U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

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MAY 27 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Elizabeth O'Brien

Robert P. Wiemann, Director
Administrative Appeals Office

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

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. The petitioner's motion to reconsider, or in the alternative, an appeal, was forwarded to the AAO pursuant to 8 C.F.R. § 103.3(a)(2)(iv).

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 she has sustained national or international acclaim at the very top level.

This petition, filed on February 24, 2003, seeks to classify the petitioner as an alien with extraordinary ability as a scientific researcher. 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 director stated in his decision that the regulatory criteria "do not automatically prove eligibility." In other words, the petitioner must do more than submit evidence addressing at least three of the criteria. The evidence

in support of each criterion must qualitatively satisfy the criterion, and indicate through extensive documentation of national or international acclaim that the petitioner meets the criterion.

Through counsel, the petitioner has submitted evidence that, she 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.*

> *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.*

With the petition, counsel initially asserted that the petitioner met these criteria. However, counsel did not further address these criteria in response to the director's request for evidence (RFE) dated April 18, 2003, or on appeal. The director determined that the petitioner did not meet these criteria, and as no further evidence was submitted in support of the criteria, we concur with the director's determination.

> *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 order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media.

The record contains a copy of an article from the October 13, 2000 edition of *Science*. The article discusses research on genetically engineered plants using the plant's own genes. Although the petitioner is mentioned in the article as one of the researchers who is working on suppressing vertical growth in plants, the article is not about her or her work as required by this criterion.

The petitioner submits evidence that other researchers have cited her research work. The AAO has consistently held that this criterion is not satisfied by citations to a petitioner's work by others in the field. The plain language of the regulation requires that the published material be about the alien, relating to his or her work.

It is the nature of research to build upon work that has gone before. In some instances, prior work is expanded upon or supported. In others, it is superseded by the findings of current research. In either case, the current researcher normally cites the work of prior researchers. Clearly citations are not the same thing as published material written *about* an individual's work in the field. Citations do not discuss the merits of an individual's work, the individual's standing in the field, or any significant impact that his or her work has had on work in the field. Citations of the petitioner's work are the subject of a separate criterion.

Dr. Robert L. Fischer, a professor in the Department of Plant and Microbial Biology, University of California, Berkeley, and in whose laboratory the petitioner works, states that the petitioner's work has been "widely recognized in the *Society of Plant Biology*." No evidence was submitted to substantiate Dr. Fischer's

statement. The record contains two documents labeled "Meeting Report" and copyrighted by the American Society of Plant Biologists. The first document appears in the January 2002 edition of the journal *The Plant Cell* and discusses the results of a workshop on the "age old-old question of whether cells make plants or plants make cells." The document "highlighted a number of new discoveries reinforcing" the idea that emerged during the workshop that the "activity of key cell cycle regulators ... also have profound effects on development." The other document appeared in the February 2003 edition of the journal *Plant Physiology*, in a report "highlight[ing] and review[ing] ... the genetic circuitry that underlies leaf form, as discussed at a workshop on 'Leaf Development.'" In both reports, the petitioner's work is listed as a reference. However, neither of the reports is about the petitioner, and do not highlight her work among the other references listed.

In this case, the petitioner has offered no evidence showing that she has been the subject of published material about her in satisfaction of this criterion.

> *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.*

As evidence of this criterion, the petitioner submits copies of four grant proposals that she reviewed from the United States Department of Agriculture (USDA). The requests for review addressed the recipient as "Dear Colleague," with no indication that the request was directed to the petitioner. Additionally, the record does not reflect the criteria used by the USDA in selecting reviewers for its grant proposals. However, the record establishes that the petitioner performed the reviews.

The petitioner also submitted a copy of a document that lists her as a reviewer for the journal *The Plant Cell* for the period of November 1, 1999 to October 31, 2000.

The record also contains a letter from the journal *Development*, a publication of Utrecht University in the Netherlands, and a telefax from the *EMBO Journal* in London, indicating that the petitioner had agreed to review a manuscript for each of the journals. The record does not contain evidence that the petitioner actually performed the reviews.

Keith Roberts, professor and associate research director at the John Innes Centre in the United Kingdom, states he is the founding editor in chief of the journal *Current Opinion in Plant Biology* and serves on the editorial boards of other scientific journals. According to Professor Roberts, "Only those who are at the top of their field are chosen to judge the work of others in the field or serve as reviewers for articles submitted to scientific publications or research proposals filed with federal government agencies." However accurate Professor Roberts' statement may be in theory, peer review is an integral part of the scientific publication process. It does not follow that every person who is selected to review papers for publication is extraordinary in his or her field. Further, because the statute requires extensive documentation, the AAO will look at the frequency and the regularity of invitations to perform peer review. Occasional participation in the peer review process does not substantiate that the petitioner has earned such sustained national or international acclaim that his opinions and insight are regularly sought as a valued element of that process.

The record reflects that the petitioner has reviewed four grant proposals for the USDA and has participated for a year as a reviewer for *The Plant Cell* journal. The record establishes that the petitioner regularly participates in the peer review process and that she meets this criterion.

Dr. Fischer states that, in her position as assistant researcher in his laboratory at the University of California, Berkeley, the petitioner supervises a small research staff, and has taught and supervised a graduate researcher and five undergraduate assistants in the laboratory. Supervising other individuals as part of one's job duties is not, without more, indicative of acclaim as required by this criterion. Although the petitioner was not hired to teach, once she assumed that role, evaluating her students became an inherent part of her job.

The evidence establishes that the petitioner meets this criterion.

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

In letters accompanying the petition, the response to the RFE and on appeal, counsel states, "Inherent to her responsibilities as a scientific researcher, [the petitioner] is responsible for many original contributions of major significance to the field of plant biology." In support of this criterion, the petitioner submitted several letters of support and recommendation from international experts in the field of plant biology who attest to the significance of the petitioner's work. The petitioner's claims appear to be focused on two main biological discoveries: the control of inflorescence and floral organ identity by the AGAMOUS gene and the role of the AINTEGUMENTA (ANT) gene in controlling plant size.

Regarding her work on the AGAMOUS gene, Dr. Fischer, who collaborated with the petitioner states:

> [The petitioner] generated transgenic Arabidopsis plants with AGAMOUS (the first floral regulatory gene as isolated by Dr. Ma and his colleagues . . .) and demonstrated that AGAMOUS is a master gene that regulates the fate of male and female organs in plants, thus proving the floral model. [Her] research in this area was published in several scientific journals including *Cell*, the most prestigious journal in biological science.

C. R. Somerville, Director, Carnegie Institution of Washington and a professor of Biological Sciences at Stanford University, stated that he has "followed [the petitioner's] work on plant developmental genetics since 1992. While she was a postdoc at Cold Spring [H]arbor, she made several important discoveries concerning the control of inflorescence and floral organ identity by the AGAMOUS gene."

Elliot Meyerowitz, a professor of biology at the California Institute of Technology in Pasadena, California, also stated he became aware of the petitioner's work in the early 1990's, "when she was a postdoctoral fellow with Dr. Hong Ma at Cold Spring Harbor Labs. There she did an important experiment in flower development, involved the overexpression of the AGAMOUS gene of the laboratory plant Arabidopsis thaliana. This gene serves a series of important functions in the development of flowers. Her work clarified several of these functions."

Kiyotaka Okada, a professor at the Graduate School of Science, Kyoto University, Japan, stated:

> [The petitioner] is one [of] the best-ranked woman biologists. She has done a number of extraordinary scientific contributions in the modern molecular plant biology . . . [H]er paper in Cell (1992) . . . clearly indicated that a single gene, named AGAMOUS, plays a pivotal role in forming flowers from undifferentiated cell mass . . . [S]he succeeded to demonstrate how a small number of plant genes conduct to form the beautiful but structurally-complex flowers.

Dr. David Smyth, a professor of genetics at Monash University in Melbourne, Australia, writes:

> I first became aware of [the petitioner's] contribution to the molecular genetics of flower development when she published a series of authoritative first author papers on a key gene (AGAMOUS) that controls the identity of reproductive organs in the Arabidopsis flower . . . These studies . . . were a major contribution to our understanding of how this universal gene controls how male and female floral organs . . . gain their identity. In particular, the very important paper . . . for the first time provided positive evidence that AGAMOUS worked this way (only negative mutant evidence was available previously).

Although the authors of these letters express the importance of the petitioner's work in this area, none state how this discovery constituted a contribution of major significance to plant biology. Dr. Smyth stated that the discovery was a major contribution to the field's understanding of the gene but does not indicate the significance of this understanding in further research.

When writing of the petitioner's work on the AINTEGUMENTA (ANT) gene, the writers are more specific. Dr. Fischer, who collaborated with the petitioner on the project, states:

> Through our research, [the petitioner] found that ANT is a general regulator of organ size in plants and that the modification of ANT activity by genetic methods is able to directly alter plant organ size . . . [This] discovery is significant. This is the first time a gene of this capacity has been isolated. [The petitioner's] work is important for basic and applied agricultural science . . . The finding that the ANT gene is a general regulator of plant growth and therefore, an intrinsic regulator of plant organ size is an important discovery for agriculture and horticulture.

Dr. Somerville agrees, stating, "On the basis of her work it now appears that ANT is an intrinsic organ size regulator that controls cell number throughout plant organogenesis . . . [I]t is an amazing finding that plant organ size can be altered by modification of a single gene . . . One of the most important and exciting prospects that I can foresee is the possibility of increasing plant productivity by engineering plants with increased size."

Dr. Smyth states his laboratory has also cloned the gene AINTEGUMENTA, and that the petitioner "published insightful papers on this gene, and discovered an unexpected role that it plays in controlling the size of plant cells and hence organs."

Dr. Roberts concluded that:

> Clearly, [the petitioner's] discovery of the novel function of the ANT gene, which is a general regulator of organ size in plants, and her work to alter plant organ size through modifications of this gene to achieve higher yield plant lines is a significant accomplishment with considerable future benefits to the agricultural industry. Her ongoing research on the regulation of endoreduplication and mitosis has also provided a breakthrough discovery in understanding plant cell size control.

The petitioner's research regarding the AINTEGUMENTA gene was published in the January 18, 2000 edition of the *Proceedings of the National Academy of Sciences*. The petitioner submitted evidence that this article had been cited 40 times as of the date of her petition.

Additionally Director of the USDA Plant Gene Expression Center and Adjunct Professor of Plant and Microbial Biology at the University of California, Berkeley, states that the petitioner's research "contributes to generate improved, more productive plant lines with higher yields. [Her] research could directly benefit the agricultural industry in the United States as well as the world's food supply."

Chief Scientific Officer of Ceres, Inc., a plant biotechnology company in Malibu, California, states:

> My career has been in plant genetics, particularly molecular genetics and the application of this area of science to crop improvement. My specialty is close to that of [the petitioner's] . . . [The petitioner's] research provides additional benefit to the United States through the application of her research by others including Ceres, Inc. The agricultural industry is seeking to make improved crops using the genes she has described. Ceres, Inc. selected the gene that she has described for commercial development because of its properties and potential. She understands its mode of action and is a world authority on its role in controlling plant development. Her value to this project has been immense and is relied upon by those carrying out development of the commercial use of the gene for crop improvement.

The record reflects that the petitioner's discovery that the AINTEGUMENTA gene controls plant growth has had a significant impact on plant biology research, which in turn is expected to have a significant impact on agriculture. The evidence establishes that the petitioner meets this criterion.

In additional support of this criterion, the petitioner submitted evidence of three applications on which she was listed as co-inventor that were filed with the U.S. Patent and Trademark Office (USPTO) for patents on research methods developed in conjunction with her work on the AINTEGUMENTA gene. Two of the applications have been approved for a patent, one subsequent to the filing date of the visa classification preference petition.[1]

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[1] Evidence that comes into existence after the petition is filed cannot be used to establish visa classification preference eligibility. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petitioner submits no evidence that the research methods for which she has received or is seeking patents have had a major impact on the scientific research community. There is no evidence of the use of these methods outside of the petitioner's own research group. The patent office grants over 100,000 patents each year. The simple grant of a patent does not signify the petitioner has made an original contribution to her field of endeavor, or that if the invention was an original contribution, that it was one of major significance. It follows therefore that the petitioner's pending application does not, by itself, establish that she has made a contribution of major significance to her field of endeavor.

Counsel asserts that the peer-reviewed articles the petitioner has published evidence her contributions to the field. Publication of a peer-reviewed article is not, by itself, indicative of a contribution of major significance to the field. In order to be accepted for publication in a scientific journal, an article must offer new and useful information to the pool of knowledge. It does not follow that every scientist whose scholarly research is accepted for publication has made a major contribution to his or her field. As noted above, the petitioner's article in the *Proceedings of the National Academy of Sciences* indicate that her work and publications on the AINTEGUMENTA gene evidence a contribution of major significance to the field. The record does not reflect that the petitioner's other published work has had a similar impact on the field.

The petitioner states that her presentations at international conferences also show that she meets this criterion. The record contains no evidence that the petitioner's presentations at these conferences have been a major contribution to the scientific research field. Such presentations are akin to published work and will be discussed further below under a separate criterion.

Counsel also asserts that university professors recommend that their students read the petitioner's published research in plant biology. As evidence, she presents copies of pages of recommended readings from the website of Dr. Jim Haseloff, a professor in the Department of Plant Sciences at the University of Cambridge. The pages show a link to the petitioner's paper that was published in the *Proceedings of the National Academy of Sciences*. Counsel submits no evidence that other professors recommend or require the reading of the petitioner's work.

However, as noted above, we find that the petitioner meets this criterion, and withdraw the director's determination.

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

The petitioner's curriculum vitae indicates that she has been the co-author of eight published articles and a book chapter on the development and molecular biology of plants, as well as seven published articles and two book chapters on other scientific topics. Many of these articles were published in highly rated journals with international circulation such as the *Proceedings of the National Academy of Sciences* and *Cell*. However, publication alone is insufficient to establish the importance or influence of the published research. The frequency of citation to the articles by independent researchers would tend to demonstrate the interest in and reliance on the published research. The petitioner submitted evidence that others have favorably and frequently cited her work in the field. She also submitted evidence that she has presented her work at international conferences and academic institutions. We find that this frequent citation and reference to the

petitioner's work satisfy this criterion, and withdraw the director's determination that the petitioner does not meet this criterion.

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

In order to meet this criterion, the petitioner must show that she 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 based on her work as a researcher at several institutions, most particularly, the Cold Spring Harbor Laboratory where she worked on the AGAMOUS gene and at the University of California, Berkeley. Although counsel asserts that the petitioner established herself as a researcher at several organizations in Japan, counsel submits no corroborative evidence of the petitioner's roles in these organizations. As evidence, counsel refers to the petitioner's curriculum vitae. Simply going on record, however, 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).

The Cold Spring Harbor Laboratory is an internationally renowned research institution and boasts an association with two Nobel laureates. The petitioner must show she has a leading or critical role at this institution. The evidence presented by the petitioner shows that she played a significant role in the research project on the AGAMOUS gene and published papers regarding her work. However, a research project is not an organization or establishment within the meaning of the regulation. The petitioner submitted no evidence that the laboratory in which she worked enjoyed a distinguished reputation separate and apart from the Cold Spring Harbor institution, or that she played a leading or critical role within Dr. Ma's laboratory.

The University of California at Berkeley is an internationally renowned educational institution with a staff that includes several Nobel laureates and MacArthur Fellows. The university's Plant Biology Division in the Department of Plant and Microbial Biology is associated with the Agricultural Experiment Station in the California Division of Agriculture and Natural Resources, and partners with the USDA in the Plant Gene Expression Center. The record reflects that the Plant Biology Division enjoys a distinguished reputation.

The petitioner is an "Assistant Researcher" at the University of California, Berkeley. According to Dr. Fischer, researcher titles are similar to professorship titles, and are only given to those who "personally conduct research." He states that the university has only four "Assistant Researcher" positions. He also states that since her elevation to this position, the petitioner initiates and works on her own research projects, independent of him, and directly supervises a research associate and a laboratory assistant. Dr. Fischer states the petitioner participated in writing grant proposals that resulted in funding from the National Science Foundation and a private corporation, and although the university requires him to be listed as principal investigator on these projects, the research, ideas and presentations are the petitioner's work. However, working on a project funded by a distinguished research organization is not performing a leading role for an organization or establishment with a distinguished reputation. The record does not indicate how many individuals work in the Plant Biology Division or how many are professors or assistant professors. The record

does not establish that an "Assistant Researcher" in the Plant Biology Division performs in a leading or critical role for the division, the department or the university.

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

The petitioner initially claimed to meet this criterion. However, as with other criteria, the petitioner did not pursue the issue in response to RFE or on appeal. Therefore, we will not further address the criterion.

Other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address other evidence the petitioner submitted under this provision.

As noted above, the petitioner submitted letters from several individuals attesting to her contributions to plant biology. The petitioner also included an "advisory opinion and peer review" from Dr. Richard F. Allison, a professor in the Department of Plant Biology, Michigan State University. Dr. Allison states that he is "periodically required to conduct interviews and examine resumes of applicants for faculty positions and review the performance of students, teachers, and researchers" in his department. He also stated that as the Director of the Graduate Research Program, he reviewed more than 1000 applicants and has over 18 years of experience. He thus feels qualified to determine that the petitioner has extraordinary ability as a research scientist. He states he bases his opinion on a review of the petitioner's "qualifications through a variety of reference letters, publications, descriptions of work experience and academic records."

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information, CIS is not required to accept the opinion or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988). We acknowledge Dr. Allison's evaluation of the petitioner's qualifications; however, CIS cannot defer to "expert" witnesses and abrogate its statutory responsibility to grant visa preference classification only to those who establish that they are aliens of extraordinary ability by meeting select criteria.

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 her field of endeavor.

In review, while not all of the petitioner's evidence carries the weight imputed to it by counsel, the petitioner has established that she has been recognized as an alien of extraordinary ability who has achieved sustained national acclaim and whose achievements have been recognized in her field of expertise. The petitioner has established that she seeks to continue working in the same field in the United States. The petitioner has

established that her entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has established eligibility for the benefits sought under section 203 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.