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

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FILE: [REDACTED]
WAC 99 238 51556

Office: CALIFORNIA SERVICE CENTER

Date: **APR 05 2005**

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

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

The petitioner is a [REDACTED]. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a priest or granthi. The director determined that the petitioner had not established: (1) the beneficiary had the requisite two years of continuous work experience and membership immediately preceding the filing date of the petition; (2) the beneficiary's position qualifies as a religious occupation; (3) the petitioner qualifies as a tax-exempt organization; and (4) the petitioner's ability to pay the beneficiary's proffered salary.

On March 11, 2004, more than two months after filing his brief, and three months after filing the appeal, counsel submits a supplement to his appeal brief. The regulations do not state or imply that the petitioner may freely supplement the record up until the date of appellate adjudication without making a written request and demonstrating good cause. 8 C.F.R. § 103.3(a)(2)(vii). Accordingly, such information will not be considered as part of the appellate record.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

- (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

8 C.F.R. § 204.5(m)(1) states, in pertinent part:

Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States. The alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 at the request of the organization. All three types of religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition.

The regulation indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition."

8 C.F.R. § 204.5(m)(4) states that each petition for a religious worker must be accompanied by a job offer from an authorized official of the religious organization at which the alien will be employed in the United States. The official must describe the terms of payment for services or other remuneration.

The first issue to be examined is whether the petitioner has demonstrated that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation for at least the two years preceding the filing of the petition.

The petition was filed on September 2, 1999. Therefore, the petitioner must establish that the beneficiary was engaged continuously as a Sikh priest from September 2, 1997 through September 2, 1999 and that he was a member of the petitioner's denomination for those two years. The Form I-94, Arrival and Departure Record, indicates that the beneficiary entered the United States on June 25, 1998 as a B-1 nonimmigrant with authorization to remain in the United States until September 22, 1998. The Form I-797A, Receipt Notice,

indicates that the beneficiary received subsequent approval to extend his stay in the United States from September 23, 1998 to March 22, 1999, and again from March 23, 1999 to September 22, 1999. As the beneficiary was outside of the United States for at least nine months of the two-year period, his experience in the United States cannot suffice to meet the experience and denominational membership requirements. Further, as the beneficiary entered the United States as a B-1 nonimmigrant, any work performed by the beneficiary in the United States during the qualifying period appears to have been performed without authorization.

In support of the petition, the president, assistant secretary, and assistant treasurer of the petitioning temple jointly provide a letter which references the beneficiary's previous experience, but do not provide any specific detail about the beneficiary's work experience during the qualifying period. Instead, the letter states that the beneficiary first came to the temple "as a visiting priest in the early part of 1998. After observing his work for a specific period of time, our temple's management committee approved his visa extension for a year in September 1998."

On May 21, 2000, the director requested further evidence of the beneficiary's work during the requisite period, including the number of hours worked per week and how much the beneficiary was paid for his services.

In response, the executive members of the petitioning temple state:

[The beneficiary] received his initial Sikh Priest's training beginning from 1980 working in a temple under Senior Priests for five years. Thereafter, he served as a Junior Priest for a short time before he was appointed as a full pledge [p]riest in Sikh temple Chotala (India).

In support of the assertions made in this letter, the petitioner submits two letters attesting to the beneficiary's work experience in India during the requisite period. The first letter, written by Nirmal Singh Thiara, a former high school teacher, states that the beneficiary "worked as a Priest at Sikh Temple Chautala Dist Hoshiar Pur Punjab India from May 1983 to May 31, 1998." As noted by the director, it "is unclear" how Mr. [REDACTED] obtained this knowledge about the beneficiary, as there is no indication as to the relationship between him and the beneficiary. The second letter, written by Jawahar Singh Saba, President of the beneficiary's previous temple, states that the beneficiary "had been performing Kirtan and delivering [s]ermons at Guru Dwara Singh Sabha for the last 15 years during this period he had earned great appreciations of congregations. Then he got six months leave and he was given a heartiest welfare."

Despite the fact that the beneficiary is purported to have been employed at this temple for more than fifteen years, there is no evidence of such employment beyond these two letters. Neither letter indicates whether the beneficiary received remuneration for his services or the numbers of hours worked each week. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The director approved the petition on July 23, 2000. Subsequently, on February 26, 2001, the beneficiary filed a Form I-485 Application to Register Permanent Residence or Adjust Status. As part of the adjustment application, the beneficiary submitted Form G-325A, Biographic Information. Instructed, on that form, to list his employment over the past five years (2001-1996), the beneficiary indicated "none" for any employment from July 1998 to the present. The beneficiary did indicate employment as a "priest" from May 1983 through June 1998 in Punjab, India.

On June 2, 2003, the director issued a notice of intent to revoke, stating that the record does not establish that the beneficiary performed continuous religious work during the two-year qualifying period.

In response to the notice, the executive members of the petitioning temple state that the beneficiary "has been employed as a Priest at Sikh Temple since July 1998 with the monthly salary of \$300 which increased to \$500 in October 2000, plus free boarding and lodging." This statement is not consistent with the beneficiary's February 2001 assertion that his work as a priest ended in June 1998 and is further undermined by the fact that the cancelled checks submitted in response to the notice are all dated after the qualifying period. The checks range in date from February 2001 through April 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted a detailed description of the beneficiary's weekly work schedule but indicates that the temple currently employs two priests. The fact that the petitioner previously employed three priests and currently employs two priests is significant in that the hours required to perform the duties listed by the petitioner do not appear to require full-time work by even a single priest.

The petitioner also submitted an updated letter from [REDACTED] who states that in addition to serving as priest from May 1983 to May 1998, the "management of [the temple at Gurdwara Singh Saba] arranged for room and board and meals for [the beneficiary] and his family. Every month, he earned a good income from the offerings of the assembly on the day of Sangrand, and every harvest he received 20 kilograms of grain per family from about one hundred families." Again, however, the petitioner failed to submit any documentary evidence support the assertion that the beneficiary was employed in a full-time position where he was compensated for his work as a priest in India.

The director revoked the approval of the petition on November 24, 2003. On appeal, counsel for the petitioner states:

The beneficiary has been a Sikh Granthi since 1983. The letters from the Gurdwara Singh Sahbha . . . confirm that the beneficiary was their Sikh Granthi from May 1983 to May 1998.

Nirmal Singh Thiara had personal knowledge that the beneficiary was the Sikh Granthi at the Gurdwara Singh Sabha . . . because he attended that Gurdwara while he was a teacher in Chotala. Nirmal Singh Thiara immigrated to the United States and now is the General Secretary for the petitioner. Because of his friendship with the beneficiary, he knew the dates that [the beneficiary] was the Sikh Granthi in Chotala.

Contrary to counsel's assertions, the evidence in the record does not confirm the beneficiary's employment prior to coming to the United States. As noted previously, the record lacks documentary evidence of the beneficiary's full-time, paid work at the Gurdwara in India, to support the statements made in Jawahar Singh's letters stating that, in addition to receiving "offerings of the assembly," the beneficiary also received "room and board." Given that the beneficiary was purportedly employed for at least fifteen years, we would expect ample documentary evidence to corroborate the beneficiary's claimed employment in India.

Further, [REDACTED] letter does not mention his relationship with the beneficiary, nor does he indicate that he attended this Gurdwara while in India. [REDACTED] does not submit any letter on appeal making these assertions on his own, despite the fact that it was specifically noted in the director's revocation decision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, counsel fails to address the beneficiary's work at the petitioning temple during the requisite period. As noted previously, the beneficiary's full-time responsibilities for the petitioner were questionable given the duties described and the fact that these duties were shared between two, and sometimes three, priests. Further, despite the petitioner's claim that the beneficiary began employment at its temple "in the early part of 1998," the petitioner did not submit any evidence that the beneficiary received any remuneration prior to February 2001. More significant is that the beneficiary's own assertion, made in support of the filing of his Form I-485, that he had no employment from July 1998 to the present.

Given the lack of evidence related to the beneficiary's employment as a priest in India and for the petitioner during the requisite period, as well as the discrepancies noted related to the beneficiary's employment with the petitioner, the record does not support a finding that the beneficiary has the qualifying employment experience.

As it relates to the beneficiary's two years of membership in the same denomination as the petitioner, on appeal, counsel states:

There is only one Sikh religion. This is unlike the western religions where there may be many different denominations within the religion. All Sikh Gurdwaras belong to the same Sikh religion. Thus the Sikh temple in Stockton and the Sikh temple in Chotala belong to the same Sikh religion.

Counsel provides no evidence to support his statement. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Despite counsel's failure to support his statement, we note in "exhibit B" of counsel's submission in response to the director's notice of intent to revoke, several Internet resources are listed for further information on Sikhism. One of the listings, www.sikhnet.com, indicates that:

Already there are signs of sects and denominations within Sikhism although the lines between them are not yet clearly or rigidly drawn. There are important doctrinal differences among some of them; for example, Namdharis seek guidance from a living person whom they recognize as Guru; whereas, the larger Sikh community following the directive of Guru Gobind Singh, recognizes Guru Granth as the repository of spiritual authority and the Sikh people speaking collectively as the voice of the Guru in temporal matters. Many Sikhs follow particular spiritual teachers and thus differ from others in minor practices but these idiosyncrasies are relatively insignificant. Our religion is

young. Will there come a time when we will recognize three different kinds of Sikhs: Those who have been confirmed (Amritdhari) and have taken final vows to maintain all the requirements of the religion; those who look like Sikhs (Keshadhari), maintain long unshorn hair but have not taken the final vows (Amrit) of the Sikh lifestyle; and finally those who follow the time honored tradition of Sikhs who like the Marrano Jews hide their identity, and are labeled Sehajdhari in the Sikh tradition?¹

We find such evidence satisfactorily corroborates counsel's statements on appeal, and thus, establishes the beneficiary's membership for the requisite period. We, therefore, withdraw this portion of the director's decision.

The next issue is whether the beneficiary will be employed in a qualifying vocation or occupation. The regulation at 8 C.F.R. § 204.5(m)(2) states, in pertinent part:

Minister means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fundraisers, or persons solely involved in the solicitation of donations.

Religious vocation means a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters.

In response to the director's request, the president, secretary, and general cashier of the petitioning temple describe the beneficiary's duties:

[W]e now seek a new Priest to perform the duties of a Sikh Granthi (Sikh Priest).

The duties of a priest include reciting the Holy Sri Guru Granth Sahib (the Sikh Holy Book) every day in the morning and afternoon prayers, preparing the Karah Prasad (holy food) in the prescribed manner in order to practice social equality, helping the supervising in preparing the Guru Ka Langar (sacred food) to be served for all the meals of the day, performing funeral services, performing Anand Karaj (marriage ceremonies), participating in Amrit Sanchar Ceremony (Sikh Baptism), and addressing the baptized in the principles of Sikhism and the Rehat Maryada (vows of Sikh principals), preaching on the anniversaries of the Ten Masters of Sikhism and other religious ceremonies, and teaching Punjab and holy prayers to the members of the congregation.

¹ See <http://www.sikh.net/publications/View/whosikh.htm> (3/22/05).

In response to the director's notice of intent to revoke, the petitioner submits the following definition of a granthi, from the Sikh Mediawatch and Resource Task Force (SMART):

(loosely) Minister. A *Granthi's* prime duties include arranging daily services, reading, teaching and explaining the Sikh scripture . . . More generally, a *Granthi* is responsible for the care of the *gurdwara* the *Guru Granth Sahib*, and also to teach and advise community members.

On appeal, the petitioner submits a document entitled "Sikhism." The document states, "[t]here is no such class as priesthood in Sikhism. However, the one who performs the daily service is called the Granthi." The document further indicates that, "any Sikh male or female may conduct the prayer or perform the services."

Despite the definition's reference to the granthi being similar to a minister, the record does not support a finding that the beneficiary meets the regulatory definition of a minister. Although the petitioner indicates that the beneficiary's participates in ceremonies such as weddings and baptisms, the record lacks evidence that the beneficiary is authorized in the Sikh religion to conduct such ceremonies. Because the term "minister" does not include a lay preacher, the fact that any member of the Sikh religion appears to be able to perform the services and prayers is significant in that the beneficiary's duties appear to be that of a lay preacher.

Moreover, given the statement that there "no such class as priesthood in Sikhism, and the fact that the petitioner has not submitted any evidence that to become a granthi, the beneficiary was required to commit to his religion in a manner different from that of others in the temple, such as the taking of vows, the petitioner is unable to demonstrate that the beneficiary is pursuing a vocation. The fact that any Sikh male or female may perform the services and prayer does not indicate that being a granthi requires a higher calling than is required of other members of the temple.

As it relates to whether the beneficiary will be employed in a religious occupation, we note that the statute is silent on what constitutes a "religious occupation," and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services (CIS), therefore, interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

Although the duties described by the petitioner indicate that the beneficiary's duties relate to a traditional religious function, the fact that the petitioner has not described any of the qualifications necessary to be considered a granthi, the implication is that any member of the Sikh religion can perform such duties. As the beneficiary's duties encompass tasks that can be delegated to any volunteer from the congregation, rather than being assigned to a full-time paid employee, such a fact does not persuasively demonstrate that the beneficiary's position is considered a qualifying occupation.

The next issue is whether the petitioner is considered a qualifying tax-exempt religious organization. The regulation at 8 C.F.R. §204.5(m)(2) defines a “bona fide nonprofit religious organization in the United States” as an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of CIS that it would be eligible if it had applied for tax-exempt status. Further, the regulation at 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization’s assets and methods of operation and the organization’s papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The director revoked the petition, noting that although the record contained a copy of the petitioner’s articles of incorporation and Form 990, such evidence did not sufficiently demonstrate the petitioner’s tax-exempt status. The director failed to consider the petitioner’s Form 1023, Form 8718 User Fee Exempt Organization Determination Letter Request and articles of incorporation dated October 22, 2002, noting that in accordance with *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements.

On appeal, the petitioner argues that it demonstrated its tax-exempt status, which was accepted by the director when he approved the beneficiary’s prior R-1 nonimmigrant status. This argument is not persuasive. A petitioner must meet the eligibility requirements for each petition filed. The fact that a previous nonimmigrant petition may have been approved, does not indicate a de facto approval for any further petition filed in the future. We note that if the previous petition was approved in error, that error does not create a presumptive entitlement to perpetuation of that error.

Counsel further argues, “the regulations do not require a formal determination letter from the IRS,” and that a petitioner who “has never sought such exemption [must only] establish to the satisfaction of [CIS] that it would be eligible therefore if it had applied for tax exempt status.” We do agree with counsel’s argument in this instance but note that in determining whether the petitioner has demonstrated *it would be* eligible for tax-exemption, it is not enough for the petitioner to simply show that it would qualify for tax-exempt status under section 501(c)(3) of the Code. Instead, the regulation makes clear that a petitioner’s tax-exempt status or qualification for such status must be related to the fact that the petitioner is a religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), the petitioner must submit the documentation required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant*

Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations
(December 17, 2003):

- (1) A properly completed IRS Form 1023;
- (2) A properly completed Schedule A supplement, if applicable;
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS² and that specifies the purposes of the organization;
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required “if applicable.” Further, IRS Publication 557 *Tax Exempt Status for Your Organization* (IRS Publication 557), submitted by the petitioner on appeal, reflects that churches are not required to file Form 1023.

The Yates Memorandum does not state that the petitioner must provide one item from the list. Rather, *all* the listed documents, “at a minimum,” are necessary to establish that the entity has represented itself to the IRS as being primarily a religious organization, in instances where the religious nature of the exemption is not readily apparent from the IRS exemption letter.

The documents listed in the memorandum are, taken together, “such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.” 8 C.F.R. § 204.5(m)(3)(i)(B). The AAO therefore concurs with, and endorses, the valuable guidance contained within the Yates Memorandum.

The petitioner’s Form 1023, indicates that the petitioning temple was “established to promote the teachings of Guru Nanak, and to offer council and encouragement to all Sikhs. The temple has regular services, conducted by temple priests, twice a week. These services are generally attended by approximately 400 individuals.”

A review of the petitioner’s articles of incorporation, dated May 27, 1912, do not contain a dissolution clause. Although the petitioner’s October 22, 2002 articles of incorporation do contain the appropriate dissolution clause, as noted by the director, the document is dated *after* the date of filing. As such, they cannot be used to show the petitioner would have been eligible for tax-exemption at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See*

² An organization may be granted an exemption if the purposes stated in the articles of organization are limited in some way by reference to 501(c)(3). The assets of an organization must be permanently dedicated to an exempt purpose. This means that should an organization dissolve, its assets must be distributed for an exempt purpose described in this chapter, or to the federal government or to a state or local government for a public purpose. *See IRS Publication 557.*

Matter of Michelin Tire Corp., 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner submits ample documentation regarding the religious activities undertaken at the petitioning church. We do not dispute that such activities take place. At issue here is not whether religious activities take place. Rather, what must be established and, thus far, has not been established, is whether the petitioner would be eligible for tax-exemption based upon the fact that it is a religious organization.

The remaining issue concerns the petitioner's ability to pay the beneficiary's proffered wage. As of the filing date, the beneficiary's compensation (including benefits) was set at \$300 per month. The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.* In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

[Emphasis added.]

With the filing of the initial petition, the petitioner failed to submit any document to establish its ability to pay. In response to the director's request for evidence, the petitioner submitted a copy of its "Income and Expenses Record" for 1999 and part of 2000.

The petitioner's statement that the beneficiary "has been employed as a Priest at Sikh Temple since July 1998 with the monthly salary of \$300 which increased to \$500 in October 2000, plus free boarding and lodging," does not sufficiently establish the petitioner's ability to pay. Pursuant to the above regulation, an officer's attestation of ability to pay is acceptable only when the prospective employer employs 100 or more workers. The petitioner has not shown that it employs 100 or more workers, and therefore the regulations require further documentation.

In his notice of intent to revoke, the petitioner noted the absence of any of the required types of documentation needed to establish the petitioner's ability to pay. In response, the petitioner submitted copies of income statements, a Form 990, bank statements, cancelled checks, and a monthly ledger showing cash payments to the beneficiary.

As previously noted in the discussion related to the beneficiary's continuous employment, the beneficiary indicated he had no employment from July 1998 to the present. Because of the inconsistency between the beneficiary's claim of pay and the beneficiary's February 2001 assertion that his work as a priest ended in June 1998, as well as the fact that the cancelled checks submitted in response to the notice are all dated after the qualifying period, we cannot accept these checks as evidence of the petitioner's ability to pay.

On appeal, counsel refers to the previous submission of the documents noted above. The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay “shall be” in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The record contains no annual reports or audited financial statements. Although the petitioner has submitted a copy of its Form 990, Return of Organization Exempt from Income Tax, because the return is for the 2002 tax year, such evidence is insufficient to demonstrate that the petitioner had the ability to pay the beneficiary from the time of filing in September 1999 in accordance with 8 C.F.R. § 205.4(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.