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[†] The Esports Bar Association Journal selected Paul Santache as the recipient of the scholarship for the Top Student Submission.

[‡] The Esports Bar Association Journal selected Phillip Jones as the recipient of the scholarship for the Student Runner-Up.

Foreign Players Join American Teams for the American Dream but Can't American Stream

By Genie Doi[†] and Samuel Johnson[‡]

Introduction

Much of the limited research in esports immigration has focused on how the United States lacks a dedicated visa for esports players. However, the United States has steadily imported foreign esports players through traditional athlete visas for nearly a decade.¹ Yet these esports players face unique immigration challenges even after visa approval. The novel and ever-changing nature of esports creates new fact patterns that legislators did not contemplate when creating the nation's immigration framework. For athletes, immigration law outlines permissible activities such as training, competing, and engaging in promotional activities related to their competition.² Where legislators in the late 1980s likely understood "promotional activities" to encompass advertisements or press conferences, they could not have imagined that 30 years down the road, gamers would be considered athletes and entertain the masses through streaming. Consequently, the law does not permit esports visa holders to engage in many forms of modern-day streaming.

Part I of this Article will introduce streaming's prevalence in esports. Part II will examine its treatment as employment under U.S. immigration law and how that employment might conflict with the terms of a player's visa. Finally, Part III will offer a practical framework for determining how foreign esports players can stream in a manner consistent with their visa.

[†] Genie Doi is the Founder & Principal Attorney at immigrate.LA and Of Counsel at ESG Law. For author correspondence please email gd@esglaw.com. Copyright © 2020 Genie Doi.

[‡] Samuel Johnson is a student at the University of California, Irvine School of Law. For author correspondence please email scjohns1@lawnet.uci.edu. Copyright © 2020 Samuel Johnson.

¹ See Pares Dave, *Online Game League of Legends Star Gets U.S. Visa as Pro Athlete*, L.A. TIMES (Aug. 7, 2013), <https://www.latimes.com/business/la-xpm-2013-aug-07-la-fi-online-gamers-20130808-story.html>.

² 8 C.F.R. § 214.2(p)(3) (2020).

I. Why is Streaming Important for Esports Players?

Streaming is the act of live-broadcasting on an internet platform.³ While the activity is commonly associated with playing video games, streamers often broadcast themselves performing any number of activities, like singing or body painting.⁴

Streaming has long been integral to the esports industry.⁵ Professional competitions utilize streaming services to broadcast events, and streaming services have signed up to 90 million-dollar deals for exclusive broadcasting rights.⁶ Beyond organized competition, esports players frequently stream themselves when practicing their gameplay. Many esports contracts require or otherwise provide financial incentives for players to stream a significant number of hours each month.⁷

Aside from satisfying contractual obligations, players are motivated to live stream for a variety of reasons, such as building a community and developing a brand.⁸ For many, streaming generates revenue to supplement their income.⁹ Prominent esports players have even retired from competing professionally to pursue streaming full-time because streaming can be a less stressful, more lucrative endeavor.¹⁰

II. Understanding Authorized Activities on Common Esports Visas

U.S. immigration law does not permit foreign nationals to engage in employment in the United States without lawful authorization.¹¹ Such authorization usually takes the form of a temporary work visa sponsored by an employer.¹² Under U.S. immigration law, employment can be understood as services or labor provided by an individual in exchange

³ See T.L. TAYLOR, WATCH ME PLAY: TWITCH AND THE RISE OF GAME LIVE STREAMING 1–3 (Fred Appel & Thalia Leaf eds., 2018).

⁴ Cecilia D'Anastasio, *Twitch's Non-Gamers Are Finally Having Their Moment*, WIRED (Jan. 9, 2020), <https://www.wired.com/story/twitch-non-gamers>.

⁵ See TAYLOR, *supra* note 3, at 137.

⁶ Jacob Wolf, *Overwatch League to be Streamed on Twitch.tv in Two-Year, \$90 Million Deal*, ESPN (Jan. 9, 2018), https://www.espn.com/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal.

⁷ TAYLOR, *supra* note 3, at 71.

⁸ *Id.* at 69.

⁹ Sam Nordmark, *Live Streamer or Competitive Gamer: Which Career Makes the Most Sense?*, DOT ESPORTS (July 22, 2018), <https://dotesports.com/general/news/esports-vs-streaming-money-career-31144>.

¹⁰ *Id.*

¹¹ 8 U.S.C. § 1324a(a)(1) (2018).

¹² It is nearly impossible for traditional “freelancers” to obtain work authorization in the United States without first obtaining contracts for work and an agent to serve as a visa sponsor. See 8 C.F.R. §§ 214.2(o)(2)(iv)(E), (p)(2)(iv)(E) (2020).

for wages or other remuneration.¹³ Simply classifying a foreign national as an independent contractor does not circumvent the need to obtain a visa; in practice, immigration officials are likely to treat almost any provision of services in exchange for compensation (whether deferred, monetary, or non-monetary) as constituting employment.¹⁴

Accidental employment while on a visitor visa is a common occurrence, as business visitors traveling for meetings in the United States each year operate under the obscure rule that they are permitted to conduct activities that involve “international trade or commerce” and where the employment was a “necessary incident thereto.”¹⁵ Despite having no clear rule for international visitors to follow, the consequences for accidental (or even alleged) unauthorized employment are severe.¹⁶ In August 2018, three *Magic: The Gathering* and *Dungeons & Dragons* artists from Europe intended to visit publisher Wizards of the Coast’s headquarters in Washington for a concept push,¹⁷ an activity which involves international trade or commerce. The travelers were denied admission, detained for over eleven hours, and removed from the United States.¹⁸

With consequences ranging from immediate removal to future ineligibility for visas, this experience is not only traumatizing—it could ruin careers.¹⁹ Accordingly, it is of vital importance for all actors in the esports industry to be aware of the specific kinds of activities that are permitted by each visa.

Streaming is one such activity that must be thoughtfully considered by foreign nationals in the United States. Because major streaming platforms are U.S. corporations that dole out payments to streamers, the act of streaming in the United States could be construed by the Department of Homeland Security (DHS) as a service or performance provided in exchange for compensation. It is therefore worth examining whether such employment would be authorized under the terms of the most commonly used visas in esports.

¹³ 8 C.F.R. § 274a.1(f).

¹⁴ While a disputed area of law, this Article recognizes that relevant federal agencies have interpreted the Immigration and Nationality Act to mean independent contractors cannot work in the United States without authorization. See *In re Garcia*, 58 Cal. 4th 440, 462 (2014). For a comprehensive discussion of the ambiguous treatment of workers as independent contractors under immigration law, see Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 225 (2008).

¹⁵ See *Matter of Hira*, 11 I & N. Dec. 824, 830 (BIA 1966).

¹⁶ 8 U.S.C. § 1227(a)(1)(C)(i) (“Any alien who was admitted as a nonimmigrant and who has failed . . . to comply with the conditions of any such status, is deportable.”).

¹⁷ Cecilia D’Anastasio, *Magic: The Gathering Artists Denied Entry to U.S., Detained Overnight*, KOTAKU (Aug. 29, 2018), <https://kotaku.com/magic-the-gathering-artists-denied-entry-to-u-s-deta-1828693925>.

¹⁸ *Id.*

¹⁹ See 8 U.S.C. § 1227(a)(1)(C).

A. Visitor Visas

The B-1/B-2 visa, ESTA, or admission under the Visa Waiver Program are essentially “visitor visas” for business or pleasure.²⁰ A visitor visa can be obtained quickly, easily, and for a nominal fee, relative to other visa classifications. However, the trade-off for this accessibility is a very limited range of authorized activities.²¹ Visitor visas bar nearly all forms of employment with narrow exceptions governed by case law and the Foreign Affairs Manual.²²

Professional athletes may utilize a visitor visa to compete in a U.S. tournament or event provided that the athlete receives no salary or payment other than prize money for their participation.²³ This exception is commonly utilized in esports and enables foreign visitors to lawfully participate in tournament-style events like EVO or the Fortnite World Cup.²⁴ However, visitor visas likely do not allow these visitors to stream freely; for example, a Twitch Partner traveling to EVO who streams from their hotel room is actually performing in exchange for compensation from a U.S. corporation. Thus, a competitor on a visitor visa, while lawfully competing at a U.S. event, may inadvertently run afoul of immigration law by clicking a “record” button.

B. O-1A Visa

In the esports context, O-1A visa classification can only be obtained by athletes of “extraordinary ability.”²⁵ A player with an O-1A visa may only perform services for the visa sponsor, usually the team or talent agent.²⁶ The permissible activities under an O-1A visa are limited to whatever event(s) the applicant states they will be participating in, so long as those activities relate to the event.²⁷ It is therefore in the applicant’s interest to draft their activities broadly to provide more freedom of activity.

²⁰ See 8 U.S.C. § 1187; 22 C.F.R. § 41.31(b)(1)–(2) (2020).

²¹ 8 U.S.C. § 1101(a)(15)(B); see *Matter of Hira*, 11 I & N. Dec. 824, 830 (BIA 1966).

²² U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL 402.2-2 (2020).

²³ See *Hira*, 11 I&N Dec. 824; U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL 402.2-5(C)(4).

²⁴ Luke Winkie, *When It Comes to Securing Visas, Sherry Nhan is the Matron Saint of Esports*, WASH. POST (Jan. 22, 2020), <https://www.washingtonpost.com/video-games/esports/2020/01/22/when-it-comes-securing-visas-sherry-nhan-is-matron-saint-esports/>.

²⁵ 8 C.F.R. § 214.2(o)(3).

²⁶ 8 C.F.R. § 214.2(o)(4).

²⁷ 8 C.F.R. § 214.2(o)(1)(i).

Because O-1A classification does not place significant restrictions on the foreign national's activities, it is an attractive option for competitors. For example, a team participating in the League Championship Series (LCS) could present a wide variety of expected activities in the player's visa application, from professional competitions to streaming, management, coaching, or content creation.

Unfortunately for esports players, the O-1A visa is unattainable for most; the regulations require that an applicant prove they are one of a small percentage who has risen to the very top of their field.²⁸ Only the most accomplished competitors will be able to satisfy the evidentiary burden. By definition, only a fraction of the industry is eligible for this visa.²⁹ Therefore, while the O-1A is a suitable option for players who wish to stream freely while in the United States, it is also virtually inaccessible for most competitors.

C. P-1A Visa

Due to the employment restrictions of the visitor visa and the demanding evidentiary standard of the O-1A, many esports imports arrive on a P-1A visa.³⁰ The P-1A classification is available to individual athletes and athletic teams who participate in a major sports league or possess international recognition.³¹ DHS has recognized only five sports as major leagues: the National Basketball Association, National Football League, Major League Baseball, Major League Soccer, and the National Hockey League.³² As a result, esports players must qualify as internationally recognized athletes. This visa is regularly granted to players competing across the LCS, Overwatch League, and more.³³

²⁸ 8 C.F.R. § 214.2(o)(3)(iii).

²⁹ See Temporary Alien Workers Seeking H-1B, O, and P Classifications Under the Immigration and Nationality Act, 59 Fed. Reg. 41,818-01 (Aug. 15, 1994) (to be codified at 8 C.F.R. pt. 214) (rejecting a suggestion that all hockey players in the NHL could be eligible for O-1 classification since extraordinary ability can only be accorded to the small percentage of individuals who have risen to the very top of their field of endeavor).

³⁰ See Bryce Blum, *The Esports Lawyer Breaks Down the Visa Issue Plaguing the LCS*, ESPN (Feb. 2, 2016), http://www.espn.com/esports/story/_/id/14661486/breaking-league-legends-visa-issue.

³¹ 8 U.S.C. § 1184(c)(4)(A) (2018).

³² See 8 U.S.C. § 1154(i)(2) (defining "professional athlete" as an individual who is employed as an athlete by "a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage"). USCIS has not publicly recognized any esports competition as a major league sport.

³³ While esports players are often granted P-1A visas, current anti-immigrant policies impacting all athletes have caused P-1A visa disruptions for some notable esports players. See Louise Radnofsky, *Athletes Seeking Green Cards Find Proving They're Exceptional Has Gotten Tougher Under Trump*, WALL ST. J. (Dec. 11, 2019),

Applicants seeking P-1A status must show that they seek to enter the United States temporarily and solely for the purpose of performing as an athlete with respect to a specific athletic competition.³⁴ In recent practice, DHS has paid particular attention to the word “solely,” disputing any activities described in the player contract which fall outside the competition (i.e., streaming).³⁵

As any sports fan (whether electronic or traditional) knows, athletes commonly engage in activities outside of their specific competition—advertising, charity work, speaking engagements, or promoting merchandise are all part and parcel of being a professional athlete. But unlike the O-1A visa category, the P-1A visa limits an athlete’s activities to those that are directly related to the specific athletic competition. Moreover, those activities may only be performed for the sponsoring team;³⁶ any independent performance for a third party in exchange for compensation constitutes unauthorized employment.³⁷

III. *Matter of CSP-C-T- LLC and the Promotional Activity Test*

For esports athletes, streaming is the electronic equivalent to media appearances, public practices, or exhibition matches. However, DHS officials’ unfamiliarity with streaming means that it can easily be mistaken for an unauthorized activity.

The only published decision to address this issue is *Matter of CSP-C-T- LLC* (the “Overwatch decision”).³⁸ In this case, the Administrative Appeals Office (AAO) affirmed the denial of a P-1A visa for

<https://www.wsj.com/articles/elite-athletes-seeking-visas-face-heightened-scrutiny-by-the-trump-administration-11576060200>; Jacob Wolf, *Broxah Has Visa Approved, Will Join Team Liquid in NA*, ESPN (Feb. 6, 2020), https://www.espn.com/esports/story/_/id/28648467/broxah-visa-approved-join-team-liquid-na.

³⁴ See 8 C.F.R. § 214.2(p)(1) (2020). Note, DHS focus on the word “solely” is a misapplication of law as the relevant regulations only use the word twice; neither usage corresponds to the activities of P-1A athletes. See also 8 U.S.C. § 1101(a)(15)(P)(i).

³⁵ With increasing frequency, DHS officers parse standard player contracts and contend that clauses requiring the player to participate in content creation for team sponsorships, or the freedom to benefit from independent sponsorships, are prima facie evidence that the player will not be “solely” performing as an athlete with respect to a specific athletic competition. This creates a paradox in light of recent litigation which has caused teams to stipulate (in order to avoid similar litigation) that players do have the freedom to seek independent sponsorships. *C.f.*, e.g., *FaZe Clan Inc. v. Tenney*, 407 F. Supp. 3d 440 (S.D.N.Y. 2019) (relating to popular gamer Tfue claims that FaZe Clan acted as an unlicensed agent in violation of the California Talent Agency Act by procuring sponsorships on his behalf).

³⁶ 8 C.F.R. § 274a.12.

³⁷ 8 C.F.R. § 214.1(e).

³⁸ See *Matter of CSP-C-T- LLC*, ID# 2901098, 2019 WL 553287 (AAO Jan. 22, 2019).

an "online Streamer/Influencer and reserve esports player" on the sponsor's Overwatch League Academy team.³⁹ The AAO determined that the team failed to establish that the player's sole purpose in the United States was to perform as an athlete with respect to a specific athletic competition.⁴⁰ Noting that the player's contract required him to spend the majority of his time streaming and promoting the team rather than actually competing, the AAO held that P-1A classification would be inappropriate.⁴¹

Whether the AAO's ruling in the *Overwatch* decision was the result of the board's misunderstanding of esports or the lackluster merits of an ill-advised visa application is unclear since the petition documents are not public. Regardless, the issue of streaming as a potentially unauthorized activity under a P-1A visa remains problematic for the esports industry. To resolve the ambiguity between authorized and unauthorized P-1A promotional activities, this Article proposes the usage of a "Promotional Activity Test" consisting of three elements:

If the activity:

- (1) is a promotional appearance;
- (2) conducted for the petitioning employer; that
- (3) relates to the player's participation in the competition;

Then the activity falls within the meaning of a P-1A promotional activity.

Given the lack of legal precedent surrounding this topic, it is worth examining how each element of the test has been applied in the past, and how those standards can be applied to streaming.

A. The Activity is a Promotional Appearance

The plain meaning of the word "promotional" dictates that the activity relate to the publicizing of a venture so as to "increase sales or public awareness."⁴² However, DHS decisions adopt a more narrow approach, requiring the activity to promote the specific event and not just the employer or sport in general.⁴³ This narrower interpretation is

³⁹ *Id.* at *3.

⁴⁰ *Id.* at *6.

⁴¹ *Id.*

⁴² *Promotional*, OXFORD ENGLISH DICTIONARY (3d ed. 2007).

⁴³ See *Matter of C-G-S-M*, ID# 4888907, 2019 WL 6324081 (AAO Nov. 5, 2019) (denying P-1A visa application where the athlete was expected to "participate in promotional events that promote the sport and the petitioning entity" without limitation to "activities related and/or incidental to specific competitions").

consistent with the AAO's ruling in the *Overwatch* decision. In the *Overwatch* decision, the player's streaming obligations were deemed unauthorized because he was to promote the organization more than the actual competition.⁴⁴ This inference was drawn from the fact that his schedule indicated he would spend the majority of his time streaming (even in the off-season) rather than competing.⁴⁵

The *Overwatch* decision further indicates that the timing of the promotional appearance (i.e., in-season as opposed to off-season) may be taken into consideration.⁴⁶ Viewed in the context of traditional sports, the merit of this argument is questionable. Traditional athletes regularly create promotional material like television commercials during the off-season; the fact that such services are performed during the offseason does not reduce their promotional value.⁴⁷ Nonetheless, the *Overwatch* decision suggests that off-season streaming while in the United States could invite greater scrutiny. Accordingly, whether in-season or off-season, foreign players whose streams discuss past or upcoming matches, or include visuals or links to resources on the competition, will have a stronger claim that the streaming is an authorized promotional activity.

B. *The Activity is Conducted for the Petitioning Employer*

Athletes in P-1A status must be in the United States to perform services for their employer.⁴⁸ Many esports players are required by their teams to stream for a fixed number of hours.⁴⁹ These streams typically feature the employer's branding and direct the viewers to the employer's website. Because the stream is conducted to satisfy a contractual obligation to the player's employer, most streams would satisfy this element.

Even so, foreign players must be cognizant of participating in paid activities unrelated to their employment, whether streaming or otherwise. For example, a player who receives remuneration from YouTube for operating a cooking channel unaffiliated with their employer would fail this element of the test and be found to have engaged in unauthorized employment. Alternately, a foreign esports player who designs and sells merchandise, or partners with a brand

⁴⁴ *CSP-C-T. LLC*, 2019 WL 553287 at *6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Dirk Hayhurst, *What Do MLB Players Really Do During the Long Offseason Months?*, BLEACHER REP. (Nov. 5, 2014), <https://bleacherreport.com/articles/2254876-what-do-mlb-players-really-do-during-the-long-offseason-months>.

⁴⁸ See 8 C.F.R. § 214.2(p)(1)(i) (2020).

⁴⁹ TAYLOR, *supra* note 3, at 71.

sponsor independent of their team organization, may also be found to have engaged in unauthorized employment.

C. *The Activity Relates to the Player's Participation in the Competition*

The final element is the crux of the Promotional Activity Test because the AAO has acutely considered whether the promotional activity was incidental or related to the event.⁵⁰ Activities that are closely related to the player's participation in the competition are more likely to be considered authorized under a P-1A visa.⁵¹

Whether a player's streaming relates to competition is a fact-specific analysis. Facts which could bolster a player's claim could include: the player's contract explicitly requires them to stream for the purpose of competitive practice;⁵² the player streams the game they regularly compete in (as opposed to other titles); the player exercises skills on stream that are essential to their performance (i.e., plays other titles, but in the same genre);⁵³ and the amount of time spent streaming is less than the amount of time spent preparing for competition.⁵⁴ Because DHS carries significant discretion in its adjudications, no one fact is likely to be dispositive. DHS will examine whether, viewing all facts, the evidence indicates the player will be streaming in addition to, rather than incidental to, competing.⁵⁵

Given the heightened scrutiny of unauthorized employment by DHS,⁵⁶ foreign esports players and their supporting teams or agencies

⁵⁰ See Matter of S-I-S- LLC, ID# 73049, 2016 WL 8315759 at *4-5 (AAO Dec. 30, 2016) (denying the appeal of an applicant when the applicant failed to establish their non-competitive activities would be incidental to the competition).

⁵¹ See Matter of F-F-S-, LLC, ID# 126527, 2016 WL 5943850 at *4 (AAO Sept. 26, 2016) (finding an athlete could spend time maintaining equipment when such duties tied directly into "preparing for competition").

⁵² *Id.* (recognizing the applicant's contract explicitly obligated them to participate in non-competitive activities in preparation for the competition).

⁵³ See AAU EAC 96 037 50064 (INS), 1998 WL 34029783 at *7 (AAO Sept. 17, 1998) (finding a non-competitive activity related when such activity continued to practice skills necessary for the performers).

⁵⁴ See *S-I-S- LLC*, 2016 WL 8315759 at *5 (noting the applicant's itinerary failed to designate how much time would be spent on non-competitive activities, preventing the AAO from establishing whether such activities were merely incidental to the actual competition).

⁵⁵ See Matter of V-L-F-, PLLC, ID# 15223, 2016 WL 929671 at *7 (AAO Feb. 4, 2016) (denying a P-1A visa application where the athlete was to provide tennis instruction in addition to participating in athletic competition).

⁵⁶ See Laura D. Francis, *Outlook 2018: More Scrutiny, Enforcement for Employment Visas*, BLOOMBERG L. (Dec. 19, 2017), <https://news.bloomberglaw.com/business-and-practice/outlook-2018-more-scrutiny-enforcement-for-employment-visas>.

would do well to consider the Promotional Activity Test when drafting contracts or directing content which involves streaming.

Conclusion

Regrettably, U.S. immigration law does not yet reflect the global, digital, and evolving nature of the esports ecosystem. U.S. immigration is an extremely high-stakes game for esports players; the ability to work and travel to the United States can make or break a career. As a result, it is crucial for teams and players to remain vigilant about a player's activities even after visa acquisition. The simple act of hobby streaming could be interpreted as unauthorized employment and failure to maintain status, resulting in the loss of important immigration benefits.⁵⁷ Until such time that sensible immigration policy can be enacted, the Promotional Activity Test can be utilized by teams, players, or practitioners as a practical tool in judging whether certain promotional content is lawful under the P-1A visa.

⁵⁷ Applicants must maintain status in order to be eligible for changes in visa classification or extension without having to depart the United States; moreover, extended periods of unlawful employment can result in three or ten-year bars from entering the United States. See 8 U.S.C. § 1182(a)(9)(B)(i)(I); see also U.S. DEP'T OF HOMELAND SECURITY, ADJUDICATOR'S FIELD MANUAL 40.9.2(a)(4)(C) (2018).

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