December 6, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: V[redacted] R[redacted] M[redacted]

This appeal is taken from an administrative determination of the Department of State that appellant, V[redacted] R[redacted] M[redacted], expatriated herself on December LO, 1974 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 certificate of loss of nationality that was executed in this case was approved by the Department on January 20, 1975. The appeal was entered twelve years later on January 29, 1987. A threshold issue must be decided: whether the Board may entertain an appeal entered so long after appellant received notice that the Department determined that she expatriated herself. For the reasons that follow, we conclude that the appeal is time-barred and not properly before the Board. Accordingly, we dismiss it for lack of jurisdiction.

1/ In 1974, 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 --
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> . . .
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> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof:...

Pub. L. No. 99-953, 100 Stat. 3655, (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;". Pub. L. No. 99-653 also amended paragraph (2) of subsection (a) of section 349 by inserting "after having attained the age of eighteen years" after "thereof".

I

Appellant was born in [redacted] of a United States citizen mother and thereby acquired United States citizenship. As she was born in Mexico, she also acquired the nationality of that state, and thus enjoyed dual nationality. The United States Embassy at Mexico City issued a report of appellant's birth as a United States citizen. According to appellant's mother, her daughter received much of her primary and secondary education in the United States. In 1972 appellant and her mother returned to Mexico, and there she continued her education.

The record shows that on December 10, 1974 appellant executed an application for a certificate of Mexican nationality (CMN). 2/ There is no copy of that in the record. There is, however, a copy of a document titled "Constancia" (certificate), issued on December 17, 1974 by the Department of Foreign Relations, attesting that on December 10, 1974, in order to obtain a certificate of Mexican nationality, appellant renounced her United States nationality and all allegiance to the United States. 3/ Although the "Constancia" did not so state, it should be noted that Mexican law required that she also declare allegiance to the laws and authorities of Mexico. At the time appellant was barely 18 years old.

On December 17, 1974 appellant executed an affidavit of expatriated person at the United States Embassy. Therein she acknowledged that she made a formal declaration of allegiance to Mexico on December 10, 1974,

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2/ After the appeal was filed, the Department informed the Board that it could not locate the record upon which it based its determination of loss of appellant's nationality. Appellant's mother, on her daughter's behalf, submitted copies of a number of documents relating to her daughter's citizenship case, including the certificate of loss of appellant's United States nationality. The Department subsequently stipulated that those documents "are copies of documents that should be in the lost administrative file" pertaining to appellant.

3/ The "Constancia" was apparently issued at appellant's request to enable her to obtain a Mexican passport, pending issuance of a CMN.

A certificate of Mexican nationality issued in appellant's name on January 7, 1975.

and declared that she had done so voluntarily with the intention of relinquishing her United States nationality.

Appellant described the events surrounding her application for a CMN in a letter to the Board dated May 19, 1987. Having been invited to attend a wedding in Maryland, appellant stated, she went to the Department of Foreign Relations in December 1974 to obtain a passport. There she was asked to fill out an application for a CMN. 4/ She allegedly refused to comply with that request, and decided to seek advice from a "very good" family friend, a Vice Consul at the American Embassy who, she informed the Board by letter dated May 19, 1987, counseled her in the following sense:

> He instructed me that no matter what petition I signed I would always have rights to return to the United States to live and work and also that immediately upon request I would be reinstated as an American citizen.
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> He then instructed me to sign the Affidavit of Expatriated Person and the Certificate of Loss of Nationality of the United States. Because of his position at the Embassy and believing that he was instructing me on my best behalf I signed both of these documents, I was engaged to be married to my husband at this time. [He] said that since I was going to marry a Mexican, it would be far better for me and make my life far less complicated if I signed all these papers for whatever duration of time we chose to remain in Mexico. He then suggested that I return to [the Department of Foreign Relations] and sign any documents there that were necessary to apply for Mexican Citizenship.
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> ... the first two documents signed were presented to me for my signature without any explanation of alternative methods to leave Mexico legally i.e. by way of an

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4/ Under Mexican law, dual nationals must choose between their nationalities after attaining the age of 18. If one elects to exercise the rights and privilege of Mexican nationality, e.g., hold a Mexican passport, one must obtain a CMN.

> American passport which I could easily have obtained. This option was never mentioned to me and being totally ignorant of any laws regarding immigration, I fully trusted [the Consul], and signed all the documents. Naturally herin [sic] lies my problem. 5/

The consul who allegedly advised appellant to proceed with an application for a CMN made the following declaration in a letter, dated October 18, 1988, addressed to counsel for the Department:

> I do not recall ever having discussed with Mrs. V[redacted] R[redacted] M[redacted] or Virginia Adeline Ramirez [appellant's maiden name] her claim to either United State or Mexican citizenship. From the documentation you forwarded, I gather that she had a claim to both citizenships and for some reason opted for Mexican citizenship when she as a 'free and voluntary' act signed the Affidavit of Expatriated Person....
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> As to her statement alleging that I 'instructed' her to sign this or any other affidavit, I can unequivocally state that I never during my entire career in the Foreign Service of the United States suggested, let alone instruct, anyone to relinquish their nationality. I have always and still firmly believe this to be a very personal decision which only the individuals concerned should be left to make for themselves.

On December 17, 1974 a consular officer executed a certificate of loss of nationality in the name of Virginia Adeline Ramirez, in compliance with section 358 of the

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5/ Appellant executed the affidavit of expatriated person before a different consular officer from the one who reportedly advised her to proceed with an application for a CMN.

Immigration and Nationality Act. 6/ Therein the consular officer certified that appellant acquired United States nationality by birth in Mexico of a United States citizen mother: acquired Mexican nationality by virtue of her birth in that state: 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 Department approved the certificate on January 20, 1975, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

Appellant married [redacted] a Mexican citizen, in April 1976.

On January 29, 1987 appellant filed this appeal. Oral argument was heard on April 5, 1988.

With respect to the substance of her case, appellant's position may be summarized as follows: She was misled by the consular officer. from whom she sought advice to sign the affidavit of expatriated person and an application for a CMN. She had not realized that "the papers I signed so many years ago had actually taken away, totally, my American citizenship." 7/ She said she could

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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, a5 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.

7/ Transcript of Hearing in the Matter of Virginia [redacted] before the Boar? of Appellate Review, April 5, 1988, (hereafter referred to as "TR"). 11.

assure the Board that "if I had ever known, if I had any idea of what would happen, it would never have happened." 8/ Her sole concern was to obtain a travel document so she could go to a wedding in the United States, "Had I been told the correct information in the first place," she wrote the Board on May 19, 1987, "i.e. that all I needed was an American passport, which I could have readily obtained--I would never ever have considered relinquishing my American citizenship. Also had I known that it would be extremely difficult to reobtain my citizenship I would not have signed any papers here in Mexico."

In brief, appellant contends that she never intended to relinquish her United States nationality when she pledged allegiance to Mexico.

II

As an initial matter, we must determine whether the jurisdictional prerequisite has been established to permit the Board to entertain this appeal.

To exercise jurisdiction, the Board must find 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. Costello v. United States, **365** U.S. 265 **(1961).**

In 1975 when the Department determined that appellant expatriated herself, the limitation on appeal to the Board of Appellate Review was "within a reasonable time" after the affected person received notice of the Department's determination of loss of citizenship. 9/ Consistently with the Board's practice in cases where the certificate of **loss** of nationality was approved prior to

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8/ TR 11, **12.**

9/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60. That section was in force from November 1967 to November 1979, when the limitation on appeal was revised. It now is "within one year after approval by the Department of the certificate of loss of nationality." 22 CFR 7.5(b)(1).

November 30, 1979, the effective date of the present regulations, we will apply the limitation of "reasonable time" the case before us.

"Reasonable time" is a term of well-established meaning. Whether an action has been taken witnin a reasonable time depends on the facts of the particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Reasonable time has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will permit. The rule presumes that an appellant will prosecute his appeal with the diligence and prudence of an ordinary person. Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F.2d 733 (2nd Cir. 1926). A party may not determine a time suitable to himself. In re Roney, 139 F.2d 175 (7th Cir. 1943). In loss of nationality proceedings reasonable time begins to run when the affected party receives notice that an adverse decision has been made with respect to his citizenship. In determining whether an appeal has been taken within a reasonable time, the courts "take into consideration the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

Reasonable time makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from taking a timely appeal. Accordingly, appellant in the instant case has the burden of showing that she initiated the appeal within a reasonable time after the winter of 1975, when we may reasonably assume, she received notice that the Department had determined that she expatriated herself.

The rationale for allowing one a reasonable period of time within which to appeal an adverse citizenship is pragmatic and fair. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, while penalizing excessive delay which may be prejudicial to the rights of the opposing party; the passage of time inevitably obscures the events surrounding the citizen's performance of the expatriative act. Furthermore, passage of many years between performance of an expatriative act and the taking of an appeal can also make it extremely difficult for the Board as trier of fact to make a fair, reasoned determination whether the act was done voluntarily with the intention of relinquishing United States nationality.

At the hearing appellant conceded that she received the certificate of loss of her nationality and associated documents, but could not recall precisely when they arrived. 10/ We believe it fair to assume that she received notice of her expatriation sometime in the winter of 1975. Upon receiving the certificate, appellant stated, she put it away without reading it. 11/ Thus, she did not realize its importance. 12/ The first time she heard about the possibility of an—appeal was around the end of 1986 or early 1987 when she and her mother inquired at the Embassy about obtaining identification documents for appellant's children. 13/

Not only did appellant allegedly not know she might take an appeal: she was unaware that there was a time limit on appeal. In her letter to the Board of May 19, 1988 she contended that:

> ...I did not know that I would have to appeal in the first place and since I did not know that I would have any problem I knew less of the fact that there were time limits. I trusted [the consul whose advice she sought] and in what he said to me, (That I did not have to worry about anything until I decided to return to the U.S. and that I would have only to ask and my American citizenship would be given back to me.). Until I went to the American Embassy thinking that I would have no problem, I had no idea that there existed any stipulations or time limits. Here I again wish to reinforce the fact that I rested easy for 11 years because of the false information given to me by [the consul]. He kept insisting that I would be able to reinstate myself as a citizen

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10/ TR 22, 23.

11/ TR 35.

12/ TR 36.

13/ TR 22.

immediately upon request when I decided to return to the United States.

The central question is whether appellant has shown that factors over which she had no control prevented her from taking a timely appeal.

There is no doubt that sometime in the winter of 1975 appellant received a copy of the certificate of Loss of nationality (CLN) that was approved in her name. She thus was on notice that an adverse determination had been made with respect to her United States citizenship. It does not appear, however, that she was informed that she had the right to appeal that determination to this Board.

Since 1972, expatriates have been informed of the right of appeal and procedures by information printed on the reverse of the CLN. As noted above, the Department could not find its record in this case. Appellant submitted a copy of the CLN that the Embassy sent her in February 1975. The reverse of that certificate was blank: there was no appeal information printed thereon.

The Department should, of course, have ensured that appellant was properly informed that she might take an appeal to the Board. In the premises, however, we do not think that the Department's evident failure so to inform appellant was material error. For one thing, there is printed in bold type on the bottom of the obverse of the CLN that was sent to appellant this notice: "See Reverse for Appeal Procedures." In effect, appellant was warned that there was a right of appeal: by the exercise of minimal diligence and a little persistence she could have obtained information about an appeal from the Embassy. She took no such action. Instead she put the CLN and associated papers away and forgot about them. Exercise of reasonable prudence (and we think it not unreasonable to ascribe to a young adult the prudence of an ordinary person) would have led appellant to find out what she might do to try to recover the United States nationality which she now protests she values so highly. We also do not consider the Department's evident failure to convey appeal information to appellant to be material error because there was no requirement in 1975 with the force of law that an expatriate be informed of the right of appeal. 14/

14/ In November 1979, the governing regulations were amended and revised. They now mandate that when an

Appellant also alleges that she did not appeal sooner -- as she put it, "rested easy" for so many years -- because of the information given her by a consular officer that "I would be able to reinstate myself as a citizen immediately upon request when I decided to return to the United States."

We are unable to accept that appellant was justified in not appealing until twelve years had elapsed because she relied on information she says she was given by a consular officer. Based on the statements the consular officer made in his affidavit of October 18, 1988, we cannot assume that he misinformed appellant, and thus gave her reason to think that her lost United States nationality was recoverable whenever she wanted to reclaim it. While it is speculative to say so, the most one could assume, after passage of so many years, is that the officer told her that whenever she wanted to go to the United States to live she might gain admission through a visa petition initiated by her United States citizen mother. It is not credible that an experienced consular officer would tell one who performed, or was about to perform, an expatriative act that loss of his or her citizenship would not be definitive. In brief, absent evidence more persuasive than appellant's allegations made long after the event, we can only assume that appellant misunderstood what the consular officer told her when she sought his advice.

We thus are led to the conclusion that appellant has not produced a legally sufficient reason wny she delayed so long in taking an appeal.

At the hearing and in her submissions, appellant expressed what we accept as sincere regret at loss of her United States citizenship, protesting that she made a youthful mistake long ago on the basis of erroneous advice. The Board naturally sympathizes with appellant, In the absence of a showing that she was prevented by factors outside her control from taking a timely appeal, however, the case law and Board precedents leave us no alternative but to conclude that appellant's delay in seeking relief from the Department's decision of loss of

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14/ Cont'd.

approved certificate of loss of nationality is forwarded to the person to whom it relates, such person shall be informed of the right to take an appeal to this Board. 22 CFR 50.52.

her nationality was unreasonable. In the circumstances, the interest in finality and stability of administrative decisions must prevail.

III

Upon consideration of the foregoing, we conclude that the appeal is not properly before the Board. It ought to be, and, hereby is, dismissed.

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Howard Meyers, Member