U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12363008

Date: JUN. 28, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

A self-petitioning physical therapist assistant seeks second preference immigrant classification as an advanced degree professional or an individual of exceptional ability in the sciences, arts or business, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).

The Texas Service Center Director denied the petition, concluding that the Petitioner qualified for classification as an individual of exceptional ability, but that he had not established that his proposed endeavor is of national interest, or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief and asserts that the Director improperly weighed and failed to consider all the evidence. The Petitioner contends that his proposed work as a physical therapist is in the national interest, and thus a waiver of the job offer and labor certification should be granted.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification (emphasis added), as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attomey General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).[1] Dhanasar states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Eligibility for the Underlying Classification

The Director determined that the Petitioner qualified as an individual with exceptional ability based upon the satisfaction of at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), namely (A), (B), and (C), relating to the Petitioner's academic record, letters from current or former employers evidencing at least ten years of full-time experience, and a license to practice the profession. However, upon de novo review, we question the evidence concerning the Petitioner's eligibility for the underlying classification as an advanced degree professional and as an individual of exceptional ability. We conclude that the evidence in fact does not support eligibility for the underlying classification and therefore we withdraw the Director's statements concluding otherwise.[4] Moreover, we observe the Director did not undertake a final merits analysis subsequent to determining that the Petitioner satisfied three of the six criteria.

> An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A)

As noted in the Director's request for evidence (RFE), the Petitioner's academic record indicates that he failed more than one course in pursuit of his foreign bachelor of science degree in physiotherapy. It is unclear why failed courses would lead to the conferment of a degree with "honours," as is stated on the academic record. In his RFE response, the Petitioner provided a [redacted] academic equivalency evaluation that appears either not to acknowledge these failed courses or alternatively characterizes them with a passing grade. The evaluation appears to base the determination upon the conclusion that "50% is the minimum passing mark in the faculties of Basic Medical and Clinical Sciences."[5] The evaluation does not provide documentation or citation to support such a conclusion concerning the minimum passing mark. Further, it is not well explained why a failing grade in the foreign academic record would constitute a passing grade under U.S. standards.

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[1] In announcing this new framework, we vacated our prior precedent decision, Matter of New York State Department of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998).

[2] See also Poursina v. USCIS, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] Statements within the record suggest that the Petitioner would like to be considered as an advanced degree professional in addition to an individual with exceptional ability.

[5] The Petitioner scored below 50 out of 100 in numerous courses. As such, the evaluator's determinations are not well-explained.

Additionally, the evaluation states that the Petitioner's education at the time of graduation is "not substantially equivalent to the first professional degree in physical therapy in the United States at the time of graduation" (emphasis added). The evaluation states that the Petitioner obtained sufficient credit hours for a U.S. bachelor's degree equivalency, but that his education lacked required courses in the humanities and social sciences, as well as professional physical therapy course content in the area of delegation. As such, it does not appear as though the Petitioner possesses a degree equivalent to a U.S. bachelor's degree in the relevant field.

When examining the [redacted] Evaluation Checklist, we note that it lists several courses that are not accounted for in the Petitioner's academic documents. For instance, the checklist includes information suggesting that the Petitioner took 1.15 credit hours' worth of land use, agriculture, and animal husbandry, but this course does not appear to be listed within the educational documents provided. Another example is a reference to a psychology class, but such a course also does not appear in the academic records provided. The evaluation states that these credit and content equivalency determinations were justified based upon the official university transcript and course descriptions. The record does not contain course descriptions, nor is it apparent where the evaluator finds support in the transcripts for the Petitioner having taken these and several other courses.

We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. Matter of Sea, Inc., 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. Id. Consistent with Sea, we hereby decline to assign this evaluation any meaningful evidentiary weight and therefore question whether the Petitioner has established that he meets this regulatory criterion.[6] Here the Petitioner has provided academic documentation indicating failed courses in pursuit of a foreign physiotherapy degree that is not equivalent in content to a U.S. bachelor's degree in physical therapy, as well as an academic equivalency evaluation that draws conclusions from documentation not included in the record. Accordingly, the Petitioner has not satisfied this criterion.

> Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B)

The record contains [redacted] Government documents verifying the Petitioner's employment in the field of physiotherapy and that such employment was for at least ten years. While it appears that the Petitioner may have satisfied this criterion, doubt is cast upon the document due to the alternative spelling used for the Petitioner's name. As the Petitioner has not claimed this name as an alias or other name used, we question the credibility of the document containing it, particularly as it does not match the name spelled on his academic degree or other [redacted] Government documents. The record, as it currently stands, is not sufficient to satisfy this criterion.

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[6] The record contains an "O Level" certificate, which is the foreign equivalent of a U.S. high school education. While such a certificate is not directly relevant to the equivalency of a bachelor's degree, we observe that the name on the "O Level" certificate includes a name different from the Petitioner's. The Petitioner has not claimed [redacted] as an alias or other name used, though it appears on the "O Level" certificate. Further, the Petitioner has not explained why an alternative spelling, [redacted]" is used for his first name. These unacknowledged and unexplained inconsistencies cast doubt of the veracity of the Petitioner's academic records as a whole because it suggests they could belong to a different person.

> A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C)

The Petitioner submitted evidence that he possesses a temporary and limited physical therapy assistant license, which is set to expire two months after the filing of the petition. However, it should be noted that this temporary and limited license establishes permission to practice as a physical therapy assistant, not a fully licensed practitioner within the physical therapy field. Before the Petitioner is eligible to take the full and permanent physical therapy licensing exam, the record indicates that he must complete certain required courses lacking from his foreign education. As of the time of filing, the Petitioner had not completed these courses or sat for the full and permanent licensing exam.[7]

In addition, the record includes conflicting evidence concerning the Petitioner's license to practice in his home country. We reviewed the licensing certificates in the record, the most recent of which expired in December 2016. The [redacted] evaluation alternatively states that the Petitioner's license to practice physiotherapy in Nigeria expired in December 2018. We acknowledge a January 2020 letter from the licensing board that states the Petitioner currently holds a license in Nigeria, however this letter was dated after the petition filing and submitted with the Petitioner's RFE response. As such, it is not apparent whether the Petitioner held a license to practice physiotherapy in his home country at the time of the petition filing. Once again, the licensing board uses an alternate spelling for the Petitioner's first name, one which does not match the name spelled on the academic degree. Therefore, the evidence is insufficient to conclude that at the time of filing the Petitioner possessed a full and permanent license or certification to practice physical therapy, as opposed to a physical therapy assistant. The record, as it currently stands, is not sufficient to satisfy this criterion.

> Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D)

The Petitioner did not submit evidence of his salary or other remuneration for services. Therefore, he has not satisfied this criterion.

> Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E)

The Petitioner submitted evidence that he became a member of the Nigeria Society of Physiotherapy in September 1997. While the certificate photocopy is blurred in areas and cannot be fully read, it appears as though he obtained sufficient experience to be qualified as a member of this association simply by virtue of graduating. The Petitioner has not provided evidence that he is currently a member of this association, particularly considering he has lived in the United States since 2016. Further, he has not established that this original membership continues in perpetuity. His certificates of participation in various courses and workshops held by the Nigeria Society of Physiotherapy do not establish that he is a

[7] The Standard Occupational Classification (SOC) code selected by the Petitioner on the Form I-140 is 29-1123, corresponding to "physical therapists" not physical therapist assistants. The Petitioner has not established that he is qualified to practice the profession he selected based upon his education and current licensure status. Moreover, despite the Director requesting a revised Form I-140 to correct errors in the completion of the one originally submitted, the Petitioner did not provide a position description in the original I-140 (Part Six, Item 3) or on the revised Form I-140 submitted in his RFE response. The Petitioner has not established that his role as a physical therapy assistant is substantially similar to that of a physical therapist.

member of the association, but rather that he attended its events. Therefore, the evidence does not sufficiently establish membership in a professional association as of the time of filing.

> Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F)

The Petitioner presented numerous certificates of participation and volunteerism in various athletic competitions. A few of the certificates indicate that the Petitioner was a medical volunteer, but most are simply certificates of participation. From these certificates alone, it is unclear whether the Petitioner volunteered in the field of physiotherapy and if so, the extent of his involvement.[8] These certificates do not establish achievement or contribution in the field of physiotherapy as much as they establish volunteerism in sporting events. Furthermore, there is little evidence that the certificates are recognized beyond the presenting institutions or are indicative of influence in the field as a whole.

Turning to the letters submitted by former colleagues and classmates, we note some of them are unsigned. The authors offer general praise concerning the Petitioner's work ethic, dedication, and good character, but none of the letters establishes how the Petitioner received recognition for achievements or significantly contributed to the field. The authors acknowledge the Petitioner's interest in the field and that he performed well in various employment roles, but none of the letters corroborates that the Petitioner received recognition for achievements or made significant contributions to the industry. Similarly, the employment verification letters from the [redacted] Government praise him as employee and acknowledge his work for the hospital, but do not support a finding that he contributed to the field as a whole. Accordingly, the Petitioner has not satisfied this criterion.

Final Merits Determination

We conclude that the evidence does not establish that the Petitioner has met any of the six regulatory criteria. When a petitioner has satisfied at least three of the six criteria, a final merits determination concerning the Petitioner's eligibility is still required per the two-part adjudication framework established in Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010). In the final merits analysis, the quality of the evidence must be evaluated. Even if the Petitioner had satisfied the three criteria identified in the Director's decision, we would still conclude that the qualifications the Petitioner possesses appear to be similar to those possessed by most physical therapists in the field. For instance, it appears as if the Nigeria Society of Physiotherapy confers membership upon anyone who applies for it and has completed the relevant education. While the evidence insufficiently establishes membership in a professional association at the time of filing, even if it had, such membership would not indicate that the Petitioner has a degree of expertise significantly above that which is ordinarily encountered in the field.

As previously described, there are evidentiary deficiencies concerning the Petitioner's academic credentials, while the licensure evidence consists of a possibly expired license to practice in his home country and a temporary/limited license to practice as an assistant in the United States. While we

[8] Numerous certificates use an alternate spelling for the Petitioner's first name. As previously mentioned, the Petitioner has not claimed this name as an alias or other name used. Therefore, we question the credibility of the documents containing this name.

acknowledge that the Petitioner may have worked in the field in his home country for more than ten years, this appears to be more function of the passage of time since becoming a physiotherapist rather than indicative of expertise or qualifications rising above that of others in his field. Accordingly, even if the Petitioner had satisfied three of the six criteria, he would not have established how his expertise reaches a level significantly above that which is ordinarily encountered for physical therapists.

Summary

The record does not support the finding that the Petitioner met at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner has not established the eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act. As previously outlined, the Petitioner must show that he is either an advanced degree professional or possesses exceptional ability before we reach the question of the national interest waiver. The Petitioner has not shown that he meets the regulatory criteria for classification as an individual of exceptional ability. Furthermore, due to the discrepancies and evidentiary deficiencies described concerning the academic record and its corresponding equivalency evaluation, we conclude that the evidence does not support a finding that the Petitioner is an advanced degree professional.

B. National Importance

As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. The waiver is available only to foreign workers who otherwise qualify for classification under section 203(b)(2)(A) of the Act. However, because the Director determined the proposed endeavor lacked national importance, and the Petitioner's appeal alleges error, we will analyze the evidence and arguments presented.[9] As noted in the Director's decision, the Petitioner submitted insufficient evidence to establish that his proposed endeavor has national importance.[10] On appeal, the Petitioner submitted a brief, largely containing evidence and arguments that were previously submitted and found to be insufficient. Although the Petitioner claims the Director improperly weighed and failed to consider evidence, the Petitioner does not identify any specific evidence or factors that the Director did not address.

In claiming that his work will produce "tremendous results on [a] huge national and global scale," the Petitioner primarily relies upon his spinal cord research essay and his proposed endeavor plan. Below we address the shortcomings in of each these documents.

The Petitioner argues that his research essay on spinal cord injuries is of "profound importance" in the area of physical therapy and that such work is "highly innovative." The research essay provided in the record reads similar to a research term paper written for school rather than that produced by a practitioner in the field. It is unclear what research the Petitioner performed independently as compared to what information he pulled from other authorities. He has not substantiated the claim that the work described in the paper is "highly innovative" when compared to the current physical therapy practices concerning spinal cord injuries. Likewise, he has not shown that others in the physical therapy field have adopted his practices to treat spinal cord injuries or taken any interest in his practices such that his work affects

[9] While we may not discuss every piece of evidence individually, we have carefully reviewed and considered each one.
[10] The Director determined that the evidence demonstrated that the Petitioner's proposed endeavor has substantial merit and that the Petitioner is well positioned to advance the endeavor.

the field of physical therapy as a whole. The Petitioner states in his essay that many physical therapists fail to recognize the importance of improving neuromuscular coordination during spinal cord rehabilitation and that the Petitioner developed exercises to address this. However, he has not cited any research authority or source for the claim that many physical therapists fail to recognize the importance of improving neuromuscular coordination. Nor has the Petitioner provided documentation to show how his exercises significantly improve spinal cord injuries in a manner in which other physical therapy approaches do not. Accordingly, the Petitioner's claims that his work is of "profound importance" and "highly innovative" are not supported by the record.

The Director determined that the Petitioner had not demonstrated the potential prospective impact of the Petitioner's particular endeavors as requested in the RFE. Specifically, the Director noted that the record did not convey how the Petitioner's proposed endeavor would impact the field or U.S. economy more broadly, outside of the Petitioner's pool of patients and workplaces. Here, the Petitioner asserts that he will "enhance patient development strategies in the United States" and that he has already developed "methodologies" and a "custom technique." As previously discussed concerning the Petitioner's research essay, the Petitioner offers only basic generalities and has not substantiated the record with a detailed explanation of the methodologies and custom technique he claims to have developed. We acknowledge his plans to "positively and immensely contribute to the body of knowledge in [the United States]," but find little indication in his plan of how specifically this will occur.

In examining the plan, we note that the Petitioner proposes to work as a physical therapist for a local high school sports team for the first five years. The record contains little explanation as to how such work would have a national impact. Further, the plan does not include relevant details such as which high school(s) he will target, how the Petitioner plans to be considered or hired for such a role, and what efforts he has made to obtain such a position.

The Petitioner's plan includes attending a three-year doctoral program for physical therapy starting in December 2020. The Petitioner does not address how much time he will spend as a doctoral student versus how much time he will spend as a physical therapist for a local high school's sports team. The plan does not include details for how he will pay tuition for his doctoral program, how attending the program will have a national impact, whether his preferred school, the University [redacted] has accepted him, or even whether he is eligible to enroll without a full and permanent license to practice physical therapy.

Next, the Petitioner proposes to launch a physical therapy training center that will cater to recent graduates who seek advanced practice techniques. The plan does not include details on how the Petitioner plans to attract recent graduates, where the training facility will be located, how his practices will be more advanced than what the graduates would have recently learned in school, or how the training center startup costs will be funded. While we acknowledge the Petitioner's estimated budget and that he is seeking investments from the physical therapy community, he has not provided specifics on how these investments will be obtained and how much investment, if any, he has already collected. Finally, the Petitioner does not address how this training facility has national importance.

The Petitioner also plans to join various associations and register for an instructor course so that he has the knowledge required to open the training center. The continuing education aspects of the Petitioner's

plan appear to be primarily for personal or professional enrichment, and he has not explained how his plans to attend an instructor course are important nationally.

Apart from the research essay and plan, the Petitioner also argues that his proposed endeavor is of national importance and interest because physical therapists are in high demand and short supply. He cites how "Schedule A" applicants are "pre-certified and do not need to obtain a labor certification." Even accepting the Petitioner's arguments concerning shortages of physical therapists in the United States, this would not indicate that the Petitioner's work, which is localized to his own patients, practice, and proposed training facility, will affect the field on a national scale. Pre-certification due to labor shortages does not imply that the Petitioner's specific endeavor possesses national scale importance.

As further argument, the Petitioner draws a comparison with physicians who work in a designated public interest or underserved area and are eligible for a national interest waiver. However, the Petitioner has not explained how the practice of physical therapy, which requires a bachelor's degree and licensure, is comparable to practicing medicine, which requires a bachelor's degree, medical degree, and licensure.

C. Waiver of the Job Offer and Labor Certification

Because the documentation in the record does not establish the national importance of the Petitioner's proposed endeavor as required by the first prong of the Dhanasar precedent decision, he has not demonstrated eligibility for a national interest waiver. Nevertheless, we briefly address the Petitioner's third prong claims. Although the Petitioner raises the issue of how the Petitioner would serve the national interest to a substantially greater degree than would an available U.S. worker with the same minimum qualifications, the Petitioner does not present a cogent argument concerning it. Rather, the Petitioner repeats the criterion and claims to meet it based on the evidence without offering analysis to supplement his claim. He relies upon a sweeping statement that the "overall value and potential" of the Petitioner's contribution to the United States is "unequivocal," along with a general reference to the accompanying evidentiary exhibits as justification for meeting this criterion. Again, the Petitioner points to the Petitioner's research essay and proposed endeavor plan, which we have already determined to be insufficient.

Although the Petitioner generally references his employment history, workshop and volunteer certificates, activities and various events attended, as well as the roles and titles he has held in the field of physical therapy, he has not analyzed why this evidence has any bearing on the factors USCIS considers when determining whether it is beneficial to waive the job offer and labor certification. In order to meet his burden, the Petitioner must provide the evidence and also identify how the evidence applies to the Dhanasar framework.

When viewed in the totality, the record does not establish that the Petitioner qualifies for the underlying classification, nor does it establish the national importance of the Petitioner's proposed endeavor as required by the first prong of the Dhanasar. Therefore, further analysis of the Petitioner's eligibility under the second and third prongs would serve no meaningful purpose.[11]

[11] Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the arguments regarding the substantial merit aspect of the first prong of the Dhanasar framework, along with the second and third prongs. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies for classification under section 203(b)(2) of the Act as a member of the professions holding advanced degrees or an individual of exceptional ability. In addition, the Petitioner has not shown that the proposed endeavor is of national importance. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Otiende, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The appeal is dismissed.

findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).