NOTE

IMMIGRATION AND ESPORTS:

THE ISSUE OF LEGITIMACY AND ITS IMPACT ON THE UNITED STATES VISA PROCESS

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I. INTRODUCTION

At the beginning of 2015, William “Leffen” Hjelte was on his way to becoming the greatest Super Smash Bros. player in the world.1 He had just won B.E.A.S.T. 5, one of the game’s most prestigious Esports tournaments.2 After his victory at B.E.A.S.T. 5, Leffen subsequently achieved status as the third ranked Super Smash Bros. player internationally.3 Leffen’s goal was to become


3. See Burden, supra note 1; Tamburro, supra note 1.
the “God Slayer” by beating The Five Gods, a group of players that had dominated the Super Smash Bros. scene for the past six years.\textsuperscript{4} By all accounts, Leffen was about to do just that.

However, a twist of fate would derail Leffen’s career and throw him out of the race for champion of Super Smash Bros.\textsuperscript{5} It was not a sudden falloff in Leffen’s performance or external distractions that kept him from fulfilling his goal.\textsuperscript{6} Rather, it was something that he could not control: his lack of status as an “athlete” under the United States’ P-1A visa requirement.\textsuperscript{7}

On his way to the major US Super Smash Bros. tournament, The Big House 5, Leffen, a Swedish resident, was deported and his visa request was denied.\textsuperscript{8} Later, Leffen released a video reading aloud the denial letter he received from the United States Citizenship and Immigration Services (“USCIS”).\textsuperscript{9} Specifically, Leffen revealed that the USCIS does not consider Super Smash Bros. a legitimate sport for purposes of the P-1A visa.\textsuperscript{10}

This denial was detrimental to Leffen’s career.\textsuperscript{11} Forced to play primarily in Europe for more than a year, Leffen had virtually no access to US Super Smash Bros. competitions that often featured the best players, and he lost out on major tournament prize money.\textsuperscript{12} Moreover, Leffen was not allowed to train with US-based

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\footnotesize{6. See Jurek, supra note 5; Silva, supra note 5.}

\footnotesize{7. See Burden, supra note 1; Tamburro, supra note 1.}


\footnotesize{9. Id.}

\footnotesize{10. See Burden, supra note 1; Tamburro supra note 1.}

\footnotesize{11. See Burden, supra note 1; Genesis 3 (Super Smash Bros Melee Singles): Tournament Results, ESPORTS EARNINGS, https://www.esportsearnings.com/tournaments/16458-genesis-3-smb-singles [https://perma.cc/4LR6-K3NP] (last visited Dec. 3, 2019) (describing that the first, second, and third place players in Genesis 3, a major Esports
Super Smash Bros. players who comprise a majority of the top players in the world.\textsuperscript{13} Unable to practice with the world’s best players, Leffen’s skill level deteriorated and he was no longer the caliber of player that he was prior to his visa denial.\textsuperscript{14} As Leffen would later describe: “[i]t felt like all of your heart, hopes[,] and dreams were ripped right out of you, constantly…”\textsuperscript{15}

Leffen’s struggles reflect issues that foreign Esports players face when trying to compete in the United States.\textsuperscript{16} Specifically, Leffen’s situation embodies the inconsistency and unpredictability of the US visa system as it pertains to admitting Esports players into the United States for competition.\textsuperscript{17} This Note will explain the source of this inconsistency and offer solutions to help ease the visa burden for Esports athletes. Specifically, this Note presents arguments that Esports are legitimate “sports” and Esports players are consequently “athletes” that should receive more consistent, favorable results when applying for P-1A visas. Additionally, this Note suggests certain mechanisms that the US Esports industry may utilize to help athletes qualify for P-1A visas in the future.

Part II provides comprehensive background information on the Esports industry and introduces visa options available to Esports players, namely the P-1A visa. Part III discusses the issue of Esports legitimacy in the United States and how that impacts the US visa process, and it also analyzes how other countries have addressed Esports legitimacy. Part IV argues that Esports are legitimate sports for the purposes of the P-1A visa. Part V delineates additional initiatives that may increase the legitimacy of Esports to help players more reliably obtain P-1A visas. Part VI concludes by summarizing the arguments in this Note, namely that the USCIS should streamline the visa process by allowing Esports tournaments that Leffen missed due to visa denial, won US$10,940, $4,376, and $2,188 respectively).

\textsuperscript{13} See Burden, supra note 1; Tamburro, supra note 1.
\textsuperscript{14} See Burden, supra note 1; Tamburro, supra note 1.
\textsuperscript{16} See Bridget A J Whan Tong, A New Player has Entered the Game: Immigration Reform for Esports Players, 24 JEFFREY S. MOORAD SPORTS L.J. 351, 369-86 (2017).
\textsuperscript{17} See id. at 369-86.
players to qualify for P-1A visas on a more consistent basis because Esports are legitimate sports.

II. THE RISE OF ESPORTS AND THE VISA CONUNDRUM

A. A Primer on the Esports Industry

Esports (or "electronic sports") are a form of professional video game playing.18 Players compete against each other in various video games in front of live crowds across the world.19 In most Esports events, teams, backed by corporate sponsors, compete for prize pools as part of a league or tournament.20 In addition to live events, the competitions are also broadcasted on streaming services such as Twitch, YouTube, and WatchESPN.21 These broadcasts are known as “shoutcasts,” and they are emblematic of traditional sports: there are play-by-play announcers who describe the gameplay in real time, color commentators who provide background details and insight, player interviews, and replay and strategy analysts.22

1. The Games

With over one hundred million active users, League of Legends is the most popular Esports game in the world.23 Like many of the most prominent Esports games, League of Legends is a Multiplayer Online Battle Arena ("MOBA").24 MOBAs are character-based games in which teams of five or six players use strategy to coordinate unique character abilities to destroy or gain control of

19. See id. at 502-05.
21. See Martinelli, supra note 18, at 502-03.
23. See id. at 361.
24. Id. at 361.
an objective, which is usually defended by the other team.\textsuperscript{25} Other popular MOBAs include \textit{Overwatch} and \textit{DOTA 2}.\textsuperscript{26}

In addition to MOBAs, the First-Person Shooter ("FPS") genre is also very popular in Esports.\textsuperscript{27} FPSs are games in which players control a character that primarily shoots guns or uses melee weapons or explosives to eliminate the other characters and complete objectives, such as detonating bombs, to win matches.\textsuperscript{28} These games are played from the "first-person" perspective, where the player sees the action through the eyes of the character they are controlling.\textsuperscript{29} \textit{Counter Strike: Global Offensive} ("CS:GO") and \textit{Call of Duty} are some of the most popular FPS games in Esports.\textsuperscript{30}

Additionally, the Battle Royale game type has gained considerable popularity in Esports.\textsuperscript{31} Battle Royales are shooting games that pit teams or individuals against each other in a fight to be the last player(s) standing. Each game has a ring that shrinks over the course of the match and damages players outside of its boundaries, forcing players closer together to engage in fights towards the end of the match.\textsuperscript{32} Arguably the most popular Battle Royale game, \textit{Fortnite}, has become a cultural phenomenon.\textsuperscript{33} The 2019 \textit{Fortnite} World Cup, held in the Arthur Ashe tennis stadium in Queens, New York, drew over two million streamers between Twitch and YouTube, and the game is even played by a number of celebrities outside of Esports.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{26} See id.
\item \textsuperscript{27} See Tong, supra note 16, at 362-63.
\item \textsuperscript{28} See id. at 363.
\item \textsuperscript{29} See id. at 351.
\item \textsuperscript{30} See Martinelli, supra note 18, at 502.
\item \textsuperscript{32} See Allan, supra note 31; Hornshaw, supra note 31.
\item \textsuperscript{33} See Allan, supra note 31; Hornshaw, supra note 31.
\item \textsuperscript{34} See Justin Kirkland, \textit{10 Celebrities who play Fortnite, Ranked}, ESQUIRE (May 11, 2018), https://www.esquire.com/entertainment/g20139550/celebrities-playing-
Fighting and sports games are also a staple of the Esports scene. At Evo 2019, 279,000 viewers tuned in to watch the *Super Smash Bros. Ultimate* final. Similarly, the soccer game *FIFA* has enjoyed considerable success as the world’s premier sports game, which has prompted the development of profitable tournaments with many participants. For example, *FIFA’s* 2018 championship included more than six million players competing for a US $400,000 prize pool.

2. The Industry – Financing and Franchising

The advent of streaming has made competitive videogaming easily accessible for consumers and provided an infrastructure in which Esports can flourish. Indeed, it is expected that in 2019, 30.3 million people in the United States will watch an Esports event at least once a month. The 2017 *League of Legends* world
championship drew 106 million viewers, which was more than the 103.4 million viewers that watched the 2018 Super Bowl. Moreover, the 2018 DOTA 2 championship audience was larger than the individual audiences for the Tour De France, Wimbledon, Daytona 500, and US Open viewership.

This level of exposure has prompted investors to claim their stake in Esports. For example, companies such as Coca-Cola, Amazon, McDonalds, Red Bull, and Intel have partnered with and sponsored Esports events and teams. Moreover, top-rank investors—including Robert Kraft, Magic Johnson, and Rick Fox—now own Esports teams. With this degree of financing and advertisement revenue, Esports is expected to become a US$1.1 billion industry in 2019, and the United States is predicted to share in the US$409 million revenue that North America is anticipated to generate, which is thirty-seven percent globally.

Esports players are typically salaried by game developers and their respective teams. While a career in Esports can certainly be lucrative, player salaries vary significantly, and total income is greatly impacted by sponsorships and streaming revenues. Top players can earn more than US$1 million per year, but minimum salaries in top-tier leagues are substantially lower than those in


43. See Ingraham, supra note 42.

44. See Tong, supra note 16, at 354-55.

45. See id. at 355; Kenny, supra note 25.

46. Kenny, supra note 25.


48. Tong, supra note 16, at 357.

49. See Holden et al., supra note 38, at 21-25.
traditional sports.\textsuperscript{50} Moreover, Esports players typically are younger than their traditional sport counterparts.\textsuperscript{51} The average age for a League of Legends player, for instance, is approximately twenty-one years old, and players often begin their professional careers at age fifteen.\textsuperscript{52}

In many ways, the structure of Esports franchising is like that of traditional sports.\textsuperscript{53} Indeed, the developers of League of Legends and Overwatch have established their own leagues: the League of Legends Championship Series and Overwatch League, respectively.\textsuperscript{54} Each league has a season, an off-season, and a trade deadline.\textsuperscript{55} Like traditional sports, comprehensive schedules are necessary for Esports players because the competition and practice schedule for optimal performance is arduous.\textsuperscript{56} Lastly, Esports are often played in sports stadiums in front of thousands of fans supporting their favorite teams and players.\textsuperscript{57}

The Overwatch League, in particular, operates akin to that of major sports leagues.\textsuperscript{58} The Overwatch League is composed of independently owned and operated teams, and teams engage

\begin{itemize}
\item \textsuperscript{50} Id. at 21.
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See id.; Tong, supra note 16, at 357.
\item \textsuperscript{54} See Holden et al., supra note 38, at 24.
\item \textsuperscript{57} See Tong, supra note 16, at 358 (noting that the League of Legends North American Championship sold out Madison Square Garden in 2015).
\item \textsuperscript{58} See Holden et al. supra note 38, at 13.
directly with the league (headed by a commissioner) and must abide by league regulations, including a code of conduct. Moreover, Overwatch League teams have ties to particular cities and are members of geographic divisions. For instance, the Atlanta Reign, New York Excelsior, and Philadelphia Fusion are part of the Atlantic Division, while the Chengdu Hunters, Los Angeles Gladiators, and Vancouver Titans are teams in the Pacific Division. As members of their respective teams, players are paid a salary and receive financial bonuses based on their performance in their league (e.g. playoff appearances or championship wins).

Yet, there are still distinct differences between traditional sports and Esports franchising. In a traditional sports structure, there are two sides to every transaction: on one side are the team owners (whose agreements form the basis of a league) and on the other side are the players. Esports, on the other hand, includes a very powerful third party: the game developer. In some Esports, game developers compensate the players in conjunction with their teams. Additionally the game developers own the game and its intellectual property, and they pay out licenses which grant permission to use the game in various ways, including league play and tournaments. For instance, Activision Blizzard offers a “community license” for third parties who are interested in using

59. See id. at 50; Overwatch League Summary of Code of Conduct: 2019 Season, https://bnetcmsusa.akamaihd.net/cms/content_entry_media/3w/3WAQ5TR2G8X11554233713822.pdf [https://perma.cc/45PZ-ES64] (mandating that players may not engage in cheating, betting on matches, illegal conduct outside of competition, or unprescribed prescription drug use).


61. Activision Blizzard, supra note 59; ESPN, supra note 60.

62. See Consolazio, supra note 53; Miceli, supra note 53.


64. See id. at 456.


66. See Heggem, supra note 64, at 456.
its titles (including Overwatch), for various competitions.\textsuperscript{68} If analogized to traditional sports, the NFL, MLB, and NBA would each own their respective sports of football, baseball, and basketball.\textsuperscript{69}

The role of game developers thus has a significant impact on the governance of Esports leagues.\textsuperscript{70} Specifically, the league and the game developer are often the same entity.\textsuperscript{71} Indeed, Riot Games, the developer of League of Legends, and Activision Blizzard, the developer of Overwatch, are the governing bodies of their respective leagues.\textsuperscript{72} This structure puts players and teams in a subservient position because they are dependent on developers to continue to support their games in order to maintain the viability of the league.\textsuperscript{73}

In turn, labor relations in Esports are complicated, and some game developers have exercised considerable control over employment terms and conditions for Esports players.\textsuperscript{74} To date, there is no true union that resembles the typical players association seen in traditional sports leagues, and current Esports players associations do not have collective bargaining power.\textsuperscript{75} Furthermore, certain game developers have taken non-traditional avenues to dictate the labor status of players, which may resemble an attempt to prevent union formation.\textsuperscript{76} For instance, Riot Games, as the league operator of the League of Legends Championship Series, has created a players association for its League of Legends


\textsuperscript{69} See Heggem, supra note 64, at 456.

\textsuperscript{70} See id.

\textsuperscript{71} See Holden et al., supra note 38, at 23.

\textsuperscript{72} See id. at 24.

\textsuperscript{73} See id.

\textsuperscript{74} See Heggem, supra note 64, at 456-57 (noting that League of Legends developer, Riot Games, specifies the contract term duration, minimum player compensation, and grounds for contract determination of the players participating in its North American Challenger Series and League Championship Series).

\textsuperscript{75} See id. at 447-48.

\textsuperscript{76} See Holden et al., supra note 38, at 47.
players. This unilateral action has driven considerable debate on
the status of Esports players as employees or independent
contractors, and consequently whether Riot Games is in violation
of the National Labor Relations Act ("NLRA").

On the other hand, efforts made by players in the Overwatch
League may resemble a trend towards operating labor
relationships more like traditional sports. Former Overwatch
professional and coach Thomas “Morte” Kerbusch has partnered
with labor attorney Ellen Zavian to develop the first grassroots
union in Esports. According to Zavian, the Overwatch union
would be modeled after the National Football League Players
Association ("NFLPA") and Major League Baseball Players
Association ("MLBPA"). A true Overwatch union would be a big
step for Esports, as players would gain the collective bargaining
power to counterbalance the significant control currently
possessed by the leagues and game developers.

3. An International Sensation

Finally, because the internet—and online streaming in
particular—has disseminated Esports across the globe, Esports
competitions have attracted an international audience and
inspired players from various countries to pursue a career in

77. Id. at 47-48.
78. See 29 U.S.C. § 158 (2018) (delineating that it is an unfair labor practice of an
employer to interfere with the “formation or administration of any labor organization or
contribute financial or other support to it”); Minnie Che, Is Riot Games in Violation of the
NLRA for Funding its Own Union?, ON LABOR (May 1, 2019), https://onlabor.org/is-riot-
organization).
79. See Maddy Myers, Pro Gamers are Getting Serious About Unionizing, KOTAKU (Mar.
14, 2018), https://compete.kotaku.com/pro-gamers-are-getting-serious-about-
unionizing-1823770452 [https://perma.cc/B6F7-MKQQ]; Jonathan Kogel, State of the
Esports Player Union: Drawbacks and Legal Challenges, THE Esports OBSERVER (May 8,
80. Liz Mullen, Two Groups vie to Establish Esports Players Associations, SPORTS BUS.
[https://perma.cc/3WWE-7D9]; Myers, supra note 79.
81. See Mullen, supra note 80; Myers, supra note 79.
82. See Holden, et al., supra note 38, at 47.
Esports. Consequently, the Esports ecosystem is a truly international phenomenon. This is particularly evident in the structure of Esports leagues and events, team rosters, and the location of live competitions.

Riot Games, for instance, has organized leagues for League of Legends in North America, Europe, China, South Korea, Taiwan, and Southeast Asia. The winners of these regions play in the League of Legends World Championship to be crowned the best League of Legends team in the world. Similarly, independent Esports tournaments, such as the Overwatch World Cup, are organized to determine a world champion among nationally-based teams.

The players that compete in these leagues and tournaments come from all over the world, and this is particularly true for leagues established in the United States. For instance, the League of Legends Championship Series, based in the United States and

83. See Jonathan Deesing, Esports – What is This Worldwide Phenomenon?, LIFEWIRE (June 24, 2019), https://www.lifewire.com/esports-basics-4147163
87. See Intergalactic Gaming, supra note 84; League of Legends, supra note 86.
Canada, is composed of players from over twenty-five countries. Additionally, more than fifty percent of players in the US Overwatch League are South Korean, and over twenty countries are represented on Overwatch League rosters.

Moreover, participation in live Esports events requires that the players physically be present in any given location across the globe. Thus, Esports players frequently travel internationally to attend competitions, and the free movement of players is necessary for Esports to function. This fundamental feature likely will not change anytime soon. For instance, the Overwatch League, composed of teams across the United States, Europe, and China, recently announced that next season, teams are required to play home and away games in the cities in which the respective teams are associated. Many players also transfer teams between seasons, which often involves changing regions (for example, from Europe to North America). Consequently, those players

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95. See Chan, supra note 94; Webster, supra note 92.

96. See Tong, supra note 16, at 358.
immigrate to the United States to train and compete with their teams during the season.\(^{97}\)

**B. Esports and US Immigration – the Visa Options Available to Esports Players**

Due to the popularity of Esports within its borders, the United States is a significant player in the global Esports industry.\(^{98}\) This prominence amid the international structure of Esports has made it necessary for Esports players to be able to travel to the United States to compete in competitions and train with their teams.\(^{99}\) As such, Esports players may pursue several avenues to lawfully be admitted into the United States to fulfill their Esports obligations.

One option for Esports players is to apply for the visa waiver program (“VWP”).\(^{100}\) Under the VWP, citizens of participating countries may stay in the United States for up to ninety days for business or tourism without obtaining a visa.\(^{101}\) Citizens of qualifying countries may utilize the VWP for the occasional business trip or vacation.\(^{102}\)

However, the VWP is not the best choice for Esports players. One issue with the VWP is that travelers are only allowed to stay in the United States briefly and may not renew the VWP for a longer period.\(^{103}\) Because the seasons for US-based Esports are often longer than ninety days, the VWP does not provide an adequate timeline for players to compete in the US on a consistent basis.\(^{104}\)

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97. See id.
98. See supra Section II.A.2.
99. See supra Section II.A.3.
101. See U.S. Dep’t of State, supra note 100.
102. See id.
103. See id.
Further, it may be illegal for salaried Esports players to play in US tournaments under the VWP. Because most Esports players are salaried, the VWP presents a significant limitation to a considerable number of Esports players wishing to compete in the United States.

Due to the VWP’s potential pitfalls, it is often necessary for international players to obtain a visa for Esports competitions. Players obtain visas primarily through their teams and the league or game developers who file a petition with the USCIS. In its current state, the visa process for international Esports players is fraught with uncertainty.

1. B-1 & B-2 Visas

One option for Esports athletes are B-1 and B-2 non-immigrant visas, which are for “business” and “pleasure,” respectively. Under the B-1 visa, “business” refers to “conventions, conferences, consultations[,] and other legitimate activities of a commercial or professional nature.” It does not include local employment or labor for hire. B-1 visas are reserved for aliens temporarily performing services, but without a contract or other prearranged employment. B-2 visas are

format-home-games [https://perma.cc/S5EX-44F8] (noting that the Overwatch League’s third season will run from February through August).

105. See Hitt, supra note 100 (noting that paying a salary to a foreign-based Esports team “[i]n my professional opinion … would be a violation of the VWP”); U.S. Dep’t of State, supra note 101 (delineating that visitors coming to the United States for business purposes may not be paid by any source in the United States, or alternatively that they may qualify tourists if they are amateurs and not being paid for sports or contests in the United States).

106. See Tong, supra note 16, at 357.


108. See Kenny, supra note 25.


110. See 22 C.F.R. § 41.31(b)(1)-(2) (2006) (defining visits for “business” and “pleasure”).

111. Id.

112. Id.

113. See id.
utilized by individuals entering the United States for “pleasure,” including “tourism, . . . medical treatment, . . . or service.”\textsuperscript{114}

Esports players have resorted to applying for B-1 or B-2 visas in the past, but under the language of the statute they likely do not qualify for these visas.\textsuperscript{115} Esports players train and participate in competitions, but they do not attend the conventions or conferences as specified in the statute for a B-1 visa.\textsuperscript{116} Moreover, Esports players are employed and salaried under contract with their respective teams and, in some instances, game developers, which violates B-1’s prohibition of “prearranged employment.”\textsuperscript{117} Additionally, because players are employed, salaried, and may receive monetary bonuses for their performances in tournaments, they do not qualify for a B-2 visa because they are not entering the United States for “pleasure” under the language of the statute.\textsuperscript{118}

2. H-1B Visa

Another potential option for Esports athletes are H-1B visas.\textsuperscript{119} H-1B visas allow for temporary admission of aliens that work in a “specialty occupation.”\textsuperscript{120} A specialty occupation requires the “attainment of a bachelor’s degree or higher degree in the specific specialty (or its equivalent).”\textsuperscript{121} An employee can meet the education requirement by obtaining a bachelor’s degree from the United States, an equivalent foreign degree, certification in the specialty occupation, or by having experience equivalent to the completion of a US Baccalaureate or higher degree.\textsuperscript{122} Three years of experience is equivalent to one year of college, meaning that a player would need twelve years of relevant experience to satisfy the education requirement.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{114} Id. (noting that recreational purposes under a B-2 visa are “tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social or service nature”).
\item \textsuperscript{115} See Tong, supra note 16, at 371.
\item \textsuperscript{116} See id.
\item \textsuperscript{117} See id.
\item \textsuperscript{118} See 22 C.F.R. § 41.31(b)(1)-(2), supra note 110.
\item \textsuperscript{119} See Tong, supra note 16, at 374.
\item \textsuperscript{121} See 8 U.S.C. § 1184(i)(1)(b) (2015).
\item \textsuperscript{122} See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) (2017).
\item \textsuperscript{123} See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (2017).
\end{itemize}
Sensibly, Esports players have avoided the H-1B visa because they usually do not meet the requirement of performing in a “specialty occupation.”124 First, Esports players start their careers at a young age and often choose to compete rather than to attend college and obtain a bachelor’s degree, the key requirement for an H-1B visa.125 Further, although certain colleges, including Ohio State University and the University of Utah, are beginning to offer video game scholarships and Esports degrees, Esports are not typically taught in higher education and thus limit a player’s ability to get a degree in the field of Esports.126 Because three years of training counts towards one year of college, a player could qualify for an H-1B visa after twelve years, but this timeframe far exceeds the average four to five year career of Esports players.127

3. O-1A Visa

Alternatively, O-1A visas may be utilized by a select few Esports players.128 O-1A visas are temporary visas reserved for individuals who exhibit “extraordinary ability in the sciences, arts, education, business[,] or athletics which has been demonstrated by

sustained national or international acclaim.”129 This “extraordinary ability” is achieved by demonstrating a level of expertise “indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.”130 In order to demonstrate this “extraordinary ability,” Esports players must provide evidence of either a major award (such as a Nobel Prize), or at least three other pieces of evidence from ten different categories, such as authorship of published material, evidence of a contribution of major significance, or the display of work in exhibitions or showcases.131

The O-1A visa is not a reliable option for most Esports players because of the high evidentiary standard required to prove “extraordinary ability.”132 The only Esports players that would likely qualify for an O-1A visa because of a major award are those that have won a major Esports championship.133 While some players may qualify by demonstrating evidence from the other categories, the O-1A visa is not a broad or easily applicable standard to the majority of Esports players, and it is not one upon which players should depend. Further, exclusively relying on the O-1A visa would essentially restrict US Esports competitions to players who have already won major championships, which would effectively prevent up-and-coming players from succeeding in Esports and limit Esports earnings to those who are already accomplished.

4. EB-1 Visa

The EB-1 visa, like the O-1A visa, also requires applicants to demonstrate “extraordinary ability.”134 The EB-1 is an employment-based visa that has the same evidentiary requirements as the O-1A visa.135 The main difference is that EB-1

131. See 8 C.F.R. § 204.5(h)(3) (2016); see also Kazarian v. U.S. Citizenship & Immigr. Servs., 596 F.3d 1115, 1119 (9th Cir. 2010) (holding that receipt of a Nobel Prize is a “quintessential example of a major award” for purposes of an O-1A visa).
132. See Tong, supra note 16, at 379.
133. See id. at 379-80.
135. See id. § 204.5(h)(3); see also Employment-Based Immigration: First Preference EB-1, U.S. CITIZENSHIP & IMMIGR. SERVS. [USCIS] (2005), https://www.uscis.gov/working-
visas are green cards, which allow for legal permanent resident status in the United States, rather than the temporary stay permitted by O-1A visas.\footnote{136}

In addition to the “extraordinary ability” issues discussed above, EB-1 visas have added complications that make them a headache for Esports players.\footnote{137} Specifically, EB-1 visas are subject to certain quotas;\footnote{138} 140,000 employment-based green cards are currently available each year and the total number of employment-based immigrants of each country is capped at seven percent.\footnote{139} This means that Esports players from countries like China and India, which have a considerable number of EB-1 applicants per year, often wait over nine years before being admitted for permanent residency.\footnote{140} Due to the typically short careers of Esports players, this kind of wait presents a considerable issue.\footnote{141}

Additionally, a bill that has been proposed in Congress could further complicate the EB-1 visa process for Esports players.\footnote{142} The Fairness for High-Skilled Immigrants Act seeks to eliminate the seven-percent cap on employment-based visas in order to redistribute green card wait times in a more equitable fashion.\footnote{143}
While this is helpful for Esports players from China and India, this bill could significantly delay admission for players from countries with shorter wait times, such as South Korea, Western Europe, and Canada. These shorter-wait time countries represent a significant portion of the Esports player pool, which means that a considerable segment of the industry is at risk of being harmed by the bill. The bill was passed in the House of Representatives, but it is unclear whether it will achieve similar success in the Senate.

5. P-1A Visa

The final, and most promising, option for Esports players is the P-1A visa. For an Esports player to secure a P-1A visa, they must (1) be an "athlete" at "an internationally recognized level of performance"; (2) be a professional athlete; (3) play as an athlete or serve as a coach of a team in the United States and "a member of a foreign league or association of 15 or more amateur sports teams" or; (4) perform as a professional or amateur athlete in an ice skating production. The first and second factor are the most applicable to Esports players.

To demonstrate an "internationally recognized level of performance," players must provide several evidentiary pieces of documentation, including a written consultation from an appropriate "labor organization," a copy of their contract with the league, a schedule, and an explanation of competition. The player must also present at least two other pieces of information demonstrating, for example, participation in a "major United States sports league," participation in an "international competition with a national team," a written statement from an official in the

144. See Cooney, supra note 137; Conditt, supra note 137.
145. See Cooney, supra note 137; Conditt, supra note 137.
147. See Tong, supra note 16, at 381.
149. See Tong, supra note 16, at 381-82.
governing body of the sport, international ranking, or some honor achieved in the sport, among others.\(^\text{151}\) Moreover, for purposes of P-1A visas, Congress defines “professional athletes” as individuals employed as an athlete on a team in an association of six or more professional sports teams and the combined revenues of those teams must exceed US$10 million per year.\(^\text{152}\)

P-1A visas are the best option for Esports players because they apply the most broadly and do not face the same risk of violation under the extensive requirements of the other visa options.\(^\text{153}\) Indeed, most high-level professional Esports leagues are comprised of more than six professional teams and earn more than US$10 million in total revenue per year pursuant to the P-1A “professional athlete” requirement.\(^\text{154}\) Moreover, a P-1A visa can be used by both professional and amateur Esports athletes, and the “internationally recognized level of performance” factor seems to include Esports players because they typically achieve some kind of level of international recognition.\(^\text{155}\)

However, both the “internationally recognized level of performance” and “professional athlete” requirements mandate that those who qualify for P-1A visas are, in fact, athletes.\(^\text{156}\) Additionally, the majority of evidentiary requirements required by the USCIS to prove an “internationally recognized level of performance” use the word “sport” and have underlying assumption that only someone who participates in a “sport” or “sports league” meets the P-1A visa requirements.\(^\text{157}\) Thus, there are certain complications that are still present in the P-1A visa despite its potential to be universally utilized by Esports players, specifically whether Esports players are actually “athletes” participating in a “sport” in the eyes of the USCIS.

\(^{151}\) See id.


\(^{153}\) See Tong, supra note 16, at 353-54.

\(^{154}\) See id. at 382.

\(^{155}\) See id.


\(^{157}\) See P-IA, supra note 150.
III. QUALIFYING FOR THE P-1A VISA – THE ISSUE OF ESPORTS LEGITIMACY

A. Esports Legitimacy in the United States

In 2013, Riot Games was able to successfully negotiate the first P-1A visa for Canadian League of Legends player Danny “Shiphtur” Le. This was initially seen as a landmark moment in which the USCIS, going forward, would recognize Esports players as professional athletes and consequently Esports as a legitimate sport. Indeed, some Esports players have been able to successfully obtain the P-1A visa, primarily through the “internationally recognized level of performance” track. As Riot Games Esports manager Nick Allen noted, Esports were finally legitimate in the eyes of the US government.

In the aftermath of Riot Games’ success, applying for P-1A visas has become the status quo, and Esports players continue to petition for these visas on a consistent basis. Players rely on other visa options as a sub-optimal alternative if, for instance, their P-1A visas are denied. Unfortunately, Riot Games’ initial victory has been far from universal for other Esports players. Since 2013, Esports players have only been able to obtain P-1A visas on a sporadic and unpredictable basis. Arguably the most infamous example of an Esports player being denied a P-1A visa occurred with Leffen. As discussed above, Leffen was denied a P-1A visa...

160. See Tong, supra note 16, at 382.
161. See Tassi, supra note 159.
163. See id. at 352.
164. See id.
165. See Burden, supra note 1; see also Tamburro, supra note 1.
in 2015 and left out of US competition for over a year, missing key events including Genesis 3, Battle of the Five Gods, and Evo.\textsuperscript{166} Leffen’s deportation led to considerable outcry from Esports players and fans, mainly because the USCIS asserted that Super Smash Bros. Melee was not a “legitimate sport.”\textsuperscript{167}

In 2016, over one hundred thousand individuals signed a petition seeking that the USCIS recognize Esports players as athletes under the same consideration as traditional athletes.\textsuperscript{168} The petition was filed under the Obama Administration’s “We the People” initiative in which citizens could directly petition the White House.\textsuperscript{169} If more than one hundred thousand people signed the petition under this initiative, the White House was required to respond, and in fact did so in the case of Leffen’s visa.\textsuperscript{170} In its official announcement, the White House noted that Esports players are not necessarily precluded from being granted Esports visas, but it also acknowledged that “[i]t is important to remember that every case, regardless of what sport it involves[,] is different and is reviewed on its own merits.”\textsuperscript{171}

Leffen’s experience best illustrates the underlying issues with Esports athletes qualifying for P-1A visas, namely that the United States does not universally respect the legitimacy of Esports as real


\textsuperscript{170} We the People, THE WHITE HOUSE, https://petitions.whitehouse.gov/responses [https://perma.cc/486A-HB23] (last visited Nov. 29, 2019); Jurek, supra note 167.

It is these issues of legitimacy, coupled with the case-by-case basis of USCIS visa review, that leave Esports players without a reliable means of obtaining visas in order to compete in the United States. The fate of a P-1A visa may depend on whether the reviewing USCIS officer believes Esports are legitimate sports, and there is minimal guidance as to how officers should handle these visas for Esports players.173

Part of this lack of guidance stems from the absence of a legal definition of "athlete" or "sport."174 While this does not necessarily disqualify Esports players, there is a prevailing cultural viewpoint that Esports players are glorified video game players, not athletes, when compared to those in traditional sports.175 Moreover, because there is no official association to encompass all Esports teams on an international or national scale, Esports currently do not possess the same institutional legitimacy enjoyed by traditional sports, which is part of the evidentiary showing for a P-1A visa.176

B. Esports Legitimacy Internationally – A Comparison and Model

Given Esports’ lack of legitimacy in the United States, an international comparison is useful to demonstrate the path that other countries have taken in legitimizing Esports. This comparison will illuminate the impact that Esports legitimacy has on improving the visa process for US-bound Esports players. In particular, looking to other countries may provide guidance as to how the United States should assess immigration issues for Esports players in the future.

172. See Mitrevski, supra note 166; Tong, supra note 16, at 383.
173. See A Response to your Petition on eSports, supra note 171; Wolmarans, supra note 168.
174. See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (2016) (defining "amateur sports organization" and "professional sports organization" but not "athlete" or "sport").
176. See Tong, supra note 16, at 368.
1. South Korea

Due to both a cultural and governmental commitment to Esports institutionalization, South Korea is the country leading the effort to legitimize Esports.\textsuperscript{177} South Korea has seen widespread cultural acceptance of Esports beginning in 1990, when the South Korean government established a nation-wide broadband network for faster internet connection.\textsuperscript{178} This initiated a gaming revolution, and video game centers started springing up across the country.\textsuperscript{179} Players began competing in these centers, known as “bangs,” quickly establishing one of the world’s first Esports ecosystems.\textsuperscript{180}

As Esports became entrenched in South Korean culture, it rapidly gained recognition as a sport and was broadcast on numerous television channels.\textsuperscript{181} In 2018, South Koreans spent twenty-nine percent of their week engaging with Esports and only twenty-seven percent engaging with traditional sports.\textsuperscript{182} With this level of engagement, Esports has had a significant impact on the South Korean economy.\textsuperscript{183} For instance, in 2017 the online gaming industry earned US$5.92 billion dollars in exports, and the


\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} See Agence France-Presse, South Korea’s Obsession with Esports has Turned it into a Video Gaming Power, TECH2 (July 21, 2018, 6:08 PM), https://www.firstpost.com/tech/gaming/south-koreas-obsession-with-esports-has-turned-it-into-a-video-gaming-power-4789851.html [https://perma.cc/S9YV-7CF9]; See also Mazur, supra note 177.


Due to its cultural popularity and economic impact, the South Korean government has taken steps to provide structure to the Esports industry.\footnote{See Mozur, supra note 177; Ozkurt, supra note 177.} In particular, the Korea e-Sports Association (“KeSPA”) was established as an organized branch under the umbrella of South Korea’s Ministry of Culture, Sports, and Tourism.\footnote{See Ozkurt, supra note 177; Jonathan Pan, Esports, the Next Olympic Sport, MEDIUM (Sept. 13, 2017), https://medium.com/@jonpan/esports-the-next-olympic-sport-8a5cbfe4f08f [https://perma.cc/HRZ4-4ME9].} KeSPA’s main objectives are to improve the legitimacy of Esports, regulate Esports, and distribute broadcasting rights.\footnote{See Chao, supra note 20, at 758; Ozkurt, supra note 177.}

KeSPA also helps provide legal aid for Esports players, particularly in the area of immigration.\footnote{See Young Jae Jeon, Protecting pro Gamers in South Korea: Q&A with KeSPA, ESPN (Sept. 21, 2017), https://www.espn.com/esports/story/_/id/20775150/q-kespa-representative [https://perma.cc/7MEF-963X]); Jaeic “Koth” Lee, Korea E-Sports Association Signs an Official Legal Advisory MOU with Law Firm ‘Legacy Pro Law’, INVEN GLOBAL (Sept. 5, 2017), https://www.invenglobal.com/articles/2889/korea-e-sports-association-signs-an-official-legal-advisory-mou-with-law-firm-legacy-pro-law [https://perma.cc/K4PG-55Z7].} In fact, on September 5, 2017, KeSPA partnered with Legacy Pro Law, a Los Angeles-based law firm, to provide advice on visa issues for South Korean Esports players.\footnote{See Jeon, supra note 188; Lee, supra note 188.} Moreover, KeSPA plays a structural role in processing athletic visas for foreign Esports players competing in South Korea.\footnote{See, e.g., Visa Requirements, EMBASSY OF THE REPUBLIC OF KOREA IN THE PHILIPPINES, https://overseas.mofa.go.kr/phen/brd/m_3277/view.do?seq=684588&srchFr=&amp;srchT=&amp;srchWord=&amp;srchTp=&amp;multi_itm_seq=0&amp;itm_seq_1=0&amp;itm_seq_2=0&amp;company_cd=&amp;company_nm=&page=2 [https://perma.cc/EWC6-KHRG] (last visited Nov. 29, 2019).} South Korea's temporary athletic visa, known as the C-4 visa, requires a recommendation from Korea’s Ministry of Culture, Sports, and Tourism.\footnote{See Jeon, supra note 188; Lee, supra note 188.} As KeSPA is an arm of the Ministry, it is able to streamline the visa process, allowing Esports players to obtain athletic visas on a more reliable basis and help expedite the visa
process so that foreign athletes can compete in South Korean Esports competitions.\footnote{192}

2. Russia

Similarly, Russia legitimized Esports in 2001 after recognizing that competitive video gaming had a sizeable Russian viewership and could benefit its economy.\footnote{193} Russian officials have also acknowledged the athletic nature of Esports compared to traditional sports.\footnote{194} Recently, Russia’s Minister of Sports, Pavel Kolobkov, stated that he sees Esports as an authentic sport because it possesses the characteristics of a traditional sport, namely training methodology, rules, and tournament systems.\footnote{195} Consequently, the Ministry has included Esports on the government’s list of officially recognized sports, and Esports players now earn official sporting grades, which are standardized rankings based on level of performance.\footnote{196}

Like South Korea, Russia established its own association known as the Russian Esports Federation, which falls under the control of Russia’s Ministry of Sport.\footnote{197} The Federation elaborates and submits regulations for sport grades, submits competition plans into the state annual competition calendar, and carries out

\footnote{192. See Jeon, supra note 188; Ozkurt, supra note 188.  
195. See Cooke, supra note 193; Mitchell, supra note 194.  
official Esports events. As it pertains to immigration, Russia’s official recognition of Esports has led to fewer visa issues for Esports athletes competing within its borders.

3. France

The French government has also begun to formally recognize Esports. In 2016, the French Senate unanimously adopted La Loi pour une République Numérique (the “Digital Republic Bill”), which dissociated Esports events from gambling and expanded the definition of athletes to include Esports players. Under the “athlete” classification, French Esports professionals can now partake and contribute to government pensions and other social nets.

Additionally, Article 42 of the Digital Republic Bill provides a framework for professional Esports players’ contracts. Specifically, Article 42 delineates the Esports titles approved by the French government and regulates the age at which players may

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198. See Cooke, supra note 193; Russian e-Sports Federation, Accreditation in the Ministry of Sport, supra note 197.


201. See Auxent, supra note 200; Bago, supra note 200.


participate in tournaments. In doing so, the bill formally acknowledges Esports as a profession and differentiates Esports players from tourists, who are disqualified from athletic visas. With these mechanisms in place, pundits believe that foreign Esports players should have fewer issues obtaining French visas.

4. China

Likewise, the Chinese government has legitimized Esports by defining Esports as a profession. China’s Ministry of Human Resources and Social Security delineated that an Esports Professional is someone who competes in Esports tournaments, performs at Esports events, or trains with other professional players. This new definition will likely provide Esports players easier access to Chinese working visas so that they may compete in China.

Additionally, China has established infrastructure that may help the visa process. This year, the China Internet Association...
announced plans to create an Esports Work Council in order to “promote, reinforce, and standardize the Esports industry” and “guide [E]sports into a sustainable way.” 211 This council has received wide government support from the Chinese Propaganda Department, the Ministry of Industry and Information Technology, the Ministry of Culture and Tourism, and the General Administration of Support of China. 212 This type of backing could help solve visa issues in China going forward. 213

IV. ESPORTS SHOULD BE CONSIDERED LEGITIMATE SPORTS FOR PURPOSES OF THE P-1A VISA

Similar to the countries discussed above, the United States has a massive financial stake in Esports. 214 Unlike these countries, however, the United States has not taken the necessary steps to streamline the visa process for the foreign players that make up a significant portion of its competition base. 215 For the United States to maintain its momentum in the industry, it is critical that it displays high-quality Esports on television and streaming services, which inevitably requires the talent of foreign players. 216 Thus, a consistent, reliable visa process is imperative for the continued success of the US Esports industry.

Given the successes of other foreign regimes, it is evident that legitimizing Esports in the eyes of the government could make the visa process more consistent by allowing Esports athletes to qualify for P-1A visas. The biggest obstacle is convincing the USCIS and other government officials that Esports are analogous to traditional sports. At present, there are inherent similarities

211. See Chen, supra note 210; Kolev, supra note 210.
212. See Chen, supra note 210; Kolev, supra note 210.
213. See Kolev, supra note 210; see also Radoslav “Nydra” Kolev, ENCE are the Fourth Team to Withdraw From WESG 2018, VPESPORTS (Mar. 5, 2019), https://www.vpesports.com/csgo/news/ence-are-the-fourth-team-to-withdraw-from-wesg-2018 [https://perma.cc/Q549-NRTM] (discussing one example of widespread visa issues that had prevented players from competing in China prior to the announcement of the Esports Work Council).
214. See supra Section II.A.
215. See supra Section III.A.
216. See supra Section II.A.
shared by Esports and traditional sports, and thus Esports should be regarded as legitimate sports and Esports players should be considered athletes. However, there are still mechanisms that can be put in place in order to improve legitimacy and help Esports players meet the requirements for a P-1A visa.

A. Esports Involve the Dictionary Elements of a Sport: Physical Effort, Skill, and Competition

Admittedly, sitting in front of a computer with a mouse, keyboard, or controller is not normally what comes to mind when someone thinks of an athlete.\textsuperscript{217} In fact, likely the opposite is true: there is a stereotype that video game addicts are unathletic and not physically fit.\textsuperscript{218} As noted, there is no legal definition of “athlete” or “sport,” and there is very little legislative history and court opinions that opine on these definitions.\textsuperscript{219} The P-1A visa definition also does not help much, where “professional athletes” are defined as individuals employed as athletes on teams in a professional sports association, but there is no guidance as to what constitutes an “athlete” or “sport.”\textsuperscript{220}

Absent a legal definition, dictionaries are the most reliable source for defining a sport and can provide a consistent standard for assessing the athlete status of Esports players.\textsuperscript{221} The Oxford Dictionary defines a sport as “an activity involving physical effort and skill in which an individual or team competes against another or others.”\textsuperscript{222} Merriam-Webster, on the other hand, connotes that a sport is a “physical activity engaged in for pleasure,” or “a particular activity (such as an athletic game) so engaged in.”\textsuperscript{223}

Certainly, Esports are competitions between teams who participate in a game or match.\textsuperscript{224} It also takes a considerable

\begin{itemize}
\item 217. See Daniel Kane & Brandon D. Spradley, Recognizing Esports as a Sport, THE SPORT May 2017, at 1.
\item 218. See generally Id.
\item 221. See Kane & Spradley, supra note 217.
\item 222. Sport, POCKET OXFORD AMERICAN DICTIONARY (2d ed. 2008).
\item 223. Sport, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1998).
\item 224. See supra Part II.A.
\end{itemize}
amount of skill to become a professional Esports athlete.²²⁵ Esports require technical dexterity to manipulate buttons on a controller, keyboard, or mouse to effectively control the on-screen avatar in a given video game.²²⁶ In fact, some professional players can perform more than 300 actions a minute, or approximately ten per second.²²⁷ There is also a significant level of mental skill required, as the outcome of many Esports contests depend on opponents strategizing and outsmarting each other.²²⁸ This skill is developed over the course of lengthy practice sessions, often lasting between twelve and fifteen hours.²²⁹

However, there is a debate as to whether Esports can meet the physical effort or activity elements that are consistent under the definition of “sport.”²³⁰ While competitive videogaming does not necessarily require the gross motor skills (such as jumping, running, and sliding) of traditional sports, it certainly calls for advanced fine motor skills,²³¹ which involve precise movements with increased accuracy and control utilizing small muscle groups.²³² The particular muscle groups used by Esports players are the hand and wrist muscles, which are the primary mechanisms for moving their in-game avatar and aiming.²³³ Through repetitive overuse, certain Esports players have experienced injuries similar to those of their traditional sport counterparts, including carpal tunnel syndrome, tennis elbow, and

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²²⁵. See Seth E. Jenny et al., Virtual(ly) Athletes: Where Esports Fit Within the Definition of “Sport”, 69 QUEST 1, 7 (2017).
²²⁶. Id.
²²⁸. See Jenny et al., supra note 225.
²²⁹. See Holden et al., supra note 38, at 21.
²³⁰. See Kane & Spradley, supra note 217.
²³¹. See Jenny et al., supra note 225, at 9, 10.
²³². See id.
Further, the lack of gross motor skills is not controlling when defining a sport. For example, archery and shooting are still considered Olympic sports despite their lack of gross motor skills.

Other scientific studies provide metrics for assessing physical effort, including basal metabolic rate and perceived exertion. Basal metabolic rate considers blood circulation, which can be measured by blood pressure. Studies have indicated that blood pressure is raised while playing video games, which shows that Esports players undergo physical exertion while they play. Perceived exertion, on the other hand, measures how strenuous an activity feels. Heart rate is one of the key gauges of perceived exertion, and it has been proven that Esports players experience increased heart rate measured at upwards of 160 – 180 beats per minute during competition, which is similar to the heart rate of someone running a mile. Thus, there is a strong argument that Esports can meet the “physical effort” or “physical activity” element of the “sports” definition, and therefore should be legitimately considered on par with traditional sports to satisfy the “professional athlete” requirement of the P-1A visa.

B. Esports Has Experienced Institutionalization Similar to Traditional Sports

Beyond dictionary definitions, certain institutions are starting to acknowledge the legitimacy of Esports. Robert Morris University, for instance, established the first varsity Esports program in 2014, and today there are more than one hundred

236. See Kane & Spradley, supra note 217.
237. See generally Tao Chen et al., Basal Metabolic Rate is Correlated With Blood Pressure Among Young Population, 9 INT’L. J. CLINICAL & EXPERIMENTAL MED. 12375 (2016).
238. See Kane & Spradley, supra note 217.
239. See id.
varsity Esports programs at various universities that offer scholarships to attract students. Additionally, the International Olympics Committee (“IOC”) is considering adding Esports to the 2024 Olympic games. Demonstrating its commitment, the IOC is overseeing an Esports tournament that will take place in Tokyo in the lead up to the 2020 Olympics. As these institutions begin to treat Esports like they do traditional sports, there is even more reason for the US government and the USCIS to view Esports as a legitimate sport and Esports players as legitimate athletes.

Beyond the sport itself, the structure of Esports demonstrates similarities to traditional sports. Just like traditional sports, Esports have a franchising system, where there are teams, leagues, a salary system in which players are compensated by their teams, central organizing committees (including league commissioners), schedules (now including the Overwatch League’s home and away schedule), and rules. This franchising system almost exactly mirrors the franchising arrangement of traditional sport professional leagues.

Esports leagues are also based in the United States and teams are often associated with international cities. For instance, the Shanghai Dragons, London Spitfire, and Paris Eternal, are a few of the international teams in the Overwatch League. This international franchising directly applies to the “internationally recognized level of performance” requirement under a P-1A visa, and it satisfies the evidentiary requirement of participation in a “major United States sports league” for foreign players.

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242. Id.
243. See Martinelli, supra note 18, at 501.
245. See supra Section II.A.
246. See Holden et al., supra note 38, at 20-25.
247. See id.
249. See 8 U.S.C. § 1184(C)(4)(A); P-1A, supra note 150.
Additionally, Esports typically have yearly international competitions in which players from the same country form teams and compete against other teams representing their respective nations, a system that is similar to the World Cup or Olympics. This should satisfy the evidentiary requirement for participation on an “international competition with a national team.”

V. INITIATIVES FOR LEGITIMIZING ESPORTS – HOW THE US CAN HELP THE VISA PROCESS FOR ESPORTS PLAYERS

US officials can also look to international regimes as evidence that Esports are legitimate. As discussed above, there are a number of countries that formally recognize Esports and have established Esports associations under the guidance of particular government bodies. South Korea’s KeSPA and the Russian Esports Federation are marquee examples of legitimizing Esports through government institutions. To date, however, there is no similar institutionalization of Esports in the United States.

A. Establishing an International Esports Association

Bringing Esports within the US bureaucracy is an unlikely prospect given that other major US sports leagues are private entities. There are, however, alternatives to incorporating Esports under the umbrella of the US government. Specifically, there are international associations that are made up of national institutions and represent Esports players in various matters. The International E-sports Federation (“IeSF”) is one the most

250. See Blizzard Entertainment, supra note 88 (laying out the 2018 Overwatch World Cup Standings); Wolf, supra note 88 (describing the US Overwatch team’s victory in the Overwatch World Cup).
251. See P-IA, supra note 150.
252. See supra Section III.B.
253. See id.
254. See Chao, supra note 20, at 756–61.
256. See Chao, supra note 20, at 764-65.
reputable of these organizations. Currently, there are fifty-six nations that are members of the IeSF, and the United States is represented in the IeSF through its national Esports association known as the United States eSports Federation (“USeF”).

At first glance, it appears that the IeSF could help Esports players meet the P-1A requirement for “internationally recognized level of performance.” However, while the IeSF performs valiant work in promoting, legitimizing, and setting standards for Esports, its membership does not include all professional Esports players across every Esports title, and it lacks status as the sole governing body of Esports. This is primarily because the various stakeholders in the Esports industry (including publishers, league, organizers, teams, players, etc.) have interests that sometimes diverge drastically and thus choose not to join the organization. Beyond the IeSF, there are other international organizations, including the World Esports Association (“WESA”), World eSports Council (“WeSC”), and Esports Integrity Coalition (“ESIC”) that each suffer from the same issues as the IeSF.

The lack of a true Esports governing body is detrimental to the P-1A visa process. Without a governing international association, it is more difficult for athletes to demonstrate the evidentiary requirement of a “written statement from an official in the

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257. Id.
259. Id.
261. Specifically, members of the IeSF have to be part of a “National Esports Federation” (for instance, the USeF) that complies with IeSF criteria and is the “controlling body” for a single country. Because not all countries have “controlling bodies,” and because not every country that has professional Esports players has its own National Esports Federation, inevitably some professional Esports players are not included in the IeSF. See Internationale Esports Federation Statutes, arts. 2 & 10, INT’L E-SPORTS FED. (Oct. 10, 2016), https://www.ie-sf.org/images/9j6q2plki25i/1Fjm3fEACgag0oEuOMGG0Q/96e69683abe60fa6b27b20bd42add27/IeSF_Statutes__As_of_Oct_08_2016_.pdf [https://perma.cc/JJK2-J6H]
262. See Chao, supra note 20, at 765 (noting the risk the United States may face by deferring to an international body, particularly as it pertains to protecting the interests of domestic stakeholders).
governing body of the sport” for a P-1A visa. Further, a comprehensive governing body could provide the infrastructure to establish international rankings in Esports, or awards for high-level of performance, such as Player of the Year or Rookie of the Year accolades. These rankings and awards would demonstrate other P-1A evidentiary factors and help prove that Esports players are part of an “internationally recognized level of competition.” Thus, establishing a cohesive international unit that can encompass all qualified Esports, set standards, and provide a productive infrastructure will help legitimize Esports and help Esports players qualify for P-1A visas. The international nature of Esports makes cooperation possible, and overcoming potential legal hurdles is a necessary step in providing reliable access to visas for Esports players.

B. Establishing Labor Unions

Finally, establishing labor unions could help solve legitimacy issues and aid players in obtaining P-1A visas because a written consultation from a labor association is required to demonstrate “internationally recognized level of performance.” Riot Games has already established an association for its League of Legends players, which is a step in the right direction. However, the type of association that Riot Games established may not be the type contemplated by USCIS for purposes of a P-1A visa.

There is no definition for “labor organization” for purposes of a P-1A visa, but the USCIS does provide a list of organizations that have sent consultation letters on behalf of players. This list includes traditional sports unions such as the Major League Soccer

264. See P-1A, supra note 150.
266. See Chao, supra note 20, at 764-45.
267. See P-1A, supra note 150.
268. See Holden et al., supra note 38, at 47-48
270. See id.
Players Union and the National Basketball Players Association.

These associations are different than the Riot Games association because they qualify as true unions: they are the product of player self-organization and they “engage in... concerted activities for the purposes of collective bargaining.”

The Riot Games association, on the other hand, was unilaterally formed by the league.

Because traditional sport unions, with collective bargaining power, are formally recognized by the USCIS, Esports players should form unions that closely resemble those of traditional sports. Fortunately, players in the Overwatch League are making efforts to do just that. With the goal of forming a labor union on par with the NFLPA and MLBPA that possesses collective bargaining power, the Overwatch League currently stands as the model to be followed by other Esports leagues.

The collective bargaining process itself can be helpful in streamlining the visa process for Esports players. For instance, players could negotiate for league officials to help the players with evidentiary aspects of the P-1A visa, such as securing a guarantee that any player may obtain a written statement from a league official. While these types of guarantees are not usually bargained for in traditional sports, Esports requires frequent international

271. Id.


274. P-1A, supra note 150

275. See Myers, supra note 79 (describing Thomas “Morte” Kerbusch’s effort to create an independent Overwatch union); Kogel, supra note 79.

276. See id.

travel to the United States from foreign countries, which is particularly unique. Esports players unions, once formed, should focus their negotiating efforts on securing visa support from their leagues.278

However, in order to form a union, players must actually want to be a part of one.279 Under the NLRA, a union may be established only if a majority of employees assert a desire to unionize, which is usually expressed by signing cards or petitions.280 The concern with Esports is that there are a multitude of games and individual leagues based around those games, which might mean that players have varying interests.281 Additionally, Esports players have expressed a lack of attention when signing contracts with teams and leagues, which has resulted in players agreeing to harmful contract terms.282 This does not indicate that the players would make the effort to unionize.

However, the work done by Morte in the Overwatch League indicates that players are beginning to take unionizing more seriously, perhaps due to the exploitation that Esports players have experienced in the past.283 Beyond Overwatch, CS: GO players


278. See supra Section II.A.3.
279. See National Labor Relations Board, supra note 272, at 9.
282. See Dave, supra note 273 (noting that players signed contracts requiring them to attend promotional events, and the players later realized that they had agreed to the stipulations); Abicus Lee, The Dangers of Esports Contracts: Don’t Sign Before you Read This, DAILY ESPORTS (Apr. 21, 2019), https://www.dailyesports.gg/the-dangers-of-esports-contracts-dont-sign-before-you-read-this/ [https://perma.cc/MZ8X-KJ9Z].
283. See Dave, supra note 273; see also Myers, supra note 79.
are also forming a player’s association under the efforts of Scott “SirScoots” Smith, a longtime Esports veteran. This union will not be legally certified because players are not signing unionization cards, but it demonstrates that players are interested in banding together. In terms of potential varying interests, thus far players have organized as individuals competing in their respective leagues under their respective titles. In this sense, Esports players’ interests are likely to be aligned in a similar fashion as traditional sports players who play their sport within their respective sports leagues. While there remains much to be seen about the future of unions in Esports, it seems that more players favor unionizing, and this trend could have positive implications for securing P-1A visas.

VI. CONCLUSION

Because of the United States’ financial impact on the Esports industry, it plays a critical role in the global Esports ecosystem. In order to preserve this position, it is imperative that the United States presents first-rate Esports talent by allowing the best players from across the globe to compete in its competitions. In its current state, the US visa system is unnecessarily hindering the ability of foreign Esports players to do so.

The most effective way to address this issue is by streamlining the US visa process and allow foreign Esports players to qualify for P-1A visas as professional athletes. Currently, the USCIS, and perhaps the American public generally, are reluctant to acknowledge that Esports are akin to traditional sports and Esports players are athletes, and this is significantly harming the chances for Esports players to obtain P-1A visas. This Note identifies certain countries that formally recognize Esports to provide a reference point for Esports legitimacy within the United States.

284. See Myers, supra note 79; Mullen, supra note 80.
285. See Myers, supra note 79; Mullen, supra note 80.
286. See Myers, supra note 79; see Holden et al., supra note 38, at 41-42 (describing the League of Legends labor association as composed of League of Legends players).
287. See Holden et al., supra note 38, at 41-44.
States. Perhaps, in looking to these countries, the United States will see Esports in a new light.

Moreover, this Note reinforces Esports legitimacy by demonstrating that Esports meet all the necessary elements of sport and are institutionally similar to traditional sports. In identifying these similarities, hopefully US officials will see that these sports are far more similar than not, and that Esports athletes should be treated with increased esteem during the visa process. Finally, this Note identifies certain avenues that can further legitimize Esports and consequently help the effort for Esports athletes to obtain P-1A visas. For the foregoing reasons, it is time for the United States to give Esports athletes, who sacrifice almost everything to pursue their sport, the respect they deserve. Otherwise, the players, the United States, and the Esports industry will continue to suffer.