write or understand the English language. It is true that I may have communicated with childhood playmates in the English language during the period I lived in the United States, but I did not retain any ability in English. I did not understand the Embassy's English-language letter in 1964, and I do not understand it now. Some friends looked at the letter and told me that it said that I had lost my American citizenship. They did not tell me that the letter said anything about appeal rights, and I did not know of any rights to appeal the decision.

In our opinion, the purport of the Embassy's letter should have been perfectly understandable to the average layman, to wit: if Mrs. [redacted] wished to contest the Department's preliminary holding of loss of her nationality, she should submit evidence in support of her case. Plainly, she was on notice that she had performed a statutory expatriating act and that the Department's preliminary determination of her expatriation would become final unless she acted. A married woman some 40 years of age in 1964, Mrs. [redacted] might be expected to have consulted some authoritative source - a lawyer, a consular officer, a person of affairs in her community - to ask the meaning of such an important communication and what she might do about it. That she understood little if any English cannot excuse her failure to act. Mrs. [redacted] was clearly on notice that she probably expatriated herself. She should have taken action in 1964, as the letter invited her to do, Here, plainly, is a case in which the rule of constructive notice is applicable.

Although the Department has a legal duty to inform an expatriat through the diplomatic or consular post concerned of his or her loss of nationality (and in this case we have no reason to believe that i and the Embassy failed to carry out their obligations correctly), a person who has knowledge of the probable loss of her nationality

cannot absolve herself of all responsibility and rest passively on an unsupported allegation that she did not receive notice of a holding of loss of nationality from the Department until many years after the event.

Appellant had a duty in the circumstances of this case to make timely inquiry about her United States citizenship status long before 1982. If a person has actual knowledge of facts which would lead an ordinary prudent man to make further investigation, the duty to make inquiry arises and the person is charged with knowledge of facts which inquiry would have disclosed. Nettles v. Childs, 100 F.2d 952 (1939). Similarly, Hux v. Butler, 339 F.2d 696 (1964), where the court stated: "#...where anything appears which would put an ordinary man upon inquiry, the law presumes that such inquiry was actually made and fixes notice upon the party as to all the legal consequences."

Appellant was less than prudent in not having ascertained, long before she finally did so, whether or not she was still a United States citizen; she was also arguably indifferent to that status until a number of years hhd passed. Knowledge of the Department's holding of loss of her United States citizenship must be imputed to her as from a reasonable time after she learned the facts about her probable expatriation from the Embassy at Mexico City in the spring of 1964.

Furthermore, it is undeniable that if we were to allow the appeal, the Department would find itself prejudiced in attempting to carry its burden of proof, as it is required to do under the Supreme Court's decisions, that appellant acted voluntarily and with the intention of relinquishing her United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

No good cause having been shown why the appeal could not have been entered before twenty years had transpired, we are unable to consider that a delay of that length is reasonable within the meaning of the applicable regulations. Thus, the interest in finality and stability of administrative determinations must be served in this case. The appeal is barred by the passage of time and not properly before the Board.

III

Upon consideration of the foregoing, the appeal is hereby dismissed. Given our disposition of the case, we do not reach any substantive issues that may be presented.

Allan G. James, Chairman

Howard Meyers, Member

James G. Sampas, Member