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COMMENT

THE GROWING ENTERTAINMENT AND SPORTS INDUSTRIES INTERNATIONALLY: NEW IMMIGRATION LAWS PROVIDE FOR FOREIGN ATHLETES AND ENTERTAINERS

I. INTRODUCTION

The immigration laws of the United States have undergone a dramatic change in order to allow for the temporary entrance of athletes and entertainers to perform in the United States. In the past there were no laws that specifically applied to athletes and entertainers. This may seem surprising given the fact that many of the world's most recognized athletes and entertainers come from outside of the United States. As Congress started to recognize the increase in global competition within the sports industry, as well as the expansion of the entertainment market at the international level, they sought to provide a set of guidelines and legal standards for the guidance of foreign athletes and entertainers in order to accommodate the future of these international markets. The Immigration Act of 1990¹ with its new O and P nonimmigrant visa categories was Congress' answer.² These new categories substantially improved what had previously been an immigration system which did not expressly provide for athletes and entertainers. These categories were welcomed within the sports and entertainment industries but were not without their problems. Congress later amended these categories to address many of the flaws that were in dispute. As a result, today there are a set of comprehensive laws governing the entrance of foreign athletes and entertainers that allow such

1. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (hereinafter Act).

2. 8 U.S.C. § 1101(a)(15)(O) & (P) (Supp. II 1990).

performers to enter the United States.³

This article will explain how the immigration laws, as they pertained to athletes and entertainers, were prior to the 1990 Act. The new 1990 Act and the brand new categories covering athletes and entertainers will be explored. Problems and complaints surrounding the new categories and the amendments to the 1990 Act that sought to address such problems will be discussed. The new O and P categories as they currently exist will be laid out, and the standards that a practitioner should follow for qualifying athletes or entertainers under these categories will be explained. Finally, this author will give what he believes are still problems with the current law as it relates to athletes and entertainers, and as to what, in his opinion, should or could be done to alleviate such problems.⁴

II. THE REGULATION OF NONIMMIGRANT ALIENS AND ENTERTAINERS BEFORE THE IMMIGRATION ACT OF 1990

Before passage of the Immigration Act of 1990 nonimmigrant athletes and entertainers needed to qualify for admission to the United States under the H nonimmigrant visa category.⁵ At the date scheduled for the implementation of the Act of 1990, the H category provisions were to no longer apply to athletes and enter-

3. The term "performers" as used in this article will include both athletes and entertainers.

4. This article will focus on athletes and entertainers seeking entrance into the United States on a temporary basis as nonimmigrants, meaning that he or she is seeking to enter only for the purposes of playing or performing and with no intention of permanently residing in the United States. Performers who wish to reside permanently in the United States could apply to be lawful permanent residents under the Immigration and Nationality Act §203(b)(1)(A) (8 U.S.C. §§ 1101-1524 (1992)) (hereinafter INA) "Priority workers" category as "Aliens with extraordinary ability." Such performers could also seek entry for permanent status under INA § 203(b)(2) as "aliens of exceptional ability." These immigration visas for lawful permanent residents are available to aliens coming into the country or for nonimmigrant temporary aliens who have applied for adjustment of status under INA § 245 for such a permanent resident category.

5. The pre-1990 H category as relevant to athletes and entertainers read:

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of *distinguished merit and ability* and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability . . . or (ii) who is coming to the United States . . . (b) to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

8 U.S.C. § 1101(a)(15)(H) (Supp. I 1989) (Italicization and revision provided by this author as relevant to athletes and entertainers).

tainers.⁶ The H category itself was substantially changed by the Act. However, due to governmental action delaying the implementation of the O and P categories, the provisions under a revised H category applied until April 1, 1992, to those applicants who would be covered by the newly created categories.⁷ Therefore, from the time of the implementation of the new Act until April 1, 1992, foreign athletes and entertainers were admitted as "H-1B" aliens of distinguished merit and ability.⁸

The H category can be divided into two subcategories as far as their applicability to athletes and entertainers are concerned. Athletes and entertainers could qualify under the H-1 category as persons of distinguished merit and ability and/or under the H-2 category as temporary workers coming to perform services for which qualified American workers are not available.⁹ It is important to note that the H category was not just limited to athletes and entertainers. This category applied to all nonimmigrant aliens who could fit in with the "distinguished merit and ability" standard, or as workers seeking positions for which there were no qualified American workers available for. Before the passage of the Act, athletes and entertainers had no statutory provisions that specifically applied to them.

A. *The H-1 Category as Providing for Performers of Distinguished Merit and Ability*

Before the 1990 Act, most athletes and entertainers sought to gain admission to play or perform in the United States under the H-1 category. The H-1 category allowed in aliens who were of "distinguished merit and ability" that were coming to the United States "to perform services of an exceptional nature requiring such merit and ability."¹⁰ The meaning of distinguished merit has been interpreted as meaning a high level of achievement shown by "prominence" in the performer's field, as demonstrated by sustained national or international acclaim.¹¹ The requirements for merit and achievement were played out through the evaluation of

6. Peters, *Much Ado About Anything?: The Effect of the Immigration Act of 1990 and Subsequent Amendments on Nonimmigrant Alien Artists and Entertainers*, 38 WAYNE L. REV. 1661, 1663 (1992).

7. *Id.* The delaying legislation was the Armed Forces Immigration Act of 1991, Pub. L. No. 102-110 § 3.

8. See *infra* notes 18-21 and accompanying discussion.

9. 8 U.S.C. § 1101(a)(15)(H) (Supp. I 1989).

10. 8 U.S.C. § 1101(a)(15)(H)(i) (Supp. I 1989).

11. 55 Fed. Reg. 2,606 (1990). See also Peters, *supra* note 6, at 1664.

many factors. Often the Immigration and Naturalization Service (INS), in judging applicants under the H-1 category, would look at whether the athlete or entertainer had or would perform as a star, the performer's salary, reviews and overall reputation.¹²

The H-1 category was much more popular with athletes and entertainers than the H-2 category, since the H-1 category's determination of admission was based on the performer's record of achievement. The H-2 category, which requires that there be an absence of Americans who were qualified to perform like services, was harder to prove and utilize for performers than the H-1 category which simply required a showing of achievement.

B. The H-2 Category as Providing for the Entrance of Performers for Positions Where no United States Workers can be Found

The H-2 category was another category that was available to nonimmigrant athletes and entertainers prior to the 1990 Act. This category was not as popular with performers as the H-1 category and, thus, was rarely used. This category was often deemed as an alternate for those performers who did not qualify as possessing the requisite "distinguished merit and ability" under the H-1 category.¹³ The H-2 category as it is applicable to performers generally provided visas for aliens who were coming to the United States to perform temporary services or labor if unemployed persons capable of performing such services or labor could not be found in the United States.¹⁴ The requirement that there be no unemployed United States workers who could perform the same service as the performer seeking entry served to create an additional burden on the employer since the employer was required to go through a temporary labor certification process.¹⁵ Before the performer could obtain a visa, the employer had to apply for and obtain a temporary certification from the United States Department of Labor. In order to receive the temporary labor certification the employer had to prove that there were insufficient workers in the United States available, willing, and qualified to perform the job that the nonimmigrant alien was coming to the country to perform, and that the wages and working conditions of workers in the United States

12. *Id.*

13. *Id.* at 1665.

14. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (Supp. I 1989).

15. 20 C.F.R. § 621 (1984).

would not be disturbed by allowing the alien to perform.¹⁶ Once the employer secured a temporary certification from the Department of Labor he could then apply to have the nonimmigrant alien admitted under the H-2 category.

Compared to the H-1 category, the H-2 category and its temporary labor certification requirements were very time consuming, difficult and burdensome. As can be imagined, most performers sought to gain entry through the H-1 category and the H-2 category was usually accepted reluctantly as an undesired back up category for those that could not fulfill the requirements under the H-1 category.

C. The H-1B Category as a Temporary Substitute for Performers Until the Implementation of the O and P Categories

Relevant in this section on immigration categories which affected athletes and entertainers prior to the implementation of the O and P categories is the H-1B category. Due to legislative delays in the implementation of the O and P categories¹⁷ (which will be discussed in the next section), athletes and entertainers sought to enter under a new H-1B category from the time of the Immigration Act of 1990 until the implementation of the new O and P categories in April 1, 1992.¹⁸

The new H-1B category got rid of the "distinguished merit and ability" provision in the old H-1 category. Congress also limited the new section H-1B category to aliens other than those qualified under the O and P nonimmigrant categories who are engaged in a "specialty occupation."¹⁹ This created a problem since the newer H category under the 1990 Act replaced the old H category used by performers for a very long time, and now the new H-1B category was not to apply to performers qualified under the O and P categories. Since the new O and P categories were not in effect at the time of the transition in the H categories, this left no real applicable provision for performers to qualify for in entry into the United States. Thus, there was a sort of a void in the Act for athletes and entertainers. Congress recognized this and through legis-

16. *Id.*

17. *See, infra* notes 26-27 and accompanying discussion.

18. 8 U.S.C. § 1101(H)(i)(b) (Supp. II 1990). This section provided for the entry of: (H) an alien (i) . . . (b) who is coming temporarily to the United States to perform services (other than services described in . . . subparagraph (O) and (P) in a specialty occupation. *Id.* (revised by this author).

19. *Id.* *See also* Carp & Goldman, *Key Entertainment and Sports Law Provisions in the New Immigration Law*, 9 ENTERTAINMENT AND SPORTS LAWYER 9 (Spring 1991).

lation provided that the "former" H category applied until April 1, 1992, to those applicants who would be covered by the newly created O and P categories.²⁰ Therefore, the former H category prior to the 1990 Act still applied to foreign athletes and entertainers until the implementation of the new O and P categories in April 1992. But during this time the aliens were classified as entering under the "H-1B" category even though the standards for them coming in were according to the prior H category requirements of "distinguished merit and ability."²¹

The H-1, H-2 and H-1B categories are no longer applicable for the entry of nonimmigrant athletes and entertainers. As of April 1, 1992, artists, entertainers, athletes and all workers in the motion picture, television and music industries no longer qualified for any of the H category nonimmigrant visa classifications.²²

For many years the H category served to allow extraordinary athletes and entertainers to enter the United States on a temporary basis. Since the H category is no longer applicable to athletes and entertainers seeking to enter the United States there is no need to dwell on the elements such as the "distinguished merit" or "ability" requirements in this category. There are a couple of relevant characteristics of the H category which should be taken into consideration before going on to a discussion about the newer and current O and P categories. First of all under the H category an entertainer or athlete had to be unique and recognized. Thus, any ordinary average performer may not have met the standards required in this category. This attribute of the H category will carry over somewhat into the new O and P categories as there are still requirements that performers be internationally recognized and play an integral role in whatever performance or event the alien performer seeks to participate in the United States. Another factor that should be recognized in the H category is that there was no special recognition of athletes and entertainers. There is no mention of the words "athletes," "entertainers," "performers," "movie stars," etc.. in the H category at all. Yet foreign athletes and entertainers used this category as a temporary source of entry into the United States anyway. They mainly tried to and did fit in with the "distinguished merit and ability" provision as a means of entry.²³

20. Peters, *supra* note 6, at 1663. The legislation was the Armed Forces Immigration Adjustment Act of 1991, *supra* note 7, at § 3.

21. Kelley, *New O and P Nonimmigrant Visa Categories: A Lesson in Compromise*, 16 COLUMBIA-VLA JOURNAL OF LAW & THE ARTS 505, 516 (1992).

22. See *supra* note 7 and accompanying discussion.

23. See *supra* note 10 and accompanying discussion.

III. THE NEW O AND P CATEGORIES AND THEIR UNIQUE STANDARDS FOR ATHLETES AND ENTERTAINERS

A. Introduction

To gain a better understanding of the current laws under the newly created O and P categories, it is important to recognize the legislative backgrounds and history leading up to these categories. On November 29, 1990, President George Bush signed into law the Immigration Act of 1990.²⁴ The Act provided the most sweeping change to immigration policy since 1952 when the Immigration and Nationality Act was passed. The purpose of the 1990 Act was to revise the Immigration and Nationality Act in order to bring it up to date with the current issues surrounding the immigration system. As was discussed in the previous section, the Act significantly changed the H category as it pertained to athletes and entertainers. The Act essentially abolished the H category's applicability to performers and in its place established the creation of two new nonimmigrant categories, the O and P categories.

The O and P categories initially created little debate but soon became some of the most controversial provisions in the Act.²⁵ Some of the controversies will be discussed in further detail in the sections covering the particular categories. Due to the controversy surrounding the O and P categories Congress enacted legislation delaying the implementation of these categories for six months.²⁶ As a result, the implementation of the O and P categories which were to go in effect on October 1, 1991, did not go in effect until April 1, 1992. During this time of delay the Act was amended to address the many disputes surrounding these categories, and these revisions were passed into law on December 12, 1991, when President Bush signed the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.²⁷ With the amendments we now have the O and P categories as they currently exist in immigration law.

In the sections covering the O and P categories this article will explain how the categories originally came out, the problems within such categories and the subsequent amendments to these

24. Pub. L. No. 101-649, 104 Stat. 4978 (1990). This Act amended the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 and has been subsequently amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991).

25. Peters, *supra* note 6, at 1662.

26. Armed Forces Immigration Adjustment Act of 1991, *supra* note 7, at § 3.

27. *Supra* note 24.

categories. The current law of these categories as they apply to athletes and entertainers and the standards required to qualify for such categories will then be explained.

B. The O Category as Allowing the Entrance of Performers of Extraordinary Ability or Achievement

1. The O Category as Originally Written

The Act's nonimmigrant O visa category covers three types of aliens.²⁸ The first, or O-1, category applies to those athletes or artists that can demonstrate an "extraordinary ability" in their field as demonstrated by "sustained national or international acclaim."²⁹ And "with regard to motion picture and television productions" the performer must demonstrate a "record of extraordinary achievement" that has been extensively documented.³⁰ The Attorney General was also required to determine if the performer's

28. The original O category as originally written provides a nonimmigrant visa for:
(O) an alien who -

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television production a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability *but only if the Attorney General determines that the alien's entry into the United States will substantially benefit prospectively the United States*; or

(ii) (I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance

(III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant *principal photography* will take place both inside and outside of the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning;
or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien.

8 U.S.C. § 1101(a)(15)(O) (Supp. II 1990). (Italicization by this author reflects portions of this category which were subsequently changed by amendments in the Miscellaneous and Technical and Naturalization Amendments of 1991, *supra* note 24).

Note for purpose of discussion this article will address the (O)(i) as the O-1 category, (O)(ii) as the O-2 category, etc..

29. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. II 1990).

30. *Id.*

entry into the United States would “substantially benefit prospectively the United States.”³¹

The O-2 category applies to those aliens who seek to enter the United States temporarily and solely for the purpose of “accompanying and assisting in the artistic or athletic performance by an alien” who is admitted under the O-1 category for a specific event or events.³² The O-2 alien must be an “integral part of such actual performance”³³ and have “critical skills and experience” with the O-1 performer which “are not of a general nature and which cannot be performed by other individuals.”³⁴ Where a motion picture or television production is involved, then the O-2 accompanying alien must have skills and experience with the O-1 performer which are not general in nature, and which are “critical” based either on a “pre-existing longstanding working relationship” or by the fact that the “continuing participation” of the O-2 alien is “essential to the successful completion of the production.”³⁵ The O-2 alien must also prove that he has a foreign residence which he has no intent of abandoning.³⁶ These requirements for accompanying aliens are more stringent than the previous H visa requirements for such aliens.³⁷ These stricter requirements are a reflection of union concerns over the prospect of O-2 accompanying aliens holding jobs that could be effectively held by United States workers.³⁸ The O-3 alien category simply applies to the alien spouse and children of O-1 or O-2 aliens.³⁹

2. Problems with the O Category Leading to Subsequent Amendments

One of the major revisions that the Act provided was that it changed the basic criteria for admission from “distinguished merit and ability”⁴⁰ in the older H category to the requirement that the alien possess “extraordinary ability” in the arts or athletics.⁴¹ The

31. *Id.*

32. 8 U.S.C. § 1101(a)(15)(O)(ii)(I) (Supp. II 1990).

33. 8 U.S.C. § 1101(a)(15)(O)(ii)(II) (Supp. II 1990).

34. 8 U.S.C. § 1101(a)(15)(O)(ii)(III)(a) (Supp. II 1990).

35. 8 U.S.C. § 1101(a)(15)(O)(ii)(III)(b) (Supp. II 1990).

36. 8 U.S.C. § 1101(a)(15)(O)(ii)(IV) (Supp. II 1990).

37. Kelley, *supra* note 21, at 518. The H category required an accompanying alien to be essential to a successful performance of the principal alien, but did not require the accompanying alien to be an integral part of the performance. *Id.*

38. Kelley, *supra* note 21, at 517.

39. 8 U.S.C. § 1101(a)(15)(O)(iii) (Supp. II 1990).

40. 8 U.S.C. § 1101(a)(15)(H)(i) (Supp. I 1989).

41. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. II 1990).

problem with the new "extraordinary ability" requirement is that the Act did not provide a definition for this new term.⁴² The Act also provided that those aliens seeking entry to work on a movie picture or television set show "extraordinary achievement" as demonstrated by extensive documentation.⁴³ Proposed regulations by the INS for the 1990 version O category stated that aliens of "extraordinary ability" were under a higher standard than the O-1 category for aliens of "extraordinary achievement" in the motion pictures and television industry.⁴⁴ Under the proposed rules "extraordinary ability" required sustained national or international acclaim while extraordinary achievement could be a one-time extraordinary accomplishment.⁴⁵ Under the proposed regulations, INS, for some reason, distinguished performers in the movie and television business from all other aliens in that a one-time achievement in film or television was deemed to more substantially prove an alien's ability than a one time achievement in the other O-1 category areas of athletics and entertainment.⁴⁶

Another controversy with the original O category was that many arts organizations objected to the documentation requirement for O-1 artists of "extraordinary ability."⁴⁷ They argued that the requirements were too stringent and were ones that could only be met by the most prominent of international artists.⁴⁸ Therefore artists that were very talented, but not commercially visible, would be excluded.⁴⁹

Another area of debate in the original Act as it applied to O-1 performers was the requirement that the alien's admission "substantially benefit" the United States.⁵⁰ The Attorney General was required to make this determination which lead to extra paperwork. How an athlete or entertainer seeking to enter the United States temporarily can substantially benefit the United States in the short time he or she is here is questionable.

A final problem with the O category is that the new Act required the INS to consult with "peer groups" in the aliens area of

42. See generally INA § 101(a)(46).

43. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. II 1990).

44. 56 Fed. Reg. 31,555 (1991).

45. *Id.* See also Kelley, *supra* note 21, at 518.

46. Kelley, *supra* note 20, at 519.

47. *Id.* at 520.

48. *Id.*

49. *Id.*

50. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. II 1990). This section was entirely deleted from the Act by subsequent amendments. See *infra* note 56, and accompanying discussion.

expertise before ruling on an O-1 category visa application.⁵¹ For aliens in the motion picture and television industry, not only must the INS consult with the appropriate union representing the alien's occupational peers but they must also consult with a management organization in the area of the alien's ability.⁵² Before the Act, the INS only consulted with such groups in questionable cases.

3. Amendments to the O Category

Amendments were made by Congress to address some of the problems in the original O category. Most of the O category as it was originally passed stayed intact. These amendments were passed into law on December 12, 1991,⁵³ and were implemented in effect on April 1, 1992, under a legislative Act which allowed time for the revision of the O and P categories.⁵⁴

The amendments addressed the arts organizations concerns by relaxing the "extraordinary ability" requirement for O-1 aliens in the arts to one of "distinction." This change was not written into the O category explicitly but is explained in another portion of the Act.⁵⁵ This change substantially eased the previously stringent standards that artists were required to prove and allowed artists to enter the United States based more upon proven talent rather than upon pure commerciality.

The amendments also completely eliminated the requirement that the Attorney General find that the admission of O-1 performers substantially benefit the United States.⁵⁶ This served to eliminate a significant amount of paperwork within the immigration system, and it was the most drastic cut in the O-1 category as it was literally written in the original Act of 1990.

The amendments also served to expedite the consultation procedure. Aliens seeking entry are now required by statute to include advisory opinions from an appropriate labor and/or management

51. 8 U.S.C. § 1184 (Supp. II 1990).

52. *Id.* See also YALE-LOEHR, UNDERSTANDING THE IMMIGRATION ACT OF 1990, 7-4 (1990).

53. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, *supra* note 24.

54. Armed Forces Immigration Adjustment Act of 1991, *supra* note 7, at § 3.

55. INA § 101(a)(46). This section states that "The term 'extraordinary ability' means, for purposes of § 101(a)(15)(O)(i), in the case of arts, distinction." *Id.*

56. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, *supra* note 24, at § 205(b).

organization in their field with their applications.⁵⁷ This saved a lot of time since the INS no longer had to consult with such organizations, and it was up to the applicant to do so. While this may have resulted in extra duties for alien performers, it was well received given the fact that such aliens could now choose and deal with the appropriate labor or management organization of their choice. If the advisory opinions are not included then the applications were to be forwarded by the Attorney General to the appropriate consulting organization to give it an opportunity to render such an opinion.⁵⁸ If the alien seeking entry establishes that no appropriate organization exists to render an opinion then a decision on the alien's application must be made without the otherwise necessary consultation.⁵⁹

4. The Current O Category and Requirements

The current status of the O category provides a nonimmigrant visa for:

(O) an alien who-

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, or with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant

57. *Id.* § 204. This is now codified in INA § 214(c). The consulting organization is then given fifteen days to render an opinion and a decision must be made on the application within fourteen days of the receipt of the consulting organization's report. *Id.*

58. *Id.* See also Peters, *supra* note 6, at 1672.

59. *Id.*

production (including pre-and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien.⁶⁰

The O category is to be used when a temporary work permit is desired for an alien who is an athlete or entertainer. Entertainers include above-the-line personnel and below-the-line personnel.⁶¹

Extraordinary ability in athletics under the O-1 category has been determined to be a "level of expertise indicating that the individual is one of the small percentage who have risen to the top of the field of endeavor."⁶² In the field of the arts, extraordinary ability means "distinction" which means a high level of achievement substantially above that normally encountered.⁶³ The INS has interpreted the term to mean "prominence" and has stated that the standards for an O-1 alien of extraordinary ability in the arts are identical to the standards for an alien of extraordinary achievement in the motion picture or television industry.⁶⁴

Extraordinary achievement with respect to the motion picture and television industry is required by a showing of a "high level of accomplishment" in the industry "evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the person is recognized as outstanding, leading, or well-known in the motion picture or television field."⁶⁵

In order to establish that a position, for which the alien is seeking to come into the United States for, requires the services of an alien of extraordinary ability or achievement, the foreign athlete or entertainer must meet one of the following two criterias: (1)

60. INA § 101(a)(15)(O) (1994).

61. Glucoft, *The O and P Categories for Entertainers, Athletes, Professors, Business Persons and Persons in the Arts*, 26th Annual Immigration and Naturalization Institute, 486 PLI/Lit 297, 301 (1993). The terms "above-the-line personnel" and "below-the-line personnel" are terms of art in the entertainment industry distinguishing the key creative individuals (i.e. writers, actors and directors) from other personnel. *Id.*

62. 57 Fed. Reg. 12,179-90, 12183 (1992). These are the interim regulations published by the INS covering the O and P categories on April 9, 1992. At the time of this writing the final regulations are still pending.

63. *Id.* See INA § 101(a)(46).

64. 57 Fed. Reg. 12,180 (1992).

65. *Id.* at 12,183.

“The position or service to be performed involves an event, production, or an activity which has a distinguished reputation or involves a comparable, newly-organized event, production, or activity;” or “the services to be performed are in a lead, starring or critical role” for an organization that itself has a “distinguished reputation” of hiring extraordinary persons.⁶⁶

The standards necessary to establish an alien of extraordinary ability in athletics is that the alien must demonstrate “sustained national or international acclaim” and recognition for achievements in the field (of athletics) by providing evidence of: (1) being awarded a major internationally-recognized award; or (2) at least three of the following forms of documentation: (a) documentation of the alien being awarded nationally or internationally recognized prizes or awards for “excellence in the field of endeavor;” (b) documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by “recognized national or international experts in their fields;” (c) published material in professional publications or major media about the alien relating to the alien’s work in the field; (d) evidence of the aliens participation in judging the work of others in the same field for which classification is sought; (e) evidence that the alien has been employed in a “critical or essential capacity for organizations that have a distinguished reputation;” (f) “evidence that the alien has commanded and now commands a high salary evidenced by contracts or other evidence.”⁶⁷

The first part of the test of receiving an internationally recognized award (which the INS rules compare to a Nobel Prize) might be hard to prove. A gold medal in the Olympics might suffice. But even if the first part cannot be met, the second part requiring proof of three classifications seem quite easy for athletes at the professional level to achieve. Even if an athlete has never received an award for his particular sport it could be argued that he is outstanding in his field (just by being in or wanted by a professional team), has been essential to a professional team (by showing that the position he plays is essential to the team), and commands and has previously commanded a high salary as evidenced by prior and future contracts (which is common in the professional sports market today). Thus these standards leave much room for argument

66. *Id.* at 12, 183-84.

67. *Id.* at 12184. See also Fragomen, *The O and P Nonimmigrant Visa Categories*, 26th Annual Immigration and Naturalization Institute, 486 PLI/Lit 267, 272-274 (1993).

and are quite easy for the athlete of professional caliber and reputation to meet. On the other hand, an amateur athlete or an emerging star that has yet to make it into the big leagues will have problems qualifying under these standards. Unfortunately, this is true even though the athlete may be just as talented, or even more so, than most professional athletes in the field of his sport.

To qualify as an alien of extraordinary achievement in the motion picture or television industry or as an alien of extraordinary ability in the field of arts, the alien must be recognized as having a demonstrated record of extraordinary achievement as demonstrated by: (1) evidence that the alien has been nominated for or has received significant national or international awards "such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award" or (2) at least three of the following forms of documentation: (a) evidence that the alien has or will be in a starring or leading role in productions "which have a distinguished reputation as evidenced by reviews, advertisements, publicity releases, publications, contracts, or endorsements;" (b) "evidence that the alien has achieved national or international recognition evidenced by critical reviews, newspapers, magazines or other published materials;" (c) evidence that the alien has "performed in a lead, starring, or critical role" for organizations that have a distinguished reputation evidenced by articles in newspapers and/or publications; (d) "evidence that the alien has a record of major commercial successes as evidenced by such indicators as title, standing in the field, box office receipts, credit for original research or product development, motion picture or television ratings, and other occupational achievements in trade journals, major newspapers, or other publications;" (e) "evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies or other recognized experts" in the motion picture, television or arts field; or (f) evidence that the alien has commanded or now commands a high salary in relation to others in the field "as evidenced by contracts or other reliable evidence."⁶⁸

Like the sports industry the requirements for musicians, actors and other performers in the entertainment industry seem easy to meet for those that are established entertainers. Of course the first requirement of a significant award will not be easy to satisfy and even the best may not truly fit in with this category. After all, there are many great actors who have yet to be nominated for or

68. 57 Fed. Reg. 12,184 (1992).

receive an Academy Award.⁶⁹ But the second requirement and set of classifications are very easy to meet for someone in a starring role. The rules even provide that aliens who have performed in "critical" roles in qualified productions can qualify under these standards. Arguably a "critical" role can encompass other important parts in a production that do not necessarily meet the qualifications of a "starring" role.

The standards may not be easy to attain for other than distinguished productions. For example, trying to get in aliens to star in a "B-movie" or low-budget production may not meet with success.⁷⁰ Like the requirements for athletes, aliens seeking entry under the motion picture and television category need to have some recognition and a distinguished reputation. Such a reputation is often measured by the previous movies the alien has performed in as well as the parts the alien played in such movies. Once again one who is an emerging actor and has starred in low-budget productions may not meet such reputational standards.

For O-1 and O-2 aliens of extraordinary ability (or accompanying such aliens) in the arts or athletics, consultation must come from a peer group with expertise in the specific field involved.⁷¹ The advisory opinion provided by the peer group must describe the alien's ability and achievements in their field, the nature of the duties to be performed, as well as whether the position requires the services of an alien of extraordinary ability.⁷²

For O-1 and O-2 aliens of extraordinary achievement (or accompanying such aliens) in the motion picture or television industry, consultation must come from both a labor organization and a management organization.⁷³ Consultation has to be made with the appropriate union representing the alien's occupational peers, and a management organization in the area of the alien's ability.⁷⁴ Both

69. John Barrymore and Peter Lorre were never nominated, and Richard Burton, Cary Grant and Greta Garbo never won.

70. Then again how many low-budget productions necessarily need to or even want to seek the entry of foreigners for starring roles.

71. INA § 214(c)(6)(A)(i) & (ii). A peer group is defined as a "group or organization which is comprised of practitioners of the alien's occupation who are of similar standing with the alien and which is governed by such practitioners." And "if there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, such a representative may be considered the appropriate peer group for purposes of consultation." 57 Fed. Reg. 12,183 (1992).

72. *Id.* at 12,185. The written opinion must contain a statement of facts which support the conclusion reached in the opinion.

73. INA § 214(c)(3)(A) & (B).

74. *Id.* Such organizations that provide such consultations among others are the Alliance of Motion Picture and Television Producers, Screen Actors Guild, Actors Equity Asso-

organizations must describe the alien's achievement and whether the position in the United States requires the services of an alien of extraordinary achievement.

Overall, while the O nonimmigrant categories may require some time-consuming paperwork and consultation requirements, they are very effective for the admittance of established athletes and entertainers. These categories allow greater flexibility in the sports and entertainment world to explore what talent there is internationally. O category visas may be issued for a period "as the Attorney General may specify in order to provide for the event (or events) for which the nonimmigrant is admitted" not to exceed a period of three years.⁷⁵

C. The P Category as Providing for Performers who are Internationally Recognized, in a Cultural Exchange Program or who are Performing under a Program that is Culturally Unique

1. The P Category as Originally Written

The P category, as originally written, covered athletes and entertainers and was divided into three main areas.⁷⁶ It should be

ciation, American Federation of Television and Radio Artists, Writers Guild of America, Directors Guild of America, International Brotherhood of Electrical Workers, International Alliance of Theatrical Stage Employees, Costume Directors Guild, Society of Motion Picture and Television Art Directors, Affiliated Property Craftpersons, International Sound Cine Technicians, Motion Picture and Videotape Editors Guild, the American Federation of Musicians and the American Guild of Musical Artists. These organizations, as well as the individual directors in charge of these organizations can be found in Glucoft, *supra* note 61, at 321-26.

75. INA § 214(a)(2)(A) & 57 Fed. Reg. 12186 (1992).

76. The P category as it was originally written provided a nonimmigrant visa for: P an alien having a foreign residence which the alien has no intention of abandoning who-

(i)(I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, or performs as part of an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time, and has had a sustained and substantial relationship with that group over a period of at least one year and provides functions integral to the performance of the group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an athlete or entertainer with respect to a specific athletic competition or performance;

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization in one or more foreign states and which pro-

noted that all of the P categories have the requirement that the alien seeking entry have a foreign residence which the alien has no intention of abandoning.⁷⁷ The P-1 category applies to aliens who perform as athletes either individually or on a team that is recognized internationally.⁷⁸ This category also applies to those aliens that perform as part of an entertainment group that has been recognized internationally as being outstanding for a substantial period of time.⁷⁹ The alien must have had a sustained and substantial relationship with the entertainment group for over a period of at least one year and his function to the group must be integral to the group's performance.⁸⁰ The athlete or entertainer must seek to enter the United States temporarily and solely for the purpose of performing as such an athlete or entertainer in a specific athletic competition or entertainment performance.⁸¹ Consultation with a labor organization is required before a P-1 petition is approved.⁸²

Note that under the P-1 category athletes may be admitted into the United States on an individual basis but entertainers may not. Under this category, entertainers must be a part of a group. Therefore, individual entertainers must, if they wish to enter the United States, seek to qualify under the P-2, P-3, or one of the O categories.⁸³

The P-2 category basically provides for the cultural exchange of artists and entertainers. This category applies to artists and entertainers both individually or as part of a group and allows such performers entry into the United States under a reciprocal exchange program between a United States organization and an international organization which provides for such temporary ex-

vides for the temporary exchange of artists and entertainers, or groups of artists and entertainers, *between the United States and the foreign states involved*;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artists or entertainer or with such a group under a program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien.

8 U.S.C. § 1101(a)(15) (P) (1990) (Italicization by this author reflects portions of this category which were changed by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, *supra* note 24).

77. *Id.*

78. 8 U.S.C. § 1101(a)(15)(P)(i)(I) (Supp. II 1990).

79. *Id.*

80. *Id.*

81. 8 U.S.C. § 1101(a)(15)(P)(i)(II) (Supp. II 1990).

82. 8 U.S.C. § 1184(c)(4)(B) (Supp. II 1990).

83. Carp & Goldman, *supra* note 19, at 12.

change of artists and entertainers.⁸⁴

The P-3 category applies to artist or entertainers both individually or as a part of a group for the purpose of performing in a program that is "culturally unique."⁸⁵ A "culturally unique" program was defined under the INS proposed rules following the passage of the 1990 Act as a "style of artistic expression which is peculiar or unique to a society or class of a country."⁸⁶ This definition provided by the INS still may not give practitioners a clear definition as to what "culturally unique" means, but there is room to argue. The P-4 category basically provides for the entrance of all spouses and children of the other P category aliens who are accompanying or following to join such aliens.⁸⁷

Before moving on to the amendments it must be noted that all of the P categories required a labor certification requirement which will be discussed in more detail in the section covering the current laws for the P category. The P-1 and P-3 categories were to have had a numerical cap of 25,000 annually on the number of aliens immigrating under that category.⁸⁸ The Act also prohibited aliens admitted under a P-2 or P-3 visa from being readmitted for another event under this category until they had remained outside of the United States for at least three months.⁸⁹

2. Problems with the P Category Leading to Subsequent Amendments

Many organizations objected to and complained about the 25,000 cap on the P-1 and P-3 categories. There was a fear that this numerical restriction in the United States might lead to a retaliation from countries who could themselves limit American performers from entering their countries. Arts advocacy groups asserted that in 1988, seventy-eight thousand nonimmigrant artists visiting the United States would have fallen under this restriction had it been in effect at the time.⁹⁰ The Act did not define what degree of international recognition was required for performers under the P-1 category. In some countries, it may be hard to achieve international recognition when media coverage or economic

84. 8 U.S.C. § 1101(a)(15)(P)(ii)(I) & (II) (Supp. II 1990).

85. 8 U.S.C. § 1101(a)(15)(P)(iii)(I) & (II) (Supp. II 1990).

86. 56 Fed. Reg. 31,572 (1991). See also Kelley, *supra* note 21, at 524.

87. 8 U.S.C. § 1101(a)(15)(P)(iv) (Supp. II 1990).

88. 8 U.S.C. § 1184(g)(1)(C) (Supp. II 1990).

89. 8 U.S.C. § 1184 (Supp. II 1990). This provision could have been waived in the case of undue hardship. *Id.*

90. Parachini, *Arts Outcry over Tough Visa Rules*, L.A. TIMES (May 11, 1991).

reasons do not allow a reputation to flourish internationally. There were complaints about the requirement that all P-1 visa applicants coming in as part of a group prove that they had been continuously associated with the group for at least one year. One of the main arguments against this provision was that it did not provide for illness or other exigent circumstances from within a group.⁹¹ There were also several complaints about the three month out of country rule requiring aliens under the P-2 and P-3 nonimmigrant categories to remain outside the United States for at least three months before re-entering the United States.

3. Amendments to the P Category

The first major change to the P category was that the 25,000 visa cap was repealed for the P-1 and P-3 categories.⁹² Under this amendment, the General Accounting Office (GAO) is required to conduct a two year study to determine the actual number of non-immigrants who seek admission under the O and P categories, how these aliens affect the American labor force, as well as the ability of American performers to obtain similar visas abroad.⁹³ Another change was to the international recognition requirement for P-1 aliens. In the case of an entertainment group that is recognized nationally as being outstanding, the Attorney General may, in certain circumstances, waive the international recognition requirement for the P-1 entertainer.⁹⁴ Congress amended this requirement upon realizing that it may be difficult for entertainers to receive the international recognition required to muster the P-1 international recognition requirement.⁹⁵

91. A main objector to the one year requirement was the Ringling Bros.-Barnum & Bailey Circus. They opposed the requirement because it would prohibit the substitution of performers who would have to leave the group because of injury or other family emergency. It was argued that this was not unusual in the circus industry since many of the performers engaged in "vigorous and sometimes daredevil feats." Thus the one year requirement would severely jeopardize the unusual nature of the circus industry. *Admission of O and P Nonimmigrants: Hearings Before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary House of Representatives on H.R. 3048 to Amend the Immigration and Nationality Act with Respect to the Admission of O and P Nonimmigrants*, 102ND CONG., 1st Sess. 135, 142 (October 9, 1991) (hereinafter *Hearings*) (testimony of Kenneth Feld, President and CEO, Ringling Bros.-Barnum & Bailey Circus).

92. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, *supra* note 24, at § 202(b).

93. *Id.* GAO will report their results to Congress. The final GAO report should be ready in October 1994.

94. INA §214(c)(4)(B)(ii).

95. Congress recognized that "it may be difficult for entertainment groups to demonstrate recognition in more than one country, due to such factors, for example, as limited

Congress partially amended the requirement that an alien be continuously associated with a group for at least one year. Recognizing the unique problems that circus groups face, Congress completely exempted alien circus personnel from the one year requirement altogether.⁹⁶ As for other P-1 performers, the one year requirement still applies, but it is waived for twenty-five percent of the performers in a group,⁹⁷ and there is an additional waiver whenever a replacement member is needed because of exigent circumstances.⁹⁸

The three month out of country rule for P-2 and P-3 aliens was completely eliminated. Rather than waiting three months for readmittance, aliens are now eligible for immediate readmittance.⁹⁹

The amended Act changed the literal grouping of the P-1 category drastically. Rather than having the long provision within the P-1 category defining the characteristics required for certain performers, the amended Act now subdivides the P-1 category into sections providing for either athletes or entertainment groups. The category now states the pertinent sections where the definitions and standards for an athlete or entertainment group can be found. Even though the literal wording and grouping of definitions may look different as between the pre-amended Act and the amended Act, in essence most of the terminology and meanings are the same.

4. The Current P Category and Requirements

The current status of the P category provides a nonimmigrant category for:

(P) an alien having a foreign residence which the alien has no intention of abandoning who -

(i)(a) is described in section 214(c)(4)(A) [8 U.S.C. § 1184(c)(4)(A)] (relating to athletes), or (b) is described in section 214(c)(4)(b) [8 U.S.C. § 1184(C)(4)(b)] (relating to entertainment groups);

access to the media - at home or abroad - or consequences of geography that make it difficult for entertainment groups in certain countries to establish an international reputation except through access to foreign markets." Kelley, *supra* note 21, at 529 (quoting statement made by Sen. Kennedy, 137 CONG. REC. s18,246 (1991)).

96. INA § 214(c)(4)(B)(iv).

97. INA § 214(c)(4)(B)(iii)(I).

98. INA § 214(c)(4)(B)(iii)(II).

99. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, *supra* note 24, at § 206(a). The three month rule was completely wiped out and replaced by INA § 214(a)(2)(B).

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien.¹⁰⁰

Under the current law, P-1 visas are available to (a) athletes who are coming to perform individually or on a team,¹⁰¹ or (b) entertainers coming to the United States temporarily to perform in

100. INA § 101(a)(15)- (1994). The appropriate section relevant to the P-1(a) category for athletes is INA §214(c)(4)(A) which provides:

For purposes of § 101(a)(15)(P)(i)(a), an alien is described in this subparagraph if the alien P

(i) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance; and

(ii) seeks to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition.

Id.

The appropriate section relevant to the P-1(b) category for entertainment groups is INA § 214(c)(4)(B)(i) which provides:

For purposes of § 101(a)(15)(P)(i)(b), an alien is described in this subparagraph if the alien P

(I) performs with or is an integral and essential part of the performance of an entertainment group that has (except as provided in clause (ii)) been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time.

(II) in the case of a performer or entertainer, except as provided in clause (iii), has had a sustained and substantial relationship with that group (ordinarily for at least one year) and provides functions integral to the performance of the group, and

(III) seeks to enter the United States temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance.

Id.

101. INA § 101(a)(15)(P)(i)(a) and 214(c)(4)(A)(i) & (ii).

an entertainment group.¹⁰² Both athletes and entertainers need to be internationally recognized.

Under the INS interim rules the term "internationally recognized" is defined as having a "high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinary encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country."¹⁰³ This "international recognition" requirement can be waived by the Attorney General for entertainment groups under certain circumstances.¹⁰⁴

The standards for an internationally recognized athlete or athletic team are not very stringent. As far as a team is concerned, a petition for an athletic team must be accompanied by evidence that the team as a unit has achieved international recognition in a sport.¹⁰⁵ A petition for an athlete who will compete individually or as a member of a United States team must be accompanied by evidence that the athlete has achieved international recognition in the sport based upon his or her reputation. Specifically, a petition for a P-1 athlete or athletic team must be accompanied by: (1) "a tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport," and (2) documentation of at least two of the following: (a) evidence of having significantly participated in a prior season in a major United States sports league; (b) evidence of having "participated in international competition with a national team;" (c) evidence of having played in a prior season for a United States university in intercollegiate competition; (d) a "written statement from an official of a major United States sports league" or of a "governing body" of the sport which explains how the alien or 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 the alien or team is internationally recognized;" (f) "evidence that the individual or team is ranked if the sport has international rankings;" or (g) "evidence that the alien or team has received a significant honor or award in the sport."¹⁰⁶

These standards for athletes or teams seem fairly easy. It

102. INA § 101(a)(15)(P)(i)(a) and 214(c)(4)(B)(i).

103. 57 Fed. Reg. at 12,187 (1992).

104. INA § 214(c)(4)(B)(ii).

105. 57 Fed. Reg. 12,187 (1992).

106. *Id.* Each member of a team is accorded P-1 classification based on the international reputation of the team. *Id.*

seems that if an alien fulfills the first part of the standards that there be a contract for playing the sport he or she is involved in then all of the other requirements for the second part would easily fall in place.

The standard that an alien has participated in international competition with a national team raises several unanswered questions. Does this include a Canadian player in the National Hockey League (NHL) who plays on a Canadian team, such as the Montreal Canadians? Would a Canadian playing in the NHL be considered to be playing for a national team when the NHL is based in the United States? The same questions could pertain to baseball players playing on Canadian teams. The requirement that the individual or team being ranked if the sport has international rankings also raises some questions. Does this mean that all boxers in the International Boxing Federation (IBF), World Boxing Association (WBA), or the World Boxing Council (WBC) (practically every league in boxing) are all eligible for this category if they are ranked by such organizations (no matter how low the ranking)? If such a standard was in another country, would players of the old World Football League (WFL) be eligible but players of the National Football League (NFL) not? These questions are not so very critical in determining whether an athlete will pass the standards needed for a P-1 petition given the fact that the other qualifications are somewhat easy to obtain. The only problem is that, as in the O category, the standards generally look to what team the player has played on and whether the player or team is recognized internationally. This standard does not account for most emerging young stars and players with great talent (unless such talent has come from a United States university athletic program). And it does not recognize the talented athlete who is from a country where his athletic talents are not appreciated or publicized. Someone very talented in a sport that may not be very popular from the country they are from, or where there is no league on the sport to play in, may not receive the international recognition required to pass the P-1 visa standards as they pertain to athletes.

It is relevant to note here that Congress provided that the Attorney General could waive the international recognition requirement for entertainment groups due to the fact that the geographical location of where the alien is from might hinder their chances of meeting such a standard of international recognition.¹⁰⁷ Unfor-

107. See *supra* notes 94-95, and accompanying discussion.

unately, for the athlete in such geographical locations, Congress did not provide for such a waiver in the sports field.

The standards and documentation needed to support a P-1 entertainment group is that the petition must be accompanied by: (1) Evidence that the group has been established and has regularly performed for at least one year; (2) a statement listing each member of the group and the dates for which such members have been employed by the group; (3) evidence that the group has been internationally recognized. This may be proved by the "submission of evidence of the group's nomination or receipt of significant international awards or prizes for outstanding achievement in its field" or by 3 of the following types of documentation: (a) evidence that the group has and will perform as a "starring or leading" group in productions or events which have a "distinguished reputation as evidenced by reviews, advertisements, publications, contracts or endorsements;" (b) evidence that the group has "achieved international recognition and acclaim for outstanding achievement in its field" as evidenced by reviews in major publications; (c) evidence that the group has performed and will perform services as a leading group for "organizations and establishments that have a distinguished reputation" as evidenced by publications; (d) evidence that the group has a "record of major commercial or critically acclaimed successes," as evidenced by such indicators as ratings, sales, or other achievements as reported in publications; (e) evidence that the group has achieved "significant recognition for achievements from organizations, critics, government agencies or other recognized experts in the field;" (f) evidence that the group has "commanded or now commands a high salary or other substantial remuneration for services comparable to others similarly situated in the field as evidenced by contracts or other reliable evidence."¹⁰⁸

These criteria are not that difficult for persons in a group such as a band who have been somewhat recognized. Note though that while the P-1 classifications may apply to athletes in an individual capacity the same is not true with respect to entertainers. Individual entertainers are not included in the P-1 classification. So quite obviously groups such as the Rolling Stones would have no problem meeting with this category. But what about individual performers such as Elton John or Phil Collins? Are they considered groups or individuals? Would Phil Collins be eligible under the P-1

108. 57 Fed. Reg. 12,188 (1992).

category when he goes on tour with his band Genesis, but not when he does so himself? These performers obviously need a band behind them. The question is whether such bands are considered units accorded P-1 status.

Under the P-2 category, artists and entertainers are granted visas under a reciprocal exchange program. The standards and documentation required for a P-2 alien are not related so much as to the qualifications of the alien as an artist or entertainer but rather focuses more on the exchange program itself. The petition for a P-2 visa must be accompanied by: (1) a "copy of the formal reciprocal exchange agreement" between the United States organization sponsoring the alien and the organization in a foreign country which will receive the United States entertainers; (2) statement from the sponsoring program describing the reciprocal program; (3) evidence that an appropriate labor organization in the United States was involved in negotiating or has concurred with the reciprocal exchange program, and (4) evidence that the aliens and United States entertainers subject to the reciprocal exchange agreement are "experienced artists or entertainers with comparable skills, and that the terms and conditions of employment are similar."¹⁰⁹

The exchange program requirements are fairly easy for aliens in that they basically require proof of the exchange program and then evidence that the entertainers are experienced entertainers with comparable skills. The word to note here is "comparable." Obviously you cannot exchange a trumpet player in a college marching band for the leading trumpet player in the London Philharmonic Orchestra, but anything in between might suffice.

Under the P-3 category, artists and entertainers are allowed visas if they are coming under a culturally unique program. The definition "culturally unique" has changed as compared to the INS interim regulations following the passage of the 1990 Act.¹¹⁰ Under the new regulations "culturally unique" means "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."¹¹¹ The artists or entertainer must also be coming to the United States for cultural events to further the understanding or development of his art form and the alien must be

109. *Id.* See also Fragomen, *supra* note 67, at 289-90. The exchange may be individual for individual, or group for group. *Id.*

110. See *supra* notes 85-86, and accompanying discussion.

111. 57 Fed. Reg. 12,187 (1992).

sponsored by an educational, cultural, or governmental organization serving to promote such international cultural activities.¹¹²

The P-3 classification applies to artists or entertainers individually or as a group. A petition under a P-3 visa must be accompanied by any two of the following: (1) documentation that the alien or group has performed in or was involved in "events involving the presentation of culturally unique performances for a substantial period of time;" (2) documentation that the alien or group has "achieved national or international acclaim for excellence in the field" as evidenced by publications; or (3) documentation that the alien or group has received recognition for achievements from organizations, critics or experts in the field.¹¹³ Documents required for a P-3 program are: (1) "affidavits, testimonials, or letters from recognized experts attesting to the authenticity and excellence of the alien's or the group's skills" explaining the level of recognition accorded the alien or group in the native country or other country and giving the credentials of the expert including the "basis of his or her knowledge as it pertains to the alien's or group's skill and recognition;" (2) evidence that "most of the performances will be culturally unique events sponsored by educational, cultural or governmental agencies."¹¹⁴

The P-3 category serves to allow in the performer who may not be so well known internationally but has talents in his native country which are of interest to the United States. Under the rules, these talents must reflect skills inherent to the alien's native country, thus the alien will be representing his native country's cultural forms of art and or entertainment while being in the United States.

P nonimmigrant aliens are authorized to stay for a period that the Attorney General may specify in order to provide for the competition, event, or performance for which an alien is admitted.¹¹⁵ In the case of nonimmigrants admitted as individual athletes, the period of authorized status may be for an individual period (not to exceed five years) during which the alien will perform as an athlete.¹¹⁶ This period for the individual athlete may be extended by the Attorney General for an additional period of up to five years for a total period of stay not to exceed ten years.¹¹⁷ As for other P-

112. 57 Fed. Reg. 12,188 (1992).

113. *Id.*

114. 57 Fed. Reg. 12,188-89 (1992).

115. INA § 214(a)(2)(B).

116. *Id.*

117. *Id.* See also 57 Fed. Reg. 12,189 (1992).

1, P-2 and P-3 aliens an extension of stay may be authorized in increments of one year for P-1 athletic teams, entertainment groups, aliens in reciprocal exchange programs, aliens in culturally unique programs, and their essential personnel to continue or complete the same event or activity for which they were admitted.¹¹⁸ All P category aliens and essential support personnel of these aliens require consultation from the appropriate labor organization with expertise in the specific field of athletics or entertainment involved.¹¹⁹

IV. CURRENT PROBLEMS IN THE NEW CATEGORIES

A. *Problems Currently Existing with the O Category*

When Congress amended the O category, they should have provided a clear and distinct definition for what "extraordinary ability" meant. They did provide a definition to the term "extraordinary ability" as meaning "distinction" in the case of arts.¹²⁰ Why Congress provided a definition of extraordinary ability for the arts and not for any of the other O performer categories is not known. It was probably due to pressure by many arts organizations for the lessening in the standards in the arts field.¹²¹ As a result, the INS has held that the standard of extraordinary ability in the arts are identical to the standards for an alien of extraordinary achievement in the motion picture industry (which it calls a lower standard than that for extraordinary ability). So does this mean that the extraordinary achievement standard is one of "distinction" too? The INS does not believe so as it relates to television and motion pictures. The standards for what is "extraordinary ability" and "extraordinary achievement" as related to performers results in a mass of confusion within the literal meaning of the Act as written. But the practitioner should not panic for the INS interim rules have given definitions and standards for what these terms mean and as to how they relate to artists, athletes, and per-

118. Fed. Reg. 12,189-90 (1992).

119. INA § 214(c)(6)(A)(iii). The labor organizations listed for the O entertainment category could apply to the P entertainment category as well. In the athletic field there are several labor organizations that will provide consultation. Some of these are Championship Auto Racing Teams, Association of Volleyball Professionals, World Boxing Association, National Ice Skaters Guild of America, National Football League, Major League Baseball, National Basketball Association and the National Hockey League. This list as well as the specific people to write to concerning such consultation requirement can be found in Glucoft, *supra* note 61, at 327-30.

120. INA § 101(a)(46).

121. See *infra* notes 47-49, and accompanying discussion.

formers in the movie and television industry. As a result, the new law of the Act is a combination of the literal meaning of the Act itself combined with the INS interim regulations. Together the standards for an alien performer can be figured out. Yet if Congress had provided definitions for both extraordinary ability and extraordinary achievement as they should apply to the athletics and television and motion picture industries (as they did for the arts industry), then all of the answers would have been provided within the Act itself, and life would have been a lot easier for the sports and entertainment lawyer seeking to admit a performer temporarily into the United States.

Another problem with the O category as it relates to athletics is that an athlete usually must be in a professional status in order to meet the standards necessary to get in. What this category may not allow in is the extremely talented individual who may be a young and emerging star but has yet to have the opportunity to prove himself.

B. Problems Currently Existing with the P Category

Congress has in their enactment of INA § 214(c)(4)(B)(ii) recognized that some entertainers may not have the "international recognition" required to withstand the P-1 statutory scrutiny by allowing the Attorney General to waive such an international recognition requirement for certain entertainers seeking such P-1 visas. Congress reasoned that entertainers should not be prejudiced because of geographical status and limited access to the media.¹²² Congress, for some reason did not extend such treatment to athletes. Thus, it is hard for an athlete to achieve the international recognition required in such countries where media access and international attention is limited. Why should the entertainer from such limited nations have the privilege of the international recognition requirement under their circumstances while athletes do not?

Another problem that relates to the P category is that it does not adequately provide for the entry of individual entertainers. There are two problems associated with this. First, there is no appropriate P category for an individual entertainer. Individual entertainers are not qualified for the P-1 visa because this applies only to entertainers as a group or unit. And most popular individual entertainers will not be under a reciprocal exchange program

122. See *infra* note 95, and accompanying discussion.

under the P-2 category, or be performing in a program that is culturally unique under the P-3 category. Therefore, neither of the three P categories would provide for individual entertainers from other nations. The P category also does not clarify what is necessarily an individual or a group. Is the opera singer Pavarotti considered an individual not applicable to the P-1 category or a part of a group covered under the P-1 category? Is Elton John an individual or a singer in a band or group?

C. Consultation Problems with both the O and P Categories

The amendments to the 1990 Act required that every O and P petition must be accompanied by a written advisory opinion from a relevant union or guild. Prior to the Act of 1990, the INS only consulted with the relevant union or labor organization in cases which were not clearly approvable.¹²³ In situations where the alien was clearly approvable or deniable, the INS rendered a decision independently without consulting a labor organization.

The labor consulting requirement can be a problem. Many labor organizations believe that the entry of aliens will hurt the employment of American workers in the United States. And given the fact that most performing arts unions have a low percentage of their members employed at any given time, the admission of foreigners in the entertainment field is viewed as having a substantial effect on the amount of work available to American performers.¹²⁴ For this reason, labor supporters lobbied hard for strict limitations on the admission of foreign performers during the formulation of new immigration laws.¹²⁵ With such an antagonistic view by labor organizations towards the entry of foreign performers into the United States, it may be very hard for such aliens to receive an appropriate advisory opinion from such organizations necessary to allow them entry. And even though the labor organization consultation requirements are to be advisory in nature and not binding on the INS, a negative consultation will most likely result in a denial of a visa petition.¹²⁶ Therefore, labor organizations have a lot of power in deciding who can be eligible under the O and P nonimmigrant categories. Some arts and labor organizations have even made agreements with labor organizations abroad that give them greater power in deciding what performers will be allowed into

123. Glucoft, *supra* note 61, at 315.

124. Peters, *supra* note 6, at 1676.

125. *Id.* at 1676.

126. Glucoft, *supra* note 61, at 318.

their country.¹²⁷ This may lead to prejudicial and or discriminatory recommendations which may play an important role on whether an alien is allowed entry.

V. RECOMMENDATIONS TO THE CURRENT LAWS REGARDING THE O AND P CATEGORIES

A. *Changes that Should be made to the O Category*

Congress should provide concise definitions for “extraordinary achievement” and “extraordinary ability” within the Act itself. The INS rules do provide definitions, yet they might not reflect the true congressional intent and can be rather confusing in determining the degree of proof under these standards.¹²⁸ Congress should explain what these terms mean as well as the standards of proof required by them. In this way, the practitioner will not have to read into the Act itself and into the INS regulations as they come out and can be informed as to the statutory requirements needed for proof in the O category. It would be assumed that Congress had some purpose in mind when they used the different terms “extraordinary ability” for one category and “extraordinary achievement” for another. Congress now needs to let the immigration field know exactly what they intended by this differing terminology.

The O category should be revised so as to accommodate very talented athletes who are too young to establish themselves as distinguishable athletes and professionals but have the talent to eventually reach such a level. The O category standards for athletes, whether through the Act itself or by INS regulations, should allow expert testimony as to a young athlete’s ability and his potential to be a professional or star player. In this way a foreigner will not have to go through joining and playing in a professional league in his own country before he can be admitted to come and play in the United States. This would be very practical because, after all, many international countries do not have professional sports franchises that participate in certain sports that the United States does. Under this recommendation, a star football player from a country where there is no professional football league, will have the opportunity to play in the United States. Under the current stan-

127. Peters, *supra* note 6, at 1675. Such an agreement exists between the American Actors’ Equity and British Equity which provides for each organization the opportunity to approve or veto the admission of individuals belonging to the other organization who seek to enter their country to perform. *Id.*

128. 57 Fed. Reg. 12,183 (1992).

dards, such an athlete may not qualify for entrance just based on his capabilities alone. If the O category standards as they pertained to athletes serve to accept athletes based more on talent rather than strictly on recognition then foreigners seeking to play sports in the United States will not necessarily have to make it in the "big-time" within their own country before they can come and play in the United States.

B. Changes that Should be made to the P Category

Congress should amend the statutory requirements to allow for a waiver of the "international recognition" requirement for athletes from countries where such recognition is limited internationally due to factors such as geography and limited access to the media. Such circumstances have been recognized as they pertain to entertainers¹²⁹ and should apply to athletes as well.¹³⁰

The P-1 category should include individual entertainers. Individuals who are internationally recognized should be allowed in the United States to perform just as any group that is internationally recognized is allowed to enter the United States. Congress provided that individual athletes were allowed under the P-1 provisions, and they should provide for individual entertainers as well. Under the current P-1 regulations, entertainers such as Elton John will probably have to prove and or claim that they are performing with a group rather than as an individual. Congress should amend the P-1 category to include individual entertainers, or they should provide a clarification of what is the difference between individuals and groups for P-1 entertainment purposes. This will provide at least some guidance as to where an entertainer falls in the P-1 category and as to what an entertainer should argue for in obtaining such a P-1 visa.

C. Changes that Should be made to the Consultation Requirements in the O and P Categories

The labor consultation requirement for O and P visas should

129. Probably due to pressure by various Arts organizations arguing that under like circumstances the INS should look at national reputation as opposed to international reputation. See *Hearings, supra* note 91, at 48 (prepared statement by American Art Alliance).

130. INA § 214(c)(4)(B)(ii) currently provides that "In the case of an entertainment group that is recognized nationally as being outstanding in its discipline for a sustained and substantial period of time, the Attorney General may, in consideration of special circumstances, waive the international recognition requirement." *Id.* This author believes that this provision should provide for athletes as well.

be abolished. This requirement gives labor organizations too much power in deciding who are eligible for visas. The INS should determine what is required for eligibility and not labor organizations. Labor organizations will be biased. Such requirements could also lead to corruption (via payoffs to certain labor organizations for good advisory opinions). The INS should go back to their old pre-1990 Act procedure of consulting with the relevant labor organizations only when cases are not clearly approvable or deniable. In that way labor organizations will not abuse their power and create their own universal labor organizations by forging agreements among other labor organizations in other nations thereby creating an indirect monopoly in deciding over who will be allowed to enter. With labor organizations having this much power, aliens seeking entry will no longer be so much concerned with meeting the INS requirements as they will be trying to persuade the appropriate labor organization to allow them to come in. Such power of decision over allowing nonimmigrant aliens into the United States should lay with the United States Government and the INS, not with privately funded labor organizations which will be inherently discriminatory.

VI. CONCLUSION

The implementation of the Immigration Act of 1990 substantially changed the law relating to athletes and entertainers seeking to enter the United States temporarily to play or perform. Whereas, before the Act, performers had to meet the vague "distinguished merit and ability" requirement under the older H category, the 1990 Act gave these performers special categories containing many detailed and explicit provisions. While the implementation of these new categories may have created an efficiently new and more visible area in the immigration statutes from which performers would now be applicable to, these new categories were not implemented without their problems. Many performer groups protested some of the new requirements laid out in these new categories. Congress subsequently sought to alleviate many of these disputes surrounding the new categories by amending several of the controversial provisions in them. As a result, today we have the current nonimmigrant visa categories as they will be applied to athletes and entertainers for years to come.

The law as it pertains to the entry of performers is not fairly straightforward. The practitioner seeking to bring a performer into the United States cannot look solely to the Immigration Act as a

basis for arguing how the relevant standards would apply to his client. Rather one must look to the Act in conjunction with the INS Interim (and eventually Final) Regulations to decipher exactly what the standards and requirements are regarding performers seeking temporary admission into the United States.

The new categories also do not seem to apply to performers that have yet to achieve a professional or international status. Therefore, many athletes and entertainers who are emerging stars working their way up to the top or who come from countries, where because of geographical or political reasons access to the media is limited, may not be able to achieve the standards required for the new nonimmigrant categories. The new categories also give labor organizations too much power and flexibility in deciding and indirectly determining who can enter the United States. The new categories even as amended still contain their problems, but arguably they are much better than what athletes and entertainers had before.

The standards for these categories are quite relaxed in that they offer several criteria for the athlete or entertainer to meet and not just one mandatory set of standards. Therefore, performers who may not be in the top of their fields will have plenty of room within the immigration laws to fit within the new categories. The old "distinguished merit and ability" of the H category was rather tough to meet for certain performers and usually only applied to the best in the field. Today with the new categories and their somewhat relaxed standards, most athletes and entertainers with at least some notoriety should be able to withstand the requirements necessary to enter and perform in the United States.

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