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NIL IS A MULTI-BILLION DOLLAR INDUSTRY BENEFITING ALL COLLEGE ATHLETES, RIGHT?

International College Athletes Have Been Left Out in the Cold

As we enter the fourth year of the new world of college sports with Name, Image, and Likeness ("NIL"), has the NCAA failed a growing minority of international college athletes? Not every athlete celebrated the new NIL landscape, nor can all NCAA athletes benefit from it.

In July of 2021, the NCAA made a landmark change to the collegiate athletics model by allowing athletes to engage in endorsement deals through the use of their NIL. In its first year of NIL, college athletes earned an estimated $917 million in NIL payments, with the industry netting over $1 billion annually in the past two years. However, international athletes have not benefitted correspondingly, as they have been handcuffed by (1) U.S. student visa restrictions, (2) a lack of guidance from the NCCA and or any of the relevant U.S. government agencies, and (3) a lack of federal legislation addressing this topic.

International students make up nearly 13 percent of all Division I NCAA athletes, with more than 20,000 athletes across all NCAA divisions. In sports like men's and women's Division I tennis, over 60 percent of athletes are international. Other sports like men's and women's soccer and men's basketball have seen a recent surge in the number of international athletes competing at the Division I level. The purpose of enacting NIL rights for NCAA athletes was to allow for immediate economic benefit of athletes who generate billions of dollars in revenue for their institutions. International athletes have almost been forced to forfeit this right that has been granted to all U.S. citizen teammates. To international athletes, NIL means "Not for International."

Virtually all foreign college athletes come to the United States on F-1 student visas. These visas permit employment only under limited circumstances. Students on an F-1 visa are not allowed to engage in employment outside of "on-campus" work or other specific programs geared toward career development. None of these exemptions allow for traditional influencer-based NIL activations (8 C.F.R. § 214.2(f)(9)(ii))). Students who engage in unauthorized employment risk violating their F-1 status, which could ultimately prevent them from being able to live and study in the United States.

However, not all avenues to NIL income are closed. Without clear federal guidance on NIL, international athletes have turned to licensing their NIL to businesses in their home country. When the "work" performed is outside of the U.S., U.S. immigration law does not apply. Irish athlete Sam Alajki, who plays basketball for the University of California at Berkley, became one of the first international NCAA athletes to take advantage of this opportunity. A U.K. registered company was able to employ Alajki to endorse their product and paid him in his local currency to an account in the UK. This deal sent shockwaves through the NCAA in 2022.

Sports lawyers and immigration lawyers have to constantly advise international athletes and universities as to what actions are permissible to stay out of the crosshairs of the immigration bureaucracy. The difference between "passive" and "active" income has become a critical element in assessing whether the NIL activity is lawful. "Active" income is barred under the current restrictions of a F-1 visa. "Passive" income is in a gray area. A string of court cases have already addressed this issue on visa holders owning rental properties generating rental income in the U.S. The argument was that "the visa holder was essentially passive, doing nothing, in earning those rental payments." An analogous argument can be made that a foreign athlete licensing their likeness alone in consideration for payment is also passive income. What makes this analysis complex and frustrating, however, is that the passive versus active income analysis does not directly overlay with the "quid pro quo" requirement of the NCAA's bylaws and interim NIL rule. Operating in this "gray area" can be substantially detrimental to international athletes. Unlike their U.S. citizen teammates, international athletes do not enjoy the same due process rights in this context. For example, a Consular Officer abroad may simply deny a student visa based on a determination that the student engaged in unauthorized employment. There are no appellate rights to challenge the denial.

Considering the murkiness of F-1 rules on employment in this context, some foreign college athletes are considering other visa categories in which employment authorization is specifically permitted. Some are opting for O-1 and P-1 visas, which

are more conventional visas for athletes who earn income in the United States.

It is still very unclear for what international athletes may and may not be able to do regarding profiting off their name, image, and likeness. Athletes are eager to hear guidance from the NCAA, USCIS or Congress as to what is to come next. Until then, international athletes should consult with sports and immigration lawyers before jeopardizing the opportunity they've worked their whole life to obtain.