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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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JUL 21 2009

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC 04 175 50673

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[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. Any further inquiry must be made to that office.

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, California Service Center. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal. On March 20, 2006, the AAO dismissed the appeal.

On January 9, 2007, the petitioner filed a lawsuit in the United States District Court, Central District of California. Prior to the District Court's entry of a ruling regarding the government's motion for summary judgment and the petitioner's opposition to said motion and request for summary judgment, the petitioner entered settlement negotiations with the government. Settlement was reached and filed with the District Court. Pursuant to this settlement agreement, the District Court ordered that the action be remanded to U.S. Citizenship and Immigration Services (USCIS) to adjudicate the I-140 petition and the related I-485 application for the beneficiary.

The matter is now before the AAO by order of the District Court. Pursuant to the District Court's order and the agreed upon settlement agreement with the petitioner, the director's decision to deny the I-140 immigrant visa petition (WAC 04 175 50673) filed by [REDACTED] on behalf of [REDACTED] and the subsequent decision by the AAO to dismiss the appeal of this decision are hereby withdrawn. The matter is thereby reinstated, and the I-140 petition will be remanded to the director, Nebraska Service Center, where it will be treated as if it had never been adjudicated, with no final decision made.

To fully comply with the settlement agreement, the director is ordered to do the following:

- (1) As indicated, supra, the director must adjudicate the I-140 petition (WAC 04 175 50673) de novo, as if this was the first adjudication of the petition;
- (2) The beneficiary's I-485 application (WAC-04-175-50640) must also be reopened and reconsidered by the director and be adjudicated de novo, as if this was the first adjudication of the application;
- (3) The director must issue a request for evidence (RFE) providing the petitioner until **Thursday, October 22, 2009** to submit additional evidence and a legal memoranda or brief in support of the I-140 petition;
- (4) The petitioner must show eligibility at the time of the initial filing of the I-140 Petition. As such, the director will adjudicate the I-140 Petition based upon the facts as they existed at the time of the initial filing of the I-140 Petition on June 1, 2004. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971);
- (5) Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must establish its ability to pay the proffered wage from the date the petition was filed on June 1, 2004 continuing up until such time as the beneficiary would obtain lawful permanent resident status. However, in re-adjudicating this I-140 petition, the director will not consider any failure by the petitioner to pay the beneficiary while beneficiary was not authorized to be employed in the United States

following the denial of the petitioner's I-140 petition and until such time as the beneficiary is again approved for employment authorization pursuant to the settlement agreement. In other words, while pay statements may normally be considered as prima facie evidence of a petitioner's ability to pay, that evidence cannot be provided by the petitioner in this case for the entire period in question given that the beneficiary was without employment authorization from August 9, 2005. The director must therefore evaluate instead any other material evidence available, e.g., the petitioner's tax returns from 2004 until the present, to determine the petitioner's ability to pay the beneficiary's proffered wage of \$58,500 per year;

- (6) Immediately upon the reopening and reconsideration of the I-485 application, the director shall reopen and re-adjudicate the beneficiary's application for employment authorization (LIN-09-150-51546). The director shall also deem the beneficiary to be lawfully present and authorized to work as long as (1) he timely applies for renewal of his employment authorization, (2) the AAO has not dismissed the appeal of a new USCIS denial of the petitioner's I-140 petition, or (3) the beneficiary has not independently become ineligible for Adjustment of Status, for example as a result of a criminal conviction or withdrawal of the I-140 petition; and
- (7) If the director again denies the I-140 petition, the director must accept any properly filed appeal of such a denial.

Furthermore, pursuant to the settlement agreement, USCIS hereby and retroactively reinstates the beneficiary into the lawful status that he possessed prior to the denial of the petitioner's immigrant visa petition. Pursuant to the Immigration and Nationality Act § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii), the beneficiary will therefore not be deemed to have been unlawfully present in the United States from the date that the petitioner's visa petition was initially denied by the USCIS Service Center Director on or about August 9, 2005. In the event that the director again denies the petitioner's immigrant visa petition and the petitioner timely appeals that denial to the AAO, USCIS hereby recognizes that the beneficiary's lawful status will not be terminated unless and until the AAO affirms the denial, unless, prior to the date of such affirmation of a denial, the beneficiary departs the United States or is otherwise in compliance with the immigration laws of the United States as a result of the filing of a separate and bona fide immigrant or nonimmigrant petition.

ORDER: The previous decisions of the AAO and the director regarding the petitioner's I-140 petition are withdrawn. The I-140 petition is reinstated. The I-140 petition and I-485 application are remanded to the California Service Center for adjudication de novo consistent with the settlement agreement filed with the United States District Court, Central District of California.