Coming to America: Immigration and the Professional Athlete

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As sport globalizes and leagues expand, the number of foreign athletes requesting access to this country continues to rise. Just as with other industries, professional sports leagues are searching not only for talent but also for their global niche. As expansion continues and leagues push for a greater global presence, it is certain that athletes from all regions of the world will occupy roster spots on American teams. Sport has fewer boundaries than ever before with foreign players like the National Basketball Association's Dikembe Mutombo, Major League Baseball's Hideo Nomo and Ichiro Suzuki, and the National Hockey League's Pavel Bure and Sergei Fedorov making significant contributions to professional sports in the United States. The acquisitions of Yao Ming by the Houston Rockets and Japan's Hideki Matsui by the New York Yankees indicate that top foreign talents will continue to test their abilities in the American major leagues. The world's top athletes acknowledge their competitive spirit by coming to America and testing their abilities against the best (Deford, 2001). This trend is certain to continue as the search for talent intensifies and as major league salaries rise. Thus, sport managers should possess a basic understanding of the immigration process as it pertains to professional athletes.

The purpose of immigration law is to regulate the general flow of immigrants to America, recently more and more foreign-born athletes have been occupying roster spots in American professional sport leagues (Dominczyk, 1998). In the early 1980s, professional American teams began to spend valuable draft picks on the Soviet Union's top basketball and hockey players (Gordon, 1989). In the 1999-2000 seasons, roughly 26% of professional athletes in MLB, the NHL, the NFL, the NBA, the WNBA and MLS were foreign, and this figure will certainly increase in the future (Sutton, 2002).

As the sport industry expanded to international markets, Congress saw the need for a set of guidelines and legal standards that specifically accommodate foreign athletes and entertainers. The Immigration and Nationality Act (INA) of 1990 dramatically changed immigration laws as they pertained to

professional athletes by establishing the non-immigrant O and P categories and the immigrant EB-1 and EB-2 categories. The O and P categories are temporary visa categories that require professional athletes to demonstrate a high level of achievement or an extraordinary ability in their respective sport. The Act also defined a professional athlete as a person employed by a team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10 million per year, as well as any minor league team that is affiliated with such an organization (8 U.S.C. §1182(a)(5)(A)(iii)(II).

In terms of permanent residency visas, the Act established preference categories for employment-based immigrants. Professional athletes fall into the first preference category (EB-1) for priority workers, once again using extraordinary ability as the determining factor. Athletes may also apply for permanent admission under the second preference category (EB-2) for priority workers of exceptional ability. Athletes applying for admission under EB-2 must have earned a college degree. In both categories, professional athletes must also show that their presence in the country will be of prospective benefit to the United States (8 U.S.C. §1153(b)(1)(A)(iii)).

The purpose of this article is to explain the INS standards for establishing extraordinary ability and prospective benefit for athletes petitioning for residency in the O, P, and EB visa categories. This explanation is prefaced with a brief discussion of the plenary power doctrine's influence on immigration decisions as well as the impact of the Supreme Court's decision in *Chevron USA Inc v. Natural Resources Defense Council* (1984). Further research includes an examination of cases involving foreign athletes in the EB-1 visa category.

IMMIGRATION LAW AND PLENARY POWER

The immigration system is intensely scrutinized in the United States because so many immigrants want to enter the country, and American politicians and citizens generally distrust the immigration process. This distrust has only intensified in the aftermath of the September 11 attacks on the World Trade Center and the Pentagon.

Immigration is an exceptionally complex area of law because it is extremely detailed and virtually every time the balance of power changes in Congress, it undergoes substantial changes. In the near future, Congress is expected to draft legislation which will significantly restructure the INS' enforcement and service functions and possibly separate the agency into two

entities. The anticipated reform is due in large part to the revelation that 13 of the 19 alleged September 11 hijackers were in the country legally with at least three overstaying their visas. The push for reform was further magnified when the INS approved student visas for two of the alleged hijackers to attend flight school six months after the attacks.

Congress has complete power to regulate immigration through the plenary power doctrine which stems from Congress' ability "to establish a uniform Rule of Naturalization" (U.S. CONST. art. 1 § 8 cl. 4). Under the plenary power doctrine, Congress can pass laws regulating immigration, and it can pass laws that cannot be applied to U.S. citizens (Dinger, 2000). In essence, Congress can, by its immigration classifications, determine which foreign persons may or may not enter the country. Further, plenary power implies that Congress' determinations are protected from judicial review (Johnson, 1993).

Johnson (1993) suggests that Congress' plenary power over immigration issues was magnified by the Supreme Court's ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984). In *Chevron* (1984), the Supreme Court reversed the appellate court's decision to set aside the Environmental Protection Agency's regulations that allowed states to treat pollution-emitting devices within the same industrial group as if they were within a single "bubble" (p. 840). These regulations were established to implement the Clean Air Act Amendments of 1977 requiring states to establish permit programs which would monitor new or modified major stationary sources of air pollution if the state had not achieved the EPA's national air quality standards. Existing plants were allowed to modify or install one piece of equipment and be exempt from the permit conditions if the installation or modification would not increase the plant's total emissions. The question before the court was whether the EPA's construction of "stationary source" was reasonable. Essentially, the ruling allows administrative agencies to interpret subjective and ambiguous statutes in any manner they chose as long as that interpretation is not unreasonable. In terms of immigration, the *Chevron* ruling allows the INS to be even more subjective in its interpretation of Congress' immigration classifications and standards, thereby magnifying its plenary power. As Gosset (1997) suggests, "in a single blow, the Court granted agencies the power to resolve questions of law, arguably undermining the classic view of the role of the courts" (p. 686).

Chevron (1984) resulted in the establishment of a two-step analysis for challenges to an agency's interpretation of statutes. The first step requires the court to determine whether Congress "directly spoke to the precise question at issue" (p. 842). If Congress' intent was clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" (p. 843).

However, if the statute is silent or ambiguous with "respect to the specific issue," the court moves to step two and must determine if the "agency's answer is based on a permissible construction of the statute" (p. 843).

According to Pierce (1997),

> the *Chevron* doctrine furthers six goals: 1) it allocates policymaking power in a manner consistent with the need for political accountability; 2) it provides a method of enforcing the non-delegation doctrine; 3) it defines the constitutionally permissible place of agencies in government; 4) it provides the Supreme Court a means to enhance its ability to control the growing, decentralized, and ideologically diverse judicial branch; 5) it provides a means to further the values of due process and equal protection in the context of the administrative state; and 6) it provides a means through which agencies can construct consistent and coherent benefit and regulatory programs (p. 2229).

Johnson (1993) suggests the *Chevron* (1984) ruling magnifies Congress' plenary power in an administrative branch where the standards are notoriously complex and ambiguous. The ruling, combined with plenary power, gives the INS greater freedom to be more subjective than any other administrative branch when interpreting its standards.

VISA CATEGORIES AND PREFERENCES

Two types of visas are available to foreign persons, immigrant and non-immigrant. Immigrant visas are permanent residency visas while non-immigrant visas are classified as temporary, meaning the foreign person is only allowed in the United States for a specified amount of time (8 U.S.C. §1201(a)(1)).

Non-immigrants come to the United States for a particular purpose such as education, travel, or government service. Non-immigrant applicants must convince the INS or consular officer that they do not intend to immigrate to the United States, will only remain in the country for a specified amount of time, and that they intend to return to their home at the end of their authorized stay (8 U.S.C. §1201(a)(1)(B)). Of the non-immigrant categories, only the O and P categories pertain to professional athletes. However, minor league athletes may qualify for temporary admission under the H2-B category if unable to meet the requirements of the O and P categories. The H2-B is a temporary visa category pertinent to specialty occupations other than those in the medical and agricultural fields. H2-B applicants must show residency in a

foreign country which they have no intention of abandoning and be certified by the Department of Labor to work temporarily in a position for which no qualified Americans are available (8 U.S.C. §1101 (a)(15)(H)(ii)(b)).

The immigrant or permanent residency visa, also known as the green card, allows foreigners to live permanently in the United States and to work wherever they choose without distinction as to how the permanent residency visa was obtained (8 U.S.C. §1154). Immigrant visas are divided into family-based immigration and employment-based immigration. Immigrants must have a family relationship to a U.S. citizen to qualify for entry in one of four family-based preference categories (8 U.S.C. §1153(a)). Because employment-based immigration is the focus of this article, family-based immigration will not be discussed.

THE 1990 ACT AND PROFESSIONAL ATHLETES

The 1990 Immigration and Nationality Act was the most significant effort by Congress to change the direction of immigration law in the U.S. The Act increased legal immigration by 35%, enabling more family-sponsored immigration and increasing employment-based immigration (Yale-Loehr & Bellinder, 2000). In 2000, approximately 850,000 foreign persons were admitted to the United States as legal permanent residents (U.S. Immigration & Naturalization Service, 2002, p. 14). This figure represents an increase of 200,000 from 1999 (p. 15). Of the foreign persons admitted in 2000, 69% entered the country on a family-based category while 13% obtained a visa in the employment-based category (p. 14). Eight percent were classified as refugees or asylees (p. 14).

The 1990 Act also provided the "green card visa lottery," a diversity program for immigrants from countries traditionally underrepresented in the United States such as Ireland and some African countries (8 U.S.C. §1153(c)). However, the most dramatic change made by the Act pertained to the immigrant selection provisions (8 U.S.C. §1153 & §1154). Rather than having quotas based on country of origin, ceilings were placed on immigrant categories (8 U.S.C. §1151). This new selection system increased the number of annual employment based immigration visas by 160% (Yale-Loehr & Bellinder, 2000). The Act was partially a response to a belief that the United States should move away from family-based immigration and focus on highly skilled immigrants who would serve the national interest. These regulations provided easier entry for highly skilled foreigners who sought permanent resident status (Nassi, 1998).

As mentioned earlier, the 1990 Act dramatically changed immigration standards for professional athletes by establishing the O and P temporary categories and the permanent EB-1 and EB-2 categories. Each category is described in the Act and in Section 8 of the United States Code. The requirements for admission under each category are contained in Section 8 of the Code of Federal Regulations. Essentially, title 8 of the Code of Federal Regulations implements the Act, and thus, the pertinent sections of the Act as well as the pertinent sections of 8 C.F.R. will be discussed simultaneously where appropriate. The categories and requirements for admission in each category are discussed below.

The O Category

The O category is divided into three parts: O-1, O-2, and O-3. The O-1 category pertains to athletes that demonstrate extraordinary ability in their sport through national and international acclaim (8 U.S.C. §1101 (a)(15)(O)(i)). The O-2 category applies to aliens seeking to enter temporarily and only applies for the purpose of assisting in an alien's athletic performance (8 U.S.C. §1101(a)(15)(O)(ii)). The O-3 category allows the spouses and children of an O-1 or O-2 alien to accompany or join them in the United States (8 U.S.C. §1101(a)(15)(O)(iii)). Foreign persons petitioning for admission under any of the three O categories are also required to submit advisory opinions with the visa application.

Although aliens working in motion pictures or television can fulfill the extraordinary ability requirement by providing evidence of a single extraordinary event, athletes must show extraordinary ability through recognized achievement in athletics and sustained national or international acclaim (8 C.F.R. 214.2(o)(3(iii)). Section 214.2 (o) of the Code of Federal Regulations stipulates that to demonstrate extraordinary ability, the O-1 athlete must provide evidence of receiving a major, internationally recognized award or at least three of the following forms of documentation.

> (1) Documentation of the alien's receipt of nationally or internationally recognized awards for excellence in the field of endeavor,
>
> (2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields,

(3) Published material in professional or major trade publications or major media about the alien relating to the alien's work in the field for which classification is sought,

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same field for which classification is ought,

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

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

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

(8) Evidence that the alien has either commanded a high salary or will command a high salary evidenced by contracts or other reliable evidence (8 C.F.R. 214.2(o)(3)(iii)).

Nationally or internationally recognized awards should be equivalent to such awards as the Nobel Prize (8 C.F.R. 214.2(o)(3)(iii)(A)). Published material for professional athletes should include articles in magazines such as *Sports Illustrated*, *ESPN the Magazine*, or segments on any of the cable sports news networks or broadcasts. Articles in sport specific magazines such as *Hockey Digest,* should also be presented as documentation. A valid contract with a major league organization as well as membership in the pertinent player's association should serve as documentation for commanding a high salary. Petitioners must demonstrate through the documentation provided that their position on the team or league in question is essential to its success (Worden, 1999).

The advisory opinions that accompany the petitioners' applications should support the conclusion reached in the opinion. It should speak to the alien's ability and achievements in athletics, provide a list of duties that the petitioner will perform, and state if the duties can only be performed by an alien of such extraordinary ability. In addition to advisory opinions, the labor organization may also submit a letter stating it has no objection to the approval of the alien's petition (8 C.F.R. 214.2(5)(ii)(A)).

Congress has exerted control over nonimmigrant alien athletes by establishing the O category and its standards. These standards may serve as safeguards for American athletes as they allow only established and qualified alien athletes into the country. They also serve to maintain the current skill level found in American sports. These standards do not block all

nonimmigrant alien athletes from entering the U. S. to perform in sports, instead they allow management to seek the best nonimmigrant alien athletes for their teams (Worden, 1999).

The P Category

The P category is also divided into three sections: P-1, P-2, and P-3. P-1 specifically pertains to athletes while P-2 and P-3 are more pertinent to entertainers and artists (8 U.S.C. §1184(c)(4)). Although athletes may also qualify for admission under P-2 and P-3, the majority of professional athletes enter on the P-1 visa (Sutton, 2002).

To qualify under the P category, the athlete must seek temporary entry only to perform as an athlete with respect to a specific athletic competition (8 C.F.R. 212.2(p)(e)(i)(A)). The P-1 category applies to aliens who are or were individual athletes and/or who are or were on an internationally recognized team (8 C.F.R. 214.2(p)(4)(i)(B)). It is available to entertainment groups and athletes who have achieved national or international recognition as outstanding in their discipline and who are coming to the United States temporarily to do one of the following

> (1) Perform at a specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, or
>
> (2) Perform with, or as an integral and essential part of the performance of, an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time, and who has had a sustained and substantial relationship with the group (ordinarily for at least one year) and provides functions integral to the performance of the group (8 C.F.R. 214.2(p)(4)(ii)(B)).

To qualify for a P-1 visa, the alien athlete must show that he or she is internationally recognized (8 C.F.R. 214.2(p)(4)(ii)(A)). To show this, the athlete must prove that he or she has attained a high level of achievement. This high level of achievement is shown through the athlete's skill and recognition. Theoretically, it should be easier for petitioners to gain admission under the P category since its requirements for demonstration of international recognition are less stringent than the O category's requirements for extraordinary ability (Worden, 1999; Nassi, 1998).

International recognition is defined as having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above

that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country (8 C.F.R. 214.2(p)(3)). To demonstrate "international recognition," the athlete must provide the following:

> (A) A tendered contract with a major United States sports league or team, or contract in an individual sport commensurate with international recognition in that sport; and
>
> (B) Documentation of at least two of the following:
>
> (1) Evidence of having participated to a significant extent in a prior season with a United States sports league,
>
> (2) Evidence of having participated in international competition with a national team,
>
> (3) Evidence of having participated to a significant extent in a prior season with a college or university in intercollegiate competition,
>
> (4) A written statement from an official of a major U.S. sports league or an official of a governing body of the sport which details how the alien or team is internationally recognized,
>
> (5) A written statement from a member of the sports media or from a recognized expert in the sport, which details how the alien or team is internationally recognized,
>
> (6) Evidence that the alien or team is ranked if the sport has international rankings,
>
> (7) Evidence that the alien or team has received a significant award or honor in that sport (8 C.F.R. 214.2(p)(4)(ii)(B)).

In addition, P-1 athletes and entertainment groups must also seek a consultation with a peer group organization (8 C.F.R. 214.2(p)(7)(i)(A)). This typically means the labor union or league will prepare an advisory opinion for the petitioner in order for the petition to be approved. Just as with the O category, the advisory opinion should focus on the athlete or group's ability and achievements, whether an entertainment group is internationally recognized and whether the group is coming to perform services where someone with that type of background is needed (8 C.F.R. 214.2(p)(7)(ii)). The advisory opinion need not be submitted in cases where expeditious handling is requested, there is no appropriate consulting organization, or a consultation has been made in connection with another visa application by the applicant within the previous two years (8 C.F.R. 214.2(p)(7)).

Aliens petitioning for P-2 and P-3 support visas such as coaches, trainers, agents, etc., must also submit consultations from a labor organization with the petition (8 C.F.R. 214.2(p)(7)(vi)). Just as with the advisory opinions in the P-1 petition, consultations must include a statement describing the alien's essential role and a copy of the contract or summary of the oral agreement between the alien and the employer (8 C.F.R. 214.2(p)(7)).

P visas are considered dual intent visas meaning that while a P non-immigrant must seek to enter the United States temporarily and must show residence abroad which they have no intention of abandoning, they may pursue permanent residency without violating the terms of the visa (8 U.S.C. §1101(p)). Also, if a P-1 athlete is traded to another team, the new team must file a new petition on behalf of the athlete within 30 days of acquisition. If the petition is not filed within the 30 day period, the athlete's visa will be revoked (8 C.F.R. 214.2(p)(2)(C)(ii)).

As mentioned earlier, the majority of athletes applying for admission to the United States enter on the P-1 visa (Sutton, 2002). This is due in large part to the less stringent requirements for establishing international recognition. Most professional athletes will possess a contract with a major league team or have competed in the United States as a collegiate athlete. It is most likely that foreign athletes who have been pursued by a professional team will be able to obtain written statements from experts in the sport to verify their abilities. Also, an athlete may qualify for a P-1 visa by combining evidence of membership on an American collegiate team with other forms of documentation (Worden, 1999).

When a nonimmigrant athlete receives an O or P category visa, he or she is authorized to stay for the period of time that the Attorney General provides, which is usually for the time needed to compete or perform (8 C.F.R. 214.2(p)(8)(c)). For an individual athlete, the Attorney General may provide for a period not to exceed five years. This period may be extended another five years, but the total period is not to exceed ten years (8 U.S.C. §1184 (a)(ii)).

The EB Categories

The O and P categories specifically pertain to athletes desiring temporary admission into the United States. Athletes applying for permanent residency typically apply under the EB-1 category, but may also attempt to apply under EB-2 (8 U.S.C. §1153(b)(2)). The requirements for extraordinary ability are essentially the same as those in the O category, except that under EB-1, foreign athletes must show how becoming a permanent resident will

prospectively benefit the United States (8 U.S.C. §1153(b)(1)(A)(iii)). The EB-2 Preference Category pertains to foreign nationals "holding advanced degrees" in professions and foreign nationals of "exceptional ability" in the sciences, arts, or business who will substantially benefit the national economy, cultural or educational interests, or welfare of the United States (8 U.S.C. §1153(b)(2)).

Unlike the other EB categories, foreign persons qualifying under EB-1 are not required to obtain a labor certification from the Department of Labor nor do they typically need to be "sponsored" by a United States employer (8 C.F.R. 204.5(h)(5)). Because of this advantage, foreign athletes may petition for permanent residency rather than seek the "sponsorship" of a United States employer meaning the athlete does not need to have signed a contract prior to entering the country. EB-1 petitioners need only to provide documentation that once admitted to the United States, they will continue to work in the field in which they possess an extraordinary ability (8 C.F.R. 204.5(h)(5). In addition, professional athletes may move from team to team after admission to the United States if the new team is in the same sport as the previous team and the league in which the teams play has a combined total revenue of $10 million (8 U.S.C. §1154(i)(1)).

"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" (8 C.F.R. 204.5(h)(2)). Foreign athletes must demonstrate this high level of achievement through sustained national or international acclaim and show that his or her achievements have been recognized in the field of expertise (8 C.F.R. 204.5(h)(3)). This must be extensively documented, and the foreign athlete must be seeking to enter the United States to continue to work in the field of endeavor, which is the subject of the acclaim (8 U.S.C. §1153(b)(A)(ii)). Further, the foreign athlete must establish that their presence and activities will be of prospective benefit to the United States (8 U.S.C. §1153(b)(A)).

To provide evidence of "extraordinary ability," foreign athletes may provide evidence of a "one time achievement" in the form of an internationally acknowledged award or prize or they may choose to provide evidence of at least three of the following:

- Receipt of a lesser national or international prize or award for excellence in the particular field of endeavor.
- Membership in associations which require outstanding achievements of their members, as judged by nationally or internationally recognized experts in the particular field.

- Published material in professional journals, major trade publications or the major media about the alien's accomplishments in the field of endeavor. These items must include title, date, author and must be translated into English.
- Participated on a panel or individually as a judge of the work of others in the same or allied field of endeavor.
- Original scientific, scholarly, or artistic contributions of major significance in the field of endeavor.
- Authorship of scholarly articles in the field, in professional journals or other major media (national newspapers, magazines, etc.).
- Display of his/her work at artistic exhibitions in more than one country.
- Performance in a lead, starring or critical role for organizations or establishments with distinguished reputations.
- Commanding a high salary or other significantly high enumeration for services in relation to others.
- Commercial success in the performing arts, as shown by box office receipts; or record, cassette, compact disk, or video sales.
- Other comparable evidence if the above types of evidence do not readily apply to the alien's occupation (8 CFR 204.5 (h)(3)).

The INS will evaluate the evidence based on its comprehensive nature. For example, membership on a major league team will help establish an athlete's extraordinary ability, but it alone does not guarantee approval of the petition (*Matter of Price*, 1994).

> Extraordinary ability must be demonstrated by sustained national or international acclaim. Not all athletes, particularly those new to major league competition, would be able to meet this standard. A blanket rule for all major league athletes would contravene Congress' intent to reserve this category to 'that small percentage of individuals who have risen to the very top of their field of endeavor' (p. 955).

No provision exists for athletes under the EB-2 category. However, athletes holding advance degrees may be successful in meeting the "exceptional ability" standards under EB-2. To meet the standards, athletes must provide evidence of at least three of the following six requirements.

- An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.
- Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation.

A license to practice the profession or certification for a particular profession or occupation.

- Evidence that the alien has commanded a salary or other renumeration for services which demonstrate exceptional ability.
- Evidence of membership in a professional association.
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities or professional business organizations (8 CFR 204.5 (k)(3)).

The INS will consider comparable evidence that is appropriate to the alien's application if he or she cannot provide the type of documentation listed above (8 C.F.R. 204.5(k)(3)(iii)). In addition, foreign persons must provide evidence beyond possession of a degree to quality for exceptional ability (Carrion, 1998; Nassi, 1998)

CASE DISCUSSION

The visa approval process for petitioners is often arduous and time consuming. The process begins by requiring foreign persons to submit an application to the appropriate INS branch or consular office (8 U.S.C. §1202). After the application has been reviewed and approved, the INS will provide the foreign person with a priority date (8 U.S.C. §1202). These dates act as time frames for which a foreign person may enter the United States and range from current to a wait list of eight years (Bureau of Consular Affairs, 2003). If the petition is denied, the INS will include details regarding the process for appealing the denial (8 C.F.R. 103.1(f)(3)(iii)). Petitions are appealed to either the Administrative Appeals Unit of the INS or the Board of Immigration Appeals of the Executive Office for Immigration Review (8 C.F.R. 103.1(f)(3)(iii)). The body hearing the petitioner's appeal will either affirm or reverse the INS' original decision regarding admittance (8 C.F.R. 103.1(f)(3)(iii)). Most often, judicial review occurs when admitted aliens request an adjustment of status from one visa category to another.

The cases discussed below involve athletes petitioning for permanent residency under the EB-1 category. *Grimson v. INS* (1996), *Muni v. INS* (1995), *Racine v. INS* (1995), and *Russell v. INS* (1999) are the only immigration cases involving foreign athletes since the extraordinary ability and prospective benefit standards for the EB-1 category were enacted in 1993. Interestingly, each case involved members of the National Hockey League. In each of these cases, the court reviewed the INS' decision to either deny or revoke the plaintiff's permanent residency visa. Specifically, the court examined the athletes' evidence of extraordinary ability and the INS' interpretation of that evidence. It should be noted that the INS does not retain copies of approved petitions or of its appealed decisions unless it deems them to be precedent setting. Thus, the plaintiff's appeals to the Administrative Appeals Unit (AAU) were not available for review.

In *Grimson v. INS* (1995), the plaintiff filed his petition with the INS on January 20, 1993, seeking classification as a priority worker of extraordinary ability. His petition was denied by the INS' Northern Service Center for failure to demonstrate that he was a player of extraordinary ability as defined by the INS. Grimson appealed to the AAU claiming that he had achieved sustained national and international acclaim as a professional hockey player. He also alleged the INS had recently classified four other hockey players of comparable ability as aliens of extraordinary ability.

The AAU affirmed the denial of his petition stating

> while the record indicates that the petitioner had played several seasons with an NHL team, it has not been established that the petitioner has achieved the sustained national or international acclaim required for classification as an alien with extraordinary ability, that he is one of a small percentage who have risen to the very top of his field of endeavor, or that his entry into the United States would substantially benefit prospectively the United States (p. 966-967).

Grimson then filed an action seeking declaratory and injunction relief. The judge remanded the case to the INS for further evidentiary proceedings to allow Grimson to take into consideration the INS' statutory interpretation of extraordinary ability when submitting further documentary evidence. The court also rejected the INS' argument that Grimson's petition lacked merit on the grounds that it need not be compared to those of other hockey players who had been granted visas (p. 967). The court concluded that how the INS treated others in the field, particularly those alleged to possess no greater skill than petitioner, was highly irrelevant under the statutory scheme (p. 967).

On remand, Grimson's petition was again denied by the Northern Service Center, a decision which was again upheld by the AAU. Grimson then filed another petition seeking declaratory and injunctive relief. On March 23, 1995, the court again remanded the case to the INS for further evidentiary proceedings.

The court specifically directed Grimson to submit evidence regarding the necessity of a player with his style of play and abilities, evidence of comparing his skill, salary level, and other abilities to those of players who fulfill the same role on other hockey teams. The court directed the INS to consider this evidence as well as Grimson's argument that a sustained career in the NHL demonstrated extraordinary ability (p. 967).

Grimson submitted the evidence of his current salary, contract with the Detroit RedWings, a *The Hockey News'* Table showing 1996 player salaries newspaper and magazine articles about himself, and an affidavit from Darren Pang, a former renowned NHL goaltender and current television broadcaster and analyst for ESPN. Pang's affidavit listed all "enforcers" in the NHL and their current salaries. Pang cited the importance of Grimson's position on a hockey team, and stated that Grimson was currently the third rated and third highest paid enforcer in the NHL. Pang also referenced that Grimson was the fifth best enforcer in the league when he filed his original petition in 1993.

The INS again denied Grimson's petition arguing that a sustained career in professional hockey and four years in the NHL should not be considered evidence of extraordinary ability (p. 968). It was further determined that Grimson had failed to present evidence that four years in the NHL as an enforcer qualified as a sustained career.

In the end, the court granted Grimson's motion for summary judgment ruling that "it is apparent to this court that at the heart of defendant's refusal to grant plaintiff a visa (as it has to other comparable NHL players) is its distaste for the role he plays on a hockey team. . . . The decision to simply ignore the evidence was an abuse of its discretion" (p. 968-969).

In *Muni v. INS,* plaintiff petitioned the INS for his immigrant visa as a worker with extraordinary ability (1995). Muni played seven seasons with the Edmonton Oilers and was a member of the 1986-87, 1987-88, and 1989-90 Stanley Cup Championship teams. While with the Oilers, Muni had the fourth best plus-minus ratio in the NHL and *Goal* magazine rated him the "most underrated defenseman" in the league in 1990. In 1991, *Hockey Digest* also named him one of the top ten hitting defensemen in the league.

At the time he filed his petition, Muni submitted as evidence his salary which was more than the average salary for defenseman, numerous magazine and newspaper articles establishing his stature in the hockey world, affidavits

from eight NHL veteran players stating that he was highly regarded by other players and was one of the best defensemen in hockey. He also alleged that other NHL players of comparable ability had received immigrant visas under extraordinary ability.

The INS' Northern Service Center denied his petition stating that there was no evidence that Muni's salary was high compared to that of other NHL players (p. 442). Muni also failed to explain the reputation, significance, or selection criteria of the awards from *Hockey Digest* and *Goal Magazine,* and that the newspaper articles used as evidence established only his improvement as a player after joining the Oilers (p. 442). The INS also found that the affidavits showed that Muni was an excellent, hard hitting defenseman (p. 442). The director concluded that

> while [Muni] appears to enjoy a noteworthy career as a professional hockey player, there is no evidence that [he] has been selected to all-star teams or received official recognitions as an extraordinary hockey player. The evidence submitted does not establish that [he] is one of the few who have risen to the very top of his field of endeavor (p. 442).

Muni appealed to the AAU, and the AAU affirmed the INS' denial of his petition (p. 442). The AAU reiterated the arguments made by the Northern Service Center and added that Muni had not established his role in the Oilers' Stanley Cup victories, and that his extended membership in the NHL was not sufficient in itself to establish an extraordinary ability (p. 442). The AAU also found that Muni had not presented enough evidence comparing the experience, abilities, and salaries of players who have already received immigrant visas with his own qualifications (p. 442). The AAU rejected Muni's argument that anyone who plays in the NHL for an extended period of time has extraordinary ability. The AAU concluded that Muni was not a top player in the NHL, and therefore, did not have an extraordinary ability (p. 442).

The court found that the INS discounted the awards Muni received and that the INS did not adequately address the evidence that Muni commanded a high salary (p. 444). Further, the court found that the INS did not explain why the articles Muni submitted did not qualify as proof of his ability and the INS completely ignored the eight affidavits Muni submitted (p. 445).

The court granted Muni's motion for summary judgment. Judge Moran quoted *Vergara-Molina v. INS* (1992), which stated "the Board abuses its discretion when it fails to weigh important factors and to state its reasons for denying relief" (p. 685). As the court explained,

> the INS made no attempt to explain why Muni's evidence did not meet the acclaim and recognition standard. Thus, it has not only failed to explain why it does not accept some of the individual facts Muni presents, it has also failed to explain why the sum of those facts and others is insufficient to warrant granting his petition. We deem such arbitrary decision making an abuse of discretion (*Muni*, 1995, p. 446).

In *Racine* (1995), plaintiff filed his petition for an alien of "extraordinary ability" with the Northern Service Center. His petition was approved, but a few months later the INS revoked his status indicating that he only succeeded as an amateur and evidence pertaining to his professional career was not persuasive (p.*4-5).

Racine appealed this decision to the Administrative Appeals Unit and submitted further evidentiary information (p. *6). The AAU affirmed the INS decision to revoke his status as a permanent resident (p.*7). Racine appealed this decision to the district court for the Northern District of Illinois.

Racine submitted as evidence of support for his petition a career summary, a trading card referring to him as a top prospect and giving his playing statistics, an employment letter from the Red Wings general manager, pages from the Red Wings' media guide, an affidavit from Darren Pang regarding Racine's ability as a player, an article from *Sports Illustrated* picking the Red Wings to win the Stanley Cup for 1992-93, miscellaneous articles from newspapers and publications including *Hockey Digest, Chicago Sun-Times, Detroit Red Wings Extra, Detroit Free Press, Les Nordique,* and *LeQueque* and the INS' decision regarding a petition for an alien of "extraordinary ability" in the sport of golf.

In addition to looking at this evidence, the court noted that the INS failed to consider evidence of Racine's role on the 1991 Team Canada, Racine's rating as top defensemen, and the media coverage provided (p. *14-18).

> It is significant to this court that INS found that the articles presented were sufficient the first time around, but on second glance, they failed to meet the level expected by the INS. What is troubling is that there have been no new articles presented to suggest that Racine has fallen from his level of talent or to suggest that those articles were inaccurate for whatever reason. In fact, it appears that INS has merely chosen to take a second look, and upon that second look, changed its mind (p. *17).

The court also noted that the INS was not following its own regulations when it determined that there were no articles that stated that Racine was "one of the best in his field" (p. *17). According to the Act, Racine only needed to

demonstrate that he was one of a small percentage who has risen to the top of his field, and not that he was the best in his field (8 C.F.R. 204.5(h)(2)). "The INS has not only inserted a new qualification under subsection (iii), it has also altered its own definition of extraordinary ability in order to support its' 'about-face' in this revocation" (p. *17).

In *Russell* (1999), plaintiff was a member of the Chicago Blackhawks and petitioned the INS for permanent status on July 7, 1997. The petition was processed by the Nebraska Service Center and denied on January 12, 1998 with the determination that Russell had not sustained his burden of showing extraordinary ability (p. *2-3).

Russell filed an appeal with the AAU in February of 1998, and in June of the same year, Russell wrote a letter to the AAU to determine the status of his case because he had yet to receive a response (p. *3).

In September of 1998, Russell filed his complaint with the District Court for the Northern District of Illinois, Eastern Division. He sought declaratory and injunctive relief based on the denial of his petition (p. *4). In December, he then filed a motion for summary judgment (p. *5). The INS filed a cross-motion for summary judgment arguing that the court lacked jurisdiction under the Illegal Immigration Reform and Immigrant Responsibility Act (p. *6).

The court ruled in favor of the INS stating that although the decision was late in coming, it could not find as a matter of law that the delay was so unreasonable that judicial intervention was warranted (p. *13). The court also held that Russell had not exhausted his administrative remedies, and therefore, mandamus relief was not justified (p. *13). It should also be noted that at the time of the ruling, Russell had retired from the National Hockey League and returned to live and work in Canada.

Matter of Price (1994), was not an appeal on behalf of an athlete. It was a petition, which was approved and later reaffirmed for publication by the INS. It is assumed that it was published to serve as a guide for those petitioning the INS for residency under the EB-1 category. Therefore, it will be included in this discussion.

Price's (1994) petition was approved by the INS with the decision entered on March 27, 1992 (p. 956). The petition was reopened by the INS for the limited purpose of incorporating revisions for publication (p. 953). To establish extraordinary ability, the petitioner provided evidence of his career summary; 1980 Swiss Open victory; second place finish in the 1982 Open Golf Championships; winner of the South African Order of Merit in 1982 and 1983; winner of the 1983 World Series of Golf; 1991 Byron Nelson champion and Canadian Open champion; Tournament winnings of more the $266,000 in 1988, $295,000 in 1989, and $400,000 in 1990, and $714,389 in 1991; his all-

around ranking of 10th on the PGA Tour; affidavits from well known golfers including Jack Nicklaus, Lee Trevino, and Tom Kite; and media coverage in *Golf Digest, Golf Magazine,* and *USA Today* (p. 955).

The INS determined that the petitioner had clearly demonstrated that he was within the small percentage of individuals who had risen to the very top of the field of golf (p. 956). The INS felt that the petitioner had sustained national or international acclaim and that his achievements had been recognized in the field of golf (p. 956). Therefore, the petitioner qualified as an alien of extraordinary ability in athletics. The INS also determined that the petitioner's ability would substantially benefit the United States (p. 956).

SUMMARY OF CASE ANALYSIS

The analysis of the cases herein indicates several interesting similarities in the court cases.

- All four petitioners were Canadian defenseman in the National Hockey League.
- All four petitions were first denied by the INS' Northern Service Center and the complaints heard in U.S. District Court for the Northern District of Illinois, Eastern Division.
- On appeal, the Administrative Appeals Unit of the INS affirmed the original decision to either deny or revoke permanent status stating that the players had not clearly established that they possessed an extraordinary ability.
- In each case, the athletes provided similar documentation to establish extraordinary ability. This included evidence of career histories and playing statistics, receipt of major awards or championships such as the World Series of Golf or the Stanley Cup, various types of media coverage in newspaper and magazines, salary documentation, and affidavits from fellow players and experts in their respective sport.

The analysis indicated that in the cases involving NHL defenseman, the INS' interpretations of extraordinary ability and prospective benefit standards were subjective and inconsistent, as illustrated through the courts' findings in *Grimson* (1995), *Muni* (1995), and *Racine* (1995). The *Grimson* (1995) and *Muni* (1995) decisions held that the INS abused its discretion when making decisions pertaining to permanent residency of defensemen in professional hockey. In determining if the INS abused its discretion, both referred to *Bothyo v. Moyer* (1985) and *Achacoso-Sanchez v. INS* (1985). These cases

established the test used by the courts to determine if the INS abuses its discretion. The test specifies that a decision must be upheld unless it was made without rational explanation, inexplicably departs from established policies, or rests on an impermissible basis such as invidious discrimination against a particular race or group (*Bothyo,* p. 357 & *Achacoso-Sanchez,* p. 1265).

The INS' exercise of its discretion must also be supported by substantial evidence, as established in *Patel v. INS* (1987). Substantial evidence is evidence that a reasonable person would find adequate to support the conclusion that the INS reached (p. 380). In *Racine* (1995), the court indicated that the INS' decision to revoke Racine's permanent status was not supported by substantial evidence (p. 14).

Grimson (1995), *Muni* (1995), and *Racine* (1995) suggest that during the time period of these cases foreign athletes, particularly defensemen, seemed to face much difficulty when petitioning for permanent residency based on extraordinary ability. Therefore, "even though the law is theoretically welcoming, these cases demonstrated a different reality" (Nassi, 1998, p. 37). It is possible that the INS had unpublished examples or ideas of what constituted extraordinary ability and prospective benefit. The employment based permanent residency categories were relatively new at the time of these cases, and some confusion may have existed pertaining to the definition of extraordinary ability.

In the cases discussed, the courts determined that the players in question did indeed provide more than enough evidence to establish an extraordinary ability, yet the INS denied their petitions. Immigration law as it pertains to professional athletes appears to be subjective in regards to an analysis of "one who has risen to the very top of their profession" (8 CFR 204.5(h)(2)). However, it should be evident that membership on a major league team constitutes an extraordinary ability and that salaries for such major league membership would constitute a prospective benefit to the United States. However, the INS determined that in these cases, the players' membership in the NHL was not by itself evidence of extraordinary ability. This seems inconsistent when compared to the O and P categories where membership on a major league team is grounds for petition approval (8 C.F.R. 214.2 (o)(3)(iii); 8 C.F.R. 214.2(p)(4)(1)). If professional athletes meet the requirements for temporary residency, they would only need to satisfy the additional requirement of prospective benefit to be granted permanent residency. This requirement should be easily satisfied by providing salary documentation.

In addition to its subjectivity, the law poses other potential problems for athletes. In its rationale for denying or revoking the visas, the INS referenced

salary levels in regards to position played. If salary level is indeed an unwritten determinant of extraordinary ability and in turn, prospective benefit, the INS should clarify the specific amount it considers to be extraordinary. Salary levels should be compared only to those athletes performing the duties of the same position. However, it is clear that the INS did not consider this in the cases discussed as the players in these cases earned top salaries when compared to other defensemen. The *Grimson* (1995) court held

> in any event, it is not reasonable simply to compare plaintiff's salary to the average NHL salary, without any indication of how that average is determined . . . A better method would be to compare plaintiff's salary to those individuals in the NHL who play his position and serve the same role to the team as plaintiff serves (p.967).

Thus, a defenseman's salary should be compared to that of other defenseman, not to that of a goaltender or forward. The comparison of salaries based on sport and position should hold true for positions in other sports as well.

Further, the denial of *Grimson's* (1995) and *Muni's* (1995) petitions and the revocation of *Racine's* (1995) may have been the result of an unfavorable perception of the role of defenseman on a hockey team. The *Grimson* (1995) court ruled "it is apparent to this court that at the heart of defendant's refusal to grant plaintiff a visa (as it has to other comparable NHL players) is its distaste for the role he plays on a hockey team" (p. 969).

It is evident that the INS should have applied a more consistent standard in evaluating these cases for permanent residency under extraordinary ability and prospective benefit. In theory, the criterion established by the 1990 Act should have made the application process easier for both INS officials and athletes. Although these guidelines appear to make it easier, INS officials, in these cases, ignored the guidelines and denied applicants using their own criteria.

The requirements state that a petitioner needs only to meet three of the ten requirements to satisfy extraordinary ability. Athletes are limited as to what types of evidence they can provide as only six requirements are applicable to sport. Thus, athletes petitioning the INS do so at a disadvantage when compared to other members of the EB-1 category.

This discussion also revealed that in these cases the extraordinary ability standards were applied, while the prospective benefit standard was not. In fact, in *Matter of Price* both standards were applied. According to prior research, prospective benefit is a non-issue when an athlete provides evidence of a major league contract (Sutton, 2002), but the analysis in these cases suggested that the INS did impose its own standard in these cases. However,

it appears that possession of a major league contract is a key in assessing what constitutes prospective benefit.

CONCLUSION

One of the greatest challenges to business and industry today is achieving and maintaining a global presence. Just as with other industries, professional sports leagues are searching not only for talent but also for their global niche. As professional sport leagues expand and push for this greater global presence, it is certain that athletes from all regions of the world will request admission to the United States. Given this, it is important for sport managers to possess a basic understanding of the immigration process as it pertains to professional athletes. Although the standards for entry as a permanent resident are somewhat subjective, it is evident that professional athletes must document their status as a world-class athlete and illustrate that their presence will prospectively benefit the United States.

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