

Esports in the Global Arena: An Established Industry Deserves a New Visa Path

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I. INTRODUCTION

This paper will examine the current U.S. visa system compared to international approaches as they apply to Esports competitors, as well as their effect on the Esports industry as a whole. The U.S. visa system is currently at odds with the Esports industry, preventing some international competitors from participating in U.S. tournaments and joining U.S. Esports teams.¹ The U.S. visa barrier encourages Esports tournament organizers and teams to move to countries that do not pose the same immigration challenges, harming the long-term viability of the U.S. Esports market.² The main issue is that the U.S. visa options for Esports competitors do not fit the realities of the industry, with the most viable option, the P-1 visa, being better suited for more traditionally recognized sports and athletes.³

The requirements for the P-1 visa highlight the issues that the Esports industry has encountered in the past, namely recognition as a legitimate sport and athletic competition.⁴ Past work on the subject of Esports visas has argued that Esports should be recognized as sports, and therefore competitors should qualify as athletes for visa purposes.⁵ However, examining international approaches to the Esports visa problem yields more effective solutions, specifically Germany's new Esports specific visa.⁶ While other countries have moved to classify Esports competitors as athletes, Germany has avoided the cultural issue of whether video games are sports entirely by creating a new, industry-tailored visa for Esports.⁷ The United States should create an Esports specific visa to prevent the immigration issues that currently affect the U.S. Esports industry and ensure the prominence of the United States in the global Esports industry as a whole.

Section II provides an overview of the Esports industry and its rapid growth over the last 5 years. It will also summarize the issues that U.S. visa applications present to the domestic Esports industry and the need to adapt the law to fit the developing market for Esports visas. Section III will outline the current U.S. visa law, the requirements made of Esports competitors, and the effect that the law has on competitors and the Esports industry as a whole. Section IV will survey international approaches to Esports visas and weigh the pros and cons of their application to U.S. law. Section V will highlight the unique approach that Germany adopted with respect to Esports Visas and then

¹ See *infra* Section II.B and note 26.

² See *infra* Section III.

³ See *infra* Section III.

⁴ See *infra* Section VI.

⁵ Bridget A.J. Whan Tong, Comment, *A New Player has Entered the Game: Immigration Reform for Esports Players*, 24 JEFFERY S. MOORAD SPORTS J. 351, 357 (2017); Noah Parson, Note, *Immigration and Esports: The Issue of Legitimacy and Its Impact on the United States Visa Process*, 43 FORDHAM INT'L L.J. 1187, 1198-99 (2020).

⁶ See *infra* Section V.

⁷ See *infra* Section VI.B.

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evaluate that system as compared to both the U.S. and international approach. Section VI proposes a policy change for the U.S. visa system, the means with which to achieve the proposed change, and the benefits and drawbacks of the proposal.

II. THE GROWING ESPORTS INDUSTRY AND THE EFFECT OF THE CURRENT VISA SYSTEM

A. Current Growth and Structure of the Esports Industry

1. Growth

For the past decade, the Esports industry has been on a trend of meteoric growth with current market estimates showing a global revenue exceeding \$1 billion dollars and more than 443 million international viewers.⁸ These figures put Esports competition viewership ahead of the National Football League (NFL) and the global rugby market combined.⁹ Investments in the Esports field have followed suit, with the total investments rising from \$490 million in 2017, to \$4.5 billion in 2018.¹⁰ This trend is estimated to continue with revenue to hit \$1.8 billion by 2022.¹¹ The Esports industry itself is made up of a variety of video game titles such as Counter-Strike: Global Offensive, Overwatch, Dota 2, and Call of Duty. Each title is released and supported by a video game publisher and developer and hosts its own respective competitive structure, usually in either a loose tournament-based form, or a formal franchise league. These competitive structures are comprised of teams from Esports organizations such as Cloud9, FaZe Clan, and NRG Esports, with the top organizations worth anywhere from \$100 million to \$400 million.¹² However, despite all of the growth in the Esports industry as a whole, one crucial aspect of U.S. participation in this global market is lagging behind: the visa application process for international competitors.

2. Structure

From a consumer and fan standpoint, the Esports industry is divided by the individual titles or games, each with its own unique competition structure, rule set, and professional player base. In term of conventional sports, each title would represent an individual sport, such as baseball or basketball. The biggest titles ranked by peak viewership and prize money are *Counter-Strike*:

⁸ James Ayles, *Global Esports Revenue Reaches More Than \$1 Billion as Audience Figures Exceed 433 Million*, FORBES (Dec. 3, 2019, 6:36 PM), <https://www.forbes.com/sites/jamesayles/2019/12/03/global-esports-revenue-reaches-more-than-1-billion-as-audience-figures-exceed-433-million/#3dc33b511329>.

⁹ *Id.*

¹⁰ *Esports Ecosystem in 2021: Key industry companies, viewership growth trends, and market revenue stats*, BUSINESS INSIDER (Jan. 3, 2021), <https://perma.cc/6RTA-M4EC>.

¹¹ *Id.*

¹² Christina Settimi, *'Awful Business' Or The New Gold Rush? The Most Valuable Companies in Esports Are Surging*, FORBES (Nov. 5, 2019, 6:00 AM), <https://perma.cc/8ZZX-R65D>.

Global Offensive or *CS:GO*, *League of Legends*, *Dota 2*, *Call of Duty*, and *Rainbow Six Siege*.¹³

Significantly, each title has its own competitive organization. Some titles have an individual tournament system, similar to professional tennis or golf, where teams compete in tournaments organized by independent organizations or the publisher themselves.¹⁴ More recently, title publishers themselves have organized their own franchise leagues, modeled after professional conventional sports franchise leagues such as the NFL or MLS.¹⁵ These leagues require a sizable buy-in fee, anywhere from \$20 million to \$60 million, but attract high-profile ownership as well as a large variety of sponsors.¹⁶ It is suggested that the familiarity with the franchise model as well as the stability it offers is attractive to investors and sponsors alike.¹⁷ Additionally, the fact that the game publisher itself is the league owner and administrator provides for a built-in governing body that has full control over the title due to terms of use and terms of service provided for by intellectual property law.

The tournaments and competitions themselves are held over LAN, or local area networks, in large arenas, filling up venues such as the Staples Center and Madison Square Garden.¹⁸ These events are held in person to allow fans to watch the event live, generate revenue for the tournament organizers, and provide a LAN environment for the players to compete in. The LAN environment is important because it is far more stable than WiFi or even ethernet connection and prevents players from experiencing “lag” or dropping out of a match potentially worth thousands or millions of dollars due to network errors. Additionally, many Esports organizations will choose to create team houses for the players to live and practice at, streamlining any connection or time zone issues related to international teams and their practice schedule. While the tournaments themselves have significant prize pools, the largest being “The International” for *Dota 2*, setting the record at \$40 million,¹⁹ most professional Esports players are salaried by their teams, receiving payment based on a contract signed between the player and the organization he or she plays for.²⁰

¹³ Jamie Hore, *The Biggest Esports Games: Which Esports Title Boasts the Widest Audience and Biggest Prize Pools?*, THE LOADOUT (Nov. 24, 2020), <https://perma.cc/9QL9-PKD5>.

¹⁴ Max Miceli, *How the Franchising Model Shook Up North American Esports in 2018*, THE ESPORTS OBSERVER (Jan. 28, 2019), <https://perma.cc/KXC4-H36W>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Sean Cunningham, *How Video Gamers Sold Out Madison Square Garden*, INSIDEHOOK (Oct. 27, 2016, 5:00 AM), <https://www.insidehook.com/article/tech/how-video-gamers-took-over-madison-square-garden>; Paul Tassi, *League of Legends Finals Sells Out LA's Staples Center in an Hour*, FORBES (Aug. 24, 2013, 9:28 PM), <https://perma.cc/R3UA-ZNX5>.

¹⁹ Jerome Heath, *The Top 10 Highest Prize Pools in Esports*, DOT ESPORTS (Dec. 29, 2021, 6:00 AM), <https://perma.cc/E2N9-S6MN>.

²⁰ Whan Tong, *supra* note 5, at 357.

In both competitive models of the Esports industry, the professional player base as well as the fan base is consistently international.²¹ This international appeal has increased due to the popularity of online streaming services, such as Twitch and YouTube, that allow fans and potential professionals around the world access to the competitive scene of their chosen title.²² As a result, both competitive models feature teams, leagues, and skilled players that are based internationally, from the League of Legends leagues in North America, Europe, China, South Korea, Taiwan, and South East Asia, to the franchised Overwatch League with Pacific and Atlantic divisions that include teams from China, Korea, the United Kingdom, France, and the United States.²³

B. The Bottleneck of Esports Visas

The international realities of the Esports industry bring it into direct contact with the U.S. visa system administered by the USCIS. The current prominence of the United States in the Esports industry and the fact that most game developers and major tournaments are located in the United States make it necessary in most for Esports players to travel to the United States.²⁴ In order for an international Esports professional player to legally compete in the United States or live with a team based there, he or she must first get a visa. However, this process is far from straightforward or guaranteed.²⁵ There are a variety of different visa options that an Esports professional player can attempt to secure in order to come to the United States, but none of them are a perfect fit, which can cause problems for players, teams, and leagues alike.²⁶

Currently, Esports competitors can make an argument to qualify for a B-1, B-2, H-1B, O-1A, EB-1, P-1A, and P-3 visa.²⁷ The B-1 and B-2 visas are inappropriate in most cases because a player who trains and competes will most likely be in violation of their visa status due to the compensation they receive as salary.²⁸ The H-1B visa applies to individuals with high-level, specialized knowledge and education who work in specific areas of employment,

²¹ Parson, *supra* note 5, at 1198–99.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1201.

²⁵ Whan Tong, *supra* note 5, at 352.

²⁶ Jonathan Brannon, *Are You Not Entertained? Considering the P-3 Visa as an Alternative Option for International Esports Professional Gamers*, 60 ARIZ. L. REV. 753, 762; Ferguson Mitchell, *Four Chinese Overwatch World Cup Team Members Denied US Visas*, THE ESPORTS OBSERVER (Oct. 27, 2017), <https://perma.cc/F9QW-XFTB>; Samuel O'Dwyer, *PSG Talon Confirms that Half of Starting Roster Will Be Unavailable for a Portion of Worlds 2020*, DOT ESPORTS (Sept. 16, 2020, 8:11 AM), <https://perma.cc/Y5YN-PYKN>.

²⁷ Parson, *supra* note 5, at 1202–08; Whan Tong, *supra* note 5, at 352; Brannon, *supra* note 26, at 757.

²⁸ Whan Tong, *supra* note 5, at 352.

usually technical or scientific.²⁹ While map knowledge³⁰ and awareness of a title's current competitive meta³¹ require some form of specialized knowledge, Esports professional players most likely do not qualify for this form of visa.³² More viable options for Esports competitors are the O-1A visa and EB-1 visa which are granted to "individuals who exhibit 'extraordinary ability . . . demonstrated by sustained national or international acclaim.'"³³ These visas have very high evidentiary requirements, which include requirements like winning a major award (like a Nobel Prize), or three other pieces of evidence from ten categories, such as published material, contributions of major significance, or display of some work in an exhibition or showcase format.³⁴ Additionally, the EB-1 visa comes with additional considerations because it is subject to green card quotas, capped on a country specific basis.³⁵ These requirements for O-1A and EB-1 visas make it unlikely that an Esports professional will receive such a visa, unless they are at the top of their competitive scene, have major awards, and their scene is widely recognized.

The current best option for Esports professional players seems to be in the P visa category, specifically designed for athletes and performers.³⁶ The P-1A visa is granted to individuals who perform as an athlete, either individually or as a team, and are internationally recognized for their level of performance.³⁷ The P-1A visa has become the norm for all high-level Esports competitors seeking U.S. visas, and for good reason—it has been done before.³⁸ In 2013, Riot Games, a game publishing company, successfully petitioned the USCIS to grant a P-1A visa for Canadian League of Legends pro Danny "Shiphtur" Le.³⁹ However, this did not establish the precedent that the Esports industry was hoping for. Today, P-1A visas are currently awarded on a "sporadic and unpredictable basis."⁴⁰ A prominent example of this is the USCIS's 2015 decision to deny a P-1A petition from a Super Smash Bros. Melee player called "Leffen," mainly on the grounds that the agency did not consider Super Smash

²⁹ *Id.* at 374.

³⁰ Map knowledge is the familiarity with the virtual, in-game area in which the competitions are held. Map knowledge can include obstacles, hiding spots, vantage points, and other features that affect the way the game is played. Map knowledge is akin to bobsled driver's familiarity with the course or a rally team's navigator knowing each turn in the track.

³¹ A "competitive meta" is a title's current best strategy or most effective way to play the game. Depending on how much the title is updated or how long it has been out, new strategies are developed which replace the old strategies that used to be the most competitive.

³² See Brannon, *supra* note 26, at 770.

³³ Parson, *supra* note 5, at 1204–05 (quoting 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (2019)).

³⁴ *Id.* at 1205.

³⁵ *Id.* at 1206.

³⁶ Whan Tong, *supra* note 5, at 384; Brannon, *supra* note 26, at 772.

³⁷ Michael McTee, *E-Sports: More Than Just a Fad*, 10 OKLA. J.L. & TECH. 70, 70 (2014).

³⁸ Parson, *supra* note 5, at 1209.

³⁹ *Id.*

⁴⁰ *Id.*

Bros. Melee a “legitimate sport.”⁴¹ The inconsistency of P-1A visa approval for Esports competitors is theorized to stem from the lack of “institutional legitimacy enjoyed by traditional sports”⁴² and “cultural resistance to consistently recognize esports as a sport and gamers as athletes.”⁴³

In addition to the specific requirements of the P-1A visa, Esports competitors must also fulfill the more traditional requirements for visa approval, such as establishing “non-immigrant intent.”⁴⁴ In order to show non-immigrant intent, a visa applicant “must demonstrate permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin.”⁴⁵ The young age of Esports competitors makes establishing this intent difficult because they do not have the traditional connections to their country of origin that establish intent for officials at the USCIS.⁴⁶

The inconsistency with which the USCIS grants P-1A visas to Esports competitors threatens the continued growth and prominent position of the United States in international Esports for a multitude of reasons. First, denial of a P-1A visa might force Esports competitors to obtain a B-1 or B-2 visa, as they have done before, which puts them at risk of deportation due to the salary paid to them by their organizations.⁴⁷ Second, the current USCIS visa regime might dissuade players from attempting to compete in the U.S. or joining a U.S. team.⁴⁸ Similarly, domestic publishing companies are considering holding their largest tournaments in other countries due to concerns regarding the visa status of their players.⁴⁹ Third, in certain Esports titles, the best competitors come from foreign countries, making it crucial for the U.S. Esports industry to attract high quality competition abroad.⁵⁰ Without such talent, it would be impossible for U.S. Esports competitions to broadcast and display high quality content, and the lack of talent would fail to attract the increasing number of Esports fans around the globe.⁵¹

An additional issue comes in the form of Esports competitors who are not in a large enough Esport or not widely recognized enough to warrant a P-1A

⁴¹ *Id.* at 1209–10.

⁴² Parson, *supra* note 5, at 1211.

⁴³ Whan Tong, *supra* note 5, at 383.

⁴⁴ Courtney New, *Immigration in Esports: Do Gamers Count As Athletes?*, FORBES (May 18, 2017, 3:49 PM), <https://perma.cc/5EFL-3JST>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Whan Tong, *supra* note 5, at 385.

⁴⁸ *Id.*

⁴⁹ Ferguson Mitchell, *Valve Ponders Moving the International Away from U.S. Facing Visa Uncertainty*, ESPORTS OBSERVER (Feb. 10, 2017), <https://perma.cc/HQF3-C5LB>.

⁵⁰ Parson, *supra* note 5, at 1217.

⁵¹ *Id.*

visa, but nevertheless possess the talent to succeed and benefit Esports as a whole.⁵² These competitors seek B-1/B-2 visas because they have no other option.⁵³ However, these options suffer from the limitations described above. In terms of Esports competition, visa status should not be a barrier to compete in U.S. events and tournaments.

C. Economic Losses Related to Visa Issues

While concrete figures of economic losses related to visa issues in the Esports industry are hard to come by, there are two main concerns that relate to visa issues in the economic sense. First, the operators of tournaments currently held in the United States are considering moving their tournaments to countries with less restrictive visa rules and more consistent applications of those rules.⁵⁴ Esports tournaments have the potential to raise huge amounts of money with events averaging 10,000–15,000 in attendance, with the potential to have over 100,000 in attendance depending on the event.⁵⁵ In 2017, the revenue from ticket sales and merchandise was estimated to be \$63.7 million.⁵⁶ Second, there is a large amount of online viewership that represents a significant part of the market, with total audiences estimated at 495 million in 2020, making it comparable to baseball at 500 million.⁵⁷ The majority of Esports organizations' revenue comes from sponsorships at an estimated \$456 million annually.⁵⁸ If U.S. teams cannot attract top talent from around the world due to visa issues, they will fail to sign as many sponsorships due to a lack of popularity. As a concrete example, on October 12, 2020, the U.S. Esports organization 100 Thieves announced that they were leaving the Counter Strike: Global Offensive Esport, citing the Esport's momentum shift to Europe as well as visa issues that precluded its former team members from practicing and competing in the United States.⁵⁹

⁵² Luke Winkie, *When It Comes to Securing Visas, Sherry Nhan Is the Matron Saint of Esports*, WASH. POST (Jan. 22, 2020), <https://perma.cc/V8MX-628F>.

⁵³ *See id.*

⁵⁴ Mitchell, *supra* note 49.

⁵⁵ Josh Chapman, *Esports: A Guide to Competitive Video Gaming*, TOPTAL FIN., <https://perma.cc/U8QS-VM2M>; Steve Van Sloun, *Esports Franchise Economics*, LOUP VENTURES (Mar. 9, 2018), <https://perma.cc/6767-4NDL>.

⁵⁶ Chapman, *supra* note 55.

⁵⁷ Roundhill Team, *Esports Viewership vs. Sports in 2020*, ROUNDHILL INVESTMENTS (Sep. 25, 2020), <https://perma.cc/7VYP-3WZB>.

⁵⁸ Mitch Reams, *How Esports Organizations Make Money*, HOT SPAWN (Apr. 15, 2019), <https://perma.cc/AWCS-HE43>.

⁵⁹ 100 Thieves (@100Thieves), TWITTER (Oct. 12, 2020, 12:45 PM), <https://perma.cc/C2PD-VH64>.

III. THE CURRENT U.S. APPROACH TO ESPORTS VISAS

A. P-1 Visa

1. Requirements

A P-1 visa requires that the applicant is temporarily coming to the United States to “perform at specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.”⁶⁰ Section 1154(i)(2) defines a professional athlete as

an individual who is employed as an athlete by – (A) 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; or (B) any minor league team that is affiliated with such an association.⁶¹

Section 1184 also allows P-1 visas for an individual who “performs as an athlete, individually or part of a group or team, at an internationally recognized level of performance.”⁶²

The Policy Manual for the USCIS states that P-1A petitioners “must be coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete or athletic team that has an international reputation.”⁶³ The Policy Manual requires that a P-1A visa petitioner submit a tendered contract with a major U.S. league or team or tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport, and two of the following:

Evidence of significant participation in a prior season with a major U.S. sports league; [e]vidence of participation in international competition with a national team; [e]vidence of significant participation in a prior season for a U.S. college or university in intercollegiate competition; [a] written statement from an official of the governing body of the sport detailing the person’s or team’s international recognition; [a] written statement from a recognized expert or member of the sports media detailing the person’s or team’s international recognition; [e]vidence that the person or team is ranked if the

⁶⁰ 8 C.F.R. § 214.2 (2020).

⁶¹ 8 U.S.C. § 1154(i)(2) (2012).

⁶² 8 U.S.C. § 1184(c)(4)(A).

⁶³ U.S. CITIZENSHIP & IMMIGR. SERV., POLICY MANUAL, vol. 2, pt. N, ch. 2. (2022).

sport has international rankings; [or] [e]vidence the person or team has received a significant honor or award in the sport.⁶⁴

In addition to those documentary requirements, P-1A petitioners must go through a statutorily mandated consultation process which the Policy Manual details as a consultation with an appropriate labor organization if one exists, in which the organization must evaluate the petitioner's qualifications and state whether the services provided are appropriate for an internationally recognized athlete.⁶⁵ Finally, in addition to all of the above requirements, the petitioner must still establish dual intent by demonstrating significant ties to their home country.

While there are few administrative appeals for Esports visa denials, the few cases that do exist highlight the difficulties that Esports competitors face in the traditional sport leaning framework of the P-1A.

For example, in a non-precedent decision of the Administrative Appeals Office from 2019, a domestic *Overwatch* academy team⁶⁶ sought to classify an international competitor who had signed a contract with a U.S. academy team as an internationally recognized athlete for the purposes of obtaining a P-1A visa.⁶⁷ The Director of the California Service Center denied the petition, concluding that the *Overwatch* Esports team “did not establish that the Beneficiary will be competing in athletic competitions which have a distinguished reputation and which require participation of an athlete who has an international reputation.”⁶⁸ The appeals office affirmed the Director's decision finding that the petitioner did not offer “specific evidence confirming that its competitions are events with a distinguished reputation and require the participation of athletes who have an international reputation”⁶⁹ and that the Esports team did not establish that the player was “coming to the United States solely for the purpose of performing as an athlete with respect to a specific athletic competition,”⁷⁰ finding that the competitor would also be a “social media player” in addition to competing in athletic competitions.⁷¹ The Director and the Administrative Appeals Office emphasized an article in evidence which stated that “literally anybody – provided they have the skill – has the chance to compete”⁷² and the official rulebook for the Esport league which they point out “[does] not require the participation of athletes who have

⁶⁴ *Id.* at vol. 2, pt. N, ch. 4.

⁶⁵ *Id.*

⁶⁶ An academy team is the Esports equivalent of a minor league team in traditional sports.

⁶⁷ CSP-C-T-, LLC Certification of California Service Center Decision Form I-129, Petition for a Nonimmigrant Worker, 2019 WL 553287, 1 (Dep't of Homeland Sec. January 22, 2019).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 6.

⁷² CSP-C-T-, LLC Certification of California Service Center Decision Form I-129, *supra* note 67, at 4.

an international reputation”⁷³ as evidence that the competition did not require international recognition.

The Director and Administrative Appeals Office’s findings indicate the uphill battle that Esports organizations can face in the U.S. visa process. First, addressing the finding that the rules did not contain an international recognition requirement, these contentions would be absurd in the context of a more traditional sport’s minor league organization, requiring, for example, that the Minor League Baseball rulebook contain a provision that only internationally recognized players would be allowed in the league. Second, the emphasis on the fact that anyone has the chance to compete completely ignores the evidence presented that only 168 players can join the league out of the 25,000 – 40,000 players who compete for one of those spots.⁷⁴

The decision also indicates the lack of compatibility between the U.S. visa system and the commercial realities of the Esports industry specifically related to streaming and social media creation. The administrative appeals office denied the competitor’s eligibility for P-1 status because the “promotional play” would extend beyond the league’s competitive season,⁷⁵ and the competitor’s status as a social media player in addition to an athletic competitor would prevent P-1 classification under the statute.⁷⁶ Streaming on social media and competition in off-season events are a central driver of Esports organizations’ popularity, and a popular streamer can help the organization grow its fanbase.⁷⁷ The statute and its application in this decision would be akin to saying that a minor league baseball player could not participate in off-season promotional events or stream their individual practice on social media.

To add further context to the decision, the *Overwatch* league is one of the few franchise leagues in U.S. Esports, with teams paying a buy in fee of between \$20 million and \$60 million for a spot in the league.⁷⁸ The petitioner in the aforementioned case was essentially the minor league affiliate of one of those teams. The *Overwatch* contenders league, in which the petitioner competed, has a total prize pool of over \$1 million dollars and is an international league represented by competitors from Australia, China, the United Kingdom, France, Korea, Canada, the United States, and more.⁷⁹

⁷³ *Id.* at 4.

⁷⁴ *Id.*

⁷⁵ *Id.* at 6.

⁷⁶ *Id.*

⁷⁷ *How Do Esports Teams Make Money?*, ESPORTZ NETWORK, (Mar. 5, 2021), <https://perma.cc/8AHT-X9WX>.

⁷⁸ Kevin Webb, *Eight Teams Paid More Than \$30 Million Each to Join the Overwatch League – Here’s Everything You Need to Know Before the New Season Starts*, BUSINESS INSIDER (Dec. 29, 2018, 8:00 AM), <https://perma.cc/2Z6F-PRWJ>.

⁷⁹ Clémence “Idril” Lemoal, *Numerous Team Departures Affect the Overwatch Contenders*, MILLENIUM (Apr. 29, 2020), <https://perma.cc/745R-3ZKN>; *Overwatch Contenders*, BLIZZARD, <https://perma.cc/K3UR-Q7X5>.

Despite these facts, the USCIS director and the appeals office found that the petitioner did not demonstrate that there was a skill level required for the anticipated competition and did not establish that the competitor was internationally recognized as the statute requires.⁸⁰ While the administrators did not reject the competitor because they did not consider him an athlete, their denial of any skill requirement to compete at a prestigious level amounts to the same thing.

2. Issues for Esports Competitors

The current U.S. law is ambiguous when it uses the terms athlete and sport. This leaves room for bureaucratic interpretation of those terms that depend on the individual beliefs of the USCIS agent who is reviewing the visa petition. As stated above, the USCIS has an inconsistent record when it comes to approving P-1 visas for Esports competitors. The USCIS operates through case-by-case adjudications and one approval or denial does not create a precedent for subsequent cases.⁸¹ Additionally, the definition of a professional athlete under section 1154 is inherently modeled after a traditional sports franchise model, such as Major League Baseball or the National Football League, where one association governs multiple franchised teams. The Esports industry does have franchise model leagues, however, a majority of the Esports leagues follow a more decentralized model with individual entities hosting tournaments for independent organizations to attend. Furthermore, the demographics of Esports competitors suggest that traditional immigration requirements with respect to repatriation would be more difficult to prove, such as a mortgage or significant ties to their home country.

In addition to the above difficulties, the inconsistency of USCIS decisions forces Esports organizations to show that they compete at an internationally recognized level each time they file a new visa.⁸² The inconsistency and lack of clear precedent of law also allow for the administrators to evaluate each case based on their view of whether or not Esports are as legitimate as traditional sports for visa petitions.⁸³

Another limitation presented by the current U.S. visa system with respect to Esports competitors is the length of time required to go through the petition process compared to the speed at which the Esports industry moves. As evidenced above, the P-1A visa process is extensive, requiring adequate documentation, consultation interviews, and an establishment of dual intent. This in addition to preparing, processing, and approving the petition can cause

⁸⁰ CSP-C-T-, LLC, Petition for a Nonimmigrant Worker, 2019 WL 553287.

⁸¹ Joss Wood, *White House Petition Response on Esports Team Visas Fails To Resolve The Issue*, THE LINES (June 28, 2016), <https://perma.cc/MB5Y-W3M8> (quoting the official White House response to a petition to recognize Esports as a "legitimate" sport for the purposes of the P-1 visa).

⁸² Parson, *supra* note 5, at 1210-11.

⁸³ *Id.* at 1211.

substantial delays, which are sometimes just as damaging as a denial.⁸⁴ In many cases, delays in visa approvals prevent players from competing in important tournaments, forcing organizations to find substitutes on short notice.⁸⁵ The long process creates more uncertainty for those international Esports organizations sending their teams to compete in the United States, and it also precludes possible roster changes and other decisions that the organizations can make before such tournaments. These concerns serve to make competitions in the United States unattractive as compared to other countries with more tailored and consistent visa systems.

IV. INTERNATIONAL APPROACHES – DEFINING ESPORTS COMPETITORS AS ATHLETES

A. Countries

An increasing number of countries have officially recognized Esports as legitimate sports for both cultural and legal purposes. These countries include South Korea, China, South Africa, Russia, Italy, Denmark, Nepal, Ukraine, Finland, Indonesia, and a host of other countries.⁸⁶ This recognition can come with tax breaks and significantly, access to visas for the competitors.⁸⁷

B. Application to the P-1A

Based on the language in 8 U.S.C. § 1184, if the United States were to recognize Esports as an official sport and Esports competitors as athletes, it would likely make the USCIS process more consistent to some degree. This could be accomplished through a guidance memo issued by the USCIS, stating that for the purpose of the P-1 visa, Esports are recognized as an athletic competition. Such a recognition would directly apply to 8 C.F.R. § 214.2 and clarify that Esports competitors are athletes for the purposes of the P-1 visa, specifically the language requiring a P-1 visa petitioner to “perform at specific athletic competition as an athlete ... at an internationally recognized level or performance.”⁸⁸ However, this is not a perfect solution because it only addresses the bare minimum of inconsistency in Esports visas, and as the administrative appeals case demonstrates, there is more room for inconsistency than just the definition of Esports as a sport.

⁸⁴ O’Dwyer, *supra* note 26.

⁸⁵ Nader Hasan, *Visa Issues Causing Headaches in the Esports World*, INSIDE SPORTS LAW (Jan. 16, 2020), <https://perma.cc/WR8K-QLUM>.

⁸⁶ Thiemo Bräutigam, *Finland has Recognized Esports as Sports*, DOT ESPORTS (Dec. 13, 2016, 9:36 AM), <https://perma.cc/YCD5-FRYB>.

⁸⁷ *Id.*

⁸⁸ 8 C.F.R. § 214.2(p) (2020).

C. Limitations and Downsides

This approach will be difficult because Esports are not well suited to fit within the framework under current U.S. law. Esports organizations are not as large or established as sports organizations such as the National Basketball Association or National Football League and do not have as much domestic recognition.⁸⁹ Therefore, they do not have the recognition that more traditional sports have when advocating for their competitors; it would be highly unusual for a petition on behalf of the Los Angeles Dodgers' minor league organization to be rejected because the petition did not sufficiently prove that the competition was at an internationally recognized level of skill, but when the San Francisco Shock, an *Overwatch* team, petitions, more questions are asked.

Additionally, Esports face resistance when it comes to recognition as athletic competition at all. Part of this resistance is that Esports lack the traditional physicality and comparative institutionalization that traditional sports have.⁹⁰ Some scholars have found that competitive video games are not yet sports given the lack of physical activity.⁹¹ The commercial nature of Esports also has the potential to limit Esports recognition as a sport by the sporting community, focusing on the fact that individual games are created for a commercial rather than recreational purpose.⁹²

Recognizing competitive video games as sports can be a controversial topic, evoking sociological questions regarding the definition of sport.⁹³ This controversial nature as well as the ambiguity within current scholarship regarding the status of competitive video games as sports, makes governmental action establishing Esports as a sport more difficult. While some legislators may find the benefits of recognition and the beliefs of their constituents to be in-line with such action, others may find that the traditional sports fan would not respond favorably. A legislative action that comes down to sociological definitions related to cultural valuation is not likely to be passed.

The language in 8 U.S.C.A. § 1184 and 8 C.F.R. § 214.2 prevents the classification of Esports as sports from being a silver bullet that solves immigration issues.⁹⁴ The statute still requires that the athlete perform at an internationally recognized level of competition. This standard would require that the USCIS make individual judgements on whether the Esport and the

⁸⁹ Katie Jones, *How the eSports Industry Fares Against Traditional Sports*, VISUAL CAPITALIST (Sept. 3, 2019), <https://perma.cc/ARA7-R6UF>.

⁹⁰ Seth E. Jenny et al., *Virtual(ly) Athletes: Where eSports Fit Within the Definition of "Sport,"* 69 QUEST 1, 15 (2017).

⁹¹ Jenny, *supra* note 90; Kirstin Hallmann & Thomas Giel, *eSports – Competitive Sports or Recreational Activity?*, 21 SPORT MGMT. REV. 14, 17 (2018), citing SportTreff, *eSports*, Cologne: SportTreff (2017).

⁹² Hallmann & Giel, *supra* note 91.

⁹³ Marko Marelić & Dino Vukušić, *E-sports: Definition and Social Implications*, 11 EQOL J. 47, 50-51 (2019).

⁹⁴ See 8 U.S.C.A. § 1184 (West 2020); see also 8 C.F.R. § 214.2 (2020).

competitor have significant enough international standing to warrant such a visa. Many of the current evidentiary avenues to establish international standing are geared more towards traditional sports with established national and international associations that can speak on the athlete's behalf.⁹⁵ Classifying Esports as a sport, while making certain visa hurdles shorter, is still akin to fitting a round peg in a square hole. A more tailored approach would be more effective.

V. GERMANY'S UNIQUE APPROACH TO ESPORTS VISAS

A. Requirements for the Visa

In order to get an Esports visa in Germany, the petitioner must satisfy three requirements. First, they must be at least 16 years old. Second, they are paid a gross salary that is at least 50 percent of the assessment ceiling for the statutory pension insurance, and third, the German organization responsible for the Esport confirms the competitor is in the professional practice of the Esports and the Esport practiced is of considerable national or international importance.⁹⁶

B. What the Visa Allows

The new visa allows Esports competitors to secure long term residency in Germany for the duration of their contracts, provided that they meet the above requirements.⁹⁷ This is a large improvement over the 90 day visa for Esports competitors that was introduced in 2018.⁹⁸ Additionally, the new visa allows Esports competitors to get a long term residence permit without the approval of the Bundesagentur für Arbeit (Federal Employment Agency).⁹⁹ That process would have required Esports competitors to reside for 5 years in Germany, prove their subsistence is ensured by a fixed and regular income, prove they have a sufficient command of the German language, prove they have a basic knowledge of the legal and social system and way of life, pass a criminal background check, and have sufficient living space in their household.¹⁰⁰ Additionally, the new German process is streamlined so that there are fewer

⁹⁵ See Matt Dillon, *An eSports Attorney Reviews the Visa Issues in eSports*, DOT ESPORTS (Jan. 27, 2016, 7:03 PM), <https://perma.cc/ABW5-XJPW> (listing the requirements for a P-1A visa and how applicants can meet those requirements as defined by statute).

⁹⁶ Beschäftigungsverordnung [BeschV] [Employment Ordinance], June 6, 2013, BGBl I at 1499, last amended by Verordnung [V], Mar. 23, 2020, BGBl I at 655, art. 2 (Ger.), <https://perma.cc/H82W-WA3G>.

⁹⁷ *Id.*

⁹⁸ Graham Ashton, *Update: Germany Approves Dedicated Visa for Pro Esports Athletes*, THE ESPORTS OBSERVER (Dec. 21, 2019), <https://perma.cc/V4D8-CYV3>.

⁹⁹ BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALES, *supra* note 96, at 655.

¹⁰⁰ Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 24, 2008, BGBl I at 162, last amended by Verordnung [V], June 19, 2020, BGBl I at 1328, art. 169 (Ger.), <https://perma.cc/7MMU-JMWF>.

agencies that need to approve the visa, meaning that the process is much faster.¹⁰¹

C. Benefits and Limitations

The President of the German Esports Federation (ESBD), Hans Jagnow, states that “[t]he German esports visa will be a big advantage for events hosted in Germany. We are the first country to establish a dedicated visa category for esports. There are more international esports events expected to take place in Germany.”¹⁰² The ESBD also states that the dedicated visa model will make “[v]isa issues at esports events in Germany will be a story of the past,” strengthening Germany as a host for international events.¹⁰³ This new visa puts Germany in a singular position among its EU counterparts and makes it a particularly attractive venue for non-EU competitors, especially those from BRIC countries.¹⁰⁴ The new visa is a streamlined process that removes the difficulties that Esports competitors experienced with the more traditional German visa processes, such as the residency permit application.

By creating a separate visa category, unlike countries that categorize Esports competitors as athletes, Germany has the freedom to tailor this policy to fit its goals. In addition to solving the issue regarding Esports visas, Germany also resolved the more academic question, “what is an athlete?” It defined the term professional Esports player through the requirements in the BeschV, setting a precedent that it did not consider Esports players as traditional athletes. Later, the German Olympic Sports Federation released a report that stated Esports is not organized sport.¹⁰⁵ These findings preclude Esports organizations from the tax benefits that traditional organized sports enjoy in Germany.¹⁰⁶

Additionally, by solving the Esports visa issue through a separate visa structure, the German legislators were able to avoid the implications of recognizing Esports as sports. Chiefly among these concerns was the ability of Esports organizations to classify themselves as non-profit organizations to avail themselves of the German Sports promotion fund.¹⁰⁷ It is clear that the choice to create a new visa rather than recognize Esports as a sport is related

¹⁰¹ *Germany Introduces a Dedicated Esports Visa in 2020 – ESBD: Big Advantage for Tournaments and Leagues in Germany*, ESBD, <https://perma.cc/WQ5F-BKEW>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Germany to Introduce Dedicated Visas for Esports Players*, ETIAS NEWS (July 6, 2021), <https://perma.cc/QQ43-Y6MQ>.

¹⁰⁵ Ashton, *supra* note 98.

¹⁰⁶ *Id.*

¹⁰⁷ Martin Jahns, *DOSB vs. eSports: Der Massensport, Der Keiner Sein Darf*, INTERNATIONAL E FACHMESSE FÜR SPORTARTIKEL UND SPORTMODE DIGITIZE (Feb. 25, 2019), <https://perma.cc/6673-MDFQ>.

to policy concerns and the implications of such action. The benefit of the German model is that it can afford for such policy flexibility.

Finally, Germany's Esports-specific visa allows the country to respond to current events and market trends far more rapidly than traditional visas. In 2020, Germany imposed an entry ban on third-country nationals in order to slow the spread of COVID-19.¹⁰⁸ However, in October 2020, the German Federal Ministry of the Interior confirmed that professional Esports competitors who qualified for the Esports visa would be exempted from the ban.¹⁰⁹ The competitors must quarantine for two weeks after entering the country and follow all of the safety precautions, but will be allowed to compete in tournaments and obtain permanent residence in Germany if they secure an Esports contract.¹¹⁰ This individualized response to the Esports industry is made possible by having a specific visa. The Esports industry is unique in that it can still operate effectively while maintaining social distancing, i.e. competitors playing from their homes or organization's separate facilities. Because the Esports visa was specifically created for this industry, the German government was able to make a narrow exception to the COVID-19 health policies for a relatively small number of visa applicants who pose a very small risk of increasing the spread of the virus due to the nature of their employment. This example of flexibility and a clear, individualized response to unexpected circumstances illustrates the advantage of creating a specialized visa for the Esports industry. It is unclear if such an individualized exception could have been made for the Esports industry if the visa process was part of a larger program, such as the P-1A or equivalent.

D. Impact of the New Visa

Prior to the introduction of the Esports specific visa measures, many teams, especially from China and India had difficulty attending tournaments in Germany due to visa issues. For example, two Asian teams were unable to attend a tournament with a \$300,000 purse held in Hamburg.¹¹¹ Three Indian teams were unable to attend a Berlin tournament after their visa applications were rejected under the old system.¹¹² Since the adoption of the new dedicated Esports visa in March 2020, visa issues have not hindered tournament participation or international contract procurement. Furthermore, German law firms predict that the addition of the Esports visa "could be a major boost for the eSports industry in Germany and thus allow the country to become a

¹⁰⁸ *ESBD: Professional Esports Athletes Can Enter Germany Despite COVID-19 Entry Ban*, SCHENGENVISAINFONEWS (Oct. 12, 2020), <https://perma.cc/C7TH-YRNQ>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Everything Athletes and Teams Should Know About the New German Esports Visa*, GERMANY VISA (Jan. 30, 2020), <https://perma.cc/T9R6-ULJE>.

¹¹² *Id.*

world leader in a rapidly developing industry.”¹¹³ The streamlined and clear system provides consistent results that Esports organizations can rely on when planning tournaments and attracting talent, while also fitting the policy goals of the German government.

VI. HOW AND WHY THE UNITED STATES SHOULD FOLLOW THE GERMAN MODEL

A. How to Implement the Policy Change

1. Legislative Amendment

The most long lasting and secure way to implement a new visa into U.S. law would be an amendment to the Immigration and Nationality Act, specifically 8 U.S.C. § 1184. This amendment would add an additional section defining an Esports competitor, and the requirements that they must fulfill in order to be granted a visa. This process would be the most difficult to navigate in one sense because it involves traversing the traditional pathways in which a bill becomes a law. This would expose the amendment to political scrutiny, and while this would be a relatively small change to the law, affecting a very small subset of visa applicants, it is neither the focus nor purview of this note to attempt to predict the political implications of such a bill.

B. Why the German Visa is Better Than the Other International Approaches

1. Consistency, Ease, and Clarity

Adopting the straightforward process of the German visa adds clarity, speed, and consistency to the visa process for Esports competitors. This removes the time restrictions for visa applicants, allows organizations to pursue the best players, and achieve the highest level of competition. It also alleviates the inconsistent USCIS decisions by providing a concrete framework that Esports organizations can rely on to plan for future contract signings and expansion.

In a perfect drafting, the requirement for international recognition would be either removed or adapted to be more tailored for the Esports industry. This would allow for more precise inclusions and exclusions rather than the current subjective standard of international recognition. A possible revision might be to create a metric that measures the number of viewers on a domestic or global scale, or a determination based on the prize pool of the competition which is correlated to the size and population of the Esports competition as a whole. The priority is to provide clarity, consistency, and expediency to Esports competitors seeking visas.

¹¹³ Aykut Elseven, *eSports Visa Germany 2020: An Overview*, SCHLUN & ELSEVEN (Feb. 13, 2020), <https://perma.cc/3ADP-5YHN>.

2. Ability to Define and Tailor the Visa Specifically to the Esports Industry

Another clear benefit of the German method is the ability for legislators and agencies to tailor the visa to the needs of the Esports market as well as any concerns that they have relating to repatriation, security, or economic gain/loss. For example, the current P-1 visa has a maximum duration of five years.¹¹⁴ This is a long time in terms of visas and in some ways justifies the lengthy process it requires. However, for the purposes of Esports, five years is unnecessary, and applicants would be better served with a shorter visa that, as a tradeoff, requires a shorter process to obtain a visa. For example, if a competitor's contract is only for one season or even one competition, there is little need to make that competitor go through the same process as a coach who wishes to coach for 5 years. This would also allow policy makers who are concerned with non-repatriation to require a yearly renewal or new petition to the USCIS for every season. As long as the process is streamlined and consistent, there would be no additional burden to Esports organizations. Part of the strength of the German approach is the flexibility that it allows legislators and administrators in crafting new policy for a new industry.

Additionally, a more specialized visa would allow policy makers more flexibility in responding to current events or global trends in order to create the best outcomes for both the industry and the public at large. Again, Germany's response to the COVID-19 pandemic is an example of a flexible response that allowed the public to remain protected while also allowing an industry to grow and provide entertainment for people who are indoors during quarantine.¹¹⁵ It is not difficult to imagine a different scenario in which a new visa restriction or travel policy would be unduly restrictive on such a highly specific industry in which the competitors themselves are relatively few and have such specialized skills.

3. Continued Growth of the Industry

A German-style visa helps to ensure that the Esports industry remains centered in the United States. There would be significantly reduced risk of losing tournaments or organizations due to visa issues.¹¹⁶ Additionally, the German-style visa adds stability for the industry, removing immigration issue risks from investors' minds and allowing Esports tournaments and organizations an additional level of legitimacy and institutionalized recognition. Further to this point, the German-style visa provides policy makers with a specialized tool in order to exempt this specific visa category from broad visa policies in order to protect the industry while also maintaining the policy goals overall.

¹¹⁴ U.S. CITIZENSHIP & IMMIGR. SERV., POLICY MANUAL, *supra* note 63.

¹¹⁵ See *supra* Part V, § C.

¹¹⁶ See Mitchell, *supra* note 49; see also 100 Thieves, *supra* note 59.

4. Avoiding the “Are Esports really sports?” Question

There is a deeply engrained sports culture in the United States, and some are hostile to the idea of Esports being considered a sport.¹¹⁷ By creating a separate category for Esports, the United States can completely avoid this issue of semantics and get right to the heart of the problem surrounding Esports visas. There does not need to be a philosophic or sociologic debate to determine whether or not Esports can be considered sports when there is another option. It is counterproductive to force the issue of Esports as a sport when Germany has demonstrated that such a determination is unnecessary to solve the issue of Esports visas by simply creating a new type of visa for Esports competitors. Doing so obscures the visa policy issue with questions that the law is less suited to answer and cannot control.

VII. CONCLUSION

The Esports industry is a relatively new fixture within the entertainment market. The amount of growth and investment within the video game industry and increasing viewership has cemented its position for years to come.¹¹⁸ The question remains, when will U.S. law decide to catch up? The explosion of Esports into the domestic market has seen large financial investment, rapidly growing viewership, and the creation of formal (and expensive) franchise leagues.¹¹⁹ However, one limitation to the growth and stability of the industry is the bottleneck of visas.¹²⁰ Numerous Esports competitors have been unable to compete or join domestic teams that have signed them due to visa issues.¹²¹

In attempting to address this problem, many are of the opinion that classifying Esports as sports is the best path.¹²² Doing so would add more apparent consistency to the USCIS process and adjudication, and indeed many countries have taken such an approach. However, this is akin to fitting a round peg in a square hole. The needs of the Esports industry with respect to visas go beyond recognition as a sport for the purposes of a P-1 visa.¹²³ The process and requirements themselves do not fit the requirements and structure of the Esports industry, which is inherently different than that of traditional sports.

The best way forward is to follow the German example and create an Esports specific visa. Doing so will create a visa that fits the industry and brings clarity, consistency, and speed to the visa process for Esports competitors. The visa will also have more flexibility with respect to policy goals related to immigration and Esports. Finally, the new visa will completely avoid

¹¹⁷ Jenny, *supra* note 90, at 10.

¹¹⁸ See *supra* Part II, § A.

¹¹⁹ See *supra* Part II, § A.

¹²⁰ See *supra* Part II, § B.

¹²¹ See Brannon, *supra* note 26.

¹²² See *supra* Part I.

¹²³ See *supra* Part III, §A.

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the pitfall of entering the “are Esports real sports” argument and deliver actual results for the industry and the competitors without getting bogged down in rhetoric and socio-philosophical arguments. Ultimately, The United States should adopt a German-style Esports visa to create a streamlined, predictable process so that the U.S. Esports industry can continue to grow and remain one of the predominant centers for the global Esports industry.