

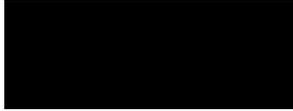


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-00-026-52845

Office: California Service Center

Date: 28 JAN 2002

IN RE: Petitioner:
Beneficiary:



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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations 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 sciences. 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.

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

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(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 have 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 Service 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 scientist. 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, international 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. The petitioner has submitted evidence which, he claims, meets the following criteria.

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

The petitioner submitted several award certificates issued by Zhejiang Agricultural University, Nanjing Agricultural University and various government agencies for Zhejiang Province. In response to the director's request for additional documentation, the petitioner submitted a Certificate of Award for Advancement of Science and Technology awarded to the petitioner in 1994 as the "fourth main contributor" to a research project. The petitioner provided no explanation for why this national award was not included initially. The director noted these certificates were awarded to the petitioner while he was a student, and could not be considered national awards.

On appeal, the petitioner argues that while he was a student at the time, the awards were not based on academic achievements, but research achievements. He argues that the Award for Advancement of Science and Technology was issued by the Chinese Ministry of Agriculture and is not a local award. The record, however, does not include any evidence regarding how many of such awards are given out in a year or other evidence of the significance of the award.

Finally, the record includes a letter offering the petitioner a Rockefeller Foundation postdoctoral fellowship under the direction of Dr. Pamela Ronald, Department of Plant Pathology, University of California, Davis. A fellowship "award" is simply a job offer, albeit a competitive one. Moreover, experienced experts in the field, generally employed in relatively well-paid permanent or tenured positions, do not compete for temporary postdoctoral fellowships which include little more compensation than a stipend and family allowance. As such, the fellowship cannot be considered a national prize awarded to an individual selected from a pool of candidates including the most highly experienced experts from around the nation.

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.

The record contains evidence that the petitioner is a member of the Nuclear-Agricultural Society of China (NASC), the Agronomy Society of China (ASC), the Genetics Society of China (GSC), the Rice Genetics Cooperative (RGC), the American Association of Plant Physiology (AAPP), and the American Association for the Advancement of Science (AAAS).

In his initial brief, counsel asserts that NASC, ASC and GSC are prestigious associations which limit membership to "accomplished scientists." Counsel further asserts that RGC is an international organization but does not discuss their membership requirements. Finally, counsel asserts that ASPP and AAAS are worldwide leading organizations based in the United States that limit membership to "those who have achieved professional competence and recognition in their respective fields of science."

The record does not include the by-laws of these organizations or other official evidence of their membership requirements. Moreover, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, being an “accomplished scientist,” or achieving “professional competence and recognition,” are not outstanding achievements.

On appeal, counsel asserts that all of these organizations other than AAAS:

Require that the members be the accomplished professional researchers in the respective fields and approve the membership after thorough review of the applicant's qualification by the executive boards consisted [sic] of national and international experts.

The petitioner, however, fails to submit any evidence of these assertions. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Regardless, as stated above, being an accomplished researcher in one's field is not an outstanding achievement.

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.

In his initial brief, counsel states:

As a leading researcher in rice genetics and molecular biology, [the petitioner] has produced many pioneering results that are often relied upon by other researchers as the foundation of their own work. Some examples of those papers published by prominent journals, such as Theoretical and Applied Genetics, Journal of Agricultural Sciences, are herewith attached (see Exhibits M).

Counsel then states that other scientists have requested reprints of the petitioner's work, a “pretty good indication,” that those scientists would cite the petitioner's work.

Articles which cite the petitioner's published articles are insufficient to meet this criterion. They are not articles *about* the petitioner as required by the first phrase of the regulation. Rather, they are articles about the author's own research, citing the petitioner's work only as background information.

In addition, counsel included as exhibit D, “publications written by others on [the petitioner's] field.” This exhibit includes December 1995 and August 1996 articles in the *Wall Street Journal*, the *New York Times*, and *National Geographic* on Dr. Ronald's research group's successes in cloning disease-resistant rice genes. The exhibit also included scientific articles in *Science* and *Scientific American* on cloning plants authored by other experts in the field prior to the petitioner's

entry into the United States. The director noted that these articles did not name the petitioner and predated his entry into the United States in October 1996 to work with Dr. Ronald. On appeal, the petitioner asserts that these articles were only submitted to demonstrate the importance of his field. Whether or not these articles were submitted as evidence for this criterion, we concur with the director that these articles cannot serve to meet this criterion.

In response to the director's request for additional documentation, the petitioner submitted three Chinese-language articles and translations. The articles are about the approval of II you 3027, a new rice hybrid developed, in part, by the Zhejiang Agricultural University and recently approved for planting.

The record, however, is inconsistent regarding the petitioner's involvement in the development of II you 3027. As will be discussed below, the petitioner's initial reference letters refer to his development of *two* rice breeds, Shanyou 371 and Xieyou 371. In response to the director's request for additional documentation, the petitioner submitted a new reference letter from Professor Qingyao Shu asserting that the petitioner actually developed *three* rice hybrids between 1989 and 1994: Shanyou 371, Xieyou 371, and II you 3027. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the articles are dated May 23, 2000 and October 14, 1999, long after the petitioner left China. In fact, the article dated May 23, 2000 was published after the petition was filed, and cannot be considered evidence of the petitioner's eligibility at the time of filing.

Finally, even if the petitioner was involved in the development of II you 3027, the articles are about the rice itself, not about the petitioner. Articles which do not mention the petitioner by name cannot be considered evidence of his acclaim.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The record contains a letter from Kangle Zheng, a senior research geneticist at the China National Rice Research Institute, asserting that he invited the petitioner to review the Ph.D. thesis of one of his students in May 1996. Mr. Zheng does not indicate where the student attended school. In addition, Xunmin Wang, a professor of genetics at Fudan University asserts that the petitioner reviewed Master theses and served on these defense committees of two students in July 1995 and July 1996. The petitioner was working at Fudan University at the time. Mr. Wang also indicated that as a member of the editorial committee of *Acta Genetica Sinica*, he invited the petitioner to "co-review" two articles submitted to the journal. Finally, Mr. Wang indicated that the petitioner was invited to review research proposals for the China National Science Foundation in 1995. The record also includes a letter from Mingwei Gao, a professor at Zhejiang University asserting that the petitioner reviewed articles for the *Journal of Hybrid Rice*.

The director concluded that the petitioner met this criterion. We do not concur. The evidence submitted for each criterion must be evaluated as to whether it reflects sustained national or international acclaim. Being requested by a colleague to review a student's work at one's own institution or to assist with that colleague's editorial responsibilities is not evidence of national acclaim. The record does not contain confirmation from the China National Science Foundation that they selected him in 1995 to review research proposals. Simply reviewing a colleague's proposal prior to submission is not evidence of national acclaim. Finally, the record does not reflect the selection process used to select reviewers for the *Journal of Hybrid Rice*. Thus, the petitioner has not established that he was invited to review articles for this journal based on his national acclaim.

In response to the director's request for additional documentation, the petitioner submitted a letter addressed to Dr. Ronald requesting that she review an article for the National Academy of Sciences Proceedings. The petitioner also included the review, co-signed by the petitioner. First, the letter is dated after the petition was filed, and cannot constitute evidence of the petitioner's eligibility at the time of filing. Regardless, the letter requesting the review is addressed to Dr. Ronald. That Dr. Ronald, the petitioner's supervisor, requested the petitioner's input is not evidence that the petitioner has acclaim beyond his supervisor.

On appeal, the petitioner submits a second letter, this one addressed to the petitioner, requesting that he review the revised manuscript of the same article. As stated above, however, the National Academy of Sciences originally requested that Dr. Ronald review the article. Only after the petitioner's review was included in Dr. Ronald's response did the Academy specifically seek the petitioner's opinion. Regardless, the letter is dated well after the date of filing.

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

The petitioner submitted two letters from Linda S. Stevenson at the University of California, Davis, acknowledging receipt of a formal written disclosure and record of invention. One letter is addressed to Dr. Ronald and the petitioner and the other letter is addressed to Dr. Ronald, Dr. Francisco da Silva, and the petitioner. The letters simply acknowledge the submission of a disclosure and make no assessment as to the significance of the "invention." The first letter states that the University will review the patentability and potential uses of the invention and the second letter states, "your disclosure will be reviewed to determine patentability, patent obligations to parties outside the University, commercial potential and marketability." The letters reflect that the University will decide whether to pursue a patent after these reviews are completed. Thus, these letters are not evidence that the petitioner's contributions have already been recognized as having a major significance.

In addition, the petitioner submitted several reference letters discussing his past and current research. The petitioner's current supervisor, Dr. Ronald, assesses the petitioner as an "exceptionally talented scientist with a strong record of accomplishments in the field of rice genetics and biology." More specifically, she states:

[The petitioner] has isolated five genes from the causal bacterial agent of rice bacterial blight, *Xanthomonas oryzae* pv. *oryzae* (*Xoo*). Four of these genes control bacterial movement. This is the first time such genes have been cloned from the bacterial genus *Xanthomonas*. Species in the genus cause serious diseases in virtually all crops. As bacterial movement is important for pathogenesis, [the petitioner's] results should significantly contribute to the understanding and to the ultimate elucidation of pathogenesis. [The petitioner] also played a critical role in the isolation of the avirulence gene *avrXa21* from the bacterium, which triggers a race specific defense response in rice. This work will allow us to identify the specific molecular mechanism molecule with which the rice Xa21 defense response is triggered.

Dr. Patrick Brown, the director of international programs at the University of California, Davis, and Professor Terence M. Murphy, a professor at that institution, provide similar information. In a letter submitted in response to the director's request for additional documentation, Professor Bostock at the University of California, Davis states that the petitioner's recent research is only "potentially important." (Emphasis added.) Original discoveries are inherent to the field of research. Discoveries which are only potentially important do not rise to the level of "contributions of major significance" as required by this criterion.

Professor John Patrick of the University of Newcastle writes about the petitioner's technical abilities while working as a visiting research fellow at that institution. Professor Patrick does not identify any contributions of major significance made by the petitioner while a fellow.

Professor Gao, the petitioner's former professor and subsequent colleague at Zhejiang University, writes:

After a long time of hard work, [the petitioner] eventually became the first person to develop a completely new fertility revertant mutant from a CMS [cytoplasmic male sterility] line in rice. The mutant is featured by its single mutated dominant gene rather than two dominant genes controlling fertility recovery as in most of the current restorers. This new finding has attracted greater attention from the rice geneticists and breeders both at home and abroad. A couple of years later, he evidenced that the gene is located on chromosome 1, which is entirely different from other restoring genes in hybrid rice. [The petitioner's] creative work is of great significance in rice genetic studies as well as in rice heterosis utilization. The unique germplasm he offered allows to establish a novel system for producing rice hybrids, and facilitates the cloning of [the] fertility restoring gene. Thus the mechanism of male sterility and fertility in hybrid rice will be fully elucidated.

During his serve [sic] at the University, he has developed two rice hybrids (Shanyou 371 and Xieyou 371) and one wheat variety (Henong 1). These were the first rice and wheat varieties of its kind bred by using then the cutting-edge somaclonal

variation techniques, which were officially released in [the] 1990's and plated to a vast area in Eastern China.

This information is reiterated by Sun Jinhe, a professor at Zhejiang Agricultural University, and in a second letter from Xunmin Wang. The petitioner also submitted certificates confirming that Shanyou 371 and Xieyou 371, both developed by Zhejiang Agricultural University and the Zhejiang Hybrid Rice Development Association, were released to areas suitable for planting in 1998 and 1999 respectively. These certificates do not mention the petitioner by name.

The above reference letters are all from collaborators and colleagues. While such letters are important in providing the details of the petitioner's work, they cannot by themselves demonstrate that the petitioner has any acclaim beyond his own circle of colleagues, collaborators, and friends.

In response to the director's request for additional documentation, the petitioner provides several letters which are not from current colleagues. Many of the references, however, were fellow students or collaborated with the petitioner in the past. Dr. Jay Gan, a scientist with the U.S. Salinity Laboratory of the U.S. Department of Agriculture, is actually a former colleague of the petitioner's and Dr. Parveen Sharma of Haryana Agricultural University in Hisar previously collaborated with the petitioner at Dr. Ronald's laboratory. Dr. Wanggen Zhang, a senior scientist at Monsanto Company, is a friend of the petitioner's from China. Norio Kurihara, a professor emeritus at Kyoto University, asserts that he met the petitioner during a lecture at Zhejiang Agricultural University. Professor Kurihara, however, merely provides general praise and does not identify any specific contributions made by the petitioner.

Other letters are from more independent experts, but provide little useful information. Professor Gregory B. Martin at Cornell University merely discusses the importance of the petitioner's area of research. He does not explain how the petitioner's results constitute a major contribution to the field. For example, he does not assert that the petitioner's results have changed the direction of research in this field or even that the petitioner's work has influenced his own research. Professor Maureen Whalen from San Francisco State University also provides only general praise of the petitioner's work.

Other letters, however, are somewhat more compelling. Zhikang Li, a geneticist with the International Rice Research Institute states that the petitioner's work on cytoplasmic male sterility "greatly influenced the research field." Mr. Li further states that the petitioner's research on bacterial blight led to a "very significant finding in biology." He concludes, "all of these accomplishments greatly contributed to rice disease resistance study and demonstrates that [the petitioner] is now a leading scientist in this research field."

Dominique Van Der Straeten, head of the Institute of Biotechnology for Developing Countries, met the petitioner through a collaborative research program funded by the European Community while the petitioner was a post-doctoral researcher at Fudan University. He asserts that the petitioner's work is at the "top scientific level" and has the "potential to benefit rice culture in the near future, all over the world."

It is clear that the petitioner is a talented researcher who has a track record for contributing to his field. The record, however, contains no testimonials about how the field has truly changed due to the petitioner's work, how independent experts have incorporated his findings into their own research, or other explanations of the major significance of the petitioner's work. Even if we were, however, to conclude that the petitioner minimally meets this criterion, it is only one criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The record reflects that at the time of filing, the petitioner had authored 32 articles published in Chinese and United States journals and a book chapter. The director concluded that the petitioner had met this criterion. Publication of articles, however, is inherent in the research field. As stated above, the evidence submitted for each criterion must be evaluated as to whether it demonstrates national or international acclaim.

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

The petitioner submitted three review articles which cite his work, one of which is a self-cite by one of the petitioner's co-authors. While self-citation is normal and expected, it is not evidence that the petitioner's work has garnered national or international attention. Two independent citations is minimal in all respects, but especially in light of the fact that the petitioner has published 32 articles, the first in 1987. Such minimal citation does not reflect that the petitioner has attained national or international acclaim.

The petitioner also submitted several requests for reprints of his recently published article. Requests for reprints may simply reflect an interest in the area of research, and does not necessarily reflect that the requestor has fully read the article and has been influenced by it. In light of the above, the petitioner's publication record appears to be evidence of success in the field, but not of national or international acclaim.

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

In his initial brief, counsel asserted that the petitioner had played a leading or critical role for "each institution with which he has been associated" as evidenced by the importance of his research projects and his contributions to those projects. Counsel refers to several letters discussing the importance of the petitioner's role in various projects.

Contributing to a particular project which is ongoing at a distinguished organization is not necessarily performing a critical or leading role for the organization itself. The petitioner worked as a teacher and research assistant for the Institute of Nuclear-Agricultural Sciences. These job titles do not reflect that the petitioner played a critical or leading role for that organization. The petitioner then worked as a research fellow for the Department of Biological Science at Newcastle University in Australia. As stated above, the letter from Professor Patrick about the petitioner's work at that institution makes no mention of the petitioner's critical role at that university. The petitioner then worked as an assistant professor and associate professor at Zhejiang Agricultural University. While the petitioner apparently performed an important role for the rice breeding program, there is no evidence that, as an assistant or associate professor, he performed a critical or leading role for the entire university.

Finally, the petitioner worked as a post-doctoral fellow and now works as a research associate for the University of California, Davis. We cannot conclude that every talented post-doctoral fellow working on a promising project plays a leading or critical role for the entire university. Moreover, Dr. Ronald's grant application for the period August 1, 1998 through September 30, 2003 lists the principal investigator as Dr. Ronald and lists five other "key personnel," none of whom are the petitioner.

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

While the petitioner does not claim to meet this criterion, the petitioner's employment as a staff research associate for \$32,000 does not reflect that he has reached the pinnacle of his field. It is acknowledged that a petitioner need not meet every criterion. Where, however, the petitioner's salary and job title are so nominal, the petitioner must explain how he compares with Nobel Laureates and other highly experienced experts in the field.

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 the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a biologist to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a biologist, but 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.