June 5, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M E R

This appeal is taken from an administrative determination of the Department of State that appellant, Marcela Estrella Rivera, expatriated herself on July 6, 1976, 1/ under the provisions of section 349(a)(2) of the Immigration and Nationality Act, by making a formal declaration of allegiance to Mexico, 2/

On October 29, 1979, the Department made its determination of loss of nationality in appellant's case, The appeal was entered nine years later on November 15, 1988. The initial issue thus confronting the Board is whether the appeal was timely filed under governing limitations. For the reasons that follow, we conclude that the appeal is time-barred, and accordingly, dismiss it for lack of jurisdiction.

1/ Appellant R made her formal declaration of allegiance to Mexico on June 25, 1976, when she applied for a certificate of Mexican nationality. She subsequently received a certificate of Mexican nationality, No. 3555, that was issued on July 6, 1976.

2/ In 1976, section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(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 --

...

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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, 99-653, 100 Stat. 3655 (1986), amended subsection (a) of section 349 (8 U.S.C. 1481) by inserting "voluntarily performing any of the fallowing 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. She also acquired by virtue of her birth in Mexico the nationality of that country. The United States Embassy at Mexico City issued a report of her birth abroad of an American parent.

Appellant grew up in Mexico and, in May 1976, married a Mexican national. On June 25, 1976, she executed an application for a certificate of Mexican nationality. In her application, she swore adherence, obedience, and submission to the laws and authorities of Mexico and expressly renounced United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America. Thereafter, the Mexican authorities issued a certificate of Mexican nationality in her name, and on November 23, 1976, informed the United States Embassy of the certificate, appellant's declaration of allegiance to Mexico, and renunciation of United States citizenship.

On January 6, 1977, the Embassy informed appellant that she might have lost United States nationality as a consequence of her making a formal declaration of allegiance to Mexico and obtaining a certificate of Mexican nationality. She was also invited to submit any information or evidence for consideration by the Department in determining whether she had lost United States nationality. Having received no response to that letter, the Embassy sent, on October 3, 1978, an identical letter to appellant. There was no response, The record shows two returned Mexican postal receipts acknowledging that the letters were received at the address given.

In the absence of any response to the letters, the Embassy prepared, on September 25, 1979, a certificate of loss of United States nationality in appellant's name in accordance with section 358 of the Immigration and Nationality Act. 3/

3/ 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

The consular officer certified that appellant acquired the nationality of the United States by virtue of her birth abroad to a United States citizen mother, acquired the nationality of Mexico by virtue of her birth in Mexico, made a formal declaration of allegiance to Mexico, and thereby expatriated herself under the provisions of setion 349(a)(2) of the Immigration and Nationality Act. The Department approved the certificate of loss of nationality on October 29, 1979, approval constituting an administrative holding or determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

In February 1988, appellant applied for a United States passport at San Jose, California, where she was then residing. To assist the Department in determining her present citizenship status and entitlement to services as a citizen of the United States, she was asked to complete a citizenship questionnaire form, which she did on March 15, 1988. The Department, on April 20, 1988, mailed appellant copies of certain documents relating to her application for a certificate of Mexican nationality, and a second citizenship questionnaire form that she might desire to complete in light of the furnished documents. She was also invited to submit any other evidence that she wished "in support of a contention of involuntariness or lack of intent to relinquish U.S. nationality." Appellant completed the second citizenship questionnaire form on April 28, 1988, and submitted additional information.

In a letter of April 28, 1988, appellant offered the following explanation of her actions in applying for a certificate of Mexican nationality in 1976:

3/ (Cont'd.)

> 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.

> When I first was preparing to move to the United States in **1980,** [sic] I was not aware of the fact that I could enter the Country with my American Birth Certificate only. Therefore, I applied for a Mexican Passport which I was unable to get, unless I had a Mexican Certificate of Nationality as one of the requirements. My intention was never to relinquish my American Citizenship, and wouldn't never have applied for a Mexican Certificate if I would've known of the situation I was getting myself into.
>
> I would like to emphasize that I was forced to get that Certificate, because as far as I was concern, [sic] that was the only way that I was going to be able to cross the border legally to the United States.

After reviewing the record, the Department denied appellant's application for a passport, The Department informed her, on August **22, 1988,** that she had presented no evidence to show that she reacquired United States citizenship since the Department's holding of **loss** of United States nationality in **1979,** and that, the Department, therefore, was unable to issue her a United States passport.

On November 15, **1988,** nine years after the Department approved the certificate of **loss** of United States nationality, appellant submitted this appeal, She alleges that she never received a copy of the certificate of **loss** of nationality, that she first had knowledge of her **loss** of nationality when her application for a United States passport was denied in **1988,** and that she did not intend to relinquish her United States citizenship when she applied for a certificate of Mexican nationality and made a formal declaration of allegiance to Mexico.

By affidavit dated February 1, **1989,** she further stated:

> **3.** That I was told sometime during my early youth by my mother, Coletta Frances Sweeney Estrella, that my birth was registered at the United States Embassy in Mexico City, Mexico, but I assumed that my birth was reported by my mother because she was a United States citizen; I

did not realize or understand that I was also a United States citizen; and that my mother had never told me that I was a United States citizen.

. . .

5. That in 1976 I wanted to travel to the United States and was told that in order for me to obtain a passport I must make an application for a Certificate of Mexican Nationality, and consequently made such application with no comprehension or awareness of the significance of such conduct: that if I had known that I could travel to the United States as a United States citizen because of my birth to a United States citizen, I would never have made such an application.

6. That in making an application for a Certificate of Mexican Nationality I gave my sister-in-law's address at Cerro del Quetzal No. 285, Praco Churubusco, Mexico, D.F.: that I never received communication from the United States Embassy in Mexico City, Mexico on or about January 6, 1977 or on October 3, 1978, informing me that my actions constituted persuasive evidence of an intent to relinquish my United States citizenshp.

. . .

8. That I came to believe that I was a citizen of the United States sometime in 1987 when my brother, Luis Jaime Estrella Sweeney, who was born in Celaya, Guanajuato, Mexico, applied for a United States passport at the Passport Office in the U.S. Post Office Building in San Jose, California, and subsequently obtained his passport: that I assumed that I was also

born under the same circumstances as my brother, Luis Jaime Estrella Sweeney, and therefore was a citizen of the United States.

. . .

II

We are faced at the beginning with the issue of the Board's jurisdiction to consider and determine an appeal entered nine years after the Department's determination of loss of nationality. To exercise jurisdiction, the Board must conclude that the appeal was filed within the limitation prescribed by the governing regulations. The courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960), Costello v. United States, 365 U.S. 265 (1961). If an appellant does not enter an appeal within the applicable limitation and does not show good cause for filing after the prescribed time, the Board would lack jurisdiction to consider and determine the appeal,

Under present regulations, the time limit for filing an appeal from the Department's administrative determination of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." 4/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certificate. 5/ These regulations, however, were not in force on October 29, 1979, when the Department approved the certificate of loss of nationality that was issued in appellant's case.

The regulations then in force regarding the time limit on taking an appeal to this Board prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's holding of loss of nationality. 6/ In accord with the Board's practice in cases where the

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4/ 22 CFR 7.5(b) (1988).

5/ 22 CFR 7.5(a) (1988).

6/ 22 CFR 50.60 (1979), which was in effect until revised on November 30, 1979, provided:

> A person who contends that the Department's administrative holding of loss of nationality

certificate of loss of nationality was approved prior to the effective date of the present regulations (November 30, 1979), we will apply the limitation period of "within a reasonable time" to the case before us.

The question of whether an appeal has been taken within a reasonable time depends on the facts and circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow. This does not mean, however, that a party be allowed to determine "a time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943). What is a reasonable time also takes into account the reason for the delay, whether the delay is injurious to another party's interest, and the interests in the repose, stability, and finality of the prior decision, Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981); Lairsey v. Advance Abrasives Co,, 542 F.2d 928, 940 (5th Cir. 1976). The reasonable time limitation thus makes allowance for the intervention of unforseen circumstances beyond a person's control that might prevent him or her from taking a timely appeal. In loss of nationality proceedings, the time limitation begins to run when the citizen claimant has notice of the Department's holding of loss of nationality in his or her case,

Here, the Department approved the certificate of loss of United States nationality in October 1979. Appellant claims that she never received a copy of the approved certificate or was informed of the Department's holding of loss of nationality in her case until 1988, when her application for a United States passport was denied, She also denies receiving the Embassy's letters of January 6, 1977, and October 3, 1978, respectively, informing her of the possible loss of her United States nationality as a consequence of her making a formal declaration of allegiance to Mexico, With respect to the two signed postal receipts in the record, indicating that the letters were in fact received at the address that appellant gave the Mexican authorities on her application for a certificate of Mexican nationality, she explained in her affidavit of February 1, 1989, that the address given by her was the address of her sister-in-law and that she (appellant) did not receive the letters.

6/ (Cont'd.)

> 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.

Apart from copies of the above-mentioned letters of the Embassy, certain documents relating to appellant's application for certificate of Mexican nationality, and the certificate of loss of United States nationality that the Embassy executed in her case, the Embassy's records are devoid of any contemporaneous evidence bearing on the disposition of the certificate of loss of nationality that was approved by the Department. The record does not disclose whether appellant received a copy of the approved certificate or otherwise had notice at that time of the Department's holding of loss of nationality. It should be noted, however, that under section 358 of the Immigration and Nationality Act and governing federal regulations, posts abroad are directed to forward a copy of the certificate approved by the Department to the person to whom it relates. 7/ It is not unreasonable to assume that the Embassy complied with the law and forwarded appellant a copy of the certificate in accordance with procedures then in effect. It is generally accepted that a presumption of regularity attaches to the actions and procedures of the government and agencies thereof in the daily conduct of public affairs. The presumption of regularity of official acts of public officers supports their official acts, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951).

Although at this late date there is no way of knowing whether the Embassy forwarded appellant a copy of the approved certificate, it appears that she had knowledge of her possible loss of United States citizenship, As we have noted, in her application for a certificate of Mexican nationality, she expressly renounced her United States citizenship and pledged allegiance to Mexico.

Absent evidence, we also have no way of knowing whether the Embassy complied with standing Department instructions and sent appellant information about making an appeal. 8/ Nonetheless, even if appellant did not receive such information, we do not consider her delay of nine years to take an appeal was justified or excusable. Here appellant, in our view, knew at the very least that she had put her United States citizenship in peril when she renounced her United States citizenship and swore allegiance to Mexico. She thus

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7/ See note 3, supra: 22 C.F.R. 50.41 (1979).

8/ Vol. 8, Foreign Affairs Manual, section 224.2 (Procedures), 1979; 8 FAM 224.2 (Procedures), 1979.

had facts which should have led her to inquire at the Embassy whether any recourse was open to her. In failing to make any inquiries until years later, she cannot be said to have exercised reasonable care or shown interest in recovering her United States citizenship. It is firmly settled that implied notice of a fact is legally sufficient to impute actual notice to a party. The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (1939).

Appellant also asserts, in her affidavit of February 1, 1989, that she did not realize or understand that she was also a United States citizen. She said her United States citizen mother never told her that she was a United States citizen. 9/ If she had known that she could travel to the United States as a United States citizen, appellant stated, she "would never have made" an application for a certificate of Mexican nationality.

Appellant contends that she "came to believe" that she was a United States citizen sometime in 1987 when her brother, who was born in Mexico under similar circumstances, obtained a United States passport. However, in her responses in her citizenship questionnaires of March 15, 1988, and April 15, 1988, appellant stated that she had been aware since her birth that she might be a United States citizen, "always knew" that she was a United States citizen, and "was registered at the American Embassy where my mother worked as secretary." And, as noted above, in her letter of April 28, 1988, appellant

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9/ Appellant's mother, Coletta Frances Sweeney Estrella, in her supporting affidavit of February 17, 1989, stated that she registered appellant's birth at the Embassy in 1957, but "did not understand that this made her a citizen of the United States, entitling her to travel to the United States." Appellant's mother further stated:

> .....That I had never realized that my daughter, [redacted] was a citizen of the United States: that I had assumed that because I was a citizen of the United States that her birth should be reported to the United States Embassy; and that I assumed that she had to obtain a Mexican Passport in order to travel to the United States just as all of my friends had to do.

declared that her intention at the time (1976) she applied for a certificate of Mexican nationality "was never to relinquish my American citizenship."

We find it difficult to reconcile appellant's statements regarding when she first was aware of her United States citizenship status. If, as appellant now maintains she had not realized or understood that she was also a United States citizen in 1976, at the time she wanted to travel to the United States, there would appear to have been no need for her to apply for a certificate of Mexican nationality, and, in the process, to renounce United States nationality and swear allegiance to Mexico. We are unable to conclude on the basis of the available record that appellant was unaware that she was a United States citizen at the time she executed her application for a certificate of Mexican nationality. Moreover, since the application contained specific renunciatory language of her United States nationality, appellant was most likely aware of the probable loss of her United States citizenship.

We are not persuaded that the appeal was taken within a reasonable time. The record shows that the Department approved the certificate of loss of nationality in October 1979, and that the appeal was entered on November 15, 1988, nine years later. Even if appellant, as she alleges, did not receive notice of the Department's holding of loss of nationality she was, in our view, aware of her probable loss of nationality as a consequence of confirming her allegiance to Mexico and of renouncing expressly her United States citizenship when she applied for a certificate of Mexican nationality in 1976, If she had any questions as to her citizenship status or how she might appeal a finding of loss of United States citizenship, she could, of course, have inquired at the Embassy.

The principal purpose of the requirement for timely filing of an appeal is to compel the taking of such an action within a reasonable time when the recollection of the circumstances or events upon which the appeal is grounded is fresh in the minds of witnesses and records are still available, Limitations are also designed to insure the finality and repose of decisions. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete or lost or obscured by the passage of time.

Appellant, in our view, permitted a substantial period of time to elapse before entering her appeal. Whatever the meaning of the term "within a reasonable time" may be, we do not believe that the term contemplates a delay of nine years in taking an appeal, justified by inconsistent and conflicting

statements and self-serving affidavits, executed twelve years or more after appellant's expatriative conduct, asserting claims of unawareness of her United States citizenship at the time she applied for a certificate of Mexican nationality and of the subsequent loss of her United States citizenship. To allow the appeal would clearly result in prejudice to the Department. It would be difficult, if not impossible, for the Department after the passage of so many years to address appellant's recent claims. In the circumstances of this case, we believe that the delay of nine years in taking an appeal was unreasonable and that the interest in finality and repose of administrative decisions requires that the appeal be dismissed as untimely.

III

On consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after receipt of notice of the Department's administrative holding of loss of nationality. We find that the appeal is time barred, and, as a consequence, lack jurisdiction to consider the case. The appeal is hereby dismissed as untimely.

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

Edward G. Misey, Member

Warren E. Hewitt, Member