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INTO THE LABYRINTH: ARTISTS, ATHLETES, ENTERTAINERS AND THE INS

I. INTRODUCTION

The Immigration and Nationality Act (“INA”)¹ presents a heavy burden for those foreign artists, entertainers, and athletes who desire to immigrate to the United States.² Although the law is designed to bring aliens into the U.S., its ambiguous requirements are extraordinarily difficult for a foreigner to satisfy. The INA establishes classifications for potential immigrants based on their reasons for immigration. Such reasons may include a need to rejoin families or to pursue careers.³ These classifications are further subdivided into concentrated categories. The current law establishes five categories for employment-based immigration called “EB preferences.”⁴ This Comment focuses on Priority Workers, the first employment-based preference (“EB-1”), the first sub-category (“extraordinary ability”), and the

1. Immigration & Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1524 (1990)).

2. For a brief explanation of INS procedures, *see* Appendix.

3. *See, e.g.*, . STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 172 (2d ed. 1997).

4. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4987 (1991). The Five categories are established in the Immigration Act of 1990 § 121:

(1) “Priority Workers” in three subcategories:

(a) Aliens with “extraordinary ability” in the sciences, arts, education, business, or athletics, as demonstrated by sustained national or international acclaim;

(b) “Outstanding professors and researchers” of international recognition; and

(c) Certain multinational executives and managers

(2) Members of the professions holding advanced degrees or aliens of “exceptional ability” in the sciences, arts, or business.

(3) Skilled workers, professionals, and “other workers.” “Skilled workers” are those whose jobs require at least two years of training or experience. “Professionals” are aliens holding baccalaureate degrees and are members of the profession.

(4) Certain “special immigrants,” including ministers and other religious workers.

(5) Certain investors who will create jobs in the U.S. and who have invested at least \$1 million in the U.S. economy.

Herbert A. Weiss, *Employment Based Immigrant Visa Petitions: An Update*, IMMIGR. BRIEFINGS, 96-6 June 1996, at 17.

second employment-based preference ("EB-2") which is characterized by exceptional ability.⁵

As a practical matter, it is overwhelmingly difficult for a potential immigrant seeking employment based immigration to satisfy the INA standards for "extraordinary" or "exceptional" ability.⁶ Indeed, the only artists or athletes who can satisfy these obstacles are "superstars."⁷ Ironically, "superstars" are the least likely of all foreigners to immigrate. Well recognized personalities such as Hugh Grant, Sean Connery, Steffi Graf, and Boris Becker all live outside the U.S. and have made no known efforts to immigrate.⁸

Congress's purpose in enacting employment-based immigration laws was twofold; Congress sought to protect the jobs and working conditions of American workers and to benefit and strengthen the U.S. economy.⁹ Yet, case law overwhelmingly indicates that the Immigration and Naturalization Service ("INS") has applied the INA standards unfairly and unpredictably and has not followed the Congressional intent of the Act.

This Comment argues that because current INA rules are inconsistently applied and yield poor results, the laws regarding foreign entertainers and athletes should be changed. In addition, this Comment argues that the requirements for employment-based immigration for those with extraordinary or exceptional ability should be made more accommodating. Part II of this Comment discusses the INA and its background. Part III examines the current INS law and the people it affects. Part IV illustrates through case law how difficult it is to determine INS policy. Part V suggests that key terms and phrases of the INA should be redefined. Furthermore, it proposes removing athletes and entertainers from the existing preference categories and adding an additional preference category to directly address their needs. Finally, Part VI concludes that it is essential for the INS to substantively revise the INA.

5. While other sections of the INA merit discussion and criticism, and while other immigrant categories undoubtedly need attention and revisions in the laws, these issues are not the province of this Comment. Its purpose is only to discuss those aspects of the INA that concern athletes and entertainers.

6. See discussion *infra* Part IV.

7. A "superstar" is popularly defined as a person of considerable international renown and presumes an already established career. LEGOMSKY, *supra* note 3.

8. Such stars can come to the U.S. with workers' visas, engage in whatever projects they desire, and return to their homelands. Thus, the current law effectively filters out all entertainers except for the "crème de la crème."

9. 8 U.S.C. §§ 1153(b), 1182(a)(5)(A) (Supp. IV 1992); see also THOMAS ALEXANDER ALEINIKOFF ET. AL., IMMIGRATION: PROCESS AND POLICY 220 (3d. ed. 1995).

II. BACKGROUND

A. Early Law

Immigration policy has been vehemently debated since the last quarter of the nineteenth century.¹⁰ Before that time, the nation openly welcomed immigrants because U.S. citizens believed that exploration and development of the frontier would lead to financial gain.¹¹ Before 1875, only two immigration restrictions existed: the 1798 Alien and Sedition Act¹² that gave the President the authority to deport aliens believed to be dangerous, and an 1862 law that banned importation of Chinese slave laborers.¹³

However, by the 1870's the U.S.'s depressed economy and the increase in racial tension sparked a movement toward more stringent restrictions in U.S. immigration law. During this era, entry was limited based on an individual's race, morality, or political ideology.¹⁴ These restrictions intensified during the early part of the twentieth century to exclude people perceived as being foreign radicals.¹⁵

In 1921, the U.S. established its first quota system in order to determine which foreigners could enter the U.S. The system favored immigrants from those countries already well represented in the U.S.¹⁶ This favoritism greatly reduced the total number of new immigrants because preferred countries exported far fewer people.¹⁷ In one form or another, these quota systems remained in place until superseded by the 1952 INA¹⁸ which often resulted in a net loss in population in the U.S.¹⁹

B. Comprehensive Law: The INA

The INA was enacted by Congress in 1952. The Act was divided into four titles²⁰ that cohesively addressed structures, policies, rules, and regula-

10. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (excluding certain contract laborers); LEGOMSKY, *supra* note 3.

11. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 1-2 (Steven C. Bell ed., 1992).

12. *Id.*

13. *Id.*

14. *See So, Does America Want Them or Not?*, THE ECONOMIST, July 19, 1997, at 22.

15. FRAGOMEN, *supra* note 11, at 1-2 to 1-3.

16. *Id.* at 1-3.

17. *Id.*

18. *Id.* at 1-1 to 1-3.

19. *Id.* at 1-3.

20. *Id.* at 1-7. The four titles are as follows. Title I defines terms and organizes the govern-

tions regarding INS control over the flow of potential immigrants. This Act has been subsequently amended many times. The most significant amendment, from the perspective of this Comment, occurred in 1990.²¹ The Immigration Act of 1990 ("1990 Act")²² was a thorough revision of virtually every part of the INA as it was originally enacted.²³ One of the most significant changes made was to the immigrant selection provisions.²⁴ Rather than having quotas based on country of origin, ceilings were placed on immigrant categories such as EB-1 and EB-2.²⁵ This new selection system increased the number of annual employment-based immigration visas by 160%.²⁶ The amendment was partially a response to an article that asserted that the U.S. should move away from family-based immigration to "select immigrants who serve the national interest."²⁷ Currently, the move away from family-based immigration is gaining strength. In the last few months of 1997, revisions in the U.S. Immigration policy shifted the focus away from the doctrine of family unification and towards favoring employment-based immigration.²⁸

III. CURRENT U.S. IMMIGRATION LAW

With the 1990 Act, Congress abolished two forms of preferences and reconstructed the regulations to contain five categories of employment-based immigrants.²⁹ The 1990 Act constitutes the most comprehensive restructuring of immigration policy in the U.S. in almost forty years.³⁰ The new regulations purportedly provide easier entry for those highly skilled foreigners

ment power structure; Title II establishes the basic construct for immigration; Title III sets out naturalization regulations and rules for determining U.S. nationality; Title IV consists of miscellaneous provisions not covered in the other three titles. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (adding or amending many sections of the INA).

21. FRAGOMEN, *supra* note 11, at 1-7. While the Act was amended in 1996, the changes that this Comment explores occurred in the 1990 amendment and were not altered by the 1996 amendment. *Id.*

22. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. at 4978 (1990).

23. Larry Carp & Mark Goldman, *Key Entertainment and Sports Law Provisions in the New Immigration Law*, ENT. & SPORTS LAW., Spring 1991, at 9.

24. FRAGOMEN, *supra* note 11, at 1-1 to 1-3.

25. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. at 4980-81 (1990).

26. ALEINIKOFF, *supra* note 9 at 220.

27. *Id.*

28. Patrick J. McDonnell, *INS Toughens Rules on Sponsoring Immigrants*, L.A. TIMES, Oct. 21, 1997, at A1.

29. Weiss, *supra* note 4, at 1 (removing the third and sixth preferences established in the 1952 Act).

30. PAUL WICKLAM SCHMIDT, *Overview of the immigration Act of 1990*, UNDERSTANDING THE IMMIGRATION ACT OF 1990: AILA'S NEW LAW HANDBOOK, 1 (Paul Wickham Schmidt et. al., eds, 1990); *see also* Carp & Goldman, *supra* note 23, at 9.

who are seeking permanent resident status.³¹ One of the most significant amendments to the 1990 Act is the creation of the EB-1 category for "priority workers."³² The EB-1 category is subdivided into three classifications of aliens: (1) individuals possessing "extraordinary ability in the sciences, arts, education, business, or athletics"; (2) "outstanding professors and researchers"; and (3) certain "multinational executives and managers."³³

EB-2 is subdivided into two classifications: (1) aliens "holding advanced degrees" in professions (which usually refers to graduate degrees); and (2) foreign nationals of "exceptional ability in the sciences, arts, or business [who] will substantially benefit the national economy, cultural or educational interests, or welfare of the U.S."³⁴ However, the guidelines accompanying the 1990 Act do not favor foreign entertainers and athletes seeking to immigrate.³⁵

A. *The Code of Federal Regulations — EB-1*

The Code of Federal Regulations ("C.F.R.") sets out the definitions and requirements needed for foreign entertainers and athletes to immigrate to the U.S. under EB-1.³⁶ The C.F.R. defines "*extraordinary ability*" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."³⁷ However, courts have had difficulty applying the "extraordinary ability" standard because it invokes a subjective approach.

1. Evidence of "Extraordinary Ability": A One-time Achievement or Meeting Three Out of Ten Requirements

To satisfy the C.F.R.'s definition of "extraordinary ability," an immigrant must present evidence of "sustained national or international acclaim and [show] that his or her achievements have been recognized in the field of expertise."³⁸ The petitioner can accomplish this in two ways. The alien can

31. *Extraordinary Ability: Who's Got It and Who Doesn't?*, 71 INTERPRETER RELEASES 782, 782 (June 13, 1994) [hereinafter *Extraordinary Ability*].

32. 8 U.S.C. § 1153(b)(1) (1996).

33. *Id.*

34. 8 U.S.C. § 1153(b)(2)(A).

35. In fact, as will be discussed in Part IV, case law indicates that foreign entertainers and athletes who seem to be qualified according to immigration regulations are usually not being accepted. Therefore, even though the law is theoretically welcoming, case law demonstrates a different reality.

36. Immigration and Naturalization Service, 8 C.F.R. § 204.5(h) (1997).

37. *Id.* § 204.5(h)(2).

38. *Id.* § 204.5(h)(3).

produce evidence of a "one-time achievement"³⁹ in the form of an internationally acknowledged award or prize. Alternatively, the alien can attempt to satisfy three of ten factors included in the 1990 Act.⁴⁰ However, in actual application each factor has weaknesses which undermine its effectiveness in determining which aliens deserve entrance into the U.S.

The first factor is "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor."⁴¹ However, the problem with this factor is that it fails to identify the number of awards necessary to show that the alien has extraordinary or exceptional ability. Additionally, this largely subjective factor favors countries where recognized prizes are routinely awarded.⁴²

The second factor asks for "[d]ocumentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields."⁴³ The problem with this requirement is that the C.F.R. does not indicate who these judges are or how they are selected.

The third factor, which is relatively clear and unambiguous, requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought."⁴⁴ The fourth factor, however, is problematic. It asks for "[e]vidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought."⁴⁵ The difficulty arises if the alien is an accomplished critic, but lacks the requisite ability. Conversely, another foreigner may lack the ability to judge, but may possess "extraordinary ability." Therefore, there are significant problems with this element because this type of evidence has little value.

The fifth factor asks the alien to present "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field."⁴⁶ Unlike original contributions in scientific, scholarly, or business fields, original artistic and athletic contri-

39. *Id.*

40. *Id.*

41. *Id.* § 204.5(h)(3)(I).

42. For example, England annually gives BAFTA awards for excellence in film and television whereas Patagonia, which has no film industry, does not give awards. Interview with Michael Cullen, director, in Sherman Oaks, Cal. (Sept. 20, 1998).

43. 8 C.F.R. § 204.5(h)(3)(ii) (1997).

44. *Id.* § 204.5(h)(3)(iii).

45. *Id.* § 204.5(h)(3)(iv).

46. *Id.* § 204.5(h)(v).

butions may be difficult to recognize. "Major significance" is the stumbling block of this requirement because the regulation leaves this term undefined.

The sixth factor is clear. It seeks "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media."⁴⁷ Factor seven, however, is problematic as it requires: "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases."⁴⁸ It is unclear what qualifies as an acceptable exhibition or showcase. For example, it may be difficult to determine whether an exhibition on a street corner is an acceptable showcase or whether the work must be actually reviewed. The current INS guidelines have also failed to specify whether there are distinguished venues where a work must be displayed in order to satisfy this element. Without this guidance, it is increasingly difficult to determine which aliens satisfy this factor.

The eighth factor requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation."⁴⁹ This poses two problems. First, it is unclear how the INS determines a "leading or critical role." While "leading" is easily determined by checking the production's credits to see who the star is, "critical" is left to a subjective interpretation. Most people would regard the role of the Wizard in *The Wizard of Oz*⁵⁰ as a critical role. However, because this role is small, it is questionable whether the INS would accept the role as "critical" for purposes of satisfying this factor. Second, it is unclear what constitutes a "distinguished organization." Unfortunately, the determination is subjective, and the results of an INS determination are too crucial to be subject to this level of uncertainty.

To satisfy the ninth factor, the petitioner must show "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field."⁵¹ The level of compensation which constitutes a high salary is an issue open to subjective determination. Further, remuneration varies considerably from country to country and from role to role, making this determination even more difficult.⁵² Finally,

47. *Id.* § 204.5(h)(vi).

48. *Id.* § 204.5(h)(vii).

49. 8 C.F.R. § 204.5(h)(viii).

50. WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

51. 8 C.F.R. § 204.5(h)(3)(ix).

52. For example, a senior producer at the British Broadcasting Corporation (BBC) earns approximately £70,000 (approximately \$110,000) annually whereas a senior producer at CBS Television earns \$330,000 or more annually. Interview with Michael Cullen, director, in Sherman Oaks, Cal. (Sept. 20, 1998) (Mr. Cullen worked for BBC Television for 11 years and CBS Television for 4 years.).

although remuneration may indicate excellence, it may also merely indicate that the alien has a good negotiator.

The tenth and final factor allows the alien to present “[e]vidence of commercial successes in the performing arts.”⁵³ Such evidence can be in the form of box-office receipts or sales of records, cassettes, compact discs, or videos. However, it is unclear how to quantify such commercial success. Moreover, money alone is not a viable benchmark for measuring extraordinary artistic ability. The U.S. immigration policy has always erroneously focused on fiscal questions such as the amount of earnings immigrants contribute to the economy versus the amounts the immigrants may receive in public welfare benefits.⁵⁴ Fiscal considerations have inappropriately infiltrated notions of extraordinary or exceptional ability. It is unrealistic to rely on financial ability as the only measure of extraordinary artistic or athletic ability. Financial productivity may be a standard by which the INS assesses potential immigrants. However, if money is to be a criterion, it should be considered independently and should not be the primary measure of an individual’s extraordinary or unique abilities.

2. Prospective Benefit Requirements

In addition to these C.F.R. requirements,⁵⁵ the statute itself also makes the demand on EB-1 applicants that “the alien’s entry into the U.S. will substantially benefit prospectively the U.S.”⁵⁶ This statutory requirement is vague. Often, prospective benefit seems to be defined by the applicant’s future financial worth in the U.S.⁵⁷ instead of the contributions they may make to U.S. culture and society. Again, reliance on financial worth as to this aspect may rob the U.S. of those aliens who may positively impact society in general.

B. The C.F.R. — EB-2

Some prospective immigrants will petition under EB-2 instead of EB-1. As indicated earlier, EB-2 has two sub-divisions: (1) aliens with graduate

53. 8 C.F.R. §204.5(h)(3)(x).

54. LEGOMSKY, *supra* note 3, at 200-1, 955-6.

55. 8 C.F.R. § 204.5(h)(2)-(3).

56. 8 U.S.C. 1153(b) (1996).

57. *See Extraordinary Ability, supra* note 31, at 783-87

degrees; and (2) aliens of exceptional ability in fields such as science, business, and the arts, who will substantially benefit the economy.⁵⁸

1. Athletes Under EB-2

There is no provision for athletes under EB-2.⁵⁹ Although EB-1 specifically names athletics as a category to be considered, EB-2 does not.⁶⁰ In 1994, INS's General Counsel concluded that athletes did not qualify.⁶¹ However, in January 1995, the INS reversed its position.⁶² The General Counsel indicated that "if a term in a statute has acquired a settled interpretation and Congress reenacts the same term without substantial change, it is reasonable to conclude that Congress intended to incorporate the settled interpretation."⁶³ This upholds the twenty-five year precedent established by the *Matter of Masters*⁶⁴ which held "that an athlete is a form of entertainer and, therefore, athletics fall within the definition of art."⁶⁵

2. Satisfying Three Out of Six Requirements

Although EB-1 seems to be more directed toward athletes and artists, in some cases EB-2 may be more attractive. For example, proving exceptional ability under EB-2 is often simpler than proving "extraordinary ability" under EB-1.⁶⁶ Logically, it would seem more difficult to prove three out of six EB-2 factors than three out of ten EB-1 factors. However, if the applicant has an advanced degree and belongs to a professional association, EB-2 factors are easier to satisfy. First, under EB-2 a petitioner must show "exceptional ability in the sciences, arts or business."⁶⁷ Exceptional ability is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or businesses."⁶⁸ Additionally, the petition must be accompanied by documentation to prove this fact.⁶⁹

58. 8 U.S.C. § 1153(b)(1)(A)(iii) (1996).

59. 8 C.F.R. § 204.5(k).

60. *Id.*

61. Weiss, *supra* note 4, at 10; see also *INS Reconsiders EB-2 Exceptional Ability Classification for Athletes*, 72 INTERPRETER RELEASES 175 (Jan. 30, 1995).

62. Weiss, *supra* note 4, at 10.

63. *Id.*

64. 13 Immigration & Nationality Laws 125 (1969).

65. Weiss, *supra* note 4, at 10.

66. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

67. Immigration and Naturalization Service, 8 C.F.R. § 204.5(k)(1) (1997).

68. 8 C.F.R. § 204.5(k)(2).

69. *Id.* § 204.5(k)(3).

To demonstrate exceptional ability in the sciences, arts, or business, the EB-2 petitioner must satisfy three of six factors. The first factor offered is “[a]n official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.”⁷⁰ This factor may be especially difficult for artists and athletes to satisfy because artists and athletes do not need degrees to succeed in their professions.

The second factor is “[e]vidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.”⁷¹ This particular factor is easy for any veteran entertainer to fulfill. However, this can prove more difficult for an athlete whose average career is relatively short. For example, in the National Basketball Association, the average career lasted for only 4.5 years.⁷² Moreover, in the National Football League, the average career lasts only 3.5 years.⁷³

The third factor, “[a] license to practice the profession or certification for a particular profession or occupation”⁷⁴ does not apply to artists or athletes because they are not required to hold a license to perform in their respective professions.⁷⁵ The fourth factor, however, echoes EB-1: “[e]vidence that the alien has commanded a [high] salary, or other [significantly high] remuneration for services, which demonstrates exceptional ability.”⁷⁶ Just as in EB-1, the regulations equate exceptional ability with financial compensation.⁷⁷ However, a seasoned professional athlete or entertainer may find this easy to prove despite the fact that, as in EB-1, it is unclear as to how much compensation would be needed to satisfy this element.

The fifth factor is “[e]vidence of membership in professional associations.”⁷⁸ Again, most professional athletes and performers would have no difficulty proving this. The final factor may be the most difficult to satisfy. It asks for “[e]vidence of recognition for achievements and significant con-

70. *Id.* § 204.5(k)(3)(ii)(A).

71. *Id.* § 204.5(k)(3)(ii)(B).

72. See Dan Weil, HADEN HEEDS NEED FOR FINANCIAL PLAN, *Houston Chronicle*, Nov. 16, 1997, at 6.

73. *Id.*

74. 8 C.F.R. § 204.5(k)(3)(ii)(C).

75. See George Martin, *Backtalk: The Bigger the Pay, the Bigger the Risk*, N.Y. TIMES, Sept. 7, 1997, § 8, at 2.

76. 8 C.F.R. § 204.5(k)(3)(ii)(D).

77. *Id.*; see also discussion *supra* Part III.A.I.

78. 8 C.F.R. § 204.5(k)(3)(ii)(E).

tributions to the industry or field by peers, governmental entities, or professional business organizations.”⁷⁹ What constitutes “recognition for achievements and significant contributions” is not clearly defined. Evidently, this is left to the discretion of the INS adjudicator.

3. National Interest Requirement

In addition to proving exceptional ability, the applicant must still either obtain a labor certification or a waiver in the national interest.⁸⁰ A labor certification can be obtained by responding to a job listed on the Department of Labor’s (“DOL”) Schedule A.⁸¹ Alternatively, the alien’s prospective employer can petition for the alien to be allowed into the country.⁸² The labor certification for these applicants can only be bypassed with a national interest waiver.⁸³ That is, if the applicant can prove his immigration to the U.S. will be in the national interest, which is never defined in the INA or the C.F.R., the applicant will receive a waiver of the certification requirement.

IV. ILLUSTRATIVE CASES

A. EB-1 Cases

The following case synopses examine some of the problems aliens will face in trying to satisfy EB-1 guidelines. According to Interpreter Releases, only redacted versions of these cases are available.⁸⁴ Analysis of these cases shows the unrealistic expectations put on aliens by Congress and the INS.

1. Satisfying Requirements: No Guarantee

A pivotal question is whether aliens would be granted EB-1 “extraordinary ability” classification automatically if they meet three of the ten criteria as required by the regulations. The answer is a resounding

79. *Id.* § 204.5(k)(3)(ii)(F).

80. *Id.* § 204.5(k)(4)(ii).

81. Employment and Training Administration Labor, 20 C.F.R. § 656.10 (1996). This list consists of jobs that the U.S. currently seeks to fill; athletics and entertainment do not appear on this list.

82. FRAGOMEN, *supra* note 11, at 2-9. In most cases, once an applicant has a job offer, the employer is the party responsible for filing the appropriate papers with the INS and DOL. *Id.* at 2-21 to 2-22.

83. Obtaining such a waiver is fraught with difficulties. See discussion *infra* Part IV B.

84. *Extraordinary Ability*, *supra* note 31, at 786. The AAU decisions are the redacted versions of cases.

“no.”⁸⁵ Dealing with the INS is extremely confusing. In reference to the INA, one court said “[w]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.”⁸⁶ This confusion is evidenced by a 1992 correspondence between two top ranking INS employees. The correspondence stressed that INS examiners must evaluate the evidence presented in “extraordinary ability” cases. Approval is not necessarily forthcoming *even if the documentation appears to fulfill the elusive three out of ten criteria.*⁸⁷

Lawrence J. Weinig, INS Assistant Commissioner of Adjudications, issued guidelines “on how to evaluate evidence presented in support of petitions filed on behalf of priority workers.”⁸⁸ In particular, although renowned publications are noteworthy, publication of an alien’s work by a “vanity” press⁸⁹ is of no consequence.⁹⁰ Moreover, the alien’s case will not be advanced if any one of the following is presented as evidence of eligibility: (1) a footnote which refers to the foreign author’s work without evaluation, (2) a basic listing in a subject matter index, or (3) an unbiased review.⁹¹

An immigration attorney asked the INS whether “[Mr. Weinig’s] memo meant that an alien who satisfied three out of the ten criteria set forth in 8 C.F.R. § 204.5(h)(3) qualifies as an alien of extraordinary ability.”⁹² The attorney was concerned that “although the regulations seem to set forth a bright line test, some INS examiners were ignoring Mr. Weinig’s memo and creating their own guidelines.”⁹³ The attorney received reassurance in a letter from Mr. Skerrett, the then Chief of the Immigrant Visa Branch at INS headquarters, that, “[i]f the petitioner establishes extraordinary ability by meeting three of the listed criteria, there should be no necessity for the adjudicating officer to go further.”⁹⁴ He went on to say, “[a]dditional documen-

85. See *Extraordinary Ability*, *supra* note 31, at 783.

86. *Yuen Sang Low v. Attorney General*, 479 F.2d 820, 821 (9th Cir. 1973).

87. The boilerplate language that the Administrative Appeals Unit advances states: that “the evidentiary list at 8 C.F.R. § 204.5(h)(3) . . . is a representative selection only, and cannot replace the statutory requirement of extensive documentation demonstrating sustained national or international acclaim. The mere contention that the alien meets a set number of criteria from the regulatory list does not mandate a finding of eligibility.” 8 C.F.R. § 204.5 (h)(3) (1997).

88. *INS Clarifies Evidence Required for EB-1 Extraordinary Ability Petitions*, 70 INTERPRETER RELEASES 124, 124 (1993)[hereinafter *INS Clarifies Evidence*].

89. A “vanity” press publishes work for which the writer bears all publication expense. 1995 NOVEL & SHORT STORY WRITER’S MARKET 626 (Robin Gee, ed. Writer’s Digest Books 1995).

90. See *Extraordinary Ability*, *supra* note 31, at 783.

91. *Id.*

92. *INS Clarifies Evidence*, *supra* note 88, at 124.

93. *Id.*

94. *Id.*

tation would be needed only where the evidence submitted does not show extraordinary ability. . . . [The purpose for the criteria] is to make the adjudicative process easier for both the petitioner and the adjudicator."⁹⁵ However, although the guidelines and C.F.R. appear to delineate a bright line test, many INS examiners, in practice, ignore the guidelines and accept or deny applicants using their own criteria.

An example of INS examiners using their own criteria occurred in a case involving an NCAA All American track and field coach who competed in the 1984 Olympics.⁹⁶ The INS' Southern Service Center ("SSC") denied his immigration petition, holding that while the petition contained adequate evidence of the alien's "extraordinary ability" as an athlete, there was little evidence that would make an extraordinary coach.⁹⁷ It is difficult to determine what guidelines the SSC applied in this case. When the Administrative Appeals Unit ("AAU") upheld the SSC's reasoning, it became apparent that this reasoning could not be construed as "regulation based" and the INS' narrow, subjective focus emerged.⁹⁸ One must wonder, if an extraordinary athlete would not make a fine coach, then who would?

Another discouraging case involved a folk musician from Romania who received numerous national awards and won a contest in his home country.⁹⁹ He had also judged fellow folk musicians, ultimately satisfying EB-1 criteria.¹⁰⁰ Yet his petition was denied.¹⁰¹ The AAU's rationale was that the musician had potential, but his fame was based on his ethnically-unique music rather than on any recognized international standard of artistic ability.¹⁰²

AAU's reasoning was puzzling. First, the INS' skill evaluating Romanian awards is questionable. Second, the AAU's rationale is elitist and short-sighted. It is unlikely that the INS have proof that this type of music is only popular in the musician's region of the world. For example, consider

95. *Id.*

96. *Extraordinary Ability*, *supra* note 31, at 783 (citing *Matter of [name not provided]*, A29 920 259 (AAU Sept. 7, 1993)).

97. *Id.*

98. *See id.*

99. *Id.* at 784 (citing *Matter of [name not provided]*, A29 606 956 (AAU Nov. 30, 1993)).

100. *Id.* The folk musician had satisfied the possibilities which require national awards for excellence and evidence of participating as a judge. *Id.* This alien had also satisfied a third possibility; this is evident because the case was granted an appeal. *Id.* Because of the case redaction, there is no indication which was the third satisfied possibility.

101. *Id.*

102. *Extraordinary Ability*, *supra* note 31, at 784 (citing *Matter of [name not provided]*, A29 606 956 (AAU Nov. 30, 1993)).

the popularity of Michael Flatley's *Riverdance*.¹⁰³ The *Riverdance* company has gained world-wide audiences in spite of the fact that its material is particularly Irish. In other words, *Riverdance*'s acclaim has transcended Irish tastes and regional boundaries.¹⁰⁴ Finally the regulations do not require an applicant to demonstrate international appeal.¹⁰⁵

In another petition,¹⁰⁶ the INS claimed that the alien did not show "extraordinary ability." This denial centered around the fact that nothing in the actress's petition separated her from any other talented actress even though she received an award in 1992 and had received good reviews in a play.¹⁰⁷ Although she fulfilled three of the ten requirements, the INS found that satisfying these regulations was insufficient to guarantee acceptance.¹⁰⁸

2. The Exclusivity Requirement

Congress appears to reserve EB-1 for "that small percentage of individuals who have risen to the very top of their field of endeavor."¹⁰⁹ The INS has adopted Congress's intent to keep this category exclusive.¹¹⁰ An exemplary case involves an alien who had twelve years experience as a professional hockey player in the National Hockey League and earned an annual salary of \$525,000.¹¹¹ Although the Northern Service Center ("NSC") approved the petition,¹¹² the AAU withdrew the approval and remanded the case.¹¹³

The AAU held that his being a professional athlete did not qualify him as having "extraordinary ability."¹¹⁴ The AAU explained that although this athlete was a good player, he was not one of the NHL's elite.¹¹⁵ The case was remanded in part because a determination was necessary as to how this hockey player's salary compared to other NHL players.¹¹⁶ The denial was

103. See *Larry King Show* (CNN television broadcast, June 3, 1997).

104. See *id.*

105. 8 C.F.R. § 204.5(k) (1997).

106. *Extraordinary Ability*, *supra* note 31, at 784 (citing *Matter of [name not provided]*, A72 668 230 (AAU Dec. 27, 1993)).

107. *Id.*

108. *Id.*

109. Employment Based Immigrants, 56 Fed. Reg. 60,897, 60,899 (1991).

110. See *id.* at 60,899.

111. *Extraordinary Ability*, *supra* note 31, at 783-84 (citing *Matter of [name not provided]*, A72 669 529 (AAU Jan. 21, 1994)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 784.

116. *Id.*

substantiated with supplementary information in the INS' November 1991 regulations that stated "extraordinary ability" classification is not intended for all major league athletes, but only for those who have reached elite status.¹¹⁷

Because of the ambiguity in the statute, it maybe difficult to determine how much money or attention an athlete must receive in order to be considered "elite." Comparing salaries *might* clarify an applicant's assertion of "extraordinary ability." Yet again it might not, especially if the athlete is young and is locked into a less than spectacular contract before the athlete's ability is recognized.¹¹⁸ Financial emolument, in any case, cannot on its own support a finding of "extraordinary ability"; the minimum of three conditions must still be met. Conversely, it does seem that insufficient remuneration alone can sink a petition if the INS does not consider the applicant one of the elite on that basis.

Athletes in other sports have also been denied petitions due to their lack of financial well-being. One such case involved a major league relief pitcher with a win-loss record of 10-13 over four seasons and an ERA of 4.45 in 120 games.¹¹⁹ The applicant had started in twenty-three games and had saved five others.¹²⁰ The athlete's attorney argued that only 648 players are talented enough to play in the major leagues, only a relatively small percentage of these are pitchers, and an even smaller percentage are relief pitchers.¹²¹ Out of the entire world population, this number is minuscule and reasonably renders such athletes members of an elite fraternity. Regardless, the Western Service Center ("WSC") and the AAU both denied the athlete's petition without offering a concrete rationale.¹²²

Another case that demonstrated the narrowness of the criterion involved an actor who starred in television and movie productions.¹²³ He had an annual salary of \$200,000, yet the INS denied his application.¹²⁴ The AAU stated that although the alien showed promise, he was not yet at the

117. *Extraordinary Ability*, *supra* note 31, at 783-84 (citing *Matter of [name not provided]*, A72 669 529 (AAU Jan. 21, 1994)).

118. Kenneth A. Korach, *Is Nothing Sacred? Labor Strife in Professional Sports*, BUSINESS HORIZONS, Jan. 11, 1998, at 34 (stating the player restraint systems limit a player's mobility because players are not free to move at will to the team that pays the highest salary).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Extraordinary Ability*, *supra* note 31, at 784 (citing *Matter of [name not provided]*, WAC 93 127 52702 (AAU Sept. 20, 1993)).

124. *Id.*

top of his field.¹²⁵ Thus, it is clear that regardless of the plain language of the statute, INS officials are more likely to determine "extraordinary ability" based on financial well-being rather than on the totality of the circumstances which may expose an alien's talent. The next section will focus on yet another hurdle prospective immigrants must satisfy even if they satisfy three out of ten criteria.

3. Prospective Benefit

An additional burden aliens must satisfy irrespective of the ten criteria specified in the statute is the proof that continuing in their professions will be prospectively beneficial to the U.S.¹²⁶ While cases demonstrate that immigration applicants have been denied entry because they were not deemed prospectively beneficial, nothing actually says *why* this is so.¹²⁷ Prospective benefit appears to be an earning-based standard: if an applicant earns enough, that will apparently satisfy this prong, but as the previous section pointed out, the less highly paid artist or athlete may have a great deal of difficulty proving a high degree of earning capacity.¹²⁸ Although factors other than remuneration may be considered when prospective benefit is assessed, case law reviewed thus far does not suggest what those factors might be.¹²⁹

One such case which displayed the illogical reliance on prospective benefit involved¹³⁰ a world-class figure skater who wanted to immigrate to the U.S. so that he could train other figure skaters.¹³¹ His petition for immigration was approved by the "NSC."¹³² However, on appeal, the AAU reversed the approval.¹³³ Although the AAU agreed that the alien embodied the requisite talent and had proven "extraordinary ability" per the regulation, the alien had failed to prove how his entry would prospectively benefit America.¹³⁴ The AAU, however, does not indicate where that failure lies. This decision not only highlights the significance of meeting all of the regulatory requirements, it also underscores the myopic focus of the AAU. Any-

125. *Id.*

126. *See* discussion *supra* Part III.

127. *Extraordinary Ability*, *supra* note 31, at 783 (citing *Matter of [name not provided]*, A72 693 550 (AAU Jan. 18, 1994)).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Extraordinary Ability*, *supra* note 31, at 783 (citing *Matter of [name not provided]*, A72 693 550 (AAU Jan. 18, 1994)).

134. *Id.* at 784 (citing *Matter of [name not provided]*, A72 693 550 (AAU Jan. 18, 1994)).

one who works in the U.S. performing even an unusual service, receives payment for such a service, and pays taxes to the U.S. government, contributes to the national economy.

A 1994 case involving a boxer also reveals the internal insecurities of the INS.¹³⁵ Even though the boxer was ranked fifth in the world in the lightweight division and won a championship in 1989,¹³⁶ the WSC denied his petition.¹³⁷ The main reason given for the denial was that the athlete “seemed to be on his way down”—a statement that does not reflect any regulatory purpose.¹³⁸ His earnings for 1990 totaled \$135,000.¹³⁹ However, in 1992 his earnings only amounted to \$50,000,¹⁴⁰ and, in 1993, he lost a title bout depreciating his earning potential further.¹⁴¹ Additionally, the WSC claimed that boxing did not meet the requirement of prospective benefit because boxing does not contribute to the U.S. economy.¹⁴² The C.F.R. does not disclose the criterion the WSC used to arrive at its decision. Taxpayers, whether they make \$100,000 or \$25,000, whether they are boxers or engineers, benefit the U.S. economy.¹⁴³ Nowhere in the regulations are boxers excluded from the definition of “athletes.”

4. Success Stories

Apparently, only super-human applicants can pass the INS's stringent application requirements. This is made abundantly clear in a case involving a novelist/singer/composer from China whose petition was approved by the INS.¹⁴⁴ Her accomplishments included three distinguished national awards in China¹⁴⁵ and participation in a number of showcases which featured other well-known performers.¹⁴⁶ Additionally, one of her novels reached such popularity that it became a “cult” classic and was translated into four other

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Extraordinary Ability*, *supra* note 31, at 783 (citing *Matter of [name not provided]*, A72 693 550 (AAU Jan. 18, 1994)).

140. *Id.*

141. *Id.*

142. *Id.*

143. Perhaps, however, the INS perceives all boxers as potential Mike Tysonesque figures (i.e. costing money during their prison terms). The INS's subjective slip is once again showing.

144. *Extraordinary Ability*, *supra* note 31, at 784–85 (citing *Matter of [name not provided]*, LIN 93 174 50404 (NSC June 9, 1993)).

145. *Id.*

146. *Id.* at 785.

languages.¹⁴⁷ Her petition also had the additional advantage of containing letters from art critics and “well-known members of U.S. performing art circles.”¹⁴⁸ In light of all the favorable evidence, the INS granted the artist a visa under the EB-1 distinction.¹⁴⁹

Another success story involved a Romanian entertainer¹⁵⁰ who had better luck proving “extraordinary ability” than the Romanian folk musician discussed in an earlier section.¹⁵¹ The alien had experience as a film star, a comedian, and a musician.¹⁵² He met five out of the ten INS criteria.¹⁵³ Just like the folk musician, the actor had received various nationally recognized awards in Romania.¹⁵⁴ However, one distinguishing difference was that his work had been critically reviewed by art critics not only in Romania, but also in Sweden and England.¹⁵⁵ He had performed in artistic showcases, including the National Theater of Romania, and had letters from elite Romanian critics confirming that he had performed a leading and critical role for artistic organizations with distinguished reputations.¹⁵⁶

Interestingly, both the Romanian folk musician denied a visa and the Romanian actor here focused the bulk of their endeavors in Romania.¹⁵⁷ If, as the INS says, admission to the U.S. is not just a numbers game,¹⁵⁸ then it is difficult to distinguish the factors in this case which pointed toward acceptance in relation to the plight of the folk musician. From the facts, it can be concluded that the actor/entertainer performed mostly in productions catering to Romanian audiences. His work was seemingly too culture specific to have appeal on an international stage. Even though the Romanian actor’s work was reviewed in Sweden and England, an argument can be made that the British and Swedish have vastly different tastes in entertainment in relation to Americans. In other words, how can review of one alien’s cultural work by other cultures guarantee a venture of potential benefit to the U.S.? Further, once again, how does economic viability ensure extraordinary artis-

147. *Id.*

148. *Id.*

149. *Id.*

150. *Extraordinary Ability*, *supra* note 31, at 784 (citing *Matter of [name not provided]*, A71 996 096 (NSC Mar. 3, 1994)).

151. *Id.* at 784 (citing *Matter of [name not provided]*, A29 606 956 (AAU Nov. 30, 1993)).

152. *Id.* (citing *Matter of [name not provided]*, A71 996 096 (NSC Mar. 3, 1994)).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Extraordinary Ability*, *supra* note 31, at 784 (citing *Matter of [name not provided]*, A71 996 096 (NSC Mar. 3, 1994)).

157. *Id.* at 784 (citing *Matter of [name not provided]*, A29 606 956 (AAU Nov. 30, 1993)).

158. *See id.*

tic ability? If the INS were reviewing Vincent Van Gogh's application, they would have to turn him down, for he rarely sold anything when he was alive.¹⁵⁹

In the *Matter of [name not provided]*,¹⁶⁰ the petition contained letters illustrating that the petitioner was one of the highest ranking fencing coaches in the U.S.¹⁶¹ For instance, he not only coached an Olympic silver medalist in 1988, but was recruited to train U.S. fencers for the 1996 Olympics.¹⁶² The NSC rejected his application, apparently relying heavily on the alien's salary.¹⁶³ A \$25,000 per year salary was not prestigious enough for the NSC because it did not exude "extraordinary ability." However, on appeal the AAU reversed¹⁶⁴ and approved the petition in manifest contravention of its own regulation.¹⁶⁵ This illustrates the difficulty and inconsistency that the INS creates when trying to follow their own rules. Furthermore, the fencing coach's case illustrates that "extraordinary ability" means whatever the INS wants it to mean at any given moment in any given venue. When definitions take on such a chameleon quality, they lose meaning and effectiveness altogether.

Through the regulations, the INS attempts to define talent in fields they are not equipped or trained to understand. Talent is not quantifiable; rather, it is extremely subjective and amorphous.¹⁶⁶ This accounts for the substandard definitions the administrators crafted, and it further accounts for the confusing muddle the INS and courts have made in interpreting the law.

B. EB-2 Cases

Under EB-2, immigrants can receive a waiver of the job requirement if they can prove immigration is in the national interest.¹⁶⁷ The major difficulty with EB-2 is the degree of variation the INS displays in determining how to define and assess "national interest." Further, "national interest" is exceedingly difficult to prove — far more difficult than proving EB-1's

159. THE LETTERS OF VINCENT VAN GOGH, x (Ronald de Leeuw ed. & Arnold Pomerans trans., The Penguin Press 1996).

160. *Extraordinary Ability*, *supra* note 31, at 783 (citing *Matter of [name not provided]*, A72 138 477 (AAU Jan 7, 1994)).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. 8 C.F.R. § 204.5(h)(3)(ix) (1997).

166. See *Extraordinary Ability*, *supra* note 31, at 783.

167. 8 C.F.R. § 204.5(k)(4)(ii).

"prospective benefit."¹⁶⁸ In other words, the ideal EB-2 candidate is a degreed performer who belongs to a professional organization, earns a great deal of money, *and* has a concrete job offer.¹⁶⁹ Not surprisingly, the case law does not reveal anyone who would be considered the ideal EB-2 candidate.

However, some case law deals with those seeking a national interest waiver.¹⁷⁰ Unfortunately, the INS has not made proving eligibility for the waiver easy for those lacking a job offer from a prospective employer. The INS has deliberately left open what is meant by the term "national interest" and has publicly declared its preference to leave the test as flexible as possible and to decide petitions on a case by case basis.¹⁷¹ Further, the INS is in no rush to publish a precedent setting decision on the definitions of national interest and will take its time developing a position on the matter.

Although it is not specifically stated anywhere what documentation the petitioner needs, it is obvious that voluminous documentation is essential to create a national interest waiver. The alien must reach a standard "mak[ing] a showing significantly above that necessary to prove 'prospective national benefit'[required for EB-1]."¹⁷² Furthermore, exactly what documents may be useful for the petitioner is difficult to ascertain as "[t]he amount of documentation and other information necessary to meet th[e] standard must be gleaned from numerous AAU decisions and other administrative decisions"¹⁷³ Further still, the first AAU case defining national interest, *Mississippi Phosphate*,¹⁷⁴ detailed a list of seven items, any one of which can prove national interest.¹⁷⁵ However, "[s]orely missing from the list . . . [was] a category that recognizes that aliens engaging in cultural activities

168. See Herbert A. Weiss, *New Developments In Work-Related Immigrant Visa Petitions*, IMMIGR. BRIEFINGS, Jan. 1994, at 7; Enid Trucios-Haynes, *National Interest Waivers*, IMMIGR. BRIEFINGS, July 1995, at 5.

169. 8 C.F.R. § 204.5(k)(4)(ii).

170. Polly A. Webber, *Strategies For Avoiding Labor Certification*, IMMIGR. BRIEFINGS, 93-12 Dec. 1993, at 14.

171. Weiss, *supra* note 168, at 7 (footnotes omitted).

172. Immigrants, *supra* note 109, at 60,897-60,900; see also Trucios-Haynes, *supra* note 168, at 21 n.52.

173. Trucios-Haynes, *supra* note 168, at 5.

174. Naomi Schorr, *They Don't Shoot Elephants, Do They?: The National Interest Waiver For EB-2 Immigrants*, 70 INTERPRETER RELEASES 773, 774-77 (1993) (citing *Matter of [name not provided]*, EAC 92 091 50126 (AAU July 21, 1992)).

175. *Id.* at 775-76. The seven factors are: (1) improvement to the economy; (2) improvement for American workers in either money or working conditions; (3) educational improvements for children and workers without sufficient skills; (4) improvement to health care; (5) housing improvements; (6) environmental improvements; and (7) involving a U.S. government agency. *Id.*

can also serve the national interest.”¹⁷⁶ Thus, case law has not explicitly defined how foreign artists and athletes can prove that their activities are in the national interest.

For example, in the *Matter of Barry M. Myers*,¹⁷⁷ the singer/songwriter managed to convince the NSC that he satisfied national interest criteria. However, his application did not pass muster with the AAU.¹⁷⁸ The AAU declared that the NSC’s finding was not supported by evidence¹⁷⁹ and instructed the NSC to request more documentation.¹⁸⁰ Therefore, it is clear that the AAU and the NSC had conflicting interpretations as to what constitutes sufficient documentation, which illustrates the lack of guidelines that artists and athletes may rely upon.

In another case, the AAU rejected a petition despite what appeared to be substantial evidence that the petitioner’s activities would be in the national interest.¹⁸¹ The case involves an alien who wished to produce and host a Nashville radio show¹⁸² which would be “wholesome, downhome music with a positive message.”¹⁸³ The applicant had letters from the mayor and a representative, indicating that he would “broaden the musical diversity of the broadcast industry.”¹⁸⁴ Despite (1) the fact that the petitioner claimed he would be creating a myriad of jobs,¹⁸⁵ (2) industry projections that such a show would generate employment and money in the six digits,¹⁸⁶ (3) claims by the Country Music Association’s board of directors that disseminating the petitioner’s values would enhance U.S. cultural interests,¹⁸⁷ the petition was denied.¹⁸⁸ Without indicating what *would* be adequate proof, the AAU simply asserted that the petitioner had not managed to prove he would create employment or in any way culturally improve the U.S.¹⁸⁹

176. *Id.*

177. Webber, *supra* note 170, at 14 (citing A70 541 827 (NSC AAU Nov. 24, 1992)).

178. *Id.*

179. *Id.*

180. *Id.*

181. Schorr, *supra* note 174, at 778 (citing *Matter of [name not provided]*, A70 527 458 (AAU Dec. 1, 1992)).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Schorr, *supra* note 174, at 778 (citing *Matter of [name not provided]*, A70 527 458 (AAU Dec. 1, 1992)).

188. *Id.*

189. *See id.* at 788–79.

A case concerning an ivory sculptor¹⁹⁰ is also instructive. Although the sculptor's petition was denied because he could not prove exceptional ability under EB-2, the AAU nonetheless discussed his further inability to prove a valid national interest.¹⁹¹ The AAU did not agree that the petitioner was a master artist who would enrich the American artistic community. The AAU indicated that the U.S. government officially discouraged importing ivory into the U.S., and that carving ivory was a dying art.¹⁹² The AAU rejected the petitioner's assertion that he could utilize his ivory carving skills in silver carving, reasoning that because he was not yet an established master silver carver, his possible ability in that arena did not qualify him.¹⁹³

C. Comparing EB-1 and EB-2

On the surface, EB-2 fulfills a necessary role: it is available to those artists who find EB-1 impractical. However, EB-2, with its amorphous "national interest" requirement, is just as difficult to satisfy as EB-1.

Currently, an athlete or entertainer applying under EB-1 faces daunting and often vague requirements. EB-1 makes "extraordinary ability" almost impossible to prove, while "prospective benefit" is relatively easy to prove relying on an earnings based standard. Alternatively, an athlete or entertainer can apply under EB-2. However, if aliens do not have a job offer from a prospective employer, they need to obtain a national interest waiver.¹⁹⁴ EB-2, in contrast to EB-1, makes exceptional ability fairly easy to prove while it makes national interest exceptionally difficult to prove.¹⁹⁵ This result, in part, arises from the fact that although the INS has left the definition of national interest vague, they have indicated that it required significantly more than a mere prospective benefit.¹⁹⁶ In essence, neither EB-1 nor EB-2, as they are currently written, offer reasonable access to prospective immigrant entertainers or athletes.

190. Webber, *supra* note 170, at 14 (citing *Matter of Chu Wah Cham*, EAC 92 134 50591 (AAU Dec. 4, 1992)).

191. No suggestion is being made that this applicant should have been admitted. Rather, the interest lies in why the AAU found it necessary to go beyond the already proven reasons for rejecting the applicant and delve into his additional inability to prove national interest. Often, the AAU gives vague or insufficient reasons for denials; in this case, however, they give concrete and superfluous reasons.

192. Webber, *supra* note 170, at 14.

193. *Id.*

194. 8 C.F.R. § 204.5(k)(4)(ii).

195. 8 C.F.R. § 204.5(k) (1997).

196. Weiss, *supra* note 4, at 7.

V. PROPOSALS

The most serious problem with current INA regulations is that the INS has the freedom and ability to interpret them at its discretion.¹⁹⁷ Furthermore, the INS can dictate whose petition for immigration will succeed and whose will fail. Although there are judicial remedies for those who feel that their petition has been wrongfully denied, these are virtually impossible for potential immigrants to obtain.¹⁹⁸ Moreover, INS decisions are difficult to overturn. The current immigration system as it stands permits INS adjudicators to have so much discretion that most reviewing courts cannot point to a specific law that has been broken or interpreted unfairly.¹⁹⁹ In fact, it is difficult for the INS to break the law because they have the opportunity to make the law as they go along.

Furthermore, the INS has effectively established itself as an "expert" in areas where its expertise is most assuredly lacking; the INS has moved from the fundamental tasks of handling immigration to judging artistic and athletic work. The question then arises as to how the INS should decide immigration matters without acting as an artistic or athletic expert. One writer sympathetic to the INS' plight says:

The effort to be true to the intent of Congress on this issue has placed the INS in an awkward position. Even in the area of athletics, which, unlike many other fields of endeavor, features rankings of participants and extensive documentation by the press, the INS sometimes has - understandably - found it difficult to determine which players qualify as "extraordinary . . ." . . . [I]t also should be remembered that INS examiners are not - nor should they be expected to be - sports experts.²⁰⁰

Nonetheless, in the absence of any guidelines, the INS has been forced into declaring themselves experts in various sports and entertainment related fields where new law is created when it is deemed appropriate. Unfortunately, the law, as it currently exists, allows such manipulation.

197. See Weiss, *supra* note 4.

198. Facsimile Interview with Frida Glucoft, Attorney-at-Law, Mitchell, Silberberg & Knupp (Nov. 24, 1997) (indicating that such remedies, in addition to being difficult, are very costly) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

199. See Weiss, *supra* note 4.

200. Weiss, *supra* note 4, at 7-8.

A. Creation of a New Employment Category: Altering the Terms of Existing INA Law Through Which an Athlete or Entertainer Can Establish "Extraordinary Ability"

The first and most obvious change necessary to make the INA more workable from the perspective of athletes and entertainers is to add a sixth preference category under employment-based immigration, thereby removing athletes and entertainers from the necessity of applying under either EB-1 or EB-2. The proposed EB-6 might read: "Aliens with extraordinary ability in the fine or performing arts or athletics."

The C.F.R. would also need an additional category to implement the new EB-6 preference to better serve the immigration needs of entertainers and athletes. Grounds for accepting or denying an applicant should be clearly spelled out in the C.F.R. so that an INS agent does not have to become an expert both in the applicant's field and in the practice of law.

One possible way to achieve creation of this new category is to clarify its requirements as distinct from those of EB-1. First, with regard to EB-1, the definition of "extraordinary ability" indicates that it "means a level of expertise indicating that the individual . . . ha[s] risen to the *very top* of the field of endeavor."²⁰¹ The difficulty with this definition is that it does not encompass prospective immigrants who may show considerable talent in their fields, but whose talent may be undeveloped.²⁰² For example, what if a talent scout for a major league baseball team locates an alien sandlot pitcher who shows enormous potential? Perhaps this alien and the talent scout could discuss the possibility of a five-year contact, subject to a year of additional training in the U.S. Under this scenario, immigration would be preferable. However, because the alien would be at the beginning rather than at the height of his career, he could not demonstrate "extraordinary ability" under the EB-1 definition. Therefore, a new sub-category of the C.F.R., geared specifically to artists and athletes as defined in the new sixth preference, could read: "A level of expertise indicating either: (1) the individual has risen to the very top of the field of endeavor, or (2) has sufficient talent to be selected by an industry-recognized talent scout in his or her field, and the individual shows sufficient talent to rise in that field."

Next, subsection (1) discusses the necessary evidence to prove "extraordinary ability." Currently, the C.F.R. states "such evidence shall include evidence of a one-time achievement . . . or at least three of the following."²⁰³ However, as the earlier sections have shown, proving three of

201. 8 C.F.R. § 204.5(h)(2) (1997) (emphasis added).

202. *Id.*

203. *See id.* § 204.5(h)(3).

the ten criteria in EB-1 does not guarantee entrance into the U.S. Thus under current law a one time award is the only evidence strong enough to dispense with any other documentation.²⁰⁴ The next section discusses an alternative way to define "extraordinary ability" that would temper reliance on the original EB-1 factors.

1. A New Federal Regulation

The following proposal selects from the current C.F.R. those forms of evidence which appear to be objective. Then, this proposal quantifies certain requirements so as to add clarification to these requirements for both the applicants and the INS.²⁰⁵ The new C.F.R. sub-category EB-6 would permit any *one* of the following as evidence of "extraordinary ability":

- (1) evidence of a one time achievement in the form of a major, internationally recognized award;
- (2) documentation that the alien has received three awards for excellence in the field of endeavor, and such awards are nationally or regionally recognized in the country of origin;
- (3) two examples of evidence in the form(s) of: (a) industry-recognized critical reviews; (b) articles in recognized industry publications; (c) discussion and/or reviews of the alien's work on television videotapes and/or radio audio tapes; (d) inclusion in a printed and published catalogue for either a retrospective of the alien artist's work or an exhibit in which the artist figures prominently; (e) evidence of the alien's original artistic or athletic contributions of significance, attested to by three industry-recognized experts in the field;
- (4) evidence of the alien's authorship of two scholarly articles in the field in professional publications;
- (5) evidence of at least two displays of the alien's work at artistic exhibitions or showcases in museums, galleries, or venues known and attested to by at least two recognized professionals in the art community;
- (6) evidence that the alien has performed in a leading or critical role on stage or screen. A leading role is defined as the alien's recognition as the star or supporting player in a show's or movie's opening credits. Critical is defined as a role which not

204. *See id.* § 204.5(h)(3)(i).

205. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

only furthers the story, but a role for which the alien has achieved favorable recognition in at least three reviews in prestigious publications; or

(7) evidence that an industry-recognized talent spotter deems the alien worthy of development for potential work in the field of endeavor.²⁰⁶

2. Training for Officials

Additionally, this proposal requires special training for INS officials to make them sensitive to critical notions particularized to an EB-6 candidate. Such training is fundamental to the entire proposed structure.²⁰⁷ Indeed, the proposed change would be meaningless unless the officials recognized talent, cultural benefit, and aesthetics. Such training is not a new concept. Currently, the INS provides training to agents regarding asylum issues, including the political and cultural problems and contexts surrounding them.²⁰⁸ For the new EB-6 to work effectively and efficiently, INS agents must understand the unique circumstances embodied by potential immigrants under EB-6.

3. Eliminating Financial Requirements

It is important that nowhere in these proposed requirements is a connection made between ability and money. If the U.S. genuinely desires to allow immigration of aliens with "extraordinary ability," then the regulations must deal with people's talents rather than their income. This proposal clarifies and simplifies the rules by removing requirements relating to financial matters.²⁰⁹ Further, this proposal is designed to permit immigration of talented people who may not have reached their potential. This is achieved by eliminating the financial requirement for up and coming petitioners as well as by allowing evidence from talent spotters. This makes sense because it is in the interest of the U.S. to have such new talent reach the apex of their

206. Note that 8 C.F.R. §§ 204.5(h)(4) and (5) are acceptable under this new proposal as they are currently stated in the law.

207. Facsimile Interview with Frida Glucoft, Attorney-at-Law, Mitchell, Silberberg & Knupp (Nov. 24, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

208. Class Discussion, Immigration Law, taught by Professor Edith Friedler, Loyola Law School, in Los Angeles, Cal. (Oct. 27, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

209. Facsimile Interview with Frida Glucoft, Attorney-at-Law, Mitchell, Silberberg & Knupp (Nov. 24, 1997) (agreeing that the terms and regulations should be more clearly defined) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

professional abilities while residing here as legal immigrants or, perhaps, as citizens.

B. *Prospective Benefit*

In addition to altering the terms under which an athlete or artist can establish "extraordinary ability," "prospective benefit" must be clearly defined in order to be a workable requirement. The following definition is offered:

Prospective benefit to the U.S. can be established through either (1) a financial showing that the applicant not only is capable of supporting him/herself, but also will contribute tax revenues to the U.S.; or (2) a showing of artistic or athletic prowess, such as is necessary to demonstrate "extraordinary ability," that will enhance the culture and reputation of the U.S.

This would create a universal standard for all applying immigrants.

This change would eliminate the need for entertainers and athletes to apply under either EB-1 or EB-2. Under the proposed EB-6, access is made substantially easier for these exceptional people.²¹⁰

C. *Potential Criticism*

The cases discussed above demonstrate the INS's often idealistic and impractical approach toward immigration applicants. Immigration critics consider such behavior appropriate. They assert that talent, both in entertainment and in athletics, should be drawn exclusively from the ranks of Americans citizens.²¹¹ These critics contend that loosening immigrations requirements for alien athletes and entertainers will allow sports and entertainment industries the ability to bypass young American talent in favor of easily accessible foreign talent.²¹² The proposals contained herein, these critics believe, would replace American recruiting with easy access to more developed alien talent, simply in the hopes of making quick money. These critics argue that such rampant commercialization of America's sports and entertainment industries is morally reprehensible.²¹³

210. The INS could choose to leave athletes and entertainers eligible under the current guidelines for EB-2. However, under the proposed EB-1 rules, it is exceedingly unlikely and unnecessary for any such applicants to avail themselves of EB-2. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (agreeing with this assertion) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

211. Doug Chapman, *Crazy for Soccer*, PROVIDENCE J.-BULL., June 12, 1994, at 8M.

212. *Id.*

213. *Id.*

However, the view that these critics support is meritless because further opening immigration doors in the sports and entertainment industries cannot simply be perceived as commercialization of American policy. In fact, the proposals set forth in this Comment specifically exclude finances as proof of extraordinary or exceptional ability in determining eligibility to immigrate. To the extent that loosening the law may have an effect of producing greater wealth, it would provide greater wealth to all Americans, not only to immigrants. For example, if more winning athletes are allowed to immigrate to the U.S., a myriad of others in the U.S. sports spectrum from peanut vendors, parking lot attendants, radio producers, and cameramen, to advertisers and all those who support the advertising industry will be among the Americans to benefit.

Additionally, critics argue that it is necessary to develop talent nationally rather than internationally. However, immigration would affect only a relatively small percentage of the people in the American entertainment and athletic industries. American talent would undoubtedly continue to be developed.²¹⁴ Consequently, immigration will add to rather than replace America's talent pools.

Further, labor organizations critical of immigration expansion argue that jobs should go to Americans already here rather than to aliens or new immigrants who come to the U.S. with the express desire to take such jobs.²¹⁵ They point out that, at any given time, about eighty percent of American Equity's Union members are unemployed.²¹⁶ These organizations contend that allowing easier immigration only serves to exacerbate this labor problem, and they argue that jobs should go first and foremost to Americans already living in the U.S.²¹⁷ Furthermore, labor groups argue that immigration has caused American wages to decline approximately five percent over the past fifteen years.²¹⁸ To this end, labor unions feel that making the employment-based immigration process easier would simply heighten this problem.

214. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (confirming this idea) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

215. Benedict Nightingale, *Exit, Pursued by a Quota Counter*, *TIMES* (London), Feb. 5, 1991; Mark W. Peters, *Much Ado About Anything? The Effect of the Immigration Act of 1990 and Subsequent Amendments On Nonimmigrant Alien Artists And Entertainers*, 38 *WAYNE L. REV.* 1661, 1665 (1992).

216. See Nightingale, *supra* note 215.

217. *So, Does America Want Them or Not?*, *THE ECONOMIST*, July 19, 1997, at 22 (quoting Dan Stein, Executive Director of the Federation for American Immigration Reform (FAIR)).

218. *Id.*

In response, labor organizations who object to less restricted immigration in order to preserve and enhance the job pool for American citizens, are forgetting one critical point: more immigration means more potential union members.²¹⁹ The truth is that the numbers of those who would immigrate to the U.S. would not have a negative effect on the employment of Americans already here. As the proposed EB-6 only deals with a specific segment of the occupational spectrum (i.e. potential immigrants of "extraordinary ability" in the arts or athletics—most of whom make substantial salaries and many of whom already make their money in the U.S.), the primary spill-over effect on wages would actually be to create more jobs for other Americans. In fact, "a recent report from the National Academy of Science . . . calculates that immigrants add a net benefit of up to \$10 billion a year to the economy."²²⁰ Further, qualifying as having "extraordinary ability" means such immigrants have already cleared one hurdle; unlike many of the eighty percent of American Equity members currently unemployed, these new immigrants would have to prove their employability prior to immigration in the first place.

Some critics might argue that the guidelines should *not* be more specific than they are, in fear that such specific rules might lead the INS to view applicants solely on the basis of a numbers game.²²¹ They argue that the game will consist of asking, "how many of each type of document does the applicant have?"²²² Therefore, rigid rules not subject to individual interpretation would lead the INS to make mechanical decisions.²²³

Finally, critics object to stringent rules because they believe that the INS should be allowed to exercise artistic judgment when dealing with applicants. However, the INS was not established to become the arbiter of artistic or athletic talent in this country. Rather, the INS's job is to ensure that applicants present the appropriate documents and to grant applicants admission to the country based on precise guidelines.²²⁴ This process *must* be mechanical, for who is to determine which INS employees have the appropriate background to make artistic judgments? This is not part of the INS's hiring

219. Facsimile Interview with Frida Glucoft, Attorney-at-Law, Mitchell, Silberberg & Knupp (Nov. 24, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

220. *So, Does America Want Them or Not?*, THE ECONOMIST, July 19, 1997, at 23.

221. See Weiss, *supra* note 4.

222. See Weiss, *supra* note 4.

223. As Herbert A. Weiss said, "[a]fter all, the determination of who qualifies among that small percentage of aliens who have risen to the top of their field is itself a kind of 'artistic' decision that requires weighing and balancing evidence and policy considerations. No scientific, mechanical formula or process is likely to do the concept justice." See Weiss, *supra* note 4, at 13 (emphasis added).

224. See generally, *Extraordinary Ability*, *supra* note 31.

criteria. Not only is it advisable to take this subjective, often whimsical decision-making away from the INS, it is necessary to do so.

VI. CONCLUSION

This Comment has demonstrated that the 1996 Amendments to the INA are still inadequate with regard to athletes and entertainers. Moreover, although the INA has gone through major revisions, it still requires many more changes to give foreign artists and athletes a fair opportunity to immigrate to the U.S.²²⁵ The first significant obstacle to a reasonable and workable law is that Congress intended the EB-1 immigration category to be elitist.²²⁶ Thus, from the beginning, the notion of a law which would actually entice and encourage talent to immigrate was destined to fail. In pursuing an elitist policy, however, Congress set in motion a system fraught with difficulties and imbued with prejudice—not just Congress's own prejudice, but also a system that is subject to the vagaries of any INS agent or officer charged with deciding a specific case.²²⁷

Not surprisingly, to implement Congress's mandate, the INS has constructed ambiguous and ill-defined parameters in its regulations.²²⁸ First and foremost is the question regarding how an alien is to interpret such undefined terms such as "prospective benefit" or "national interest" when the definitions may change from one INS official to another. And how can an alien adequately meet three out of ten factors set forth in the C.F.R.'s requirement for EB-1 when these, too, can be redefined to suit the examining INS agent? Further, even if the alien meets these requirements, it is entirely possible that the INS agent will refuse him entry.²²⁹

Such a situation cannot continue. First, Congress should reconsider its elitist stance regarding entertainers and athletes. Why should only those immigrants who are at the top of their professions be allowed into the U.S. when, in all likelihood, they have no reason to immigrate?

Second, the INS must give the regulations more than a cursory overhaul. In fact, the regulations should invite talented people into this country rather than urge them to stay away. The INS needs to set forth objective criteria for alien immigration into the U.S. for those involved in international

225. Facsimile Interview with Frida Glucoft, Attorney-at-Law, Mitchell, Silberberg & Knupp (Nov. 24, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

226. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

227. *Id.*

228. *Id.*

229. *Extraordinary Ability*, *supra* note 31, at 782–83.

sports or entertainment related fields. Why should the INS be put in the position of determining artistic or athletic ability?

Third, the INS should ensure that the terms and regulations are clearly defined.²³⁰ What exactly is "prospective benefit"? Is it enough that the applicant does not go immediately on welfare? What is meant by "national interest"? Is the security of the country at stake? How much documentation is enough? What exactly is the necessary documentation?

Finally, the INS must consider why entertainers and athletes should be subject to more stringent requirements than other legal immigrants to this country. Other immigrants merely have to prove that they: (1) are married to U.S. citizens, (2) have jobs sponsoring them into the country, (3) have a family to join, or (4) are fleeing oppressive regimes.²³¹ Artists and athletes, however, must prove their intrinsic worth and that they will benefit the country or serve the national interest. Such a requirement is inconsistent with other immigration policy.²³²

230. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (agreeing with this notion) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

231. LEGOMSKY, *supra* note 3, at 200-1, 955-6.

232. Interview with Edith Friedler, Professor of Law, Loyola Law School, in Los Angeles, Cal. (Nov. 18, 1997) (agreeing with this notion) (transcript on file with *Loyola of Los Angeles Entertainment Law Journal*).

APPENDIX²³³

The following summarizes the general INS employment-based immigration procedure for petitioners without job offers under EB-1 and EB-2.

1. Alien petitions the INS for classification in the specific preference. At this time the alien must select EB-1 or EB-2 preference.

2. The alien must prove qualification under the selected preference (EB-1 or EB-2).

3. The INS approves or rejects the petition.

A. An approval indicates that the alien is qualified to apply for an immigrant visa.

B. If the petition is rejected, the alien has some recourse through administrative channels by filing for an AAU hearing. If the appeal is denied by the AAU, the alien may file in federal court by petitioning the Attorney General's office. If the petition is denied, the alien has no further recourse.

4. Once the INS approves the petition, the alien files an application for an immigrant visa with a U.S. consulate or an adjustment of status application for permanent residence with the INS. A potential immigrant can apply only if the Department of State has determined in its *Visa Office Bulletin* that immigrant visas are "immediately available." If visas are not immediately available, then aliens are given priority numbers to obtain visas when numbers become available.

5. Once a visa number is allotted, the procedure is complete and the alien may immigrate to the U.S.

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233. See FRAGOMEN, *supra* note 11, at 2-3 to 2-28.

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