

# ARE YOU NOT ENTERTAINED? CONSIDERING THE P-3 VISA AS AN ALTERNATIVE OPTION FOR INTERNATIONAL ESPORTS PROFESSIONAL GAMERS

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*Professional video gaming has exploded in popularity over the last decade. Many elite professional gamers are not residents of the United States but wish to enter the country to participate in major tournaments. This has proven difficult because there is no visa that plainly allows professional gamers to enter the United States to compete. Many gamers have tried to enter the country on a P-1A visa for internationally recognized athletes. This has led to philosophical debates about a gamer's ability to satisfy the definition of "athlete." While some gamers are being granted athlete visas, P-1A visas are still an inconsistent and unreliable option for many professional gamers entering the country to compete. This Note suggests that until the athlete visa becomes a reliable visa category or legislation is passed to create a more-fitting visa category, gamers have a case to enter the country under the P-3 visa for artists or entertainers participating in a culturally unique event. In many instances, professional gamers satisfy the requirements of the P-3 visa. While not a permanent solution, the P-3 visa should warrant consideration by professional gamers who continue to receive denials to their P-1A visa petitions. In an ideal world, there would be a separate visa category for professional gamers; in the meantime, the P-3 visa is the best option for esports gamers.*

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### INTRODUCTION—“SHALL WE PLAY A GAME?”<sup>1</sup> NOT IN THE UNITED STATES

In 2013, the United States Citizenship and Immigration Services (USCIS) granted Danny “Shiptur” Le a P-1A<sup>2</sup> visa to enter the United States from Sweden and join a professional video-gaming (esports<sup>3</sup>) team to play *League of Legends* (LOL). This occurred after the USCIS rejected Le’s first petition to enter.<sup>4</sup> Soon after, however, a USCIS spokesman described the P-1A visa as “highly specific” and stated that the USCIS considers “each petition on a case-by-case basis.”<sup>5</sup>

The USCIS made this “case-by-case” point clear in 2016 when it denied the P-1A visa petition for William “Leffen” Hjelte, a highly ranked player in *Super*

1. WARGAMES (Sherwood Productions 1983).

2. A P-1A visa is for athletes “coming to the United States to participate in [an] individual event, competition or performance in which [they] are internationally recognized with a high level of achievement.” *P-1A Internationally Recognized Athlete*, USCIS, <https://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete> (last updated July 15, 2015).

3. “[Es]ports . . . is a general term used to describe video game competitions. Much like athletic sporting events, e[s]ports games are often played before live audiences and may be broadcast over the Internet as well.” *eSports*, TECHTERMS.COM, <https://techterms.com/definition/esports> (last updated Feb. 23, 2018).

4. Paresh Dave, *Online Game League of Legends Star Gets U.S. Visa as Pro Athlete*, L.A. TIMES 1 (Aug. 7, 2013), <http://articles.latimes.com/2013/aug/07/business/la-fi-online-gamers-20130808>.

5. *Id.*

*Smash Bros. Melee* (SSBM), in part because the USCIS did not consider SSBM “a legitimate sport.”<sup>6</sup> Is SSBM so inherently different from LOL that it could not be recognized as a legitimate sport?<sup>7</sup> It does not seem so. This denial likely created confusion for professional gamers applying for U.S. visas. This uncertainty made immigration matters more complicated for international esports gamers, and since 2016 a number of esports teams have forfeited competitions or been forced to compete without certain foreign team members.<sup>8</sup> The USCIS, the branch of the Department of Homeland Security (DHS) that determines visa eligibility, has supplied inconsistent results for professional gamers attempting to enter the United States under the P-1A visa for professional athletes.

Non-U.S.-citizen members of esports teams require *some* type of visa to enter the country to participate in major tournaments held on U.S. soil.<sup>9</sup> If not the P-1A visa for athletes, what other option do professional video-game players have to compete in their field? Can the P-3 visa for artists or entertainers fill the needs of the esports industry? The USCIS’s consideration of at least some forms of professional gaming as illegitimate sports adds to the confusion when media outlets, like ESPN, cover esports so heavily.<sup>10</sup> Imagine if prominent baseball players, like

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6. Paul Tamburro, *ESports Player Denied Visa as “Super Smash Bros. Melee is Not a Legitimate Sport,”* MANDATORY (Apr. 29, 2016), <http://www.mandatory.com/culture/983369-esports-player-denied-visa-super-smash-bros-melee-not-legitimate-sport>; see Jacob Wolf, *Leffen Receives Athlete Visa, Approved to Compete in the US*, ESPN (Oct. 3, 2016), [http://www.espn.com/esports/story/\\_id/17705825/leffen-receives-visa-allowed-return-usa-compete-smash-tournaments](http://www.espn.com/esports/story/_id/17705825/leffen-receives-visa-allowed-return-usa-compete-smash-tournaments) (reporting that the gamer who had been previously denied the athlete visa has now received it).

7. SSBM is a fighting game in which players “throw [their] opponent off the stage and get a point for the ‘kill.’” *Super Smash Bros. Melee Wiki Guide*, IGN, <http://www.ign.com/wikis/super-smash-bros-melee> (last updated Sep. 25, 2013). LOL requires two teams to battle each other with the goal of destroying the other team’s structure. *Nexus*, LEAGUE OF LEGENDS WIKI, <http://leagueoflegends.wikia.com/wiki/Nexus> (last visited Jun. 10, 2018).

8. 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](http://www.espn.com/esports/story/_id/14661486/breaking-league-legends-visa-issue).

9. There are numerous video-game competitions held in the United States every year. See Steven Wong, *Getting to Know Some of the World’s Biggest ESports Events*, ALISTDAILY.COM (Feb. 14, 2017, 11:00 AM), <http://www.alistdaily.com/strategy/getting-know-worlds-biggest-esports-events/> (referencing major esports tournaments held in Seattle, San Francisco, Chicago, New York, Columbus, and Atlanta).

10. See generally ESPORTS NEWS, <http://www.espn.com/esports/> (last visited Aug. 13, 2018); Peter Warman, *ESports Revenues Will Reach \$696 Million This Year and Grow to \$1.5 Billion by 2020 as Brand Investment Doubles*, NEWZOO (Feb. 14, 2017), <https://newzoo.com/insights/articles/esports-revenues-will-reach-696-million-in-2017/>; *Global ESports Market Report: Revenues to Jump to \$463M in 2016 as US Leads the Way*, NEWZOO, <https://newzoo.com/insights/articles/global-esports-market-report-revenues-to-jump-to-463-million-in-2016-as-us-leads-the-way/> (last visited July 30, 2018).

Harry Wright, were denied entry to the United States because baseball was not considered a legitimate sport.<sup>11</sup>

The USCIS, perhaps with the help of Congress,<sup>12</sup> needs to determine if there is presently an appropriate visa for esports gamers. Currently, there seems to be no visa that fits the needs of a foreign professional gamer.<sup>13</sup> One way to resolve the problem would be to create a new visa category under which esports professionals and similarly situated individuals could come to the United States temporarily and compete in a particular event. This solution would create a more streamlined process void of shoving square-peg esports gamers into round-hole athlete visas.

It is worth mentioning that these visa issues cannot be blamed wholly on the USCIS. Esports leagues could follow the example of the U.S. Chess Association, which proactively “streamline[d] the process for acquiring a P-1 visa” by offering official invitations to foreign players.<sup>14</sup> Other sports leagues have had success in changing the rules by making their cases to the USCIS and other decision-makers in the country.<sup>15</sup> After “months of lobbying by sports leagues and lawyers for foreign athletes,” U.S. immigration leaders “agreed to let foreign athletes keep playing [in the United States] as long as they leave the country after 10 years and apply for a new visa.”<sup>16</sup> While esports scrambles for immigration stability, these options are worth investigating.

Both the acceptance of professional video-game players as athletes and the creation of a new visa for esports professionals could take time to take effect.<sup>17</sup> In the interim, it seems reasonable to allow esports players to come into the country under the P-3 visa for entertainers participating in a culturally unique program. As the USCIS continues to receive backlash for the obstacles it places in the way of

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11. Wright was an immigrant from England who served as one of the pioneers of professional baseball in the United States. *Harry Wright*, BASEBALLHALL.ORG, <https://baseballhall.org/hof/wright-harry> (last visited Jan. 22, 2018).

12. This is a complicated process that requires effort from more than one body. See Jennifer Chacon, *Who is Responsible for U.S. immigration policy?*, INSIGHTS ON L. & SOC’Y, Spring 2014, at 20.

13. See *infra* Parts III & IV.

14. *ESports Visas: An Introduction to P-1 Visa Legal Issues for Professional Gamers*, KELLYWARNERLAW.COM (Jun. 20, 2017), <http://kellywarnerlaw.com/esports-visas-p-1-visa-legal-cyberathletes/>.

15. It may not help, however, to petition the White House. See Joss Wood, *White House Petition Response on Esports Team Visas Fails to Resolve The Issue*, ESPORTSBETTINGREPORT.COM (Jun. 28, 2016, 10:12 AM), <https://www.esportsbettingreport.com/white-house-esports-p1-visa-response/>.

16. *U.S. Extends Stay of Foreign Athletes*, N.Y. DAILY NEWS (Mar. 9, 2009, 4:27 PM), <http://www.nydailynews.com/latino/u-s-extends-stay-foreign-athletes-article-1.369256>.

17. This is especially true while the current administration is trying to limit immigration rather than expand it. See Nicholas Kulish, et al., *Trump’s Immigration Policies Explained*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/trump-immigration-policies-deportation.html> (describing Trump-administration policies regarding increased deportation).

esports growth in the United States,<sup>18</sup> any solution, albeit temporary, appeals to professional gamers.

**A. Mini-Map<sup>19</sup>**

This Note argues that most professional gamers should be able to enter the United States on a P-3 visa. Part I addresses the development and rise of esports over the last few decades.<sup>20</sup> Part II describes the P-1A visa for professional athletes and the difficulty professional gamers have in petitioning for it.<sup>21</sup> Part III addresses the appropriateness of certain immigrant and nonimmigrant visas—like the B, O, H-1B, Q, and WB visas—for professional gamers.<sup>22</sup> This Part helps illustrate that the current visa system does not provide an adequate solution for professional gamers.<sup>23</sup> This Note argues that there is a clear need for immigration reform to allow professional gamers to consistently acquire visas.<sup>24</sup> Part IV applies the professional gamers’ case to the P-3 visa requirements.<sup>25</sup> This Part argues that many professional gamers should qualify for entry into the country under the requirements of the P-3 visa.<sup>26</sup> There, I concede that the P-3 visa is an imperfect solution but argue that it is a better and more reasonable option than what is currently available to esports professionals.<sup>27</sup> The conclusion then summarizes the best options for immigration reform in the esports context: allowing gamers in under the P-1A visa, the P-3 visa, or ultimately creating a new visa category specifically for professional gamers.<sup>28</sup>

This Note aims to demonstrate that the U.S. immigration system is overburdening an emerging market that could contribute greatly to the U.S. economy.<sup>29</sup> The longer the wait, the more likely the industry will leave the United States for a more inviting location.<sup>30</sup>

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18. See Wood, *supra* note 15.

19. “A small, dynamically updated map of a game world . . . for quick reference.” ERNEST ADAMS, FUNDAMENTALS OF GAME DESIGN 515 (2013).

20. *Infra* Part I.

21. *Infra* Part II.

22. *Infra* Part III.

23. *Infra* Part III.

24. *Infra* Part III.

25. *Infra* Part IV.

26. *Infra* Part IV.

27. *Infra* Part IV.

28. *Infra* The ‘Reset’ Button.

29. See *infra* note 40 and accompanying text.

30. “With the esports industry skyrocketing, both at home and abroad — not to mention rising viewership — the industry must figure out a way to make it easier for the world’s best video game players to compete on the US stage. If not, the U.S. esports programs may not be able to become contenders.” *ESports Visas: An Introduction to P-1 Visa Legal Issues for Professional Gamers*, *supra* note 14.

## I. GAINING XP—THE WORLDWIDE DEVELOPMENT OF ESPORTS

Since the first tournaments in the 1980s,<sup>31</sup> the professional video-gaming (esports) industry has continued to grow in popularity.<sup>32</sup> While the Atari Football Tournament in 1980 attracted only 512 participants,<sup>33</sup> recent League of Legends (LOL) tournaments have been viewed worldwide by more than one million viewers.<sup>34</sup> Although some regard gaming as a method of wasting time<sup>35</sup> and rotting your brain,<sup>36</sup> esports has its own “Olympic” competition in Poland,<sup>37</sup> will be a medal event in the 2022 Asian Games,<sup>38</sup> and has been discussed as a medal event for the 2024 Olympic Games in Paris.<sup>39</sup>

As esports expand, opportunities for monetization—through media rights, advertisements, and sponsorships—increase.<sup>40</sup> Professional video gaming, described as “a vast reservoir of future income,”<sup>41</sup> is projected to reach a global

31. Tyler F.M. Edwards, *ESports: A Brief History*, ADANAI (Apr. 30, 2013), <http://adanai.com/esports/>.

32. *Id.*

33. *Early Video Game Tournaments And Players*, THE GOLDEN AGE ARCADE HISTORIAN (Apr. 9, 2013), <http://allincolorforaquarter.blogspot.com/2013/04/early-video-game-tournaments-and-players.html>.

34. Edwards, *supra* note 31. Many of these were post hoc viewers, but popular video-game streams often attract tens of thousands of live viewers. James Vincent, *Drake Drops in to Play Fortnite on Twitch and Breaks the Record for Most-Viewed Stream*, VERGE (Mar. 15, 2018, 8:04 AM), <https://www.theverge.com/2018/3/15/17123424/ninja-drake-fortnite-twitch-stream-record-travis-scott-juju> (“At its peak, the [video-game] stream was trending on Twitter and hit 628,000 concurrent viewers . . . Ninja usually gets around 70,000 live viewers per stream.”).

35. Don Reisinger, *A Lot of Americans Think Gaming Is a Waste of Time*, PCMAG.COM (Dec. 16, 2015, 4:18 PM), <https://www.pcmag.com/article2/0,2817,2496707,00.asp>. A young Korean gamer explained that “[t]he older generation think[s] of e[s]ports and gaming as something that people who have failed would do to waste their time.” Simon Hattenstone, *The Rise of ESports: Are Addiction and Corruption the Price of its Success?*, GUARDIAN (Jun. 16, 2017, 7:24 AM), <https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports>.

36. Mia de Graff, *Violent Shooter Video Games Really DO Rot Your Brain: Frequent Players Have Less Gray Matter, Study Reveals*, DAILY MAIL (Aug. 7, 2017, 7:00 PM), <http://www.dailymail.co.uk/health/article-4768834/Violent-shooter-video-games-really-rot-brain.html>. There is at least some anecdotal evidence that playing video games for long periods of time can have damaging health consequences. Hattenstone, *supra* note 35.

37. “Once a weekend-long event, it now takes place over two weekends. This year’s figures are record-breaking: 173,500 attending, more than 46 million viewers watching online (up 35% from last year).” Hattenstone, *supra* note 35.

38. Maddy Myers, *Esports Will Become A Medal Event at The 2022 Asian Games*, KOTAKU (Apr. 18, 2017, 5:01 PM), <https://compete.kotaku.com/esports-will-become-a-medal-event-at-the-2022-asian-gam-1794431163>.

39. Hattenstone, *supra* note 35. (President of Korean esports association, Jun Byung Hun, arguing that esports should be an Olympic sport).

40. See Warman, *supra* note 10.

41. Hattenstone, *supra* note 35.

audience of 380 million people in 2018.<sup>42</sup> While market revenues grew to over \$450 million in 2016, research projects that global- and local-market revenues for esports will combine to exceed \$1 billion.<sup>43</sup>

Major companies are starting to take notice of the potential profit to be made from esports. Because of these attractive market projections, ESPN, a major U.S. sports-broadcasting network, is making a concerted effort to cover more esports competitions.<sup>44</sup> Amazon purchased Twitch, a platform for live-streaming and viewing video-game play, for just under \$1 billion in 2014.<sup>45</sup> A writer for *Sports Illustrated* magazine described the esports industry as “experiencing a meteoric, seemingly exponential rise in worldwide popularity.”<sup>46</sup> Although not all experts believe some of the big-number predictions for the esports market, experts still concede that esports consistently reaches tens of millions of people for a single event, “and over a hundred million occasionally.”<sup>47</sup>

Although many prestigious esports competitions are held in the United States,<sup>48</sup> the overwhelming majority of the highest-paid professional gamers are citizens of other countries.<sup>49</sup> The CEO of “one of the best esports teams in the world”<sup>50</sup> described competitive video gaming as “more popular” and “more

42. Jurre Pannekeet, *Global Esports Economy Will Reach \$905.6 Million in 2018 as Brand Investment Grows by 48%*, NEWZOO (Feb. 21, 2018), <https://newzoo.com/insights/articles/newzoo-global-esports-economy-will-reach-905-6-million-2018-brand-investment-grows-48/>.

43. *Global ESports Market Report: Revenues to Jump to \$463M in 2016 as US Leads the Way*, *supra* note 10.

44. Matt Peckham, *Why ESPN Is So Serious About Covering Esports*, TIME (Mar. 1, 2016), <http://time.com/4241977/espn-esports/>. BBC, SkySports, and Yahoo are among the companies that have also started broadcasting the sport and its tournaments. Daniel Rapaport, *What to Expect from the Booming ESports Industry in 2017*, SPORTS ILLUSTRATED (Feb. 9, 2017), <https://www.si.com/tech-media/2017/02/09/esports-industry-expectations-billion-dollar>.

45. This purchase occurred only three years after Twitch’s founding. Hattenstone, *supra* note 35.

46. Rapaport, *supra* note 44. “In 2016, esports events comfortably sold out KeyArena, Nationwide Arena in Columbus, Staples Center in Los Angeles and Madison Square Garden in New York.” *Id.* Deloitte, however, predicts, “[a]lthough e-Sports might not match or surpass traditional sports any time soon, its potential business value is clearly too significant to ignore.” Paul Lee & Duncan Stewart, *ESports: Bigger and Smaller than You Think*, DELOITTE, <https://www2.deloitte.com/global/en/pages/technology-media-and-telecommunications/articles/tmt-pred16-media-esports-bigger-smaller-than-you-think.html> (last visited Jan. 22, 2018).

47. Lee & Stewart, *supra* note 46 (“A single event . . . may attract 40,000 people watching live, and tens of millions watching over the Web.”).

48. See Wong, *supra* note 9 (referencing major esports tournaments held in Seattle, San Francisco, Chicago, New York, Columbus, and Atlanta).

49. *Highest Overall Earnings*, ESPORTS EARNINGS, <https://www.esportsearnings.com/players> (last visited Jan. 22, 2018).

50. Rianne Coale, *If You Don’t Think Pro Gamers Are Athletes, Consider This*, CHI. TRIB. (Jun. 21, 2016, 2:59 PM), <http://www.chicagotribune.com/redeye/redeye-esports-athlete-chicago-video-games-20160616-story.html>.

advanced” outside the United States.<sup>51</sup> For example, many believe that the best players in the world come from South Korea, where some young people train for hours each day in hopes of becoming professional gamers.<sup>52</sup> The popularity of video games in South Korea became so widespread that, in a 2011 effort to curb the country’s growing problems with video-game addiction in young people, the Korean government introduced the “Cinderella law,” which prohibits anyone under the age of 16 from playing computer games between midnight and 6 a.m.<sup>53</sup>

To command a share of this expanding esports market, the United States must ensure that these foreign players can enter the country and participate in U.S.-based competitions. Otherwise, professional gamers will likely take their talents and the revenue they provide to other locations that provide an easier path to major esports competitions. Many current visa options fail to accommodate the unique nature of esports. To remain attractive to esports organizations and players, the United States must adapt its visa programs to the unique needs and characteristics of professional gaming. This should not prove to be overly burdensome as most major competitions last no longer than a few months.<sup>54</sup>

## II. THE “ATHLETE” VISA—P-1A

Many major American sports leagues employ non-U.S.-citizen players,<sup>55</sup> coaches,<sup>56</sup> general managers,<sup>57</sup> and other staff from countries across the globe. Athletes coming to participate in these leagues usually obtain P-1A visas for

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51. *Id.* (“They have a little more passion and are not shy in showing it. The United States is slowly getting up there, but everywhere else it’s just blown up so much that it’s an accepted sport.”).

52. Hattenstone, *supra* note 35.

53. *Id.*

54. *See* 2018 NA LCS Summer, TOURNAMENT, <https://www.toornament.com/tournaments/1494935490162139136/information> (last viewed Jun. 10, 2018) (an LOL tournament lasting less than three months); *see also* *Fortnite Pro-Am 2018*, TOURNAMENT, <https://www.toornament.com/tournaments/1517346112071360512/information> (last viewed Jun. 10, 2018) (a Fortnite tournament lasting one day).

55. *See, e.g.,* *NBA Rosters Feature 108 International Players from Record 42 Countries and Territories*, NBA.COM (Oct. 17, 2017, 10:44 AM), <http://www.nba.com/article/2017/10/17/nba-international-players-2017-18-season-record-countries#/>.

56. *See, e.g.,* Aaron Kasinitz, *The Latin-Born Managers in Major League Baseball History*, PENN LIVE (Apr. 4, 2016, 7:58 AM), [http://www.pennlive.com/sports/index.ssf/2016/04/the\\_latin-born\\_managers\\_in\\_maj.html](http://www.pennlive.com/sports/index.ssf/2016/04/the_latin-born_managers_in_maj.html).

57. *See, e.g.,* *Current NBA General Managers*, REALGM, <https://basketball.realgm.com/nba/staff-members/16/General-Manager/Current> (last visited Jan. 22, 2018).



athletes.<sup>58</sup> The P-1A visa provides beneficiaries a number of advantages.<sup>59</sup> Beneficiaries are essentially allowed to stay in the country as long as necessary to complete the “event, competition or performance.”<sup>60</sup> The mechanics of this visa are based on whether the beneficiary is coming as an individual competitor or as part of a team.<sup>61</sup> A beneficiary’s spouse and children<sup>62</sup> can accompany the athlete and attend school, but they cannot work.<sup>63</sup> This visa does not provide for a smooth transition to permanent residency, but many athletes can make a case in a permanent-residency petition after playing for years in a professional league in the United States.<sup>64</sup>

The Code of Federal Regulations (C.F.R.) prescribes the requirements for obtaining an athlete visa—a P-1 classification applies to an alien coming temporarily to the United States: (1) to perform at a specific athletic competition as an athlete; (2) individually or as part of a group or team; (3) at an internationally recognized level or performance.<sup>65</sup> This is a straightforward process: when individuals satisfy each requirement with supporting documents<sup>66</sup> they may obtain

58. Stuart Anderson, *27% Of Major League Baseball Players Are Foreign-Born*, FORBES (Apr. 27, 2018, 12:23 AM), <https://www.forbes.com/sites/stuartanderson/2018/04/27/27-of-major-league-baseball-players-are-foreign-born/#4222c54f7712>; Josh Wildes, *Athletes, P-1 Visas, and the NBA*, WILDES.LAW.COM, <https://www.wildeslaw.com/immigration-resources/latest-immigration-news/athletes-p-1-visas-and-the-nba-by-josh-wildes> (last visited Jun. 10, 2018).

59. *Filing for Permanent Residence Based on a Family Petition*, USCIS, [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Customer%20Service%20Reference%20Guide/Permanent\\_Residents\\_Fam.pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Customer%20Service%20Reference%20Guide/Permanent_Residents_Fam.pdf) (last viewed Jun. 11, 2018) (“A beneficiary is an alien who has a visa petition filed on his or her behalf.”).

60. *P-1A Internationally Recognized Athlete*, *supra* note 2.

61. *See id.* (explaining that an individual athlete gets up to five years to compete, while a member of an athletic group gets only one year).

62. “Children,” under immigration law, are unmarried and under 21. *Id.*

63. *Id.* (explaining the rules for relatives coming under the P-4 visa).

64. Robert Seiger & Jocelyn Campanaro, *How Can Foreign Professional Athletes Remain in the United States When the Crowds Stop Cheering?*, ASS’N CORP. COUNS. (Mar. 13, 2013), <http://www.acc.com/legalresources/quickcounsel/hcftparriswtsc.cfm>.

65. 8 C.F.R. § 214.2(p)(1)(ii)(A).

66. For a list of required documentation, see *P-1A Internationally Recognized Athlete*, *supra* note 2.

The [petition] must include the following documents:

1. A written consultation from an appropriate labor organization
2. A copy of the contract with a major U.S. sports league or team
3. An explanation of the event and itinerary
4. Documentation of at least two of the following:
  - a. Evidence of having participated to a significant extent in a prior season with a major United States sports league
  - b. Evidence of having participated to a significant extent in international competition with a national team
  - c. Evidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition

a P-1A visa. For example, international athletes coming to join an NBA franchise often get a P-1A visa.<sup>67</sup>

**A. *Glitch in the System—Inconsistent Results for Esports Gamers Applying for P-1A Visas***

Not all P-1A visa petitions are granted, even for internationally recognized athletes.<sup>68</sup> Petitions are denied, according to some, because the USCIS is a “highly discretionary and inherently flawed system.”<sup>69</sup> There is cause for concern that the consular officers reviewing visa petitions “act[] as judge and jury in deciding whether to grant . . . visas.”<sup>70</sup> Gamers, who suffer more visa issues because they are not considered athletes, may benefit from the U.S. history of “considering non-athletic games under the banner of sports—chess being the best-known example.”<sup>71</sup> Additionally, the P-1A visa definition of *professional athlete* includes amateurs and some theatrical performers.<sup>72</sup> Are some consular officers not aware of the growing esports market, or do they simply not find that most video gamers satisfy the definition of “athlete”? Does a generational or cultural bias exist that fails to always

- 
- d. A written statement from an official of a major U.S. sports league or an official of the governing body of the sport which details how you or your team is internationally recognized
  - e. A written statement from a member of the sports media or a recognized expert in the sport which details how you or your team is internationally recognized
  - f. Evidence that you or your team is ranked, if the sport has international rankings
  - g. Evidence that you or your team has received a significant honor or award in the sport.

*Id.*

67. Michelle Tsai, *Dribbling to America*, SLATE (Jul. 2, 2007, 6:39 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2007/07/dribbling\\_to\\_america.html](http://www.slate.com/articles/news_and_politics/explainer/2007/07/dribbling_to_america.html).

68. Daniel Etchells, *USA Weightlifting Confirms Iranian Athlete Denied Visa for 2017 World Championships in Anaheim*, INSIDE THE GAMES (Oct. 3, 2017), <https://www.insidethegames.biz/articles/1056102/usa-weightlifting-confirms-iranian-athlete-denied-visa-for-2017-world-championships-in-anaheim> (Iranian weightlifter denied P-1A visa); *Iranian Athlete Denied “Extraordinary Ability” Visa*, IMMIGR. DIRECT, <https://www.immigrationdirect.com/immigration-news/iranian-athlete-denied-extraordinary-ability-visa/> (last visited Feb. 24, 2018) (table-tennis player denied athlete visa for not demonstrating “extraordinary ability”).

69. 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](http://www.espn.com/esports/story/_/id/14838499/csgo-major-visa-issues-not-mlg-fault).

70. *Id.*

71. Adi Robertson, *US Visa Bureau Says ‘League of Legends’ Is a Professional Sport*, VERGE (Jul. 13, 2013, 4:57 PM), <https://www.theverge.com/2013/7/13/4520188/us-citizenship-immigrations-to-give-league-of-legends-players-sports-visas>.

72. 2010 WL 3692492, at \*5 (citing 8 U.S.C. 1154(i)(2)) (“[P]rofessional athletes [are] defined [as] athletes and coaches who participate in certain qualifying amateur sports leagues or associations; and professional and amateur athletes who perform in theatrical ice skating productions.”)

accept or include video gaming as a legitimate sport?<sup>73</sup> Maybe such is to be expected when addressing a relatively new market and profession.<sup>74</sup>

Merely repeating the argument that professional esports gamers should be eligible for the P-1A visa, however, would be to replay a level.<sup>75</sup> Many have argued that esports should be accepted as a sport in the United States, like it is in other parts of the world,<sup>76</sup> and that esports players should be considered athletes.<sup>77</sup> Some consider this a simple point: a writer for the emerging-technology-focused magazine *Wired* even wrote that it is “certainly easy” to make a case that esports professionals are athletes.<sup>78</sup>

Yet, there are obvious differences between esports and traditional sports, primarily with respect to the physical demands of the activities.<sup>79</sup> As professional gaming earns more coverage and sponsorships,<sup>80</sup> esports and traditional sports will

73. See generally Christopher J. Ferguson, *Clinicians' Attitudes Toward Video Games Vary as a Function Of Age, Gender and Negative Beliefs About Youth: A Sociology Of Media Research Approach*, 52 *COMPUTERS HUM. BEHAV.* 379, 379 (2015) (discussing “harmful beliefs [about video games] endorsed mainly by older individuals who are hostile toward younger generations”).

74. While professional video gaming has existed for decades, its popularity is certainly blossoming now. Warman, *supra* note 10.

75. Arguments for awarding the P-1A visa for athletes to professional video gamers have been made in law journals. See, e.g., Bridget A.J. Whan Tong, Comment, *A New Player Has Entered the Game: Immigration Reform for Esports Players*, 24 *JEFFREY S. MOORAD SPORTS L.J.* 351 (2017).

76. See Coale, *supra* note 50. However, it is not accepted in all parts of the world. Maximilian v. Mauch, *Why eSports Are Not Recognized as a Sport in Germany*, *DW.COM* (Mar. 29, 2017), <http://www.dw.com/en/why-esports-are-not-recognized-as-a-sport-in-germany/a-38188352>.

77. Former NBA champion, Rick Fox, even acknowledges the athletic nature of esports. Jonathan Grey, *3-Time NBA Champion Says Pro Gamers Are Professional Digital Athletes, Defends His Stance on TV Show 'The View'*, *EVENT HUBS* (Jun. 30, 2014, 9:01 AM), <https://www.eventhubs.com/news/2014/jun/30/3-time-nba-champion-says-pro-gamers-are-professional-digital-athletes-defends-his-stance-tv-show-view/> (“[Pro gamers] are digital athletes, professional digital athletes,” said Fox.”).

78. Kevin Morris, *Gamers Are Not Only Athletes, but the Internet Has Changed the Definition of 'Sports'*, *WIRED* (Dec. 23, 2013, 9:30 AM), <https://www.wired.com/2013/12/are-esports-really-sports-who-cares-its-here-to-stay/> (explaining how one professional gamer “trains for hours everyday [sic]; has finely tuned reflexes; thinks at a faster, more strategic pace than most” people).

79. Chaitanya Tapase, *GT Explains: What are eSports and How Do They Differ from Regular Sports*, *GUIDING TECH* (Nov. 17, 2015), <https://www.guidingtech.com/53230/gtexplains-esports-differences-sports/>.

80. “The revenues generated by brands this year, consisting of advertising, sponsorship, and media rights, is expected to total \$350 million. This represents 71% of the esports economy . . .” *Esports Revenues for 2016 Adjusted Upward to \$493M*, *NEWZOO* (Aug. 31, 2016), <https://newzoo.com/insights/articles/esports-revenues-2016-adjusted-upward-493m/>.

Coca-Cola sponsors the League of Legends World Championships. Buffalo Wild Wings and Arby's attach their name to The “ELeague”—

continue to exist, compete, and even cooperate, in the same or similar markets.<sup>81</sup> Some major organizations are considering whether to include esports as an athletic contest.<sup>82</sup> Professional gamer Choi Seong Hun expressed some optimism when he said that in “10 or 20 years, many people will recognize [esports] as a sport.”<sup>83</sup> Lenny Daniels, president of Turner Sports, added, “There’s no doubt in our mind that this is a sport—these are athletes.”<sup>84</sup>

Until esports gains worldwide recognition as a sport, foreign esports gamers can file for P-1A visas, for which the likelihood of grants are—at best—uncertain;<sup>85</sup> avoid participating in esports competitions held in the United States altogether;<sup>86</sup> or attempt to enter the United States under an alternative visa or visa exception. This third option is a less-than-perfect solution because many of these visas have different petition requirements and different limitations once granted.

### III. PLAYING ON ANOTHER MAP—FINDING A DIFFERENT PATH FOR GAMERS TO COMPETE IN THE UNITED STATES

Altogether avoiding any esports competition held inside the United States may seem drastic, but newer, stricter immigration policies proposed by the Trump Administration may be intimidating enough to cause many professional gamers to

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a competition/reality show that broadcasts games of Counter-Strike: Global Offensive. Geico has a “pro-tip” series on Major League Gaming’s MLG.tv. Red Bull, a brand synonymous with cutting-edge sports marketing, has made a massive commitment to e[s]ports.

Rapaport, *supra* note 44.

81. It seems that esports may already be more valuable than some other traditional sports in the U.S. Rapaport, *supra* note 44 (stating that the purse for the *Dota 2* championship was “roughly double the total payout of The Master’s” golf tournament). “[T]he NBA announced a partnership with videogame publisher Take-Two Interactive Software Inc. to form the NBA 2K eLeague. The plan is for five-man teams to represent every NBA team and compete in a five-month season that aligns with the NBA season.” *Id.*

82. Joss Wood, *How Aggressively Will Las Vegas Embrace Esports Betting? It Depends on Whether or Not It’s a Sport*, ESPORTS BETTING REP. (May 16, 2016), <https://www.esportsbettingreport.com/esports-betting-likely-coming-soon-nevada/>.

83. Monica Campbell, *Why Foreign Video Gamers Are Considered America’s New Pro Athletes*, PUB. RADIO INT’L (Jan. 28, 2014, 5:45 PM), <https://www.pri.org/stories/2014-01-28/why-foreign-video-gamers-are-now-considered-americas-new-pro-athletes>. Choi’s confident perspective may have something to do with the fact that he already possesses a P-1A visa. *Id.*

84. Rapaport, *supra* note 44.

85. See *supra* note 68 and accompanying text.

86. This is not to say that other countries are all liberal with athlete visas. See, e.g., Nitin Sharma, *Man Kaur, 101-Yr-Old Athlete, Denied Visa for China Masters Meet*, INDIAN EXPRESS (Sep. 26, 2017, 8:37 AM), <http://indianexpress.com/article/sports/sport-others/man-kaur-101-yr-old-athlete-denied-visa-for-china-masters-meet-4861182/> (China denied 101-year-old athlete); Mauch, *supra* note 76 (Germany does not recognize esports as a sport).

press pause on their plans to compete in the United States.<sup>87</sup> Strict rhetoric from the administration suggests “more restrictive adjudication [of visa petitions] from consular officers.”<sup>88</sup> At the time of President Trump’s first proposed travel ban,<sup>89</sup> it was reported that an Indian snowshoe competitor was denied a visa due to “current policies.”<sup>90</sup> As U.S. immigration debates developed,<sup>91</sup> Chris Dodd, former U.S. Senator and current chairman of the Motion Picture Association of America (MPAA), communicated the MPAA’s worries regarding the effect of more-restrictive immigration policies on the entertainment industry, emphasizing the industry’s global nature.<sup>92</sup> The esports industry can be included in the current immigration conversation given its increasing global reach.<sup>93</sup>

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87. See Blair Guild, *Trump Calls for Stricter Immigration Policy After NYC Attack*, CBS NEWS (Dec. 11, 2017, 7:30 PM), <https://www.cbsnews.com/news/trump-administration-calls-for-stricter-immigration-policy-after-nyc-attack/>.

88. Chad Blocker, *Draining the Pool Visa Categories Related to the Entertainment Industry May Be Strongly Affected by Changes in U.S. Immigration Policy*, L.A. LAW, May 2017, at 34, 37.

89. See Steve Almasy & Darran Simon, *A Timeline of President Trump’s Travel Bans*, CNN, <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html> (last updated Mar. 30, 2017, 4:01 AM).

90. Ashiq Hussain, *US Embassy Denies Visa to Indian Athlete, Manager Citing ‘Current Policy’*, HINDUSTAN TIMES, <http://www.hindustantimes.com/india-news/us-embassy-denies-visa-to-indian-athlete-manager-citing-current-policy/story-dHXacOlPrGdjsOYfLF5yjL.html> (last updated Feb. 1, 2017, 09:27 AM). This report was later found to be incorrect, but reports of this nature did not help resolve immigration issues as rhetorical and political debates grew more divisive. *MEA Clarifies Why US Visa Was Denied to Kashmiri Athlete and Manager*, INDIAN EXPRESS, <http://indianexpress.com/article/india/mea-clarifies-why-us-visa-was-denied-to-kashmiri-athlete-and-manager-4504382/> (last updated Feb. 2, 2017, 6:48 PM).

91. See generally George Borjas, *The Immigration Debate We Need*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/opinion/the-immigration-debate-we-need.html> (“The first month of the Trump administration has already changed the direction of the immigration debate, with many more changes coming soon.”); *Civil Rights Challenges to Trump Refugee/Visa Order*, U. MICH. C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?searchSpecialCollection=44> (last viewed Feb. 23, 2018) (summarizing litigation over Executive Orders from the Trump Administration regarding immigration travel bans); Devlin Barrett & Dan Frosch, *Federal Judge Temporarily Halts Trump Order on Immigration, Refugees*, WALL ST. J., <https://www.wsj.com/articles/legal-feud-over-trump-immigration-order-turns-to-visa-revocations-1486153216> (last updated Feb. 4, 2017, 8:29 PM); Barnini Chakraborty, *Trump Signs New Immigration Order, Narrows Scope of Travel Ban*, FOX NEWS (Mar. 6, 2017), <http://www.foxnews.com/politics/2017/03/06/trump-signs-new-immigration-order-narrows-scope-travel-ban.html>.

92. Blocker, *supra* note 88, at 35 (“Among those potentially affected are members of the creative community who cannot freely express themselves in their home country and come to the United States seeking the opportunity to communicate and enlighten.”).

93. Lisa Hanson, *China (And Asia) Are Driving A Booming Global ESports Market*, FORBES (May 9, 2016, 10:37 AM), <https://www.forbes.com/sites/lisachanson/2016/05/09/welcome-to-the-world-of-esports-big-globally-but-huge-in-china/#71840f14703b> (“eSports . . . are booming globally”).

Some fear a snowball effect, in which stricter adjudication would lead to increased and more elaborate evidence requests from consular officers.<sup>94</sup> This would lead to slower processing times and possibly “denials of visa petitions that may have been approved in the past.”<sup>95</sup> Petitioners may appeal these decisions, but for many entertainers and athletes, the appeals process is “so lengthy and burdensome” that by the time an appeal is granted, the performance or event may have passed, undermining the original purpose of the visa.<sup>96</sup> In fact, it is possible—given the short-term nature of many esports competitions—that stricter, slower adjudications could create this type of problem even before appeal.<sup>97</sup> These delays could mean a loss of hundreds of thousands of dollars to a production company broadcasting these events.<sup>98</sup> Because many esports tournaments last only a few days,<sup>99</sup> there is a legitimate incentive to avoid competing in the United States.<sup>100</sup> However, for those willing to take the risk, there are other available options.

In fact, there are 185 different types of U.S. visas.<sup>101</sup> Realistically, though, esports players have only a handful of viable options. The benefit of not applying for a P-1A visa is that the argument that a gamer is not an athlete becomes “completely irrelevant.”<sup>102</sup> Esports players can consider the B visa for visitors traveling for business or pleasure, the O visa for extraordinary ability or extraordinary achievement in certain fields, the H-1B visa for graduate-level (or equivalent) workers in specialty occupations, the Q visa for cultural exchange, or the WB visa under the Visa Waiver Program. The most appropriate visa, however, may be the P-3 visa for artists or entertainers coming to participate in a culturally unique program.<sup>103</sup> This visa category may not fit perfectly, but until there are other reliable options, professional gamers are limited to these less-than-ideal visa choices.

#### A. Suggested Solutions

With little hope for success under the athlete visa, professional gamers can investigate other visa categories, but there is no clear-cut answer. It becomes evident, after investigating each visa, that the visa categories provide no adequate

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94. Blocker, *supra* note 88, at 36.

95. *Id.*

96. *Id.*

97. See 2018 *ESports Tournament Schedule*, ROAR, <http://www.theroar.com.au/esports/esports-tournament-schedule/> (last updated Jan. 20, 2018) (listing many esports-tournament dates of less than a week).

98. See Blocker, *supra* note 88, at 37.

99. Even if professional gamers comes to the United States for a short tournament, they still need a visa because they are coming to work. *Working in the US*, USCIS, <https://www.uscis.gov/working-united-states/working-us> (last updated Jun. 14, 2017) (stating that foreign workers must obtain a Green Card, work permit, or a work visa to work in the United States).

100. See 2018 *ESports Tournament Schedule*, *supra* note 97.

101. *Types of Visas Available to Immigrants in Los Angeles*, JGOLD LAW (Apr. 7, 2016), <https://jgoldlaw.com/citizenship/types-visas-available-immigrants-los-angeles/>.

102. Morris, *supra* note 78.

103. *Infra The ‘Reset’ Button*.

options for esports gamers.<sup>104</sup> Esports is still fairly new, but with the growth of the industry, it is time for the United States to create a path into the country for professional gamers, either by relaxing interpretations of current visas or by creating a separate visa altogether.

*1. B-1 and B-2 visas*

The B-1 tourist visa applies to temporary visitors for business,<sup>105</sup> but these temporary visits “do[] not include local employment or labor for hire.”<sup>106</sup> By restricting “local employment” and “labor for hire,” the statute restricts B-visa holders from obtaining new employment in the United States.<sup>107</sup>

To classify as a nonimmigrant visitor, it must be proven that:

- (1) The alien intends to leave the United States at the end of the temporary stay;
- (2) The alien has 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.<sup>108</sup>

Other scholarship suggests that esports players are unlikely to qualify under this visa category because “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.’”<sup>109</sup> This is likely to be an obstacle for professional gamers because they get paid, often in large tournament winnings, to perform and succeed in major U.S. video-game tournaments.<sup>110</sup> The B-1 visa, which prohibits contracts and other forms of prearranged employment, is unlikely to help professional gamers enter the country for the purpose of competing in esports tournaments because “[e]sports players are often salaried by both game developers and their respective teams, violating B-1’s prohibition of ‘prearranged employment.’”<sup>111</sup>

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104. See Tong, *supra* note 75, at 370–80 (giving extensive analysis on many of the same visa categories discussed in this Note, including B1, B2, H-1B, and O-1A).

105. See generally 22 C.F.R. § 41.31(b)(1) (2006).

106. *Id.* These are specifically for “limited, temporary business trips.” Tong, *supra* note 75, at 370.

107. Under this visa, one cannot “work at a job and get paid by a local person or organization. So while [people] can keep taking checks from the company that sent [them] to work in America, [they] can’t quit and work at the local Wal-Mart without changing [their] visa.” *B1 and B2 Visas: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/b1-b2-visa> (last visited Jun. 10, 2018).

108. Tong, *supra* note 75, at 370 (quoting 22 C.F.R. § 41.31(a)).

109. *Id.*

110. *Top Games Awarding Prize Money*, ESPORTS EARNINGS, <https://www.esportsearnings.com/games> (last visited Feb. 23, 2018).

111. Tong, *supra* note 75, at 371.

The B-2 tourist visa provides visas to temporary visitors for pleasure.<sup>112</sup> *Pleasure* “refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature.”<sup>113</sup> While some may argue that video games satisfy “amusement,” or that they are “of a fraternal” or “social” nature,<sup>114</sup> esports players are employees coming to the United States to work. It seems unlikely that a gamer’s job would qualify as *pleasure* under the aforementioned terms. Because professional gamers are paid for the work they do in esports tournaments held on U.S. soil, they do not qualify for the B-2 visa; B-2 visa beneficiaries are not allowed to work at all.<sup>115</sup>

These requirements, however, have not stopped esports players from using the B-1 or B-2 visas; according to a writer at ESPN, “It’s widely known by industry insiders that certain players competed entire splits on tourist visas.”<sup>116</sup> This type of misrepresentation carries stiff penalties, like deportation and a ban on reentry.<sup>117</sup> This behavior likely stems from the knowledge that other visas—like the P-1A—are difficult to obtain, further demonstrating a need for reform in this area of immigration law.

## 2. O-1 visa

While the O-1 visa category provides opportunity to some esports players, the vast majority of professional gamers are unlikely to qualify under the strict requirements for this visa, which is designated for individuals with “extraordinary ability or achievement.”<sup>118</sup> *Extraordinary ability* refers to “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.”<sup>119</sup> Qualification under this standard “is evidenced by a major award, such as a Nobel Prize.”<sup>120</sup>

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112. 22 C.F.R. § 41.31(b)(2) (2006).

113. *Id.*

114. See generally Nicolas Ducheneaut & Robert J. Moore, *The Social Side of Gaming: A Study of Interaction Patterns in a Massively Multiplayer Online Game*, in PROCEEDINGS OF THE 2004 ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK 360 (2004).

115. Tong, *supra* note 75, at 373 (citing *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)).

116. Blum, *supra* note 8.

117. Emily Kendall, *Consequences of Lying on a Work Visa Application*, ALL LAW, <https://www.alllaw.com/articles/nolo/us-immigration/consequences-lying-work-visa-application.html> (last visited Aug. 11, 2018).

118. 8 C.F.R. § 214.2(o) (2006).

119. § 214.2(o)(3)(ii).

120. Tong, *supra* note 75, at 370 (citing *Kazarian v. U.S. Citizenship & Immigr. Servs.*, 596 F.3d 1115, 1119 (9th Cir. 2010)). “These days, [the USCIS] has outlined eight ways that someone can prove they are extraordinary. The list includes making a lot of money compared to others in one’s field and achieving national or international recognition for one’s work.” Alexia Fernández Campbell, *The Visa for People Officially Deemed ‘Extraordinary’*,



Although it is unlikely that an esports gamer has a Nobel Prize to offer in a visa petition, athletes participating in more traditional sports have seen success under the O-1A category,<sup>121</sup> designated for individuals with an extraordinary ability in the sciences, education, business, or athletics.<sup>122</sup> In *Muni v. I.N.S.*, the court reversed the denial of a professional hockey player's O-1A visa petition, in large part because the beneficiary played a key role on three Stanley Cup-winning teams.<sup>123</sup> This would appear to bode well for members of world-champion esports teams because esports teams are generally small enough that almost every player can make a case for having played a key role on a world-championship team.<sup>124</sup> Unfortunately, some believe the O-1A remains unattainable for the majority of professional athletes, which raises worries for professional gamers.<sup>125</sup>

The requirements for the O-1A visa<sup>126</sup> are certainly more challenging to satisfy than those of the P-1A, but the case law suggests that petitions should be granted to players in professional leagues, regardless of whether they have earned all-star selections or the highest salaries in their respective leagues.<sup>127</sup> With esports gamers achieving some success with the P-1A visa, it would come as no surprise to see professional gamers submit O-1A petitions; however, because the relationship between gamers and “athletes” is not yet clearly defined, the O-1A presently remains unreliable for professional gamers.

There is yet another option available to esports gamers within the O-1 category: the O-1B visa. The O-1B is essentially the same visa for a different set of categories; namely, the arts and the motion-picture and television industries.<sup>128</sup> Though esports will be analyzed as an art form in Part IV—regarding the classification of esports for the purposes of the P-3 visa—in the current esports-

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ATLANTIC (July 27, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-visa-for-people-officially-deemed-extraordinary/493130/>.

121. See *Grimson v. I.N.S.*, 934 F. Supp. 965 (N.D. Ill. 1996) (hockey player); *Muni v. I.N.S.*, 891 F. Supp. 440 (N.D. Ill. 1995) (hockey player); *Racine v. I.N.S.*, No. 94 C 2548, 1995 WL 153319 (N.D. Ill. 1995) (hockey player).

122. 8 C.F.R. § 214.2(o)(1)(i) (2006).

123. 891 F. Supp. at 444.

124. See Steven Bogos, *New League of Legends Gamemode Increases Team Size to Six*, ESCAPIST MAG. (Feb. 15, 2014, 6:12 AM), <http://www.escapistmagazine.com/news/view/132259-New-League-of-Legends-Gamemode-Increases-Team-Size-to-Six>; see also Flyquest, LOLESports.COM, [https://www.lolesports.com/en\\_US/na-lcs/na\\_2018\\_spring/teams/flyquest](https://www.lolesports.com/en_US/na-lcs/na_2018_spring/teams/flyquest) (last visited Feb. 23, 2018) (showing an esports-team roster of ten players).

125. Tong, *supra* note 75, at 379 (“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.’”).

126. See generally 8 C.F.R. § 204.5(h)(3) (2006).

127. See *Muni*, 891 F. Supp. at 440; see also *Racine v. I.N.S.*, No. 94 C 2548, 1995 WL 153319 (N.D. Ill. Feb. 27, 1995); *Grimson v. I.N.S.*, 934 F. Supp. 965 (N.D. Ill. 1996). “[The I.N.S.] apparently was under the impression that only all-stars or the League’s highest-paid players have extraordinary ability. That is an overly grudging interpretation of its own regulation.” *Muni*, 891 F. Supp. at 440.

128. 8 U.S.C. § 1101(a)(15)(O)(i).

immigration climate it is worth considering whether esports can fit under one of the O-1B categories. If the *athletics* definition is a major obstacle preventing professional gamers from receiving an O-1A visa, the O-1B visa could eliminate that problem if professional video games can be considered art. In the arts, the USCIS defines *extraordinary ability* as follows:

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.<sup>129</sup>

While it is possible that professional gamers could qualify as *performing artists* under the O-1B visa, it is less likely that most professional gamers coming to compete in the United States could satisfy the high-level-of-achievement requirement, with the exception of the top professional gamers in the world.<sup>130</sup>

### 3. H-1B visa

The H-1B visa is not a likely solution to the immigration dilemma esports gamers currently face, but it may be available to some professional gamers. The H-1B allows U.S. companies to employ graduate-level workers for specialty occupations.<sup>131</sup> There are some difficult standards and requirements for professional gamers seeking to enter the United States under the H-1B visa. The main problem with this visa category is the yearly cap placed on H-1B visas: only 65,000 can be issued per year, with some exceptions.<sup>132</sup> The cap does not apply to those employed at an institute of higher education,<sup>133</sup> a “related or affiliated nonprofit entity” or a “nonprofit research organization or a governmental research organization,” or to those who have earned master’s degrees<sup>134</sup> or higher.<sup>135</sup> This cap on H-1B visas leads to a timing problem because the cap is often filled within weeks or even days of

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129. 8 C.F.R. § 214.2(o)(3)(ii).

130. “The O-1 visa is reserved for athletes and others of ‘extraordinary ability,’ and the German-born [Dirk] Nowitzki is one the [NBA]’s top players. But it’s not an option for the average professional athlete.” *Stay of Foreign Athletes Extended*, ESPN (Mar. 9, 2009), <http://www.espn.com/espn/news/story?id=3964478>.

131. 8 C.F.R. § 214.2(h)(1)(i).

132. *Requirements for U.S. Masters’ Graduates to Enjoy Benefit of H1B “Master’s Cap,”* MURTHY (Nov. 19, 2012), <https://www.murthy.com/2012/11/19/requirements-for-u-s-masters-graduates-to-enjoy-benefit-of-h1b-masters-cap/> (“[T]here is an exemption from the 65,000 annual quota that is available to the first 20,000 H-1B petitions filed each fiscal year for beneficiaries who have been granted masters’ or higher degrees by U.S. institutions of higher education.”).

133. 8 C.F.R. § 214.2(e)(5). In this statute, the exemption also applies to those who have only received an offer of employment at a qualifying institution. *Id.*

134. The exception for those with master’s degrees or higher can apply to an extra 20,000 beneficiaries. *Requirements for U.S. Masters’ Graduates to Enjoy Benefit of H1B “Master’s Cap,”* *supra* note 132.

135. 8 U.S.C. § 1184(g)(5)(C).

becoming available to petition.<sup>136</sup> In fact, on April 7, 2017, for the fifth straight year, “the demand for H-1B visas . . . outstripped supply.”<sup>137</sup> It is unlikely that a professional gamer could rely on this visa.

#### 4. *Other Options? Q or WB*

There are at least two more visa categories worth pursuing, but they both require extra effort by the professional-gamer beneficiary or the petitioner.

The Q visa is reserved for cultural-exchange programs.<sup>138</sup> This might be a viable option if gaming organizations are able to find partners to create exchange programs. Perhaps in lieu of a “trade,” esports organizations could create a short-term solution. This visa lasts up to 15 months<sup>139</sup> and allows for the beneficiary to be paid “wages and working conditions comparable to those accorded local workers similarly employed.”<sup>140</sup> A major problem with this visa category is that to participate in an exchange program, beneficiaries have to perform tasks outside their employment.<sup>141</sup> The uncertainty surrounding this course of action makes the Q visa an unlikely option.

The WB visa is for a “Temporary Business Visitor under Visa Waiver Program [(VWP)].”<sup>142</sup> The WB visa “enables nationals of 35 participating countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Nationals of VWP countries must meet eligibility requirements to travel without a visa on the VWP.”<sup>143</sup>

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136. Ananya Bhattacharya, *Once Again, There are More H-1B Aspirants Than There are Visas Available*, QUARTZ MEDIA (Apr. 7, 2017), <https://qz.com/953371/the-85000-cap-on-h-1b-visas-for-2018-has-been-exceeded-within-four-days/>.

On April 7—four days after H-1B applications were opened—USCIS announced that the 85,000 cap for new visas in fiscal year 2018 were exceeded, including the 20,000 allocated for masters’ students. The immigration body did not announce the total number of applications received yet but experts had expected between 210,000 and 240,000 applications. Last year, the USCIS logged a record 236,000 applications.

*Id.*

137. *Id.*

138. 8 U.S.C. § 1101(a)(15)(Q).

139. § 1101(15)(Q)(i).

140. *Id.*

141. *Q Cultural Exchange*, USCIS, <https://www.uscis.gov/working-united-states/temporary-workers/q-cultural-exchange> (last updated July 14, 2015) (“It is an employment oriented program, but an integral part of your duties must have a cultural element.”).

142. *WB Temporary Business Visitor under Visa Waiver Program*, USCIS, <https://www.uscis.gov/working-united-states/temporary-visitors-business/wb-temporary-business-visitor-under-visa-waiver-program> (last updated July 14, 2015).

143. *Id.*

The VWP is limited to 35 countries,<sup>144</sup> under the WB, the beneficiary cannot come to work or earn money under the visa waiver.<sup>145</sup> On its face, this waiver-program option would likely appeal to a professional gamer with few immigration options, but he or she would likely be unwilling to compete for free.<sup>146</sup>

All of these visa options demonstrate the primary immigration problem professional gamers face: esports gamers do not really fit into any visa category.

#### IV. BRING THE P-3 TO E3!<sup>147</sup> THE P-3 VISA AS AN OPTION FOR PROFESSIONAL GAMERS

The P-3 visa may provide a path into the United States for professional gamers. This visa applies to those who are “coming temporarily to perform, teach or coach as artists or entertainers, individually or as part of a group, under a program that is culturally unique.”<sup>148</sup> While there is no precedent of the USCIS approving P-3 visa petitions for professional gamers, the P-3 visa should be utilized and accepted until esports is popular enough to merit serious and consistent visa approvals for gamers, either under the P-1A visa or a new and permanent legislative solution of creating a visa category specific to professional gamers.

##### A. “I’m the Best!”<sup>149</sup> Why the P-3 Visa is the Best Option

The P-3 visa requires the petitioner to satisfy certain elements. A P-3 visa petition requires proof that the beneficiary’s performance is “culturally unique.”<sup>150</sup> This requires the petitioner to prove that the beneficiary is “coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional” performance or presentation.<sup>151</sup> Additionally, that performance or presentation must be “ethnic, folk, cultural, musical, theatrical, or artistic.”<sup>152</sup> The petition needs to support claims regarding these elements through “written documents” from recognized experts or published materials.<sup>153</sup> This

144. Most of the countries producing major esports talent are listed. *Compare Citizen or National of VWP Designated Country*, USCIS, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> (last visited Jan. 21, 2018), with *Top Countries for 2017*, ESPORTS EARNINGS, <https://www.esportsearnings.com/history/2017/countries> (last visited Jan. 21, 2018).

145. *Visa Waiver Program: Travel Purposes Not Permitted on Visa Waiver Program – Examples*, U.S. DEP’T ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> (last viewed Feb. 23, 2018).

146. If a gamer is willing to compete for free, the B-2 visa may be appropriate. See *supra* Section III.A.1.

147. *What is E3?*, E3 EXPO, <https://www.e3expo.com/faqs#what-is-e3> (last visited Feb. 24, 2018) (“E3 is the world’s premier event for computer and video games and related product.”).

148. 8 U.S.C. § 1101(a)(15)(P)(iii).

149. *E.g.*, MARIO PARTY 3, (Nintendo, Hudson Soft 2000).

150. § 1101(a)(15)(P)(iii)(II).

151. 8 C.F.R. § 214.2(p)(6)(i).

152. *Id.*

153. 8 C.F.R. § 214.2(p)(6)(ii)(A–C).

Section will make the case for professional gamers' applicability under the specific elements required to obtain the P-3 visa.

### 1. *Developing, Representing, Coaching, or Teaching*

Because professional-esports competitions do not likely serve as a way for professional competitors to develop the skills of others,<sup>154</sup> to coach, or to teach others,<sup>155</sup> this subsection will focus on the *representing* requirement of the visa.

As esports continues to gain exposure, more people are learning about gaming competitions, including popular games, elite players, and other information specific to the esports world.<sup>156</sup> Especially now, professional gamers' participation in major esports competitions serves not only as entertainment, but also as a means of representing the sport—in addition to educating and exposing new viewers to the world of video-game competition.<sup>157</sup>

### 2. *Culturally Unique*

To qualify for the P-3 visa, esports must qualify as *culturally unique* or *traditional*.<sup>158</sup> Because professional video gaming is not considered *traditional*, pro-gamer beneficiaries will need to focus on the cultural uniqueness of esports. In *Matter of Skirball Cultural Center*,<sup>159</sup> the USCIS Administrative Appeals Office (AAO) explained the requirements for cultural uniqueness when describing the burden that the petitioner must meet:

The petitioner bears the burden of establishing by a preponderance of the evidence that the beneficiaries' artistic expression, while drawing from diverse influences, is unique to an identifiable group of persons with a distinct culture; it is the weight and quality of evidence that establishes whether or not the artistic expression is "culturally unique."<sup>160</sup>

Here, professional gamers should argue that their gameplay, strategy, and general participation in esports competitions (viewed by thousands, or even

154. If "develop" under the P-3 visa can be interpreted to mean *develop one's own skills*, a professional gamer's coming to the United States to compete in a major esports competition would likely qualify as *development*. See Tamburro, *supra* note 6 (describing a player's inability to train against other elite players because of the denial of a visa petition); see also Josh Neubert, *10 Ways Competitions Enhance Learning*, INST. COMPETITION SCIS. (July 4, 2016), <https://www.competitionsciences.org/2016/07/04/10-ways-competitions-enhance-learning> (investigating how competition increases learning and development).

155. Esports coaches and the like, however, may be able to rely on this language in their own petitions.

156. *Esports Awareness Exceeds 1 Billion as New Global & Local Initiatives are Launched*, NEWZOO (May 11, 2016), <https://newzoo.com/insights/articles/global-esports-awareness-exceeds-1-billion-as-new-initiatives-launched/> ("This jump in [esports] awareness in these key regions has, for a large part, also translated into higher audience numbers for both Occasional Viewers and Esports Enthusiasts.").

157. *Id.*

158. 8 C.F.R. § 214.2(p)(6)(i)(A).

159. 25 I.&N. Dec. 799, 799 (AAO 2012).

160. *Id.*

millions) qualifies as *artistic expression*. Professional gamers can cite, if necessary,<sup>161</sup> many sources as *diverse influences* that contribute to their artistic expression, such as their own culture, previous gameplay, instruction, tutorials, etc.<sup>162</sup>

Additionally, the C.F.R. defines the term *culturally unique* as “a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons.”<sup>163</sup>

Pro-gamer beneficiaries must request that fans of esports or video-game players be considered “an identifiable group of persons with a distinct culture.”<sup>164</sup> This may prove to be a challenge because similar groupings of people have been rejected by the USCIS in the past.<sup>165</sup> However, the USCIS also held that *culturally unique* does not require that the artistic expression be unique to a particular country.<sup>166</sup> Moreover, the USCIS’s determination that hearing-impaired people qualified as a “group of persons” expands the definition in favor of professional gamers.<sup>167</sup>

With a P-3 visa petition, a beneficiary must authenticate his or her culturally unique skills with affidavits, testimonials, or letters from “recognized experts” that attest to the beneficiary’s skill.<sup>168</sup> In *Skirball*, the petition included documents from a scholar who established familiarity with the beneficiary’s work, a director of grand performances in Los Angeles, and the executive director of an art-focused nonprofit to provide evidence for a musical culture combining Jewish and Argentine cultures.<sup>169</sup> Generally, it seems that a petition will authenticate the

161. This may not be necessary if the “diverse influences” language is more a concession that an art form need not be wholly uninfluenced by the rest of the world to be culturally unique, and not actually a distinct element of cultural uniqueness.

162. *Infra* notes 187–90.

163. 8 C.F.R. § 214.2(p)(3).

164. *Skirball*, 25 I. & N. Dec. at 805.

165. See *Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(P)(iii) of the Immigration and Nationality Act*, 8 U.S.C. § 1101, 2014 WL 4113462, at \*1 (AAO 2014) [hereinafter *Hipster-Culture Decision*] (rejecting “hipster culture” as a unique culture for a photographer).

166. *Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(P)(iii) of the Immigration and Nationality Act*, 8 U.S.C. 1101(a)(15)(P), AAU LIN 94 208 52089 (INS), 1997 WL 33306354, \*2 (AAO 1997) [hereinafter *Deaf-Culture Decision*] (finding that deaf people qualified as a group of persons).

167. *Id.* Neither professional gamers nor the deaf are necessarily identifiable as a group based on factors such as national origin, language, religion, class or ethnicity, etc. However, if sign language and braille, generally, satisfy the requirement of speaking a “particular language,” gamers may argue that video gaming has its own language as well—utilizing a great deal of slang, etc. See *Video Game Vocabulary, Jargon, and Slang*, LEE LAUGHEAD, <http://www.leelaughead.com/video-game-vocabulary-jargon-and-slang/> (last updated Feb. 21, 2016) (listing an extensive collection of video-game vernacular).

168. 8 C.F.R. § 214.2(p)(6)(ii)(A).

169. *Skirball*, 25 I.&N. Dec. at 802–03.

beneficiary's skills with documents from professionals in respected positions who are knowledgeable of and deal with the proposed art form.<sup>170</sup>

Pro gamers would likely rely on professionals working in esports to support their petitions. Professionals who are responsible for and direct esports events could better describe the uniqueness of *gamer culture* or esports generally and help the USCIS understand the magnitude and expansion of these events. Professional-gamer beneficiaries could also rely on academics as research into the world of esports and competitive gaming continues to increase.<sup>171</sup>

Further, the petitioner, through reviews in newspapers, journals, or other published materials, must demonstrate that the beneficiary's performance is culturally unique.<sup>172</sup> For more prominent esports competitors, this requirement may prove easy to satisfy due to increased media coverage of professional gaming. However, if a beneficiary's art form must be culturally unique *to video-game culture specifically*, and not just to the United States as a whole, the requirement would be a much greater challenge.<sup>173</sup> While the definition of *culturally unique* requires a case-by-case determination of the facts based on the discretion of the AAO,<sup>174</sup> an art form is *culturally unique* when it is unique to "an identifiable group of persons with a distinct culture."<sup>175</sup> A professional gamer could argue that video-game culture fits this definition because gamers have a distinct culture. While it may not be immediately apparent that certain people belong to video-game culture, the ability to identify this group of persons is likely comparable to the ability to identify deaf people, who are not always visibly identifiable either.<sup>176</sup>

Next, the petitioner must provide evidence that all performances or presentations will be culturally unique.<sup>177</sup> This can be as simple as providing documentation of performance agreements between the beneficiary and the employer or the venue where the entertainer will perform or present.<sup>178</sup> It is important to note that without corroborating evidence, performance agreements alone may be insufficient.<sup>179</sup> A professional gamer coming to participate in an

170. *Id.*; *Hipster-Culture Decision*, *supra* note 165; *Deaf-Culture Decision*, *supra* note 166.

171. *See* Warman, *supra* note 10.

172. 8 C.F.R. § 214.2(p)(6)(ii)(B).

173. *Skirball*, 25 I.&N. Dec. at 804 (stating that the director initially denied the petition because a hybrid style of music incorporating elements from genres from different cultures could not be considered *unique*).

174. *Id.* at 805.

175. *Id.*

176. *Hipster-Culture Decision*, *supra* note 165.

177. 8 C.F.R. § 214.2(p)(6)(ii)(B).

178. *See* Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(P)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(iii), AAU WAC 06 221 50605 (DHS), 2008 WL 5063311 (AAO 2008).

179. "In the absence of corroborating evidence such as published materials or critical reviews of the beneficiary's past and prospective performances describing the cultural uniqueness of the beneficiaries' performance, the record is insufficient to establish that the beneficiary qualifies for P-3 classification." *Id.* at \*4.

esports competition in the United States will likely have already performed well in previous competitions. If this experience is evidenced by published materials or critical reviews, the gamer will likely have the corroborating evidence necessary to prove that future performances will be culturally unique.

### 3. Cultural/Theatrical

A petitioner must prove that the beneficiary's art form will be performed or presented in a manner that fits at least one of the following descriptors: ethnic, folk, cultural, musical, theatrical, or artistic.<sup>180</sup> Professional-gamer beneficiaries are best-suited to classify their art form as cultural, theatrical, and even artistic.

*Video Game Culture* is a real concept examined in academic research.<sup>181</sup> "Throughout this research, there is a pervasive sense of video-game culture as separate from a constructed mainstream culture, as something new, different, and more importantly definable."<sup>182</sup> Examples of this type of research will prove valuable when considering that other similar arguments for new or nontraditional cultures have been rejected by USCIS officials.<sup>183</sup>

Petitioners will need to distinguish video-game culture from precedent, such as a denied petition claiming the beneficiary's art was a part of "hipster culture."<sup>184</sup> Distinguishing the hipster-culture petition is not a major issue because the adjudicator denied that petition, in large part, because the documents submitted to attest to the beneficiary's skills or the cultural uniqueness of future events lacked references to hipster culture and failed to explain why the art form was culturally unique.<sup>185</sup> A petition on behalf of a professional-gamer beneficiary should be able to address these matters with appropriate and convincing documentation as described above.<sup>186</sup> Video-game culture has its own language,<sup>187</sup> terms,<sup>188</sup> meeting places,<sup>189</sup> and celebrities.<sup>190</sup>

180. See 8 C.F.R. § 214.2(p)(6)(i)(A) (2012).

181. See, e.g., Adrienne Shaw, *What is Video Game Culture? Cultural Studies and Game Studies*, 5 GAMES & CULTURE 403 (2010).

182. *Id.* at 404.

183. *Hipster-Culture Decision*, *supra* note 165 at \*11 (stating that "hipster culture [is] not accepted as a unique culture").

184. *Id.*

185. *Id.* at \*6–12.

186. See *supra* Section IV(B)(2).

187. "[L]eet speak evolved from a method to mislead search functionalities into a language for online gamers to describe formidable prowess or accomplishment." Roald Craenen, *Leet Speak Cheat Sheet*, GAMEHOUSE.COM, <http://www.gamehouse.com/blog/leet-speak-cheat-sheet/> (last visited Apr. 16, 2018).

188. *Video Game Vocabulary, Jargon, and Slang*, *supra* note 167 (defining terms like *noob*).

189. See generally TWITCH, <https://www.twitch.tv/> (last visited Apr. 16, 2018) (Twitch is an online platform where video-game players can stream gameplay).

190. Danny Wadson, *Gamertube: Pewdiepie and the YouTube Commentary Revolution*, POLYGON (Sep. 6, 2013, 12:00 PM), <https://www.polygon.com/features/2013/9/6/4641320/pewdiepie-youtube-commentary>.



There may also be convincing evidence that professional gaming can be described as *theatrical*. This argument grows stronger as professional gaming continues to experience growth as a spectator sport.<sup>191</sup> As esports rises in popularity, “watch parties” in large venues, like movie theaters and stadiums, become increasingly popular.<sup>192</sup> While these parties happen in the United States, they are becoming popular in other parts of the world as well.<sup>193</sup>

Is it enough, on its own, that large groups of people are meeting to participate in these watch parties? This is unclear, but the world is beginning to take note of esports competitions as cultural experiences as opposed to just video-game competitions.<sup>194</sup>

Initially, professional gaming may not seem artistic, but major media outlets have discussed the question of whether gaming is a form of art.<sup>195</sup> The C.F.R. defines *art* as follows: “Arts includes fields of creative activity or endeavor such as,

191. See Hattenstone, *supra* note 35.

192. Dave McNary, *Hollywood’s Chinese Theatre Complex Launching Esports Facility*, VARIETY (Mar. 27, 2017, 10:07 AM), <http://variety.com/2017/film/news/hollywood-chinese-theatre-launching-esports-facility-1202016945/>.

“What we are launching is just the tip of the iceberg,” said Robert K. Laity, CEO of the TCL Chinese Theatre. “We see cinema operators working together as a global network of immersive MX4D esports theaters and becoming part of the fabric of competitive gaming. We are in discussions with sponsors, esports organizations and other cinema operators to join forces with the TCL Chinese Theatre as we bring this exciting capability to the world of online and live tournament play.”

*Id.*

193. See *Movie Theaters and ESports: The Golden Opportunity*, NEXT LEVEL (Apr. 12, 2017), <http://tnl.media/esportsnews/2017/4/11/movie-theaters-and-esports-the-golden-opportunity> (acknowledging watch parties for esports in major arenas like Madison Square Garden, and highlighting the business opportunity of utilizing movie theaters to watch esports events); see also Henry Young, *Seven-Figure Salaries, Sold-Out Stadiums: Is Pro Video Gaming a Sport?*, CNN, <http://www.cnn.com/2016/05/31/sport/esports-is-professional-gaming-a-sport/index.html> (last updated May 31, 2016, 8:00 AM).

Stadiums packed with partisan fans and gaming stars are now cropping up in England, Poland and Germany. “It’s the same as if you go to a football match and you’re jumping up and down,” Clark says. “You enjoy the moment with people you don’t even know. It stays with you.”

*Id.*

194. See Jesse Aaron, *The Controversial Dichotomy Between Sports and ESports*, HUFFINGTON POST, [http://www.huffingtonpost.com/jesse-aaron/the-controversial-dichoto\\_b\\_6692052.html](http://www.huffingtonpost.com/jesse-aaron/the-controversial-dichoto_b_6692052.html) (last updated Dec. 6, 2017).

Some may think, “Why would anyone want to give see a live Esports video game tournament if we’re just watching them play on a big screen? Can’t we just do that at home?” Think about concerts, shows, and any other form of grand entertainment. It’s about the people, the fans, and the culture. It’s an experience and it’s a new one.

*Id.*

195. Peckham, *supra* note 44.

but not limited to, fine arts, visual arts, and performing arts.”<sup>196</sup> Further, evidence supporting a finding that a beneficiary’s performances were scheduled in performing-arts venues helped sustain an appeal.<sup>197</sup>

Pro gamers will need to argue that video gaming can be considered a performing art. The “not limited to” language in the regulation is also important in the petitioner’s argument that this rule should be flexible enough to include video-game competition as an art form.<sup>198</sup> It certainly helps the beneficiary’s case that video-game competitions are increasingly held in performing-art venues.<sup>199</sup> A major challenge to describing professional video gaming as *artistic* is found in earlier case law: the USCIS denied a soccer coach’s visa petition based on a particular soccer strategy because the petitioner failed to establish that athletics constituted an *art form*.<sup>200</sup> This could be problematic for professional gamers if an adjudicator finds that esports is similar enough to athletics to establish a precedent; however, that might help in working toward satisfying an athlete visa.<sup>201</sup> Given the discretionary nature of these administrative decisions, it is difficult to predict how an adjudicator would rule.<sup>202</sup> Ultimately, it does not hurt the beneficiary to make the argument, but the *cultural* and *theatrical* descriptors appear more helpful to obtaining a granted petition.

#### 4. Performance

A petitioner must prove that the beneficiary’s art form will be demonstrated as either a performance or a presentation.<sup>203</sup> In the same way that dancers or singers perform their artistic expressions, gamers perform their video-game strategies.<sup>204</sup>

196. 8 C.F.R. § 214.2(p)(3) (2012).

197. *R-R-T-D- LLC*, 2017 WL 4074062 (DHS), \*4 (AAO 2017).

198. See 82 C.J.S. *Statutes* § 438 (2018).

Under the canon of “*ejusdem generis*,” when, as part of an enumeration in a statute, general words follow specific words, the general words are presumed to be and are construed as restricted by the particular designations; thus, the general words include only things of the same kind, character, and nature as those specifically enumerated.

*Id.*

199. See *Movie Theaters and ESports: The Golden Opportunity*, *supra* note 193 (acknowledging watch parties for esports in major arenas like Madison Square Garden and highlighting the business opportunity of utilizing movie theaters to watch esports events).

200. *Q-C-M, Inc.*, 2017 WL 2902765 (DHS), \*6 (AAO 2017).

201. But then, if video games are so similar to athletics that this case has precedential value, that would go a long way toward helping a P-1A petition succeed. However, this is true only if the decision is appealed and becomes binding law because AAO decisions are not precedential. See *AAO Non-Precedent Decisions*, USCIS, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-non-precedent-decisions> (last updated Feb. 26, 2018).

202. Blum, *CS:GO Major Visa Issues: It’s Not MLG’s Fault*, *supra* note 69 (describing the visa-adjudication process as controlled by “misguided” and “all-too-powerful consular officers”).

203. 8 C.F.R. § 214.2(p)(6)(i)(A) (2017).

204. The “strategy as an art form” argument was rejected by the USCIS in *Q-C-M*, *supra* note 200, at \*1, but the professional gamer’s petition is distinguishable because it would

The main difference is that there are other players who are trying to disrupt this performance (through performances of their own). A competition between professional gamers should not be disqualified; examples of competitions that also serve as performances include rap battles, sparring competitions in martial arts, cooking competitions, and game shows.<sup>205</sup> Additionally, esports competitions are so different from other competitions that present rules and regulations may not account for all the variables of video-game competitions.<sup>206</sup>

#### 5. Final Requirements

A few additional elements of the P-3 visa are worth mentioning. According to the C.F.R., the beneficiary must participate in a cultural event that will further the understanding or development of the art form.<sup>207</sup> A petition for a professional gamer should be granted because competing in major esports competitions will allow professional gamers to develop skills, and their art form, against others of equal or greater skill.<sup>208</sup>

Additionally, under the P-3 visa requirements, these cultural events may be of a commercial nature.<sup>209</sup> As discussed in Part I of this Note, opportunities for monetization in the esports world are tremendous.<sup>210</sup> The monetization aspect is important because, as mentioned above, many visa options do not allow the beneficiary to work while in the United States.<sup>211</sup>

The time needed to complete the event, activity, or performance is not to exceed one year.<sup>212</sup> If an entire “season” is required, like in many sports leagues, the petition must argue that the “activity” is a season of competition. In a worst-case scenario, the beneficiaries may have to limit their activities to one year for the first year of competition in the United States and then try to adjust or extend their statuses.<sup>213</sup> However, on many occasions a player will just come for a single

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not argue that video-game strategy is sports strategy. Further, the petitioner could altogether avoid an argument that video-game competitions, as a whole, are forms of art.

205. These activities require the participants to perform even though the activities are competitive in nature.

206. Rapaport, *supra* note 44 (explaining the interactive nature of live-stream broadcasting of video games on platforms like Twitch: “By allowing viewers to interact with the gamers they’re watching, these sites push the viewing experience a step further. Unlike traditional sports broadcasting, it’s a two-way transaction.”).

207. 8 C.F.R. § 214.2(p)(6)(i)(B).

208. *See* Tamburro, *supra* note 6 (describing a player’s inability to train against other elite competitors because of the denial of a visa petition).

209. 8 C.F.R. § 214.2(p)(6)(i)(B) (2017).

210. *See supra* Part I.

211. *See supra* Section III(A).

212. *P-3 Artist or Entertainer Coming to be Part of a Culturally Unique Program*, USCIS, <https://www.uscis.gov/working-united-states/temporary-workers/p-3-artist-or-entertainer-coming-be-part-culturally-unique-program> (last updated July 17, 2015).

213. *See* 8 U.S.C. § 1255 (2008).

tournament lasting only a few days; this type of competition would easily comply with the rule.<sup>214</sup>

### THE “RESET” BUTTON

Accepting professional gamers under the P-3 visa would likely be a difficult decision for the USCIS to make. Given the current discord regarding immigration,<sup>215</sup> major changes to ease the immigration process for any group of people is likely to attract criticism. However, as when a game experiences lag (a “decrease in application speed”),<sup>216</sup> making the necessary corrections early to avoid major losses is important.<sup>217</sup>

If professional gamers cannot enter the United States to compete, that is not only an immigration problem, but also an economic problem. Failing to create a path into the country for foreign players who dedicate the majority of their time to compete in professional esports is likely to result in a lower talent level in major esports competitions in the United States, which could eventually lead to a decrease in major esports events in the United States.<sup>218</sup> Companies outside the United States are fighting for a bigger share of the esports market as well,<sup>219</sup> and if the United

214. See *supra* Section III(A) (discussing the Visa Waiver Program).

215. See generally Borjas, *supra* note 91 (“The first month of the Trump administration has already changed the direction of the immigration debate, with many more changes coming soon.”); *Civil Rights Challenges to Trump Refugee/Visa Order*, *supra* note 91 (summarizing litigation over executive orders from the Trump Administration regarding immigration travel bans); Barrett & Frosch, *supra* note 91; Chakraborty, *supra* note 91.

216. *What is Lag? – Definition from Techopedia*, TECHOPEDIA, <https://www.techopedia.com/definition/17182/lag-gaming> (last visited Nov. 11, 2017).

Lag is a slang term for a noticeable decrease in application speed, due to extreme network congestion or insufficient processing power. When traffic is heavier than network capacity, the network requires that a program wait before sending or receiving data.

In real-time applications (like games), lag refers to an application’s failure to respond to inputs in a timely manner. Lag is commonly used to describe a time delay between a player’s action and a game’s reaction to that input.

*Id.*

217. In the case of esports, the U.S. economy would be losing both money and an emerging market with the potential of increased growth. See Warman, *supra* note 10; see also *Global ESports Market Report: Revenues to Jump to \$463M in 2016 as US Leads the Way*, *supra* note 10. Additionally, the United States would gain (or further cement) its reputation of being unfriendly to the international gaming community.

218. See Tamburro, *supra* note 6 (describing a player’s inability to train against other elite competition because of the denial of a visa petition).

219. In 2015, Swedish media company Modern Times acquired a majority stake in ESL, the oldest esports company, for \$87 million. Lee & Stewart, *supra* note 46.

Russian investors have committed \$100 million. Canadian motion picture exhibitor Cineplex is spending \$15 million to acquire an eSports company and create a new gaming league that will take place in its theatres, and the first dedicated eSports venue has been opened in the UK in partnership with a cinema chain.

States wants to participate in this market it needs to act quickly. For the purpose of inviting a growing industry to establish a foundation in the United States, the visa issues plaguing esports professionals must be given attention and respect.

The P-3 visa may not be a perfect fit for professional video gamers. The language of the statute suggests that the P-3 visa was not made to provide a path to the United States for professional gamers, but neither does the language of any other visa option.<sup>220</sup> However, professional video gamers want to participate in major tournaments and competitions held in the United States,<sup>221</sup> and U.S. tournaments should want the best players to participate. These events boost the economy and bring a quickly growing, worldwide market to the country.<sup>222</sup> The fact that prominent esports players do not clearly qualify for *any* visa to come participate in these major competitions should be addressed sooner rather than later. The temporary solution for professional gamers is the P-3 visa, but in the long-term, lobbying for a new visa category specific to esports is the best solution.

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*Id.*

220. See *supra* Parts II, III, & IV.

221. See Paul Tassi, *The U.S. Now Recognizes eSports Players as Professional Athletes*, FORBES (July 14, 2013, 11:27 AM), <https://www.forbes.com/sites/insertcoin/2013/07/14/the-u-s-now-recognizes-esports-players-as-professional-athletes/#63b1dd343ac9> (“This was a lengthy process; we had a lot of people fighting for this . . .”).

222. 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/> (“The global eSports economy continues to surge forward, with revenue expected to hit \$463 million this year—a 43% jump from 2015. The U.S. is leading this global market with a 38% share of revenues . . .”).