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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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Services

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FILE:

[REDACTED]
LIN 06 210 50435

Office: NEBRASKA SERVICE CENTER

Date: MAY 28 2009

IN RE:

Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that the director misapplied the law and the facts and that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. – An alien is described in this subparagraph if –

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term “extraordinary ability” means a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a producer/director. In describing the job on the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that he would “[p]roduce and direct noncommercial productions.” In

denying the petition, the director stated that the petitioner “must establish extraordinary ability in the field as a whole, not just in a particular area.” Counsel takes issue with this statement on appeal, arguing that “[a] reasonable narrowing of the scope of consideration is obligatory in this case as commercial television and non-commercial community television are such diametrically different arenas.”¹ Counsel cites to an unpublished opinion by the AAO in support of his argument. While 8 C.F.R. § 103.3(c) provides that precedent decisions of the United States Citizenship and Immigration Services (USCIS) are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Nonetheless, in this instance we concur with counsel that the director’s statement regarding the petitioner’s designated area of expertise is overreaching. As with other fields of endeavor, such as acting (movie, television or theater), athletics, musicians, or artists, it is reasonable to distinguish between the various categories of producing and directing, although they may fall within the same general category and use the same general skill set. Counsel has submitted voluminous evidence to establish that the petitioner’s work in noncommercial television is separate and distinct from commercial television. This finding, however, in no way minimizes the petitioner’s burden of proof in establishing that he is among the very top of his field in directing and producing noncommercial television.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien’s receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

In his June 29, 2006 letter accompanying the petition, prior counsel alleged that the petitioner qualified for this visa preference classification because of his receipt of a major internationally recognized award. Specifically, the petitioner had been the recipient of an Emmy Award as director of the program “Access Democracy: Smackdown Your Vote.” The petitioner provided photographs of himself posing with an Emmy Award and submitted a May 15, 2006 letter from [REDACTED], founder and director of the Downtown Community Television Center (DCTV). Mr. [REDACTED] indicated that the petitioner was recruited to work on DCTV’s show *I.M.N.Y.* and stated:

[The petitioner’s] work on *I.M.N.Y.* was recognized with the 2004 *Emmy Award* for Outstanding Teen Programming as well as the *Aurora Awards* Gold Award and the 2003 *Chicago International Television Award*. He is a principal force in providing groundbreaking, non-commercial media work to the public. His contribution to our non-commercial work is well documented and gained both DCTV and [the petitioner] great national and international acclaim Other programs he directed here at DCTV include *Bridge to Baghdad* which aired

¹ As the petitioner has obtained new counsel on appeal, the terms “prior counsel” or “previous counsel” will be used in reference to the attorney who represented the petitioner prior to the appeal.

nationally on MTV and received outstanding reviews, *Access Democracy* which was awarded yet another *Emmy Award*, and a special program on the 1-year anniversary of September 11, which aired nationally on Link TV, as well as in Asia on the channel NHK.

The petitioner submitted what appears to be a program or flyer indicating that the New York Chapter of the National Television Academy “honors *Access Democracy Smackdown Your Vote*,” was nominated for Outstanding Childrens/Youth & Teen Programming at the 2001-2002 New York Emmy Awards. The document identifies the petitioner as the director, but does not indicate that the program actually won the award. The petitioner also provided a list of the 2003 winners of the Annual New York Emmy Awards. The document includes “*Access Democracy Smackdown Your Vote*” under Childrens/Youth & Teen Programming; however, the source of this document is not shown.

In response to the director’s request for evidence (RFE) dated March 28, 2007, the petitioner submitted another photograph of the 2001-2002 Emmy Award for the show “*Access Democracy Smackdown Your Vote*.” This photograph clearly indicates that the Emmy was awarded to Time Warner Cable. The award inscription included the name of [REDACTED] as the producer of the program but did not name the petitioner. We note that the petitioner submitted no photograph of the 2003 Emmy. The petitioner also submitted a copy of a June 16, 2007 letter from [REDACTED] who identified himself as “an elected Director representative of the New York Chapter of the National Academy of Television Arts and Sciences (NATAS), “which is associated with the famous Emmy Awards® for television programming.” [REDACTED] stated, “[a]s the same high standards are used for the granting of all Emmy® Awards around the country, in both national and regional competitions, all Emmy® Awards are recognized internationally as the top award for television shows and professionals in the United States.” [REDACTED] stated that the petitioner directed “*Access Democracy Smackdown Your Vote*,” which was awarded an Emmy in 2001 and IMNY, produced by [REDACTED] which was awarded an Emmy in 2003 for Teen Programming. [REDACTED] further stated:

Traditionally, when an award is given to a program (not an individual person), the program’s title and the producer’s name are inscribed on the award. The producer is the “official representative” of the entire production team. It should be noted that under the “Children/Youth” category there is no specific award given to “best director”, “best producer”, “best editor”, etc.

The show as a whole is awarded and recognized under this category. This same procedure is followed for similar categories in the Academy Awards (the “Oscars”®), as well. Naturally, the Director plays a pivotal role in creating the production. The award is given to the program due to the Director’s vision and leadership that made a show stand-out in comparison to other nominated productions. The Producer is the ‘point person’ responsible for everything from financing and the smooth running of the set, to development, sales and post-production. Thus, the Director, not the Producer, is the artistic, creative and

technical force behind every award-winning film or TV broadcast. The Producer is the “official representative” accepting the award on behalf of the production team. The Director’s share in every “Best Show” award is extremely significant!

On appeal, counsel asserts:

When a television production wins an award, the Director is an immediate recipient of that award. The producer traditionally acts as the “official representative” when a telecast or film is honored as a whole, but it is ignorant to discredit the Director’s role in creating the award winning production or to deny the Director his share in the award. It is the Director’s vision and leadership that cause a show in its entirety to be honored . . . No person would dare claim that the Director is not specifically honored in such an accolade. It is also important to note that the NY Emmy® does not provide a separate award for Best Director in each category.

While we do not dispute the petitioner’s role as director in the programs that were awarded the Emmy, we cannot ignore the fact that the prize was awarded to Time Warner Cable and not to the petitioner. [REDACTED] letter underscores this point. The producer is the official representative of the team, the producer’s name appears on the award and the producer accepts the award on behalf of the team. We also do not dispute counsel’s assertions that the director reaps some benefit from the award. Nonetheless, the plain language of this criterion requires the alien to document his or her own receipt of the award. The petitioner has not done so. Awards presented to a third-party or organization are not sufficient to establish eligibility. The fact that the New York chapter does not award a “best director” award in the petitioner’s field does not lessen his burden or proof.

Accordingly, despite counsel’s assertions that it is an “an act of extraordinary folly,” we find that the evidence does not establish that the petitioner won an Emmy Award. Further, the petitioner’s contention that the Emmy awarded by the New York Chapter is internationally recognized as an award of excellence is not supported by the record. We are not persuaded that an award whose participants and recipients are constrained to one particular local area is indicative of the national or international recognition of that award. While [REDACTED] claims that the regional award carries the same national and international recognition as the national award, the petitioner provides no evidence to support this statement. The petitioner has failed to produce documentary evidence to establish that the receipt of an Emmy from a local chapter carries the same significance as an Emmy awarded on a national level, much less an international level. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has not established that he is the recipient of a major, internationally recognized award.

The petitioner also submitted evidence that, he claims, meets the following criteria.² A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Prior counsel alleges that the petitioner meets this criterion based on recognition of his work “with Emmy and Aurora Awards,” as well as other organizations such as the Television News Directors Association, the National Federation of Community Broadcasters, and the Chicago International Television Award. As noted above, the petitioner submitted photographs of him with two Aurora Awards. [REDACTED] stated in his May 15, 2006 letter:

[W]e at DCTV invited [the petitioner] to direct a project titled Live from Downtown. The show was groundbreaking . . . The program gained enormous popularity among viewers . . . [The petitioner] is responsible for the critical and popular success of the program. He ensured that all aspects of the production ran smoothly, including all technical aspects of the broadcasts, such as lighting and sound design, positioning and blocking of the sets, staging the performances, timing the live broadcast, calling all camera shots, as well as overseeing the technical direction of the program and all camera and tape traffic. As a result of its innovative style, the program acquired a sizeable cult following. Based on [the petitioner’s] extraordinary skills, the program received The Aurora Awards Gold Award; Alliance for Community Media Northeast Regional Video Festival – First Place in Performing Arts; The Aegis Award; and Alliance for community Media Northeast Regional Video Festival – First Place in Comedy.

The petitioner submitted a copy of a February 26, 2003 letter from the Chicago International Television Awards (The Hugoes) addressed to [REDACTED] at Downtown Community Television, informing her that her submission “Access Democracy” had been awarded a Gold Plaque in the category of Public Access Program at the 39th Chicago International Film Award; a copy of a July 22, 2003 letter from The Aurora Awards in Salt Lake City, Utah addressed to [REDACTED] and indicating that two entries, “Live from Downtown – Ethel’ Musical-Variety” and “IMNY – Best of IMNY Part 1’ For Children/Youth” received Gold Awards; a copy of a document indicating a “Gold Award 2003” for “Live from Downtown – Ethel;” a copy of a webpage from the Alliance for Community Media – Northeast

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Region, listing the 2003 ACM-NE Video Festival Winners and Place Award Recipients indicating "1st [REDACTED] MNN New York, NY "Live from Downtown;" and a copy of a page from the PBS website about the EGG arts show. The document indicates that the program was the recipient of the Peabody Award. Additional documentation from the website indicates that the petitioner produced programs about [REDACTED] a; however, there is no documentation to indicate that either of the petitioner's programs was a Peabody Award winner.

In response to the RFE, the petitioner submitted additional photographs of the Aurora award statues. The photographs indicate that the awards were given to DCTV, with [REDACTED] as producer for "Live from Downtown" and [REDACTED] as producer for IMNY – Best of IMNY Part 1. As previously discussed with the Emmy Award, these awards were not given to the petitioner but to DCTV. In addition, there is no evidence that the Aurora Award is nationally or internationally recognized as an award of excellence. The petitioner submitted no documentation that he received an individual award from the Aurora Awards or any of the organizations discussed above.

As it relates to the petitioner's claimed receipt of the Emmy award, as previously discussed, even if the petitioner had adequately documented his receipt of this award, he has failed to demonstrate that an award issued on a regional level, is a nationally or internationally recognized award.

The petitioner has not established that he meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner claims to meet this criterion based on his membership in the Producers Guild of America (PGA). The petitioner submitted a copy of his PGA membership card and a page from the organization's website that lists the requirements for joining:

To join the PGA, an applicant must have received on-screen/on-air credits and performed the job functions for at least one of the capacities listed under the section "The Producing Team" . . . within the past seven (7) years, as indicated below:

Film: At least two (2) feature films that have had broad domestic or verifiable international theatrical release, subject to PGA Council requirements.

Television: At least two (2) long-form television programs (MOW's, movies, etc.) or thirteen (13) weeks of episodic or (26) weeks of non-episodic programs that have been marketed broadly in the domestic territory.

Other: Recommended for membership by the Membership Committee due to sufficient equivalent production experience that justifies membership as part of the producing team.

Those who are eligible for membership as part of the producing team include producers and executive producers, co-producers and co-executive producers, supervising producers, associate producers, segment producers, production supervisors and managers, post-production supervisors and managers, production and post production coordinators.

On its Frequent Asked Questions (FAQ) page, the PGA states that "Members who join the PGA represent the highest standards in film, television and new media professionals" and that the organization is "setting the industry standards for knowledge, professionalism, expertise and quality." On appeal, the petitioner also submits a June 15, 2007 letter from [REDACTED] Director of Operations at the PGA East Coast office, who states that potential members for the organization must "pass a rigorous review process," and that the petitioner was granted membership because of his "award-winning TV programming."

Nonetheless, a review of the PGA's membership requirements reveals that while the organization may have a "rigorous review process," "rigorous" is not synonymous with "outstanding." The requirements as listed above do not establish that the PGA requires outstanding achievements of its members.

On appeal, counsel asserts that the petitioner also meets this criterion based on his membership in the Directors Guild of America (DGA). However, although the petitioner submits a copy of his DGA membership card for the year 2008, he submits no information regarding the membership requirements of the DGA or evidence to establish when he first became a member. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1),(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence does not establish that the petitioner meets this criterion.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner submitted several published articles about the show *Democracy Now!* on which he served as the director. Articles that appeared in the June 2002 issue of *The Independent* and the May/June 2004 issue of *Clamor* recognized the petitioner as director of the show. However, the articles are about the show *Democracy Now!* or its host and are not primarily about the petitioner and his work on the show. Although the petitioner did not claim to meet his criterion, the director addressed it in his RFE and in his decision. The petitioner submitted no additional documentation relevant to this criterion and does not address it on appeal. Accordingly, the petitioner has failed to establish that he meets this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The petitioner did not initially allege that he meets this criterion. However, the director addressed the issue in his decision and, on appeal, counsel asserts that the evidence submitted, including his "innovation and pioneering proliferation of Democracy Now!" and his "Rediscovering the Map," a "cutting-edge multimedia documentary," was sufficient to establish that the petitioner qualifies under this criterion.

The petitioner submitted letters of recommendation from several individuals who attest to his skills as a director and producer; however, while the references describe the petitioner's influence over specific shows, none indicated that any of the techniques employed by the petitioner constituted a contribution of major significance to directing or producing.

- In a May 4, 2006 letter, [REDACTED] Director of Current Affairs of Link TV, described the petitioner as a pioneer who uses "innovative and thought-provoking concepts to produce outstanding television broadcasts," and who "offer[s] startling originality and conceptual ingenuity."
- In his May 31, 2006 letter, [REDACTED] Associate Director of *Martha*, stated that the petitioner "developed and turned *Democracy Now!* – a formerly radio-only broadcast – into the number one non-commercial, independent news program in the country," and that "His significant contribution to other award-winning non-commercial programs, such as *Egg: the arts show*, *TV 411* and *Access Democracy*, made him into one of the most sought after names in the non-commercial industry." [REDACTED] stated that he is "extremely impressed by the techniques and artistic solutions developed by [the petitioner] in order to deal with the difficulties of producing quality programming for the non-commercial market."

- an independent producer, stated in a May 25, 2006 letter that the petitioner's "original thinking and deep technical knowledge allow him to create quality television programming under very small budgets."
- Executive Director of the Alliance for Community Media, stated in a June 18, 2007 letter:

[A]s the head of *Democracy Now's* Broadcast Department, [the petitioner] developed and employed innovative techniques that made this broadcast possible for only a small portion of the budget usually needed for a live national TV news program. For example, he implemented the use of the *Globecaster* video switching platform in the production of *Democracy Now!* This unique device was designed and built for use in religious organizations, government agencies and schools as a way to control close-circuit video feeds. Following [the petitioner's] lead, product developers at *Globecaster* added downstream key channels, color correctors and DVE options to their product, so that it could be used for live broadcasts. This had *never* been done. The *Globecaster* has become the main tool used in the production of *Democracy Now!*, replacing expensive broadcast equipment commonly used in mainstream TV productions . . . [The petitioner's] innovation undoubtedly saved his organization hundreds of thousands of dollars over the years. [Emphasis in the original.]

As noted, these individuals describe the petitioner's work as significant to his employers by saving them money while producing quality programs. However, none of them indicate that his contributions were of major significance to the petitioner's field of endeavor. In denying the petition, the director "noted that most of the authors fail to identify the particular techniques or concepts" used or developed by the petitioner, and that while adapting the use of the *Globecaster* video switching platform "may demonstrate the petitioner's ingenuity and creativity, there is no indication that the petitioner designed or developed this device." The director determined that "the record fails to establish that the petitioner has developed new equipment, techniques, methodologies, etc that have been recognized and adopted by others and which have significantly impacted the field."

Counsel's argument on appeal focuses primarily on the petitioner's work with *Democracy Now!*, asserting that the director "neglected to mention or consider [the petitioner's] ground-breaking and critically acclaimed work" on that program. Counsel states that the petitioner developed a television show from a radio show and turned it "into a household name, known to the masses, as never done before." Counsel asserts that the petitioner "is responsible, in part, for changing the face of public television as we know it today." In support of his appeal, the petitioner submitted additional testimonials. We quote at length from [REDACTED], Executive Producer and host of *Democracy Now!*, who, in a June 15, 2006 letter stated:

Just days after the September 11 attacks on the World Trade Center we made the decision to expand the show, which was a radio-only broadcast at the time, into a television program . . .

Despite the show's established reputation as one of the leading radio programs in the non-commercial industry, the transition was not simple. The budget usually available to mainstream, commercial television productions was not available to us. Furthermore, our extremely small staff of engineers and news producers did not have any experience producing television programs. We looked for a television professional who could spearhead the development of the broadcast from a low-budget radio show to a nationally syndicated television broadcast, and lead us all into this new exciting era of television production. Undoubtedly, the right man for the job was [the petitioner].

Having already worked as a Producer/Director on a few of the most prestigious non-commercial television programs in the country, [the petitioner] brought his vast experience and expertise to *Democracy Now!*, and immediately began training the crew, developing the technical elements required for a television broadcast, supervising the artistic sides of the production and creating the unique and famous on-air look of *Democracy Now!* His innovative ideas, original thinking and extraordinary talent, allowed us to overcome the many obstacles we were facing, and move ahead with the development of the show.

[The petitioner] is perhaps the most prominent and skilled director/producer in our industry. He has risen to the top of his field, and his contribution to the enormous success of *Democracy Now!* as a nationally syndicated television program can be easily demonstrated: When he joined our team, the program was airing on one station in New York City. Today, four years after he's been our television team leader, *Democracy Now!* is available to tens of millions of viewers across the U.S. on PBS stations, both TV satellite networks . . . and on hundreds of local community access television stations. The broadcast is also viewed by a very large audience around the world on our internet "podcasts[.]" With his leadership, professional excellence and superior artistic skills, [the petitioner] helped *Democracy Now!* become what was called by the press "an independent media empire[.]" Indeed, the program is today the leading, most popular independent news program in North America.

letter confirms that the petitioner played a major role in the development and success of *Democracy Now!* as a television news program. In a June 12, 2007 letter, Ms. [REDACTED] stated that she had previously "explained how [the petitioner's] work as Director of our award-winning TV programs had a tremendous impact on the entire field of independent, non-commercial, public broadcasting." However, the record does not support this assertion by [REDACTED]. The evidence establishes that the petitioner is a talented and resourceful producer/director. Nothing in [REDACTED] letters or any other documentation in the record,

however, confirms that the petitioner's work on *Democracy Now!* constituted a contribution of major significance to his field of endeavor. Despite counsel's assertion, success as a director does not automatically signify that the individual has made a significant contribution to his field.

Counsel also asserts that the petitioner's "innovative use" of the Globecaster video switching platform, which was a "pioneering contribution," was "dismissed" by the director. On appeal, the petitioner submits a copy of an April 10, 2008 letter from [REDACTED] Executive Director of Cambridge Community Television, in which she discusses, among other issues, the technological challenges and differences between commercial and non-commercial television. [REDACTED] described the alterations that the petitioner had made to the Globecaster video switcher and stated that it allowed the operator to perform the work "usually performed by 3 to 7 people in mainstream television." [REDACTED] further stated:

It's worth mentioning that [the petitioner] introduced this innovative technical solution to other community television organizations that encountered the same technical difficulties: In April 2003, when he was asked to direct a live production of *Democracy Now* from the Free Speech TV studios in Boulder, Colorado, while the show was traveling across the country, he introduced this innovative technical solution to the local station engineers and managed to increase the video capacity of the production video switcher the station was using at the time.

Counsel asserts that "[t]his new use of technology defined new heights for the arena of non-commercial television," and that "[t]his industry defining revelation cannot be underestimated." However, the record does not support counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). While counsel cites the use of the altered device by Free Speech TV, the record contains no confirmed use by any other non-commercial entity. Further, while the altered device apparently proved innovative, useful and money saving to his individual show, the evidence of record does not reflect that use of the altered Globecaster video switching platform was of major significance to the field.

The evidence does not establish that the petitioner meets this criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The wording of this criterion indicates it is intended for those in the visual arts such as sculptors and painters. According to prior counsel, the petitioner's artistic showcase is "broadcast," and that the petitioner's "artistic work has been displayed extensively through broadcast media." Counsel asserts on appeal that the determination that the petitioner "did not satisfy the criterion is particularly egregious" as "the copious documentation regarding the illustrious reputation of *Democracy Now!*" was not considered. Nonetheless, while the evidence indicates that the

petitioner worked behind the scene in securing the success of the broadcast of *Democracy Now!* as a director, the evidence does not indicate that the broadcast of the programs are considered “artistic” showcases.

Counsel also asserts that the petitioner meets this criterion based on his documentary *Rediscovering the Map* about award-winning composer and conductor [REDACTED] which was broadcast in China, on the National Geographic Channel in the United States, and at the Asia Society in New York, which counsel claims “is one of the foremost cultural forums in the world.” Counsel states that these “exhibitions conclusively prove that the petitioner’s work has been exhibited in premier forums.” However, as with the directing and producing of *Democracy Now!*, the evidence does not indicate that the film *Rediscovering the Map* and the petitioner’s work as a producer and director was an “artistic exhibition or showcase.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted no documentation that establishes his work as a director or producer has been the focus of a specific exhibition or showcase.

The evidence does not establish that the petitioner meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation. The petitioner claims to meet this criterion as director of *Democracy Now!*. The director concluded that while the record established the distinguished reputation of the organizations for which he worked, it failed to establish that the petitioner worked in a leading or critical role.

Upon review, we find that the petitioner has sufficiently documented his position within and contributions to *Democracy Now!* as the program’s director and producer. We further find that the petitioner has adequately demonstrated that his role with that program was leading or critical to the success of the program. We, therefore, withdraw the director’s finding on this issue.

The petitioner has established that he meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

With the petition, the petitioner submitted a June 22, 2006 letter from the accountant for Docuart Productions Inc. stating that the petitioner was an employee of the company and was paid a salary of \$37,000 for the year 2006.

In his RFE, the director advised the petitioner that if he claims to meet this criterion, he should submit evidence of his salary or other remuneration for the year 2005 (the year prior to filing the petition) and to provide evidence that his remuneration was “significantly higher than that normally encountered in the field.”

In his June 19, 2007 letter accompanying the petitioner’s response to the RFE, prior counsel stated that the petitioner was currently the director of the studio production division with IMG/Spring and earned an annual salary of \$100,000, which placed him within the top 25% of all producers and directors. The petitioner submitted a copy of a March 12, 2007 letter from IMG Worldwide offering him the position of director for Sprint Power View. The offer, accepted by the petitioner on March 13, 2007, indicated that the petitioner’s salary would be \$100,000 per year with merit increases “based on performance consistent with other employees at a similar level in the Company.” The letter indicated that the petitioner’s start date was March 19, 2007.

We note first that the position with IMG was obtained after the filing date of the petition. Therefore, it cannot be considered as evidence that the petitioner commanded a high salary at the time of filing the petition. The petitioner must establish eligibility at the time of filing. The petition cannot be approved after the petitioner becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1),(12); *Matter of Katigbak*, 14 I&N Dec. at 49. Second, to establish that this salary is significantly high compared to others in his field, the petitioner provided information regarding salaries for producers and directors in the New York-White Plains-Wayne, NY-NJ metropolitan area. The petitioner must establish that his salary or other remuneration is significantly high compared to all others in his field of endeavor and not just in a specified or discrete area. Further, the documentation submitted by the petitioner indicates that producers and directors, who are paid at Level 4 in the New York-White Plains-Wayne, NY-NJ metropolitan area, earn up to \$125,400 per year. The petitioner’s proposed salary of \$100,000 is not evidence that his salary is significantly high compared to others in his field. The remaining evidence of the petitioner’s 2006 salary is also insufficient to establish that he has commanded a high salary in relation to others in his field.

The petitioner does not address the director’s findings any further on appeal and submits no further evidence regarding this criterion. Accordingly, the petitioner has failed to establish that he meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Prior counsel alleged in his June 29, 2006 letter accompanying the petition that the petitioner meets this criterion based on the success of the documentary *Rediscovering the Map*, which followed award-winning composer Tan Dun’s return to his homeland in rural China. The petitioner submitted documentation reflecting that the documentary was broadcast on the National Geographic Channel and was critically reviewed in the April 2005 issue of *BBC Music Magazine*, on Amazon.com, and in other forums such as on the Philadelphia Orchestra website

and *The New Arcadia Review*. However, the petitioner submitted none of the documentation required by the regulation such as evidence of box office receipts or video sales. The petitioner submitted no additional documentation about this criterion in response to the director's request for evidence and does not pursue this issue on appeal.

The petitioner has not established that he meets this criterion.

Counsel asserts that "the regulations provide that eligibility may be established through the submission of 'comparable evidence' of extraordinary ability," and indicates that the testimonials submitted by the petitioner fall within this provision. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the beneficiary's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of the regulatory criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Nevertheless, the reference letters submitted in support of this petition have already been addressed under the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i) and (v). Further, there is no evidence showing that the documentation the petitioner requests evaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of the beneficiary's field. While reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the classification sought requires "extensive documentation" of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from individuals selected by the petitioner.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor.

Review of the record indicates that the petitioner is a highly talented and skilled director. However, the evidence is not persuasive that the petitioner's achievements set him significantly

above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.