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A NEW PLAYER HAS ENTERED THE GAME: IMMIGRATION REFORM FOR ESPORTS PLAYERS

“Video games are new and different, but not necessarily inferior to physical ones. All the hallmarks of mental alacrity that grass-based sports exhibit—from positioning and footwork to planning and foresight—are also present in e-sports. You play with an avatar, but the skill and the thrill of competition are still just as real.”¹

I. PRESS START: AN INTRODUCTION TO ESPORTS’ IMMIGRATION ISSUES

Esports (“electronic sports”) is a rapidly-growing industry through which individuals compete against each other in various video games.² With its growing popularity and viewership, Riot Games, a prominent video game developer, has petitioned and successfully lobbied United States Citizenship and Immigration Services (USCIS) to recognize esports players as athletes.³ As recognized athletes, esports players are eligible to enter the United States under the P-1A visa category.⁴ The P-1A visa category is specifically designated for both professional and amateur athletes to

1. Vlad Savov & Sam Byford, *Can Video Games Be Sports?*, VERGE (July 11, 2014, 1:30 PM), <http://www.theverge.com/2014/7/11/5890907/can-video-games-be-sports> [<https://perma.cc/9RLF-64KM>] (averring esports, despite its differences from traditional sports, should still be considered sport).

2. See Phil Kollar, *The Past, Present, and Future of League of Legends Studio Riot Games*, POLYGON, <http://www.polygon.com/2016/9/13/12891656/the-past-present-and-future-of-league-of-legends-studio-riot-games> [<https://perma.cc/WR64-9A6X>] (last visited Sept. 13, 2016) (recounting Riot Games’ rise in gaming industry for its first title, *League of Legends*); Ben Casselman, *Resistance is Futile: eSports is Massive . . . and Growing*, ESPN (May 22, 2015), http://www.espn.com/espn/story/_/id/13059210/esports-massive-industry-growing [<https://perma.cc/K8YH-T8MD>] (showing growth in viewership, challenging that of traditional sporting events, such as events for football, baseball, and other traditional sports); Matt Peckham, *Why ESPN is so Serious About Covering Esports*, TIME (Mar. 1, 2016), <http://time.com/4241977/espn-esports/> [<https://perma.cc/EZ58-BFGA>] (noting competition prizes over \$10 million and growing viewership while projecting revenues for pro-gaming to near \$1 billion by 2019).

3. See Paresh Dave, *Online Game League of Legends Star Gets U.S. Visa As Pro Athlete*, L.A. TIMES (Aug. 7, 2013), <http://articles.latimes.com/2013/aug/07/business/la-fi-online-gamers-20130808> [<https://perma.cc/7PG2-YCXZ>] (granting first P-1A visa to esports player, Danny “Shiphtur” Le, to play *League of Legends* professionally for Team Coast in United States in 2013).

4. See *id.* (recognizing esports players receipt of P-1A visas implies status as athlete).

train and compete in the United States.⁵ Following Riot Games' extensive lobbying, USCIS allowed P-1A visas for *League of Legends* esports players; however, it has yet to consistently grant this type of visa for esports players of all competitive video games.⁶ Successfully obtaining P-1A visas for *League of Legends* players has been sporadic and unpredictable.⁷ As a result, esports players resorted to traveling to the United States with non-immigrant visas, such as the B-1/B-2 visa categories, to train and participate in competitions.⁸

However, training and competing in the United States as an esports player under these non-immigrant visa categories places the player in violation of his or her B-1/B-2 visa status, as players are employed and highly compensated while living in the United States.⁹ Unsuccessful petitions to enter the United States under the P-1A visa category raise the question as to whether esports is indeed a sport, and by extension, its players athletes.¹⁰ If esports is considered a sport, and its players athletes, the next logical question is which visa is the most appropriate for players.¹¹ Visa categories to be considered include: B-1/B-2, H-1B, O-1A, and P-1A.¹² B-1/B-2 visa categories are historically the last resort for esports players, although they are not qualified for such a visa type because their

5. See Immigration and Nationality Act, 8 U.S.C. § 1184(c)(4)(A) (2016) (describing requirements to qualify under P-1A visa category).

6. See Bryce Blum, *CS:GO Major Visa Issues: It's Not MLG's Fault*, ESPN (Feb. 24, 2016), http://www.espn.com/esports/story/_/id/14838499/csgo-major-visa-issues-not-mlg-fault [<https://perma.cc/JQ6Q-Z49R>] (recognizing difficulties in successfully applying for and obtaining P-1A visas as esports players).

7. See Bryce Blum, *The Esports Lawyer Breaks Down the Visa Issue Plaguing the LCS*, ESPN (Feb. 2, 2016), http://www.espn.com/esports/story/_/id/14661486/breaking-league-legends-visa-issue [<https://perma.cc/S82V-LT54>] (observing several *League of Legends* players have been only intermittently successful in obtaining P-1A visas).

8. See Blum, *supra* note 6 (relating esports players have resorted to visitor visas, B-1/B-2, to participate in competitions in United States).

9. See *id.* (distinguishing P-1A visa from B-1/B-2 visas, which “do not allow for employment”). See also 22 C.F.R. § 41.31(b)(1) (2017) (defining scope of B-1 visa and excluding United States employment under that scope).

10. See Jesse Aaron, *The Controversial Dichotomy Between Sports and eSports*, HUFFINGTON POST (last updated Apr. 19, 2015), http://www.huffingtonpost.com/jesse-aaron/the-controversial-dichotomy_b_6692052.html [<https://perma.cc/8L7U-Z3TC>] (questioning whether esports can be considered sport and comparing esports to traditional sports such as football, basketball, and baseball).

11. See Blum, *supra* note 6 (speculating whether esports will receive “special consideration” for immigration reasons or if “consular officers will be trained” about esports in relation to P-1A visas).

12. See generally 22 C.F.R. § 41.31 (describing B-1/B-2 visa qualifications); 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2016) (explaining H-1B visa category); 8 U.S.C. § 1101(a)(15)(O) (2016) (detailing O-1A visa); 8 U.S.C. § 1184(c)(4)(A) (2016) (relating P-1A visa category requirements).

compensation far exceeds that permitted under this category.¹³ H-1B visas are for individuals who meet specific qualifications regarding education in addition to type of occupation to be pursued while in the United States and are employed by United States employers.¹⁴ Two visa categories explicitly for athletes include O-1A and P-1A visas.¹⁵ Outstanding individuals in their field of study and practice, including athletes, are covered by O-1A visas.¹⁶ P-1A visas primarily concern amateur and professional athletes who wish to perform in the United States.¹⁷ “Athlete” or “sport” is not legally defined.¹⁸ Ultimately, esports should be considered a sport due to the intense training and skill behind esports players’ performance, coupled with recent developments in making esports more accessible and present to the cultural consciousness.¹⁹ B-1/B-2 and H-1B

13. See Callum Leslie, *Ember Become First Team To Release League Player Salaries*, DAILY DOT (Dec. 26, 2015, 12:38 PM), <http://www.dailydot.com/esports/ember-release-roster-player-salaries/> [<https://perma.cc/LBG8-SM6G>] (summarizing salaries of esports players in challenger scene [tier below professional play] as approximately \$65,000 USD); see Kristine Hutter, *ESPN Survey: Average NA LCS Player Salary Approximately \$105K, EU Salary \$81K*, SCORE ESPORTS (Jan. 13, 2017), <http://www.thescoreresports.com/lol/news/12728-espn-survey-average-na-lcs-player-salary-approximately-105k-eu-salary-81k> [<https://perma.cc/W4MB-YQXT>] (reporting average salary of North American League Championship Series (“LCS”) player was over \$100,000); 9 FAM 402.2-5 (U) (2017) (capping any compensation at a reasonable allowance).

14. See 8 U.S.C. § 1184(i) (2016) (requiring “specialty occupation” of individuals for purposes of H-1B visas).

15. See 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (2017) (listing athletes as eligible individuals for O-1A visa); 8 U.S.C. § 1184(c)(4)(A) (specifying athletes as primary candidates for P-1A visa).

16. See 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (describing individuals “who ha[ve] extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim” as qualifying individuals for O-1A visas).

17. See 8 U.S.C.A. § 1184(c)(4)(A) (identifying potential individual who qualifies for P-1A visas). Those qualifying for a P-1A visa include one who performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance; is a professional athlete . . . ; performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams . . . ; or is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production; and seeks to enter the United States temporarily and solely for the purpose of performing—as such an athlete with respect to a specific athletic competition.

Id.

18. See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (2016) (defining “amateur sports organization” and “professional sports organization,” but not “sport” or “athlete”); Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 (2016) (providing circular definition of “sports organization”).

19. See Michael McTee, *E-Sports: More Than Just a Fad*, 10 OKLA. J. L. & TECH. 70, 70 (2014) (concluding USCIS’s recognition of esports as sport by previously granting P-1A visa is illustrative of changing perceptions of both “sport” and “ath-

visas are inappropriate for esports players because of a high potential for violation of status and likely lack of qualifications.²⁰ Of the two other options, P-1A visas apply to the broad spectrum of both amateur and professional esports players and should be the recommended visa type for esports players.²¹

II. “IT’S DANGEROUS TO GO ALONE[,] TAKE THIS.”²² BACKGROUND OF THE ESPORTS SCENE

In recent years, esports has seen massive growth in viewership, both in person, and through online streaming services.²³ This

lete”); Savov, *supra* note 1 (debating with fellow columnist, Sam Byford, about viability of esports as sport and noting differences in approaching the question of what “sport” is); see also Darren Rovell, *76ers Acquire Esports Teams Dignitas and Apex*, ESPN (Sept. 26, 2016), http://www.espn.com/esports/story/_/id/17637299/76ers-acquire-esports-teams-dignitas-apex [<https://perma.cc/J8NQ-4R6V>] (reporting 76ers’ purchase of an esports teams, Team Dignitas and Apex); Katherine E. Hollist, *Time to be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 840–41 (2015) (citing Douglas Belkin, *Liberal Education: At This College, Videogames Are a Varsity Sport*, WALL STREET J. (Sept. 1, 2014, 10:35 PM), <http://www.wsj.com/articles/a-college-offers-videogame-scholarships-for-league-of-legends-1409625331>) (observing one of first colleges offering video game scholarships); see *Game Center*, NYU, <http://gamecenter.nyu.edu/academics/courses/> [<https://perma.cc/GQ42-M2CZ>] (last visited Oct. 26, 2016) (offering classes for study of video games and gaming in higher education); see Philip Kollar, *Overwatch League is Blizzard’s Ambitious New Esports Org, Includes City-Based Teams*, POLYGON (Nov. 4, 2016, 2:34 PM), <http://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-esports-org-includes-city> [<https://perma.cc/4NK8-R26R>] (describing game developer, Blizzard, and its efforts to create city-based esports teams to mirror traditional sports teams’ structure).

20. Compare 9 FAM 402.2-5(F)(1)(U) (2017) (noting individuals can be compensated for living expenses or reasonable allowance under B-1 in lieu of H-1) with Leslie, *supra* note 13 (stating esports players in challenger scene are compensated approximately \$65,000 USD in salary); Hutter, *supra* note 13 (describing esports player salaries of approximately \$100,000). Compare 22 C.F.R. § 41.31 (2017) (describing nonimmigrant purposes for entry into United States under B-1/B-2 visas), and 8 U.S.C. § 1184(i)(1) (detailing qualifications for H-1B for purposes of B-1 in lieu of H-1 as having at least bachelor’s degree in specific field and working in “specialty occupation”), with Rich Stanton, *The Secret to eSports Athletes’ Success? Lots—and Lots—of Practice*, ESPN (May 29, 2015), http://www.espn.com/espn/story/_/id/13053116/esports-athletes-put-hours-training-reach-pinnacle [<https://perma.cc/GNZ4-XVUN>] (considering esports players’ rigor of training and industry’s movement to holistically train players to decrease “burnout” rates).

21. See 8 U.S.C.A. § 1184(c)(4)(A) (enumerating types of athletes to be reasonably considered for P-1A visa).

22. THE LEGEND OF ZELDA (Nintendo 1986) (providing origins for “It’s dangerous to go alone! Take this.” An old man exclaims this when gifting Link, the main protagonist of game, a sword in his quest to rescue Princess Zelda).

23. See Ben Popper, *Field of Streams: How Twitch Made Video Games a Spectator Sport*, VERGE (Sept. 30, 2013, 9:00 AM), <http://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming> [<https://perma.cc/E62L-FYRE>] (comparing Twitch to ESPN for video game streaming based upon

growth has drawn the attention of corporations, such as Coca-Cola and Intel, which have partnered with and sponsored both esports events and teams.²⁴ By slowly entering mainstream media, esports' popularity has sparked debates about what "sport" really means.²⁵ As a growing number of retired professional athletes and investors purchase esports teams and defend esports as a sport, the debate about whether esports is really a sport is brought further into the spotlight.²⁶

viewership); *see also* Chris Morris, *What Impact Will YouTube's Gaming Channel Have on Twitch?*, FORTUNE (Aug. 26, 2015), <http://fortune.com/2015/08/26/youtube-gaming-channel-vs-twitch/> [<https://perma.cc/6GPG-R36U>] (recognizing Twitch has "1.5 million broadcasters and 100 million viewers per month, who watch, on average, 106 minutes of streamed content on the network per person per day").

24. *See* John Gaudiosi, *Big Brands Gravitating Towards eSports*, FORTUNE (July 24, 2014), <http://fortune.com/2014/07/24/esports-sponsors/> [<https://perma.cc/C7U3-VM57>] (acknowledging Coca-Cola, Intel, Nissan, Red Bull, HBO, and ESPN as companies seeing potential in esports, partnering or sponsoring events and teams); *see also* *Coke Esports Returns with World Finals Big-Screen Viewing Parties*, LoL ESPORTS (Oct. 11, 2016, 5:47 PM), http://www.lolesports.com/en_US/articles/coke-esports-returns-world-finals-big-screen-viewing-parties [<https://perma.cc/AG4U-Z9HA>] (advertising Coke Esports events, where individuals have opportunities to view *League of Legends* 2016 World Championship Finals at their local theatres).

25. *See* Aaron, *supra* note 10 (recognizing cultural divide between traditional sports and esports, but noting similarities in coaching staff, commentators, time commitment, and merchandise); Harold Goldberg, *Meet League of Legends: The Video Game Turning E-Sports into Big Business*, PLAYBOY (October 21, 2014), <http://www.playboy.com/articles/winners-losers-and-legends> [<https://perma.cc/2RG8-77JN>] (highlighting rise in esports popularity by featuring full-page spread of *League of Legends* team, Team Cloud9, and educating about esports teams, players, and competitions).

26. *See* Aaron, *supra* note 10.

I think they're just as much a sport as football and baseball. You have to dedicate a large portion of your life to becoming good at it. You need to have reflexes; you need to have hand-eye coordination. You have to be able to react quickly to a changing situation.

Id. (quoting former NFL player Chris Kluwe). *See also* Christina "Peanut" Kelly, *Rick Fox, Shaq's League of Legends Teams to Face Off for League Elimination*, ESPN (Aug. 6, 2016), http://www.espn.com/esports/story/_/id/17234225/rick-fox-shaq-league-legends-teams-face-league-elimination [<https://perma.cc/PY6R-2M5W>] (reporting on Rick Fox and Shaquille O'Neal's purchases of *League of Legends* teams Echo Fox and NRG eSports respectively, with O'Neal's reported interest in investing in *Overwatch* team); Pete Volk, *Magic Johnson, Other NBA Figures Purchase eSports Franchise Team Liquid*, RIFT HERALD (Sept. 27, 2016, 10:26 AM), <http://www.riftherald.com/na-lcs/2016/9/27/13074352/team-liquid-sold-magic-johnson-ted-leonsis-investment-group> [<https://perma.cc/5SSR-5Z2R>] (announcing Team Liquid being purchased by Magic Johnson, Ted Leonsis, co-owner of Washington Wizards, and Peter Guber, co-owner of Golden State Warriors); Rovell, *supra* note 19 (revealing 76ers as "first North American professional sports team to own an esports team"); Nick Statt, *MLB's Streaming Arm Will Broadcast League of Legends Tournaments in \$300 Million Deal*, VERGE (Dec. 16, 2016, 3:58 PM), <http://www.theverge.com/2016/12/16/13987814/riot-games-league-of-legends-mlb-bamtech-streaming-deal> [<https://perma.cc/8UL3-XCM3>] (asserting "BAMTech is essentially the gold standard of live streaming. . . . That BAMTech has decided to

Esports consists of a series of competitive video game matches that take place in front of an audience.²⁷ These audiences are not only an in-person audience viewing the games in large arenas on projection screens, but also a loyal online audience via streaming services such as Twitch and YouTube.²⁸ Often, 10,000 people or more attend these competitive gaming events.²⁹ Each game has live commentators and analysts who discuss, or “shoutcast,” during the games and analyze performances after the matches.³⁰ Competitive events feature a number of players seated at computers on opposite ends of a stage, virtually fighting against each other in a specific video game.³¹ *League of Legends* is an especially popular game in esports and its developer, Riot Games, has been at the forefront of lobbying efforts for esports players to receive P-1A visas.³²

commit such a sizable investment in the competitive side of a game like *League of Legends* means the traditional sports industry is taking serious financial interest in the future of e-sports”); Pete Volk, *Riot Reaches 7-Year, \$300 Million League of Legends Streaming Deal With MLB, Disney*, RIFT HERALD (Dec. 16, 2016, 12:28 PM), <http://www.riftherald.com/competitive/2016/12/16/13728834/riot-lol-streaming-deal-bamtech-mlb> [<https://perma.cc/Y852-TQXP>] (listing fellow companies partnering with BAMTech for streaming purposes: “HBO, Disney, the NHL, the WWE and the PGA Tour”).

27. See Bianca Seidman, *Fans Mob Madison Square Garden for Video Game Championships*, CBS NEWS (Aug. 24, 2015, 3:14 PM), <http://www.cbsnews.com/news/video-game-championship-sold-out-madison-square-garden/> [<https://perma.cc/39ND-N27V>] (explaining high attendance at Madison Square Garden for *League of Legends* 2015 North American Championship); see also Popper, *supra* note 23 (exploring trend of esports audiences engaging in matches both in person and through streaming services).

28. See Popper, *supra* note 23 (describing esports fans viewing competitions both in person and online through increasingly popular streaming platform, Twitch).

29. See Aja Romano, *‘League of Legends’ Championship Becomes Most-Watched eSports Event of All Time*, DAILY DOT (Nov. 20, 2013, 1:46 PM), <http://www.dailydot.com/esports/league-legends-lcs-grand-final-32-million/> [<https://perma.cc/R6WK-4J64>] (relating in-person attendance at Staples Center of approximately 13,000 and “as many as 8.5 million people . . . streaming the game at once”); *Worlds 2016: Semifinals Survival Guide*, LoL ESPORTS (Oct. 18, 2016, 8:54 AM), http://www.lolesports.com/en_US/articles/worlds-2016-semifinals-survival-guide [<https://perma.cc/ZF6M-72JX>] (noting that tickets were “sold out” for *League of Legends* 2016 World Championship Semi-Finals at Madison Square Garden).

30. See LoLeventVODs – LoL Esports VODs, *ROX vs. SKT, Game 2 – Worlds 2016 Semifinal – ROX Tigers vs. SK Telecom T1*, YOUTUBE (Oct. 22, 2016), <https://www.youtube.com/watch?v=SV9Ku5oy2ss> (highlighting scope of esports live audiences, commentators, and analysts at *League of Legends* 2016 World Championship Semi-Finals).

31. See *id.* (observing five players seated on either side of stage with large projection screens above their heads); ESL, *CS:GO – Fnatic vs. EnVyUS [Dust2] – ESL One Cologne 2015 – Grand Final Map 1*, YOUTUBE (Aug. 23, 2015), <https://www.youtube.com/watch?v=02I5vVxIjH0> (illustrating set-up of typical esports event, specifically showing Grand Final for CS:GO).

32. See John Gaudiosi, *These Are the Most Popular eSports Games on Twitch*, FORTUNE (Apr. 6, 2016), <http://fortune.com/2016/04/06/most-popular-esports->

Oftentimes, esports players are salaried by the game developers and their respective teams, who both receive their income from sponsorships.³³ During their time as esports players, they tend to live in gaming houses, where it is not uncommon for them to play about twelve hours per day and take only a handful of days off each month.³⁴ Players often start their professional careers as young as fifteen, though they are not allowed to compete at the professional level until they turn seventeen.³⁵ It is also common for esports players to retire, and often turn to full-time video game streaming, in their early twenties.³⁶

games-on-twitch/ [https://perma.cc/CN2J-ATF8] (listing *League of Legends* and *DOTA 2* as contributing “58% of total hours watched” on Twitch and *CS:GO*, *StarCraft II*, and *Hearthstone* as other popular titles); Dave, *supra* note 3 (noting Riot Games’ partnership with immigration attorney when lobbying to have P-1A visas granted to esports players—specifically for player known as “Shiptur”).

33. See David Segal, *Behind League of Legends, E-Sports’s Main Attraction*, N. Y. TIMES (Oct. 10, 2014), http://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html?_r=0 [https://perma.cc/VAJ7-8S3Z] (estimating “a few hundred professional players” Riot Games has salaried); Austin Goslin, *Some LCS Team Owners Aren’t Happy with Riot, Here’s Why*, RIFT HERALD (Aug. 24, 2016, 5:29 PM), <http://www.rifthermald.com/2016/8/24/12621698/riot-lcs-owners-drama-explanation> [https://perma.cc/Q428-MXCF] (analyzing current financial structure supporting esports players’ salaries and controversy surrounding Riot Games declining to increase players’ salaries); Jacob Wolf, *Riot Plans to Mandate Teams Give Players Employee Benefits*, ESPN (Nov. 1, 2016), http://www.espn.com/esports/story/_/id/17945538/league-legends-riot-plans-mandate-teams-give-players-employee-benefits [https://perma.cc/8TQW-7KRH] (explaining several esports teams salary their players, and that remaining independent contractor relationships will be phased out due to Riot Games’ mandate for employee benefits); Hutter, *supra* note 13 (describing “minimum player compensation is \$12,500 per split per starting player and coach with stipend for substitutes”).

34. See Stanton, *supra* note 20 (highlighting *League of Legends* team, Team Dignitas, and its players’ residence in gaming house during splits). Former *StarCraft II* player, Greg “IldrA” Fields, stated, “When I played in Korea . . . the training schedule excluded any activity that wasn’t eating, sleeping and practicing. . . . [W]e played for 12 hours a day with one or two days off a month.” *Id.*; see also G—League, *Immortals House Tour with Host Wildturtle*, YOUTUBE (Feb. 5, 2016), <https://www.youtube.com/watch?v=Clji-oTe0pA> (providing house tour, guided by Jason “Wildturtle” Tran, Team Immortals player, of team’s gaming house, which includes gaming room where each player has desk and computer for practice).

35. See Josh Raven, *How Riot’s Age Restrictions Hurt Its Brightest Talents*, DAILY DOT (May 27, 2015, 12:24 PM), <http://www.dailydot.com/esports/sencux-riot-games-age-restrictions/> [https://perma.cc/M6UR-3KS4] (discussing Chres “Sencux” Laursen’s competitions in Challenger Series, but difficulties in entering LCS due to his age).

36. See Jacob Wolf, *Dyrus Exits Pro League of Legends with Teary Farewell*, DAILY DOT (Oct. 10, 2015, 7:16 PM), <http://www.dailydot.com/esports/dyrus-plays-final-lol-match/> [https://perma.cc/EYK8-SC6U] (recounting Marcus “Dyrus” Hill’s emotional final game in LCS); Rachel Weber, *Meet the Retired Pro-Gamer Who Earns \$2 Million a Year*, ROLLING STONE (Mar. 29, 2017), <http://www.rollingstone.com/culture/news/retired-pro-gamer-michael-imaqtpie-santana-earns-2-million-a-year-473992> [https://perma.cc/XR2P-4456] (exploring how twenty-five-year-old

League of Legends' North American Championship sold out Madison Square Garden in 2015.³⁷ Later that year, thirty-six million individuals viewed the finals for *League of Legends'* 2015 World Championship (colloquially known as “Worlds”), and the entire World Championship resulted in “360 million hours of live esports viewed”—on par with the viewership of traditional sports, such as football, baseball, and basketball.³⁸ Esports, like traditional sports, has regular seasons, otherwise known as “splits,” and experiences similar player trades and transitions.³⁹ Many players transfer from one team to another between splits, which often involves changing regions: for example, from Europe to North America—and, consequently, immigrating to countries like the United States to both train and compete with their team during the regular split.⁴⁰

In *League of Legends* competitive play, there are six competitive regions.⁴¹ Each region has at least eight teams that play best of two or best of three matches against fellow teams in the region during

Michael “Imaqtpie” Santana retired in 2014 and accumulated a massive online following for his streaming). See also Jesse Aaron, *How Much Can You Make Streaming as a Professional Gamer?*, HUFFINGTON POST (last updated May 27, 2015), http://www.huffingtonpost.com/jesse-aaron/how-much-can-you-make-str_b_6926362.html [<https://perma.cc/2R5L-FS7K>] (noting Imaqtpie has reported over \$8,000 from streaming in just one month” because of his popularity on Twitch, ad revenue, and subscription fees viewers pay for benefits such as shout-outs). Imaqtpie previously played *League of Legends* professionally on Team Dignitas. See Ian J. Barker, *Imaqtpie Leaves Team Dignitas*, DOT ESPORTS (Oct. 21, 2014, 1:28 PM), <https://dotesports.com/league-of-legends/imaqtpie-leaves-dignitas-791> [<https://perma.cc/7CWU-A7VG>].

37. See Seidman, *supra* note 27 (detailing large audience at Madison Square Garden for *League of Legends* 2015 North American Championship).

38. Magus, *Worlds 2015 Viewership*, LoL ESPORTS (Dec. 9, 2015, 7:55 PM), http://www.lolesports.com/en_US/articles/worlds-2015-viewership [<https://perma.cc/N2CN-Q7X6>] (citing “record-breaking” statistics of viewership for *League of Legends* 2015 World Championship); Casselman, *supra* note 2 (comparing viewership for esports and traditional sports).

39. See Leah “Spinn” Jackson, *Meet the 2016 NA LCS Summer Split Teams*, LoL ESPORTS (June 1, 2016, 11:27 AM), http://www.lolesports.com/en_US/articles/meet-2016-na-lcs-summer-split-teams [<https://perma.cc/8QVS-V225>] (listing rosters for all ten North American teams and noting thirty-six new players).

40. See Blum, *supra* note 7 (noting both esports players’ successful immigration to United States to play with their new teams and failures in receiving approval for visa before competition).

41. See Pete Volk, *League of Legends Worlds Qualifying 2016: How it Works and the Standings*, RIFT HERALD (Sept. 5, 2016, 8:16 PM), <http://www.riftherald.com/2016/8/8/12149458/lo1-worlds-qualifying-2016-standings> [<https://perma.cc/6ADF-FZSK>] (detailing each competitive region and teams most likely to compete in World Championship 2016). These competitive regions include: LCK (from Korea), LPL (from China), NA LCS (from North America), EU LCS (from Europe), LMS (from Taiwan, Hong Kong, and Macau), and IWC (the international wild card regions such as Turkey, Brazil, and Russia). See *id.*

nine week-long splits in the spring and summer.⁴² At the end of each split, the bottom two teams in the League Championship Series (“LCS”) must battle in a tournament that could result in their relegation to the Challenger Series, the tier below the professional league.⁴³ The two splits’ competition culminates in the World Championship (“Worlds”), where teams from all six regions compete against each other for the Summoner’s Cup.⁴⁴ The Summoner’s Cup is the highest award given to any professional *League of Legends* team because it is given to the best international team at the World Championship final.⁴⁵ Typically, teams can qualify for Worlds three different ways: (1) by winning the regular summer split, (2) by accumulating the most points during the both of the regular splits (spring and summer splits), or (3) by battling their way through the Regional Qualifier (commonly known as the “gauntlet”), where other regional teams are also vying for their spot at Worlds.⁴⁶ Each region is allotted a certain amount of teams to

42. See *NA LCS Schedule*, LoL ESPORTS, http://www.lolesports.com/en_US/na-lcs/na_2016_summer/schedule/regular_season/1 [<https://perma.cc/K2FW-JTLQ>] (last visited Oct. 26, 2016) (showing regular summer season schedule, which includes nine weeks and, for North America, best of three competitions between teams).

43. See *About*, LoL ESPORTS, <http://2015.na.lolesports.com/about> [<https://perma.cc/9FG8-RVAA>] (last visited Oct. 26, 2016) (describing format of league and consequences of standings).

44. See Pete Volk, *League of Legends Worlds 2016: Schedule, Standings, and Live Scores*, SB NATION (Oct. 2, 2016, 10:30 PM), <http://www.sbnation.com/2016/9/29/13090776/lo-world-championship-2016-schedule-standings-results> [<https://perma.cc/JAV5-QC7U>] (detailing scale, tournament bracket, and schedule of *League of Legends* World Championship 2016); *Final Battle for the Cup*, LoL ESPORTS (Oct. 25, 2016, 8:58 PM), http://www.lolesports.com/en_US/articles/final-battle-cup [<https://perma.cc/WN35-5WQ7>] (discussing significance of Summoner’s Cup within *League of Legends* competitive play).

45. See Fran Berkman, *Worlds 2016: A Viewer’s Guide*, DAILY DOT (Sept. 27, 2016, 6:32 PM), <http://www.dailydot.com/esports/league-of-legends-worlds-2016-how-to-watch-viewers-guide/> [<https://perma.cc/HF4R-MPKQ>] (recounting prestige associated with winning World Championship as international champion); see also *LoLeventVODs – LoL Esports VODs, Worlds 2016 Opening Ceremony – World Championship 2016*, YouTube (Sept. 29, 2016), https://www.youtube.com/watch?v=pehw4e13IA4&list=PLJIIsW8PQINDu3HtPhXtOrWUPY_EgbZIQ&index=2 (celebrating top sixteen teams in world competing for Summoner’s Cup, interviewing professional players attending Worlds on diligence and prestige associated with attending Worlds). *League of Legends* 2016 World Championship was broadcasted in over fifteen languages and introduced all teams competing for the Summoner’s Cup. Summoner’s Cup was presented in stadium by last year’s reigning team, SKT Telecom T1 (otherwise known as SKT) from South Korea. See generally *id.*

46. See Volk, *supra* note 41 (analyzing how teams can qualify for World Championship based on championship points determined by performance in LCS during each split).

represent it at Worlds.⁴⁷ Teams playing for the *League of Legends*' 2016 World Championship had the potential to win 40% of a \$6.7 million prize pool—over half of which was contributed by fans' in-game purchases.⁴⁸

By comparison, *Counter-Strike: Global Offensive* (“CS:GO”) hosted their international competition in Cologne and enjoyed a “concurrent viewership of 1.3 million” and the Electronic Sporting League Pro League “generated . . . almost 30 million hours watched in 2015.”⁴⁹ For CS:GO, the top four teams from the regular season compete in the finals and have a chance to win \$200,000 USD.⁵⁰ *League of Legends* and CS:GO are two of the top esports games, although several other video games are played competitively at the professional level, including *Super Smash Bros.*, *DOTA 2*, and *Overwatch*.⁵¹

47. See *id.* (breaking down how many teams from each region can attend World Championship and likely representative teams from each region).

48. Bradmore & Magus, *2016 League of Legends Worlds Championship by the Numbers*, LoL ESPORTS (Dec. 6, 2016, 3:00 PM), http://www.lolesports.com/en_US/articles/2016-league-legends-world-championship-numbers [https://perma.cc/ESW5-CWVA] (providing infographic depicting the original prize pool's growth due to fan contributions); Riot Magus & Riot Bradmore, *Update: Fan Contribution to Worlds Prize Pool*, LoL ESPORTS (Oct. 9, 2016, 10:54 PM), http://www.lolesports.com/en_US/articles/update-fan-contribution-worlds-prize-pool [https://perma.cc/DF4X-4U9T] (detailing process by which 25% of certain in-game *League of Legends* sales contribute to overall Worlds prize pool and approximately doubled original prize pool).

49. *US\$1.5 Mil Prize Pool, 24 of the World's Best Teams – ESL Pro League Returns in 2016*, ESL PRO LEAGUE (Jan. 18, 2016), <http://en.pro.eslgaming.com/csgo/proleague/news/us-15-mil-prize-pool-24-of-the-worlds-best-teams-esl-pro-league-returns-in-2016/> [https://perma.cc/MG78-6Z34] (specifying viewership numbers and prize pool for ESL One Cologne).

50. See *Announcing the ESL Pro League Prize Money Distribution*, ESL PRO LEAGUE (Feb. 9, 2016), <http://en.pro.eslgaming.com/csgo/proleague/news/announcing-the-esl-pro-league-prize-money-distribution/> [https://perma.cc/KEH7-PSUL] (relating money prize for each standing in league).

51. See Gaudiosi, *supra* note 32 (indicating top five esports games are “*League of Legends*, *Dota 2*, *Counter-Strike: Global Offensive*, *Hearthstone*, and *StarCraft II*”); *Team Members*, TEAM SOLOMID, <http://www.tsm.gg/teams> [https://perma.cc/RR6C-LB2P] (last visited Oct. 27, 2016) (observing Team SoloMid diversified and has specialized teams for various video games, including: *League of Legends*, CS:GO, *Super Smash Bros.*, *Hearthstone*, and *Vain Glory*); *Teams*, IMMORTALS, <https://immortals.gg/teams/> [https://perma.cc/UUS7-X3KH] (last visited Oct. 27, 2016) (listing Immortals' teams for *League of Legends*, CS:GO, *Super Smash Bros. 4*, and *Overwatch*).

A. *League of Legends*: Welcome to Summoner's Rift⁵²

With over 100 million active monthly users worldwide and a thriving esports scene, *League of Legends* now stands as one of the most popular multiplayer online battle arenas ("MOBAs").⁵³ Although it stands as a free-to-play game, it has largely surpassed other MOBAs in earnings.⁵⁴ The game's main objective is for two teams of five players to battle for each other's "nexus," which is a structure in each team's base.⁵⁵ Of the three available maps, the most popular one—the one used for competitive play—is called Summoner's Rift.⁵⁶ Summoner's Rift is a square map mirrored diagonally, with three lanes demarcated: top, middle, and bottom.⁵⁷ The two teams' bases are found at the opposite ends of middle lane: bottom left and top right.⁵⁸

Each team is divided up into five different roles—one for each individual on that team: top, jungle, middle, attack damage carry ("ADC"), and support.⁵⁹ Each team member can choose from over 130 in-game champions, each with unique abilities and categorized

52. LEAGUE OF LEGENDS (Riot Games 2009) (welcoming players each game with announcer exclaiming: "Welcome to Summoner's Rift").

53. See Kollar, *supra* note 2 (outlining growth in champion roster, number of players, and introduction of esports to *League of Legends* since its inception in 2006).

54. See Saira Mueller, *Report: League of Legends Made \$1.6 Billion in Revenue Last Year*, DAILY DOT (Jan. 26, 2016, 11:52 AM), <http://www.dailydot.com/esports/league-of-legends-2015-revenue/> [<https://perma.cc/4QQ6-QLQX>] (comparing *League of Legends*' revenue of over \$1.6 billion in 2015 with other MOBAs and online games such as *DOTA 2* and *CS:GO*, which each made over \$220 million in revenues in same year).

55. See *Game Modes*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/game-modes/> [<https://perma.cc/X884-GS4R>] (last visited Oct. 26, 2016) (describing *League of Legends* as team-based game with goal of destroying opposite team's nexus before opposing team destroys player's nexus).

56. See *id.* (differentiating three main game modes in *League of Legends* and noting Summoner's Rift as main game mode).

57. See *Summoner's Rift*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/game-modes/summoners-rift/> [<https://perma.cc/6368-QJVD>] (last visited Feb. 27, 2017); Yannick LeJacq, *Beginner's Tips for Playing League of Legends*, KOTAKU (May 8, 2015, 11:15 AM), <http://kotaku.com/a-beginner-s-guide-to-league-of-legends-1703090875> [<https://perma.cc/6ZJT-GP78>] (recounting Summoner's Rift's map design: top (following perimeter of square from bottom left corner to top left corner to top right corner), middle (flowing diagonally through square from bottom left to top right), and bottom (mirroring top lane)).

58. See *Summoner's Rift*, *supra* note 57; LeJacq, *supra* note 57 (illustrating relation of each team's base to three lanes).

59. See LeJacq, *supra* note 57 (referring to traditional roles played and their positions typically played on Summoner's Rift).

into certain tailored roles.⁶⁰ Minions regularly spawn from each team's nexus and travel down all three lanes and eleven turrets on each side of the map guard paths to the nexus.⁶¹ Destroying enemy turrets brings the player's team closer to the enemy's base and, by extension, their nexus.⁶² By strategically gaining advantages through items, understanding and mastering the mechanics of various champions' abilities, working as a team around the map, and securing neutral objectives, each team attempts to outplay its opponents and ultimately destroy the opposing team's nexus first.⁶³

B. Counter-Strike: Global Offensive

CS:GO is a first person shooter ("FPS") video game with a variety of maps which is more three-dimensional than *League of Legends*.⁶⁴ CS:GO generates one of their various maps for each

60. See *Champions*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/champions/> [<https://perma.cc/DNC9-552U>] (last visited Jan. 19, 2017) (listing all 134 champions, as of January 19, 2017, under "Game Info"); see also LeJacq, *supra* note 57 (describing different roles within game). The top laner resides in the top lane for a great portion of the game. See *id.* Top laner could be "tanky" champion with larger health pool to soak up damage for his or her teammates or "fighter" (otherwise known as a "carry top laner") who deals tons of damage. Mid laners play in middle lane as either an assassin (who quickly kills other champions using advanced mechanics) or a mage (who uses magic damage). ADCs play in the bottom lane as ranged marksmen who rely on their supports for most of the game. Supports provide vision around the map by placing illuminating items called "wards" in areas clouded by the fog of war, heal their teammates, and use crowd control ("CC") abilities by stunning, snaring, and slowing enemies. The jungler does not play in specified lanes, but rather in areas in between lanes, where he plays against neutral monsters and power buffs before assisting his teammates by sneaking in and assisting ("ganking") their respective lanes.

61. See LeJacq, *supra* note 57 (depicting function and placement of turrets and periodic spawn of minions). Successfully last-hitting minions and destroying enemy turrets provides team members with in-game gold that can be traded in for powerful items. See *id.*

62. See *Structures*, LEAGUE OF LEGENDS, http://na.leagueoflegends.com/en/featured/new-player-guide#/how-to-win/structures?_k=bcvb2l [<https://perma.cc/CH3W-FGQJ>] (last visited Oct. 26, 2016) (describing success of game as dependent upon destroying specific structures, therefore getting closer to enemy nexus).

63. See *Summoner's Rift*, *supra* note 57 (outlining broad objectives and points of contention around Summoner's Rift); see also LeJacq, *supra* note 57 (detailing how large monsters spawn in jungle as neutral objectives); see League of Legends, *What is League of Legends?*, YOUTUBE (Oct. 13, 2015), <https://www.youtube.com/watch?v=BGtROJeMPeE> (reporting that by killing enemy champions, last hitting minions, and securing neutral objectives, individuals gain experience points, thereby allowing in game champions to gain access to and power up all four of their abilities).

64. Compare ESL Counter-Strike, CS:GO – NRG vs. CLG [Mirage] Map 1 – ESL Pro League Season 4 – NA Matchday 16, YOUTUBE (Sept. 16, 2016), <https://www.youtube.com/watch?v=QRCjBnNK3k0> (playing CS:GO professionally during regular split and showing three dimensional, first person shooter perspective), with LoLeventVODS – LoL Esports VODS, TSM vs. CLG, Game 1 – NA LCS 2016 Summer

match.⁶⁵ Players navigate alleyways and buildings from their team bases on opposite ends of the map.⁶⁶ Each game features two teams of five players each.⁶⁷ Individuals play as terrorists or counter-terrorists and acquire in-game currency to buy upgrades for their weapons and defense mechanisms (for example, flash grenades).⁶⁸ Competitive play centers around demolition mode, where the terrorist team's goal is to plant a bomb and protect it until the timer runs out, while the counter-terrorist team must either eliminate the terrorists before they have an opportunity to plant the bomb or deactivate the bomb after it has been planted.⁶⁹ Unlike *League of Legends*, games are timed, with sixteen rounds of two minutes each.⁷⁰ Rounds end by letting the timer run out, eliminating the other members of the opposing team, or completing the objective.⁷¹ Strategy revolves around using cover, handling defensive mechanisms, and utilizing the map as a team.⁷²

C. The "Athlete" Problem

Esports, unlike traditional sports, is not inextricably intertwined with physical activity; instead, esports focuses primarily on

WID1 – Team SoloMid vs. Counter Logic Gaming, YOUTUBE (June 4, 2016), https://youtu.be/2bCWCxEf-rw?list=PLJIIsW8PQINCFuphyqbif_Ngn1WPxmWN5 (playing *League of Legends* during NA LCS Summer Split with overhead, third person perspective in game).

65. Compare ESL Counter-Strike, *supra* note 64 (competing in game one on "Mirage" map), with ESL Counter-Strike, *CS:GO – NRG vs. CLG [Cobble] Map 2 – ESL Pro League Season 4 – NA Matchday 16*, YOUTUBE (Sept. 16, 2016), <https://www.youtube.com/watch?v=NTTqtGKZVUc> (playing game two on "Cobblestone" map).

66. See ESL Counter-Strike, *supra* note 64 (illustrating players' movement through windows in buildings, down alleyways, and using cover of structures and buildings).

67. See *id.* (showing five players' screen names on left and right sides of game screen); see also ESL Counter-Strike, *supra* note 65 (commenting on different roles *CS:GO* players might take in game depending upon the map generated and strategy shown in previous game). Responsibilities and roles for each team member are not rigidly defined, but teammates may specialize in flanking or objective control and communicate their strategies more heavily via headset. See *id.*

68. See ESL Counter-Strike, *supra* note 64 (displaying counter-terrorist team's scores, accrued in-game money, and screen names on left hand side of game screen, and terrorist team's respective stats on right hand side of game screen).

69. See *id.* (declaring counter-terrorist team winners of rounds when it kills all members of terrorist team or diffuses the bomb).

70. See *id.* (displaying timer in top center of game screen that counts down from 2:00 and players continuing game for 16 rounds).

71. See *id.* (illustrating three ways rounds end).

72. See *id.* (observing players' movement as team around structures and use of various weapons and defensive mechanisms).

the use of the mind.⁷³ Like traditional sports, esports teams are led by coaches, assistant coaches, analysts, and sports psychologists.⁷⁴ While it seems as though this is where the similarities between esports and traditional sports end, “sport” can and should be defined in a broader sense than purely competition based upon physical activity.⁷⁵ Black’s Law Dictionary does not define “sport,” nor “athlete,” and statutes do not provide much more guidance.⁷⁶ Statutes that define “sport” to any meaningful extent do so without requiring “sport” to have a connection to physical activity.⁷⁷ Instead, “sport” is defined as an activity in which an individual “sponsors,

73. See Aaron, *supra* note 10 (presenting most striking difference between esports and traditional sports: physical exertion).

74. See Neda Salamat, *Pillars of the League: LCS Coaches*, ESPN (May 23, 2016), http://www.espn.com/esports/story/_/id/15661854/lcs-coaches [<https://perma.cc/PN4R-BJKS>] (outlining coaching structure for LCS teams); Tyler “Fionn” Erzberger, *Head Games – Injecting Sports Psychology into Esports*, ESPN (Mar. 12, 2016), http://www.espn.com/esports/story/_/id/14959904/head-games-injecting-sports-psychology-esports [<https://perma.cc/B3SF-VAS9>] (considering importance of both mental and physical health of esports players and highlighting Weldon Green’s work with TSM’s *League of Legends* team).

75. See McTee, *supra* note 19 (attempting to reach definition of “sport” that includes both traditional sports and esports); Savov, *supra* note 1 (contending esports are sports, despite lack of physical exertion because at center of sports is conflict).

76. See 28 U.S.C. § 3701 (2016) (defining “amateur sports organization” and “professional sports organization”); see generally 36 U.S.C. § 220501 (2016) (providing circular definitions). “Amateur sports organization” is defined as that which “sponsors or arranges an amateur athletic competition.” 36 U.S.C. § 220501(b)(3). “Amateur athletic competition” is then defined as “a contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete.” 36 U.S.C. § 220501(b)(2). An “amateur athlete” is a person who “meets the eligibility standards established by the national governing body . . . for the sport in which the athlete competes.” 36 U.S.C. § 220501(b)(1).

77. Compare 28 U.S.C. § 3701 (introducing some tangible definition of “sport,” though lacking in definition for “athlete”), with 36 U.S.C. § 220501 (defining “amateur athlete” by standards set forth by organization and failing to provide further definitions of “athlete,” “competition,” or “sport”), and Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7801 (2004) (lacking definition of “sport,” but providing circular definition for “intercollegiate sport”). “Intercollegiate sport” is defined as “a sport played at the collegiate level for which eligibility requirements for participation by a student athlete are established by a national association for the promotion or regulation of college athletics.” 15 U.S.C. § 7801(6). “Student athlete” is then understood as “an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport. An individual who is permanently ineligible to participate in a particular intercollegiate sport is not a student athlete for the purposes of that sport,” thus providing little guidance for how “athlete” or “sport” should be understood. 15 U.S.C. § 7801(9).

organizes, schedules, or conducts a competitive game in which one or more . . . athletes participate.”⁷⁸

A great majority of professional esports players are well-known for their skill after having progressed through qualifying tournaments to get to the professional level, competing in their respective regions, and participating in international competitions such as the World Championship.⁷⁹ Additionally, USCIS has already granted P-1A visas, which are granted to athletes who perform at an “internationally recognized level of performance,” to esports players, thereby recognizing them as athletes.⁸⁰ Regarding the significance of USCIS’s granting of the P-1A to its first esports player, one scholar noted, “[w]hile seemingly minor in the grand scheme of esports as a whole, this recognition by the government is a huge step towards acceptance of gaming as a sport and gamers as athletes.”⁸¹ While this may be true, there continues to be a cultural resistance to categorizing esports players as athletes and, by extension, esports as a sport alongside traditional sports.⁸²

Esports players do not achieve recognition based on physical athletic prowess, but rather based upon their strategic strength and acumen.⁸³ Culturally and legally accepting esports players as athletes is difficult, especially when comparing their physical appearance and competitive performance with National Football League (NFL) players.⁸⁴ Appearances aside, difficulties in culturally under-

78. McTee, *supra* note 19 (quoting 28 U.S.C. § 3701) (ignoring, notably, potential physical nature of sports, and instead defines based upon characteristic competitive participation).

79. See Mina Kimes, *The Unkillable Demon King*, ESPN THE MAGAZINE (June 10, 2015), http://www.espn.com/espn/feature/story/_/id/13035450/league-legends-prodigy-faker-carries-country-shoulders [<https://perma.cc/6FNQ-FUK2>] (highlighting famous Korean *League of Legends* player, Lee “Faker” Sang-hyeok); Goldberg, *supra* note 25 (featuring spread of Team Cloud9 in magazine and describing “League gods” known across regions for their skill).

80. 8 U.S.C. § 1184(c)(4)(A)(i)(I) (2016) (stating standard for P-1A visa candidates); Dave, *supra* note 3 (granting first P-1A visa to esports player in 2013).

81. McTee, *supra* note 19 (concluding USCIS’s recognition of esports as sport by previously granting P-1A visa is illustrative of changing perceptions of both “sport” and “athlete”).

82. See Aaron, *supra* note 10 (acknowledging difficulties in accepting esports as sports due to preconceived notions as to what “sport” should encompass and specific stereotypes of video games).

83. See Kimes, *supra* note 79 (describing Faker’s strategic skill set setting him and his team apart from competition); see League of Legends, *Playmaker: Catalyst – Reignover*, YOUTUBE (Oct. 21, 2016), <https://www.youtube.com/watch?v=GS06-Dhl9ic> (analyzing Kim “Reignover” Yeu-jin’s strategic process of turning mistakes into opportunities when playing *League of Legends*).

84. See Aaron, *supra* note 10 (recognizing culturally held stereotypes “gamers are weird” and video game competitions would not be entertaining).

standing esports as a sport also stems from esports' novelty, in addition to its steep learning curve in each video game's related characters, rules, and strategies.⁸⁵ For example, in *League of Legends*, understanding esports games is dependent upon understanding the map, objectives, and all four abilities for the over 130 champions that could be played in that game.⁸⁶

Despite the strikes against it, esports has garnered the interest of individuals such as Chris Kluwe, a former punter for the Minnesota Vikings, who has noted the viability of esports as a sport.⁸⁷ Additionally, household names such as Mark Cuban, Rick Fox, Shaquille O'Neal, the Philadelphia 76ers, and even Major League Baseball ("MLB") have invested in esports and declared their support for categorizing esports as a sport.⁸⁸ Colleges have offered athletic scholarships and courses in competitive video gaming.⁸⁹ Globally, the United States has the largest portion of esports revenues and an esports arena has been built in Santa Ana.⁹⁰ Finally,

85. See Savov, *supra* note 1 (advocating esports qualify as sport, while recognizing esports' accessibility challenges).

86. See *Champions*, *supra* note 60 (listing over 130 champions available to play, four unique abilities for each, and outlined strengths and weaknesses in "Champion Spotlight" videos for each champion page).

87. See Aaron, *supra* note 10 (quoting Chris Kluwe's defense of esports as sport); see also Kelly, *supra* note 26 (announcing competition between Rick Fox's team, Echo Fox, and Shaquille O'Neal's team, NRG eSports).

88. See Kelly, *supra* note 26 (describing Rick Fox's team, Echo Fox, and Shaquille O'Neal's team, NRG eSports, in elimination face off in NA LCS in addition to O'Neal's reported interest in investing in an *Overwatch* esports team); Pete Volk, *Magic Johnson, Other NBA Figures Purchase eSports Franchise Team Liquid*, *supra* note 26 (noting purchase of esports team, Team Liquid, by Ted Leonsis, Peter Guber, and Magic Johnson); Rovell, *supra* note 19 (reporting 76ers as "first North American professional sports team" to own esports teams and noting young esports industry "presents corporate America with a way to reach millennials in a way stick and ball sports just isn't"); Statt, *supra* note 26 (describing seven year, \$300 million deal between MLB and Riot Games, which will enable *League of Legends* to be streamed using BAMTech software and to develop application for mobile streaming).

89. See Hollist, *supra* note 19, at 840–41 (citing Belkin, *supra* note 19) (recognizing one of first colleges offering video game scholarships); *Game Center*, *supra* note 19 (providing opportunity to study both game design and gaming itself at New York University); Doug Cortez, *University of Utah Announces Varsity Esports Program*, ESPN (Apr. 5, 2017), http://www.espn.com/esports/story/_/id/19086129/university-utah-announces-varsity-esports-program [https://perma.cc/Y6YY-KPEF] (announcing University of Utah's formation of college varsity esports program and plans to expand to four games). See also John Gaudiosi, *How the U.S. Is Killing it in eSports*, FORTUNE (Jan. 27, 2016), <http://fortune.com/2016/01/27/us-is-killing-it-in-esports/> [https://perma.cc/4BXF-54KN] (recognizing United States' large share of international esports revenues).

90. See Paresh Dave, *Competitive Video Game Players Get a Big-Time Stage in Santa Ana*, L.A. TIMES (Sept. 8, 2015, 9:32 AM), <http://www.latimes.com/business/technology/la-fi-esports-arena-20150909-story.html> [https://perma.cc/7T5Q-4DEW] (describing esports arena in Santa Ana that operates as gym and venue for esports

ESPN, in covering esports events and news both online and in print, has been curtailing some of the accessibility issues that have impeded esports' identification as a sport.⁹¹ Such developments challenge cultural expectations as to what a sport is and should be, while also allowing esports to vie for a spot at the table.⁹²

One scholar posits that such a cultural understanding of what sports should be contributes to legal challenges, such as immigration issues.⁹³ Understanding esports players as athletes is essential, not only because of the precedent already set by USCIS, but also because of the distinctions between different athletes under O-1A and P-1A visas.⁹⁴ Athletes of “extraordinary ability” are candidates for the O-1A visa, while athletes of an “internationally recognized level of performance” and “professional athletes” are eligible for entry into the United States to train and compete under the P-1A visa.⁹⁵ An athlete of “extraordinary ability” is one that has “risen to the very top of the field of endeavor”—a standard that is proven through a major award in the field or documentation proving their contribution in some other way to the field.⁹⁶ An athlete of “internationally recognized level of performance” can be proven through international competition, international recognition, international ranking, or some honor achieved within the sport.⁹⁷ A “profes-

events). *See also* Jacob Wolf, *Vegas Esports Venue to Open at Luxor Hotel in 2018*, ESPN (April 11, 2017), http://www.espn.com/esports/story/_/id/19133512/esports-arena-open-las-vegas-luxor-hotel-2018 [<https://perma.cc/6XTY-F6UY>] (revealing plans to launch esports venue in Las Vegas' Luxor Hotel as “the iconic destination in esports” similar to “Yankee Stadium, Madison Square Garden and Wembley Stadium are considered their sports' most aspirational venues”).

91. *See* Peckham, *supra* note 2 (exploring ESPN's coverage of esports amidst its growing popularity, especially in mainstream coverage).

92. *See* Savov, *supra* note 1 (approving view that esports is sport, despite arguments that esports lacks simplicity and long history of traditional sports).

93. *See* McTee, *supra* note 19 (positing esports has challenges in being considered sport in both legal and public sense).

94. *See* 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (2017) (providing “extraordinary ability” as basis for O-1A visas); 8 U.S.C. § 1184(c)(4)(A) (2016) (listing “professional athlete[s]” or athletes of “internationally recognized level of performance” as eligible candidates for P-1A visa).

95. *See* 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (introducing O-1A visa eligible individuals as those with “extraordinary ability”); 8 U.S.C. § 1184(c)(4)(A) (noting “professional athlete[s]” and athletes of “internationally recognized level of performance” are eligible candidates for P-1A visa).

96. *See* 8 C.F.R. § 204.5(h)(2) (defining “extraordinary ability”); *see also* Kazarian v. U.S. Citizenship & Immigr. Servs., 596 F.3d 1115, 1119 (9th Cir. 2010) (describing evidentiary burden to prove “extraordinary ability”); 8 C.F.R. § 204.5(h)(3) (listing ways to prove “extraordinary ability” other than major award in field).

97. *See P-1A Internationally Recognized Athlete*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., [https://www.uscis.gov/working-united-states/temporary-workers/p-](https://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete)

sional athlete” is defined as one who is part of a team in an association of six or more professional sports teams and the combined revenues of those teams exceed \$10 million per year.⁹⁸

As discussed below, esports players *can* be considered athletes of “internationally recognized level of performance” because of their participation in international competitions and player trades.⁹⁹ However, not all esports players are able to meet the high bar of an athlete of “extraordinary ability,” because not all players are able to prove they have “risen to the very top of” the esports field.¹⁰⁰ Similarly, esports players cannot be considered “professional athletes” because although esports’ revenue exceeds the regulatory minimum of \$10 million per year, esports teams are currently not organized under an association.¹⁰¹ Because of these distinctions, P-1A visas come out the victor as the recommended visa type for esports players.¹⁰²

1a-internationally-recognized-athlete [https://perma.cc/3H8W-KBRE] (last visited Oct. 26, 2016) (summarizing criteria, application process, and necessary documents for applying for P-1A visa as “internationally recognized athlete”).

98. See 8 U.S.C. § 1154(i)(2) (2014) (defining “professional athlete”).

99. See Volk, *supra* note 41 (describing international tournament for *League of Legends*); see Kollar, *supra* note 19 (introducing *Overwatch*’s new league in progress, which aims to have city-based teams that still compete internationally).

100. See Kien Lam, *SK Telecom T1 Wins World Championship Again*, LoL Esports (Oct. 30, 2016, 1:28 AM), http://www.lolesports.com/en_US/articles/sk-telecom-t1-wins-world-championship-again [https://perma.cc/85JL-8QLD] (describing how SKT T1 has won half of World Championships to date); *Esports Champions Crowned at Blizzcon 2016*, BLIZZCON (Nov. 6, 2016), <https://blizzcon.com/en-gb/news/20367681/esports-champions-crowned-at-blizzcon-2016> [https://perma.cc/RR6W-K5P7] (recognizing achievements of limited number of teams and individuals at annual esports conference known as BlizzCon).

101. See 8 U.S.C. § 1154(i)(2) (giving base revenue requirement for “professional athlete” association); Paul Lee & Duncan Stewart, *eSports: Bigger and Smaller Than You Think*, DELOITTE, <http://www2.deloitte.com/global/en/pages/technology-media-and-telecommunications/articles/tmt-pred16-media-esports-bigger-smaller-than-you-think.html#> [https://perma.cc/ND4V-A3KJ] (last visited Oct. 26, 2016) (quoting esports’ revenues as approximately \$400 million in 2015). Compare Hollist, *supra* note 19, at 843 (recognizing established esports associations internationally, but lack of any such association in United States or even to any meaningful extent in Europe), and Kollar, *supra* note 19 (describing Blizzard’s anticipated *Overwatch* league), with 8 U.S.C. § 1154(i)(2) (requiring association of teams in addition to revenue to be considered “professional athlete”).

102. See 8 U.S.C. § 1184(c)(4)(A) (2016) (listing elements necessary for athletes to be eligible to enter United States to train and compete under P-1A visas, one of which is status as athlete of “internationally recognized level of performance”).

III. WELCOME TO WARP ZONE:¹⁰³ POSSIBLE VISA CATEGORIES

The following visa analysis is predicated on the assumption that esports players are considered athletes, as implied by USCIS's past granting of P-1A visas to esports players.¹⁰⁴ With respect to esports players, there are four potentially relevant visa categories.¹⁰⁵ There are two visa categories specifically for athletes: O and P; O-1A and P-1A visas are specifically for the athletes themselves.¹⁰⁶ The United States grants O-1A visas to individuals who have "extraordinary ability . . . demonstrated by sustained national or international acclaim."¹⁰⁷ P-1A visas provide opportunities for professional athletes and athletes that play at "an internationally recognized level of performance."¹⁰⁸ B-1/B-2 visas are nonimmigrant visas for "business" and "pleasure" respectively, and are oftentimes used by esports players when they are not granted P-1A visas.¹⁰⁹ Finally, an H-1B visa is one of the primary visas used for individuals employed by United States employers, which could theoretically benefit players who are employed by United States esports teams.¹¹⁰ Of these visa categories, the P-1A visa provides the most reasonable solution to esports players' immigration issues without running afoul of visa status violations.¹¹¹

103. See *SUPER MARIO BROS.* (Nintendo 1985) (introducing "Warp Zone" when player maneuvered Mario to top of certain levels, bypassing several enemies and coming to typically three warp pipes that player could choose from. Doing so would transport Mario to new worlds within game).

104. See McTee, *supra* note 19 (recounting USCIS's recognition of esports as sport by previously granting P-1A visa); Dave, *supra* note 3 (summarizing USCIS's first grant of P-1A visa for esports player, Shiphtur, in 2013).

105. See *generally* 22 C.F.R. § 41.31(a) (2017) (describing B-1/B-2 visa qualifications); 8 U.S.C. § 1101(a)(15)(H)(i)(b) (explaining H-1B visa category); 8 U.S.C. § 1101(a)(15)(O) (detailing O-1A visa); 8 U.S.C. § 1184(c)(4)(A) (relating P-1A visa category requirements).

106. See 8 C.F.R. § 214.2(o)(3)(iii) (specifying athletes as potential beneficiaries of O-1A visa); 8 U.S.C. § 1184(c)(4)(A) (indicating amateur and professional athletes are beneficiaries of P-1A visas).

107. See 8 U.S.C. § 1101(a)(15)(O)(i) (defining standard for individuals to qualify for O-1A visa as those with "extraordinary ability").

108. See 8 U.S.C. § 1184(c)(4)(A)(i)(I)-(II) (stating both "professional athlete[s]" and athletes that play at "internationally recognized level of performance" are eligible for P-1A visas).

109. See *generally* 22 C.F.R. § 41.31 (denoting two purposes for B-1/B-2 visas: "business" and "pleasure").

110. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (explaining H-1B visas as option for employees in "specialty occupation" for United States employers).

111. See 8 U.S.C. § 1184(c)(4)(A) (providing guidelines for qualifying individuals for P-1A visa).

A. Thank You, B-1 and B-2, “but Our Princess
Is in Another Castle”¹¹²

B-1 and B-2, nonimmigrant visas, are for “business” and for “pleasure.”¹¹³ To qualify as a nonimmigrant visitor, an individual:

(1) [I]ntends to leave the United States at the end of the temporary stay . . . ; [(2) H]as permission to enter a foreign country at the end of the temporary stay; and (3) Adequate financial arrangements have been made to enable the alien to carry out the purpose of the visit to and departure from the United States.¹¹⁴

Under a B-1 visa, individuals are permitted to travel to the United States for limited, temporary business trips.¹¹⁵ The regulation is clear, however, that this “does not include local employment or labor for hire.”¹¹⁶ Instead, the visa’s main purpose is to allow individuals “to enter the United States temporarily with the idea of performing temporary services of an exceptional nature . . . but having no contract or other prearranged employment.”¹¹⁷ Under the B-2 visa, individuals can enter the United States for “pleasure,” including: “tourism . . . medical treatment . . . or service.”¹¹⁸

Although esports players have had to resort to them in the past, players should not, under the current wording of the statute, be able to take advantage of the B-1/B-2 visa categories.¹¹⁹ Their training and competition do not fall under the limited purpose of the visa for business, which includes short-term business-related trips, such as those for conferences or negotiations.¹²⁰ While

112. SUPER MARIO BROS., *supra* note 103 (repeating “Thank you, Mario, but our princess is in another castle” at seven different boss-stage castles at the end of each world before Mario actually rescues Princess Peach from Bowser in eighth and final castle).

113. *See* 22 C.F.R. § 41.31(b)(1)–(2) (defining visits for “business” and “pleasure”).

114. *Id.* § 41.31(a) (classifying elements of nonimmigrant visitor).

115. *See id.* § 41.31(b)(1) (defining scope of B-1 visa’s limited purpose).

116. *Id.* (rejecting to classify local employment or “prearranged employment” as temporary business visit under visa category).

117. *Id.* (distinguishing temporary business trips from employment).

118. *Id.* § 41.31(b)(2) (stating recreational purposes for B-2 visa are “tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature”).

119. *See* Blum, *supra* note 6 (noting esports players’ last resort reliance on visitor visas, B-1/B-2, to train and compete in United States with their teams).

120. *Compare* Stanton, *supra* note 20 (describing length of training and competition), *with* 22 C.F.R. § 41.31(b)(1) (distinguishing temporary business trips from employment).

esports players are employed in the United States, they are compensated by their respective teams and are contenders for large sums of money by playing in tournaments; therefore, they cannot be considered visitors for business under the B-1 visa category.¹²¹ Esports players are often salaried by both game developers and their respective teams, violating B-1's prohibition of "prearranged employment."¹²² Therefore, the purpose of their stay does not align with the purposes as set forth by regulations governing B-1 visas.¹²³

Under a variance on the B-1, the B-1 in lieu of H-1, an individual who qualifies for H-1 status and receives no salary or form of reimbursement other than a reasonable allowance can be granted a B-1.¹²⁴ A person qualifies for H-1 status if they practice a "specialty occupation" and work for a United States employer.¹²⁵ Such an exception under B-1, however, would not be reasonable for esports

121. Compare Leslie, *supra* note 13 (presenting salaries for challenger team, which would be less than that of their professional counterparts), and Hutter, *supra* note 13 (citing ESPN survey noting esports players' salaries of approximately \$100,000), with 22 C.F.R. § 41.31(b)(1) (restricting B-1 visa holders from employment in United States).

122. Compare Segal, *supra* note 33 (estimating "a few hundred professional players" Riot Games has on salary), and Hutter, *supra* note 13 (estimating salaries for North American and European esports players), and Goslin, *supra* note 33 (explaining financial structure supporting esports players' salaries), with 22 C.F.R. § 41.31(b)(1) (recognizing lack of ability for individuals under B-1 visa to be employed in United States). See also Wolf, *supra* note 33 (noting that some esports players operate under independent contractor relationships with teams, but that such relationships will transition to fully salaried employment).

123. See 22 C.F.R. § 41.31(b)(1) (enumerating examples of business visits that comport with purpose of B-1 visa); Leslie, *supra* note 13 (reporting salaries of esports players in challenger scene are approximately \$65,000 USD, and professional players therefore will most likely have higher salary); Hutter, *supra* note 13 (detailing average esports player salaries by region and referencing minimum compensation).

124. See 9 FAM 402.2-5(F)(1) (2015) (indicating B-1 in lieu of H-1 does not allow for compensation more than reasonable allowance for living expenses).

A nonimmigrant in B1 status may not receive a salary from a U.S. source for service rendered in connection with his or her activities in the United States. A U.S. source, however, may provide the alien with an expense allowance or reimbursement for expenses incidental to the temporary stay. Incidental expenses may not exceed the *actual reasonable expenses* the alien will incur in traveling to and from the event, together with living expenses the alien reasonably can be expected to incur for meals, lodging, and other basic services.

Id. (emphasis added).

125. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (describing individuals who qualify for H-1B visa as those practicing in "specialty occupation" and want to continue to practice such occupation in United States for United States employer).

because most esports players are salaried and paid far more than a reasonable allowance.¹²⁶

Alternatively, professional athletes are permitted under the B-1 category, provided they are not salaried in the United States.¹²⁷ A professional athlete is defined as an athlete employed by “a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year” or “any minor league team that is affiliated with such an association.”¹²⁸ Esports players cannot be considered “professional athletes” because they are not currently organized under an overarching association.¹²⁹ Therefore, esports players also cannot be considered for this exception to the B-1 visa because they are salaried and not simply winning prize money.¹³⁰

126. Compare 9 FAM 402.2-5(F) (detailing instances in which individuals qualify for B-1 in lieu of H-1), with Leslie, *supra* note 13 (recognizing highly salaried nature of those who participate in esports, especially those at professional level), and Hutter, *supra* note 13 (describing approximate \$100,000 salaries for esports players in North America and Europe). See also Wolf, *supra* note 33 (noting esports business relationships are transitioning from independent contractor relationships to fully salaried employment).

127. See 9 FAM 402.2-5(C)(4) (advising athletes cannot be salaried by United States employers).

(a) Professional athletes, such as golfers and auto racers, who receive no salary or payment other than prize money for his or her participation in a tournament or sporting event.

(b) Athletes or team members who seek to enter the United States as members of a foreign-based team in order to compete with another sports team should be admitted provided:

] (1) The foreign athlete and the foreign sports team have their principal place of business or activity in a foreign country;

(2) The income of the foreign-based team and the salary of its players are principally accrued in a foreign country; and

(3) The foreign-based sports team is a member of an international sports league or the sporting activities involved have an international dimension.

Id.

128. 8 U.S.C. § 1154(i)(2)(A)–(B) (2014) (defining “professional athlete”).

129. Compare Hollist, *supra* note 19, at 843 (acknowledging traditional sports’ established associations, and noting lack of established esports associations, especially in United States), and Doug Cortez, *Professional eSports Association Unveiled, Announces CS:GO League*, ESPN (Sept. 10, 2016), http://www.espn.com/esports/story/_/id/17496388/professional-esports-association-unveiled-announces-csgo-league [<https://perma.cc/SM6V-48YQ>] (announcing Professional eSports Association (“PEA”) that will launch in 2017 and comprise of top North American esports teams, such as “Team SoloMid, Cloud9, Team Liquid, Counter Logic Gaming, Immortals, NRG eSports”), with 8 U.S.C. § 1154(i)(2) (defining “professional athlete” by the applicant’s team’s inclusion in league or association in sport in addition to revenue considerations).

130. Compare Leslie, *supra* note 13 (noting salaried nature of esports players), and Hutter, *supra* note 13 (recounting minimum compensation and average salaries of North American and European esports players), and Wolf, *supra* note 33 (describing transition from independent contractor models to salaried employ-

The B-2 visa does not provide a better option because esports players are not merely here for recreational purposes due to their employment, which involves extensive training and competition.¹³¹ B-2 visas, rather, are primarily for entry into the United States for “pleasure,” which includes: “tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature.”¹³² B-2 visas do not permit individuals to be employed, even when they are only given an allowance for basic necessities such as housing and “pocket money.”¹³³ Even if esports players are not compensated, they would not qualify for B-2 visas, because they are not tourists or visiting for pleasure.¹³⁴ Therefore, esports players cannot qualify under the B-1/B-2 visa categories because they are compensated for more than a reasonable allowance and do not enter the United States for the stated purposes of either visa.¹³⁵

ment across esports), with 22 C.F.R. §41.31(b)(1) (describing B-1 visa’s limited purpose).

131. Compare Stanton, *supra* note 20 (summarizing training regimen for esports players), with 22 C.F.R. § 41.31(b)(2) (including examples of recreational visits).

132. 22 C.F.R. § 41.31(b)(2) (listing potential “legitimate activities of a recreational character” covered by B-2 visa category).

133. See Matter of Hall, 18 I. & N. Dec. 203, 205 (B.I.A. 1982) (deciding individuals under B-2 are not even allowed compensation to cover “pocket money” or living expenses).

134. See 9 FAM 402.2-4(A)(7) (2017) (noting athletes do not qualify for B-2 visas even if they are not compensated when they normally are).

A person who is an amateur in an entertainment or athletic activity is, by definition, not a member of any of the profession associated with that activity. An amateur is someone who normally performs without remuneration (other than an allotment for expenses). A performer who is normally compensated for performing cannot qualify for a B-2 visa based on this note even if the performer does not make a living at performing, or agrees to perform in the United States without compensation. Thus, an amateur (or group of amateurs) who will not be paid for performances and will perform in a social and/or charitable context or as a competitor in a talent show, contest, or athletic event is eligible for B-2 classification, even if the incidental expenses associated with the visit are reimbursed.

Id. Esports players are not in the United States for what the law describes as “pleasure.” See 22 C.F.R. § 41.31(b)(2) (considering possible reasons or purposes for visits of “pleasure”).

135. Compare generally 9 FAM 402.2-5(F) (describing B-1 in lieu of H-1’s “reasonable expenses”), and 22 C.F.R. § 41.31 (listing visits for “business” and “pleasure” as possible purposes of trips under B-1/B-2 visas), with Leslie, *supra* note 13 (recognizing highly salaried nature of both challenger series and professional players in *League of Legends* esports), and Hutter, *supra* note 13 (reporting compensation for North American and European esports players).

B. H-1B: “The Cake Is a Lie”¹³⁶

Esports players have reasonably not applied for the H-1B visa, which is a visa category that allows for dual intent, meaning that the individual could have nonimmigrant or immigrant intent.¹³⁷ Under an H-1B, a person must perform in a “specialty occupation” and the Department of Labor must certify that the employee’s compensation is adequate in relation to similarly situated.¹³⁸ A “specialty occupation” is understood to be “an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”¹³⁹ An individual can meet this educational requirement through a bachelor’s degree from the United States, an equivalent foreign degree, certification in the specialty occupation, or experience that equates to the “completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty

136. See PORTAL (Valve Corporation 2007) (depicting “the cake is a lie” painted on a wall when protagonist realizes promised cake was used to incentivize her to perform tasks within game, but this goal is actually unattainable).

137. See 8 U.S.C. § 1184(b) (2016) (allowing for dual intent).

Every alien . . . shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.

Id.

138. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (relating requirements of nonimmigrant H-1B, especially regarding occupation requirements); 20 C.F.R. § 655.730(d) (2008) (listing “attestations” that the Labor Condition Application (“LCA”) contains). The LCA must contain labor condition statements, providing [T]hat no individual may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed . . . an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrant’s no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer’s other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment.

20 C.F.R. § 655.730(d)(1). The LCA contains other attestations that require the United States employer to show the potential H-1B beneficiary will be adequately compensated, relative to similarly situated employees in field. See 20 C.F.R. § 655.730(d)(2)–(6).

139. 8 U.S.C. § 1184(i)(1) (defining “specialty occupation” for purposes of H-1B visas).

through progressively responsible positions directly related to the specialty.”¹⁴⁰ Three years of experience is considered the equivalent of one year of college.¹⁴¹

The United States employer acts as the petitioner, must pay for the costs of the employee’s petition process, and promises to pay the wage reflected on the petition within thirty days of their employee’s entry into the United States.¹⁴² Additionally, the employer cannot force an H-1B employee into a “nonproductive” state due to lack of work and may be liable for the “reasonable costs of return transportation of the alien abroad,” should the employee be terminated.¹⁴³ One of the biggest challenges to the H-1B is the cap of 65,000 H-1B visas per year, and the possible lottery if the number of non-exempt H-1B petitions exceeds this cap.¹⁴⁴ While there are a

140. 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) (2017) (detailing ways in which individual can meet educational requirement necessary for “specialty occupation”).

141. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (“For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.”).

142. *See* 8 U.S.C. § 1182(n)(2)(C)(vii)(III) (2013) (stating employer’s economic responsibilities to H-1B employee). It states:

In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection . . . with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

Id.

143. 8 U.S.C. § 1184(c)(5)(A) (identifying United States employer’s potential liability). It states:

In the case of an alien who is provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) or 1101(a)(15)(H)(ii)(b) of this title and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

Id.; *accord* 8 U.S.C. § 1182(n)(2)(C)(vii)(I)–(II) (requiring United States employers to utilize their H-1B employees). It states:

It is a failure to meet a condition of paragraph (1)(A) for an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant’s lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

8 U.S.C. § 1182(n)(2)(C)(vii)(II).

144. *See* 8 U.S.C. § 1184(g)(1)(A) (summarizing annual caps between 1999 and 2003 and subsequent fiscal years following 2003); *see USCIS Completes the H-1B*

variety of exceptions to this annual cap, esports players would not fall within these exceptions, as the exceptions extend only to these limited categories: colleges and universities, nonprofits associated with colleges and universities, and certain government entities.¹⁴⁵

Esports players reasonably avoid applying for H-1B visas, because, despite the flexible dual intent, esports players will not be able to reach the essential element of performing in a “specialty occupation.”¹⁴⁶ Most esports players start their careers at a young age; they oftentimes do not attend university or even finish high school, therefore lacking a bachelor’s degree—a key component of the “specialty occupation” requirement.¹⁴⁷ Furthermore, esports and professional gaming is not the type of occupation that is normally taught in higher education, such that an individual can major and then get a degree in the field.¹⁴⁸ Players could meet the education requirement with experience in esports of approximately twelve years, depending on the education level of the player, because there are four years of college training needed and three years of work experience counts towards one year of college under

Cap Random Selection Process for FY 2016, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016> [<https://perma.cc/8ACJ-3ZTW>] (last visited Oct. 27, 2016) (describing lottery process by which H-1B visas are granted, should non-exempt petitions exceed annual cap and noting USCIS’s continued acceptance of cap exempt petitions or petitions from current H-1B holders).

145. See 8 U.S.C. § 1184(g)(5) (listing exceptions to annual H-1B visa cap). The exceptions state,

The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who—

- (A) is employed (or has received an offer of employment) at an institution of higher education . . . or a related or affiliated nonprofit entity;
- (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization;
- or
- (C) has earned a master’s or higher degree from a United States institution of higher education . . . until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Id.

146. See 8 U.S.C. § 1184(i) (defining “specialty occupation” for the purpose of H-1B visas); Raven, *supra* note 35 (recognizing that Championship Series allows flexibility for players to attend school or work, though “LCS players are required to drop everything including school, jobs, friends, and family to move to Berlin or Los Angeles”).

147. See Raven, *supra* note 35 (observing Sencux’s difficulties in entering professional LCS due to his age).

148. See Hollist, *supra* note 19, at 840–41 (citing Belkin, *supra* note 19) (considering one of first colleges offering video game scholarships); *Game Center*, *supra* note 19 (describing New York University’s video game course offerings).

the “specialty occupation” requirement for H-1B visas.¹⁴⁹ However, the average career length of esports players is not nearly this long, as many players experience “burnouts” from intense training schedules or injuries such as carpal tunnel syndrome.¹⁵⁰

If players pursued H-1B visas, the restrictions and pressures on the United States employers—namely, United States esports teams—may dissuade coaches and owners from enriching their teams through foreign players, who bring specialized talent and unique strategic thinking.¹⁵¹ Specifically, the financial obligations imposed on the employer combined with their inability to “bench” their employee could cause the employer to hesitate to take a foreign player.¹⁵² Finally, esports players have unfavorable odds because their employers cannot be considered H-1B annual cap exempt: they are not a nonprofit associated with a college or university.¹⁵³ Therefore, although a seemingly attractive option for employed and salaried players, esports players do not meet the elements required for H-1B, and even if they were able to prove “specialty occupation,” the limited number of available H-1B visas and the chances of obtaining one through the lottery leaves esports players subject to much uncertainty.¹⁵⁴

149. See 8 C.F.R. § 214.2(h)(4)(iii)(C) (2017) (listing methods to meet education requirement for “specialty occupation” under H-1B); 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (determining three years of experience equals one year of college training); Raven, *supra* note (suggesting Sencux is typical player who starts playing very young and admitting short career length of esports players, who often retire at relatively early age).

150. See Stanton, *supra* note 20 (reporting industry movement to decrease “burnout” rates for esports players who endure rigorous training regimens); Weber, *supra* note 36 (recounting twenty-five-year-old Imaqtpie’s retirement from competitive esports three years ago and his transition to streaming); Luke Plunkett, *The Injuries That Are Ending eSports Careers*, KOTAKU (July 16, 2015, 7:00 PM), <http://kotaku.com/the-injuries-that-are-ending-esports-careers-1718373200> [<https://perma.cc/W736-BDS2>] (remembering *League of Legends* Cloud 9 player, Hai “Hai” Lam, who, like many other players, retired because of “repetitive motion injuries,” such as carpal tunnel syndrome).

151. See Chris Higgins, *How These Surprise Trades Upend the LCS in 2016*, RED BULL (Jan. 6, 2016), <http://www.redbull.com/en/esports/stories/1331768688947/how-these-surprise-trades-upend-the-lcs-in-2016> [<https://perma.cc/P65N-U836>] (recounting player trades which dynamically change North American teams).

152. See 8 U.S.C. § 1182(n)(2)(C)(vii)(III) (identifying United States employer’s financial responsibilities during employee’s H-1B petition process); 8 U.S.C. § 1184(c)(5)(A) (2016) (describing employer’s potential liability upon early termination of H-1B employee); 8 U.S.C. § 1182(n)(2)(C)(vii)(I)-(II) (requiring employers to utilize their H-1B employees and prohibiting employer’s avoidance of compensation by simply not utilizing their employee).

153. See 8 U.S.C. § 1184(g)(1)(A) (relating annual caps between 1999 and 2003 and subsequent fiscal years following 2003).

154. See 8 U.S.C. § 1184(i) (summarizing “specialty occupation” for H-1B visa category); 8 U.S.C. § 1184(g)(1)(A) (relating annual cap of 65,000 H-1B visas);

C. O-1A: “It’s Super Effective!”¹⁵⁵ . . . Or Is it?

O-1A visas may provide a reasonable alternative for a few esports players, as O-1A visas are for individuals “who ha[ve] extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim” and enter the United States to continue to work in their field of extraordinary ability.¹⁵⁶ “Extraordinary ability” is defined as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”¹⁵⁷ This can be shown by presenting extensive evidentiary documentation.¹⁵⁸ Ideally, such ability is evidenced by a major award, such as a Nobel Prize.¹⁵⁹ An athlete can demonstrate extraordinary ability by providing at least three other pieces of evidentiary documentation that fit under ten different categories.¹⁶⁰ Unlike B-1/B-2 and P-1A visas which are purely nonimmigrant visas,

USCIS Completes the H-1B Cap Random Selection Process for FY 2016, *supra* note 144 (describing lottery process by which H-1Bs are granted, should non-exempt petitions exceed annual cap); Raven, *supra* note 35 (acknowledging how professional esports’ demands often result in individuals quitting obligations such as school).

155. POKÉMON RED (Nintendo 1996) (exclaiming “It’s super effective!” when damage done to pokémon is greatly increased).

156. 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (2017) (observing “extraordinary ability” as basis for O-1 visa).

157. 8 C.F.R. § 204.5(h)(2) (2017) (defining “extraordinary ability”).

158. *See* 8 C.F.R. § 214.2(o)(3)(iii) (stating “[e]videntiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business or athletics”).

159. *See Kazarian v. U.S. Citizenship & Immigr. Servs.*, 596 F.3d 1115, 1119 (9th Cir. 2010) (detailing how individuals can apply for O visas). The court explains,

Aliens may apply for a visa on the basis of ‘extraordinary ability.’ An alien can prove an extraordinary ability in one of two ways. The first is ‘evidence of a one-time achievement (that is, a major, international recognized award).’ . . . Receipt of the Nobel Prize is the quintessential example of a major award.

Id. (citations omitted).

160. *See id.* (quoting 8 C.F.R. § 204.5(h)(3)) (describing how one can prove extraordinary ability). Extraordinary ability can be shown by providing at least three of the following:

(i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

O-1A are similar to H-1B visas in that both allow for a dual intent.¹⁶¹ If an individual pursues an O-1A with a non-immigrant intent, he or she must show that his or her stay in the United States will be temporary and “solely for the purpose of accompanying and assisting in the artistic or athletic performance . . . for a specific event or events.”¹⁶² For immigrant intent, the individual must desire to “enter the United States to continue work in the area of extraordinary ability, and the alien’s entry into the United States will substantially benefit prospectively the United States.”¹⁶³

Only a handful of esports players will be able to take advantage of the O-1A visa because of the high evidentiary standard for proving “extraordinary ability.”¹⁶⁴ More specifically, esports players who have won a World Championship competition, or competitive equivalent, would most clearly fit the criteria of receiving a major award in their field, because the Summoner’s Cup, or comparable esports championship award, serves as esports’ equivalent of the

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

(v) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Id.

161. See 8 U.S.C. § 1101(a)(15)(O)(i)(I) (outlining nonimmigrant intent for O-1 visas); 8 C.F.R. § 214.2(o)(13) (relating immigrant intent for O-1 visas). Section 214.2(o)(13) states:

The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O-1 petition, a request to extend such a petition, or the alien’s application for admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an O-1 nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

Id.

162. 8 U.S.C. § 1101(a)(15)(O)(ii)(I) (requiring certain factors for individuals who wish to enter United States under O-1 visa category to qualify for this visa).

163. 8 U.S.C. § 1153(b)(1)(A)(ii)–(iii) (2006) (recounting elements necessary for immigrant O-1 visas).

164. See 8 C.F.R. § 204.5(h)(3) (2017) (enumerating evidentiary standards for “extraordinary ability” necessary for O-1 visa).

Stanley Cup.¹⁶⁵ If a player has not won a World Championship, he or she could still potentially meet evidentiary standards for consideration of “extraordinary ability” by showing publications about their performance.¹⁶⁶ Also, players sometimes serve as commentators or analysts for other matches, so evidence of their participation as a judge may help satisfy the “extraordinary ability” standard.¹⁶⁷ Additionally, players can illustrate their contributions to the field of esports, participation in a “critical role” for longstanding and “distinguished” organizations, and salary significantly higher than their counterparts.¹⁶⁸

Due to the higher evidentiary standards associated with proving “extraordinary ability,” only a select few athletes—and therefore a select few esports players—are able to qualify for the O-1A visa.¹⁶⁹ While the O-1A visa can provide a solution for a few esports players to practice and compete in the United States, it does not provide a broad, easily applicable solution for all esports players that may not reach the “extraordinary ability” standard.¹⁷⁰ Therefore, though a few esports players may be eligible for the O-1A, the P-1A visa would be the most appropriately applicable visa for a great majority of esports players.¹⁷¹

165. Compare 8 C.F.R. § 204.5(h)(3) (indicating ways to prove “extraordinary ability,” including “nationally or internationally recognized prizes or awards for excellence in the field of endeavor”), with *Final Battle for the Cup*, *supra* note 44 (reporting prestige in raising Summoner’s Cup at end of World Championship as best international team).

166. See 8 C.F.R. § 204.5(h)(3) (listing evidentiary documentation for “extraordinary ability” element necessary for O-1 visa, including “[p]ublished material . . . relating to the alien’s work in the field”); Kimes, *supra* note 79 (highlighting famous Korean *League of Legends* player, Faker); Goldberg, *supra* note 25 (acknowledging Team Cloud9, a North American team of international recognition).

167. See 8 C.F.R. § 204.5(h)(3) (detailing potential evidence to prove “extraordinary ability” necessary for O-1 visa); see also LoL Esports, *New Analysts, Familiar Faces*, YOUTUBE (Sept. 17, 2013), <https://www.youtube.com/watch?v=JLRD3yM4oAs> (interviewing then-esports player, Mitch “Krepo” Voorspoels, and current player, Yiliang Peter “Doublelift” Peng, being featured on analysts’ desk).

168. 8 C.F.R. § 204.5(h)(3) (listing evidentiary documentation necessary for “extraordinary ability” under O-1 visa); Kimes, *supra* note 79 (describing how world-famous Faker has been part of *League of Legends* team, SKT, for many years and has won *League of Legends* World Championship multiple times with this team).

169. See 8 C.F.R. § 204.5(h)(3) (reciting possible evidence to prove “extraordinary ability” element for O-1 visa).

170. Compare 8 C.F.R. § 204.5(h)(3) (identifying potential evidence to prove “extraordinary ability” for O-1 visa), with Raven, *supra* note 35 (recounting youth of esports players and Riot Games’ age restrictions so that individuals often dedicate themselves to routine video game practicing at high school age and may not attend college or discontinue their studies at college).

171. See 8 U.S.C. § 1184(c)(4)(A) (2016) (identifying how individual qualifies for P-1A visa); see also 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (describing requirements and standards for O-1A visas).

D. I Choose You, P-1A¹⁷²

B-1/B-2 visas have inadvertently served as a temporary fix for esports players who want to train and compete in North America with their new teams and O-1A visas only potentially benefit a small percentage of esports players who can prove “extraordinary ability.”¹⁷³ P-1A visas, however, provide a reasonable visa option for both amateur and professional esports players.¹⁷⁴ Procuring a P-1A visa, however, is difficult and uncertain for esports players in recent years because of USCIS’s inconsistency in granting esports players this type of visa.¹⁷⁵ To obtain a P-1A visa, an individual must: (1) play as an athlete at “an internationally recognized level of performance,” (2) be a professional athlete, (3) play as an athlete or serve as a coach of a team in the United States and “a member of a foreign league or association of 15 or more amateur sports teams,” or (4) perform as a professional or amateur athlete either individually or with a group “in a theatrical ice skating production.”¹⁷⁶ Again, a “professional athlete” is defined based upon the establishment of a team in an association of six or more professional sports teams and the combined revenues of those teams exceeding \$10 million per year.¹⁷⁷

Alternatively, P-1A visas can be granted to athletes of “internationally recognized level of performance,” which must be proven through several evidentiary pieces of documentation.¹⁷⁸ With an

172. See POKÉMON RED, *supra* note 155 (allowing players to choose one of three elemental pocket monsters, or “pokémon,” to travel with them on their journey).

173. See 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (requiring showing of “extraordinary ability” for O-1A visa); Blum, *supra* note 7 (recognizing tourist visas as means for esports players to compete during seasons, only to “‘sort out’ visa issues” outside United States after split ends).

174. See 8 U.S.C.A. § 1184(c)(4)(A) (recounting qualifications for amateur and professional athletes to qualify for P-1A visa).

175. See Jacob Wolf, *Froggen, kfo, and Hard Will Not Play For Echo Fox Today*, DAILY DOT (Jan. 24, 2016, 1:43 PM), <http://www.dailydot.com/esports/echo-fox-team-liquid-subs/> [https://perma.cc/4RGX-U7C2] (acknowledging three esports players’ inability to compete because unable to obtain P-1A visas to properly enter United States); see Blum, *supra* note 6 (recounting history of esports players petitioning USCIS for P-1A visas and being denied before applying again).

176. 8 U.S.C. § 1184(c)(4)(A) (enumerating factors to be considered qualifying candidate for P-1A visa).

177. See 8 U.S.C. § 1154(i)(2) (2014) (defining “professional athlete” for purposes of 8 U.S.C. section 1184(c)(4)(A), and, by extension, P-1A visa).

178. See 8 U.S.C. § 1184(c)(4)(A)(i)(I) (describing athletes or teams “at an internationally recognized level of performance” that qualify for P-1A visa); see also *P-1A Internationally Recognized Athlete*, *supra* note 97 (summarizing criteria, application process, and necessary documents for applying for P-1A visa as “internationally recognized athlete”).

individual's petition, he or she must submit a "written consultation from an appropriate labor organization," a copy of his or her contract with the league, and a schedule and explanation of the competition.¹⁷⁹ Additionally, the individual must present at least two other pieces of evidence showing: participation in a prior season with a "major United States sports league," participation in an "international competition with a national team," participation in a prior season in an "intercollegiate competition," details of international recognition from an official of a "major United States sports league or an official of the governing body of the sport," details of international recognition from an expert in that sports field, international ranking, or some honor achieved in the sport.¹⁸⁰

Esports players have proven their ability to meet the "internationally recognized level of performance" requirement through various international tournaments and player trades across regions.¹⁸¹ While esports players can demonstrate the elements for athletes or teams of "internationally recognized level of performance," it is less probable that they are able to prove themselves "professional athletes" at this point in time.¹⁸² The profitability of esports thus far would seemingly fulfill the requirement for teams' "total combined revenues exceed[ing] \$10,000,000 per year."¹⁸³ However, unlike professional sports associations such as the National Basketball Association (the "NBA"), NFL, and the MLB, esports does not yet have an official association that encompasses all teams on the international scale, much less one in the United States.¹⁸⁴ Because the

179. See *P-1A Internationally Recognized Athlete*, *supra* note 97 (listing three mandatory documents to be submitted with application for P-1A visa).

180. *Id.* (providing options for supplementary documentation, of which individual can choose at least two, which need to be submitted in addition to mandatory documents above).

181. See Kimes, *supra* note 79 (highlighting "Faker" as internationally famous *League of Legends* player); Goldberg, *supra* note 25 (featuring spread of Team Cloud9, known across international regions for their skill); Dave, *supra* note 3 (recounting USCIS's granting of P-1A visa to esports player).

182. See 8 U.S.C. § 1154(i)(2) (considering elements necessary for determination of "professional athlete" for P-1A visas). See Kimes, *supra* note 79 (recognizing Faker's international fame as world-renowned mid laner); Goldberg, *supra* note 25 (featuring Cloud9, consistently one of top teams in North America who often qualify for World Championship).

183. 8 U.S.C. § 1154(i)(2) (providing base revenue requirement for defining "professional athlete"); see also Lee & Stewart, *supra* note 101 (comparing esports' revenues of approximately \$400 million to soccer's revenues of approximately \$30 billion in 2015).

184. Compare Hollist, *supra* note 19, at 843 (observing several established esports associations internationally, but lack of such association in United States or even to any meaningful extent in Europe), with 8 U.S.C. § 1154(i)(2) (requiring association of teams in addition to revenue amount to be considered "professional

definition of “professional athlete” does not depend on physical strength or skill, esports players may, in fact, be considered professional athletes if current efforts to form an association succeed and revenues in esports events continue to exceed \$10 million.¹⁸⁵ In the meantime, however, esports players apply for the P-1A visa as athletes of “internationally recognized level of performance.”¹⁸⁶

The obstacle between esports players and P-1A visas is not their inability to provide evidence of high performance, but rather inconsistencies that seemingly stem from USCIS and cultural resistance to consistently recognize esports as a sport and gamers as athletes.¹⁸⁷ Because of this inconsistency, esports players have either had to forfeit matches by delaying their entrance to the United States and re-filing an application for a P-1A visa, or defer to the less advisable B-1/B-2 nonimmigrant visas.¹⁸⁸ Esports players should be considered athletes for the purposes of the P-1A visa because of the competitive nature of the sport and the high strategic skill of its players.¹⁸⁹ Therefore, due to the high-salaried nature of esports players’ work while in the United States, paired with players’ “internationally recognized” level of skill, P-1A visas are the most reasonable visa option for esports players—especially considering the pitfalls of other relevant visa options.¹⁹⁰

athlete”). See also Kollar, *supra* note 19 (describing Blizzard’s anticipated *Overwatch* league).

185. See Hollist, *supra* note 19, at 843 (considering traditional sports’ established associations, and noting lack of established esports associations, especially in United States); Cortez, *supra* note 129 (projecting PEA will launch in 2017 and comprise of seven of top North American esports teams that compete in variety of video games); Lee & Stewart, *supra* note 101 (estimating esports’ revenues at “about \$400 million in 2015” and projecting further revenue growth).

186. See Blum, *supra* note 6 (quoting Adam Apicella, Senior Director of Events at Activision-Blizzard Media Network, where he describes documentation sent with esports players’ applications for P-1A visas); 8 U.S.C. § 1184(c)(4)(A)(i)(I) (2016) (permitting athletes of “internationally recognized level of performance” to qualify for entry into United States under P-1A visa).

187. See Blum, *supra* note 6 (speculating esports may eventually “rise to a level of prominence,” allowing consular officers to understand esports P-1A visa petitions, but recognizing current difficulties in obtaining P-1A visa as esports player); Savov & Byford, *supra* note 1 (highlighting divide in accepting esports as sport).

188. See Wolf, *supra* note 175 (recounting how three esports players were forced to have their team forfeit due to denial of their P-1A visa petitions); Blum, *supra* note 7 (recognizing that some players “competed entire splits on tourist visas”).

189. See Kimes, *supra* note 79 (describing Faker’s strategic skill set setting both he and his team apart from competition); see League of Legends, *supra* note 83 (highlighting Reignover’s chess-like strategy and mental process during a game of *League of Legends*).

190. See Leslie, *supra* note 13 (presenting salaries for a challenger team of at least \$65,000, which would be less than that of professional team, and excludes any prize money won); 8 U.S.C. § 1184(c)(4)(A)(i)(I) (presenting elements necessary

IV. ESPORTS PLAYERS AS P-1A ATHLETES . . . IT “FILLS YOU WITH DETERMINATION”¹⁹¹

Going forward, esports players should be considered athletes for the purposes of P-1A visas.¹⁹² Inconsistently applying this understanding of esports players would result in players continuously failing to obtain O-1A and P-1A visas under the current model.¹⁹³ First, failing to consistently grant esports players P-1A visas bars one of two paths to entry into the United States.¹⁹⁴ Refusing to understand esports players as athletes also bars outstanding esports players' entry into the United States under their only other option: the O-1A visa category.¹⁹⁵ H-1B visas, while applicable to employees who receive salaries such as esports players, fail to provide a reasonable option for players due to high educational and specialty occupation standards in addition to annual H-1B visa caps.¹⁹⁶ Esports players similarly do not qualify for B-1/B-2 visas because they are salaried for more than reasonable allowances for living expenses and the purpose of their stay does not comport with the purposes set forth by B-1/B-2 visas.¹⁹⁷

for athletes to be eligible to enter United States to train and compete under P-1A visas).

191. *UNDERTALE* (Toby Fox 2015) (stating that something “fills you with determination” at routine save spots within game (i.e., “Playfully crinking through the leaves fills you with determination”). *Undertale* guides the player, a human character, through a world predominantly populated by quirky monsters. Such “determination” is deemed to be the characteristic human trait that allows the player to continue their journey despite setbacks, such as deaths within game sequence. *See generally id.*

192. *See* 8 U.S.C. § 1184(c)(4)(A)(i)(I) (allowing athletes “at an internationally recognized level of performance” to qualify for P-1A visas).

193. *See* 22 C.R.R. § 41.31(b)(1) (prohibiting employment while in United States under B-1/B-2 visa); Blum, *supra* note 6 (noting petitions put forward by two esports players were denied twice).

194. *See* Blum, *supra* note 7 (describing *League of Legends* players' intermittent success in obtaining P-1A visas); Blum, *supra* note 6 (detailing difficulties in successfully applying and obtaining P-1A visas as esports players and highlighting visa issues for *CS:GO* players); *see also* 8 U.S.C. § 1101(a)(5)(O) (specifying athletes as potential beneficiaries of O-1A visas); 8 U.S.C. § 1184(c)(4)(A) (indicating amateur and professional athletes are qualifying candidates for P-1A visas).

195. *See* 8 C.F.R. § 204.5(h)(3) (identifying potential evidentiary documentation to prove high standard of “extraordinary ability” for O-1 visa).

196. *Compare* Raven, *supra* note 35 (reporting young esports players may not finish high school, let alone attain bachelor's degree), *and* Hutter, *supra* note 13 (evincing esports players are compensated with salary per split), *with* 8 U.S.C. § 1184(i) (relating high evidentiary standard by providing definition of “specialty occupation”).

197. *Compare* Leslie, *supra* note 13 (describing highly salaried challenger series players in *League of Legends*), *and* Hutter, *supra* note 13 (noting esports players in North America are salaried for more than \$100,000), *with* 9 FAM 402.2-5(F) (2017) (noting how individuals can be compensated for living expenses or reason-

Additionally, inconsistent results in petitioning for P-1A visas and resistance to understanding esports players as athletes may result in player dissuasion from attempting to train and compete in the United States, detriment to a growing sector of the United States economy, and reliance on nonimmigrant visas for which esports players do not qualify.¹⁹⁸ Rejecting esports players as athletes for the purposes of the P-1A visa could present negative consequences for United States esports teams and perhaps dissuade players from even attempting to enter the United States to train and compete.¹⁹⁹ Such a reaction from players would be detrimental to a growing industry of which the United States has one of the largest shares compared to all other global competitors.²⁰⁰

Finally, esports players who petition for and are granted B-1/B-2 visas, as they have been in the past, run the risk of being deported due to their salaried employment.²⁰¹ As previously mentioned, B-1/B-2 visa categories do not allow for employment that compensates employees more than a reasonable allowance for living expenses, a requirement that esports players exceed due to high salaries.²⁰² Esports players, while new to the sports arena, deserve to be considered athletes in this new, cutting-edge sport and be

able allowance under B-1 in lieu of H-1). *See also* 22 C.F.R. § 41.31(a) (detailing purposes for entry into United States under B-1/B-2 visa).

198. *See* 9 FAM 402.2-5(F) (allowing for living expenses or reasonable allowance as compensation under B-1 in lieu of H-1); 22 C.F.R. § 41.31(a) (summarizing “business” and “pleasure” purposes for entry into United States under B-1/B-2 visa); Gaudiosi, *supra* note 89 (acknowledging United States’ comparatively large share of esports revenues compared to other countries internationally).

199. *See* Wolf, *supra* note 175 (highlighting negative effects on *League of Legends* esports team, Echo Fox, when unable to secure P-1A visa).

200. *See* Gaudiosi, *supra* note 89 (reporting United States has “38% share of revenues” and “[g]lobal eSports revenues will reach \$1.1 billion by 2019” for projected “180 million eSports enthusiasts and another 165 million occasional viewers”).

201. *See* 8 U.S.C. § 1227(a)(1)(C)(i) (describing how “[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable”).

202. *See* 9 FAM 402.2-5(F) (noting individuals can only be compensated for living expenses or reasonable allowance under B-1 in lieu of H-1); 22 C.F.R. § 41.31(a) (describing purposes for entry into United States under B-1/B-2 visas); Leslie, *supra* note 13 (noting highly salaried nature of esports players, even at levels below professional competition); Hutter, *supra* note 13 (describing esports players’ salaries in North America and Europe of approximately \$100,000 per split).

consistently granted the visa by USCIS that properly suits their circumstances—the P-1A visa.²⁰³

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203. See Savov & Byford, *supra* note 1 (contending esports is viable sport in debate with colleague columnist); Stanton, *supra* note 20 (highlighting esports players' diligence and rigorous training).

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