U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: APR 13 2007

XPW90 237 0706

IN RE: Applicant: [redacted]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for adjustment of status from temporary to permanent resident was denied by the District Director, Los Angeles, California, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant was convicted of a felony.

On appeal, counsel for the applicant contends that the applicant's felony conviction under section 422 of the California Penal Code does not constitute a "felony" for immigration purposes as that term is defined at 18 USC § 3559.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(c)(1). "Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The record reveals the following criminal record:

1. On January 30, 1996, the applicant was arrested in Riverside, California, and charged with possession of a loaded gun in a car and possession of a gun in a car.

2. On May 23, 2001, the applicant was arrested in Riverside, California, and charged with driving with a suspended driver's license in violation of section 14601.1(a) of the California Vehicle Code, a misdemeanor, and driving without a valid driver's license in violation of section 12500 of the California Vehicle Code, a misdemeanor. On August 25, 2001, the applicant was convicted in the Superior Court of California, County of Riverside, of driving without a valid driver's license. The applicant was granted summary probation for a period of 36 months and ordered to pay a fine and assessment in the amount of $281. (Case No.

3. On May 5, 2005, the applicant was arrested in Riverside, California, and charged with making criminal threats in violation of section 422 of the California Vehicle Code, a felony. On October 22, 2005, the applicant pled guilty to this charge in the Superior Court of California, County of Los Angeles. The applicant was placed on

> probation for a period of 36 months, ordered to serve 120 days imprisonment under the weekend work release program, and ordered to pay a restitution fine of $200.00. (Case No.

On appeal, counsel asserts that the applicant's felony conviction under section 422 of the California Penal Code does not constitute a felony conviction for immigration purposes because the maximum penalty for a conviction of a violation of section 422 of the California Penal Code is one year, and "felony" is defined under 18 USC § 3559 as an offense where the maximum term of imprisonment is more than one year.

According to section 422 of the California Penal Code, making a criminal threat which will result in death or great bodily injury to another person is punishable by imprisonment in the county jail for not more than one year **or by imprisonment in the state prison**. (Emphasis added.) If the court documents do not specify whether the defendant is being charged with a felony or a misdemeanor, an offense with this type of alternate punishment is considered a "felony" unless the defendant is in fact fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor". See *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). In this case, the applicant was charged with this offense as a felony and pled guilty to this offense as a felony.

Furthermore, even if the court document had not specified that the charge was a felony, the sentencing in the applicant's case would be consistent with a felony conviction; the judge did not merely impose a jail sentence, nor did he simply fine the applicant. See *People v. Banks*, 338 P.2d 214, 215 (1959), 348 P.2d 102, 113 (1959). (In *Banks*, the defendant pled guilty, the proceedings were suspended, and the defendant was placed on probation for a period of three years; the court held that the defendant had been convicted of a felony, not a misdemeanor.) In this case, the applicant pled guilty, was placed on probation for a period of 36 months, ordered to serve 120 days under a weekend work release program, and to ordered to pay a restitution fine of $200.

"Felony" is defined at 8 C.F.R. § 245a.1(p) as an offense that is punishable by imprisonment for more than year, regardless of the actual time served. The only exception to this definition is when the offense is defined by the state as a misdemeanor. In this case, the state classified the offense as a felony. Therefore, counsel's assertions cannot be accepted.

The applicant stands convicted of a felony. He is therefore ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.