January 25, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

The Reverend A[redacted] M[redacted] W[redacted] appeals an administrative determination of the Department of State, dated January 10, 1975, that she expatriated herself on April 12, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the United Kingdom. 1/ An appeal from that determination was filed on May 20, 1988.

After appellant had set forth why she believed the Department erred in holding that she expatriated herself, the Department made a further review of the case and informed the Board that it was of the opinion it could not carry its burden of proving that appellant intended to relinquish her United States nationality when she acquired British nationality, The Department therefore requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality.

For reasons given below, the Board concludes that the appeal is time-barred and not properly before the Board, Accordingly, it is dismissed for lack of jurisdiction. The fact that the Board dismisses the appeal does not, in itself, however, bar the Department from taking further administrative action to correct manifest errors of law or fact.

1/ In 1973, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application, ...

Pub. L. No. 99-653, 100 Stat, 3655 (Nov. 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".

I

An officer of the United States Embassy at London executed a certificate of loss of nationality in appellant's name on April 19, 1974, as required by law. 2/ The officer certified that appellant acquired the nationality of the United States by birth at [redacted]; that she obtained naturalization in the United Kingdom on April 12, 1973 upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department 'approved the certificate on January 10, 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 initiated this appeal on May 20, 1988, thirteen years after the Department approved the certificate of loss of nationality that was approved in her name.

After appellant had made submissions setting forth the grounds of her appeal, the Department filed a memorandum, dated January 11, 1989, in which it requested that the Board remand the case so that the certificate of loss of nationality might be vacated. The Department had carefully reviewed the record in the case, it informed the

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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 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.

Board, and was of the view that there was insufficient evidence to enable the Department to carry its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she obtained naturalization in the United Kingdom. 3/

The Department was particularly impressed by the fact that both before she obtained naturalization and afterwards in **1974,** appellant "stated in clear terms" to the Embassy that she had no wish to relinquish her United States nationality and that her naturalization had no political motivation but rather was done to further her work as part of a religious community. Aside from the act of naturalization itself (appellant did not renounce previous allegiance or nationality upon being granted British nationality), her statements close to the time she performed the expatriative act are thus the only evidence of record that bears on her intent with respect to her United States citizenship; they reflect a wish to retain citizenship, the Department concluded.

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To be able to remand a case, the Board must first establish that it has jurisdiction to entertain the appeal. If the Board determines that the jurisdictional requirements have not been met, the only proper course is to dismiss the appeal.

For timely filing is mandatory and jurisdictional. United States v. Robinson, **361** U.S. **220 (1960).** Thus, if we find that the appeal was not entered within the applicable limitation and no legally sufficient excuse therefor has been presented, the appeal must be dismissed for want of jurisdiction. Costello v. United States, **364** U.S. **265 (1961).**

Consistently with the Board's practice, we will apply here not the present limitation on appeal but the one prescribed by regulations in effect at the time the Department approved the certificate of loss of nationality issued in appellant's name, namely, section **50.60** of Title

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3/ In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the citizen intended to relinquish United States nationality when he or she performed the expatriative act in question. Vance v. Terrazas, **444** U.S. **252 (1980);** Afroyim v. Rusk, **387** U.S. 253 **(1967).**

22, Code of Federal Regulations (effective November 29, 1967 to November 30, 1979), 22 CFR 50.60. That section 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 of 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.

"Reasonable time" is to be determined in light of all the circumstances of the particular 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. Ashford v. Steuart, 657 F.2d 1053, 1055 (1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F.2d 928, 940, quoting 11 Wright & Miller, Federal Practice and Procedures, Sec. 3866, at 228-29:

> '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.

She did not appeal sooner, appellant stated, because when she received the approved certificate of loss of nationality, "I was given to understand that there was no possibility that an appeal would be successful.'' (Her emphasis.) It was only in May 1988, she asserted that "I heard from a fellow expatriate that the law and/or its interpretation had been changed, and that it was now possible that an appeal could be successful.''

The Board finds appellant's reasons for the delay in taking the appeal insufficient to excuse it.

She has not explained, let alone documented, how or from whom she learned that there was no possibility an appeal would be successful. Perhaps (but she has not so stated) she refers to the information about appeals set forth on the reverse of the certificate of loss of her nationality which read as follows:

APPEAL PROCEDURES

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22, Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.
>
> Unless you have new or additional evidence to submit, or you believe that the holding of loss of nationality was contrary to the law or the facts in your case it is unlikely that an appeal will be successful.
>
> Your appeal must clearly show the basis upon which it is made.. ..
>
> For additional information about appeals and to obtain copies of the provisions of the Code of Federal Regulations, consult the nearest American Embassy or Consulate or the Board of Appellate Review, Department of State, Washington, D.C. 20520.

The information was infelicitously phrased but we do not think it was so negative as to justify her not pursuing the possibility of review of her case. Concern for loss of her citizenship should have led her to act more aggressively and more promptly. Many others whose situations resemble appellant's who were given the same information about appeals as she have sought relief from the Board without allowing so many years to pass. In any event, she was on actual notice that she had the right of appeal: had she been given discouraging advice by a consular officer, she still could have written directly to the Board to ascertain what recourse she might have.

With respect to appellant's understanding that there had finally been a change favorable to her in the applicable law and/or its interpretation, appellant may be referring to the 1986 amendments to the Immigration and Nationality Act. See note 1 supra. The amendments merely incorporated into statute law the rulings that federal

courts had earlier made with respect to loss of nationality, namely, that citizenship is not lost unless the citizen performed an expatriative act voluntarily with the intention of relinquishing her United States nationality. Diligence combined with concern about loss of her citizenship would have led her in 1975 or reasonably soon thereafter to the knowledge that legal grounds were available to her on which to ground an appeal.

In the circumstances of this case, where there has been no showing of a requirement for an extended period of time to prepare an appeal or any obstacle beyond appellant's control to moving much sooner, the norm of "reasonable time" cannot extend to a delay of thirteen years.

III

Upon consideration of the foregoing, it is our conclusion that appellant's waiting for thirteen years to challenge the Department's determination of loss of her nationality was without legal justification. The appeal is time-barred and is hereby dismissed for lack of jurisdiction, 5/

5/ The fact that the Board has determined that the appeal is time-barred and has dismissed it on the grounds that it lacks jurisdiction, does not in itself bar the Department from taking further administrative action.

> ...where the Board of Appellate Review has dismissed an appeal in a citizenship case as time barred, that fact standing alone does not preclude the Department from taking further administrative action to vacate a holding of loss of nationality. This continuing jurisdiction should be exercised, however, only under certain limited conditions to correct manifest errors of law or fact, where the circumstances favoring reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions.

Opinion of Davis R. Robinson, Legal Adviser of the Department of State, December 27, 1982. Excerpted in American Journal of International Law, Vol 77 No. 2, April 1983.

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

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member