

THE ABANDONMENT OF INTERNATIONAL COLLEGE ATHLETES BY NIL POLICY*

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A new era in college sports dawned on July 1, 2021, when the National Collegiate Athletic Association announced that college athletes were (subject to various limitations and restrictions) entitled to earn money based upon their name, image, and likeness (“NIL”). NIL is now a billion-dollar industry. The more than 450,000 college athletes across the United States are now able to leverage NIL to make paid appearances, endorse products or services on social media, receive compensation for autograph signings, and promote local and national businesses. Excluded from most NIL opportunities, however, are the 12 percent of athletes recruited from outside of the United States. Most international athletes enter the United States on student (“F”) visas, which are subject to very specific rules for when employment is permissible in the United States. The creators of the F visa had no reason in 1952 to include an NIL exception to the work prohibition, which consequently results in serious inequity for these athletes today. This Article details the tax and employment prohibition issues facing foreign athletes, including the way in which current F visa rules may be complied with either by engaging in NIL activity abroad or by generating NIL income characterized by the Internal Revenue Service as passive rather than active. The proposed paradigm shapes an approach by which foreign athletes may maximize NIL earning potential, while also highlighting obvious areas for improvement in the current framework of law and regulation.

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*There is in every country an antipathy to the foreigner.*¹

INTRODUCTION

A new era in college sports dawned on July 1, 2021. College sports generate billions of dollars in revenue, and the National Collegiate Athletic Association (“NCAA”) announced that college athletes were (subject to various limitations and restrictions) entitled to earn money based upon name, image, and likeness (“NIL”) without losing eligibility to compete.² Money started pouring in, with the first NIL deal announced the same day the NCAA issued its rule guidelines.³ As of the one-year anniversary of the new rules, it is estimated that

1. ELEANOR ROOSEVELT, ELEANOR ROOSEVELT’S BOOK OF COMMON SENSE ETIQUETTE 147 (1962).

2. *Interim NIL Policy*, NCAA (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [<https://perma.cc/NLG9-V45R>] [hereinafter *NCAA Interim NIL Policy*].

3. Amanda Christovich, *NCAA Athletes Cash In Day One of NIL: “It’s Like the Super Bowl,”* FRONT OFF. SPORTS (July 1, 2021, 5:16 PM), <https://frontofficesports.com/nil-era-day-one-feels-like-super-bowl/> [<https://perma.cc/CVH6-L3S8>].

\$917 million has been spent on NIL deals, with \$607.4 million going to Power Five schools.⁴ Six- and seven-figure individual NIL deals⁵ have been announced around the country,⁶ with most deals taking place in many of the expected, revenue-generating sports of college football and men's basketball; but such deals have proliferated to non-revenue-generating sports as well, such as women's basketball and volleyball.⁷

By some estimates, college athletes are enjoying annual endorsement revenues of \$5,000⁸ for less popular athletes⁹ to well over \$1 million for marquee

4. Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?*, AP, <https://www.usnews.com/news/sports/articles/2022-07-06/one-year-of-nil-how-much-have-athletes-made> [<https://perma.cc/TX8S-AZC8>] (last updated Aug. 31, 2022, 6:21 PM); see also Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO! FIN. (July 1, 2022), <https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html> [<https://perma.cc/MJ64-X658>]. Power Five schools are the schools in the five largest and financially successful conferences: the Big Ten, SEC, PAC-12, Big 12, and ACC plus Notre Dame. See Dennis Dodd, *Majority of Power Five Schools Favor Breaking Away to Form Own Division Within NCAA*, *Survey Shows*, CBS SPORTS (Oct. 13, 2020, 3:47 PM), <https://www.cbssports.com/college-football/news/majority-of-power-five-schools-favor-breaking-away-to-form-own-division-within-ncaa-survey-shows/> [<https://perma.cc/AU4R-2XAY>].

5. In March 2022, *Sports Illustrated* reported that a five-star football recruit in the class of 2023 had inked an NIL deal that could exceed \$8 million in value by the end of his third year. Madeline Coleman, *Report: Class of 2023 Football Recruit Signed NIL Deal Potentially Worth over \$8 Million*, SPORTS ILLUSTRATED (Mar. 12, 2022), <https://www.si.com/college/2022/03/12/five-star-recruit-signed-nil-deal-8-million> [<https://perma.cc/43JZ-PLJN> (dark archive)].

6. "The biggest brands in the sports apparel space didn't jump into the name, image, and likeness era immediately. The landscape had a patchwork of laws, school rules, and a lack of uniformity . . . By the one-year mark, all three of the top apparel brands in college sports—Nike, Under Armour, and Adidas—had not only begun to sign deals, but also crafted strategies that spanned from sprawling ambassador programs to high school endorsements." Amanda Christovich, *How the Three Sports Apparel Giants Are Investing in NIL*, FRONT OFF. SPORTS (July 27, 2022, 1:43 PM), <https://frontofficesports.com/three-sports-apparel-giants-nil/> [<https://perma.cc/5675-JAQP>].

7. In March 2022, the *Washington Post* reported the "surprise" winners in NIL compensation are women's basketball players who at that time ranked second only to football players in total NIL compensation. Kareem Copeland, *Who's Making the Most from NIL? Women's Basketball Is Near the Top*, WASH. POST (Mar. 30, 2022, 5:00 AM), <https://www.washingtonpost.com/sports/2022/03/30/womens-college-basketball-endorsements-nil/> [<https://perma.cc/KP6F-B9HU> (dark archive)]; see also Matt Bonesteel, *NCAA Athletes Dive into New NIL Rights with Iced Tea Deals, Branded Apparel and Paid Messages*, WASH. POST (July 2, 2021, 12:05 AM), <https://www.washingtonpost.com/sports/2021/07/01/college-athletes-nil-deals-bo-nix-deriq-king/> [<https://perma.cc/AZ7D-BHMX> (dark archive)].

8. A.J. Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETICDIRECTORU, <https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes/> [<https://perma.cc/ZH8D-7JR5>]. The University of Arkansas reports that 140 athletes participated in NIL activities from July 2021 to November 2021, earning an average of \$4,102 each. Dan Whateley & Colin Salao, *How College Athletes Are Getting Paid from Brand Sponsorships as NIL Marketing Takes Off*, BUS. INSIDER, <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12> [<https://perma.cc/Z4RF-GU7U>] (last updated Dec. 19, 2022, 10:58 AM).

9. See, e.g., Maestas & Belzer, *supra* note 8 (estimating that "annual endorsement revenue . . . would be \$700,000 for LSU's Joe Burrow, \$440,000 for Alabama's Tua Tagovailoa, \$390,000 for Oklahoma's Jalen Hurts and in the \$5K–\$30K range for less popular athletes").

athletes.¹⁰ The more than 450,000 college athletes across the United States are now able to leverage NIL to make paid appearances and autograph signings,¹¹ promote local and national businesses, and participate in social media appearances.¹² However, little is being mentioned about an important segment of college athletes barred from participating in NIL deals: international athletes.

ESPN describes international athletes as existing “in a legal no man’s land” when it comes to NIL.¹³ International college athletes comprise more than 12 percent of college athletes and are generally unable to benefit from the NIL rules because of visa status.¹⁴ International college athletes, by and large, enter the United States on student (“F”) visas.¹⁵ The F visa prescribes very specific rules for when employment is permissible in the United States, and those rules do not, as presently applied, contemplate NIL-related income.¹⁶ In 1952, the creators of the F visa had no reason to include an NIL exception to a work prohibition as no college athletes were allowed to be paid for their on-court or on-field performances.¹⁷

10. On July 20, 2022, Alabama football coach Nick Saban disclosed that the Alabama football players had secured NIL deals totaling \$3 million. *Nick Saban Says Alabama Players Topped \$3M in NIL Money*, SPORTS BUS. J. (July 20, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/07/20/Colleges/Nick-Saban-NIL-deals.aspx> [<https://perma.cc/ZV3J-KMLT>]. In fact, in less than thirty days after the new policy was implemented, University of Alabama quarterback Bryce Young had reportedly earned close to \$1 million in endorsement deals. Maria Carrasco, *Some College Athletes Cash In While Others Lose Out*, INSIDE HIGHER ED (Oct. 12, 2021), <https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out> [<https://perma.cc/L7RR-4AAY> (dark archive)].

11. The Vitamin Shoppe hired fourteen college athletes in 2021 in its first athlete-based marketing campaign. Notably, none of the athletes across a wide range of sports had more than 10,000 followers on Instagram. The athletes were paid as micro-influencers to promote the brand on social media and given \$100 worth of products. Whateley & Salao, *supra* note 8. Two Florida quarterbacks may be charging \$2,000 per hour as an appearance fee. George Malone, *Biggest NIL Deals in College Sports*, GOBANKINGRATES (Mar. 16, 2022), <https://www.gobankingrates.com/net-worth/sports/biggest-nil-deals-in-college-sports/> [<https://perma.cc/W95B-B3AH>].

12. Coleman, *supra* note 5.

13. David M. Hale & Dan Murphy, *International Student-Athletes Face an NIL Conundrum, and No One Seems To Have an Answer*, ESPN (June 9, 2021, 6:11 AM), https://www.espn.com/college-sports/story/_/id/31575978/international-student-athletes-face-nil-conundrum-seems-answer [<https://perma.cc/H2EG-4JFD>].

14. See, e.g., Josh Planos, *One Group of Student-Athletes Is Conspicuously Absent from NIL Deals*, FIVETHIRTYEIGHT (Nov. 15, 2021), <https://fivethirtyeight.com/features/one-group-of-student-athletes-is-conspicuously-absent-from-nil-deals/> [<https://perma.cc/DH5A-KNGK>].

15. *Id.*

16. 8 U.S.C. § 1101(a)(15)(F); 8 C.F.R. § 214.2(f)(5)(i), (9)(i)–(iii) (2022); see also 8 C.F.R. § 214.1(e) (2022) (stating that a nonimmigrant “may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment”).

17. See, e.g., Andy Staples, *The NCAA Must Change the Rules in Order To Solve College Basketball’s Existential Crisis*, SPORTS ILLUSTRATED (Feb. 23, 2018), <https://www.si.com/college/2018/02/23/fbi->

The world has changed abruptly as concerns athlete compensation,¹⁸ but it has not changed at all for the coaches and programs who are seeking to field the best athletes,¹⁹ whether foreign- or native-born, to obtain success on the field of play. Foreign athletes, however, may be hesitant to ply their trade at U.S. universities if they are the only ones on the team who cannot be compensated for their NIL.²⁰ Alternatively, international athletes may be tempted to push the envelope of what is acceptable NIL activity,²¹ even though the consequences of falling out of visa status would be severe and long-term.²²

The result is that the NIL rules inherently confer power and privilege on some, while perpetuating the marginalization of athletes from outside of the United States. There are a few likely outcomes when those who are positioned equally are treated unequally: (1) the international athletes will risk visa status to earn NIL income (that may or may not be determined to violate U.S. immigration law); (2) qualifying international athletes will forego the traditional student visa in lieu of one that grants work authorization; or (3) universities, conferences, and the NCAA will lobby Congress for a legislative fix. This Article poses solutions for international college athletes to earn money from their NIL in the near-term until Congress amends the law or the Department of Homeland Security (“DHS”) issues additional interpretation and formal regulatory change. A brief overview of the NCAA’s current NIL policy is provided in Part I of this Article, which follows in Part II with a

probe-investigation-ncaa-recruiting-rules-andy-miller [https://perma.cc/5XHD-XLWT (dark archive)] (noting the NCAA adopted the “Sanity Code” in 1948 to eliminate paying college athletes, and then, when that proved unsuccessful, repealed it and adopted the precursor to our modern rules which allow universities to provide tuition, room and board, and now a modest stipend).

18. See, e.g., Dennis Dodd, *Fissures Already Appearing After NCAA’s Attempted Crackdown on NIL from Boosters, Collectives*, CBS SPORTS (May 16, 2022, 12:06 PM), <https://www.cbssports.com/college-football/news/fissures-already-appearing-after-ncaas-attempted-crackdown-on-nil-from-boosters-collectives/> [https://perma.cc/2D42-HVP5] (noting the explosion of collectives used to funnel money to college athletes and the NCAA’s attempt to maintain a semblance of control and order over the process).

19. Coaches are already lauding that their athletes have landed more NIL money than any other program, presumably as a tool for future athlete recruitment. See SPORTS BUS. J., *supra* note 10 (announcing that the deals landed by Alabama’s football players are “better than anybody in the country”); see also Lauren Michelson, *Huskers Embracing Impacts of NIL on College Athletics*, NEB. NEWS KLKN TV (July 28, 2022, 12:09 PM), <https://www.klkntv.com/huskers-embracing-impacts-of-nil-on-college-athletics/> [https://perma.cc/B5GJ-5MR9] (reporting that Nebraska’s coach Scott Frost stated: “I think Nebraska should be one of the best places in the country for NIL.”).

20. See Planos, *supra* note 14 (noting international students’ disappointment with the current system and their inability to earn money and grow their brands through NIL).

21. Kristi Dosh, *Berkeley International Student Athlete Sam Alajiki Signs NIL Deal*, FORBES (Apr. 25, 2022, 2:59 PM), <https://www.forbes.com/sites/kristidosh/2022/04/25/berkeley-international-student-athlete-sam-alajiki-signs-nil-deal/?sh=5e90167b61a8> [https://perma.cc/X3H4-V52G (dark archive)] [hereinafter Dosh, *Berkeley International*] (interviewing a sports immigration attorney who disagreed with colleagues as to the scope of acceptable behavior by international college athletes with regard to sponsored social media activity).

22. See *infra* notes 83–86 and accompanying text.

discussion of relevant U.S. immigration law and the trap that exists for the unwary international athlete. Earning passive rather than active income, as defined by U.S. tax law and detailed in Part III, may allow international athletes some limited opportunities to participate in NIL deals while still complying with immigration obligations. Part IV of this Article offers a path forward for international athletes under current law, detailing ways to maximize NIL earning potential while also highlighting targeted areas for improvement in both law and regulation. Currently, international college athletes are forced to forego most NIL-related income opportunities—and more concerningly, if they are ill-advised or unaware, entering even *de minimis* NIL deals could jeopardize their current immigration status and even prevent them from acquiring a professional athlete visa in the future.

I. THE NCAA AND NAME, IMAGE, LIKENESS POLICY

A. *The Current NIL Policy*

The NCAA did not come easily or willingly to the policy change announced in an unassuming one-page FAQ on July 1, 2021—in fact, it endured decades of losing courtroom battles as athletes slowly but surely chipped away at the concept of amateurism utilizing the arsenal of antitrust law.²³ In the spring of 2021, the NCAA marshalled one final attempt to control the direction of money flowing into college athletes' hands, but was forced to capitulate when the Department of Justice gave notice that the NCAA's proposed new plan was unlikely to pass antitrust muster.²⁴ The proposed plan would have limited athletes' ability to earn NIL-related income with "guardrails": preventing "pay

23. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021) (striking down NCAA limitations on education-related benefits); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 119–20 (1983) (striking down the NCAA's plan on limited televising of college football games); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–76 (9th Cir. 2015), *cert. denied* 137 S. Ct. 277 (2016) (striking down NCAA regulations that prohibited member schools from providing college athletes with scholarships up to the full cost of attendance).

24. Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM), <https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/> [<https://perma.cc/HG7E-C3N7> (dark archive)].

for play”²⁵ and booster involvement,²⁶ and imposing requirements that NIL payments be a genuine “fair market value” payment for NIL use alone.²⁷ The NCAA then reversed course and issued its interim policy which allowed athletes to be compensated for their NIL provided that: (1) the athletes adhered to state NIL laws (if any); (2) the payments did not come from the schools themselves; and (3) the payments were not “pay-for-play.”²⁸ In May 2022, the NCAA issued revised NIL guidelines targeting boosters—with particular attention on corralling the newly-created collectives that arose as part of the athlete

25. “Pay for play” is the general nickname used to describe the situation where college athletes receive impermissible benefits under NCAA rules in exchange for their decision to play for a particular university. See Nicole Auerbach, *The ‘NIL Presumption’ and How an NCAA Bylaw Change Aims To Alter Infractions Cases*, ATHLETIC (Feb. 2, 2023), <https://theathletic.com/4148166/2023/02/02/ncaa-nil-presumption-rules-infractions-cases/> [https://perma.cc/EMT9-ETEW]. Pay for play has a history that lasts over one hundred years. See *infra* notes 53–64 and accompanying text. The current model being utilized by boosters is to contact agents for players to let them know what type of NIL opportunities would be available to the player if the player committed to their school. See Leonard Armato, *Pay for Play Is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022, 11:08 PM), <https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=d9944638e7af> [https://perma.cc/MTL3-M5NC (dark archive)]. This type of behavior is expressly prohibited by the NCAA but has proven very difficult to enforce, which is part of the reason the NCAA adopted new Bylaw 19.7.3, mentioned above, that switches the burden of proof onto the school or athlete to demonstrate compliance. See *infra* note 30 and accompanying text.

26. The NCAA has promulgated a lengthy definition of “booster.” Under the NCAA’s definition, a booster:

include[s] anyone who has: Provided a donation in order to obtain season tickets for any sport at the university. Participated in or has been a member of an organization promoting the university’s athletics programs. Made financial contributions to the athletic department or to a university booster organization. Arranged for or provided employment for enrolled student-athletes. Assisted or has been requested by university staff to assist in the recruitment of prospective student-athletes. Assisted in providing benefits to enrolled student athletes or their families. Been involved otherwise in promoting university athletics.

Role of Boosters, NCAA, <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> [https://perma.cc/2RPL-FWDZ]. Once an individual is deemed a booster, the individual remains a booster forever in the eyes of the NCAA. *Id.*; see also NAT’L COLLEGIATE ATHLETIC ASS’N, 2022–23 NCAA DIVISION I MANUAL § 8.4.2 (2022) (defining “Representatives of Athletics Interests”) [hereinafter 2022–23 NCAA DIVISION I MANUAL].

27. NCAA BD. OF GOVERNORS FED. & STATE LEGIS. WORKING GRP., FINAL REPORT AND RECOMMENDATIONS 4, 7, 21 (2020) (discussing limiting payments from third parties to a “fair market value standard” and the need for guardrails); see *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), <https://www.ncaa.org/news/2020/4/29/board-of-governors-moves-toward-allowing-student-athlete-compensation-for-endorsements-and-promotions.aspx> [https://perma.cc/ELM4-D7HS].

28. See *NCAA Interim NIL Policy*, *supra* note 2; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [https://perma.cc/AZQ7-ABJN].

recruitment process.²⁹ The NCAA later followed up with a new bylaw in October 2023 that created a presumptive NIL violation to allow the NCAA to proceed against a school or individual for impermissible conduct unless the accused institution or individual involved can prove with “credible and sufficient information” that they have complied with all NCAA rules.³⁰

The current NCAA policy on NIL is that college athletes are permitted to earn money based on their name, image, or likeness.³¹ If the state in which the university is located has a law governing NIL, the athlete may participate in NIL activities to the extent permitted by that law.³² If the state is not one in which there is a law governing NIL, the athlete may engage in NIL activity as permitted by the NCAA.³³ This avenue of compensation includes everything from traditional endorsement deals, licensed use of photographs or videos, social media campaigns, autographs, appearances, camps, and more. Current NIL policy also allows all college athletes to hire an agent, given the agent only provides assistance for permissible NIL activities.³⁴

The NCAA issued additional guidance in October 2022, which clarified that schools “can and should provide education to current student-athletes, including on topics like financial literacy, taxes, social media practices and entrepreneurship. Schools can also provide NIL education to collectives, boosters, and prospects.”³⁵ Schools are also now explicitly authorized to inform college athletes about potential NIL opportunities, and schools may also collaborate with collectives to help match college athletes with potential NIL

29. Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image and Likeness Guidance to Schools*, NCAA (May 9, 2022, 5:21 PM), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx> [https://perma.cc/VE7T-GLYR]. This new guidance is aimed directly at curbing the influence of boosters and collectives in the athlete recruitment process. *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, NCAA (May 9, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/7ZH3-SB3R]. However, its efficacy remains to be seen. *Id.* Collectives are entities formed by boosters or other fans that are designed to collect money from a wide variety of donors including mega donors as well as the general public to package endorsement deals for college athletes. See Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3.COM (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [https://perma.cc/VQQ6-MKUT].

30. NAT'L COLLEGIATE ATHLETIC ASS'N, 2023–24 NCAA DIVISION I MANUAL § 19.7.3 (2023) (bylaw adopted Oct. 26, 2022, effective Jan. 1, 2023).

31. *NCAA Interim NIL Policy*, *supra* note 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx> [https://perma.cc/PXF7-TLCD].

opportunities.³⁶ What has not changed, however, is the NCAA's steadfast resistance to pay for play.

Boosters and collectives are expressly prohibited from recruiting or communicating with a prospective athlete with the purpose of inducing the athlete to attend a specific university.³⁷ Additionally, athletes may not enter into any NIL agreement that is contingent on the athletes enrolling in a particular school.³⁸ School personnel are also prohibited from contacting a collective or similar NIL entity regarding a specific athlete or that athlete's request for compensation.³⁹ In essence, the NCAA's policy remains that college athletes should not be induced to attend any specific school based on what it would consider impermissible benefits.

B. *The Winding Path to NIL—Pay for Play's Lengthy History*

Ostensibly, the NCAA's adoption of an NIL policy in 2021 was groundbreaking. However, the world of college sports both changed immensely, and, yet, not at all. Some NCAA officials, university officials, commentators, and fans still insist that NIL will kill college sports (or at least college football).⁴⁰ With arguments nearly identical to those made in the 1940s with the adoption of the Sanity Code,⁴¹ these voices allege that college sports cannot withstand this level of cash influx to college athletes' pocketbooks.⁴² Fears of the costs associated with keeping students in the program and the needed collective cash are openly discussed.⁴³ Stated simply, however, the "seismic" change in NIL rules enacted in 2021 merely brings to light the same compensation that has

36. *NCAA Division I Institutional Involvement in a Student-Athlete's Name, Image, and Likeness Activities*, NCAA 3 (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [<https://perma.cc/2KW8-WDMU>] [hereinafter *NCAA Division I Institutional Involvement*]. Schools are still prohibited, however, from negotiating NIL opportunities on behalf of their athletes. *Id.* at 4. School personnel are allowed to assist a collective in its fundraising through appearances or donations of memorabilia, but they cannot be employed or have an ownership stake in the collective. *Id.* Schools may also contact donors and ask them to contribute to a specific collective as long as the school does not request the donated funds be allocated to a specific athlete. *Id.*

37. *Name, Image, and Likeness Interim Policy, Questions and Answers*, NCAA 2 (Feb. 2023), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [<https://perma.cc/MC5F-H63X>].

38. *Id.*

39. *NCAA Division I Institutional Involvement*, *supra* note 36, at 3.

40. *See infra* notes 65–66 and accompanying text.

41. The Sanity Code was an attempt by the NCAA and its members to restrain member spending on athletics and to curb improper benefits to athletes. *See infra* note 60 and accompanying text.

42. *See infra* notes 61, 65–66 and accompanying text.

43. *See, e.g.*, Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows To Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [<https://perma.cc/D797-Z3LL> (dark archive)] (noting the rising costs of attracting and retaining players who are seeking "five-, six- and seven-figure payments . . . under the guise of endorsement opportunities and appearance fees").

been paid under the table for the past several decades (though compensation will likely increase in magnitude).

In 2019, three men involved in an Adidas-sponsored pay for play program were convicted in federal court on various financial charges for directing payments to individuals to bring in highly sought recruits to prominent college basketball programs.⁴⁴ Many believed that more aggressive action was likely to follow at the NCAA level, but the infractions appear to have been mostly met with a shrug⁴⁵ and minor penalties imposed.⁴⁶ A few game suspensions for a few coaches, minor self-imposed penalties, a reduction of one or two scholarships, and some limitations on recruiting visits and recruiting days seem to be the most of it.⁴⁷ *Sports Illustrated* reported an anonymous insider as saying, “[t]hings may be worse now than they were before the FBI stuff.”⁴⁸ Thus, “if nothing is done, the message is that cheating is O.K. You can do what you want and nothing happens.”⁴⁹

The 2019 FBI investigation was only one of the most recent investigations. In 2017, *Bleacher Report* ran an article titled, *College Football’s Biggest Scandals Since 2000*.⁵⁰ In terms of athletes receiving impermissible compensation, the article describes the more mundane claims, like selling autographed

44. Mark Schlabach, *Three Sentenced in Adidas Recruiting Scandal*, ESPN (Mar. 5, 2019, 11:33 AM), https://www.espn.com/mens-college-basketball/story/_/id/26141993/three-sentenced-adidas-recruiting-scandal [<https://perma.cc/5LLJ-TNW3>] (noting the schools involved were high profile college basketball programs including Kansas, Louisville, and NC State, and bribes were paid to coaches at Arizona, USC, and Oklahoma State among others). LSU’s head basketball coach Will Wade was surreptitiously recorded by the FBI discussing making an offer for a specific player. Pat Forde, Pete Thamel & Dan Wetzel, *Exclusive: Wiretap Reveals LSU Coach Will Wade Discussed Recruiting ‘Offer’ with Hoops Scandal Middleman*, YAHOO! SPORTS (Mar. 7, 2019), <https://sports.yahoo.com/exclusive-wiretap-reveals-lsu-coach-will-wade-discussed-recruiting-offer-hoops-scandal-middleman-175046487.html> [<https://perma.cc/TR5W-GLZV>].

45. “The only reason this system of handlers, middlemen and under-the-table payments exists is because the NCAA’s rules—which were voted into existence by the schools—created the market.” Andy Staples, *What Has the NCAA—or Anyone—Learned from the College Basketball Black Market’s Time on Trial?*, SPORTS ILLUSTRATED (May 9, 2019), <https://www.si.com/college/2019/05/09/ncaa-trial-fbi-bribery-corruption-mark-emmert> [<https://perma.cc/YQ34-QKS4>] (dark archive).

46. See, e.g., Pat Forde, *Three Years Ago, the College Basketball Corruption Scandal Promised a Reckoning. Where Is It?*, SPORTS ILLUSTRATED (Oct. 21, 2020), <https://www.si.com/college/2020/10/21/college-basketball-scandal-sec-recruiting-daily-cover> [<https://perma.cc/B9TF-7P6U>] (dark archive)].

47. See, e.g., Billy Witz, *N.C.A.A. Follows Familiar Pattern in Punishment for Auburn*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/sports/ncaabasketball/ncaa-auburn-infractions-penalties.html> [<https://perma.cc/V9MG-KSC8>] (dark archive)] (noting after a multi-year FBI investigation and subsequent NCAA investigations, only Louisville coach Rick Pitino was fired).

48. Forde, *supra* note 46.

49. *Id.* (quoting former South Carolina men’s basketball coach Frank Martin).

50. Kerry Miller, *College Football’s Biggest Scandals Since 2000*, BLEACHER REP. (July 12, 2017), <https://bleacherreport.com/articles/2720980-college-footballs-biggest-scandals-since-2000> [<https://perma.cc/72SK-CS8W>].

memorabilia and direct cash payments for attending a specific program.⁵¹ Over the last twenty years alone, the football programs at Alabama, Colorado, Southern California, North Carolina, Ohio State, and Miami were all involved in scandals with players earning money in impermissible ways according to NCAA regulations.⁵²

Pay for play has long been the NCAA's nemesis, and, as history shows, the NCAA has never beaten it. From the earliest days, Walter Camp, known as the "Father of American Football," controlled and administered a \$100,000 slush fund (over \$2.5 million in today's dollars) for "tutoring" players, which simply involved bringing in ringers to play for his alma mater, Yale University.⁵³ The report on Walter Camp's slush fund, along with the violence and injury concerns over the new sport of football, led to the creation of the NCAA in 1906.⁵⁴ However, that did little to solve the problem.

In 1929, the Carnegie Foundation issued its report on "American College Athletics" ("Carnegie Report") describing university recruitment of players as having "reached the proportions of nationwide commerce," and decrying the "immoral to the last degree" process of "pay[ing] money to high school boys, either directly or indirectly, in order to enlist their services for a college team."⁵⁵ The Carnegie Report found widespread use of inducements to attract college athletes, noting that 81 of the 112 universities tracked in the report utilized some type of subsidy to attract athletes.⁵⁶ Indeed, the Carnegie Report's conclusions could just as easily have been written today as nearly 100 years ago:

51. *Id.* (discussing Georgia's Todd Gurley and A.J. Green selling autographed memorabilia and Cam Newton's father seeking over \$100,000 to have his son play at Mississippi State).

52. *Id.* The most notorious of the bunch were the USC violations involving Heisman Trophy winner Reggie Bush on the football team and first-round NBA pick O.J. Mayo on the basketball team—not to mention "Aunt Becky" schemes in which wealthy individuals paid college coaches to earn their children admission. *See, e.g.,* Kyle Bonagura & Dan Murphy, *College Admissions Scandal: Fake Athletes, Alleged Bribes and Aunt Becky*, ESPN (Mar. 12, 2019, 2:40 PM), https://www.espn.com/college-football/story/_/id/26240641/college-admissions-scandal-fake-athletes-alleged-bribes-aunt-becky [<https://perma.cc/QC9M-GY2T>].

53. Warren Goldstein, *Walter Camp, The Father of American Football*, CONN. EXPLORED (2018), <https://www.ctexplored.org/walter-camp-the-father-of-american-football/> [<https://perma.cc/M3CA-83HF>]. The reporting on Camp revealed that one Yale athlete of the era entered school at the age of twenty-seven, was provided the best dorm, all proceeds from selling baseball game scorecards, and held an exclusive campus license for the sale of certain brands of cigarettes. *Id.*

54. *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/3KKV-EKFE>].

55. HOWARD J. SAVAGE, HAROLD W. BENTLEY, JOHN T. MCGOVERN & DEAN F. SMILEY, *AMERICAN COLLEGE ATHLETICS*, at xv, 240 (1929).

56. *Id.* at 241–58 (noting that these benefits or subsidies occurred in one of four common ways: jobs, loans, scholarships, and miscellaneous assistance; noting also that jobs were offered at rates well above market and/or required little or no work, and loans offered featured "dubious" repayment schemes and outright cash payments).

Commercialism motivates the recruiting and subsidizing of players, and the commercial attitude has enabled many young men to acquire college educations at the cost of honesty and sincerity. More than any other force, it has tended to distort the values of college life and to increase its emphasis upon the material and the monetary Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth under responsibility, to exercise at once the body and the mind, and to foster habits both of bodily health and of those high qualities of character which, until they are revealed in action, we accept on faith.⁵⁷

What effect did the Carnegie Report, with its meticulous research and moral imperatives, have on college athletics? It was largely ignored, or, if learned of, quickly forgotten.⁵⁸ In 1939, freshman football players at the University of Pittsburgh went on strike to protest being paid less than upperclassmen.⁵⁹ Then, in 1948, the NCAA imposed the “Sanity Code” to “alleviate the proliferation of exploitative practices in the recruitment of student-athletes.”⁶⁰ The Sanity Code was never effectively enforced, as the only permissible sanction was expulsion, and it was rescinded three years later.⁶¹ Over the next seventy years, the NCAA established a compliance division which has grown with time,⁶² and adopted a system that allows for punishment for major and minor infractions.⁶³ However, the one constant since the

57. *Id.* at 307, 310.

58. See, e.g., *Assessing the Carnegie Report*, GO BLUE: COMPETITION, CONTROVERSY, & CMTY. IN MICH. ATHLETICS, <http://michiganintheworld.history.lsa.umich.edu/michiganathletics/exhibits/show/follow-the-money/the-carnegie-report/assessing-the-carnegie-report> [https://perma.cc/S8KB-CS9D] (noting the report led to zero new regulations or sanctions).

59. See, e.g., Stephen Shaver, *Unnecessary Roughness: Why the NCAA’s Heavy-Handed Amateurism Rules Violate the Sherman Antitrust Act*, 48 WASH. UNIV. J.L. & POL’Y 347, 347 (2015).

60. See, e.g., Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 14 (2000) [hereinafter Smith, *A Brief History*].

61. See, e.g., Alex Kirshner, *The NCAA Wants To Make Up Its Own Subpoena Power*, BANNER SOC’Y (Aug. 14, 2019, 10:24 AM), <https://www.bannersociety.com/2019/8/14/20706902/ncaa-enforcement-policy> [https://perma.cc/7FCY-RAUS] (noting that seven universities, later known as the Sinful Seven, admitted to not abiding by the Sanity Code; however, when the NCAA attempted to expel them, less than the required two-thirds majority voted in favor of their expulsion).

62. See generally Smith, *A Brief History*, *supra* note 60 (examining the history of the NCAA and the regulation of college sports).

63. *New Violation Structure Introduced*, NCAA (Aug. 1, 2013, 12:00 AM), <https://www.ncaa.org/news/2013/8/1/new-violation-structure-introduced.aspx> [https://perma.cc/4N5G-E738] (noting the four levels of NCAA violation at that time); 2022–23 NCAA DIVISION I MANUAL, *supra* note 26, § 19.1.1–1.3 (2022) (defining three levels of infraction for severe, significant, and limited violations). The NCAA has only imposed the most significant penalty of eliminating a school from participating in a sport five times, with the most recent major program, SMU, receiving the penalty for the 1987 season. David Luther, *College Football: A New Death Penalty for a New Era*, BLEACHER REP. (Aug. 23,

beginning of college sports has been pay for play—in direct opposition to the NCAA’s guiding principles of amateurism and the college athlete.⁶⁴

At every step, the NCAA has decried the harms that would occur with the influx of money—*into the hands of students*—in college athletics.⁶⁵ Both before the era of NIL and now, while issues are identified and potential solutions are being drafted, the NCAA has continued its longstanding role as a harbinger of impending doom of college sport if athletes are paid.⁶⁶ Coaches, commentators, and officials all publicly discuss the existential issue facing college athletics, and, as the march toward outright professionalization of athletes continues apace, fans continue to hear that NIL may imperil their favorite sport, team, and pastime.⁶⁷

Is there truth to the NCAA’s contention that its product is so popular precisely because only amateurs compete?⁶⁸ Looking at the long-term growth of college athletics, the ever-present commercialization of sports that the Carnegie Report warned of, and the tremendous influx of money into university coffers through ticket sales and television deals, it seems not. One full year after the approval of NIL rights, college sports have continued much as they had before,

2011), <https://bleacherreport.com/articles/818402-college-football-a-new-death-penalty-for-a-new-era> [<https://perma.cc/29JC-PW9Z>].

64. See *supra* notes 52–57 and accompanying text.

65. See Tim Dahlberg, *NCAA President: Paying Athletes Could Destroy College Sports*, DIVERSE (June 19, 2014), <https://www.diverseeducation.com/sports/article/15094936/ncaa-president-paying-athletes-could-destroy-college-sports> [<https://perma.cc/8TG9-4PFK>]; Kevin B. Blackistone, *Paying Athletes Would Break College Sports? Never Before Has That Been More Hypocritical*, WASH. POST (Dec. 14, 2017, 12:59 PM), https://www.washingtonpost.com/sports/colleges/paying-athletes-would-break-college-sports-never-before-has-that-been-more-hypocritical/2017/12/14/e61f63f0-e04a-11e7-bbd0-9dfb2e37492a_story.html [<https://perma.cc/559C-69AF>]; Nick McCann, *No Pay for College Athletes, NCAA Says*, COURTHOUSE NEWS SERV. (Dec. 16, 2013), <https://www.courthousenews.com/no-pay-for-college-athletes-ncaa-says> [<https://perma.cc/ZH4S-FEU5>] (noting the NCAA’s arguments against paying athletes that consumers preferred amateurism, and that allowing pay would adversely impact women’s athletics).

66. See, e.g., Alex Kirshner, *The NCAA Shot Itself in the Head*, SLATE (May 10, 2022, 6:56 PM), <https://slate.com/culture/2022/05/ncaa-name-image-likeness-athlete-pay-for-play-dilemma.html> [<https://perma.cc/EZ3V-GVFQ>].

67. See, e.g., David Ubben, *Nick Saban on NIL, Pay for Play Disparities: ‘I Don’t Think It’s Going To Be a Level Playing Field,’* ATHLETIC (May 30, 2023), <https://theathletic.com/4564636/2023/05/30/nick-saban-nil-alabama/> [<https://perma.cc/6WYY-VS7L>] (quoting celebrated Alabama football coach speaking to the downsides of NIL); Gentry Estes, *When Nick Saban, Lane Kiffin and Others Are Concerned About NIL, We Should Be, Too*, TENNESSEAN, <https://www.tennessean.com/story/sports/college/2022/02/05/nick-saban-lane-kiffin-nil-transfers-john-calipari-tim-corbin/6651764001/> [<https://perma.cc/NYS4-DRFX>] (last updated Feb. 5, 2022, 10:08 AM) (discussing the pitfalls of NIL).

68. See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2152 (2021) (noting the NCAA argued that its amateurism rules widened consumer choice by fielding a unique product in the sports entertainment industry).

if not even better.⁶⁹ Viewership and attendance of college sporting events following the new NIL deal did not drop.⁷⁰ Even with COVID-19 concerns still prevalent during the 2021–2022 college year, fans clamored to return to stadia and arenas in person and en masse;⁷¹ college sports continue to enjoy great interest and investment from the fans;⁷² and creative sponsorships have given fans some joy while compensating the athletes well—in some cases, to the benefit of the university, as athletes who may have left school early to pursue professional opportunities at a lower league abroad remain in the United States to capitalize on NIL deals.⁷³ All of this is good news for current college athletes, unless they are on a visa which prevents them from working within the United States. In that case, they are forced to watch as their teammates and competitors are able to earn good money for doing precisely what they themselves are doing: participating in college athletics.

II. U.S. IMMIGRATION LAW AND FOREIGN ATHLETES

The NCAA now allows college athletes to earn NIL income, which raises a myriad of issues for the international college athletes concerned with visa compliance. Earning compensation or working without proper authorization may violate visa status. Although most international athletes are F visa holders, there are other visa statuses available, such as O and P, which have been used more commonly by professional athletes. Part II details the most common visa statuses available to the international college athlete.

69. See, e.g., Emma Hruby, *NCAA Volleyball Championship Draws Record 1.2 Million Viewers*, JUST WOMEN'S SPORTS (Dec. 22, 2021), <https://justwomenssports.com/ncaa-volleyball-championship-viewers-wisconsin-nebraska> [<https://perma.cc/7HBU-MXJB>]; Meredith Cash, *The Women's NCAA Basketball Championship Had Higher Viewership than Most College Football Bowl Games This Year*, INSIDER (Apr. 5, 2022, 2:44 PM), <https://www.insider.com/womens-ncaa-championship-more-viewers-most-college-football-bowl-games-2022-4> [<https://perma.cc/6K3D-8SVU>]; Nick Bromberg, *NCAA Tournament: CBS and Turner Say Men's March Madness TV Viewership Up 12%*, YAHOO! SPORTS (Mar. 22, 2022), <https://sports.yahoo.com/cbs-and-turner-say-mens-tv-viewership-up-12-over-2021-175845706.html> [<https://perma.cc/VP52-JR2C>].

70. See, e.g., Eric Levenson, *College Football Fans and Traditions Are Back, Even with Covid-19 Still Here*, CNN (Sept. 11, 2021, 4:07 AM), <https://www.cnn.com/2021/09/11/us/college-football-fans-covid/index.html> [<https://perma.cc/TRN9-QFJY>].

71. *Id.*

72. See *supra* note 69.

73. See, e.g., Bryan Kalbrosky, *Drew Timme on "Controlled Rage" Before March Madness, Using His Facial Hair for NIL, and More*, USA TODAY (Mar. 16, 2022, 12:08 PM), <https://ftw.usatoday.com/lists/march-madness-gonzaga-drew-timme-dollar-shave-club-mustache> [<https://perma.cc/66Q9-C6NK>] (noting the Gonzaga center known for his facial hair struck a deal with Dollar Shave Club to become a "chinfluencer"); Eric Prisbell, *Could NIL Deals Keep Borderline NBA Draft Prospects in School?*, ON3 (Mar. 30, 2022), <https://www.on3.com/nil/news/nil-deals-borderline-nba-draft-prospects-stay-in-school> [<https://perma.cc/4CJ9-RGYZ>].

A. *F Visas*

The student or “F” visa is the most common visa utilized by international college athletes, with over 3,000 international college athletes competing in Division I sports alone.⁷⁴ The nonimmigrant F visa, and more specifically the F-1 visa,⁷⁵ was historically attractive to international students as there are no annual caps on how many student visas can be granted in any given year.⁷⁶ The visas are relatively easy to procure procedurally⁷⁷ and allow the athletes to remain for the duration of their studies.⁷⁸ An important downside of the F visa for purposes of the international athlete is the sharply defined restrictions placed upon employment of the visa holder.⁷⁹ In general, F-1 visa holders are permitted to work: (1) on campus;⁸⁰ (2) off campus if they have suffered a severe economic hardship;⁸¹ or (3) in curricular or optional practical training.⁸²

F-1 visa holders who engage in unauthorized employment violate the terms of their student visa and open themselves up to removal—commonly referred to as deportation.⁸³ Additionally, engaging in unauthorized employment and therefore violating visa status may prevent the student from being able to reinstate student status⁸⁴ or adjust their status to that of lawful

74. See Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall*, U.S. NEWS (Dec. 24, 2021), <https://www.usnews.com/news/us/articles/2021-12-24/foreign-college-athletes-left-out-of-rush-for-nil-windfall> [<https://perma.cc/3QKE-EW8L>].

75. While the F visa is for students, it is broken down into two separate visas: the F-1 for the student applying for the visa, and the F-2 for the spouse and minor children of the F-1 applicant. 8 U.S.C. § 1101(a)(15).

76. See 8 C.F.R. § 214.2(f)(1) (2022) (setting forth the criteria for F visa eligibility).

77. See *id.* § 214.2(f)(1); *id.* § 214.13 (requiring students to be admitted to their university of choice, obtain the required form I-20, pay the required SEVIS fee, and apply to the appropriate U.S. embassy or consulate); see also *Student Visa*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html> [<https://perma.cc/25C7-GGL7>]. SEVIS refers to the Student and Exchange Visitor Information System. See generally *About SEVIS*, DEPT. OF HOMELAND SEC., <https://studyinthestates.dhs.gov/site/about-sevis> [<https://perma.cc/358W-G3KY>] (explaining the web-based system that is the Student and Exchange Visitor Information System).

78. See 8 C.F.R. § 214.2(f)(5) (2022).

79. See *id.* § 214.2(f)(9), (10).

80. See *id.* § 214.2(f)(9).

81. See *id.* § 214.2(f)(9)(ii)(C).

82. See *id.* § 214.2(f)(10). Two other employment authorization opportunities exist for F visa holders, but other than this brief discussion to call attention to them, coverage of them will be omitted as beyond the scope of this Article, as they are not applicable to most F-1 international college athletes. These two other programs are: (i) the special student relief program, employment which allows the Department of Homeland Security (“DHS”) to suspend or alter employment eligibility criteria for students of countries specified in the federal register in the event of emergencies, and (ii) internships sponsored by a recognized international organization. See *Special Student Relief*, DEP’T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/students/special-student-relief> [<https://perma.cc/2Y4P-QCNF>]; 8 C.F.R. § 214.2(f)(9)(iii) (2022).

83. 8 U.S.C. § 1227(a)(1)(C); see also 8 C.F.R. § 214.1(e) (2022).

84. 8 C.F.R. § 214.2(f)(16)(D) (2022).

permanent resident.⁸⁵ These violations also subject the employer of the visa holder to sanctions under the Immigration Reform and Control Act of 1986 (“IRCA”).⁸⁶

1. On-Campus Employment

F-1 visa holders are authorized to work at an on-campus job without need of additional authorizations provided that the work takes place on campus (or at an off-campus location that is “educationally affiliated with the school”).⁸⁷ The on-campus employment cannot exceed twenty hours per week while school is in session but may be full-time during school breaks.⁸⁸ Unlike the option for off-campus employment due to hardship,⁸⁹ an F-1 visa holder may begin on-campus employment up to thirty days prior to the commencement of classes.⁹⁰

On-campus employment is not currently a permissible way for F-1 international college athletes to earn money from NIL because the NCAA has issued rules stipulating that schools are prohibited from compensating athletes directly for NIL.⁹¹ Additionally, if the international student is engaged in on-campus employment with a company other than the university, the employment must be a type which directly involves services to students.⁹²

While on-campus employment does not currently permit international students to engage in NIL opportunities, a policy memorandum or interpretation could resolve the issue. U.S. Citizenship and Immigration Services (“USCIS”) could issue an interpretation, consistent with federal law and regulations, that NIL activity conducted on campus is allowed to the same

85. 8 U.S.C. § 1255(c).

86. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–63 (1986) (codified as amended at 8 U.S.C. § 1324(a)(1)(A), (4)).

87. 8 C.F.R. § 214.2(f)(9)(i) (2022). Employment with on-campus commercial firms that provide “direct student services” such as dining halls or bookstores are also acceptable. *Id.*

88. *Id.* In addition, the on-campus employment opportunity must not displace a U.S. citizen or lawful permanent resident. *Id.*

89. 8 C.F.R. § 214.2(f)(9)(ii) (2022).

90. *Id.* § 214.2(f)(7)(ii).

91. See *NCAA Interim NIL Policy*, *supra* note 2.

92. 8 C.F.R. § 214.2(f)(9)(i) (2022). The regulation does not explicitly state that on-campus employment has to be for the university, but the Foreign Affairs Manual (“FAM”) states that the employment must be “in an enterprise operated by or on behalf of the school.” 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 402.5-5(N)(1) (2023), <https://fam.state.gov/FAM/09FAM/09FAM040205.html> [<https://perma.cc/U98D-7L3U>] [hereinafter FAM]. The FAM further states unequivocally, “Employment located on-campus that does not directly involve services to students (such as construction work) does not qualify as on-campus employment.” *Id.*; see also *Employment*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/sevis/employment> [<https://perma.cc/A7QZ-J3BC>] (stating “[e]mployment on-campus has to be for the school or for a company that contracts with the school to serve students directly”).

extent as traditional on-campus employment—i.e., incident to status—as authorized by the school.⁹³

2. Off-Campus Employment

F-1 students are permitted to apply for off-campus employment only after they complete one full academic year of school, remain in good academic standing, and continue to carry a full-time course of study.⁹⁴ Additionally, the F-1 student must demonstrate “severe economic hardship caused by unforeseen circumstances beyond the student’s control,”⁹⁵ and that the employment would not disrupt the F-1 student’s full course load.⁹⁶ If the F-1 student is granted work authorization for off-campus employment, the student will receive an employment authorization document permitting the student to obtain outside employment.⁹⁷ This work authorization may be granted in one-year intervals and is potentially renewable throughout the duration of the student’s academic course of study.⁹⁸

In theory, the off-campus employment option could function to allow an international college athlete on an F-1 visa to earn money from NIL activity, albeit not during the first year of studies.⁹⁹ The biggest barrier to this path will be proving the college athlete endured “severe economic hardship caused by unforeseen circumstances beyond the student’s control” after the athlete’s first year of college.¹⁰⁰ This is a difficult standard to satisfy. To receive an F-1 visa, the student must have demonstrated that the student had “sufficient funds to successfully study in the United States without being forced to resort to unauthorized employment,” and that the student had sufficient funds to “defray all expenses *during the entire period of anticipated study*.”¹⁰¹ As a result, while there will very likely be cases of athletes who find themselves able to take advantage of this provision due to unforeseen hardship, it is too narrow a path for the vast majority of F-1 college athletes seeking to earn money through their NIL.

93. 8 C.F.R. § 274a.12(b)(6)(i) (2022).

94. *Id.* § 214.2(f)(9)(ii)(A), (D).

95. *Id.* § 214.2(f)(9)(ii). The regulations provide examples of the type of circumstances that may result in a finding of severe economic hardship caused by unforeseen circumstances: currency fluctuations with a home currency; unexpected loss of financial aid or on-campus employment; significant, unexpected expenses incurred by the student’s source of support including medical bills; etc. *Id.* § 214.2(f)(9)(ii)(C).

96. *Id.* § 214.2(f)(9)(ii)(D)(3).

97. *Id.* § 214.2(f)(9)(ii)(F)(2).

98. *Id.*

99. *Id.* § 214.2(f)(9)(ii)(D).

100. *Id.* § 214.2(f)(9)(ii)(C).

101. 22 C.F.R. § 41.61(b)(1) (2022); FAM *supra* note 92, § 402.5-5(G)(1) (emphasis added).

3. Practical Training

F visa holders also qualify for employment authorization if they engage in practical training. Practical training is work “in a position that is directly related to his or her major area of study.”¹⁰² Within the option of practical training, there are two types that students may consider: curricular practical training (“CPT”) during the course of studies or optional practical training (“OPT”), which may occur during or after the completion of studies.¹⁰³

A. Curricular Practical Training

CPT is available to students who work in a program that is “an integral part of an established curriculum.”¹⁰⁴ CPT is designed to encompass work opportunities built into an existing educational curriculum like “internships, cooperative education agreements or any other type of required internship or practicum.”¹⁰⁵ The CPT work opportunity must be required by the relevant curriculum of study, or the student must earn academic credit for the experience.¹⁰⁶ One example the Student Exchange and Visitor Program (“SEVP”) provides is the classic case of student teaching by students pursuing a degree in education.¹⁰⁷

Though international athletes should consider alternative solutions, at least some athletes have been able to conduct NIL-adjacent activities via CPT when the internship or position is connected to their major—such as the communications major who accepts a paid internship (that is part of a relevant degree program) working with the social media arm of the entity.¹⁰⁸ While CPT, at this time, is likely not a good vehicle for most international college athletes seeking to monetize their NIL,¹⁰⁹ some schools have begun to create

102. 8 C.F.R. § 214.2(f)(10) (2022).

103. *Id.* § 214.2(f)(10)(i), (ii).

104. *Id.* § 214.2(f)(10)(i).

105. *Id.*

106. *See id.* §§ 214.2(f)(10), 274(b)(6)(iii); INS CENT. OFF. CABLE, FILE NO. CO 243.69-C (Jan. 1992), reprinted in 69 INTERPRETER RELEASES 187 (Feb. 10, 1992); INS CENT. OFF. CABLE, FILE NO. CO 243.69 (Jan. 1992), reprinted in 69 INTERPRETER RELEASES 587 (May 11, 1992), https://www.nafsa.org/sites/default/files/ektron/uploadedFiles/Chez_NAFSA/Resource_Library_Assets/Regulatory_Information/CPTsourcecompilation.pdf [https://perma.cc/8NTJ-3WQW].

107. *SEVP Reminds US Schools That CPT, OPT Are Not Interchangeable*, U.S. IMMIGR. & CUSTOMS ENFT (July 3, 2019), <https://www.ice.gov/news/releases/sevp-reminds-us-schools-cpt-opt-are-not-interchangeable> [https://perma.cc/S7Z5-FJ6Y].

108. *See, e.g., WWE Unveils Inaugural NIL Class*, WWE NETWORK (Dec. 8, 2021), <https://www.wwe.com/article/wwe-unveils-inaugural-nil-class> [https://perma.cc/74LA-FEL4].

109. CPT has constraints. Furthermore, in addition to requiring an integral connection to a course of study, CPT is generally not even available to F-1 students until they have completed one full year of studies. 8 C.F.R. § 214.2(f)(10)(i) (2022).

areas of study around NIL.¹¹⁰ If schools structure academic courses of study focused on NIL, that could theoretically allow international students to engage in NIL activity with CPT as an integral part of their field of study.¹¹¹ This course of action may create more questions than there are answers. Typically, the type of work authorized by CPT involves payment from the internship site to the student; but here, a student could structure NIL internships with multiple enterprises. For example, students could seek NIL deals related to brand management or marketing while pursuing separate deals that focus on videography, social media, or traditional media advertising. If NIL programs of study proliferate, DHS will be called upon sooner rather than later to rule on the use of CPT in these programs.

b. Optional Practical Training

Whereas CPT requires the student work experience be “an integral part of an established curriculum,”¹¹² OPT work experiences have a lower nexus threshold that the work be “directly related to the student’s major area of study.”¹¹³ SEVP provided guidance in 2019 on how to determine the direct relationship between the employment and the major area of study, given that the direct connection “may not be immediately discernable.”¹¹⁴ The ultimate test for OPT validity is “whether there is a logical connection between the duties involved in the practical training opportunity and the student’s major area of study.”¹¹⁵

110. See, e.g., Eugene Curtin, *New Business Course Guides Student Athletes Through NIL Issues*, CREIGHTON NEWS (Nov. 11, 2022), <https://www.creighton.edu/news/new-business-course-guides-student-athletes-through-nil-issues> [<https://perma.cc/GVQ8-FEUD>]. In 2021, the University of North Carolina created a new program called LAUNCH to educate its college athletes on NIL and NIL-related issues such as branding, graphic design, contract issues, etc. *Launch*, U.N.C. CHAPEL HILL ATHLETICS (2023), <https://goheels.com/sports/2021/8/11/LAUNCH.aspx> [<https://perma.cc/VP5Y-MDUA>].

111. The University of Tennessee, for example, recently announced a new minor in entrepreneurship focused on NIL. See *Tennessee Athletics Deploying Comprehensive NIL Resources for Student-Athletes, Expanding Entrepreneurship Minor with Haslam College of Business*, UT SPORTS (June 3, 2021), <https://utsports.com/news/2021/6/3/general-tennessee-athletics-deploying-comprehensive-nil-resources-for-student-athletes-expanding-entrepreneurship-minor-with-haslam-college-of-business.aspx> [<https://perma.cc/A7UW-D3W2>] (noting material offered within the minor includes: “education related to brand development, marketing, communications/messaging, personal finance/financial planning and several other key elements of NIL maximization”).

112. 8 C.F.R. § 214.2(f)(10) (2022).

113. *Id.* § 214.2(f)(10)(ii).

114. U.S. IMMIGR. & CUSTOMS ENF’T, SEVP POLICY GUIDANCE: PRACTICAL TRAINING—DETERMINING A DIRECT RELATIONSHIP BETWEEN EMPLOYMENT AND A STUDENT’S MAJOR AREA OF STUDY 2 (2019), <https://www.ice.gov/doclib/sevis/pdf/optDirectlyRelatedGuidance.pdf> [<https://perma.cc/V6N4-T3GN>] [hereinafter SEVP POLICY GUIDANCE]. An example provided by SEVP was that a music major working at a restaurant may not appear to satisfy the criteria until it is shown the music major was providing musical entertainment for the restaurant’s patrons. *Id.*

115. *Id.* at 3.

While most other categories of visa holders are required to apply directly to USCIS for work authorization,¹¹⁶ F-1 students apply first to their university's designated school official ("DSO").¹¹⁷ Only upon receiving a signed I-20 form recommending the grant of OPT from the DSO can the F-1 student then apply for employment authorization from USCIS.¹¹⁸ The USCIS will then "adjudicate the [application for OPT] on the basis of the DSO's recommendation and other eligibility considerations."¹¹⁹

To qualify for OPT, the F-1 student must provide an accurate description of how their employment opportunity directly relates to their field of study. Further, the DSO must recommend the student for OPT after reviewing the application and determining that the test has been satisfied.¹²⁰ Prior to making the recommendation to grant OPT, the DSO must first determine the student's eligibility for the type and length of OPT sought and counsel the student on the "student's responsibilities for maintaining status while on OPT."¹²¹ The DSO's decision to recommend OPT then triggers additional responsibilities for the university to maintain the student's Student and Exchange Visa Information System ("SEVIS") record for the entire period of OPT, and to update the student's SEVIS record to reflect any relevant changes.¹²²

OPT represents a potential avenue for F-1 international athletes to capitalize, in part, on their NIL, but it is not without risk for either the athlete or the university.¹²³ Additionally, it is not an ideal vehicle for international college athletes for a number of reasons. First, there is the nexus question that both the student and university must be willing to sign off on.¹²⁴ Student athletes studying for degrees in business, communications, marketing, or other related fields may be able to parlay those studies into positions with companies focusing on their brand and/or brand management, depending on the nature and type of employment opportunity. Likewise, students in a course of study relating to modeling or fashion design/merchandising may also be able to satisfy

116. See 8 C.F.R. § 274a.12(a) (2022).

117. *Id.* § 214.2(f)(11)(i).

118. *Id.*

119. *Id.* § 214.2(f)(11)(iii).

120. See SEVP POLICY GUIDANCE, *supra* note 114, at 2.

121. 8 C.F.R. § 214.2(f)(11)(ii)(A) (2022). The F-1 student may not apply for work authorization until the DSO has uploaded the DSO's recommendation in SEVIS indicating whether the employment is to be full-time or part-time. *Id.* § 214.2(f)(11)(ii)(B). Current students may be granted pre-completion OPT for full-time employment during vacations, and for part-time employment not exceeding twenty hours a week while school is in session. *Id.* § 214.2(f)(10)(ii)(A)(1), (2). Students seeking pre-completion OPT during vacation periods must also establish that the student is currently enrolled, eligible to continue registration, and plans on registering for the next term. *Id.*

122. *Id.* § 214.2(f)(12)(i).

123. Universities can lose SEVP certification for failure to comply with applicable law and regulation. *Id.* § 214.4; see also notes 79–83 and accompanying text.

124. See SEVP POLICY GUIDANCE, *supra* note 114, at 2–3.

the “logical connection” required to show a direct relationship between the employment opportunity and their field of study.¹²⁵ Finally, as addressed above, universities may begin to create fields of study that focus specifically on NIL.¹²⁶ In that case, students may also be able to properly request OPT.

It is unclear how DHS would respond to students who are enrolled in a bona fide academic program focused on NIL utilizing OPT for NIL-related deals. However, it is not within the purview of DHS to assess the validity or purpose of any particular academic degree program. Provided that the international college athletes comply with all pertinent OPT regulations, this may be another pathway for international athletes to earn NIL-related income. Again, these determinations are not risk-free, but under the language of the regulation and available guidance, they are possible.

Second, OPT is not available to F-1 students until they have completed one full year of academic study.¹²⁷ Finally, even if pre-completion OPT is granted, it is limited in duration to twelve months.¹²⁸ Given these significant limitations, international college athletes may find that their institutions are reluctant to issue recommendations to grant an OPT for NIL-related activity. Even if the institutions are willing to grant it, the scope will be more limited than the international college athlete would prefer.

Due to these limitations and the newness of NIL, USCIS and SEVP have recently stated they are looking into the issue.¹²⁹ Currently, there are a few avenues that could be utilized to allow international college athletes to engage in NIL activity under the terms of their F visas that do not require amending current law.¹³⁰ Similar to the 2019 policy guidance for the “direct relationship”

125. *See id.* at 3.

126. *See supra* note 110 and accompanying text.

127. 8 C.F.R. § 214.2(f)(10)(ii)(A) (2022). A student may apply for pre-completion OPT up to 90 days prior to being enrolled for one full academic year as long as the employment does not begin prior to the student completing one full academic year. *Id.* § 214.2(f)(11)(i)(B)(1). Not to mention any processing time that may further slow the process. *Id.* § 214.2(f)(10)(ii)(A).

128. 8 C.F.R. § 214.2(f)(10). The twelve-month limit applies to all practical training: CPT, pre-completion OPT, and post-completion OPT, though a student may qualify for an additional twelve months when changing to a higher educational level. *Id.*

129. *See* Louise Radnofsky, *Meet the Only College Athletes Who Can't Do Endorsement Deals*, WALL ST. J. (May 15, 2022, 10:01 AM), <https://www.wsj.com/articles/name-image-likeness-international-students-11652622256> [<https://perma.cc/7A9Q-XBZC> (dark archive)]. Traditionally, employment-based visas in the United States have been used to protect the domestic labor force from unconstrained international competition. David P. Weber, *Athletes in Transit: Why the Game Is Different in Sports and the Visas Should Be Too*, 96 TUL. L. REV. 893, 942 (2022).

130. Weber, *supra* note 129, at 916–20. On July 26, 2023, Sen. Murphy and Rep. Trahan re-introduced the College Athlete Economic Freedom Act in the Senate and House of Representatives, respectively. S. 2554, 118th Cong. (2023) (draft bill available at <https://www.murphy.senate.gov/imo/media/doc/caefe.pdf> [<https://perma.cc/7TUX-R2US>]); H.R. 4948, 118th Cong. (2023) (draft bill available at https://trahan.house.gov/uploadedfiles/trahan_022_xml.pdf [

test, SEVP could issue additional guidance setting forth acceptable parameters in determining a direct relationship for NIL activity. It is interesting to consider whether any such guidance would be limited only to international college athletes, or if it would be more generally available to all international students—thereby implicitly opening a floodgate of income-generating opportunities for international social media influencers studying in the United States.

A better solution would be for DHS to initiate the notice and comment period for a proposed regulation ensconcing international college athletes' ability to earn money in the United States from NIL-related activity.¹³¹ This proposed regulation could amend 8 C.F.R. § 214.2(f) to either insert language in 8 C.F.R. § 214.2(f)(9)(i) that clarifies that DHS considers NIL activity as a permissible on-campus employment opportunity, or create a new subsection in 8 C.F.R. § 214.2(f) following the provisions on OPT and CPT that would specifically allow NIL activity by individuals on an F-1 visa.¹³² This solution would offer the affected communities an opportunity to comment on any proposal prior to implementing a regulation and would provide a more lasting and reliable alternative than policy guidance which is subject to immediate revocation or amendment. And, of course, the ideal solution may be the most predictable law review article prescription: an amendment to the law. While proposals to amend or draft new laws are often met with opposition, college sports generally receive broad bipartisan support with voters¹³³ and may be one of the few issues able to unite lawmakers to swiftly draft, pass, and implement corrective legislation.¹³⁴

UQ4J)). This bill is the first to introduce a new category of student F visa specifically for international college athletes. Pursuant to the terms of this bill, international college athletes would be eligible to participate in NIL deals while in the United States incident to status. S. 2554 § 5(b); H.R. 4948 § 5(b). The proposed bill also creates a protective mechanism that would allow international college athletes to continue to compete and participate in collegiate sports in the United States on their student visa even if college athletes are legally determined to be employees. S. 2554 § 5(d); H.R. 4948 § 5(d).

131. Weber, *supra* note 129, at 944.

132. See 8 C.F.R. § 214.2(f) (2022). This proposed provision could be limited to international athletes or available to all F-1 visa holders which would allow international influencers and e-gamers the same opportunity to earn money from their NIL as international athletes. As with other types of employment under an F-1 visa, safeguards could be put in place requiring involvement and approval by the school's DSO. *Id.*

133. ESPN asked U.S. Senator Chris Murphy of Connecticut, "The NCAA has begged Congress to step in on NIL legislation, and there are some real concerns with consumer protections and supporting athletes in the space. Do you think Congress should act?" with Sen. Chris Murphy stating that he believes the NCAA is "an illegal monopoly." Andrea Adelson, David M. Hale, Adam Rittenberg, Alex Scarborough & Dave Wilson, *The 11 Biggest Power Brokers and Advocates Shaping the Future of College Football*, ESPN (Aug. 2, 2022, 7:00 AM), https://www.espn.com/college-football/story/_/id/34272528/the-11-biggest-power-brokers-advocates-shaping-future-college-football [<https://perma.cc/275R-8WNP>].

134. See Tyler Thompson, *Oscar Tshiebwe Meets with Mitch McConnell To Push for Federal Immigration Law Change*, ON3 (Apr. 4, 2022), <https://www.on3.com/teams/kentucky-wildcats/news>

4. The Independent Contractor Fallacy

An F visa holder may erroneously believe F visa employment restrictions could be circumvented by classification of the visa holder as an independent contractor rather than an employee. This approach is actually inapposite for the issue at hand. F visa holders may only work in the manners prescribed above, regardless of whether they would be classified as employees or independent contractors.¹³⁵

As stated previously, F-1 visa holders who perform unauthorized work will lose their immigration status and may be precluded from future employment opportunities in the United States.¹³⁶ There is also considerable risk for employers. IRCA prohibits employers from knowingly hiring unauthorized employees.¹³⁷ With regard to the employment of foreigners, the Code of Federal Regulations (“CFR”) defines employment as “any service or labor performed by an employee for an employer within the United States However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.”¹³⁸ The CFR further defines employee as “an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined [below].”¹³⁹ Lastly, the CFR defines an independent contractor as “individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.”¹⁴⁰

Reading only those provisions, an employer may feel there is no risk in hiring an international college athlete to endorse their product or service line as they may be able to qualify the college athletes as independent contractors. However, the CFR specifically states that anyone who attempts to “obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor shall be considered to have hired the alien for employment in the United States in violation of . . . [8 U.S.C. § 1324a(a)(4)].”¹⁴¹ Given the high profile of these college athletes, it would be very difficult for an employer hiring an international college athlete for endorsement purposes to avoid liability in these situations.

/oscar-tshiebwe-mitch-mcconnell-federal-immigration-law-change-f1-student-visa-nil-kentucky/
[<https://perma.cc/N4JZ-5D2Y>].

135. See 8 C.F.R. § 214.1(e) (2022).

136. See *supra* notes 79–83 and accompanying text.

137. *Id.*

138. 8 C.F.R. § 274a.1(h) (2022).

139. *Id.* § 274a.1(f) (2022).

140. *Id.* § 274a.1(j) (2022).

141. 8 U.S.C. § 1324a(a)(4).

B. *P Visas, O Visas, and EB-1 Visas for Exceptional Athletes*

International college athletes *should proceed with caution and seek independent legal guidance* if they attempt to secure a visa other than an F visa in order to capitalize on NIL opportunities. Given the doctrine of consular nonreviewability,¹⁴² an international college athlete who participates in NIL activities in the United States may face increased scrutiny from consular officers abroad with any visa application. In the event of a denial of a visa application abroad, there is no opportunity to appeal an adverse decision in the U.S. court system.¹⁴³ Furthermore, this type of activity may incur long-term, visa-related barriers for future entrance into the United States and work authorization if it is deemed to violate immigration law.¹⁴⁴

1. P-1A Visas

P-1A visas present some significant hurdles for college athletes; though for some international students, P-1A visas may be an acceptable immigration path to capitalize on NIL revenue streams.¹⁴⁵ One potential hurdle for college athletes applying for a P-1A visa is that the regulations state that the P-1A athlete must be “seek[ing] to enter the United States temporarily and solely for the purpose of performing as [a qualifying P-1A visa holder] with respect to a specific athletic competition.”¹⁴⁶ With that language, the risk is that an adjudicator could decide that an applicant seeking a P-1A visa for NIL activities is therefore not applying solely to come to the United States for a specific athletic competition. That said, some NCAA athletes have had success with P-1A visa applications.¹⁴⁷

142. The doctrine of consular nonreviewability provides that when a consular officer makes a decision on a visa application, the applicant is unable to appeal that decision in a court of law. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (stating that “[this] doctrine holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least until Congress says otherwise”).

143. Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 114 (2010). In some instances, a denied applicant may appeal within the consulate or embassy, but this ability is not set forth in statute or regulation. *See id.*

144. *See, e.g.*, Ksenia Maiorova (@sportsvisalaw), TWITTER (Apr. 13, 2022, 9:38 PM), <https://twitter.com/sportsvisalaw/status/1514417856917782538> [<https://perma.cc/KVL2-BCT7>].

145. *See, e.g.*, Ksenia Maiorova (@sportsvisalaw), TWITTER (Apr. 14, 2022, 1:10 PM), <https://twitter.com/sportsvisalaw/status/1514652385561485315> [<https://perma.cc/S7DX-6TDK> (staff-uploaded archive)].

146. 8 U.S.C. § 1101(a)(15)(P)(i)(II); *see also* Hale & Murphy, *supra* note 13 (citing immigration attorney Rob Seiger who noted that international students coming to engage in endorsement deals will have a difficult time proving they are coming “primarily to be a student”).

147. *See* Ksenia Maiorova (@sportsvisalaw), TWITTER (Apr. 20, 2022, 2:14 PM), <https://twitter.com/sportsvisalaw/status/1516857927713361931> [<https://perma.cc/6MNV-SF5M> (staff-uploaded archive)].

P visas were created, in part, for athletes who perform at an internationally recognized level.¹⁴⁸ The P visa is very likely superior to the O visa for international college athletes as it can provide for a longer stay,¹⁴⁹ and it requires a lower threshold of renown for eligibility.¹⁵⁰ For P visa eligibility, the athlete must demonstrate that they have “a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that such achieved is renowned, leading, or well-known in more than one country.”¹⁵¹

The petitioner must provide evidence that the athletic competition itself is sufficiently high quality. The regulations require that the competition have “a distinguished reputation . . . which requires participation of an athlete . . . that has an international reputation.”¹⁵² The USCIS Policy manual states,

it is sufficient for the petitioner to show that the competition is at an internationally recognized level of performance such that it requires that caliber of athlete or team to be among its participants or that some level of participation by internationally recognized athletes is required to maintain its current distinguished reputation in the sport.¹⁵³

In assessing this, USCIS will consider the level of viewership, attendance, revenue, media coverage, the quality of the athletes who have participated in the past, the international ranking of the athletes actually competing, and documented merit requirements for participation.¹⁵⁴ For many NCAA sports, even though they are typically a tier below the major professional leagues, these metrics should be easy to satisfy.

For qualifying international college athletes, the P visa may provide one of the only ways to capitalize on their NIL within the United States. P visas allow international athletes to work in the United States if they are coming to perform “at specific athletic competition as an athlete, individually, or as part

148. 8 U.S.C. §§ 1101(a)(15)(P)(i)(a), 1184(c)(4)(A)(i)(I). College athletes will not fall under the professional athlete prong of the P visa as they are not “employed” by their teams. *Id.* § 1154(i)(2).

149. Compare 8 U.S.C. § 1184(a)(2)(B) (stating that the initial grant of a P visa may be for a period not to exceed five years with the possibility of an additional extension), with 8 C.F.R. § 214.2(o)(6)(iii), (12)(ii) (2022) (stating that the initial grant of an O visa may not exceed three years, and that extensions would be granted in one-year increments).

150. Compare 8 U.S.C. § 1184(c)(4)(A)(i)(I) (requiring an internationally recognized level of performance for P visas), with 8 U.S.C. § 1101(a)(15)(O)(i) (requiring extraordinary ability with sustained national or international acclaim).

151. 8 C.F.R. § 214.2(p)(3) (2022).

152. *Id.* § 214.2(p)(4)(ii)(A).

153. U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL: CHAPTER 2 - ELIGIBILITY REQUIREMENTS (2023), <https://www.uscis.gov/policy-manual/volume-2-part-n-chapter-2#footnote-2> [<https://perma.cc/FWV6-FDVJ>].

154. *Id.*

of a group or team, at an internationally recognized level of performance.”¹⁵⁵ Standard P-1 applicants who are professional athletes need to provide evidence of “a tendered contract with a major [U.S.] sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport.”¹⁵⁶ Since the NCAA prohibits universities from paying athletes for their athletic services, the NCAA athlete who is maintaining amateur status would have to instead fall within the exception that professional contracts are not “normally executed in the sport,”¹⁵⁷ or argue that NIL contracts should be a permissible substitution for a professional contract since college athletes are only able to obtain NIL contracts due to their athletic prowess.

The petitioner athlete must also submit at least two of the following options to prove international recognition: “[e]vidence of having participated in international competition with a national team”; “[e]vidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition”; a written statement from either an official of the governing body of the sport or from a member of the sports media or a recognized expert “which details how the [athlete] is internationally recognized”; and evidence that the athlete is “ranked if the sport has international rankings; or . . . has received a significant honor or award in the sport.”¹⁵⁸

Many college athletes already compete on their countries’ senior national teams, which will assist in their P-1 visa application as evidence of “international recogn[ition].”¹⁵⁹ Competitions like the Olympics, the International Basketball Federation World Cup or its qualifying competitions, the International Association Football Federation (“FIFA”) World Cup or its qualifying competitions, or other similar world championships or meets satisfy the

155. 8 C.F.R. § 214.2(p)(1)(ii)(1) (2022). An “athletic event” may “include an entire season of performances.” *Id.* § 214.2(p)(3). P visas are valid for up to 5 years. *Id.* § 214.2(p)(8)(iii)(A). P visas may be extended for up to an additional 5 years. *Id.* § 214.2(p)(14)(ii)(A). With the grant of employment authorization, the P visa holder may engage in NIL activity. *See generally Employment Authorization Document*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 11, 2022), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document> [<https://perma.cc/H3LX-U94C>] (discussing the process for filing a Form I-765, which confirms that a noncitizen is authorized to work in the United States for a set period of time and would allow someone to partake in NIL work).

156. 8 C.F.R. § 214.2(p)(4)(ii)(B)(1) (2022).

157. *Id.*

158. *Id.* § 214.2(p)(4)(ii)(B)(2)(ii)–(vii).

159. *See id.* § 214.2(p)(1)(i) (2022); *see, e.g.*, Jon Nyatawa, *Creighton Freshman Arthur Kaluma Returns to International Stage with Uganda’s Senior National Team*, OMAHA WORLD HERALD (Aug. 25, 2021), https://omaha.com/sports/college/creighton/creighton-freshman-arthur-kaluma-returns-to-international-stage-with-ugandas-senior-national-team/article_d3dda076-05d5-11ec-bf8a-8780a0a7d7ab.html [<https://perma.cc/2278-ZKF7>]; Peter Woodburn, *Andrew Nembhard Invited to Team Canada Qualifying Camp*, SBNATION (May 27, 2021, 6:13 PM), <https://www.slipperstillfits.com/2021/5/27/22457760/andrew-nembhard-team-canada-invitation> [<https://perma.cc/SUT4-L6YW>].

competition's requirement of having a "distinguished reputation."¹⁶⁰ Even the Olympic men's soccer competition should be seen as having the requisite reputation, although the International Olympic Committee and FIFA limit participation in the event to athletes under twenty-three years of age (with three over-age-twenty-three exceptions permitted per team),¹⁶¹ as players such as Lionel Messi, Neymar, and Sergio Aguero have all featured in the competition.¹⁶²

For some sports, qualifying for a P visa will be easier than in others. For example, athletes in sports with clear objective outcomes will be more easily able to prove international recognition based on finishing times or performances (e.g., track and field, swimming, cycling, etc.). Also, athletes that compete in sports that maintain international rankings should be more easily able to satisfy the evidentiary requirements (e.g., tennis, golf, gymnastics, etc.).¹⁶³ For sports in which there is no single governing body (such as many mixed martial arts), or which can only be played as a member of a team, the evidentiary requirements may be more challenging.

Given the high threshold of an "[i]nternationally recognized"¹⁶⁴ athlete, P-1A visas will be a difficult path for most college athletes under the current legal framework, but for those who are eligible, they provide a potential avenue that could allow for NIL remuneration (as long as the P-1A petition properly includes those activities). If, at some point, college athletes are deemed employees of their universities, and, therefore, professional athletes, the P visa may become the best option.¹⁶⁵

160. See 8 C.F.R. § 214.2(p)(4)(ii)(A) (2022).

161. See Simon Borg, *Olympic Soccer Rules, Explained: How Men's and Women's Football Tournaments Work in Tokyo*, SPORTING NEWS (Aug. 7, 2021), <https://www.sportingnews.com/us/soccer/news/olympic-soccer-rules-men-women-tournament-tokyo/154emrauwrqxc1na5nmszrrqdf> [<https://perma.cc/MLF3-6WBN>].

162. Jamie Spencer, *The Best Male Footballers To Have Won an Olympic Gold Medal*, 90 MIN (July 23, 2021), <https://www.90min.com/posts/olympics-best-male-footballers-have-won-gold-medal-lionel-messi-sergio-aguero-neymar-pep-guardiola> [<https://perma.cc/S9AF-7CG3>].

163. See, e.g., *ATP Rankings (Singles)*, ATP TOUR, <https://www.atptour.com/en/rankings/singles> [<https://perma.cc/UAQ9-LASR>]; *World Ranking*, WORLD GOLF RANKING, <http://www.owgr.com/ranking> [<https://perma.cc/7YED-9FF9>]; *World Rankings*, FEDERATION INTERNATIONALE DE GYMNASTIQUE WORLD RANKINGS, https://www.gymnastics.sport/site/rankings/ranking_wag.php [<https://perma.cc/Y9AB-ZCNX>].

164. 8 C.F.R. § 214.2(p)(3) (2022) ("Internationally recognized means having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country."). Often, a professional contract is used to establish eligibility, but with amateur athletes, that would not be possible. *Id.* § 214.2(p)(4)(ii)(B)(1). The level of achievement required means that most college athletes would not be eligible. See, e.g., Madeline Myers, *How Can International Athletes Get NIL Deals? Here's How To Do It Safely*, BUS. OF COLLEGE SPORTS (Mar. 16, 2023), <https://businessofcollegesports.com/name-image-likeness/how-can-international-athletes-get-nil-deals-heres-how-to-do-it-safely/> [<https://perma.cc/FMS8-VNSB>] (last updated Mar. 17, 2023).

165. See 8 C.F.R. § 214.2(f)(9)–(11) (2022).

2. O Visas and EB-1 Visas

O-1 nonimmigrant visas and EB-1 immigrant visas share substantially similar eligibility criteria: namely,¹⁶⁶ that the applicant possess extraordinary ability with sustained national or international acclaim and is in “the small percentage who have risen to the very top of the field of endeavor.”¹⁶⁷ Unfortunately, most college athletes—especially those in teams sports such as basketball, football, volleyball, and soccer—will not be eligible for either the O-1 or EB-1 visa, as they compete in a second tier of U.S. sports and have not, therefore, reached the summit of their profession.

Athletes competing at the level of Olympic finalists should be eligible for either an O-1 or an EB-1 provided they are able to demonstrate sustained national or international acclaim. Based on the athlete’s immigration and/or professional goals, an EB-1 may be preferred between the two options, as the EB-1 allows for self-petitioning that results in a grant of lawful permanent resident (LPR) status,¹⁶⁸ which could eventually lead to U.S. citizenship if the athlete so desired.¹⁶⁹ O visas, on the other hand, may not be granted for a period longer than three years,¹⁷⁰ though they are eligible for multiple renewals of one year provided the holder continues to compete in the same event or activity.¹⁷¹ Athletes who can satisfy the O-1 eligibility threshold but not the EB-1 threshold and those who prefer not to become an LPR may apply for an O visa instead by demonstrating eligibility under the required guidelines.¹⁷²

As with P visas, the nature of the particular sport is likely to play a predominant factor in whether a collegiate athlete is eligible for an O-1 or EB-1 visa. Athletes in individual sports with global success will be more easily able

166. Compare 8 U.S.C. § 1101(a)(15)(O) (utilizing an extraordinary standard), with 8 U.S.C. § 1153(b)(1)(A)(i) (using a similar extraordinary standard). Although the statutory language for both the O and EB-1 visas utilizes the extraordinary standard, federal regulations and USCIS have interpreted the EB-1 criteria as having a higher eligibility threshold. See U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL: CHAPTER 2 - EXTRAORDINARY ABILITY (2023), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2> [<https://perma.cc/HE3S-H6U4>] (noting a previous grant of an O visa will not automatically lead to the granting of an EB-1); see also Weber, *supra* note 129, at 909–10.

167. 8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)(3)(ii) (2022).

168. 8 U.S.C. §§ 1153(b)(1)(A), 1255(k).

169. See 8 U.S.C. § 1427.

170. 8 C.F.R. § 214.2(o)(6)(iii) (2022).

171. *Id.* § 214.2(o)(12)(ii).

172. See U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL: CHAPTER 2 - ELIGIBILITY FOR O CLASSIFICATION (2023), <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-2> [<https://perma.cc/CPN3-RFQV>]. In January 2022, USCIS issued a new policy memorandum providing guidance on establishing eligibility with comparable evidence. U.S. CITIZENSHIP & IMMIGR. SERVS., PA-2022-03, POLICY ALERT: O-1 NONIMMIGRANT STATUS FOR PERSONS OF EXTRAORDINARY ABILITY OR ACHIEVEMENT (2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf> [<https://perma.cc/RE5J-RGJL>].

to prove their eligibility than those on team sports who will need to prove their individual level of talent.¹⁷³ For athletes in competitions with objective outcomes—track and field, swimming, cycling, etc.—the amateurs may very well be competing against the best of the world at the Olympics or other World Championship events. For example, the sport of swimming has a lengthy history of athletes winning the NCAA Championship and an Olympic gold medal in the same year.¹⁷⁴ In 2016 alone, three swimmers won both an Olympic gold medal and an NCAA title.¹⁷⁵ Additionally, the NCAA reported that more than 1,000 current, former, and future college athletes competed in the 2020 Tokyo Olympics,¹⁷⁶ and more than 200 current, former, and future college athletes competed in the 2022 Beijing Olympics.¹⁷⁷ Once employment authorization is granted, whether via an EB-1 or an O-1 visa, the athlete is free to engage in NIL activity.¹⁷⁸

III. EXPLORING THE BOUNDARIES OF PASSIVE INCOME

As stated above, the F-1 visa prohibits international college athletes from working outside of the few prescribed areas.¹⁷⁹ The F-1 visa does not, however, prohibit international college athletes from making money in general.¹⁸⁰ Provided that the international athlete can structure the income mechanism appropriately, that athlete can earn money from NIL opportunities either by engaging in the activities abroad or by earning only passive income while in the United States. U.S. immigration law aims to prevent the domestic labor market from unrestrained international competition.¹⁸¹ U.S. tax law, on the other hand, is more agnostic about where income is earned as long as it is properly reported.¹⁸²

173. See, e.g., 8 C.F.R. § 214.2(o)(3)(i) (2022) (stating that extraordinary ability “must be established for an individual alien”).

174. Daniel Takate, *A Rare Feat: NCAA & Olympic Champions in the Same Year*, SWIMSWAM (Apr. 2, 2021), <https://swimswam.com/a-rare-feat-ncaa-olympic-champions-in-the-same-year/> [<https://perma.cc/Z8EL-D2KZ>].

175. See *id.*

176. *Olympic Medal Tracker for NCAA Student-Athletes in Tokyo*, NCAA (Aug. 11, 2021), <https://www.ncaa.com/news/ncaa/article/2021-08-09/olympic-medal-tracker-ncaa-student-athletes-tokyo> [<https://perma.cc/BF74-8235>].

177. *2022 Olympics Medal Winners for NCAA Student-Athletes in Beijing*, NCAA (Feb. 21, 2022), <https://www.ncaa.com/news/ncaa/article/2022-02-20/2022-olympics-medal-winners-ncaa-student-athletes-beijing> [<https://perma.cc/DG4Z-494J>].

178. See generally *Employment Authorization Document*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document> [<https://perma.cc/5CSN-AX55>] (exemplifying a way to prove authorization to work).

179. See *supra* Part II.A. and accompanying notes.

180. See *supra* Part II.A. and accompanying notes.

181. See Weber, *supra* note 129, at 937–38, 937 n.302.

182. See, e.g., 26 U.S.C. § 911(b)(1)(A) (taxing U.S. citizens on worldwide income barring exceptions).

There are more than one million nonresident, noncitizen students studying abroad in the United States at an eligible college or university on an F visa.¹⁸³ Subject to the exceptions discussed in Part II, this visa category generally does not have work authorization. This restriction on employment limits the ability of international college athletes to benefit from NIL compensation because the consequences of falling out of visa status are too severe.¹⁸⁴ Notably, however, earning passive income while on an F-1 visa does not run afoul of this limitation on employment and is permitted.¹⁸⁵ Also, since passive income is allowed under F-1 status, there is no limit on the amount of passive income that an F-1 visa holder may earn.¹⁸⁶ There is an interesting nexus here, as immigration law collides with tax law to allow some members of a college sports team to make millions of dollars while nonresident, noncitizen teammates are restricted to earning only income that is characterized as

183. *Full-Year US Visa Numbers Show Solid Gains for 2022*, ICEF MONITOR (May 3, 2023), <https://monitor.icef.com/2023/05/full-year-us-visa-numbers-show-solid-gains-for-2022/> [<https://perma.cc/ZZQ7-6R56>].

184. The NCAA's November 2021 Q&A states that international students can "benefit" from their NIL; however, it also notes that international college athletes "may consider consulting" with their institution in matters "related to maintaining their immigration status and tax implications." *Name, Image and Likeness Policy: Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [<https://perma.cc/CB5G-FFP5>]. "[I]nternational student-athletes will likely find that earning money from their NIL will violate the terms of their, likely, F-1 visas, potentially ending their college athletic eligibility and time in the country with revocation of their visas." Erin E. Butcher, Jeff Knight, Joseph Hall & Kasey Nielsen, *Developing a NIL Policy: Student-Athlete Representation and International Students (Part 6)*, BRICKER & ECKLER (Jan. 26, 2022), <https://www.bricker.com/insights-resources/publications/developing-a-nil-policy-student-athlete-representation-and-international-students-part-6> [<https://perma.cc/55XU-5PW9>].

185. *See, e.g., Lauvik v. Immigr. & Naturalization Serv.*, 910 F.2d 658, 661 (9th Cir. 1990) (allowing investor without work authorization to engage in some work to protect value of capital investment).

186. *See, e.g., Amanda Christovich, International Athletes Find NIL Loophole at Battle 4 Atlantis*, FRONT OFF. SPORTS (Nov. 29, 2022, 4:45 PM), <https://frontofficesports.com/international-athletes-find-nil-loophole-at-battle-4-atlantis/> [<https://perma.cc/6HQR-YJXU>]; Charlie Desmond, *International Athletes Profit Off NIL While Competing off of U.S. Soil*, UB L. SPORTS & ENT. F. (Dec. 2, 2022), <https://ublawsportsforum.com/2022/12/02/international-athletes-profit-off-nil-while-competing-off-of-u-s-soil/> [<https://perma.cc/K93J-VQXW>]; Leigh P. Cole & Adam R. Maldonado, *International Student-Athlete Visas Potentially at Risk Due to New NCAA NIL Rules*, HIRSCHFELD KRAEMER (Sept. 1, 2021), <https://www.hkemploymentlaw.com/international-student-athlete-visas-potentially-at-risk-due-to-new-ncaa-nil-rules/> [<https://perma.cc/E224-J9NN>] (noting passive income is permitted under F visa status). The F-1 visa holder will not fall out of visa status for earning passive income, but must nonetheless report the income on a tax return. A tax treaty may apply to exempt some portion of the income made by the F-1 student from tax. Many treaties exempt an F-1 visa holder from paying taxes on their first \$2,000 to \$5,000 of U.S. source income. *See Ernest R. Larkins, Coming to America: International Students Face a Labyrinth of Income Tax Issues*, 15 CONN. J. INT'L L. 47, 86–87 (2000).

“passive.”¹⁸⁷ In working towards solutions, however, Part III considers the outer boundaries of the tax concept of passive income.

In the United States, taxable income may be divided into three categories: active, passive, and portfolio income. Active or earned income is generally the fruit of the taxpayer’s labor. Portfolio income, which is generally considered to be income generated by investments and dividends, is a hybrid and may be characterized as either passive or active depending upon the level of participation by the taxpayer.¹⁸⁸ According to the Internal Revenue Service (“IRS”),¹⁸⁹ passive income is generated by two types of passive activities: rental activities, even if there is material participation (unless the taxpayer is a real estate professional), and trade or business activities in which the taxpayer does not materially participate.¹⁹⁰ An important characteristic of passive activities¹⁹¹ is the absence of the taxpayer’s participation in day-to-day activities related to production of the income.¹⁹² This part will examine both types of passive income activities and then address the relation between passive income activity and NIL activity.

187. “Going into last July [2021], every athletic department that I know of was telling international student athletes that it wasn’t safe for them to do name, image and likeness deals. They were referring the student athletes to the office on campus that deals with student visas.” Kristi Dosh, *Revisiting NIL for International Student Athletes*, BCS (May 19, 2022), <https://businessofcollegesports.com/podcast/revisiting-nil-for-international-student-athletes/> [<https://perma.cc/6SUH-5V7Y>] [hereinafter Dosh, *Revisiting NIL*].

188. “In more liberal terms, portfolio income is for all intents and purposes, passive. Yes. You have to invest in and manage a portfolio of holdings across a variety of asset classes. But, there are ways you can automate that process. In other words, set it up and forget.” *What Is Portfolio Income & 5 Reasons It Is Important*, DIVIDENDS DIVERSIFY, <https://dividendsdiversify.com/what-is-portfolio-income/> [<https://perma.cc/8GRN-TEBV>].

189. I.R.S., PUBL’N. 925, CAT. NO. 64265X, PASSIVE ACTIVITY AND AT-RISK RULES 3–4 (2022), <https://www.irs.gov/pub/irs-pdf/p925.pdf> [<https://perma.cc/8W27-2RSE>] [hereinafter I.R.S., PASSIVE ACTIVITY AND AT-RISK RULES].

190. 26 U.S.C. § 469(c).

191. “Passive income complements the income you are earning from your primary job. It is ideal to have several streams of passive income set up to protect your primary source of income, should you be unfortunate enough to lose your job.” Melissa Houston, *Passive Income, How To Get It Working for You*, FORBES (Apr. 19, 2022, 5:00 AM), <https://www.forbes.com/sites/melissahouston/2022/04/19/passive-income-how-to-get-it-working-for-you/?sh=70c1dd6d285c> [<https://perma.cc/2UXL-QU2B> (dark archive)].

192. A somewhat reductionist but apt explanation of passive income is income that a taxpayer would continue to earn if they died. *See, e.g.*, Charles L. Baum II, *Computing Economic Damages in Florida Wrongful Death and Personal Injury Cases*, 91 FLA. BAR J., 8, 14–16 (2017) (explaining that passive income accrues even after death). Loss limitation rules set forth in the Internal Revenue Code (“IRC”) § 469 limit the deduction of passive losses against income generated by the passive activity. 26 U.S.C. § 469. Tax shelters thrived in the 1970s and 1980s, and Congress responded through § 469 by curtailing deductions attributable to losses from passive activities. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 19:05[1] (3d ed. 2002).

A. *Rental Activities*

To legally profit from any NIL work while in the United States, international college athletes should ensure the NIL income is considered passive. Doing so, however, is not always straightforward. Some helpful comparisons can be drawn from another area in which there is more elaboration on the differences between active and passive income: rental activities.

Determining whether rental activity is passive or active is sometimes a difficult calculus. There are impactful differences in the tax treatment of active versus passive income, including differences in effective tax rates, FICA and/or self-employment taxes, loss limitation rules, and the availability of depreciation or amortization deductions.¹⁹³ A popular fiction is that real estate investment is always a passive activity. Of course, with the rise of collaborative consumption and peer economy technology platforms, such as Airbnb, the gig economy has drawn a closer eye to what it means for property rental to be passive.¹⁹⁴ As a general matter, rental of property is a passive activity even if the taxpayer (as a property owner) materially participates.¹⁹⁵ There are, of course, exceptions. Temp. Regs. 1.469-1T(e)(3)(ii) provides that a rental will not be considered a rental activity under the passive activity rules if customer use of the property averages seven days or less.¹⁹⁶ Also, in 1993, Congress amended passive activity rules to account for the fact that some real estate professionals satisfy the meaningful participation requirements to establish that they are actively engaging in a trade or business.¹⁹⁷ To render the income active, taxpayers who engage in multiple rental activities may make an election to aggregate all the rental activities for the purpose of determining status as a real estate professional.¹⁹⁸ There are special penalties for any taxpayer who improperly

193. Suzanne Forbes, *Navigating Short-Term Rentals and Tax in a Shared Economy*, JAMESMOORE & CO. (May 21, 2019), <https://www.jmco.com/articles/real-estate/short-term-rentals-tax-treatment/> [<https://perma.cc/EKW3-4WFE>]; Jennifer Larson & Christopher Davis, *Short-Term Rental Properties: 4 Tax Issues To Consider*, SOL SCHWARTZ (July 7, 2022), https://www.ssacpa.com/short-term-rental-properties-4-tax-issues-to-consider/?utm_source=rss&utm_medium=rss&utm_campaign=short-term-rental-properties-4-tax-issues-to-consider [<https://perma.cc/8SPA-QC8T>].

194. See, e.g., Jesse Hubers, *Beware Vacation Property Owners: Short-Term Rentals Could Trigger Self-Employment Taxes*, HBK (Jan. 17, 2022), <https://hbkcpc.com/beware-vacation-property-owners-short-term-rentals-could-trigger-self-employment-taxes/> [<https://perma.cc/Z8S3-7C2W>].

195. See *Specks v. Comm'r*, 104 T.C.M. (CCH) 746 (2012).

196. 26 C.F.R. § 1.469-1T(e)(3)(ii) (2022). This type of rental income is often generated by the taxpayer who owns a vacation home. See Cynthia Bolt Lee, *Short-Term Rentals Classified As Passive Activity Losses*, J. ACCT. (Jan. 1, 2000), <https://www.journalofaccountancy.com/issues/2000/jan/shorttermrentalsclassifiedaspassiveactivitylosses.html> [<https://perma.cc/64NX-9ART>].

197. The real estate professional tests apply to individuals and sometimes C corporations. For more, see John H. Skarbnik, *Real Estate Professionals: Avoiding the Passive Activity Loss Rules*, TAX ADVISER (July 1, 2014), https://www.thetaxadviser.com/issues/2014/jul/skarbnik-july2014.html#fnref_30 [<https://perma.cc/F8R4-KCVY>].

198. See 26 U.S.C. § 469(c)(7).

deducts losses from a passive activity from active income, so precisely charactering income is important.¹⁹⁹

When rental activity is passive (because the “material participation” requirements are not satisfied), § 469(i)(1) allows eligible taxpayers to deduct up to \$25,000 of losses against active income from the passive rental activity, provided that the taxpayer “actively participates” in the rental activity.²⁰⁰ Active participation is a far lower standard than material participation and only requires that the taxpayer engage “in a significant and bona fide sense in making management decisions or arranging for others to provide services.”²⁰¹ A training manual used by the IRS provides that the taxpayer may not simply bless all decisions of the property manager and must demonstrate that the taxpayer is exercising individual judgment.²⁰²

And thus, if the taxpayer rents a room in his house on Airbnb or VRBO for a few days at a time, intermittently, and very little personal service is provided, the income would likely be characterized as passive. If the taxpayer is actively involved in managing Airbnb properties (checking in guests, cleaning the property, handling all repairs and maintenance) and it is a full-time job, the income will be characterized as active. Income generated from any type of rental managed by a real estate agent or management company will generally be characterized as a passive activity. However, income generated from rental of a property on a long-term basis will be treated as active income if the taxpayer, as a “real estate professional,” materially participates in management of the rental.²⁰³ Additionally, income generated from renting property as a bed and breakfast (or its equivalent) is also characterized as active.²⁰⁴

We see then, from an IRS perspective, the determination of active versus passive income often comes down to the level of management, degree of service or work involved, and the frequency of the actions being taken. However, while the IRS perspective is useful, DHS’s interpretation of the same question involves a balancing of different interests that may dictate a more cautious path

199. The penalty is assessment of unpaid taxes and interest plus a penalty of 20% of the understated tax liability for negligence. See Skarbnik, *supra* note 197. The penalty will not apply if it is proven that the taxpayer acted based upon a reasonable belief and good faith. *Id.*

200. 26 U.S.C. § 469(i)(1). Material participation rules should not be confused with “active participation” requirements. Compare 26 U.S.C. § 469(h) (defining “material participation”), with 26 U.S.C. § 469(i)(6) (defining “active participation”).

201. *Ani v. Comm’r*, No. 20312-09S, 2011 WL 4809034, at *3 (T.C. Oct. 11, 2011).

202. I.R.S., CAT. NO. 83479V, PASSIVE ACTIVITY LOSS: AUDIT TECHNIQUE GUIDE (ATG) § 2-2 (2005), <https://www.irs.gov/pub/irs-mssp/pal.pdf> [<https://perma.cc/FC66-GBDE>]. This loss allowance starts to be phased out for any married couple with a modified adjusted gross income of \$100,000 and is completely phased out at \$150,000 or more. I.R.S., PASSIVE ACTIVITY AND AT-RISK RULES, *supra* note 189, at 4–5.

203. I.R.S., PASSIVE ACTIVITY AND AT-RISK RULES, *supra* note 189, at 3–4.

204. See *id.* at 4 (describing rental activities as passive activities except when average customer stay is seven days or less, or customers are provided significant personal services).

with respect to income classification.²⁰⁵ Remaining on the right side of the passive income rules (both IRS and DHS) is a high-stakes proposition for the international athlete and F visa holder.

B. *Business Activities*

Foreign nationals enrolled at a university or a college on an F visa may organize a corporation, limited liability company, or partnership without falling out of visa status. Activities related to starting a business or investing are permissible. The F visa holder may open bank accounts, engage in market research, hire employees, build test models, and negotiate equity structures with co-venturers.²⁰⁶ The visa holder must take a position as a passive investor or owner in the business and may not provide services for the business, regardless of whether the student is unpaid or earns a salary.²⁰⁷

An F visa holder may not be self-employed without proper authorization.²⁰⁸ When a start-up business earns substantial revenue and there are no employees and one owner, the revenue will likely be characterized as active income for the owner of the business. It is advisable, in most instances, for the owner of the business to hire at least one managing employee to operate the business while completing their studies.

205. See *infra* Part IV.C.

206. *Starting a Business While in F-1 Student Status*, CARNEGIE MELLON, <https://www.cmu.edu/swartz-center-for-entrepreneurship/assets/Connect%20Spring%202017/f-1-visa.pdf> [<https://perma.cc/D4HZ-UQUS>] [hereinafter CARNEGIE MELLON].

The stringent restrictions on the employment of foreign students are one of the main obstacles that potential foreign student entrepreneurs face. F-1 visa holders are prohibited “from being self-employed because self-employment is still considered ‘employment.’ As a result, foreign students looking to remain in the United States to start a new business or launch an entrepreneurial venture cannot do so without jeopardizing their legal status.” However, while foreign students are prohibited from being self-employed, they are not prohibited from investing in new companies or existing business ventures. Generally, a foreign student cannot be “actively engage[d] in venture operations’ but can be a ‘passive owner of a business.’”

Yasser Killawi, *Preserving an Entrepreneurial America: How Restrictive Immigration Policies Stifle the Creation and Growth of Startups and Small Businesses*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 129, 140 (2013) (citations omitted).

207. See *International Student Entrepreneurs in the United States*, FOURSORE BUS. L., <https://fourscorelaw.com/international-student-entrepreneurs-in-the-united-states/> [<https://perma.cc/U6HB-6HBQ>]; CARNEGIE MELLON, *supra* note 206.

208. See *Training Opportunities in the United States*, DEP’T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/students/training-opportunities-in-the-united-states> [<https://perma.cc/BRD2-TF9X>] (“The U.S. government considers starting your own business in the United States, also known as entrepreneurship, as work. Therefore, if you are an F-1 student who plans to start your own business in the United States, you must qualify and apply for OPT.”).

C. *Passive Income Characterization for NIL Activities*

The obvious hurdle for many international athletes is determining the NIL activities that may be permitted, versus activities that may be deemed “unauthorized employment” threatening visa status. There is no clear guidance, leaving students to navigate this alone. This is further complicated by the fact that characterization of income as active versus passive often hinges upon the facts and circumstances of each individual taxpayer’s situation. Additionally, the Internal Revenue Code (“IRC”) may consider some income activities passive from a taxation point of view, which may be considered active from an immigration perspective. Lastly, the same activity that may be deemed passive in some instances could also be considered active depending upon the level of taxpayer’s involvement.²⁰⁹

For the international college athlete hoping to earn money from NIL in the United States, the main question is what type of NIL activity can be done while the athlete is in the United States. Because this particular issue is not addressed in the IRC, the international college athletes and their advisers are left to infer which activities may be passive based on how the IRC characterizes other transactions. The general categories in which a taxpayer may earn passive income include owning/holding real estate, renting real estate (or some portion thereof), peer-to-peer personal property rental, investing in a business, investment or trading (e.g., stock, REITs, cryptocurrency), royalties, and winning prizes or money.²¹⁰ There are nuanced rules that apply to each of these categories. As discussed above, rental of real property (or a portion thereof, e.g., guest house or spare room) will generally be characterized as passive if managed by a real estate agent or management company. Passive income may also be generated by renting belongings that the taxpayer does not need to use every day, provided that renting the belongings requires little oversight or management on the part of the taxpayer. Peer-to-peer economy technology allows a taxpayer to rent swimming pools (Swimply), cars (Getaround or Turo), or unused space on a property for storage (Neighbor and Stache).²¹¹ As with renting a property on Airbnb or VRBO, however, passive versus active income characterization will hinge upon the level of involvement of the taxpayer and the scope of services being provided.²¹²

209. See *infra* notes 248–251 and accompanying text.

210. See, e.g., 26 U.S.C. § 469(c).

211. Andrea Forstadt, *10 Passive Income Small Business Ideas*, U.S. CHAMBER OF COM. (June 17, 2021), <https://www.uschamber.com/co/start/business-ideas/passive-income-business-ideas> [<https://perma.cc/2YLJ-USQ2>].

212. Driving for a service such as Uber or Lyft generates active income, but any income earned through carpooling apps (Waze Carpooling or Scoop) may be characterized as passive. The rationale is that these carpool apps simply reimburse the driver for expenses, and it is therefore unnecessary to

Income earned from gambling may generally be characterized as passive income, but this calculus changes if the taxpayer has become so involved in gambling that they are deemed a professional gambler who is materially participating in a trade or business with a profit motive.²¹³ Also, awards or prizes from competitions (e.g., a lottery) will be characterized as passive income.²¹⁴ The holder of an F visa may create and write manuscripts, articles, or books, but they need to be prepared to answer three important questions: where was the work produced; where is the work being sold; and where are the royalties being sent and deposited.²¹⁵ Writing and publishing a book while in the United States would likely be considered active income²¹⁶ but receiving payment for a previously published book, even while in the United States, would be passive.²¹⁷ That distinction is a helpful one for international college athletes. Athletes engaging in promotional shoots or advertising are actively working, but athletes licensing previously taken photographs or videos are not.

As a general matter, unless a social media presence is an employer-employee relationship or an uncompensated hobby, it is a business.²¹⁸ Influencers may be treated as operating a sole proprietorship, or they may decide to entitize. Regardless, the income generated will be characterized as active. Therefore, college athletes who provide social media content, provide autographs, and attend events pursuant to NIL deals are engaging in active income generation. Furthermore, for social media activity, the U.S. government has notice of all of the existing social media accounts of a given international student because disclosure of social media information (e.g., Facebook,

provide the driver with a 1099 (for reportable income). *Using Scoop on a Work or Student Visa*, SCOOP, <https://takescoop.zendesk.com/hc/en-us/articles/221124887-Using-Scoop-on-a-Work-or-Student-Visa> [<https://perma.cc/MA7E-4MW5>].

213. See Eric Smith, *Taxation of Gambling Income*, CPA J. (Dec. 2019), <https://www.cpajournal.com/2019/12/24/taxation-of-gambling-income/> [<https://perma.cc/P8SV-AEPK>].

214. See Jason Gordon, *Passive Income—Explained*, BUS. PROFESSOR (Apr. 8, 2022), https://thebusinessprofessor.com/en_US/accounting-taxation-and-reporting-taxation/passive-income-definition [<https://perma.cc/AHG6-HRHK>]; see also *What Is Passive Income and How Do You Earn It?*, FINANCE101 (May 9, 2023), <https://www.finance101.com/what-is-passive-income-and-how-do-you-earn-it/> [<https://perma.cc/33ZV-VVB5>].

215. *How Can F1 Students Earn Passive Income?*, MYRA, <https://blog.myrawealth.com/insights/how-can-f1-students-earn-passive-income> [<https://perma.cc/L6JD-PQMT>]; see also *The Differences Between Active and Passive Income*, IPUBLISH GHOSTWRITERS (Dec. 30, 2020), <https://www.ipublishghostwriters.com/blog/passive-or-active-income> [<https://perma.cc/ZXH3-52HN>].

216. See 26 U.S.C. § 469(c) (defining passive activity).

217. See § 469(e)(1)(A)(i)(I) (allowing royalties as passive income).

218. See, e.g., *Foreign Student Liability for Social Security and Medicare Taxes*, IRS, <https://www.irs.gov/individuals/international-taxpayers/foreign-student-liability-for-social-security-and-medicare-taxes> [<https://perma.cc/3MBS-2FRB>] (noting that “[a]s a general rule, the immigration laws of the United States do not permit nonimmigrants to earn self-employment income in the United States”).

Instagram, and Twitter handles) is required in the visa application process.²¹⁹ If a student produces and posts content on social media while in the United States, and the content generates income, this income will be characterized as active. If a student has monetized an online platform, such as YouTube, TikTok, or Instagram, prior to coming to the United States, the monetization feature on the channel should be turned off while the student is in the United States on F-1 visa status if the student expects to continue utilizing the platform while in the United States.²²⁰ If the student does not interact with the platform in any way while in the United States and/or hires a content manager to take over all management of the social media platforms, income generated by the content posted prior to coming to the United States should be characterized as passive.²²¹

There are activities that some regard as “clearly passive income,” but that should fairly be characterized as gray area activities because of the possibility of

219. See *Frequently Asked Questions on Social Media Identifiers in the DS-160 and DS-260*, U.S. DEP'T OF STATE (June 4, 2019), [https://travel.state.gov/content/dam/visas/Enhanced%20Vetting/CA%20-%20FAQs%20on%20Social%20Media%20Collection%20-%206-4-2019%20\(v.2\).pdf](https://travel.state.gov/content/dam/visas/Enhanced%20Vetting/CA%20-%20FAQs%20on%20Social%20Media%20Collection%20-%206-4-2019%20(v.2).pdf) [https://perma.cc/R9BK-456R] (requesting disclosure of social media identifiers for most visa applicants). On April 4, 2021, the Office of Information and Regulatory Affairs issued a disapproval of the collection of this information by the Department of Homeland Security. See OFF. OF MGMT. & BUDGET, NO. 202007-1601-001, OIRA CONCLUSION (Apr. 2, 2021), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202007-1601-001 [https://perma.cc/M8FV-TE3Z]. However, that disapproval does not affect the State Department, which handles visa applications. See Harsha Panduranga, *White House Office Rejects DHS Proposal To Collect Social Media Data on Travel and Immigration Forms*, BRENNAN CTR. FOR JUST. (Apr. 27, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/white-house-office-rejects-dhs-proposal-collect-social-media-data-travel> [https://perma.cc/EPB6-ZP2P]. Instead of limiting the State Department's collection of social media data, the Biden administration has sought to extend the data collection program to also cover individuals who enter the country under a visa waiver program. Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, Electronic System for Travel Authorization (ESTA), 87 Fed. Reg. 10223, 10223–24 (Feb. 23, 2022).

220. *F1 Visa Work Options: A Complete Guide [2023]*, IMMIGRATIONCASES.ORG, <https://www.immigrationcases.org/f1-visa-work/> [https://perma.cc/VY3T-KCKJ] (stating that “[m]onetization of a YouTube channel, Instagram page or other social media profile while on an F1 visa could be considered self-employment”); *Am I Allowed To Make Money Through a YouTube Channel While in H1B Status?*, MURTHY L. FIRM (Oct. 7, 2021), <https://www.murthy.com/2021/10/07/am-i-allowed-to-make-money-through-a-youtube-channel-while-in-h1b-status/> [https://perma.cc/9LU8-DYJ2] [hereinafter MURTHY L. FIRM] (stating that it is unclear if a YouTube channel would be unauthorized employment, and hinges on whether “the foreign national created the channel and content prior to entering the U.S., and is now merely earning income from the views that occur while the person is in the U.S.”); see Amresh Singh, *How To Generate Passive Income as an F1 Visa/OPT International Student?*, HOMEABROAD (Apr. 3, 2023), <https://homeabroadinc.com/passive-income-f1-visa-opt-international-student/> [https://perma.cc/R7LN-PEAS] (noting that “you cannot earn money from your Youtube [sic] Channel, Tiktok or any other content platform while you ar [sic] present in the US on a F1 Visa or OPT”).

221. See MURTHY L. FIRM, *supra* note 220; see also 26 U.S.C. § 469(e)(1)(A)(i)(I) (allowing royalties as passive income).

pushback from the IRS due to the labor participation involved.²²² As discussed above, establishing a business does not—in and of itself—run afoul of visa requirements but actively participating in building the business does. Dropshipping²²³ appears to be an extraordinarily lucrative source of income where the taxpayer invests little effort in sourcing inexpensive products in marketplaces, such as AliExpress, and offers them for sale through an online storefront, with all the backend labor and fulfillment outsourced to a partner.²²⁴ The reality is that eCommerce businesses often require an hour or more of time each day, and the taxpayer may run afoul of material participation rules and this activity would likely be considered impermissible while on an F visa.²²⁵ Starting, owning, or operating a blog is another activity that hinges upon characterization of income and depends upon the involvement of the owner of the blog.²²⁶ It is possible to purchase an existing blog that is generating an income stream and operate the blog as a passive income source.²²⁷

And, of course, some international athletes avoid U.S. rules entirely by traveling to their home country for an NIL deal. Lou Hedley, a kicker from Australia on the University of Miami football team, flew home to Australia to record videos and take photos for a healthcare company called LifeWallet (owned by a Miami resident).²²⁸ He signed all contracts in Australia and was paid in Australian currency.²²⁹ Mustapha Amzil, a Finnish basketball player on the University of Dayton team, also plans on finding opportunities for compensation when he returns to Finland.²³⁰ Opportunities for some international athletes remain limited, however, as they may be discouraged by

222. Also, websites that discuss “how to make passive income” may not be using the word passive in the same way that the Internal Revenue Code utilizes the word passive.

223. Shweta & Cassie Bottorff, *What Is Dropshipping? Everything You Need To Know*, FORBES (May 15, 2023, 5:24 PM), <https://www.forbes.com/advisor/business/what-is-dropshipping-everything-you-need-to-know/> [<https://perma.cc/S23Y-DP76>].

224. Globally, the dropshipping market was an estimated \$100+ billion industry in 2018 and is expected to see a compound annual growth rate of nearly 29%. Forstadt, *supra* note 211.

225. *See supra* notes 79–83 and accompanying text.

226. *See* Darren Rowse, *Blogging for Income—A Passive Income?*, PROBLOGGER (Jan. 29, 2007), <https://probblogger.com/blogging-for-money-a-passive-income/> [<https://perma.cc/7CUR-Y437>] (describing active and passive aspects of blogging).

227. *Cf.* Paul Franklin, *Passive Income vs. Active Income & Blogging Nirvana*, SIDEGAINS (Oct. 14, 2020), <https://www.sidegains.com/making-money/passive-income-vs-active-income/> [<https://perma.cc/8D6Y-DBW4>] (noting how blogging could create passive income if all the work was outsourced).

228. Dan Friedell, *Foreign Athletes at US Colleges Find Ways To Make Money*, VOA LEARNING ENG. (June 18, 2022), <https://learningenglish.voanews.com/a/foreign-athletes-at-us-colleges-find-way-to-make-money-/6607205.html> [<https://perma.cc/3H3F-UXJQ>].

229. *Id.*

230. *Id.*

their universities or colleges from entering into international NIL deals due to uncertainty.²³¹

IV. TOWARD SOLUTIONS

In 2022, international college athletes began to test the NIL waters to see what types of behavior were acceptable under the terms of their student (F) visas.²³² The advice they have received has ranged from the ultra-cautious (“do not accept any NIL deals”)²³³ to a *Goldilocks* middle-of-the-road approach (“only engage in NIL activity when you are in your home country”)²³⁴ to the very edge of permissible (“structure your deals with a company located in your home jurisdiction, get paid in currency of your home country, and engage in minimal NIL activity in the United States”).²³⁵ Part IV considers this range of advice and provides a focused approach on how to structure NIL deals as passive income so as to comply with the terms of the F-1 visa.

A. *Avoiding NIL Activity Altogether*

Avoiding NIL activity entirely is the safest approach for college athletes on F-1 visas as they would continue to fall neatly within the existing framework and would not put any future visa application at risk.²³⁶ However, this does nothing to address a growing divide between international and domestic college athletes. Any teamwide event designed to capitalize on NIL income (e.g., autograph signings, camps, showcase events, etc.) is an existential threat to an international athlete’s continued presence in the United States because seeking or receiving compensation (even if inadvertently) will jeopardize the international athlete’s legal status.

Although safest in the short and long run, for most international college athletes this approach will be frustrating, and it will lose them an opportunity

231.

Schools including Drexel University in Pennsylvania and West Virginia University have asked their foreign students to stay away from NIL deals for now But other schools, like the University of Nebraska, are not waiting Administrators at the University of Florida told their athletes to be sure they could prove they were in their home countries if they signed any documents that resulted in money. They were told, for example, to make sure their passports got stamped.

Id.

232. See *supra* Part III.C. (discussing international college athletes who utilized CPT for an NIL deal); *infra* Part IV.B. (detailing international college athletes who have returned to their home countries to participate in NIL deals).

233. See, e.g., Eaton-Robb, *supra* note 74 (noting some schools have advised international college athletes to refrain from entering into any NIL-related deals).

234. See *infra* Part IV.B.

235. See *infra* Part IV.C.

236. See *supra* Part III.A.

to capitalize on their NIL during an athletic career of uncertain length, at least until USCIS addresses the issue.²³⁷ At some point, either Congress or USCIS is likely to step in and provide additional guidance. Until then, any NIL-related activity incurs a nonzero risk of adverse immigration consequences.

B. *NIL Activity Abroad Only*

Employment authorization in U.S. immigration law covers only U.S.-based employment or labor, and the current law is designed to protect the U.S. labor pool from unauthorized international competitors.²³⁸ As such, NIL activity engaged in exclusively in the athlete's home country or another third country should not violate the terms of the F-1 visa. In fact, many of the well-publicized NIL deals involving international athletes have utilized this approach.²³⁹ Australian punter Lou Hedley (University of Miami) and basketball player Jaz Shelley (University of Nebraska) each traveled to their home country to sign NIL deals.²⁴⁰ Dominican athlete Hansel Emmanuel (with scholarship offers at the time from Memphis, Tennessee State, and Bethune-Cookman) traveled to Mexico to film a commercial for Gatorade.²⁴¹ In other cases, collectives have organized NIL activities in the international college athlete's home country to provide some level of compensation to the international college athlete.²⁴² Provided the international college athlete is not engaging in *any* unauthorized NIL activity in the United States, working in foreign jurisdictions will not violate the terms of the F-1 visa.

This approach is not ideal for generating NIL revenue due to inherent restrictions on international travel for college athletes, but international college athletes can engage in NIL promotions and/or social media marketing while outside of the United States during breaks in the school calendar. This approach presents some risk that consular officers may perceive any NIL activity as prohibited—regardless of location²⁴³—but that risk may be mitigated through

237. See, e.g., Dosh, *Revisiting NIL*, *supra* note 187 (quoting Rob Seiger who opined that USCIS is delaying issuing a policy memorandum until the issue “settle[s] a bit”).

238. See, e.g., 8 U.S.C. § 1324a(a)(1)(A) (making it unlawful to hire any individual who does not have authorization).

239. See, e.g., Ken Maguire, *‘It’s All Legal’: Foreign College Athletes Cash In at Home*, AP NEWS (May 30, 2022), <https://apnews.com/article/college-football-sports-nebraska-cornhuskers-7bfc7f0e983ca10b22e3078ac212bf08> [<https://perma.cc/WZF2-BWUQ>].

240. *Id.*

241. Radnofsky, *supra* note 129.

242. See, e.g., Emma Becerra, *International Student-Athletes Can Profit with Light It Blue Collective*, UTAH STATESMAN (Feb. 24, 2023), <https://usstatesman.com/international-student-athletes-can-profit-with-light-it-blue-collective/> [<https://perma.cc/2AFQ-E53W>].

243. Radnofsky, *supra* note 129 (quoting Chris Richardson, who prepares applicants for visa interviews: “There are a lot of consular officers I know who are adamantly of the belief that you cannot do NIL deals on a student visa.”). See Dan Murphy & Michael Rothstein, *NCAA’s International Athletes*

proper documentation. The University of Florida requests their international college athletes to “document their physical location while conducting NIL activities.”²⁴⁴ Athletes should document their presence outside the United States through their Form I-94.²⁴⁵ With the ubiquity of smartphones, athletes should also utilize photographs, videos, or other location-tracking applications to record their location while engaged in NIL activities.

C. *NIL as Passive Activity, Regardless of Location*

Two legal frameworks collide for the international athlete on the F visa: immigration and taxation. Immigration law stipulates that the visa holder may only earn passive income, and tax law provides the framework by which we distinguish active from passive income. While sharing significant overlap, the entities tasked with administering these laws and regulations operate with very different objectives, which inexorably influences the filter through which each agency views passive income. While the IRS is concerned with the taxable treatment of active versus passive income, and relatedly how some passive income losses may be properly deducted,²⁴⁶ the DHS is primarily concerned with who is authorized to work in the United States and compete against domestic sources of labor.²⁴⁷

1. Passive Income Under the Immigration and Nationality Act

In construing the Immigration and Nationality Act (“INA”), courts and the DHS (or previously the Immigration and Naturalization Service) defined the term “unauthorized employment” broadly—even including some unpaid positions such as internships or work with religious entities.²⁴⁸ There is, however, caselaw construing the INA that allows for some types of income-

Still Facing NIL Challenges, ESPN (Mar. 31, 2023, 8:00 AM), https://www.espn.com/college-sports/story/_/id/36007358/ncaa-international-athletes-facing-nil-challenges [<https://perma.cc/9BGY-22UN>] (quoting immigration lawyers Ksenia Maiorova and Amy Maldonado who stated, “[E]ven meticulous proof that an athlete didn’t perform any work while in the United States could be overlooked by an officer in a consular hearing about future visas or resident status. If the officer misunderstands a passive NIL deal and rules against an athlete, those decisions cannot be appealed or overturned.”).

244. *International Student Athletes and NCAA “Name, Image, and Likeness” (NIL) Legislation*, UNIV. OF FLA. INT’L CTR., <https://internationalcenter.ufl.edu/f-1-student/f-1-status-requirements/employment/international-student-athletes-and-ncaa-nil-legislation> [<https://perma.cc/E2F5-VF9Z>].

245. The Form I-94 is the official entry/departure record for international travelers. See *Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance*, U.S. CUSTOMS & BORDER PROT., <https://i94.cbp.dhs.gov/I94/#/home> [<https://perma.cc/LC4L-CNMQ>].

246. See *supra* note 182 and accompanying text.

247. See, e.g., 8 C.F.R. § 274a.12(a) (2022) (listing visa classes eligible for employment authorization).

248. SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY § 8:28, Westlaw (last updated 2023).

generating opportunities if they are passive in nature.²⁴⁹ This caselaw, coupled with the IRC's definition of passive income,²⁵⁰ provides some guidance, if only by analogy, as to what types of NIL activities may be permissible for students on F-1 visas.

In a series of cases from the 1970s, 1980s, and 1990s, the courts and the Board of Immigration Appeals ("BIA") have provided some guidance as to what constitutes a valid exception to the definition of unauthorized employment.²⁵¹ These cases largely deal with nonimmigrants present in the United States on investor visas, or who had previously sought investor visas,²⁵² so their applicability to the NIL issue may be limited. Even so, the underlying rationale from the previous cases is that activity which is seen as generating *passive income*, such as seeking a return on invested capital, is not unauthorized employment, whereas active "work" or "labor" would be unauthorized employment.²⁵³ From these cases, along with an analysis of the IRC, some common principles can be derived which should be used in guiding a decision into whether NIL activity is passive, and therefore permitted, or active, and therefore unauthorized employment.

In *In re Lett*,²⁵⁴ the BIA in 1980 held that when a qualified investor manages his or her investment, that activity is not unauthorized employment as it would be deemed exempt from a labor certification requirement.²⁵⁵ One year later in *Bhakta v. INS*,²⁵⁶ the Ninth Circuit held that the owner-operator of a motel did not engage in unauthorized employment as his work existed "solely

249. See, e.g., *Lauvik v. Immigr. & Naturalization Serv.*, 910 F.2d 658, 661 (9th Cir. 1990) (allowing investor to engage in some work to protect value of capital investment).

250. See 26 U.S.C. § 469 (2022); *supra* Part III.

251. See *Bhakta v. Immigr. & Naturalization Serv.*, 667 F.2d 771, 773 (9th Cir. 1981) (holding that an owner/operator of a business was not "employed" in violation of his visa status); *In re Lett*, 17 I. & N. Dec. 312, 313 (B.I.A. 1980) (holding that for "a qualified investor of an enterprise with capital exceeding \$40,000 and with qualified employees, his management work does not constitute employment"); *Patel v. Immigr. & Naturalization Serv.*, 811 F.2d 377, 383 n.15 (7th Cir. 1987) (noting "[m]anagement of a business which forms the basis for an investor application ordinarily is not considered to be unauthorized employment"); *Lauvik*, 910 F.2d at 658 (concerning a treaty investor permitted to engage in labor consistent with the protection of his investment in a business); *In re Ahmad*, 15 I. & N. Dec. 81, 83 (B.I.A. 1974) ("In many instances a bona fide investor will properly be able to engage in activities of a skilled or unskilled nature.").

252. *Bhakta*, 667 F.2d at 771 (business investor visa previously denied); *Lett*, 17 I. & N. Dec. at 3 (business investor); *Patel*, 811 F.2d at 383 n.15 (citing to *Bhakta*); *Lauvik*, 910 F.2d at 659 (treaty investor); *Ahmad* (business investor).

253. See, e.g., *Cheung v. Dist. Dir.*, 641 F.2d 666, 670 (9th Cir. 1980) (holding that a self-employed optometrist's income derived primarily from labor, not capital investment); *In re Udagawa*, 14 I. & N. Dec. 578, 581–82 (B.I.A. 1974) (holding that a tempura chef who had not invested any of his own funds in a business and provided some unskilled labor could not qualify as a treaty investor and would therefore require a visa which would grant him work authorization).

254. 17 I. & N. Dec. 312 (B.I.A. 1980).

255. *Id.* at 312.

256. *Bhakta*, 667 F.2d at 773.

because of [his] investment capital and the business acumen required to manage a successful enterprise.”²⁵⁷ Nine years after that, the Ninth Circuit reaffirmed the holding from *Bhakta* in *Lauvik v. INS*. The Ninth Circuit noted that while Mr. Lauvik performed some menial tasks in a motel/trailer park that he had acquired for investment, his actions were primarily to direct, manage, and protect his investment, and, therefore, those actions did not constitute unauthorized employment.²⁵⁸ Under this line of cases, management of investments, even when it involved some ancillary work-like activity, has been approved as passive activity for immigration purposes.

In contrast to those decisions which found control and direction of capital investments to be passive income for immigration purposes, other nonimmigrants were found to have crossed that line.²⁵⁹ In *Wettasinghe v. United States*,²⁶⁰ a student on an F-1 visa was held to have engaged in unauthorized employment when he purchased a fleet of ice cream trucks, leased the trucks to others, and then purchased the ice cream and stocked the trucks daily.²⁶¹ Distinguishing the case from *Bhakta*, the Sixth Circuit held that Mr. Wettasinghe’s activity in his ice cream business was “more than an investor-manager.”²⁶² The Sixth Circuit in *dicta* stated:

The prohibition against unauthorized employment for students does not serve the same purposes as that relating to status adjustments. Aliens with student status are forbidden to work in order to insure that those who seek entry into the country to pursue educational opportunities in fact do so full time. The protection of American labor is not the primary goal of that provision.”²⁶³

The lodestar that should be guiding any international college athlete subject to F visa restrictions in assessing a prospective NIL deal entered into in the United States is whether the income generated by the activity will be properly characterized as passive or active.²⁶⁴

257. *Id.*

258. *Id.*

259. *Wettasinghe v. United States*, 702 F.2d 641, 642 (6th Cir. 1983); *Yiu Tsang Cheung v. Immigr. & Naturalization Serv.*, 641 F.2d 666, 670 (9th Cir. 1981) (holding that an optometrist who competed in the labor market engaged in unauthorized employment as “[l]abor, not capital, [was] the mainstay of his profession”).

260. 702 F.2d 641 (6th Cir. 1983).

261. *Id.* at 642. Mr. Wettasinghe also occasionally drove the trucks if no drivers were available that day. *Id.*

262. *Id.*

263. *Id.*

264. *See, e.g.*, Robert J. Romano & Denise Kamyuka, *Understand How F-1 Visas Impact NIL for International Student-Athletes*, 19 COLL. ATHLETICS & L. 1, 1 (2022). One way to structure passive income is to make it “home facing” so that the athlete earns their money outside of the United States. *Id.* at 9.

2. Defensible Approaches

Without additional guidance from USCIS, it is impossible to propose a structure by which F visa holders may earn NIL income in the United States subject to nonzero risk that a subsequent USCIS adjudicator or consular officer may disagree with the characterization. But there is a path forward, explored in this section, that is legally defensible.²⁶⁵

While immigration law has focused on the ownership of capital and the related capital gains in assessing passive income, the IRC generally classifies royalty income²⁶⁶ from a foreign source as passive.²⁶⁷ An international college athlete may create a foreign-held corporation or business entity in their home country to which all NIL rights are assigned in part or whole. Ideally, the entity will be managed by an agent on behalf of the athlete. This agent may be empowered to negotiate and execute NIL deals on behalf of the international college athlete. Additionally, the international college athletes, while in their home countries, could create a series of stock photos, NFTs, and/or videos and then transfer those intellectual properties (“IP”) to their company for licensing opportunities (exclusive or otherwise).

Provided the international college athlete is not engaged in the creation of any content while in the United States, and has assigned his or her rights in the IP to the company in the home country, such activity should not be considered unauthorized employment under the INA.

D. *Structuring Deals Requiring Social Media Marketing in the United States*

Some international athletes are being advised that social media work is passive and permissible so long as payment is made to a foreign-controlled entity established in the athlete’s home country.²⁶⁸ This approach is extraordinarily risky and generally inadvisable. It may be argued that the athlete is engaging in nominal activity (e.g., retweeting on Twitter does not require a great deal of energy or involvement), but this ignores the law: work is taking place in the United States and compensation is being paid for services rendered in the U.S., regardless of the fact that actual payment is being sent abroad.²⁶⁹

265. Any international college athlete considering this structure should inform their school pursuant to any school-specific NIL policy and seek independent legal advice.

266. It is important that the F visa holder consult counsel to determine if an applicable tax treaty between the United States and their home country could impact characterization of any royalties. Tax treaties may afford substantial benefits to nonresident aliens on F visas in the United States but may also impact the ability to generate passive NIL income.

267. *Am. Air Liquide Inc. v. Comm’r*, 45 F. App’x 721, 721 (9th Cir. 2002).

268. *See Maguire, supra* note 239.

269. Advisers would do well to note the strong language used by the court in *Wettasinghe* construing very narrowly an F-1 student’s opportunity to work, and noting the public policy in support of its interpretation. *Wettasinghe v. United States*, 702 F.2d 641, 641 (6th Cir. 1983).

In April 2022, Forbes reported that Irish college athlete Sam Alajiki signed a four-figure endorsement deal with NextUpRecruitment.²⁷⁰ It was reported that NextUpRecruitment, a U.K. company, would be paying Mr. Alajiki in British currency to and from an account in the U.K.²⁷¹ Mr. Alajiki agreed to promote NextUpRecruitment across social media and provide content for NextUpRecruitment's TikTok account.²⁷² Mr. Cook, founder of NextUpRecruitment stated, "He's literally going to be retweeting content. There's no way that can be deemed as work."²⁷³

This approach may ostensibly adhere to F visa limitations, at least according to Mr. Cook, but it ignores the economic substance of the transaction: the intention of both parties is for Mr. Alajiki to promote NextUpRecruitment from within the United States. If he is creating TikTok content in exchange for pay while in the United States, it is very likely his work would require employment authorization.²⁷⁴ Unlike the B-1 visa, which allows holders to engage in the more amorphous concept of "business" (though not "skilled or unskilled labor"),²⁷⁵ the law and regulations for the F visa stipulate the only avenues for F-1 students to engage in work. While retweeting content may be considered *de minimis* in terms of time, effort, and energy, there is no *de minimis* labor exception under U.S. immigration law, and this is work that could otherwise be done by an individual in the United States with work authorization.²⁷⁶ Even riskier is the creation of content for social media channels. Content creation requires active participation and effort. It is even more clearly work that is not permitted under an F visa unless pursued through one of the approved F-1 visa employment options detailed above.²⁷⁷

Without additional guidance from USCIS, any athlete utilizing this approach should have advisers use extreme scrutiny to assess the legal validity of the approach as well as concerns as to future immigration-related consequences.²⁷⁸

270. Dosh, *Berkeley International*, *supra* note 21. Notably, the deal did not take effect until September 2022. Maguire, *supra* note 239.

271. Dosh, *Berkeley International*, *supra* note 21.

272. *Id.*

273. Maguire, *supra* note 239.

274. *See, e.g.*, 8 C.F.R. § 214.2(f)(9), (10) (2022).

275. *See In re Hira*, 11 I. & N. Dec. 824, 829–30 (B.I.A. 1966) (holding that a tailor who entered the United States to take orders and measurements did not violate the terms of his B-1 visa since the work involved "international trade or commerce and the employment was a necessary incident thereto" and the "principal place of business and the actual place of eventual accrual of profits . . . remain[ed] in the foreign country").

276. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 7.12 (2022) (stating "[t]here is no precedent decision concerning *de minimis* [sic] employment or *nunc pro tun* authorization").

277. *See supra* Part I.A.1–3.

278. Radnofsky, *supra* note 129 (quoting immigration lawyer Amy Maldonado: "Unlike some people, I don't believe that just hanging out and having your photo taken is not work.").

CONCLUSION

The state of affairs for international college athletes attempting to earn money through NIL activity is fraught with uncertainty and will continue to be so until Congress moves to amend existing law or regulation or the USCIS issues guidance through a policy memorandum. Careful adherence to U.S. immigration law and proper representation should allow many international college athletes to take advantage of the new burgeoning billion-dollar field of collegiate NIL activity. For each international athlete attending college in the United States as an F visa holder, there should be an examination of the structure of any potential NIL deal with a close look at potential immigration consequences. The international athlete who entirely avoids NIL deals, engages in NIL activity abroad, and/or respects the importance of receiving only passive income while in the United States, is unlikely to contend with adverse immigration consequences (if done correctly).

Conversely, the risks cannot be overstated for those who choose to structure a deal to be paid abroad while engaging in U.S.-based NIL activity.²⁷⁹ If the athlete is deemed to have violated the terms of the athlete's visa, the athlete may be subject to removal and future adverse immigration consequences.²⁸⁰ Additionally, if a consular officer perceives an inadmissibility issue regarding NIL activity in a future visa application, the officer can simply deny the application, leaving no recourse for the affected individual.²⁸¹ Taken on balance, it is foolish to jeopardize future professional visas to compete in the major leagues in the United States in exchange for short-term NIL income.

279. Eaton-Robb, *supra* note 74 (“Juhasz, who is from Hungary, is among the more than 12% of college athletes in the U.S. from a foreign country If the school finds out that one of their international student-athletes has been doing side jobs, making money off their [NIL], the school is legally obligated to terminate their visa It has drastic consequences.”).

280. *See id.*

281. *See supra* note 142 and accompanying text.