UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAM RUSSELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98 C 6132**
	)	
IMMIGRATION AND NATURALIZATION SERVICE, DORIS MEISSNER, Commissioner, IMMIGRATION AND NATURALIZATION SERVICE OFFICE OF ADMINISTRATIVE APPEALS, and TERRANCE M. O'REILLY,	)	**Judge Rebecca R. Pallmeyer**
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Cam Russell was a professional hockey player who, during his career in the National Hockey League ("NHL"), played for the Chicago Blackhawks and the Colorado Avalanche. In 1997, Russell filed a petition with the Immigration and Naturalization Service ("INS") for permanent residency in the United States as an alien of extraordinary athletic ability, 8 U.S.C. § 1153(b)(1)(A). After the Administrative Appeals Unit ("AAU") affirmed an agency decision denying his petition, Russell filed a complaint against the INS in this court for declaratory and injunctive relief. The court has subject matter jurisdiction over the appeal pursuant to 28 U.S.C. § 2201, 1361. The parties have cross-moved for summary judgment. Russell, however, has since retired from playing professional hockey and has apparently embarked on a career in Canada where he both owns and coaches a professional hockey team. For this and other reasons set forth below, the INS's motion for summary judgment is granted and Russell's motion for summary judgment is denied.

FACTUAL BACKGROUND

Russell was born in Halifax, Nova Scotia and is a citizen of Canada. He began his hockey career as a defenseman in the Quebec Major Junior Hockey League ("QMJHL") where he played from 1985 through 1989. (Administrative Record ("AR") at 29.) In 1987, while still playing in the QMJHL, Russell was drafted in the third round of the NHL draft (the 50th pick overall) by the Chicago Blackhawks. (*Id.*) Russell first played with the Blackhawks during the 1989-1990 season and remained with the team through the 1997-1998 season. (*Id.*) During this time, Russell amassed a total of eight goals and nineteen assists for a total of twenty-seven points. Shortly after the start of the 1998-1999 NHL season, Russell was traded from the Blackhawks to the Colorado Avalanche. During the 1998-1999 season with the Avalanche, Russell played in thirty-five games, scored one goal and had two assists. Each year that he played with the NHL, Russell was granted a non-immigrant visa by the INS.

In July of 1997, while still with the Blackhawks, Russell filed an Immigrant Petition for Alien Worker with the Northern Service Center of the United States Immigration and Naturalization Service ("INS"). By way of this petition, Russell sought permanent residence in the United States under the classification of "alien with extraordinary ability." 8 U.S.C. § 1153(b)(1)(A).[1] In order to establish "extraordinary ability," a petitioner must, among other

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[1] Section 203(b) of the Act provides, in relevant part:

(1) Priority Workers. – Visas shall first be made available to qualified immigrants who are aliens described in any of the following subparagraphs (A)

(continued...)

things, demonstrate at least three of ten factors established by INS regulation, including, for example, the receipt of nationally recognized awards for excellence in the field, a high salary in relations to others in the field, and the establishment of a distinguished reputation within the field. *See* 8 C.F.R. § 204.5(h)(3). In an attempt to establish these factors, Russell submitted, along with his petition, an affidavit detailing his hockey career and achievements, statistical data, salary verification, the affidavits of other present and former NHL players testifying to Russell's abilities, and media publications concerning him and his play. (AR at 12-80.) Later, in response to an INS request for additional documentation (AR at 81-84), Russell submitted three decisions in which judges in the United States District Court for the Northern District of Illinois overturned the denials of visa petitions to three other NHL players (AR at 85-126).

Despite his various submissions, the INS denied Russell's petition on January 12, 1998.

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[1](...continued)
through (C):

> (A) Aliens with Extraordinary Ability.–An alien is described in this subparagraph if:
>
> > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> >
> > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> >
> > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

(AR at 127-131.) Russell subsequently appealed to the Administrative Appeals Unit ("AAU") of the INS on February 2, 1998, arguing that the denial of his petition was arbitrary and contrary to legal precedent. (AR at 132.)[2] Because the AAU had not yet ruled on his appeal, on September 30, 1998, Russell filed a complaint in this court, under 5 U.S.C. § 706, seeking to compel a decision from the AAU. Russell's complaint alleged inexcusable delay on the part of the AAU. He also alleged that the visa petition denial was arbitrary, legally erroneous, and an abuse of discretion. Both parties moved for summary judgment, and on August 20, 1999, this court concluded that the AAU's delay was not so unreasonable as to warrant judicial intervention at that time. *See Russell v. INS*, No. 98 C 6132, 1999 WL 675255 (N.D. Ill. Aug. 24, 1999).

On November 26, 1999, the AAU affirmed the initial decision of the INS (AR at 150-156), and on December 22, 1999, this court granted Russell's motion to reinstate his appeal to this court. In April, both parties moved for summary judgment. In preparing its decision on these motions, the court learned, through its own research, that Russell has retired from professional hockey due to injury.[3] In response to the court's inquiry, Russell advised the

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[2] The AAU is the organizational body within the INS which has jurisdiction to review decisions denying immigration petitions made by directors of the INS Service Centers located in various areas of the country.

[3] In the July 3, 2000 newspaper article discovered by the court, Russell is quoted as saying: "I'm hanging them up, that's what I'm doing. It's been about a year and half since I hurt my shoulder and it is not much better now than it was last November. I've gone through four rehab programs and there's been progress, but not enough to play at that level. . . . I wanted to stay positive and keep my options open and I wanted to play . . . but my (continued...)

court that his retirement did not render his appeal moot. *See* Plaintiff's Memorandum in Response to the Court Order of December 13, 2000 ("December 13 memo"). As explained below, the court disagrees. Because Russell's petition is now moot and because he would not prevail on the merits, this case is dismissed.

DISCUSSION

I. Mootness

The United States Constitution limits this court's jurisdiction to live cases and controversies. *See Stotts v. Community Unit Dist. No. 1*, 230 F.3d 989 (7th Cir. 2000) (citing U.S. CONST. art. III, § 2; *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181 (1982)). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944 (1969). The requirement that a case have an actual, ongoing controversy extends throughout the pendency of the action. *See Board of Educ. of Downer's Grove Grade School Dist. No. 58 v. Steven L.*, 89 F.3d 464, 467 (7th Cir. 1996). When a case is moot, it must be dismissed as non-justiciable. *See id.*

The original controversy that sparked the present case was Russell's request for permanent resident status in the United States so that he could further his professional hockey career, and the INS's denial of that request. As already noted, the Immigration and

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[3](...continued)
body just wasn't strong enough." Monty Mosher, *Cam Russell Retires From Professional Hockey*, Halifax Chronicle-Herald, July 3, 2000, *available at* http://www.canoe.ca/Hockey Colorado/jul3_cam.html.

Nationality Act provides special visa eligibility for immigrants who qualify as aliens with extraordinary ability. To qualify, though, an alien must "seek[] to enter the United States *to continue work in the area of extraordinary ability*." 8 U.S.C. § 1153(b)(1)(A)(ii) (emphasis added). Even if Russell's extended career in the NHL were enough to garner status as an athlete of "extraordinary ability" for purposes of § 1153(b)(1)(A), *but see infra* Section II, the fact is that he has now retired. Moreover, he has not indicated to the court any plans "to continue work[ing] in the area" of professional hockey in the United States. To the contrary, he has informed the court that he now owns and coaches a professional hockey team in Canada. *See* December 13 memo, at 3 ("In this case, Cam Russell *had* an extended career in the NHL which can be considered a one-time achievement under [8 C.F.R. § 204.5(h)(3)]. *Cam Russell now owns and Cam coaches a professional hockey team in Canada*.") (emphases added).

Russell nevertheless insists that a controversy still does exist and that the courts have previously accorded "extraordinary ability" status to athletes based upon past athletic experience and ability. In support of this assertion, Russell cites to the approved visa petitions of former hockey players Chris Kontos and Darren Pang, as well as the published AAU decision of *In re X*, No. A70 499 721 (AAU 1993). The petitions of Kontos and Pang do not help sway the opinion of this court. While Russell contends that Kontos and Pang were no longer active professional hockey players when their respective visa petitions were granted, he provides no support for this purported fact, nor does he mention whether either Kontos or Pang had plans "to continue working [in the United States] in the area of [their]

extraordinary ability."[4] As for *In re X*, this case only serves to underscore the court's concerns. *In re X* involved an Olympic silver medalist in synchronized swimming who sought permanent residency in the United States in order to coach a synchronized swimming team. The AAU explicitly noted that, in order to be approved, "the petition must be accompanied by evidence that the alien is coming to the United States to continue work in the area of expertise." The petitioner, according to the AAU, met this burden by submitting her coaching plans. Unlike the petitioner in *In re X*, Russell has failed to demonstrate evidence of any future plans to play, coach, or in any other way "continue work" related to hockey in the United States.

II. The Merits

Even if Russell were still playing in the NHL or had presented evidence of plans to continue working in the United States in a hockey-related position, this court concludes his appeal would fail on the merits. When reviewing a denial of a visa petition, the court considers only whether the INS's decision constituted an abuse of discretion. *See Bal v. Moyer*, 883 F.2d 45, 47 (7th Cir. 1989). The test is whether the decision of the INS "was made without a rational explanation, inexplicably departs from established policies, or rests on an impermissible basis such as invidious discrimination against a particular race or group." *Id.*

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[4] In fact, the record clearly indicates that Pang did continue to work in a hockey-related position after retiring from the NHL. (AR at 19-20.) In his affidavit, Pang states that he is a "former professional hockey player in the National Hockey League" and is currently "a sports announcer and a hockey analyst regarding the television and radio broadcasts of professional hockey games in the National Hockey League . . . ." (AR at 19.)

(citing *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985)). The court concludes the AAU's decision survives this generous review.

In its seven-page ruling, the AAU set forth the language of § 1153(b)(1)(A) and the relevant INS regulation, and then proceeded to discuss why Russell's evidence and supporting case law did not satisfy the statutory and regulatory requirements. The AAU, which decided the matter prior to Russell's retirement, noted that the decision to grant or deny Russell's petition would rest on whether he has "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." 8 U.S.C. § 1153(b)(1)(A). To meet this standard, the AAU continued, a petitioner must, among other things, provide evidence of a one-time achievement (such as the petitioner's Olympic silver medal in *In re X*) or at least three of the following:

> (1) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
> (2) Documentation 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;
> (3) Published 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. Such evidence shall include the title, date, and author of the material, and any necessary translation;
> (4) Evidence 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;
> (5) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
> (6) Evidence of an alien's authorship of scholarly articles in the field, in

> professional or major trade publications or other major media;
> (7) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
> (8) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
> (9) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or,
> (10) Evidence of commercial success in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3).

In his submissions to the AAU, Russell argued that he met, at least, the following five factors: receipt of nationally or internationally recognized awards of excellence in the field of endeavor (Factor #1); membership in an association which requires outstanding achievements (Factor #2); published materials and major media publications (Factor #3); evidence of a distinguished reputation within the NHL (Factor #8); and evidence of high salary or remuneration in relation to others in his field (Factor #9). While the AAU indicated that a position on the roster of an NHL team may, in itself, satisfy Factor #2, it found that Russell's proffered evidence on the other § 204.5(h)(3) factors did not suffice. For example, in an attempt to satisfy Factor #1, Russell pointed to his relatively early selection in the 1987 NHL draft. The AAU, however, found one's draft position to be an "implausibly broad interpretation" of the term "award." With respect to Factor #3, the AAU wrote that Russell's submission of articles from Chicago newspapers did not demonstrate that Russell

had attracted the requisite attention from the *national* media.[5] As for Factor #9, the AAU concluded that Russell's evidence was inadequate because he failed to provide comparative data to demonstrate that his $450,000 per year salary was greater than that of the average player in his position in the NHL. (AR at 153) ("Without documentation of the median salary paid to NHL defensemen, the bare assertion that $450,000 per year is significantly high is unsubstantiated."). And, finally, but less explicitly, on Factor #8, the AAU concluded that, based on his statistics (and despite the supportive statements of other NHL players), Russell did not play a "leading" or "critical" role for the Blackhawks, Avalanche, or, for that matter, the NHL on the whole.[6]

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[5] The court has serious reservations about the AAU's evaluation of Russell's Factor #3 evidence. Nowhere in the relevant language of the INS regulation is there a requirement that the submitted media publications be from news outlets throughout the country. *Cf. Racine*, 1995 WL 153319, at *6 ("There is no requirement under the Act that the articles describe him at the top of the field. The articles need to demonstrate his work within the field."). Nevertheless, even if Russell's evidence satisfied Factor #3, he would still have failed to satisfy three of the ten § 204.5(h)(3) factors.

[6] Russell did not provide comparative data to help the court gauge where his record of his eight goals and nineteen assists would place him amongst NHL defensemen. The court has consequently decided to perform its own comparison, using the 1992-1993 season as an example. In that season, Russell scored 2 goals and had 4 assists for a total of 6 points. (AR at 16.) That same season, NHL defenseman Yves Racine, found by Judge Marovich of the United States District Court for the Northern District of Illinois to have been an athlete with "extraordinary ability," *see Racine v. INS*, No. 94 C 2548, 1995 WL 153319, at *7 (N.D. Ill. Feb. 27, 1995), scored 9 goals and had 31 assists, for a total of 40 points, and Steve Smith, another NHL defenseman, scored 10 goals and had 47 assists, for a total of 57 points, *see id*. While the court recognizes that point totals are not the sole indicator of ability within the NHL, especially for defensemen, it does consider this comparison to be evidence that the INS did not abuse its discretion in concluding that Russell's performance was less than "extraordinary."

In addition to its consideration of the INS regulation and its factors, the AAU reviewed the three district court cases submitted by Russell and alluded to earlier in this opinion: *Racine v. INS*, No. 94 C 2548, 1995 WL 153319, at *4 (N.D. Ill. Feb. 27, 1995); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996). The AAU distinguished the three cases from Russell's, stating that:

> the record plainly shows that in each of the three cases . . ., the courts have relied upon specific comparative evidence rather than the duration of the plaintiffs' employment with the NHL. In contrast, in the present case, counsel has provided information regarding this one petitioner, arguing without supporting evidence that this information indicated that the petitioner was near the top of his field.

(AR at 155.) The court finds that, in addition to the lack of comparative evidence presented in the case at bar, these three cases are further distinguishable on their facts. In *Racine*, for example, the evidence demonstrated that, since he began his NHL career, the petitioner was fifth overall in scoring amongst NHL defensemen (and third overall in assists). *Racine*, 1995 WL 153319 at *5. In *Muni*, the petitioner won the NHL's championship trophy, the Stanley Cup, three times with the Edmonton Oilers. *Muni*, 891 F. Supp. at 441. During that time, he also had one of the best plus/minus ratios on the team, which means that the team performed exceedingly well when he was on the ice. *Id.* Moreover, the record included comparative evidence indicating that his salary was above the average for NHL defensemen. *Id.* Finally, in *Grimson*, the court found that the petitioner played the specialized and necessary role of "enforcer" on his NHL team and that, at the time of its decision, was one

of the three best "enforcers" in the world.[7] *Grimson*, 934 F. Supp. at 967. The court also notes that in both *Grimson* and *Muni*, the petitioners submitted affidavits from other present or former NHL players speaking of the respective petitioner in superlative terms. For example, it was Darren Pang, a former NHL goalie, and now an NHL analyst and commentator for ESPN, who labeled Grimson one of the three top "enforcers" in the world. *Grimson*, 934 F. Supp. at 967. And, Muni was referred to by his peers as "one of the best defensemen in professional hockey." *Muni*, 891 F. Supp. at 442. Russell, on the other hand, was considered by Pang and others to be a "steady" (AR 19), "consistent" (AR 28) and "reliable" (AR 20) player and "a solid defensive defenseman." (AR 26.) The AAU's decision recognized this distinction, stating that "the affidavits indicate that the petitioner is skilled and reliable, but not that he enjoys a substantially greater degree of acclaim than most other NHL players." (AR 154.) These characterizations of his play are actually supported by one of the media articles submitted by Russell, wherein he is described as a "competent" player who is a "good fifth or sixth defenseman." (AR 49.)

In sum, because the AAU clearly reviewed the applicable statute, regulation, and precedent, and explicated its consideration, and subsequent rejection, of Russell's evidence and arguments in a rational manner, its decision survives the narrow "abuse of discretion" standard of review. The court in no way seeks, by this decision, to minimize Russell's

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[7] The *Grimson* court also stated that it was "apparent to this court that at the heart of defendants' refusal to grant plaintiff a visa (as it has to other comparable NHL players) is its distaste for the role he plays on a hockey team." *Grimson*, 934 F. Supp. at 969. Here, there is no indication that the defendant relied on similar logic.

accomplishments–for there are thousands of hockey players throughout the world who have been unable to crack the ranks of the NHL and thousands of youngsters who dream of one day being able to do so. In the words of the *Racine* court, however, "the plain reading of the statute suggests that the appropriate field of comparison is not a comparison of [the petitioner's] ability with that of all of the hockey players at all levels of play; but, rather [the petitioner's] ability as a hockey player within the NHL." *Racine*, 1995 WL 153319, at *4.

CONCLUSION

For the reasons above, the court grants the INS's motion for summary judgment (Doc. 29-1) and dismissal (Doc. 29-2), and denies Russell's motion for summary judgment (Doc. 26-1).

ENTER:

Dated: January 3, 2001

REBECCA R. PALLMEYER
United States District Judge