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Casey Shilts

Kate Jett

Brett Lashbrook

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# MAJOR LEAGUE INTERNATIONALS WITH MINOR-LEAGUE TITLES: LET THEM IN. LET THEM PLAY.

*A proposal to expand the scope of P-1 visas for international professional athletes competing in the United States*

CASEY SHILTS,\*  
KATE JETT\*\*  
&  
BRETT LASHBROOK\*\*\*

When they first yelled, “Play ball!” in the minor leagues this month, many of the best baseball players under contract didn’t step up to the plate. They haven’t swung a bat, fielded a fly or spat from a dugout. Heck, they’re not even here yet. Some 200 of the game’s hottest new talents are stuck back in Venezuela, the Dominican Republic, Mexico or wherever scouts found them earlier this year—waiting for visas. . . . Somewhere at the immigration service is a bureaucrat who could wave a wand tomorrow and make [minor-league baseball] players eligible for instant P-1 visas. At that skill level, every player qualifies as top-notch.<sup>1</sup>

## INTRODUCTION

Globalization is occurring throughout American professional sports leagues as evidenced by the ever-increasing presence of international athletes.

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\* Casey Shilts is Executive Vice President & General Counsel for Hicks Holdings LLC, which serves as the parent company of the Texas Rangers Baseball Club and Dallas Stars Hockey Club.

\*\* Kate Jett serves as Associate Counsel for the Texas Rangers Baseball Club and Dallas Stars Hockey Club.

\*\*\* Brett Lashbrook currently serves as a legal intern for Hicks Sports Group and is expected to receive his J.D. from Marquette University Law School in December 2006. The authors wish to thank Ed Burns, Lucy Calautti, Steve Ladik, John Lombardo, Sal Artiaga and Jeff Pfeifer for their assistance in drafting this article.

1. Editorial, *Spitballing the Minors*, WALL ST. J., Apr. 22, 2004, at A18.

At no other point in our history have so many premier athletes come from other countries to succeed in the United States. What once was an anomaly has now become commonplace as international athletes fill the rosters of American professional sports leagues. In the last two years alone, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) have each either awarded their Most Valuable Player trophy<sup>2</sup> to and/or had their top draft pick classified as a non-American citizen.<sup>3</sup> Further, the United States, once known for its dominance in the international sporting world, has failed to be crowned champion of the most recent World Baseball Classic, Olympic Men's Basketball Tournament and Olympic Men's Hockey Tournament.<sup>4</sup> This trend of globalization is further established by the number of international superstars attracting an unprecedented amount of the public's interest in recent years. Seven-foot, six-inch Yao Ming from China has captured the world's imagination while Japan's Hideki Matsui of the New York Yankees has succeeded in the world's biggest media market. Sidney Crosby from Canada was hailed by the American press as hockey's savior before even playing his first game. These are just a few of the household names currently competing in the United States without citizenship. As a result of this trend, non-Americans currently account for approximately eighty-five percent of National Hockey League players,<sup>5</sup> over twenty-five percent of Major League Baseball players, and almost fifty percent of minor league baseball players.<sup>6</sup> Not surprisingly, these numbers represent a tremendous spike compared to just a few years ago.

However, despite the growing success of international athletes at the major league level, there is a serious immigration issue facing professional team sports in the United States today. As the result of current government immigration policy, which is partially a result of the unfortunate events of

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2. NBA: 2004-05 & 2005-06 MVP – Steve Nash (Canada); MLB: 2005 National League MVP – Albert Pujols (Dominican Republic); 2006 American League MVP: Justin Morneau (Canada); NHL: 2005-06 MVP – Joe Thornton (Canada). *Note: MLB only selects League MVPs.*

3. NBA: 2005 – Andrew Bogut (Australia), 2006 – Andrea Bargnani (Italy); NHL: 2005 – Sidney Crosby (Canada). *Note: MLB does not allow international players to be selected in their annual Player Draft.*

4. At the inaugural 2006 World Baseball Classic, the United States failed to qualify past the second round due to a losing record in group play. At the 2004 Summer Olympics, the United States men's basketball team failed to win the gold medal for the first time since professional athletes were allowed to compete in the 1992 Summer Olympics. At the 2006 Winter Olympics, the United States men's hockey team finished a distant sixth place after participating in the gold medal game at the 2002 Winter Olympics.

5. David Czurak, *U.S. Players, Canadian Owners Win*, GRAND RAPIDS (MICH.) BUS. J., May 31, 2005, at 6.

6. Mark Zwolinski, *Visa Restrictions Could Put Some Draftees in Limbo; Non-U.S. Born Players Affected Solution Not Likely For This Season*, TORONTO STAR, June 7, 2004, at C7.

September 11, 2001, an unintended consequence has greatly affected the competitiveness of professional team sports. Today, professional team athletes competing in the minor leagues are being unfairly disadvantaged due to a United States requirement that these individuals may only obtain the temporary and restricted H-2B visas and not the more advantageous P-1 visas.

This is a significant legal issue because it has affected the ability of American professional sports leagues (which includes both major and minor leagues) to consistently attract the top talent from around the globe, which is exactly what the public has come to expect from these leagues.<sup>7</sup> The economic structure of these multi-billion dollar American professional sports leagues is based upon the crucial premise of constantly displaying the best athletes from around the world competing against each other regardless of nationality. Therefore, it is vital to the continued long-term viability and success of American professional sports leagues to have appropriate immigration visas issued to their athletes in a timely and logical manner.

Due to this, it is the authors' belief that, for the reasons outlined herein, the United States Congress should take immediate action to pass specific legislation to allow all qualified international professional athletes to receive P-1 visas.

## I. INTERNATIONAL ATHLETE VISA CATEGORIES

There are two relevant categories of visas issued by the United States government to international athletes competing in this country: P-1 and H-2B.

### A. P-1 VISAS - OVERVIEW

As set forth by the United States Code in Section 1184 (c)(4)(A)(i), P-1 visas are issued to individuals that have abilities that are "internationally recognized" in their chosen field or profession.<sup>8</sup> Examples of those typically receiving P-1 visas include "internationally recognized" entertainers, artists, musicians, and athletes.<sup>9</sup> The most beneficial aspect of P-1 visas is that the number issued by the government is not capped. Therefore, in essence, all individuals that can successfully demonstrate "internationally recognized"

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7. Of the five major professional team sports in this country, there would be little to no argument that MLB, the NBA, National Football League (NFL) and the NHL represent the absolute best worldwide talent in their respective sports. Whereas, while Major League Soccer (MLS) represents the highest level of the game in the United States, there would be little to no argument that, as of today, it is not yet equal to several leagues in Europe.

8. Immigration and Nationality Act § 214(c), 8 U.S.C. § 1184(c)(4)(A)(i) (2000).

9. Laura J. Danielson, *Navigating Difficult Waters: Immigration Laws as Applied to Foreign Artists, Entertainers, and Athletes*, 19 Ent. & Sports Law 3, 4 (2001).

ability, as set forth in the government's two-part test, are allowed to enter into the United States. However, as it relates to international athletes competing in a team sport, this is limited to those competing "with a major United States sports league . . . [or] team."<sup>10</sup> Unfortunately, based on current implementation of this country's immigration policies, international athletes competing for a "minor" league team (even if employed, coached and assigned by a "major" league team) are automatically deemed ineligible to receive a P-1 visa.

### B. H-2B VISAS - OVERVIEW

H-2B visas are intended to be issued to low-wage, seasonal workers in the United States. Examples of industries in need of this type of visa include landscaping, hospitality, forest products, fisheries, and winter and summer resorts.<sup>11</sup> Professional athletes competing in the minor leagues have for years been classified by the government under this "catch-all" immigration status.<sup>12</sup> However, as a result of a number of contributing factors, including public reaction towards the events of September 11, 2001, the United States government for the first time in history recently denied otherwise valid petitioners from receiving H-2B visas by enforcing a limit of 66,000 H-2B visas that may be issued annually.<sup>13</sup>

Although in hindsight it certainly is debatable whether an immigration status intended for low-wage seasonal workers was most appropriate for minor league professional athletes—especially those minor-league professional athletes that were sometimes being paid significant signing bonuses—it had never before posed a problem. Prior to 2002, there are no known reported cases of minor league professional athletes being denied entry into the United States. Hence, all of the parties involved with this issue (i.e., leagues, teams and athletes) were amicable to keeping the status quo and continuing to classify these international athletes as H-2B visa candidates despite the oddity that these highly skilled (and arguably "internationally recognized") individuals were being lumped together with low-wage, typically non-skilled, seasonal workers.

Therefore, as a result of recent changes to the United States immigration policy, which have resulted in limiting the number of H-2B visas issued, the P-1 visa is more desirable to both professional sports teams and the international

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10. 8 C.F.R. §§ 214.2(p)(4)(ii)(B)(2)(i)-(ii) (2006).

11. 109 CONG. REC. S8668-9 (2005).

12. *Id.*

13. *See id.*

athletes they employ. As a result, the issue of defining who qualifies as “internationally recognized” has become a crucial element to this debate.

## II. CURRENT UNITED STATES LAW REGARDING ATHLETE VISAS

Due to the simple fact that P-1 visas in recent years have increased in popularity as a result of the limits placed on H-2B visas, the guidelines the government has set forth for determining if an international athlete petitioner is “internationally recognized” has come under strict scrutiny. Specifically, the United States Code sets forth that international athletes belong to a nonimmigrant class defined as “an alien having a foreign residence which the alien has no intention of abandoning”<sup>14</sup> and in which the alien:

- i. [P]erforms as an athlete, individually or as part of a group or team, at an *internationally recognized level of performance*, and
- ii. [S]eeks to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition.”<sup>15</sup>

As a result of this law, the United States Citizenship and Immigration Services (USCIS), which oversees the administration of immigration policies and priorities in this country,<sup>16</sup> has implemented guidelines for international athlete-petitioners to demonstrate they are “internationally recognized.” Unfortunately, as detailed below, these guidelines set forth a two-part “internationally recognized” test that is unfair and that disparately impacts certain international athletes.

### A. THE “INTERNATIONALLY RECOGNIZED” TEST

As of today, for an international athlete-petitioner to demonstrate he or she has “internationally recognized” ability, he or she must successfully meet the following two-part test by providing:

- (1) A tendered contract with a *major* United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport, *if such contracts are normally executed in the sport*, and
- (2) Documentation of at least two of the following:
  - (i) Evidence of having participated to a significant extent in a

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14. 8 U.S.C.A. § 1101 (a)(15)(P) (2005).

15. 8 U.S.C.A. § 1184 (c)(4)(A)(i) (emphasis added).

16. About USCIS, <http://www.uscis.gov/portal/site/uscis> (last visited Nov. 9, 2006).

prior season with a major United States sports league;

(ii) Evidence of having participated in international competition with a national team;

(iii) Evidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition;

(iv) A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized;

(v) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized;\

(vi) Evidence that the individual or team is ranked if the sport has international rankings; or

(vii) Evidence that the alien or team has received a significant honor or award in the sport.<sup>17</sup>

Unfortunately, this two-part “internationally recognized” test unfairly presents a higher burden for athletes competing in a team sport than it does for those competing in an individual sport. This is due to the fact that individual sport athletes do not “normally execute” signed playing contracts with a “major United States professional sports league or team,” which is the exact requirement that has caused the insurmountable issue with comparable international team sport professional athletes competing at the minor league level on behalf of their affiliated “major” league clubs.

#### i. ANALYSIS OF PART ONE OF THE “INTERNATIONALLY RECOGNIZED” TEST

Part one of the test requires the following:

“(I) A tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport[.]”<sup>18</sup>

Unfortunately, the wording and implementation of this first requirement has caused uncertainty and subsequent unfairness on two distinct issues.

First, the term “major” is not defined in the regulation. However, USCIS has consistently interpreted the definition of “major United States sports

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17. 8 C.F.R. § 214.2(p)(4)(ii)(B) (2006) (emphasis added).

18. *Id.* at § 214.2(p)(4)(ii)(B)(1).

league or team” as only representing the highest level of each individual sport in the United States, such as MLB, NHL, NBA, NFL, and MLS.<sup>19</sup> Subsequently, USCIS has deemed any contract between an international athlete and one of these “major” league teams as unacceptable if they are for playing services to be rendered in the minor leagues. This is a very narrow interpretation of the term “major” USCIS has chosen to use considering the high caliber of abilities in the minor leagues (i.e. “internationally recognized”) and the simple fact that these international athletes are under contract (and being paid) at all times by a “major” league team throughout their minor league service. Arguably, the simple fact that an international athlete has signed a professional player contract with any American professional sports team, regardless of whether it is classified as being in the major or minor leagues, would adequately demonstrate their abilities as being “internationally recognized.”

Secondly, international athletes competing in a professional team sport wishing to receive a P-1 visa must have a “tendered contract.”<sup>20</sup> However, these guidelines do not equally apply to individual sport athletes attempting to demonstrate “internationally recognized” ability. Specifically, since these individuals do not compete in a sport with a league or team that “normally execute[s]”<sup>21</sup> individual player contracts, these individual sport athletes are waived from meeting this requirement.

This has led to a tremendous discrepancy in the type of athletes being issued P-1 visas. For example, the United States government has routinely issued P-1 visas to entry-level professional golfers, tennis players, and even poker players.<sup>22</sup> Yet at the same time, it has denied P-1 visas to comparable entry-level professional baseball and hockey players competing in the early stages of their professional careers. Obviously, this discrepancy has caused an undue hardship on this country’s professional team sports industry in its attempts to consistently develop and retain the best worldwide talent.

The simple fact that P-1 visas are intended to be issued for those individuals performing at an “internationally recognized level of performance” should arguably mean that any international athlete whose ability and past achievement has resulted in their signing a professional player contract (even

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19. Typically, any team in one of these “major” leagues that signs an international athlete can apply without any issue for a P-1 Visa by providing the Immigration Officer assigned to the case a copy of the professional sports employment contract with a “major” league or team, which in itself shows that the international athlete has “internationally recognized” ability in their profession.

20. 8 C.F.R. § 214.2(p)(4)(ii)(B)(1) (2006).

21. *Id.*

22. Dennis Oehring, *It’s Official! Poker Is A Sport!*, POKER PLAYER NEWSPAPER, May 1, 2006, at 13.



if first assigned to a minor league team) ought to satisfy the first part of the “internationally recognized” test.

ii. ANALYSIS OF PART TWO OF THE “INTERNATIONALLY RECOGNIZED” TEST

Part two of the test used to determine if an international athlete demonstrates “internationally recognized” ability presents a considerably lower standard than part one of the test. Considering only two of the seven possible elements must be demonstrated, there is a very high probability that any minor league professional athlete competing on behalf of a major league club would be able to meet—if not demonstrably exceed—the government’s requisite number of two elements met. This routinely allows all levels of professional athletes in individual sports, even if just starting to compete in professional sports, a high likelihood of being able to easily meet this standard. However, a comparable lower-level or entry-level professional athlete in professional team sports—such as a recently signed international athlete assigned to a minor league baseball team—is automatically denied the ability to meet these guidelines. Simply put, the government’s current interpretation of this statute is both unfair and biased.

Further demonstrating this point of unfairness, any international athlete signed by a professional sports team would, in almost all circumstances, be able to easily and conclusively demonstrate at least two of the seven factors required by the second part of the “internationally recognized” test. For example, below is a review of the seven requirements and the likely factors that an international team sport athlete could demonstrate in their visa petition to satisfy the requirement.

i. Evidence of having participated to a significant extent in a prior season with a major United States sports league: For those athletes who have previously competed in the major leagues that are now plying their trade in the minor leagues, this would be easily demonstrated. Interestingly, as this requirement is worded, a former “major” league athlete that retires and decides several years later to play again would be considered for purposes of this section as having “internationally recognized” ability even though it is likely his or her ability would have deteriorated since retirement.<sup>23</sup>

ii. Evidence of having participated in international competition with a

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23. Thus muting a potential argument by the government that minor league professional team sport athletes should be denied P-1 visas because they are not “currently” “internationally recognized” in their ability.

*national team*: Especially for those athletes from smaller countries and/or competing in less popular sports, it is very common for professional athletes to have competed on behalf of their national team and/or junior national team. Most noteworthy, and adding to the unfairness of this test, the government does not require an athlete to have competed at a high level for his or her national team. This makes the requirement even lower for an athlete from a smaller country, who due to a lower population, is more likely able to attain a position on his or her country's national team.

iii. *Evidence of having participated to a significant extent in a prior season for a United States college or university in intercollegiate competition*: Especially for those athletes competing in smaller sports, an overwhelming number have competed in the United States collegiate system. Most noteworthy, this requirement also demonstrates a much lower standard in determining if the international athlete petitioner should be considered "internationally recognized." Here, the government is essentially saying that having competed for a team while studying at an American university (regardless of the amount of success experienced or the level of competition) demonstrates that the athlete has "internationally recognized" ability. However, those athletes competing in a team sport are forced to also demonstrate a signed professional contract with a "major" sports team. As all American sports fans know, competing in a sport on the university level (especially outside of NCAA Division I) is much easier to achieve than receiving a signed professional player contract.

iv. *A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized*: All petitioning athletes in team sports would be able to demonstrate this by showing that they have been signed to a playing contract with a professional sports team, which in itself should demonstrate that sporting officials believe the athlete to be "internationally recognized." Additionally, major league sports leagues and their associated player associations could provide a blanket letter of support for each of these international petitioners.<sup>24</sup> This is a requirement almost all professional athlete-petitioners would be able to automatically meet.

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24. Both the Major League Players Association and the National Hockey League Players Association have stated their support of receiving such an opportunity as it relates to international athletes wishing to compete in these respective leagues.

v. A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized: An overwhelming majority of athletes petitioning to be classified as an “internationally recognized” professional athlete would have had articles written about them in the media. Additionally, since the government provides no limitation as to the type of “member of the sports media” that can be used to satisfy this requirement, this is a very low standard to meet. This is especially true in this day and age where journalistic means have substantially increased due to new mediums such as the Internet. Further, especially for team sport athletes, one would be hard pressed to not find an article about an athlete recently signing a professional playing contract that highlights the athlete’s past accomplishments. This is a requirement almost all professional athlete-petitioners would be able to automatically meet.

vi. Evidence that the individual or team is ranked if the sport has international rankings: For team sports, it would be very easy for a team or league to demonstrate that it is internationally ranked. Today’s minor league teams, especially all those directly associated with major league professional teams, represent a very high level of talent, especially when compared to the type of rankings the government accepts on behalf of individual sports. For example, individual sport athlete-petitioners have routinely been allowed to use international rankings to demonstrate their “internationally recognized” skills, regardless of how many athletes are ranked. In fact, several individual sports issue international rankings that reach into the thousands. In golf, over 6000 male athletes<sup>25</sup> and over 500 female athletes are ranked,<sup>26</sup> in women’s singles tennis over 1400 are ranked,<sup>27</sup> and in men’s singles tennis over 1300 are ranked.<sup>28</sup> In fact, even the International Poker Federation, which governs the game of poker (which is arguably not a sport, but the government has issued P-1 visas to its participants) even has international rankings.<sup>29</sup> *This is a*

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25. Official World Golf Rankings, <http://www.officialworldgolfranking.com/rankings/default.sps> (last visited Nov. 8, 2006).

26. LPGA Rankings, <http://www.lpga.com/content/RolexRankings7-24-06.pdf> (last visited Nov. 8, 2006).

27. WTA Rankings, [http://www.sonyericssonwtatour.com/2/rankings/singles\\_numeric.asp](http://www.sonyericssonwtatour.com/2/rankings/singles_numeric.asp) (last visited Nov. 8, 2006).

28. ATP Rankings, <http://www.atptennis.com/3/en/rankings/entrssystem> (last visited Nov. 8, 2006).

29. Int’l Poker Fed’n, <http://ipf.pokerworks.com/> (last visited Nov. 8, 2006).

*requirement almost all professional athlete-petitioners would be able to automatically meet.*

*vii. Evidence that the alien or team has received a significant honor or award in the sport: Similar to several of the other requirements, it is very likely that an international athlete-petitioner would have received multiple honors or awards in his or her sport. The fact that the athlete is one of the elite amateurs, as evidenced by him or her signing a professional contract and thus moving onto professional status, demonstrates the high likelihood that he or she would have received multiple honors or awards. Further, this guideline does not define "significant," leaving open to wide interpretation as to what level of honor or award would be considered acceptable. This is a requirement almost all professional athlete-petitioners would be able to automatically meet.*

Therefore, it is a routine occurrence for a legitimate individual sport athlete to demonstrate his or her "internationally recognized" ability under part two of the test *before ever competing in professional sports*. Yet, comparably skilled team sport athletes signed to their first professional contract are routinely denied. Simply put, the guidelines for determining "internationally recognized" ability are unfairly burdensome on and biased against team sport athletes. This is especially true in light of the inherent impossibility of minor league professional team sport athletes meeting the first part of the "internationally recognized" test due to the government's narrow definition of what consists of a "major" professional sports league or team.

### III. MINOR LEAGUE SPORTS<sup>30</sup>

Although their job description includes the words "minor league," international athletes competing in the minor leagues are highly regarded in the professional sports industry, including by teams that are categorized as members of "major" professional sports leagues. Several of these "major" professional sports leagues (especially MLB and the NHL) have very extensive minor league systems. In almost all situations, a minor league team is associated with a "parent team" that is a member of a "major" league. The major league teams fund the minor league teams in order for those teams to train additional athletes to eventually be promoted to the major league team. To complete the playing rosters of their minor league teams, these major

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30. For purposes of this article, the term "minor league" exclusively means those teams that are affiliated with a "major league" team. It does not include teams that compete in leagues that are commonly referred to as "independent" or "unaffiliated."

league teams annually participate in player drafts where they select the playing rights for individual athletes from around the globe,<sup>31</sup> sign them to professional playing contracts, and then assign them to their affiliated minor league clubs.

The important role of the minor league player development system should not be underestimated regarding its importance to the professional team sports industry, especially professional baseball and hockey. Unlike professional football and basketball where athletes are routinely drafted and immediately placed on the active rosters of a NFL or NBA roster, this is typically not the case in the NHL and is a very rare occurrence in MLB.<sup>32</sup> For a myriad of reasons, these athletes typically need substantially more training by participating with the parent club's affiliated minor league teams.

As it relates to baseball, Major League Baseball and Minor League Baseball have a long-standing contractual relationship of developing professional baseball players. The relationship between the two requires that minor league clubs provide the ballparks and locally promote the games, while major league clubs employ the players and coaches.<sup>33</sup> Player development typically takes anywhere from three to seven years, especially for those being drafted immediately out of high school as they hone the necessary skills to participate at the major league level. However, throughout this development period, the player continues to be employed by the major league club while he competes for the affiliated minor league club. In fact, the close working relationship between the major league team and minor league team is further understood by realizing that the player remains under contract to the major league team, the major league team continues to pay all of the player's salary (even though the player is playing for the minor league team), and the minor league team is supervised by members of the major league team's coaching and medical staff.

The government's position to repeatedly deny P-1 visas to minor league athletes due to lack of "internationally recognized" ability is especially

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31. While true for the majority of team sports, MLB is unique in that it does not have an international player draft. MLB clubs are simply allowed to negotiate player contracts directly with international athletes.

32. In the last ten years, MLB has had only one player go immediately from being drafted to being placed on a MLB Active Roster (Xavier Nady, 2000, San Diego Padres). Conversation with Jeff Pfeifer, Baseball Operations Staff, Major League Baseball (Aug. 30, 2006). Interestingly, Nady played only one game at the MLB level before being sent to the minor leagues where he played for two more seasons before returning to the majors. *Xavier Nady*, WIKIPEDIA, [http://en.Wikipedia.org/wiki/Xavier\\_Nady](http://en.Wikipedia.org/wiki/Xavier_Nady) (last visited Nov. 8, 2006).

33. Each MLB club typically maintains player development relationships with at least the following affiliated minor league clubs: Class AAA and Class AA (the two highest levels), along with two Class A clubs and a rookie league club (typically for those players just drafted).

baffling in light of the simple fact that in team sports, the minor leagues are an essential part of training to reach the major leagues.<sup>34</sup> The high level of skill exhibited in minor league sports, especially as it relates to baseball, is further shown by realizing that almost every single player who has ever worn a MLB uniform played his first professional baseball game in the minor leagues.<sup>35</sup>

In fact, the main objective of minor league teams is to develop the ability of individual athletes in order for them to be promoted to the parent club at the major league level. As is to be expected, this occurs quite often.<sup>36</sup>

Therefore, forcing a "major" league club to risk not having their minor league players eligible to receive visas during this vital stage of their development is risking the possibility that American professional sports leagues will not be comprised of the best available athletes in future years. By doing this, the government is unnecessarily depleting this country's professional sports leagues' bases of quality athletes.

#### IV. EXAMPLE OF "NON-INTERNATIONALLY RECOGNIZED" MINOR LEAGUE ATHLETE ISSUES

As an example of the discrepancy caused by not allowing these drafted athletes to qualify for one of the unlimited number of P-1 visas instead of the severely restricted H-2B visas because they are not classified as "internationally recognized" talent, consider this hypothetical example. The Texas Rangers are a MLB team that annually signs several international athletes to professional playing contracts. Like most MLB clubs, the Rangers spend significant resources scouting international talent. In fact, the Rangers have a Baseball Academy in the Dominican Republic that they use to scout players throughout Latin America.<sup>37</sup>

It is common for the Rangers to sign an international athlete at the age of eighteen, which is a very typical practice in both professional baseball and hockey. Despite this international athlete's outstanding potential to succeed in

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34. While it is difficult to know the exact number of amateur baseball players worldwide, according to recent participation numbers from Little League Baseball, approximately only 0.002% of Little Leaguers will ever be selected to play professional baseball (i.e., minors or majors). This is further evidence that even lower level professional players still exhibit "internationally recognized" ability.

35. Minor League Baseball History, *available at* <http://www.minorleaguebaseball.com/app/milb/history> (last visited Nov. 8, 2006).

36. In any given year, a MLB club will have approximately thirty-seven to forty-five different players per team spend time on their club's Twenty-Five-Man Active Roster. Conversation with John Lombardo, Director of Minor League Operations, Texas Rangers Baseball Club (Aug. 29, 2006).

37. Twenty-nine of the thirty MLB clubs have baseball academies in Latin America, including several clubs with locations in multiple countries.

the future with the Rangers, he is almost in all instances assigned first to the Rangers' affiliated minor league team for several important reasons. These reasons include the opportunity to continue honing his skills under the direct supervision of the Rangers' coaching staff, learn the English language, and become acquainted with the rigors of professional baseball. These reasons are all in the best interest of the athlete as they help with his cultural assimilation and long-term development.

Simply because this player first reports to the Rangers' minor league team should not be taken as evidence that his skills are not "internationally recognized." Therefore, it simply is not logical that this international athlete is treated less like a "major" league professional player and more like a low-skilled, minimum wage immigrant worker by the government's immigration policies, *despite being employed by a "major" professional sports team.*

#### V. "MAJOR" LEAGUE ROSTER RESTRICTIONS

It is important to note that all major professional sports leagues impose strict limitations on the number of players that may be signed to any team at any time. Otherwise, for example, the MLB and NHL clubs could simply avoid these immigration issues for their athletes by simply signing them to "major" league contracts instead of "minor" league contracts.

However, due to very important competitive balance issues, both MLB and the NHL strictly limit the number of athletes signed at any one time to a club's player roster. For instance, MLB allows each club to carry a "Forty-Man Roster" consisting entirely of players signed to major league contracts. However, at any given time during a season, only twenty-five of those players may be on the "Active Roster." The remaining fifteen players are either injured, not currently playing competitive games, or assigned to the minor leagues. This is due to two important reasons: 1) to maintain competitive balance in the leagues; and 2) to benefit the individual athletes. Competitive balance is essential to the long-term success of any professional sports league. This allows professional teams in smaller markets to compete more equally with teams in larger markets like New York and Los Angeles. By limiting the number of players on each team's roster to a low number, the leagues are ensuring against any one powerful club from "stockpiling" players on their minor league clubs who should otherwise be competing in the major leagues. These strict major league roster size limitations in turn provide a benefit to the individual athletes by insuring that the top athletes are competing in the major leagues and not unfairly "stuck" in the minor leagues.

## VI. NATIONAL SECURITY & VISA ABUSE CONCERNS

It is important to note that each of these international athlete-petitioners, regardless of whether competing in a team or individual sport, is still required to proceed through the standard background checks as any other individual applying for a United States visa and are not treated any differently in that respect. In no way does the P-1 visa circumvent any national security issues in lieu of expediting professional athletes into the country.

Additionally, any athlete that receives a P-1 visa is still limited to receiving employment only as an athlete within their sport. He or she is not eligible for other types of employment. Further, individuals applying for a P-1 visa must remain citizens of the country they are from while competing athletically in the United States.<sup>38</sup> An athlete's family, living with him or her in America, is not eligible for employment in the United States although they are allowed to attend educational institutions.<sup>39</sup>

Finally, because it is commonly agreed upon that these athletes are highly skilled in their field, they are not taking away employment opportunities from United States citizens. As an "internationally recognized" actor, artist, singer or athlete, it is assumed that the United States could not adequately replace that person's employment opportunity with another American. This point is further demonstrated by noting that both the MLB Players Association and the NHL Players Association have supported legislation to increase the scope of P-1 visas issued to professional athletes.

## VII. RECENT STEPS TAKEN TO MINIMIZE THE H-2B VISAS SHORTFALL

Upon several complaints regarding both the scarcity and timing of H-2B visa issuances from industries which employ large numbers of individuals with H-2B visas, the United States government passed the emergency supplemental *Save Our Small and Seasonal Business Act of 2005*.<sup>40</sup> This Act set forth new policy regarding the administration of the 66,000 H-2B visas issued annually. Specifically, the government set forth policy that instead of issuing the H-2B visas all at once on a first-come, first-serve basis, it would split the allocation into two issuances each year.<sup>41</sup> This helped the

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38. See Heather E. Morrow, *The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into U.S. Professional Sports*, 26 Hous. J. Intl. L. 649, 657 (2004).

39. Memorandum from Geoffrey Liebl & Joe Kirkwood, Attorneys at Law (on file with author).

40. 8 U.S.C. § 1101 (2006).

41. Several of the industries that rely on H-2B Visas are seasonal. Gwyneth K. Shaw, *Senate Votes to Expand Visas for Foreign Seasonal Workers*, BALT. SUN, Apr. 20, 2005 at 1.A. Hence,



professional team sports industry by allowing it to "re-apply" every six months instead of every twelve months to attempt to get visas for its athletes because under the old policy the government's H-2B "allocation" would often be exhausted in a matter of weeks.<sup>42</sup>

In addition, the Act exempted from the H-2B "allocation" any petitioner who had previously worked in the United States under an H-2B visa in one of the three prior fiscal years.<sup>43</sup> While these were all admittedly positive steps in solving the ultimate issue of American professional sports leagues attempting to routinely bring premier international athletes into the country, they certainly did not provide an ultimate solution. Unfortunately, problems continue to persist as international athletes are still being unfairly denied. This has caused a continual hardship to the professional team sports industry, especially MLB and the NHL.

### VIII. OVERALL ROLE OF IMMIGRATION IN THE UNITED STATES

It is also important to note that the United States government is currently undergoing one of the most extensive and hotly debated discussions in its history regarding the appropriate role immigration should have as it relates to the future of this country. As is to be expected, the events of September 11, 2001 have had an enormous impact on this discussion and have been the cause of very strong opinions on both sides of the debate regarding the appropriate role of immigration in this country. Unfortunately, this larger discussion has caused the isolated issue of visas for professional athletes to be largely ignored as part of the current immigration debate.<sup>44</sup> However, because the need for American professional sports leagues to employ the world's best athletes is such a vastly different issue compared to the appropriate role of immigration in this country, all parties involved in the immigration reform debate should

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industries such as sharecropping and fishing place their applications in the spring to have the workers available to work in this country during the summer. *Id.* Correspondingly, several of the winter industries such as ski resorts place their applications in the fall to have the workers available to enter the country and work during the winter. *See id.* However, this new restriction caused problems as the total "allotment" of H-2B Visas was based on a first-come, first-serve basis. *See id.*

42. For example, under the initial H-2B visa restrictions, H-2B visas became available for allocation on October 1, 2004, and were all accounted for by January 3, 2005, causing obvious problems with employers. Denny Lee, *Few Visas, Fewer Resort Workers*, N.Y. TIMES, June 10, 2005, at F1.

43. Christie Smythe, *Federal Government Reaches Cap on First-Time, Temporary Worker Visas*, CAPE COD TIMES (Mass.), Apr. 8, 2006.

44. Ira Mehlman, spokesperson for the Federation for American Immigrant Reform, compares the issue of athletes potentially being classified as P-1s to the overreaching argument regarding the role of immigration in this country as, "It's so small in the grand scheme of what needs to be done." John Hunt, *Visa Troubles on the Rise*, THE OREGONIAN, Apr. 30, 2006, at C9.

take steps to separate the issue of P-1 visas for professional athletes by taking immediate action.

### IX. PROPOSED SOLUTIONS

The simple solution to this issue is to expand the definition of eligible P-1 visa applicants to include minor league professional athletes competing on behalf of a team affiliated with a major league sports team. This would ensure that the best international athletes are given the ability and opportunity to both develop and compete within the United States professional sports structure. This can be easily accomplished by passing applicable Congressional legislation.

In the last several years there have been numerous attempts to accomplish this goal. This includes a strong attempt in July 2005 when Senator Susan Collins introduced Senate Bill 1443 to the United States Congress.<sup>45</sup> Unfortunately, the bill was never acted upon further and has remained in the Senate Judiciary Committee.

Most recently, in August 2006, Senator Collins made an additional attempt by introducing Senate Bill 3821.<sup>46</sup> This latest bill, which is titled *Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006*, sets forth proposed legislation to expand the scope of P-1 visas to include minor league athletes competing on behalf of a team affiliated with a major league sports team.<sup>47</sup> Like previous legislative attempts, this too has been referred to the Senate Judiciary Committee and is currently awaiting further action by the United States Congress.<sup>48</sup>

Regardless of how the solution is obtained, whether it be from an issue-specific Senate bill or part of a rider to a larger immigration bill, Congress should (at a minimum) immediately take steps to pass legislation that allows all legitimate professional athletes to participate in this country's professional sports industry.

By enacting this solution, the United States government could solve the

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45. Senate Bill 1443 was introduced by Senator Susan Collins (R-Maine), Chairman of the Senate Committee on Homeland Security and Governmental Affairs, and co-sponsored by Senator Joseph Lieberman (D-Connecticut), Ranking Democrat on the same committee. S. 1443, 109th Cong. (2005).

46. Senate Bill 3821 was introduced by Senator Collins on behalf of herself, and Senator Diane Feinstein (D-California), Senator John Cornyn (R-Texas), Senator Barbara Mikulski (D-Maryland), Senator Patrick Leahy (D-Vermont) and Senator Joseph Lieberman (D-Connecticut). S. 3821, 109th Congress (2006).

47. S. 3821, 109th Congress (2006).

48. *Id.*

entire issue. It would immediately and automatically remedy a situation that has proven to cause unnecessary player development issues throughout professional team sports. Simply put, all international athletes who sign a playing contract with any legitimate, professional American sports league would qualify as meeting the first requirement of the two part test for P-1 visa eligibility (or be treated equal to their comparable counterparts in individual sports).

In addition, such Congressional action would allow the entirety of the current H-2B visa allocations to be used by those individuals for whom they were originally intended - industries that most naturally rely on low-wage seasonal workers.

### CONCLUSION

The simple fact remains that minor league professional athletes do not belong in the same category as low-wage seasonal workers. They are highly skilled athletes that should be considered "internationally recognized" in their abilities. Simply put, Congress should pass specific legislation to allow American professional sports leagues to return uninterrupted to doing what the public wants them to do – showcasing and developing the world's best athletic talent. American fans are known worldwide for their excitement and passion for the games they play and watch, and have correspondingly high expectations for their teams to showcase the best talents available. By expanding the requirements for P-1 visas, these teams will be able to make decisions based on athletic ability and not an athlete's nationality.