DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] C[redacted]

The Department of State made a determination on February 22, 1984 that H[redacted] C[redacted] expatriated himself on July 14, 1980 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/ On December 3, 1988 [redacted] entered an appeal from that holding.

A threshold issue is presented: whether the Board has jurisdiction to hear and decide this appeal. For the reasons given below, we conclude that the appeal is time-barred, and accordingly, dismiss it for want of jurisdiction.

I

Appellant, H[redacted] C[redacted], acquired United States nationality by virtue of his birth in [redacted] of a United States citizen father on [redacted]. 2/ Since he

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1/ In 1980, section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 --
>
> . . .
>
> (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. 99-653, 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. 99-653 also amended paragraph (2) of subsection (a) of section 349 by inserting "after having obtained the age of eighteen years" after "thereof."

2/ Appellant acquired United States nationality under section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1401(a)(7), which read in pertinent part as follows:

was born in Mexico he also acquired the nationality of that country at birth and enjoyed dual nationality.

It appears that appellant's father registered his son's birth as a United States citizen at the Embassy in Mexico City. It further appears that the Embassy issued appellant a card of identity in 1961, 1964 and 1973. He has never held a United States passport.

Appellant had some brief periods of schooling in the United States. In 1974 he began training in Mexico as an airplane pilot and in 1977 was hired by Mexicana Airlines. He states that he obtained a Mexican passport in 1977 (which was valid for two years) and apparently used it with a U.S. visa to fly into the United States. When his Mexican passport expired sometime in June 1979 he applied for a new one. He was told, he states, to complete an application which he understood was to obtain a new passport.

The record shows that on June 13, 1979 appellant executed an application for a certificate of Mexican

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2/ (cont'd.)

Sec. 301.

(a) The following shall be nationals and citizens of the United States at birth:

. . .

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: ...

Pub. L. 95-432, 92 Stat. 1046 (1978) amended section 301 by striking out "(a)" after sec. 301.", and by redesignating paragraphs (1) through (7) as subsections (a) through (g) respectively.

nationality (CMN). 3/ In the application he expressly renounced United States nationality and all allegiance to the United States, and declared adherence, obedience and submission to the laws and authorities of Mexico. A CMN issued in appellant's name on July 14, 1980. Three months later, the Department of Foreign Relations sent a diplomatic note to the United States Embassy to inform the Embassy that appellant had obtained a CMN, having made an application therefor in which he renounced United States nationality and declared allegiance to Mexico. Copies of appellant's application for a CMN and the CMN were annexed to the diplomatic note.

Shortly after receiving the diplomatic note, the Embassy wrote to appellant to inform him that he might have expatriated himself, and enclosed a copy of the relevant section of the law and a citizenship questionnaire which it asked him to complete and return in 30 days. He was also offered an appointment with a consulate officer to discuss his case. Appellant did not reply to that letter. The Embassy sent him an identical letter in May 1981 to which he replied in June 1981 by posing questions about his case. The Embassy replied in July 1981, suggesting that he visit the Embassy to discuss his questions. Two years passed. In June 1983 the Embassy again wrote to appellant. Upon reviewing his file, the Embassy had noticed that he had not visited the Embassy, as requested two years earlier. He was asked to do so within 60 days. If he did not, his case would be referred, without more, to the State Department for decision. In July 1983 appellant went to the Embassy and talked with a consular officer. He completed the citizenship questionnaire and, for information purposes, an application for a passport and registration as a United States citizen. Thereafter, in compliance with the law, a consular officer executed a certificate of loss of nationality in appellant's name on Sepbember 6, 1983. 4/ The consular officer certified

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3/ After age 18, the Mexican authorities require that a passport applicant, if a dual national, confirm his or her Mexican nationality by means of a certificate of Mexican nationality which is issued by the Department of Foreign Relations. The Mexican Government enforces this legal requirement by requiring the dual citizen applicant to sign an application for a certificate of Mexican nationality, in which the applicant renounces any other nationality and swears allegiance to Mexico.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

Sec. 358. Whenever a diplomatic or consular

that appellant acquired the nationality of the United States by birth abroad to a United States citizen father; that he acquired the nationality of Mexico by birth therein; that he made a formal declaration of allegiance to Mexico; and thereby expatriated himself under the provisions of section 349(a)(2) of the Immigration and Nationality Act. Five months later, on February 22, 1984, the State Department approved the certificate, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. 22 CFR 7.3(a).

Appellant initiated this appeal pro se on December 3, 1988. He contends that he did not perform the expatriative act voluntarily (letter of April 16, 1989). "I did read this form [application for a certificate of Mexican nationality] before I signed it," appellant wrote, "but in June 1979, I did not know I was a United States citizen so I signed it without thinking that in the future this would have serious consequences." 5/

II

As an initial matter the Board must determine whether the jurisdictional prerequisites have been satisfied. Timely filing being mandatory and jurisdictional, (see United States v. Robinson, 361 U.S. 220 (1961)), the Board's jurisdiction depends upon whether the appeal was filed within the

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4/ (cont'd.)

> 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.

5/ English translation, Division of Language Services, Department of State. LS No. 128944-A. Spanish (1989).

limitation on appeal prescribed by the applicable federal regulations. The limitation on appeal is set forth in section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), which reads as follows:

> A person who contends that the Department's administrative holding 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.

The regulations further provide that an appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time. 22 CFR 7.5(a).

The Department of State on February 22, 1984 approved the certificate of loss of nationality that the Embassy in Mexico City executed in appellant's name. Under the regulations, he had until February 22, 1985 to appeal the Department's holding. He did not do so, however, until December 3, 1988, nearly four years after the allowable time. Appellant's delay in seeking appellate review of his case may be excused only if he is able to show a legally sufficient reason for not moving within the prescribed time.

"Good cause" is a term of generally accepted meaning. It is defined in Black's Law Dictionary, 5th ed. (1979) as "a substantial reason, one that affords a legal excuse. Legally sufficient ground or reason." What constitutes good cause depends upon the circumstances of the particular case. In general, to establish good cause for taking an action belatedly one must show that circumstances which were largely unforeseeable and beyond one's control intervened to prevent one from taking the required action.

Appellant acknowledges that he duly received a copy of the approved certificate of loss of his nationality. On the reverse of the certificate was a notice that an appeal might be taken to this Board within one year after approval of the certificate. "I swear that I did not pay attention to the back part of the certificate," appellant stated in his reply to the Department's brief. Continuing, he asserted that:

> I did not know I could appeal my citizenship and when I realized that I

> could, the year had already gone by. Not even my father had informed me that I could appeal my United States citizenship since he did not realize it either. Because my father had an accident in 1985, approximately, his health was foremost on my mind and I forgot to solve the problem of my citizenship. Moreover, my family was having serious financial problems so I had to take care of them for some time as well as save some money for the future. In June 1988, my parents decided to go live in San Antonio, Texas, and asked me to go with them in February 1989 and try to solve my citizenship situation. So I started to process my citizenship in December 1988.

The Board appreciates appellant's filial concern about his father's well-being and his obligation to support his parents. We do not understand, however, why he was unable at least to communicate with the Board about his case, as the information about appeals on the reverse of the certificate of loss of nationality suggested he do if he wanted more information about taking an appeal. In that way, he might at least have tolled the limitation.

On the submissions appellant has made, it is obvious that he did not confront circumstances that he had not foreseen or could not control that barred his taking a timely appeal or giving notice that he wished to do so and would proceed when he was less preoccupied with family obligations.

Appellant was fully aware that he might seek review of the Department's holding of loss of his United States nationality but consciously chose not to take an appeal until a time suitable to himself. He acted at his peril in not moving at least as soon as he realized that he had the right of appeal.

The holding of the Supreme Court in Ackerman v. United States, 340 U.S. 193, 198 (1950) that the petitioner had not made a timely motion to set aside an adverse judgment, is apposite here:

> ...Petitioner made a considered choice not to appeal,.... His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to

> indicate to him that his decision not to appeal was probably wrong,.... There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

In the case before the Board, too, there must be an end to litigation.

III

Since the appeal was not filed within one year after the Department approved the certificate of loss of appellant's nationality and since he has failed to show good cause why the Board should enlarge the prescribed time for taking the appeal, the Board has no discretion to allow the appeal. It is time-barred and must be, and hereby is, denied for lack of jurisdiction.

In view of our disposition of the case, we find it unnecessary to make other determinations.

Alan G. James, Chairman

Edward G. Misey, Member

Mary Elizabeth Hoinkes, Member