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# A Survey of Legal Issues Facing the Foreign Athlete

Debra Dobray

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# ENTERTAINMENT & SPORTS LAW JOURNAL

## ARTICLES

### A SURVEY OF LEGAL ISSUES FACING THE FOREIGN ATHLETE

DEBRA DOBRAY<sup>†</sup>

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#### I. INTRODUCTION

Foreign-born athletes contribute greatly to American sports. Many Olympic stars for the United States have been immigrants from foreign countries. Notable immigrants who have excelled in a variety of team sports include basketball center Patrick Ewing, baseball pitcher Bert Blyleven, and football coach Knute Rockne. Sonja Henie, Arnold Schwarzenegger and Mario Andretti represent just a few of the many foreign-born athletes who have distinguished themselves in individual athletic pursuits. There is growing enthusiasm in this country for sports such as hockey and soccer that owe much of their increased popularity to the foreign stars whose athletic skills have incited the patronage of loyal fans.<sup>1</sup>

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<sup>†</sup> Assistant Professor, Law and Taxation, Edwin L. Cox School of Business, Southern Methodist University.

1. For an interesting article on foreign-born athletes and the role they have played in American sports see Deford, *Playing It the American Way*, SP. ILLUSTRATED, June 30, 1986, at 52.

Foreign athletes who arrive in the United States face a multitude of adjustments on both a cultural and personal level. A language barrier may exist for many of these athletes, as well as feelings of isolation and loneliness generated by separation from family and friends who remain behind.

Additionally, the foreign athlete may have to confront and resolve a variety of legal problems. This article will examine some of these issues. First, the article will explore the constitutional rights enjoyed by foreign athletes and limitations on those rights. Second, it will discuss certain issues they face with regard to immigration and naturalization. Finally, the paper will highlight special tax questions presented to resident and nonresident athletes.

## II. CONSTITUTIONAL ISSUES

The United States Constitution allows federal courts to exercise jurisdiction in suits involving aliens.<sup>2</sup> More specifically, federal law grants district courts the right to hear disputes between citizens of the United States and citizens of foreign states,<sup>3</sup> as well as disputes in which subjects of a foreign state are joined as additional parties.<sup>4</sup> Therefore, foreign athletes can enforce their contractual rights in federal courts under the requisite circumstances if the controversy meets the jurisdictional amount.

Without regard to any amount in controversy, foreign athletes may enforce a number of constitutional rights in federal as well as state courts.<sup>5</sup> Many constitutional rights are not limited to citizens but encompass "persons" so as to include aliens. For example, resident aliens enjoy the rights of free speech, religion and privacy guaranteed by the first amendment, as well as the criminal procedure protections afforded by the fourth, fifth and eighth amendments.<sup>6</sup> The due process clause of the Constitution<sup>7</sup> embraces all

2. U.S. CONST. art. III, § 2.

3. 28 U.S.C. § 1332(a)(2) (1982). The amount of the matter in controversy must exceed \$10,000 exclusive of interest and costs. *Id.*

4. 28 U.S.C. § 1332(a)(3) (1982). It is unclear whether federal courts may exercise jurisdiction in cases between citizens where foreign parties are joined on both sides of the controversy. See Note, *Federal Jurisdiction Over Suits Between Diverse United States Citizens with Aliens Joined to Both Sides of the Controversy Under 28 U.S.C. § 1332(a)(3)*, 38 RUTGERS L. REV. 71 (1985) (Since complete diversity is not mandated by statute, federal courts should have jurisdiction in suits between diverse United States citizens with aliens joined to both sides of the controversy).

5. Gordon, *The Alien and the Constitution*, 9 CAL. W.L. REV. 1, 14 (1972).

6. See *id.* at 1, 2. Most of these rights should extend to nonresident aliens as well. For a discussion of the criminal procedure safeguards and their application to nonresident aliens see Bryan, *The Constitutional Rights of Nonresident Aliens Prosecuted in the United*

persons, including both resident and nonresident aliens. The equal protection clause extends to any person within a state's jurisdiction.<sup>8</sup> Under the equal protection analysis applied by the courts, alienage constitutes a suspect classification which requires the government to show that laws classifying persons with respect to alienage serve a compelling governmental interest and be necessary to the promotion of that interest.<sup>9</sup> While it remains unclear whether nonresident aliens are entitled to equal protection under the Constitution, arguably they should not be treated differently from resident aliens or citizens except for exclusion from the political process.<sup>10</sup> Thus, foreign athletes, even if only temporarily in the United States, should be entitled to the fourteenth amendment's guaranties of due process and equal protection under the law.

Nevertheless, some federal laws do restrict the business activi-

*States*, 3 FORDHAM INT'L L. FORUM 221 (1980).

7. U.S. CONST. amend. XIV, § 1.

8. *Id.*

9. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (state program of assistance for higher education which was unavailable to aliens violates equal protection clause of fourteenth amendment); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state statute excluding all aliens from most civil service positions violates equal protection clause of fourteenth amendment); *In re Griffiths*, 413 U.S. 717 (1973) (exclusion of aliens from membership in state bar association violates equal protection clause of fourteenth amendment); *Graham v. Richardson*, 403 U.S. 365 (1971) (state law denying welfare benefits to resident aliens violates equal protection clause of fourteenth amendment); *Truax v. Raich*, 239 U.S. 33 (1915) (statute prohibiting private employers from employing in excess of a certain percentage of aliens is unconstitutional); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (local ordinance regulating type of building in which aliens could operate laundries violates equal protection clause of fourteenth amendment). *See also*, *Lichtenberg, Within the Pale: Aliens, Illegal Aliens and Equal Protection*, 44 U. PITT. L. REV. 351 (1983); *Morrison, Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 639-44 (1976); Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583. Other laws which do not classify persons according to race, national origin, or alienage and which do not infringe upon fundamental rights must only be rationally related to a legitimate governmental purpose. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-27 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Classifications based upon gender must serve important governmental objectives and be substantially related to the achievement of those objectives. *See, e.g.*, *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (federal law and fifth amendment analysis); *Stanton v. Stanton*, 429 U.S. 501 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

10. Citizens, resident aliens and nonresident aliens pay taxes; however nonresident aliens, unlike citizens and resident aliens, are precluded from the voluntary military service and registration. Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L. L. 135 (1982). *See also* Liebman and Levine, *Foreign Investors and Equal Protection*, 27 MERCER L. REV. 615, 628 (1975) (nonresident aliens physically present within the territorial jurisdiction of the United States probably are protected by the equal protection clause).

ties of aliens. The Communications Act of 1934<sup>11</sup> prohibits the Federal Communications Commission from issuing licenses for the operation of radio or television stations to aliens or their representatives.<sup>12</sup> The Federal Aviation Act of 1958<sup>13</sup> prevents aliens as individuals, partners or prominent owners of a corporation from operating domestic air carriers.<sup>14</sup> Aliens also have limited opportunities to participate in United States maritime trade.<sup>15</sup> While not restricting investment, other federal laws require the disclosure and registration of investments made by aliens in securities and agricultural land.<sup>16</sup> Aliens must also report and keep records of certain shipments of currency and foreign accounts or be subject to penalties.<sup>17</sup> Thus, the successful foreign athlete who wishes to invest in federally regulated industries should become familiar with current restrictions and disclosure requirements.

State laws may also restrict alien ownership of property.<sup>18</sup> Because states possess great latitude in regulating land use within their borders, the most significant state restrictions affecting aliens relate to the ownership of land.<sup>19</sup> These state laws may contain general prohibitions on alien ownership, limit the amount of land

11. 47 U.S.C. § 151 (West 1962 & Supp. 1986).

12. *Id.* § 310. Regulations promulgated pursuant to the Act extend the prohibition to all significant licensed wireless operations. Report, *Rights and Restrictions on Interests of Aliens in U.S. Estates: Federal and State Laws Affecting Administration and Distribution of U.S. Estates in Which Aliens Hold Interests*, 15 REAL PROP. PROB. & TR. J. 659, 668-69 (1980).

13. 49 U.S.C. § 1301 (West 1970 & Supp. 1986).

14. However, individual aliens admitted for permanent residence may register privately owned planes with the Civil Aeronautics Board, 49 U.S.C. § 1401(b)(1) (West Supp. 1987); *See also* Report, *supra* note 12, at 673-74.

15. Report, *supra* note 12, at 671.

16. For example, the Securities Exchange Act of 1934, the International Investment Survey Act of 1976 and the Agricultural Foreign Investment Disclosure Act of 1978 require reporting and recordkeeping of alien ownership in certain circumstances. For a discussion of such disclosure requirements see Report, *supra* note 12, at 680-86. *See also* Richards, *Real Estate Counsel, Contract and Closing for the Foreign Investor*, 14 REAL PROP. PROB. & TR. J. 757, 777-80 (1979) (discussion of federal and state disclosure laws regarding ownership).

17. For a discussion of the Currency and Foreign Transactions Reporting Act see Report, *supra* note 12, at 681-82.

18. Some state laws restrict inheritance by aliens but these laws generally would not be applicable to the foreign athlete except in unusual circumstances. Exceptions to this generalization might be worker's compensation statutes or wrongful death statutes, some of which limit inheritance by nonresident alien dependents. *See id.* at 677.

19. Federal law also prohibits aliens from "blocked list" countries from acquiring property or from transferring property owned prior to their native country's placement on the blocked list without approval from the U.S. Treasury Department. Countries which have been on the blocked list at various times include Cambodia, Cuba, Rhodesia, China, North Korea and Vietnam. *See id.* at 667. This federal restriction, however, should not have much impact on the foreign athlete, because few are from these countries.

that may be owned or the duration of ownership, or restrict the type of land that may be owned.<sup>20</sup> Agricultural land is usually the type of land ownership that carries such restrictions. There presently are fourteen states that impose some restrictions on alien land ownership.<sup>21</sup> Most of these laws should have little impact on the foreign athlete because investments in urban, commercial and residential real estate are exempt from such restrictions.<sup>22</sup> It is unlikely that the athlete would desire to acquire large parcels of land or to invest in agricultural land. Even in those states with more stringent constraints, the limitations may be avoided if the alien forms a corporation and invests indirectly.<sup>23</sup> In some cases, bilateral and multilateral treaties protecting the rights of aliens to acquire real property preempt state land use restrictions.<sup>24</sup> Laws that limit a resident alien's rights to own property could arguably also be challenged on equal protection grounds.<sup>25</sup> While many arguments can be made against the enforcement of these state laws,<sup>26</sup> the most persuasive reasoning suggests that if there is to be any regulation of alien investment for national security or public welfare reasons, then such legislation should be uniformly applied by

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20. For a survey of state statutes and their restrictions on alien ownership *see id.* at 688-99. *See generally* Richards, *supra* note 16, at 790-91.

21. These states include Connecticut, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota and Wisconsin. *See, e.g.*, MINN. STAT. ANN. § 500.221 (West 1987); OKLA. STAT. ANN. tit. 60, § 121 (West 1971); S.D. CODIFIED LAWS ANN. § 43-2A-1 (Allen-Smith 1983); KY. REV. STAT. ANN. § 381.290 (Bobbs-Merrill 1970). For a general discussion of state laws affecting alien land ownership *see* Morrison, *supra* note 9; Note, *A Proposed Model Code Concerning Alien Acquisition and Ownership of Real Property in the United States*, 3 INT'L PROP. INVESTMENT J. 89 (1986) [hereinafter Note, *A Proposed Model Code*]; Comment, *Foreign Investment in Mississippi: An Argument for Leniency*, 51 MISS. L.J. 819 (1981); Note, *Alien Ownership of Kansas Farmland: Can it be Prohibited?* 20 WASHBURN L.J. 514 (1981).

22. *See* Morrison, *supra* note 9, at 663-64. The majority of states impose no express restrictions on alien ownership. *See, e.g.*, TEX. PROP. CODE ANN. § 5.005 (Vernon 1984) (An alien has the same real and personal property rights as a United States citizen).

23. *See* Note, *A Proposed Model Code*, *supra* note 21, at 99; Note, *supra* note 10, at 138-39.

24. For a discussion of treaty limitations on state regulation of ownership *see* Gordon, *supra* note 5, at 19; Morrison, *supra* note 9, at 656-59; Note, *A Proposed Model Code*, *supra* note 21, at 101. However, even the most favored nation status makes an exception for the equal treatment of aliens with respect to vital activities. Hence, states still may be able to restrict aliens in agricultural or mineral development. Note, *supra* note 10, at 144-45.

25. *See supra* text accompanying notes 8-10. While nonresident aliens could challenge the laws as a denial of due process, it is unlikely such economic regulations would be declared unconstitutional. Fisch, *State Regulation of Alien Ownership*, 43 MO. L. REV. 407 (1978); Note, *supra* note 10, at 147.

26. *See, e.g.*, Note, *A Proposed Model Code*, *supra* note 21, at 101-09 (state restrictions create land use inefficiencies and have detrimental effects on federal immigration and naturalization policies and foreign relations).

Congress in conjunction with federal immigration and naturalization, international affairs and commerce policies.<sup>27</sup>

### III. IMMIGRATION AND NATURALIZATION ISSUES<sup>28</sup>

Some foreign athletes must first escape from their native country before they can entertain the hope of playing sports in America.<sup>29</sup> Many of the most publicized cases of foreign athletes entering the United States involve sports figures defecting from Communist block nations.<sup>30</sup> However, the majority of foreign athletes are unable to avoid certain visa requirements by gaining entry through political asylum. While there are several categories of visas available to aliens<sup>31</sup> under the Immigration and Nationality Act,<sup>32</sup> the B-1, H-1, and H-2 visas provide the foreign athlete the greatest chance of gaining entry.

Foreign athletes may obtain admission to the United States as a non-immigrant temporary visitor.<sup>33</sup> The B-2 visa allows entry to non-business visitors such as tourists. An athlete seeking to participate in an amateur sports event may be eligible for this type of visa.<sup>34</sup> A more likely option is the B-1 visa for business visitors.

27. See Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 282-83 (1980). See also Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069 (1979) (Congress should have the exclusive right to regulate and discriminate against aliens because federal law preempts state law).

28. See generally A. FRAGOMEN AND S. BELL, IMMIGR. PRIMER (1985); Goldstein, *Representing the Foreign Investor*, 16 IMMIGR. & NATURALIZATION INST. 315 (1983); Watson, *Nonimmigrants*, 38 IMMIGR. & NATIONALITY L. 30 (1984).

29. For an interesting story about one minor league baseball player's escape from his native Nicaragua see Gammons, *A New Land, An Old Bond*, SP. ILLUSTRATED, June 30, 1986, at 66.

30. For example, Bela Karolyi, the famous gymnastics coach who guided Nadia Comaneci and Mary Lou Retton to Olympic gold medals, defected from Romania in 1981. Deford, *supra* note 1, at 56. A discussion of the asylum provisions of the Immigration and Nationality Act, however, is beyond the scope of this paper. See generally Kurzban, *The Right of Applicants in Asylum and Withholding of Deportation/Exclusion*, 38 IMMIGR. & NATIONALITY L. 714 (1984); Tasoff, *Documenting an Asylum/243 Ch. Case*, 38 IMMIGR. & NATIONALITY L. 669 (1984).

31. E visas are available to treaty alien investors and L visas are available to intra-company transfers. For a discussion of these types of visas see Bonaparte, *Rights of the Foreign Investor Under the Immigration and Nationality Act*, 17 IMMIGR. & NATURALIZATION INST. 135 (1984); Fraade, Gardner & Stewart, *The IRS, the INS and the Foreign Entertainer*, 5 COMM/ENT L.J. 191, 200 (1983); Gordon, *The Immigration Laws of the United States and the Employment of Foreign Personnel*, 9 N. C. J. INT'L L. & COM. REG. 397, 403-07 (1984); Richards, *supra* note 16, at 762-64; Yonemura, *Representing the Foreign Investor: Part II - The Treaty Alien*, 16 IMMIGR. & NATURALIZATION INST. 323 (1983).

32. 8 U.S.C. §§ 1101-1525 (West 1964 & Supp. 1986).

33. 8 C.F.R. § 214.1 (1986).

34. Foster, *The International Entertainer Under United States Immigration Law*, 20

The decision to grant or to deny an alien the status of a business visitor is discretionary, featuring an expeditious process where application can be made to the American Consulate office in the country where the athlete resides.<sup>35</sup> The B-1 visitor may not earn money from a United States source, but is permitted to engage in certain business activities such as negotiating contracts.<sup>36</sup> Unfortunately, the regulations exclude those applicants who are entertainers by profession,<sup>37</sup> unless the applicant is to participate in a cultural program sponsored by a foreign government without remuneration.<sup>38</sup> Arguably, a foreign sports figure along with any necessary personnel could obtain a B-1 visitor visa more easily than other kinds of alien "entertainers,"<sup>39</sup> providing that all expenses and wages are paid by a foreign source.<sup>40</sup> The B-1 visitor visa expires after one year, although six month extensions may be granted.<sup>41</sup>

If the foreign athlete is not coming to the United States for business or pleasure but instead for employment purposes, then a non-immigrant H visa should be obtained.<sup>42</sup> Federal law establishes four "H" classifications for work visas: H-1 for persons of distinguished merit and ability, H-2 for other temporary workers coming to perform services for which qualified Americans are unavailable, H-3 for alien trainees, and H-4 for spouses or minor children accompanying or joining a qualified alien.<sup>43</sup> Given that an offer of employment is a prerequisite to achieving the H status, the prospective employer must petition the Immigration and Naturalization Service ("INS") for an H visa on behalf of the alien.<sup>44</sup> A

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SAN DIEGO L. REV. 143, 148 (1982).

35. Glucoft, *Temporary Employment in the United States of Foreign Entertainers: Immigration Principles*, 5 ENT. & SP. LAW. 1, 2 (1986).

36. Fraade, Gardner & Stewart, *supra* note 31, at 193.

37. Foster, *supra* note 34, at 146.

38. Ferris, *Foreign Entertainers and Their Entourages: Conflicts of Interest with American Labor Unions*, 20 BEV. HILLS B.J. 104, 106 (1986).

39. Foster, *supra* note 34, at 148-49; Fraade, *Non-Immigrant and Immigrant Visas for Entertainment Industry Personnel*, 16 IMMIGR. & NATURALIZATION INST. 477 (1983). Sometimes it is difficult to distinguish between entertainers and sports participants. See *Matter of Pacheco*, 11 I. & N. Dec. 427 (1965) (female wrestlers from Japan).

40. The noneligibility of entertainers under the B-1 visa category applies whether the payment is made by a United States source to a foreign bank or the employer is a foreign organization. Glucoft, *supra* note 35, at 2.

41. Gordon, *supra* note 31, at 402.

42. If an athlete entering under a business or visitor visa gains employment, then the nonimmigrant status would have to be changed.

43. See generally Wildes, *Temporary Work Visas: The "H" Category*, 16 IMMIGR. & NATURALIZATION INST. 419 (1983).

44. Ferris, *supra* note 38, at 108. If the athlete is to perform for several employers,



foreign athlete's petitioner might be an agent, promoter or sports organization.<sup>45</sup>

In order to qualify for an H-1 non-immigrant visa, the alien must be of distinguished merit and ability, and be coming to the United States to perform services of an exceptional nature without further education or training.<sup>46</sup> Because athletes are not considered to be members of a profession, they must establish that they have achieved international recognition<sup>47</sup> and that they are able to work immediately<sup>48</sup> in a position requiring exceptional skill. The INS considers several factors in determining whether an athlete is of distinguished merit and ability, including the individual's integrity, standing, and license, along with the length of time the athlete has played his or her sport.<sup>49</sup> Where the athlete is not a recognizable "star,"<sup>50</sup> the prospective employer must document the claim of distinguished merit and ability with supporting evidence, such as newspaper or magazine articles attesting to the athlete's skills and advisory opinions from the appropriate union.<sup>51</sup> Finally, the merit and ability must be established in the sport and position in which the athlete's services are to be rendered. For example, an internationally renowned soccer player would not necessarily qualify for an H-1 visa if the athlete was seeking to coach a United States soccer team.

Unlike the H-2 visa,<sup>52</sup> the H-1 visa requires no labor certification. Moreover, an athlete can be employed temporarily in a position of a permanent nature providing the athlete has no intention of remaining in the United States permanently or of abandoning

separate petitions must be filed. For example, if an athlete wishes to engage in promotions for various companies or manufacturers, those entities either must pay the athlete through this official employer or make a separate petition for a visa. Should the petitioning team wish to trade a foreign player the new team must apply for a new visa immediately. This requirement may be obviated if the foreign athlete forms an American corporation to broker the performances. See Fraade, *Loan Out Corporations Can Help Foreign Entertainers Get U.S. Visas*, 11 ENT. L. & FIN. 3 (1987).

45. Del Rey, *U.S. Immigration Procedures and the Employment of Alien Performers and Sports Personalities*, 1 COPYRIGHT, ENT. & SP. L. 119, 125 (1982).

46. 8 C.F.R. § 214.2(h)(2) (1986).

47. Glucoft, *supra* note 35, at 12.

48. *Matter of St. Joseph's Hospital*, 14 I. & N. Dec. 202 (1972).

49. Fraade, *supra* note 39, at 482.

50. The INS's focus on the star system arguably translates the definition of merit and ability to the ability to be mass marketed, at least in the entertainment field. Ferris, *supra* note 38, at 114-15. See also Foster, *supra* note 34, at 150-53.

51. Foster, *supra* note 34, at 150-53. Union advisory opinions may be mandatory. Glucoft, *supra* note 35, at 13. A copy of the contract should also be attached so that the salary term verifies the claim of exceptional ability.

52. See *infra* text accompanying notes 55-60.

foreign residency.<sup>53</sup> The H-1 visa is valid for a maximum period of two years, with one year extensions available as long as the requisite criteria are met, and the stay is intended to be temporary.<sup>54</sup>

If the foreign athlete cannot meet the distinguished merit and ability requirements, then an H-2 visa is the recommended alternative.<sup>55</sup> For an alien to obtain an H-2 non-immigrant visa, the Department of Labor ("DOL") first must certify that: (1) there are no qualified persons in the United States available for employment; (2) that the pay and job conditions are commensurate with prevailing standards; and (3) that the alien's employment will not adversely affect the wages and working conditions of American workers.<sup>56</sup> The prospective employer must advertise for American workers while the local DOL office will document the claim, often consulting the appropriate union.<sup>57</sup> For athletes, this search should extend beyond local markets. The employment position must also be temporary,<sup>58</sup> for example, a single season for an athlete. The H-2 visa is valid for one year and renewable for a maximum of three years.<sup>59</sup> An approved petition, however, is suspended automatically during a strike or labor dispute,<sup>60</sup> to preclude foreign athletes from acting as strike breakers. Where the decision by the DOL office is adverse to the foreign athlete, it is appealable to an administrative law judge.<sup>61</sup> The labor certification process is also subject to review

53. Fraade, Gardner & Stewart, *supra* note 31, at 195-96.

54. Gordon, *supra* note 31, at 402-03. An athlete who qualifies for an H-1 visa is allowed to bring support personnel who are essential to his or her performance. 8 C.F.R. § 214.2(h)(2)(vii) (1986). See also Del Rey, *supra* note 45, at 125. This provision is of limited significance except possibly for athletes competing in individual sports such as boxing, track, tennis or gymnastics.

55. The H-3 category for trainees is of limited applicability to professional sports figures unless the athletes are being brought to the U.S. solely for the purposes of training. Fraade, *supra* note 39, at 486.

56. 8 C.F.R. § 214.2(h)(3)(i)(A) (1986). See generally Bastone, *Labor Certification Regulations: What They Say and What They Mean - 1982-1983 Update*, 16 IMMIGR. & NATURALIZATION INST. 525 (1983); Furin, *Immigr. Law: Alien Employment Certification*, 16 INT'L L. 111 (1982); Kaye, *Immigrant Labor Certifications*, 38 IMMIGR. & NATIONALITY L. 76 (1984). Labor certification is also a prerequisite for Third and Sixth Preference visa petitions for permanent residency. See *infra* text accompanying notes 65-75.

57. Furin, *supra* note 56, at 115-17. A good, steady player would seek entry via an H-2 visa. However, depending upon the strength of the union, those efforts might prove fruitless.

58. *Matter of Contopoulos*, 10 I. & N. Dec. 654 (1964). For H-1 visas the employment position may be permanent as long as the intent to remain in the U.S. is temporary. See *supra* note 53 and accompanying text.

59. 8 C.F.R. § 214.2(h)(6)(10) (1986).

60. 8 C.F.R. § 214.2(h)(11) (1986).

61. Furin, *supra* note 56, at 117. Moreover, the final decision on admission still rests with the INS.

under the Administrative Procedure Act.<sup>62</sup>

In professional sports, the regulations governing H-1 and H-2 visas and labor regulations may be modified by the collective bargaining process. For example, the Major Indoor Soccer League ("MISL"), pursuant to a collective bargaining agreement with the players association and an arrangement with the INS, allocates a limited number of H-1 visas for foreign players.<sup>63</sup> The MISL also restricts the maximum number of foreign players per team and mandates a minimum number of American players who are required to be on the field at all times.<sup>64</sup>

The preceding discussion centered on non-immigrant work visas. Some foreign athletes, however, may desire to immigrate to the United States. Federal law permits 270,000 aliens to immigrate annually.<sup>65</sup> There are six categories<sup>66</sup> of preference for immigration that are allocated sequentially. The purpose of four of these categories is to reunite families. The Third and Sixth Preferences encompass aliens seeking employment. Under the Third Preference, immigrant visas are available to aliens who are professionals or because their exceptional ability in the sciences or arts will benefit the economy, cultural interest or welfare of the United States;<sup>67</sup>

62. *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973) (issuance of a labor certification is not a discretionary act and its denial is subject to judicial review). However, as a practical matter, the possibility of a lengthy appellate process may be of little consolation to an athlete and the sports organization seeking the athlete's services for scheduled performances. Arguably the labor certification is too arbitrary and should be modified. Ferris, *supra* note 38, at 114.

63. Interview with Gordon Jago, head coach of the Dallas Sidekicks, in Dallas (February 24, 1987). The league consists of twelve teams. In the 1986-87 season, eighteen H-1 visas were allowed; in 1987-88, fifteen will be allocated and in 1988-89, twelve will be allocated. *Id.* As the rules of the North American Soccer League also limit the number of foreign players on each team, such precertification is available annually to a certain number of foreign players. Foster, *supra* note 34, at 154 n.52.

64. Interview with Gordon Jago, head coach of Dallas Sidekicks, in Dallas (February 24, 1987). Resident aliens are considered American players under these rules. Ferris, *supra* note 38, at 114.

65. 8 U.S.C. § 1151(a) (West Supp. 1986). In contrast, the H-1 visa is exempt from the numerical limitation. Del Rey, *supra* note 45, at 132. Permanent residency obviates the need for visa renewals and permits employment changes.

66. The First Preference deals with the admission of immigrants who are the unmarried children of United States citizens. The Second Preference deals with the admission of spouses or children of aliens already in the United States with permanent residency. The Third Preference concerns admission of aliens who are professionals that would advance the economy. The Fourth Preference allows admission of the married children of U.S. citizens. The Fifth Preference concerns the admission of brothers and sisters of U.S. citizens. The Sixth Preference allows visas to be made available to immigrants capable of performing skilled or unskilled temporary labor. 8 U.S.C. §§ 1153 (a)(1) - (6) (West 1970).

67. 8 U.S.C. § 1153(a)(3) (West 1964 & Supp. 1986).

and whose professional services are sought by an employer in the United States. Generally, an athlete will not be considered a "professional"<sup>68</sup> and sports do not fall within the definition of a "science."<sup>69</sup> Some non-immigrant alien sports figures who have achieved international acclaim or notoriety in the United States might fall within the exceptional ability in the arts proviso.<sup>70</sup> For example, a professional woman golfer, with substantial evidence to document her ability and fame, qualified as a Third Preference immigrant.<sup>71</sup> Nevertheless, most athletes seeking Third Preference status will be required to obtain labor certification<sup>72</sup> including a "no objection" letter from the appropriate union.

The Sixth Preference category requires labor certification as well.<sup>73</sup> This category requires the alien to be capable of performing specified skilled or unskilled labor not seasonal in nature for which there is a shortage of workers,<sup>74</sup> and hence, generally is not applicable or useful to the foreign athlete.<sup>75</sup> If an athlete qualifies for a Third or Sixth Preference immigrant visa, or "green card," and is therefore lawfully admitted for permanent residence, then that individual enjoys most of the same constitutionally protected rights

68. Doctors, lawyers, engineers, teachers and other individuals who have achieved a degree in their specialized field are considered professionals. 8 U.S.C. § 1101(a)(32) (West 1964). In contrast, athletes generally attain no degree in their sport. See *Matter of Masters*, 13 I. & N. Dec. 125 (1969) (because golf and other sports do not require high academic or mental preparation but physical dexterity, training and experience, a professional golfer is not considered a "professional").

69. *Matter of Masters*, 13 I. & N. Dec. 125, 126 (1969).

70. Previous qualification for an H-1 visa carries no evidentiary support because exceptional ability is a more stringent requirement than distinguished merit and ability. *Matter of Kim*, 12 I. & N. Dec. 758 (1967). See also *supra* notes 48-54 and accompanying text. Exceptional ability has been defined as requiring some rare or unusual talent or unique or extraordinary ability in a calling which requires such talent or skill. *Matter of Frank*, 11 I. & N. Dec. 657 (1966).

71. *Matter of Masters*, 13 I. & N. Dec. 125 (1969). Nevertheless, a bona fide offer of employment is a prerequisite to obtaining an immigrant visa. Foster, *supra* note 34, at 157. The offer may be extended to an athlete by the sponsor of a sporting event.

72. See *supra* notes 56-57 and accompanying text. However, some sports leagues may have agreements with the INS for precertification of a certain number of athletes. For example, the Major Indoor Soccer League under such an agreement allocates two "green cards" to each club per year. Interview with Gordon Jago, head coach of the Dallas Sidekicks, in Dallas (February 24, 1987).

73. Both the Third and Sixth Preference categories have fixed ceilings on the number to be granted annually. Fraade, Gardner & Stewart, *supra* note 31, at 205-06.

74. *Id.* at 206. The employer's needs dictate whether the position is temporary or permanent in nature. *North American Industries v. Feldman*, 722 F.2d 893 (1st Cir. 1983).

75. Moreover, the Sixth Preference is the last category and as such has fewer positions available for which to qualify. For a discussion of the steps which must be followed to obtain Third or Sixth Preference immigrant visas see Gordon, *supra* note 31, at 410-11.

as United States citizens.<sup>76</sup> After a five year period the resident alien may apply for citizenship.

#### IV. TAX ISSUES<sup>77</sup>

Foreign athletes who are resident aliens are subject to United States taxation. The definition of residency under immigration laws differs from that under tax laws.<sup>78</sup> Prior to 1984, the definition of residence for tax purposes was an illusive test which concentrated on the intent of the alien's stay in the United States as gleaned from surrounding facts and circumstances.<sup>79</sup> The ultimate intent to return to the native domicile was not afforded great weight in determining residency for tax purposes.<sup>80</sup> Under the Tax Reform Act of 1984<sup>81</sup> an alien is defined as a resident for tax purposes if the alien is a lawful permanent resident under the immigration laws any time during the tax year<sup>82</sup> or satisfies the substantial presence test.<sup>83</sup> Under the substantial presence test an alien is considered a resident if the alien is present in the country for 183 days or more or if the sum of the days the alien is physically present in the United States during the calendar year, plus one-third the number of days the alien is physically present in the United States during the first preceding calendar year, plus one-sixth the number of days the alien is physically present in the United States

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76. See *supra* notes 6-10 and accompanying text.

77. See generally, Ardi, *Tax Planning for Foreign Entertainers Who Perform Within the United States*, 32 TAX LAW. 349 (1979); Kirios, *Taxation of the Foreign National*, 17 IMMIGRATION & NATURALIZATION INST. 181 (1984); Zagaris, *Investment by Nonresident Aliens in United States Real Estate*, 31 U. MIAMI L. REV. 565, 569-86 (1977) (United States tax implications for real estate investment).

78. Fraade, Gardner & Stewart, *supra* note 31, at 208-10. Nonresident immigrants may still be treated as residents for tax purposes. Resident immigrants will be treated as residents for tax purposes. Langer, *When Does a Nonresident Alien Become a Resident for U.S. Tax Purposes?* J. TAX'N, April 1976, at 220. Spouses may also be treated differently for tax purposes. *Id.* at 222.

79. Factors considered included whether the alien owned a home, office, or car in U.S., whether the alien possessed U.S. charge cards, bank accounts, driver's license, or memberships in American clubs, and whether his family along with substantial personal possessions accompanied the alien. See Fraade, Stewart & Gardner, *supra* note 31, at 214-15; Langer, *supra* note 78, at 222-23.

80. Langer, *supra* note 78, at 221-22.

81. For a comprehensive discussion of the law see Khokhar, *New Definition of a Resident Alien*, 13 TAX MGMT. INT'L. J. 283 (1984); Lipton & Fuller, *Taxation of Compensation Paid to Aliens Requires Careful Analysis*, TAXES, July 1986, at 444.

82. An alien will be a lawful permanent resident if he or she holds a valid "green card," without regard to the length of the stay. See Khokhar, *supra* note 81, at 289.

83. I.R.C. § 7701(b)(1)(A) (West 1987).

during the second preceding year, equals or exceeds 183 days.<sup>84</sup>

Excluded from this test are aliens present in the United States for thirty days or less during the calendar year or those individuals present in the United States for less than 183 days during the calendar year *and* who can establish closer connections with a foreign tax home.<sup>85</sup> The definition of "closer connection to a foreign tax home" remains vague and will be difficult to apply to athletes who commute between countries.<sup>86</sup> The same set of circumstances previously used to define residency<sup>87</sup> will most likely be used to define closer connection.<sup>88</sup>

While the tax consequences for lawful permanent residents, or green card holders, are unavoidable, a nonresident alien may avoid adverse tax consequences which flow from being treated as a resident alien under the substantial presence test by limiting the number of days spent in the States.<sup>89</sup> However, that possibility is slight for the athlete whose season generally exceeds the numerical day limitation.

A resident alien is subject to the United States graduated income tax schedule on worldwide income.<sup>90</sup> On the other hand, foreign source income for nonresident aliens generally is exempt.<sup>91</sup> Moreover, a nonresident alien is subject to graduated taxation only on United States source income which is effectively connected with the conduct of a trade or business in the United States, such as salaries, fees and prize purses received when the performances occur in this country.<sup>92</sup> Income derived from United States sources which is not effectively connected with a United States trade or

84. I.R.C. § 7701(b)(3)(A) (West 1987).

85. I.R.C. § 7701(b)(3)(B) (West 1987).

86. Khokhar, *supra* note 81, at 295.

87. Langer, *supra* note 78.

88. Lipton & Fuller, *supra* note 81, at 446.

89. See Weiss, *Tax Planning Issues Affecting International Entertainers and Athletes*, 9 *FORDHAM INT'L L.J.* 97 (1985-6). The only exempt period that might be applicable to athletes is that time which is spent in the United States due to a medical problem which arose during the athlete's stay. I.R.C. § 7701(b)(3)(D)(ii) (West 1987).

90. For a discussion of the pros and cons of resident alien status including other tax consequences with respect to corporate and property investment see Khokhar, *supra* note 81, at 303. A tax credit may be available for foreign taxes paid. Langer, *supra* note 78, at 220.

91. An exception would be royalties earned abroad from U.S. sources. Fraade, Gardner, & Stewart, *supra* note 31, at 216.

92. Such income, however, is not taxed if the total remuneration does not exceed \$3000, the nonresident alien's total stay during the taxable year does not exceed ninety days, or the nonresident alien performs for a foreign entity. I.R.C. § 864(b)(1)(A) (West 1987).

business is taxed at a flat rate of thirty percent.<sup>93</sup>

Athletes must often determine what part of their salary is taxable as United States as opposed to foreign source income when they are paid for an annual period yet only perform some months in the United States.<sup>94</sup> The less time the foreign athlete spends in the United States during the period of the contract, the less United States tax is owed. In *Stenkowski v. Commissioner*<sup>95</sup> the court held that a hockey player's annual salary included the regular and play-off season, along with the period of time spent at training camp, but not the off-season.<sup>96</sup> Hence, the taxable amount of United States source income equalled the amount of the player's annual compensation multiplied by the ratio of the number of days services were performed during the contract period to the total number of days included in said period.<sup>97</sup>

Sign-on bonuses represent another question to athletes regarding the allocation of income to United States sources. In *Linseman v. Commissioner*<sup>98</sup> such a bonus was allocated on the basis of the number of regular season games the team athlete was to play during the first of a six-season contract, since the bonus was to induce the player to sign with the club and not to play for anyone else.<sup>99</sup>

Another important ramification which flows from determining what is United States source income is that the significant allowable deductions are limited to those business expenses which are effectively connected with the conduct of a trade or business in the United States.<sup>100</sup> Generally, all "ordinary and necessary" business-

93. See generally Histrop, *Taxation of Canadian Resident Athletes and Artists Performing in the United States*, 32 CANADIAN TAX J. 1060, 1062 (1984); Weiss, *supra* note 89, at 102.

94. There are often problems of how to allocate the amount of tax owed annually for salary paid in different seasons. See, e.g., Harwood, *Recent CA-2 Decision Focuses on Computing U.S. Source Income for Nonresident Alien*, J. TAX'N, May 1983, at 266, 267.

95. 690 F.2d 40 (2d Cir. 1982), *rev'g in part*, 76 T.C. 252 (1981).

96. *Id.* at 46. Because the contract required the athlete to report to training camp in good condition and to participate in play-off games, both those periods were covered by the contract. *Id.* Arguably, the off-season days might be included in the number of days allocated to U.S. source income if a supervised training program was required under the contract. Harwood, *supra* note 94, at 267.

97. If teams trained or played exhibition games outside the United States the foreign athlete's tax bill would be reduced further. Harwood, *supra* note 94, at 266.

98. 82 T.C. 514 (1984).

99. *Id.* at 521-22. The player argued that part of the bonus should be allocated to foreign source income because he first had to secure release from a Canadian club. *Id.* at 518-19.

100. I.R.C. § 873(a) (West 1987). See also *Commissioner v. Flowers*, 326 U.S. 465 (1946); *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971). Exceptions include some casualty losses, charitable contributions and the standard single

related expenses, such as fees paid to agents, coaches, trainers and legal consultants are allowable.<sup>101</sup> Travel expenses incurred, if ordinary and necessary to the trade and business also are allowable. However, in *Stemkowski v. Commissioner*<sup>102</sup> the court held that a hockey player's living expenses in the city in which his team played were not deductible as a business necessity because it was the player's personal choice to reside in Canada.<sup>103</sup> For athletes, other allowable expenses may include off-season conditioning expenses, particularly when the contract requires the player to report to training camp fit and to remain fit throughout season.<sup>104</sup> However, expenses necessary for conditioning are not equated with expenses for recreational sports. On remand, the tax court in *Stemkowski*<sup>105</sup> determined that bowling and golfing expenses were recreational in nature and not deductible.<sup>106</sup> The court also disallowed expenses for therapeutic massages, running shoes, a swim suit, and Y.M.C.A. dues, along with the depreciation of a tennis racket primarily because of a lack of substantiation and the athlete's inability to allocate these expenses between the hockey season and the off-season spent in Canada.<sup>107</sup> Personal expenses, of course, are not allowable deductions.<sup>108</sup> For international athletes such expenses have been held to include disability insurance premiums, telephone and television expenses,<sup>109</sup> along with state and local gasoline and personal property taxes.<sup>110</sup> On the other hand, allowable business deductions have included such expenses as a subscription to Hockey News and the costs of answering fan

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personal exemption. I.R.C. § 873(b) (West 1987). Moreover, all deductions are allowable only if the taxpayer properly files the return. I.R.C. § 874(a) (West 1987).

101. I.R.C. § 162(a) (West 1987). If substantiated, fines and professional association dues are deductible. *Linseman*, 82 T.C. at 518.

102. 690 F.2d 40 (2d Cir. 1982).

103. *Id.* at 48. *See also* *Wills v. Commissioner*, 411 F.2d 537 (9th Cir. 1969) (baseball player's living expenses in Los Angeles not deductible for business travel when player opted to maintain Spokane residence); *Hanna v. Commissioner*, 763 F.2d 171 (4th Cir. 1985) (hockey player's living expenses in the United States while maintaining foreign residence not allowed).

104. *Stemkowski*, 690 F.2d at 46.

105. 82 T.C. 854 (1984).

106. *Id.* at 864-65. What activities are deemed to be recreational in nature probably is contingent upon the athlete's sport and the type of training it necessitates.

107. *Id.* at 865-68. The court questioned the reasons for the discrepancies between the amount of the deduction listed on the tax return and the first amended petition and brief in disallowing some of the deductions. *Id.*

108. I.R.C. § 262 (West 1987).

109. *Stemkowski*, 690 F.2d at 47-48.

110. *Hanna*, 763 F.2d at 173.



mail.<sup>111</sup>

Several other tax issues confront the foreign athlete. Like U.S. citizens, resident aliens are subject to a graduated withholding tax on income earned, whereas nonresident aliens are subject to a flat withholding rate of thirty percent if the alien is an independent contractor, and to the graduated rate if the alien is an employee of a United States employer, with some exceptions.<sup>112</sup> Thus, a key inquiry for withholding tax purposes is the employment status of the athlete. The payor, or withholding agent, is required by law to withhold the appropriate amount.<sup>113</sup> In some circumstances, foreign athletes might be concerned with gift and estate tax laws.<sup>114</sup> Because residence is defined as domicile for estate and gift tax purposes, it is generally easier for a nonimmigrant alien to remain a nonresident for these taxes as opposed to the federal income tax.<sup>115</sup> Tax treaties represent another major area of the law which significantly affect tax liability.<sup>116</sup> While treaties may reduce tax liability in several ways, a highly remunerated athlete could be affected adversely by a treaty. Some model treaties contain specific provisions which affect international athletes and reduce the player's ability to avoid taxation.<sup>117</sup> The advantages of utilizing a "loan out" corporation, whereby the athlete forms a corporation which in turn loans the athlete's services for a fee which is usually subject to a lower tax rate, are being restricted by current laws.<sup>118</sup> Alternatively, plans to defer compensation to periods in which the athlete's earnings are diminished often represent a viable means of reducing the tax burden.<sup>119</sup> In sum, tax planning for the foreign athlete requires a keen comprehension of a variety of complex laws.

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111. *Stemkowski*, 82 T.C. at 868-69. Tickets purchased for fans, not friends, if substantiated, may be deductible. *Stemkowski*, 690 F.2d at 47; *Hanna*, 763 F.2d at 172.

112. For a more comprehensive discussion of withholding requirements and exemptions see Fraade, Gardner & Stewart, *supra* note 31, at 216-20; Histrop, *supra* note 93, at 1068-69; Lipton & Fuller, *supra* note 81, at 449-51.

113. I.R.C. §§ 1441, 1442 (West 1987).

114. See generally, Khokhar, *supra* note 81, at 362; Wildes & Grunblatt, *Domicile for Immigration and Federal Gift and Estate Tax Purposes - Is a Harmonious Rule Possible?* 38 IMMIGR. & NATIONALITY L. 821 (1984); Zagaris, *supra* note 77, at 586-601.

115. Langer, *supra* note 78, at 22-23.

116. For a discussion of tax treaties and their impact on athletes see Weiss, *supra* note 88, at 115-33.

117. *Id.* See also Fraade, Gardner & Stewart, *supra* note 31, at 220-22.

118. For a more complete analysis of the loan out corporation and the methods used by the IRS to attack such transactions see Histrop, *supra* note 93, at 1072-76.

119. *Id.* at 1076-79.

## V. CONCLUSION

The United States offers the foreign athlete many opportunities to perform. Yet the alien player faces some restrictions on entry and investment activities along with a potentially significant tax burden. Some immigration and tax laws appear to apply more harshly to the immigrant athlete than to the non-athlete immigrant.<sup>120</sup> Currently, labor unions, whose interests are to protect American workers from competition, play a significant role in advising the INS and DOL on the qualifications of foreign athletes.<sup>121</sup> However, just as many foreign-born athletes desire to perform in the United States, many American athletes now are seeking to perform abroad. American basketball players perform in Europe and baseball players play in Japan. Spectators the world over should be able to enjoy viewing the best players perform in their sporting events. Average American baseball, basketball and football players could delight European audiences while average South American and European soccer players could enhance the appeal of that sport in the United States. Perhaps it is time for the United States sports industry to make a concerted effort to enhance the free exchange of athletes between countries.<sup>122</sup> Both the individual athletes as well as fans would benefit from such a more liberal attitude towards foreign athletes and the use of their talents.

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120. See *supra* text accompanying notes 37-40, 49-51, 68-72, and 117-18.

121. For a critique of the role of labor unions under immigration laws and a proposed modification see Ferris, *supra* note 38.

122. Athletes are free to migrate between countries in the European Common Market because there are no labor restrictions. See D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 125-54 (2d ed. 1981).