Gaining Entry: The New O and P Categories for Nonimmigrant Alien Athletes

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COMMENT

GAINING ENTRY:
THE NEW O AND P CATEGORIES FOR
NONIMMIGRANT ALIEN ATHLETES

I. INTRODUCTION

Imagine that you are a scout for a professional sports franchise. It is your job to find new talent, and you usually travel anywhere to do so. Recently, you traveled to California, Michigan and Florida in an effort to scout young athletes. Your job, however, now demands that you travel even farther, to places such as Europe and Asia. This scenario is not as unusual as one might think.

As the world becomes more accessible, it seems likely that this "global shrinking" will affect professional sports. Now, more owners, general managers, scouts, and coaches possess the ability to observe and to negotiate with foreign players. For example, Toni Kukoc, a Croatian, plays for the Chicago Bulls and the New York Yankees have a contract with Hideki Irabu, a Japanese pitcher. Of course, any time a foreigner wishes to enter the United States, this foreigner must obtain a visa. Usually, professional athletes who wish to play in the United States attempt to secure a visa, under either the O or P category, as a nonimmigrant alien. To do so, they must fulfill the standards required by law. The current nonimmigrant alien statutes that athletes must follow were enacted in 1990, and they became effective in 1992. Consequently, they are still relatively new.

One of the major changes brought about by this legislation is the standard nonimmigrant alien athletes must fulfill before gaining entry into the United States. The new legislation changed the amount of athletic ability these nonimmigrant aliens must demonstrate before obtaining a visa to work in the United States. While Congress attempted to create industry specific standards, its provisions for implementing these

1. *See* Thomas R. Dominczyk, *Comment, The New Melting Pot: As American Attitudes Toward Foreigners Continue to Decline, Athletes are Welcomed With Open Arms*, 8 SETON HALL J. SPORTS L. 165, 166, n. 6 (citations omitted) (1998). In addition, there are more than 100 Russians and Europeans in the National Hockey League, and more than 100 foreigners play in Major League Baseball. *See* id. at 166 n. 8 (citations omitted).
standards are subjective and will often result in arbitrary decisions regarding which nonimmigrant athletes will be successful in obtaining a visa.

This comment will set forth the United State’s immigration laws as they were before the 1990 statutes were passed. It will then explain the 1990 statutes and their standards, as well as review the objections to these statutes. Next, this comment will explain the amendments to the new O and P categories for visas, and will set forth the current O and P categories. Finally, this article will address why the current standards lack uniform application and what, if anything, can alleviate this problem.

II. Background

A. Before the 1990 Act

Before Congress passed the Immigration Act of 1990, nonimmigrant alien workers, including athletes, applied for admission to work in the United States under the H category. In pertinent part, this category stated that an alien having a residence in a foreign country which he has no intention of abandoning who is of “distinguished merit and ability” and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability should apply for a visa under the H category.

Congress intended to change this with the Immigration Act of 1990 and the creation of the new O and P categories. These changes, however, were not implemented immediately, and a revised H category was used until April 1, 1992. Until this date, nonimmigrant alien athletes used this revised H category, called H-1B, to work in the United States. Although this was a revised category, the standard for admitting these

7. Apparently, Congress enacted this act because of controversy surrounding the new immigration act. See also Dominczyk, supra note 1, at 170 n. 30.
athletes was the same “distinguished merit and ability” applied to nonimmigrant alien athletes under the then existing H category.\(^8\)

This original H category was divided into two parts. Under the H-1 category, athletes would qualify for a visa if they were considered to have “distinguished merit and ability.”\(^9\) Athletes could qualify under the H-2 category as temporary workers who were performing services for which qualified Americans were not available.\(^10\)

1. Distinguished Merit and Ability as it Applied to Athletes

In addition to requiring nonimmigrant athletes to be of “distinguished merit and ability,” the United States required that these athletes came to the United States to “perform services of an exceptional nature requiring such merit and ability.”\(^11\) This “distinguished merit and ability” standard has been further defined as prominence and high achievement in the field which must be demonstrated by “sustained national or international recognition and acclaim.”\(^12\) Most often the Immigration Naturalization Service (INS) determined whether an athlete fulfilled this standard, and as such, it looked at the athlete’s salary, whether the athlete would perform in a “star role,” and the athlete’s overall reputation.\(^13\) If an athlete was unable to fulfill this standard, he or she could still obtain a visa if there were no qualified Americans to perform the function that he or she would perform.\(^14\)

2. Visas for Athletes Performing Functions for Which There Were No Qualified Americans According to the H-2 Category

This H-2 visa was for aliens seeking entry into the United States to fulfill a temporary labor function for which there were no available, qualified Americans.\(^15\) In this case, the athlete’s employer was required

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8. *Id.* Although this paper addresses nonimmigrant professional athletes, this distinguished merit and ability standard was applied to all nonimmigrant alien workers. *See* Jordan, *supra* note 3, at 209.


13. 8 C.F.R. § 214.2(h)(4)(vii)(C)(1). *See* Peters, *supra* note 5, at 1664. This section is not athlete specific, but addressed all nonimmigrant alien athletes attempting to gain entry under the H-1 category. 8 C.F.R. § 214.2(h)(4)(vii)(C)(1).


to obtain a temporary certification from the United States Department of Labor.\textsuperscript{16} To do this, the employer had to actually prove that there were insufficient American workers available, willing and qualified to perform the same job that the nonimmigrant alien athlete was to perform.\textsuperscript{17} The employer also was required to prove that the wages and working conditions of American workers would not be disturbed if this alien was allowed into the United States.\textsuperscript{18}

Because obtaining an H-2 visa was more difficult and time consuming, most nonimmigrant alien athletes first attempted to obtain an H-1 visa. Of course, this standard changed with the new O and P categories, but until the implementation of these categories, nonimmigrant alien athletes would be required to fulfill the H-1B category.

B. The Temporary H-1B Category for Nonimmigrant Alien Athletes

As stated earlier, the temporary H-1B category was necessary due to the delay in implementing the new O and P categories.\textsuperscript{19} The H-1B category was effective until April 1, 1992, when the new O and P categories were implemented.\textsuperscript{20}

This temporary category was somewhat different from both the old H category and the soon-to-be implemented O and P categories.\textsuperscript{21} For one, the temporary H-1B category did not follow the previously used “distinguished merit and ability” standard.\textsuperscript{22} In addition, the H-1B category only applied to aliens other than those qualified under the O and P nonimmigrant categories for those engaged in a specialty occupation.\textsuperscript{23} This created an obvious gap, as this H-1B category was to replace the old H category, which athletes used previously, and yet the new H-1B category would not apply to those qualified under the O and P categories. While these O and P categories were not yet implemented, nonimmigrant alien athletes had no means to come into the United States to

\textsuperscript{17} See id.
\textsuperscript{18} See id. See also Jordan, supra note 3, at 210-11.
\textsuperscript{19} See Armed Forces Immigration Adjustment Act of 1991 at § 3 (this was the legislation which caused the delay); See also Jordan, supra note 3, at 211.
\textsuperscript{21} For discussion about the new O and P categories see infra notes 51-82 and accompanying text.
\textsuperscript{22} See Jordan, supra note 3, at 211.
work. Recognizing the gap, Congress passed legislation which allowed those who would qualify under the new O and P categories to use the former H category until April 1, 1992. On this date, athletes would no longer qualify for entry to the United States under an H category, but instead must qualify under the new O and P categories.

III. The New O and P Categories and Nonimmigrant Alien Athletes

The O and P categories were drafted and passed, but they also underwent public comment, which produced amendments. These amendments lead to the O and P categories existing today.

A. The Original O and P Categories

1. The O Category

The O category was divided into three parts. O-1 covered athletes that demonstrated "extraordinary ability" in their sport through "national and international acclaim." O-2 applied to aliens seeking to enter temporarily and only applied for the purpose of assisting in an alien’s athletic performance. O-3 was used by the alien spouse and children of an O-1 or O-2 alien. One more important aspect of the O category was that it required the INS to receive input from the alien’s

24. Remember that the H category applied to all nonimmigrant alien workers and not just athletes. If the temporary replacement for this H category (the H-1B category) did not apply to those who qualified under the new O and P categories, athletes would have no means for obtaining a visa as the new O and P categories applied specifically to them.

25. See Armed Forces Immigration Adjustment Act at § 3; see also Peters, supra note 5, at 1663. Interestingly enough, alien athletes who gained entry during this time were still regarded as having gained entry under the temporary H-1B category even though the old H category standard of distinguished merit and ability was used. See Jordan, supra note 3, at 212 (citing Judith A. Kelley, New O and P Nonimmigrant Visa Categories: A Lesson in Compromise, 16 COLUM.-VLA J.L. & ARTS 505, 516 (1992)).

26. This is the date when the new O and P categories would become effective.

27. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. II 1990). The original statute reads, in pertinent part, "an alien who has extraordinary ability in . . . athletics which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability, but only if the Attorney General determines that the alien's entry into the United States will substantially benefit prospectively the United States . . . ." The O category applies to entertainers as well as athletes.


peer group, such as a union, before the nonimmigrant alien could obtain access.\(^\text{30}\)

2. The P Category

Similar to the O category, the P category was also divided into three main parts.\(^\text{31}\) P-1 covered aliens who were individual athletes or were on an internationally recognized team.\(^\text{32}\) To qualify under this category, the athlete had to seek temporary entry only to perform as an athlete with respect to a specific athletic competition. This performance had to substantially benefit the United States, and the nonimmigrant alien’s petition had to be accompanied by a document explaining how his or her performance would do this.\(^\text{33}\) In addition, Congress originally intended that there be a numerical cap on the number of aliens admitted under the P-1 and P-3 categories.\(^\text{34}\)

The fact that these new O and P categories were not implemented immediately indicates that there was some discussion and disagreement surrounding them.

B. The Discussion Surrounding the O and P Categories

1. The O Category

The main discussion about the new O category revolved around the fact that the new Act did not define “extraordinary ability,” which it used to replace the original standard of “distinguished merit and ability.”\(^\text{35}\) Although this seemed to generate the most debate, there was also


\(^{31}\) Although this category was divided into three main parts, there were still provisions for spouses and children in 8 U.S.C. § 1101(a)(15)(P)(iv).

\(^{32}\) See 8 U.S.C. § 1101(a)(15)(P)(i)(I) (Supp. II 1990). In pertinent part the statute reads: “[A]n alien having a foreign residence which the alien has no intention of abandoning who performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance . . . .” The other two categories, P-2 and P-3, do not apply to athletes. P-2 provides for the cultural exchange of artists and entertainers, and P-3 applies to artists or entertainers individually or as part of a group for the purpose of performing in a culturally unique program. 8 U.S.C. §§ 1101(a)(15)(P)(ii) and (iii) (Supp. II 1990).

\(^{33}\) See Kelley, supra note 25, at 518 (citing 56 Fed. Reg. 31, 555 (1991)).

\(^{34}\) See 8 U.S.C. § 1184(G)(1)(C) (Supp. II 1990). This cap was set at 25,000 aliens per year entering the country.

some discussion about the requirement that the alien's entry would substantially benefit the United States.  

The final area of debate regarding the O category was about the peer group consultation requirement. Although there was some questioning of this practice in general, most of the comments regarded aliens in the motion picture and television industries. When a nonimmigrant alien in the motion picture or television industry attempted to gain entry, the INS was required, by law, to consult with a union peer group and with a management organization in the alien's area. Much of this debate probably stemmed from the fact that before this Act, this peer group consultation only occurred in questionable cases. It is logical that this new requirement would increase the amount of time between filing an application and receiving a decision. After filing an application the worker in question would have to wait for the INS to correspond with a union or other management organization. Furthermore, there could be various peer groups, and one group could produce a different decision than another group. For example, the Casting Society of America could reach a conclusion different from one reached by another appropriate union. Likewise, comparable peer groups in athletics could reach different conclusions about a nonimmigrant alien attempting to gain access.

The O category was not the only category to be questioned. There were a few problems with the P category as well.

2. The P Category

The 25,000 per year cap on P-1 and P-3 immigration seemed to produce the most objections. As evidenced by hearings before the subcommittee on International Law, Immigration and Refugees, opponents feared that other countries would limit the number of American performers allowed into their countries in retaliation for the United States' numerical cap. It also seems that the lack of explanation and motiva-

37. See infra note 38 and accompanying text.
40. See Jordan, supra note 3, at 225; see also Kelley, supra note 25, at 525 (citing Admission of O and P Nonimmigrants: Hearings on H.R. 3048 Before the Subcomm. on Intl' Law, Immig. and Refugees, of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. 109 (Oct. 9, 1991) (prepared statement by American Arts Alliance (“AAA”) accompanying the testimony of Marc Scorca, Exec. V.P., Opera America)).
tion regarding this cap could have caused some of the objections. A cap like this would obviously affect professional athletics and the entertainment industry, yet the legislative history offers little reasoning for this cap.

Another objection also stemmed from a missing definition. This time the term in question was "international recognition," which was required of performers seeking a P-1 visa. The entertainment industry pointed out that attaining "international recognition" may be more difficult in certain parts of the world. The term "international recognition" was very broad and could be difficult to fulfill. For example, an entertainer, well known throughout the third world, might still be denied entry into the United States because INS may decide that this does not truly constitute "international recognition." In some cases, then market size or market reputation may come into effect, and value judgments regarding a market may be issued. Furthermore, the Act did not explicitly provide any allowances for differences in media. If a nonimmigrant athlete is from a country or region with poorly developed communication or media, he or she may be unable to prove "international recognition." Still, most of the groups objecting to this term were from the entertainment industry.

In response to the objections to the O and P categories, Congress made several amendments.

C. Amendments to the O and P Categories

1. The O Category

Although most of the O category was unchanged, the few changes that were made became effective on April 1, 1992. One amendment repealed the requirement that the Attorney General determine that the United States will substantially benefit from the O-1 alien's entry. This addressed the concern over the amount of time it would take to get an O-1 application approved because it reduced the paperwork required in the process.

41. See Jordan, supra note 3, at 225; see also Kelley, supra note 25, at 526.
42. See Jordan, supra note 3, at 225; see also Kelley, supra note 25, at 526.
43. See Jordan, supra note 3, at 225; see also Kelley, supra note 25, at 526.
45. See Jordan, supra note 3, at 217. The INS has determined that an applicant satisfying the requirements of extraordinary ability will substantially benefit the United States, and the
In an effort to expedite the visa application process, Congress passed another amendment. This amendment actually placed more burden on the applicant, as it required applicants to include advisory opinions from the appropriate labor or management group. This made it unnecessary for the INS to seek consultations with an applicant's labor organization. This also gave applicants more freedom, as they were able to select the specific organization to be consulted. If no labor organization existed, however, the applicant must establish this and then the decision would be made without the consultation.

2. The P Category

There were four changes made to the P category. The first was the elimination of the 25,000 cap for P-1 and P-3 category aliens. Instead of applying a cap to control the number of nonimmigrant alien athletes and entertainers allowed into the United States, Congress required the General Accounting Office to undertake a two year study to ascertain the number of nonimmigrants seeking entry under the O and P categories. In addition, the General Accounting Office was to study how these aliens were affecting the American labor force, and whether American performers were obtaining similar visas in other countries.

The second change primarily affected entertainers. Congress no longer required that an alien be continuously associated with a group for at least one year. This change resulted from the objections raised by those involved with professional circuses, and consequently, alien circus...
personnel were exempted from the one year requirement. However, this change did not only affect alien circus performers. The one year requirement was suspended for twenty-five percent of a group's performers, and for aliens who served as replacements due to extraordinary circumstances.

The third amendment made to the P category was Congress's elimination of the three month out of the country rule for P-2 and P-3 aliens. The three month rule previously required P-2 and P-3 aliens to wait three months for readmittance to the United States. The amendment allowed these aliens immediate readmittance into the United States.

The last amendment to the P category actually further divided the P-1 category. The division separated the requirements for athletes and entertainers. This change, however, was not particularly significant. Instead of having a lengthy section of definitions within the P-1 category, the P-1 category now directed the reader to the sections where alien athlete or entertainer standards could be found. This amendment did not actually change the standards, but merely served to direct those reading the statute.

These amendments were added to the original O and P categories, resulting in the current O and P categories.

D. The O and P Categories Today

1. The O Category

Nonimmigrant alien athletes and entertainers should use the O category for a temporary work permit. To obtain a visa under the O category, a nonimmigrant alien athlete must prove "extraordinary ability." An athlete will fulfill this standard if he or she can show that he or she has "a level of expertise indicating that the person is one of that small

51. See Miscellaneous and Technical Immigration and Naturalization Amendments, at § 203(b); 8 C.F.R. § 214.2(p)(4)(iii)(C)(3); see also Jordan, supra note 3, at 227; Peters, supra note 5 at 1672; Kelley, supra note 25 at 529.

52. See Miscellaneous and Technical Immigration and Naturalization Amendments, at § 203(b); 8 C.F.R. § 214.2(p)(4)(iii)(C)(3); This change does not seem to affect athletes, however. See id.

53. See Miscellaneous and Technical Immigration and Naturalization Amendments, at § 206(a); see also Jordan, supra note 3, at 227.

54. See generally Jordan, supra note 3, at 227; see also Kelley, supra note 25, at 529.

55. See id.

56. See id.

57. See Austin T. Fragomen, Jr., The O and P Nonimmigrant Visa Categories: 26th Annual Immigration and Naturalization Institute, 486 PLI/LIT 267, 269 (1993).
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percentage who have risen to the very top of the field of endeavor."58 However, the INS has stated that membership on a major league team will not by itself fulfill the "extraordinary ability" standard.59

The statute further requires that the nonimmigrant alien athlete establish extraordinary ability through recognized achievement in athletics and sustained national or international acclaim.60 The alien athlete can demonstrate this by providing evidence of the following:

(A) being awarded a major internationally recognized award; or
(B) at least three of the following forms of documentation:

(1) documentation of the alien being awarded nationally or internationally recognized prizes or awards for excellence in the field of endeavor,

(2) documentation of the alien's membership in associations in the field for which classification is sought, which requires outstanding achievements of their members, as judged by recognized national or international experts in their fields,

(3) published material in professional publications or major media about the alien relating to the alien's work in the field,

(4) evidence of the alien's participation in judging the work of others in the same field for which classification is sought,

(5) evidence of an alien's original scientific, scholarly, or business-related contributions of major significance in the field,

(6) evidence of the alien's authorship of scholarly articles in the field, professional journals or other media,

(7) evidence that the alien has been employed in a critical or essential capacity for organizations that have a distinguished reputation, or

(8) evidence that the alien has commanded and now commands a high salary evidenced by contracts or other evidence.61

58. 8 C.F.R. § 214.2(o)(3)(ii); see also Grimson v. INS, 934 F. Supp. 965, 968 (N.D. Ill., 1996); Muni v. INS, 891 F. Supp. 440, 443 (N.D. Ill, 1995); Racine v. INS, 1995 WL 153319 (N.D. Ill., 1995); Fragomen, supra note 57, at 270.
60. See 8 C.F.R. § 214.2(o)(3)(iii). See also Jordan, supra note 3, at 220 (citing Fragomen, supra note 57, at 272-74). This is different from the extraordinary achievement standard used for nonimmigrant aliens working in motion pictures or television because this standard can be fulfilled by a single, extraordinary event, whereas an athlete's extraordinary ability must be shown through sustained national or international acclaim. 8 C.F.R. § 214.2(o)(3)(v); see Peters, supra note 5, at 1667; see also Kelley, supra note 25, at 518.
61. 8 C.F.R. § 214.2(o)(3)(iii); see also Fragomen, supra note 57, at 272.
This appears to give the nonimmigrant alien athlete a variety of choices regarding documentation as to his or her extraordinary ability. It allows the athlete a "back-up" method of proving extraordinary ability, which may be necessary given the fact that there are only a certain number of major internationally recognized awards. Furthermore, it is a questionable assumption that an athlete who does not receive one of these awards has not risen to the top of his or her field of endeavor. For instance, if for some reason, Tara Lipinski (or her nonimmigrant alien equivalent) was injured and unable to participate in the Olympics, she still would most likely be determined to possess extraordinary talent. However, without an Olympic medal, which should be considered a major internationally recognized award, or a different internationally recognized award, she may be unable to satisfy this requirement.

Perhaps this is why Congress included the second documentation option; the option that allows the nonimmigrant alien athlete to produce three forms of documentation out of a list of six possible forms.\textsuperscript{62} Although this route may require more time and effort from the athlete seeking entry, it may also be a more feasible way for that athlete to prove extraordinary ability. A nonimmigrant alien athlete should be able to obtain an O visa if he or she shows that he or she is a member of a national team because this should satisfy the documenting of membership in an association in the same field for which entry is sought, which requires outstanding achievement as judged by recognized national or international experts in their fields.\textsuperscript{63} In addition, a nonimmigrant alien athlete who proves that his or her past and current salaries are high would fulfill another documentation option.\textsuperscript{64} This same nonimmigrant alien athlete could show that he or she plays a position essential to the team, and thus fulfill a third documentation option and prove that he or she has extraordinary ability.\textsuperscript{65}

When choosing to produce documents showing that the nonimmigrant alien athlete has been the subject of material in a professional pub-
lication, the documents need not prove that he or she is a “star.”\textsuperscript{66} They only need to report about the athlete’s extraordinary skill in his sport.\textsuperscript{67}

While it may be fairly easy for a professional athlete to fulfill this standard and document his or her extraordinary ability, amateur athletes face a more difficult task. Amateur athletes have fewer opportunities to compete for major, internationally recognized awards (except perhaps for an Olympic medal). It is also unlikely that amateurs will be able to fulfill the back-up option. Obviously, amateurs will not be able to produce evidence of a high salary. Amateurs may not have the opportunities to win an award for excellence in their field of endeavor, to be the focus of a story in a professional publication relating to the athlete's sport, or to participate in judging the work of other athletes in the same sport. This, therefore, could make it very difficult for amateur athletes to document extraordinary ability through the back-up option. Consequently, amateur athletes who are equally as talented as professional athletes may be unable to gain entry into the United States.

In addition to this, a nonimmigrant alien athlete must show that he or she will fulfill a position that requires extraordinary ability.\textsuperscript{68} To do this, the athlete must be able to meet one of two criteria.\textsuperscript{69} The athlete must either show: (1) that the position he or she will be performing involves an event or activity that has a distinguished reputation; or (2) involves a comparable, newly organized event or activity.\textsuperscript{70} An athlete may also prove, alternatively, that he or she will be performing in a lead or critical role for an organization with a distinguished reputation for hiring extraordinary persons.\textsuperscript{71}

While Congress amended the O category so that consultation with a peer group was no longer necessary,\textsuperscript{72} it did provide for advisory opinions.\textsuperscript{73} These advisory opinions must come from a peer group that has attained a level of expertise in the field or sport.\textsuperscript{74} In these cases a group

\begin{itemize}
  \item \textsuperscript{66} See Muni, 891 F. Supp. at 445. Here the northern district court in Illinois found that articles in newspapers and hockey magazines discussing Muni's hitting ability and record as a defenseman were enough to prove Muni's ability. See also Grimson, 934 F. Supp. at 965 (where the court held that superstars are not the only athletes who have extraordinary ability).
  \item \textsuperscript{67} See Muni, 891 F. Supp. at 445; see also Grimson, 934 F. Supp. at 965.
  \item \textsuperscript{68} See 8 C.F.R. § 214.2(o)(3)(iii).
  \item \textsuperscript{69} See id.
  \item \textsuperscript{70} See id.
  \item \textsuperscript{71} See id.
  \item \textsuperscript{72} See Peters, \textit{supra} note 5, at 1668.
  \item \textsuperscript{73} See Miscellaneous and Technical Immigration and Naturalization Amendments, at § 204; see also Peters, \textit{supra} note 5, at 1668.
  \item \textsuperscript{74} See Miscellaneous and Technical Immigration and Naturalization Amendments, at § 203(b); 8 C.F.R. § 214.2(o)(3)(ii).
\end{itemize}
qualifies as a peer group if its members are practitioners of the alien’s occupation (sport) who are of “similar standing with the alien.” This provision also allows a collective bargaining representative in the same field to write an advisory opinion. These advisory opinions must discuss each element that the nonimmigrant alien athlete must prove and must support all conclusions with a statement of facts. That is, the advisory opinion should include: (1) whether the position for which the athlete is applying requires an alien of extraordinary ability; (2) the alien’s achievements in the sport in question as well as ability; and (3) the duties which the alien will be performing.

Congress has exerted control over nonimmigrant alien athletes by establishing the O category and its standards. Proving that a nonimmigrant alien athlete possesses “extraordinary skill” involves a great deal of paperwork and may be time consuming. Most of these athletes will attempt to produce ample documentation to prove extraordinary ability even if they have received a major, internationally recognized award. These standards may also serve as safeguards for American athletes as they only allow established and qualified alien athletes into the United States. They also serve to maintain at least the current skill level found in American sports. These standards do not, however, block all nonimmigrant alien athletes from entering the United States to perform in sports, but instead allow management to seek the best nonimmigrant alien athletes for their teams.

2. The P Category

Today, athletes who perform individually or on a team, who have no intention of leaving his or her residence, and who wish to perform in one event or competition, may apply for P-1 visas. To qualify for a P-1 visa, a nonimmigrant alien athlete must show that he or she is “internationally recognized.” To show this, the athlete must prove that he or she has attained a high level of achievement. This high level of achievement is shown through the athlete’s skill and recognition, both of which are sub-

75. 8 C.F.R. § 214.2(o)(3)(ii).
76. See id.
77. See 8 C.F.R. 214.2(o)(3); See also Jordan, supra note 3, at 222. Recall that if there is no appropriate peer group, an advisory opinion is not required.
78. This summary is based on the author’s experience while working for a professional soccer team which fields nonimmigrant alien players who have obtained O and P visas.
79. See Fragomen, supra note 57, at 282.
80. 8 C.F.R. § 214.2(p)(4); see Jordan, supra note 3, at 229; See also Fragomen, supra note 57, at 282.
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stastically above that which an athlete usually possesses so that the athlete’s achievement is “renowned, leading, or well-known in more than one country.”

For an athlete who will compete either individually or as a member of an American team, the application must show that the athlete has garnered “international recognition” in his or her sport, and that this recognition is based on his or her reputation. If the application is for a team, then it must show that the team as a whole has garnered “international recognition” in the sport in question.

The statute sets forth two requirements for demonstrating “international recognition.” The requirements are (1) a contract with an American major league sports team or a contract in an individual sport with international recognition in that sport; and (2) documentation of at least two of the following:

a. evidence of significant participation in a prior season with an American major league,

b. evidence of participation in international competition with a national team,

c. evidence of playing in intercollegiate competition during a prior season for an American university,

d. a written statement from an official of an American major league from a governing body of that sport which explains how the alien or team is internationally recognized,

e. a written statement from a member of the sports media or from a recognized expert in the sport, which explains how the alien or team is internationally recognized,

f. evidence that the alien or team is ranked if the sport maintains international rankings, or

g. evidence that the alien or team has received a significant award or honor in that sport.

These standards should be fairly easy for a professional athlete to meet. Most athletes who apply for entry into this country to participate

81. 8 C.F.R. § 214.2(p)(3). This is different from the extraordinary ability standard for the O category, and athletes who do not qualify under the standard may apply for entry under the P category. See Tibby Blum, O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences, 4 FORDHAM INT'L PROP. MEDIA & ENT. L.J. 533, 548 (1993).

82. See Blum, supra note 81, at 548.

83. See id. See also Jordan, supra note 3, at 229.

84. See 8 C.F.R. § 214.2(p)(4)(ii)(B); see also Fragomen, supra note 57, at 285-87.
in professional sports will probably already have a contract with the team for which he or she will be playing. In addition to this, it is most likely that a nonimmigrant alien athlete who has been pursued by an American major league team will be able to obtain a written statement from an expert in his or her sport.

It is easier for an amateur athlete to fulfill this standard than the standard that the O category requires. An athlete may qualify for this kind of visa by showing that he or she has played for an American college and has received a significant award in that sport. Therefore, an alien who has yet to play professionally, but has played at the intercollegiate level, and can supply one other form of the required documentation, may be able to gain entry into the United States to play professional sports.

Interestingly enough, Congress has mandated different standards for athletes and entertainers under the P category regarding “international recognition.” Congress allows the Attorney General to waive the “international recognition” standard because some entertainers do not have access to the media given their geographical location. It is rational that an athlete may be equally restrained from the media because of his or her geographic location, and yet, there seems to be no explanation offered for the difference in treatment.

In addition, a nonimmigrant alien applying for entry under the P category must fulfill a consultation requirement. However, in this case, the consultation is with a labor organization that has expertise in the athlete’s field.

When a nonimmigrant alien athlete receives a P category visa, he or she is authorized to stay for the period of time that the Attorney General provides, and this is usually for the time needed to compete or perform. For an individual athlete, the Attorney General may provide for a period not to exceed five years.

The result of the new O and P categories is standard specific to nonimmigrant alien athletes. While they once were bound by the same standards as professionals seeking entry into the United States to work, they are now held to standards unique to themselves. Perhaps it is not

85. See Kelley, supra note 25, at 529 (quoting Senator Kennedy, 137 Cong. Rec. 18,246 (1991)).
86. See Peters, supra note 5, at 1669.
87. See 8 C.F.R. § 214.2(p)(8)(ii); see also Jordan, supra note 3, at 233.
88. See 8 C.F.R. § 214.2(p)(8)(iii)(A); see also Jordan, supra note 3, at 233. This period may be extended for another five years, but the total period is not to exceed ten years. See also 8 C.F.R. § 214.2(p)(14)(ii)(A).
enough for unique standards when those applying the standards have no expertise in the area or when the standards are not applied uniformly.

IV. The Need for a Better Standard

As stated earlier, the standard affecting nonimmigrant alien athletes changed from one of “distinguished merit and ability”90 to one of “extraordinary ability.”91 Congress further defined distinguished merit as prominence and high achievement,92 and mandated that this would be determined by looking at whether the athlete was a star and the athlete’s reputation.93 Regarding extraordinary ability, Congress looks at whether the athlete has risen to the top of his field and whether the athlete had “sustained national or international recognition.”93

There seems to be little difference between the two standards. They both are rather arbitrary. This is true even despite the fact that Congress made efforts to mandate different ways in which a nonimmigrant alien athlete could fulfill the extraordinary ability standard. Looking at four recent cases will demonstrate how this standard has been applied differently by the INS94 and the courts, and will show why this standard needs further development.

A. Four Recent Cases Involving Nonimmigrant Alien Athletes

1. Matter of Price

In 1994, INS denied a visa petition for Nick Price, a professional golfer. In an effort to prove his extraordinary ability, Price offered evidence of his 1983 World Series of Golf championship, his win at the 1992 Canadian Open, and his tenth place rank on the Professional Golfers Association Tour in 1989.95 Price established that his earnings in 1991

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91. See 8 C.F.R. § 214.2(h).
92. See id.
93. 8 C.F.R. § 214.2(o)(3)(iii).
94. Additionally, the INS denied Paul Ereng of Kenya an extension of his O-1 visa in August 1994, even though Ereng won the gold medal in the 800-meter run at the 1988 Seoul Olympics. See Dominczyk, supra note 1, at 175 n. 48 (citing John Markon, Ereng Runs Into Federal Wall, Track Star Loses Bid to Train in U.S., RICHMOND TIMES-DISPATCH, Aug. 18, 1994, at D1). The INS said that Ereng was not an elite athlete. Although the INS later acknowledged his elite status, it still denied extending his visa because it would leave Ereng in the country too long. See Markon, Ereng Runs Into Federal Wall, at D1. The author does not include this case in her in-depth discussion because the INS eventually recognized Ereng's elite status but used a different reason to deny his visa extension.
($714,389.00) ranked him in the top ten that year. In addition, Price provided affidavits from well known golfers and experts, as well as evidence of major media coverage. 96

INS initially denied his petition for a failure to prove extraordinary ability, and Price appealed. On appeal, the Administrative Appeals Unit contended that although performing at a “major league” level did not necessarily establish extraordinary ability, it did help establish it. 97 In addition, the Administrative Appeals Unit stated that allowing performance at a major league level to equal extraordinary ability would contravene Congress's intent to reserve this visa for those who have risen to the top of their field. 98 In this specific case, however, the Administrative Appeals Unit found that Price had demonstrated his extraordinary ability by evidence of his achievements and awards and by providing affidavits from golfers and experts. The Administrative Appeals Unit then granted Price his visa. 99

The original INS decision in Price makes little sense based on the facts given. Price clearly demonstrated that he maintained membership in the small percentage of those who had risen to the top in professional golf. Furthermore, Price fulfilled his obligation to show extraordinary ability through recognized achievement in athletics and that he sustained “national or international acclaim.” 100 Congress gave applicants various methods to establish this, and Price offered the following approved documentation: a major internationally recognized award (the Canadian Open championship); published material in professional publications or major media; and evidence of high earnings. 101

When the INS erred in its original decision, it forced Price to appeal. 102 This then lengthened the process for gaining entry, which could have made a major difference in his career. While a delay may not be as detrimental in golf as in a team sport with a strictly defined season, a delay nonetheless could cause an athlete to miss an important game or tournament. If the INS better defined its standards or more uniformly applied them, this kind of delay may not occur at all.

96. See id.
97. See id. at 954.
98. See id.
99. See id. at 956.
100. 8 C.F.R. § 214.2(o)(3)(iii).
101. See id.
102. See Matter of Price at 953.
2. Racine v. INS

Yves Racine was a player for the National Hockey League's (NHL) Detroit Red Wings. This case is somewhat different because Racine already had his visa to play in America. The dispute arose when INS revoked his visa because it determined that Racine no longer could establish extraordinary ability.103

When Racine first filed for his visa petition, he offered his employment letter and various affidavits from the Red Wings General Manager, other experts, and major media and professional publications.104 While this was originally enough, INS then decided that this was not enough to continue to establish extraordinary ability. INS' decision was based on the fact that Racine had no award from the NHL and that he did not show that his salary was a top salary.105 When Racine appealed, the Administrative Appeals Unit upheld the revocation and further determined that selection to Team Canada did not prove international acclaim.106 It also held that the articles failed to show he was in the small percentage who had risen to the top of hockey.107

The United States District Court for the Northern District of Illinois reversed and granted Racine his visa petition. The court questioned whether the INS had used appropriate comparisons in this case. According to the court, the appropriate field of comparison is Racine's ability as a player within the NHL and not Racine’s ability as a hockey player at all levels.108 The court found that the evidence offered showed that Racine’s ability placed him in the small percentage who had risen to the top.109 In addition, the court held that the appropriate comparison regarding salaries was to compare salaries with those similarly situated.110

103. See Racine, 1995 WL 153319 at *1. Racine was originally granted a visa on February 3, 1993. INS informed Racine of its intent to revoke his visa on June 4, 1993 because the evidence he had supplied with his visa application did not truly establish his “extraordinary ability” as a professional hockey player. Racine responded by submitting a letter from the Executive Director of the NHL’s Player Association in addition to other evidence. On August 16, 1993, INS revoked his visa. See id. at *1-*2.

104. See id. at *1.

105. See id. at *1-*2.

106. Racine was a member of Team Canada in 1991. Team Canada is a hockey team comprised of Canadian players who are chosen to represent Canada in an international tournament. See id. at *5.

107. See id. at *1-*2.

108. See Racine, 1995 WL 153319, at *4. Although this placed Racine within a more narrow comparison group, the court felt that Racine’s evidence fulfilled the required standard of “extraordinary ability.” See id.

109. See id.

110. See id. at *6.
Because Racine could show that his salary was above the average for players in his position and with his experience, this was enough to show that he had extraordinary ability based on commanding a high salary.\textsuperscript{111}

Again, there was a difference between the INS' original decision and the final disposition of the dispute. Although, in this case, the INS and the Administrative Appeals Unit both elected to revoke Racine's petition, the court reversed.\textsuperscript{112} This shows a difference in the way the court and INS interprets the extraordinary ability standard. Unfortunately, Racine is not the only case in which this happens.

3. Muni v. INS

In this case, Craig Muni, an NHL player, petitioned for a visa as a worker with extraordinary ability.\textsuperscript{113} Muni had been a member of the Edmonton Oilers when they won the Stanley Cup in 1987, 1988, and 1990, and he was ranked fourth in plus/minus ratio.\textsuperscript{114} \textit{Goal} magazine, a leading publication in hockey, called him the most underrated defenseman in the NHL, and \textit{Hockey Digest}, another well respected publication, said Muni was one of the top ten hitting defenseman.\textsuperscript{115}

In 1993, Muni was traded to the Chicago Blackhawks, and he filed for a nonimmigrant alien visa. When Muni initially petitioned for a visa his salary was $400,000.00 while the average salary for a defenseman was roughly $390,000.00.\textsuperscript{116} By the time his petition advanced to the United States District Court for the Northern District of Illinois, Muni earned $550,000.00 in salary.\textsuperscript{117} In addition to this documentation, Muni offered affidavits from eight veteran NHL players, who all stated that he was one of the best defensemen.\textsuperscript{118}

Despite this documentation and the fact that INS had granted visas to other NHL players with comparable ability, the INS denied Muni's petition.\textsuperscript{119} In its explanation, the INS said that Muni's salary was not high and that he failed to establish the criteria for any awards he had

\begin{itemize}
  \item \textsuperscript{111} See generally id.
  \item \textsuperscript{112} See id.
  \item \textsuperscript{113} See \textit{Muni}, 891 F. Supp. 440, 441.
  \item \textsuperscript{114} See \textit{id}. The plus/minus ratio is determined by subtracting the number of goals scored against Muni's team while he is on the ice from the number of goals his team scores when he is on the ice. \textit{id.} at 441, n.5.
  \item \textsuperscript{115} See \textit{id}.
  \item \textsuperscript{116} See \textit{id}. The precise number was $387,914.00.
  \item \textsuperscript{117} See \textit{id}.
  \item \textsuperscript{118} See \textit{Muni}, 891 F. Supp. at 442.
  \item \textsuperscript{119} See \textit{id}
\end{itemize}
The INS also found influential the fact that Muni was not selected to all-star teams nor had he received official recognition as an extraordinary player. In short, the INS found that the evidence offered did not establish that Muni was of the few who had risen to the top of hockey.

Before explaining its reasons for reversing the INS' decision, the court set out two important facts. First, the court declared that an INS definition of a term was binding unless it was unreasonable. Secondly, the court reiterated that membership on a major league team would not alone demonstrate that a player possessed "extraordinary ability."

Although this court did not find the INS' definition of "extraordinary ability" unreasonable, it did not agree with the INS' application of this definition. The court stated that being a good player on a great team, such as the Edmonton Oilers, tended to establish "extraordinary ability." In addition, the court questioned the INS' request for the criteria of such self explanatory awards as "most underrated defenseman," and the court found the publications Muni offered to be reputable where the INS did not. In this respect, the court said that a petitioner need only show that the material published about him comes from either a professional or major trade publication, or other major media. While the INS found Muni's salary to be unconvincing, the court directly stated that Muni's above average, and increasing salary gave credit to his argument that he possessed "extraordinary ability."

In addition to explicitly contradicting the INS' findings, the court admonished the INS for ignoring the affidavits Muni proffered. Along this line, the court stated that INS' failure to consider all of the evidence presented a major problem. One example of this is the INS' failure to consider the Stanley Cup as evidence of a major internationally recog-

120. See id.
121. See id.
122. See id. at 443.
123. See Muni, 891 F. Supp. at 443.
124. See id.
125. See id.
126. See id.
127. See id.
128. See Muni, 891 F. Supp. at 444.
129. See id. at 445 (citing 8 C.F.R. § 204.5(h)(3)(ii)).
130. See Muni, 891 F. Supp. at 444.
This case presents still new problems with the "extraordinary ability" standard, its definition, and its application. Although the court did not find the definition unreasonable, it certainly interpreted the definition differently than INS did. The court found every piece of evidence Muni offered as proof of his "extraordinary ability" and "international acclaim and recognition," while the INS found every piece to be lacking. If the courts and the INS continuously have such different interpretations of the definition of "extraordinary ability's," these types of cases will continuously clog the court system. Furthermore, such extreme difference in decisions and interpretations begs the question of which decision or interpretation is correct. This then leads one to question which body, if any, has the authority or expertise to decide this issue.

4. Grimson v. INS

In January 1993, Stuart Grimson, an "enforcer" for the NHL's Detroit Red Wings, filed a petition to play hockey in America as a worker with "extraordinary ability." The INS denied Grimson's petition because he failed to establish that he possessed "extraordinary ability." Grimson appealed this decision, and the Administrative Appeals Unit upheld the INS determination that Grimson had not shown he had achieved national or international acclaim as was necessary to prove that he possessed "extraordinary ability."

When Grimson then filed an action in court, the United States District Court for the Northern District of Illinois remanded the case to the INS for more evidentiary proceedings. Regarding this remand, the judge assigned to the case explicitly stated that the INS's argument that it need not compare Grimson's petition to those of other hockey players who had been granted visas was lacking in merit and "border[ed] on the specious."

133. See id. at 446.
134. See id.
135. See Muni, 891 F. Supp. at 446.
136. See Grimson, 934 F. Supp. 965, 966. An enforcer's job entails aggressively going after the opposing team's players, as well as defending his own team's star players when necessary. See id. at 969.
137. See id.
138. See id. at 966-67.
139. See id. at 967.
140. See id.
GAINING ENTRY

Similar to before, the INS denied Grimson's petition and upheld the Administrative Appeals Unit. Grimson again filed an action in court, and the court again remanded the case to the INS. This time the court gave specific instructions that Grimson was to submit, and the INS was to consider, evidence comparing Grimson’s skill, salary and other abilities with those of comparable NHL players, especially players who fulfilled the same role Grimson did. The court also instructed Grimson to produce evidence as to whether a player with his style of play and abilities was necessary in hockey. Not satisfied, the court instructed the INS to consider Grimson’s argument that his sustained career in the NHL established his extraordinary ability.

Grimson then offered evidence of his salary and contract with the Detroit Red Wings, and he included a HOCKEY News table with player salaries in 1996. In addition, Grimson produced newspaper and magazine articles about himself, and an affidavit from Darren Pang. In his affidavit, Pang declared that Grimson is the third rated and third highest paid enforcer in the NHL, and that most teams carry two enforcers. Pang also provided evidence of current enforcer salaries.

The INS once again denied Grimson’s petition, and it stated that evidence about Grimson’s career after the date on which he filed his petition would not be considered. According to the INS, Grimson’s lengthy NHL career was not evidence of his extraordinary ability, and furthermore there was no evidence to support Grimson’s claim that four years as an enforcer was a sustained career. The INS went on to reject all evidence that Grimson commanded a high salary.

In 1996, this case then proceeded back to the court in the Northern District of Illinois where Grimson was finally successful in obtaining his petition. The court believed that the INS’s main reason for denying
Grimson’s petition was its dislike for his position. The court maintained that Grimson offered evidence of his ranking as the fifth best enforcer, but the INS ignored this, which was an abuse of its discretion.

In addition, the court disagreed with the INS using its belief that because Grimson’s role is disfavored, his abilities cannot be considered evidence of his extraordinary ability. Instead, the court asserted that a player may have extraordinary ability “limited to the role that he plays on a hockey team.” Grimson produced various evidence of his high ranking among enforcers, his high salary, and the necessity of an enforcer to hockey. As a result, there was no reasonable explanation for denying Grimson’s petition, and the court directed the INS to issue Grimson a visa.

This case clearly shows the INS’ discretion when issuing or denying a nonimmigrant alien athlete’s visa petition. Indeed, this case calls into question the INS’ ability to make such a decision. Here, it appears that the INS based its decision on its dislike for the enforcer role and its dislike for the hitting professional hockey now entails. Of course, neither of these criteria appears in the Act or the Regulations.

B. The Need for Change

While it is true that in each of these cases, the player eventually received his visa, the need for change still exists. There are two main areas, in particular, which need change. They are: (1) a better definition for extraordinary ability, and (2) a more uniform application of this definition.

1. What is extraordinary ability?

While Congress attempted to make a better standard for nonimmigrant alien athletes when it changed the criteria from “distinguished merit” to “extraordinary ability,” it really only exchanged one ambiguous term for another. The definitions that have developed over time, such as “one of the few who have risen to the top of his field” and “sustained national and international acclaim,” are of as little help as the original term, “extraordinary ability.”

153. See id. The court’s belief is based on the INS’ statement that the necessity of an enforcer is debatable, and that the INS maintains that hockey itself does not condone the activity for which Grimson was known. Id.
154. See id. at 969.
155. See id.
156. See Grimson, 934 F. Supp. at 969.
157. See id.
What exactly is international acclaim and how is it measured? Surely an athlete from a country with a more developed media or better technology is in a better position to produce evidence of his or her acclaim. The laws allow some leeway regarding just this dilemma, but it may not be enough. If a professional soccer team in America wishes to employ a goal tender from a small country, the team may face more difficulty than if attempting to employ a well known player from Brazil. If this particular goal tender is one of the best in the world, but because of the market in which he plays, has received little exposure, his ability to produce evidence of his acclaim is hindered.

What if he is well-known in his small country's market and has won various awards in this market? Most likely, he will still be denied his petition according to the unpredictable manner in which the INS determines "sustained national or international claim" as demonstrated by the four cases discussed earlier. This is because the INS' interpretation of international acclaim does not seem to include acclaim earned in a smaller market. The INS did decide that playing on a national team (Team Canada) did not qualify as international acclaim.

Furthermore, the methods of establishing "extraordinary ability" make it more difficult for a young nonimmigrant alien athlete to obtain a visa to play professionally. Aside from an award specifically geared toward a rookie player (such as Rookie of the Year), young players are less likely to have won a major internationally recognized award. They are also less likely to have access to such an award, but this does not necessarily mean that this athlete does not possess extraordinary ability. This athlete does have the option of producing three forms of documentation from a list of eight forms.

Unfortunately, a young athlete, or an athlete from a country with a less developed athletic system or media is unlikely to have the capability to fulfill most of them. A young athlete is probably unable to maintain membership in an association which requires outstanding achievements as judged by recognized national or international experts. Even the

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158. Although the methods discussed refer to obtaining an O category visa, the methods for obtaining a P category visa are somewhat easier for a young athlete or an athlete from a lesser developed country to fulfill. See 8 C.F.R. §§ 214.2(o) and (p). The drawback with a P category visa, however, is that it only allows entry for a specific event.


160. See id. It is important to make the distinction between professional and amateur athletes. The O and P categories apply to athletes who wish to play in the United States professionally, including amateurs playing professionally for the first time. Amateur athletes may apply for an H-2B visa. See Steven C. Bell, Nonimmigrant Visa Categories: The Nonpetition Categories, 500 PLI/LIT 43, 52 (1994). An H-2B category is available for nonimmigrant
best American athletes would not be able to produce this kind of documentation. In addition, a young athlete is less likely to have judged the work of others in the same field, which is another option for establishing acclaim. At the very least, these young athletes may still be competing against the only athletes they would have an opportunity to judge.

Another criteria, evidence that the athlete commands a high salary, is also difficult for a young athlete to fulfill because the athlete may not have been paid before or the amount of money available in that athlete's country may be very small in comparison to the massive amounts most American athletes seem to make. While the courts have mandated that salaries must be compared to others similarly situated, how exactly will the INS determine if a mediocre salary from a country that ordinarily pays its athletes very little establishes acclaim and ability? When an athlete is unable to fulfill three out of six methods of documentation, and merely because he or she is too young or from a country where sports are not favored as much as they are in America, the methods available must be questioned.

2. Why these changes will make a difference

These changes should expedite the immigration process. The way the standards are defined and applied makes the current process lengthy. The four cases discussed make this clear. In each case, the athlete was forced to appeal the INS' decision, sometimes even multiple times. With the exception of Price, which never reached the court, the court reversed the other three INS decisions. At least a better definition and more uniform application of it might make it less likely for an athlete to file an action in court because the athlete does not expect a reversal. As it stands now, the courts rather consistently reverse INS decisions.

Furthermore, this current process of appeal is expensive for everyone involved. The athlete may be forced to remain in his or her country and may not have another means of making money. If the athlete has aliens who intend to maintain residence in a foreign country, and who seeks to perform temporary labor in the United States if there are no available and capable Americans to perform such labor. 8 U.S.C. §1101(a)(15)(H)(ii)(b) (1994); United States v. Dattner Architects, 972 F. Supp. 738, 741 (S.D. NY 1997). Apparently, athletes who wish to play on a minor league team in the United States also may qualify for an H-2B visa. See Jeff Blair, For Some Players, Visa is No Free Pass, St. Louis Post Dispatch, Apr. 4, 1998, at 8. H-2B petitions are filed by employers, and H-2B visas are valid for one year and may be extended or renewed. 8 C.F.R. §§ 214.2(h)(6)(iii)(B) and (h)(6)(iv)(B).


161. See id.

162. See id.

ready signed a contract with an American team, the team may be forced to fulfill its contractual obligations without receiving the benefit of the athlete’s skill. In addition, the team usually is forced to pay all related legal costs. A team may then have a contract with a player who is unable to obtain a visa or whose visa is revoked and be forced to pay both the contract and legal costs. The current process is also costly for the government. For example, the court sent Grimson’s petition back to the INS several times and in the end reversed the INS’ decision and granted Grimson a visa.\footnote{See Grimson v. INS, 934 F. Supp. 965.} Surely it would have been less expensive if the end result was reached from the very beginning.

The current system leaves many unanswered questions, which must be addressed.

3. Unanswered questions

One question raised by the four cases discussed is simply why these cases exist at all. Surely for each of these cases there are numerous non-immigrant alien athletes who successfully gain entry into the United States. In none of these cases does the analysis lead to a close decision. All four athletes seem to possess extraordinary ability. Why, then, did the INS deny their petitions? The answer may lie in the application of extraordinary ability or it may even turn on the particular agent who denied their petitions. There may indeed be an answer to this, but it is not easily found within INS decisions or other relevant cases.

Another question raised by the Racine and Grimson cases is why the athletes in question were applying for a visa at all.\footnote{See id. See also Racine v. INS, 1995 WL 153319.} Racine had already received his visa, and Grimson was already playing for a United States based team when he applied for a visa in the middle of the NHL season.\footnote{See Grimson, 934 F. Supp. at 965; See also Racine, 1995 WL 153319.} As usual with this particular immigration provision, there seems to be no record of such details in INS decisions.

A third question raised by the cases and the relatively new O and P categories revolves around the distinction between professional and amateur athletes. It appears that an amateur athlete seeking to enter the United States and play either in a minor league or in some other amateur capacity is more likely to receive a visa than an amateur athlete whose first professional contract is with a United States based team. This perhaps explains how Major League Baseball is able to employ young athletes from other countries. These athletes can be employed to
play with a farm club and then apply for an O or P category visa using their minor league statistics and experience to help fulfill the extraordinary ability standards. As with the other issues discussed, INS decisions and other cases do not answer this question.

Although these three questions remain unanswered, they are no doubt important. While the majority of O and P category petitions are handled accurately, some are not. Some petitions do not seem to be held to the standards mandated by law.

V. Conclusion

There seems to be little legislative history behind the changes affecting nonimmigrant alien athletes. The closest one comes to discerning the reasons behind these changes can be found in the originally proposed categories where Congress mandated that a nonimmigrant alien athlete must be entering to fulfill a position for which there was no qualified Americans available.

Most of this country's history, with a few noted exceptions, is the story of people who came here with dreams. While these nonimmigrant alien athletes do not wish to reside here permanently, they are offering valuable services. In addition, they bring with them part of their culture and their perspective of the world. Surely a country as diverse as America can recognize the value in this. The author does not suggest that every athlete seeking to enter America is qualified to play professional sports here, but there are examples when those who were qualified were initially denied visas. Although each athlete in the four cases addressed eventually received his visa, this does not explain why he had such a difficult time doing so in the first place.

In an effort not only to shorten a tedious process, but also to afford nonimmigrant alien athletes with respectful consideration, Congress should make further attempts to define the standards by which these athletes are judged. In this author's humble opinion, the INS should strive to apply uniformly the standards so that its decisions are similar to the courts' decisions.

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