March 29, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S Q M

The Department of State made a determination on February 5, 1981 that S Q M expatriated herself on March 24, 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/ An appeal from that determination was entered on appellant's behalf by counsel in September 1988.

Since the appeal was not entered within one year after approval of the certificate of loss of nationality, as prescribed by the applicable regulations, we confront a threshold issue: whether good cause has been shown why the Board should exercise its discretionary authority and allow the appeal. For the reasons given below, it is our conclusion that there has been no showing of good cause. Accordingly, the Board lacks jurisdiction to hear and decide the appeal. It is dismissed.

I

S Q M acquired United States citizenship by birth of American citizen parents at Mexico, she also acquired the nationality of that country, and so enjoyed dual national status. The United States Embassy at Mexico City documented her as an American citizen in a report of birth issued in 1959. The Embassy also issued her passports at regular intervals between 1959 and 1974.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), reads as follows:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
>
> . * .
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years: ...

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In March 1980 appellant applied to renew her Mexican passport (presumably issued to her while a minor). According to appellant's brief,

> she was informed by the officials there [presumably the Department of External Affairs] that she must execute a reaffirmation of her Mexican citizenship in order to renew her passport. She was further informed failure to do so would result in difficulties for her continued residence with her family in Mexico.
>
> Upset by this news, she consulted her parents. she had never resided on her own and although approximately twenty-two years of age, had never worked or been required to manage her own affairs.
>
> Her parents advised her this was a formality and tried to alleviate her concern that she would be forced to leave home as well as assure her she would always be an American citizen. Upon the advice of her parents, she executed the document.

The document that appellant executed on March 24, 1980 was an application for a certificate of Mexican nationality (CMN).

The Board takes note that Mexican law does not permit one to retain dual nationality after majority. The government of Mexico tolerates dual nationality until the individual reaches the age of eighteen, freely issuing a Mexican passport to enter and re-enter Mexico as a Mexican citizen. Upon attaining the age of eighteen a dual national must elect either Mexican or his other nationality. If such person wishes to exercise the rights of Mexican nationality, e.g., hold a Mexican passport, he must possess a certificate of Mexican nationality, application for which must be made one year after his eighteenth birthday.

In the application, a pre-printed document, appellant expressly renounced United States citizenship and loyalty to the government of the United States, and declared adherence, obedience and submission to the laws and authorities of Mexico. 2/

2/ The application contained the following statement:

> 'I therefore hereby expressly renounce ....citizenship, as well

A CMN issued on March 24, 1980. Three months later the Mexican Department of Foreign Affairs informed the Embassy' that appellant had obtained a CMN, and enclosed a copy thereof and of her application. Subsequently, the Embassy wrote to appellant to inform her that by making a formal declaration of allegiance to Mexico she might have expatriated herself. She was asked to complete a form titled "Information for Determining U.S. Citizenship," and informed that she might, if she wished, discuss her case with a consular officer. Appellant completed the citizenship questionnaire in November 1980 and returned it to the Embassy. The record does not indicate whether she had an interview with a consular officer.

In compliance with the statute, 3/ a consular officer

2/ (Cont'd)

> as any submission, obedience, and loyalty to any foreign government, especially to that of ...., of which I might have been subject, all protection foreign to the laws, and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.'

The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America), respectively.

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 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

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executed a certificate of loss of nationality in appellant's name on December 12, 1980, therein certifying that appellant. acquired the nationality of both the United States and Mexico at birth; 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 forwarded the certificate and supporting documents to the Department under cover of a pre-printed memorandum form on which a consular officer checked a box indicating that.:

> [X] It is the consular officer's opinion that the subject's stataments [sic] are credible and that it was his/her intention to transfer allegiance from the United States to Mexico. It is therefore recommended that the Certificate of loss be approved.

The Department approved the certificate on February 5, 1981, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

An appeal from the Department's adverse determination was taken on appellant's behalf by counsel in September 1988, following denial of appellant's application (made in November 1986) for a United States passport. 4/

II

As an initial matter, we must determine whether the Board may assert jurisdiction over this appeal. The Board's jurisdiction depends on whether the appeal was filed within the applicable limitation, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1961). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b)(1) of Title 22. Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

3/ (Cont'd.)

> 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.

4/ When he filed notice of appeal on his client's behalf, counsel for appellant took the position that the appeal was from denial of appellant's passport application, and should

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

22 CFR 7.5(a) provides in pertinent part 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.

The Department approved the Certificate that was issued in this case on February 5, 1981. The appeal was not entered until September 1988, six years after the time allowed for appeal. We must therefore determine whether appellant has shown good cause why she could not take the appeal within the limitation prescribed by the applicable regulations.

"Good cause" is a term of settled meaning. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th ed. (1979). It is generally accepted that to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforeseeable.

4/ (Cont'd)

be adjudged timely because the appeal was filed within sixty days after denial, as prescribed by the applicable federal regulations.

In acknowledging counsel's filing, the Board stated that it noted a certificate of loss of nationality had been approved in appellant's name in 1981. "Therefore, if she wishes to have this Board review her case," the Board's letter stated, "her appeal would lie from the Department's 1981 determination that she expatriated herself, not from the recent denial of a passport. There is no appeal from denial of a passport on grounds of non-citizenship, See 22 CFR 51.80."

In her brief appellant. addressed the issue of timely filing, arguing that her appeal should be allowed on the following grounds:

> We believe good cause exists and it would be a clear travesty of justice to deny Mrs. [redacted] the opportunity to contest. her citizenship case if, as we believe, she was wrongfully stripped of the most valuable possession she has, her American citizenship.
>
> Our position is one of estoppel and misinformation. Mrs. [redacted] returned to the Embassy on at least two occasions during the one-year appeal period. Both times she and her parents were separately informed the certificate was final and nothing could be done.
>
> Two further visits to the Embassy in 1983 and 1984 further misled her into believing first, the matter was closed and second, that a letter of explanation might help the situation. It wasn't until late 1984 that counsel was contacted (followed by a family tragedy which further delayed action) and specific efforts were undertaken to bring the issues back before the Department in a more formal setting.
>
> A review of the declarations of both Mrs. [redacted] and her mother clearly explains the information they were given and the dates and also the identity of at least one employee they dealt with. The Department can verify or prove false whether a Ms. Cardenas was employed at the Embassy during the timeframe mentioned. The misleading information that 'nothing could be done' resulted in the loss of a valuable appeal right which might not. have occurred if the appeal procedure was specifically pointed out and explained to Mrs. Marquard and her parents.

> We believe that where such a valuable right as American citizenship is at stake, the care and quality of information provided **by** the Department's employees must be at the highest possible level. Indeed, we urge the proposition that the Department not only had an affirmation obligation to advise and assist Mrs. Marquard in her citizenship contest but were akin to that of a fiduciary in that relationship. The conduct of the Department in this case falls well below acceptable standards and we believe fails in that affirmative obligation to provide accurate and correct. information to her at all times.

For the reasons that follow, we do not think appellant has shown good cause why she could not take a timely appeal.

The Department of State approved the certificate of loss of nationality that was executed in this case on February 5, 1981. Shortly thereafter, the Embassy forwarded a copy of the approved certificate to appellant. She acknowledged in her brief that she received the certificate early in 1981: "Nothing occured [after she completed the citizenship questionnaire in November 19801 until February 1981 when a Certificate of Loss of Nationality was received." On the reverse of the certificate information was set forth about how to prepare and file an appeal to this Board, "within one year after approval of tne certificate of loss of nationality." The information included a statement that an appeal should be addressed to the Board of Appellate Review directly, or through an embassy or consulate or authorized attorney in the United States. The Board's address was given, and it was stated that further information about taking an appeal might be obtained by consulting an embassy or consulate, or by writing directly to the Board.

Obviously appellant. received timely notice, as required by the regulations, that she might appeal the Department's determination. 5/ It is apparent too that she had

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5/ Sec. 50.52 Notice of right. to appeal.

> When an approved certificate of loss of nationality or certificate of expatriation is forwarded to the person to whom it relates or his or her representative, such

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sufficient guidance to request that the Board review the decision on loss of her nationality. She did not, however, avail herself the right of appeal until more than seven years had passed.

Appellant may not excuse the delay in seeking appellate review of her case simply by asserting, without offering a shred of evidence, that on repeated occasions she consulted the Embassy about how to challenge the Department's decision but was given erroneous information.

First of all, there is a record of only one visit by appellant to the Embassy. According to Embassy records, she "came today /August 3, 1984/ informing she never received approved CLN. Embassy's copy provided to Mrs. M. bor." There is no mention in Embassy records that appellant inquired how she might challenge the decision on loss of her citizenship.

Furthermore, the record sheds no light on appellant's failure to communicate with the Board, despite the explicit information about taking an appeal set out the reverse of the certificate of loss of nationality. One would imagine that ordinary prudence would have led appellant to address her concerns to the Board if she found the officers or employees of the Embassy unresponsive.

In short, appellant has not demonstrated that circumstances she was unable to foresee and over which she had no control prevented her from taking a timely appeal. On the evidence, it is evident that appellant alone was responsible for the delay in taking the appeal.

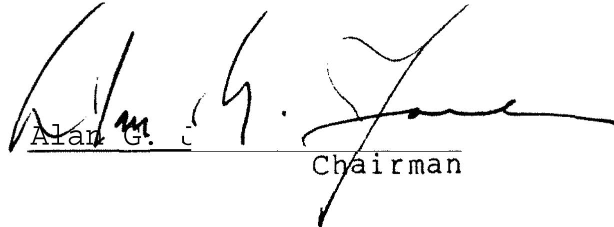
The regulations are explicit about the time within which an appeal shall be entered. They are also reasonable and fair, giving one an opportunity to show wherein a delay in taking an appeal was warranted and therefore entitled to be excused. Under the regulations, the Board has no discretion to allow an appeal which is filed more than a year after approval of the CLN and where the party concerned has failed by any objective standard to show good cause why the appeal could not have been entered within the limitation.

5/ (Cont'd)

> person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review (Part 7 of this chapter) within one year after approval of the certificate of loss of nationality or the certificate of expatriation.

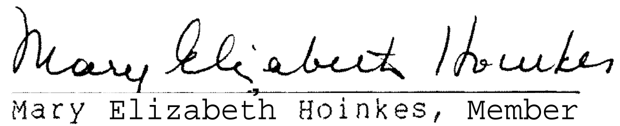
III

Since the appeal was not filed within one year after the Department approved the certificate of loss of appellant's nationality and since she has failed to show good cause why the Board should enlarge the prescribed time €or taking the appeal, the Board has no discretion to allow the appeal. We find that the appeal is time-barred, and hereby dismiss it for lack of jurisdiction.



Alan G. James, Chairman

Warren E. Hewitt, Member



Mary Elizabeth Hoinkes, Member

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