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## Leveling the Playing Field: How to Get International Student-Athletes Paid under Name, Image and Likeness

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# Leveling the Playing Field: How to Get International Student-Athletes Paid under Name, Image, and Likeness

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Table of Contents

I. Introduction .....	349
II. History Preceding NIL: International Student-Athletes Left Behind ...	350
a. O’Bannon, Alston, and state NIL laws .....	350
b. Current lack of NIL applicability for international student-athletes.....	352
III. Visas for International Student-Athletes .....	353
a. Standard student visa options for international student-athletes.....	353
b. F-1 visa permitted off-campus employment options: CPT and OPT.....	354
c. Exceptional non-immigrant visas.....	355
IV. Current Workarounds for International Student-Athletes: Limited and Inconvenient.....	360
V. Solutions: Fine-Tuning Nonimmigrant Visas.....	361
a. Amendments to Part 214 of the CFR: Loosening OPT restrictions for international student-athletes .....	361
b. Rise of the P-1A/O-1A visas? .....	363
VI. NIL: Active or Passive Income? .....	364
a. Defining passive income .....	364
b. Group licensing .....	366
VII. Potential Implications of Loosening Visa Restrictions.....	367
a. National security .....	367
b. Human trafficking .....	368
VIII. Conclusion .....	369

## I. INTRODUCTION

In December of 2010, five Ohio State football players were suspended for the first five games of the 2011 season for selling jerseys, championship rings, and other memorabilia in exchange for cash and free or discounted tattoos from a Columbus tattoo parlor owner.<sup>1</sup> The National Collegiate Athletic Association (NCAA) eventually vacated all wins from Ohio State's 2010 season because of the ineligible players involved in "Tattoogate."<sup>2</sup>

Purported scandals such as "Tattoogate" likely would have never transpired had they occurred in the Name, Image, and Likeness (NIL) era.<sup>3</sup> This is because, as of 2021, most college student-athletes "have a right to control and potentially profit from the commercial use of their name, image, or likeness" such as signing endorsement deals and licensing their identities for use in video games or sports apparel.<sup>4</sup> However, international student-athletes are largely unable to join their teammates in pursuing lucrative NIL ventures because they are precluded by their student visas from pursuing almost all off-campus employment.<sup>5</sup> Any plausible method of getting international student-athletes paid under NIL would require an amendment to federal immigration law as opposed to state NIL legislation. Therefore, the Department of Homeland Security (DHS) should amend Part 214 of the Code of Federal Regulations (CFR), pertaining to nonimmigrant classes, to permit international student-athletes who major in any field related to either sports or business to pursue NIL ventures through Optional Practical Training (OPT).<sup>6</sup>

Part II of this Comment will examine cases that predated the NCAA passing its NIL policy and summarize the current lack of accessibility of NIL opportunities for international student-athletes. Part III will provide an overview of F-1 student visas that most international students possess, explore F-1 visa restrictions precluding international student-athletes from NIL opportunities, and introduce other types of potentially relevant temporary nonimmigrant visas.<sup>7</sup> Part IV will discuss current workarounds

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<sup>1</sup> *Ohio State football players sanctioned*, ESPN (Dec. 23, 2010, 11:51 AM), <https://www.espn.com/college-football/news/story?id=5950873>.

<sup>2</sup> Daniel Chavkin, *Ohio Lawmaker Wants 2010 Ohio State 'Tattoogate' Wins Reinstated Amid NIL Rule*, SPORTS ILLUSTRATED (Mar. 2, 2022), <https://www.si.com/college/2022/03/02/ohio-state-representative-terrelle-pryor-tattoo-vacated-wins-reinstate>.

<sup>3</sup> *Id.*

<sup>4</sup> *College Athlete Name, Image, and Likeness Rights Under the Law*, JUSTIA, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/> (Aug. 2023).

<sup>5</sup> *Students and Employment*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 13, 2020), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment>.

<sup>6</sup> See Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2 (2023).

<sup>7</sup> *Id.* See generally Alicia Jessop, *International Intercollegiate Athletes: A Legal Pathway to Benefit from their Name, Image, and Likeness in the United States*, 52 CAL. W.

available for international student-athletes on F-1 visas to legally pursue NIL ventures and explain why such methods do not sufficiently fix the overall issue.<sup>8</sup> Part V will consider several possible solutions pertaining to visas. The optimal proposal, as previously stated, would be for the DHS to codify carve-outs for majors related to sports and business that would allow F-1 international student-athletes to lawfully partake in NIL ventures as part of permitted OPT off-campus employment.<sup>9</sup> A less preferred resolution analyzes whether having international student-athletes apply for nonimmigrant work visas, such as P-1A and O-1A visas, is viable.<sup>10</sup> Part VI will examine whether all NIL activities constitute employment and if there is a potential opening for international student-athletes to lawfully profit from passive income.<sup>11</sup> Part VII acknowledges potential concerns about national security and human trafficking before concluding that such worries are outweighed by the financial benefits provided to international student-athletes through loosening OPT restrictions.<sup>12</sup> Finally, Part VIII will conclude this Comment by emphasizing the need for codification of OPT carve-outs given that other nonimmigrant visas and current workarounds are largely unhelpful and reiterating that the benefits of such codification override the negligible concerns of national security and human trafficking.

## II. HISTORY PRECEDING NIL: INTERNATIONAL STUDENT-ATHLETES LEFT BEHIND

### *a. O'Bannon, Alston, and state NIL laws*

The NCAA, the governing body overseeing most universities and their collegiate athletics programs, generates massive amounts in revenue annually; however, the NCAA restricts student-athletes from receiving compensation tied to such earnings.<sup>13</sup> The NCAA has historically justified this stance by categorizing student-athletes as amateurs, defining

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INT'L L.J. 309, 329–30 (2022) (discussing whether the P-1A and O-1A visas are potential options for international student-athletes).

<sup>8</sup> See generally Ashley J. Beth, *International Student-Athletes Lose Out in NIL Era*, INSIDE COMPLIANCE (Dec. 8, 2021), <http://blogs.luc.edu/compliance/?p=4325> (explaining that international student-athletes may participate in NIL opportunities abroad, although they are more limited).

<sup>9</sup> See *Students and Employment*, *supra* note 5.

<sup>10</sup> See Victoria J. Haneman & David P. Weber, *The Abandonment of International College Athletes by NIL Policy*, N.C. L. REV. 1 (forthcoming Aug. 2022).

<sup>11</sup> See generally Beth, *supra* note 8 (arguing that passive NIL income is not explicitly forbidden).

<sup>12</sup> See generally *Post-9/11*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/post-911> (discussing formation of U.S. Citizenship and Immigration Services agency, which oversees lawful immigration, following 9/11 terrorist attacks); see generally Jessop, *supra* note 7 (discussing “bad actors” who traffic international students through F-1 visas).

<sup>13</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1083 (9th Cir. 2015).

amateurism as “someone who does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport.”<sup>14</sup> As amateurs, student-athletes were only allowed to receive academic scholarships that covered up to full-tuition; however, in 2015, the Ninth Circuit Court in *O’Bannon v. National Collegiate Athletic Ass’n* recommended that the NCAA allow for scholarships to cover the entire cost of attendance, including tuition, room and board, books, and other fees.<sup>15</sup> Yet other forms of compensation not tied to education remained forbidden, and student-athletes, such as those involved in “Tattoogate,” continued to be sanctioned for receiving improper benefits.

The landscape of student-athlete compensation changed in 2021. Following *O’Bannon*, many lawsuits emerged challenging the NCAA amateurism model and were consolidated into *National Collegiate Athletic Association v. Alston*.<sup>16</sup> In *Alston*, the U.S. Supreme Court affirmed the holding from the United States District Court for the Northern District of California that NCAA limitations on student-athlete educational compensation were a violation of the Sherman Antitrust Act, thus solidifying the holding in *O’Bannon*.<sup>17</sup> The Court did not analyze whether limitations on compensation unrelated to education should also be lifted; however, Associate Justice Brett Kavanaugh wrote in a concurrence that the NCAA’s non-education-related compensation rules would also be likely to be found to violate the Sherman Act.<sup>18</sup>

The *Alston* decision came in the wake of many states already having passed laws legalizing NIL payments to athletes: California was the first state to pass such a law back in 2019, with Senate Bill 206 making it “illegal for the NCAA universities to prohibit third parties from paying college athletes for use of their NILs in endorsements, sponsorships and other appearances.”<sup>19</sup> With the passage of state NIL laws coupled with the *Alston* ruling, the NCAA was essentially pressured to adopt an interim NIL policy, effective as of July 1, 2021.<sup>20</sup> Under this policy, most but not all

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<sup>14</sup> Andrew H. King, *Name, Image, and Likeness in US College Athletics: One Year Later*, NAT’L L. REV. (July 11, 2022), <https://www.natlawreview.com/article/name-image-and-likeness-us-college-athletics-one-year-later>.

<sup>15</sup> 802 F.3d at 1053.

<sup>16</sup> Judith Araujo & J. Nicci Warr, *A Dollar and a Dream: Student-Athlete Compensation in the Aftermath of U.S. Supreme Court’s Alston Decision*, JD SUPRA (Oct. 7, 2021), <https://www.jdsupra.com/legalnews/a-dollar-and-a-dream-student-athlete-2056263/>.

<sup>17</sup> Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2152 (2021).

<sup>18</sup> Araujo & Warr, *supra* note 16.

<sup>19</sup> J. Brady McCollough, *Think NIL blew up college sports? California is going for the knockout with new bill*, L.A. TIMES (May 16, 2022), <https://www.latimes.com/sports/story/2022-05-16/nil-college-sports-california-bill-ncaa>.

<sup>20</sup> 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>.

student-athletes can earn money for signing autographs, sign sponsorship or endorsement deals, and even profit off jerseys sold which bear their name.<sup>21</sup>

*b. Current lack of NIL applicability for international student-athletes*

Presently, international student-athletes are largely unable to benefit from NIL.<sup>22</sup> NIL legislation is state-dependent, meaning that student-athletes must comply with state law when participating in NIL activities.<sup>23</sup> By contrast, student visas, which are required for international student-athletes to come to the United States, are a product of federal immigration law.<sup>24</sup> It is not the NIL legislation itself that prohibits international student-athletes from being entitled to compensation; rather, international student-athletes are largely being preempted from NIL opportunities due to their student visas. There are some international student-athletes that do not hold student visas but instead have green cards, which enable them to profit from NIL because they can permanently work and live in the United States; however, this group pales in comparison to most international student-athletes, who are on nonimmigrant visas.<sup>25</sup>

As of 2019, 12.4% of NCAA student-athletes are international, with some sports comprising an even higher international student-athlete proportion, such as tennis (60%), men's soccer (over a third), and women's golf (one-third).<sup>26</sup> During the 2019-2020 season, the NCAA reported over 20,000 international student-athletes, illustrating the considerable number of individuals that are restricted from receiving monetary benefits provided through NIL.<sup>27</sup> Furthermore, the median compensation between July 1 and November 30 (a five-month period) of 2021 for NCAA Division I student-athletes who were able to land NIL deals was \$1,256, indicating that international student-athletes are potentially missing out on thousands of dollars per capita, if not more.<sup>28</sup>

The consequences of attempting to participate in NIL as an international student-athlete are potentially catastrophic. University of

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<sup>21</sup> King, *supra* note 14.

<sup>22</sup> See Jessop, *supra* note 7, at 312.

<sup>23</sup> Hosick, *supra* note 20.

<sup>24</sup> *Students and Employment*, *supra* note 5.

<sup>25</sup> 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/>.

<sup>26</sup> Matthew La Corte & Nguyen Vo, *March Madness, immigration edition: New NCAA rules let student-athletes earn cash, but foreign players are in limbo*, NISKANEN CENTER (March 17, 2022), <https://www.niskanencenter.org/march-madness-immigration-edition-new-ncaa-rules-let-student-athletes-earn-cash-but-foreign-players-are-in-limbo/>.

<sup>27</sup> See Jessop, *supra* note 7, at 320.

<sup>28</sup> See Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall*, U.S. NEWS & WORLD REPORT (Dec. 24, 2021), <https://www.usnews.com/news/us/articles/2021-12-24/foreign-college-athletes-left-out-of-rush-for-nil-windfall>.

Connecticut women's basketball forward Dorka Juhasz of Hungary noted that she and her fellow foreign teammates were advised not to partake in any NIL ventures because "[i]f the school finds out that one of their international student-athletes has been doing side jobs, making money off their name, image or likeness, the school is legally obligated to terminate their visa."<sup>29</sup> Furthermore, the Student and Exchange Visitors Program (SEVP) has not been helpful in clarifying this issue: on July 19, 2021, the SEVP claimed that it would continue to "assess the issue of F and M international student athletes receiving compensation for the use of their name, image and likeness" and provide updates after "monitor[ing] current and pending state and federal legislation" on NIL; however, the SEVP has not provided a follow-up, thus leaving international student-athletes to fend for themselves.<sup>30</sup> This lack of guidance further proves the urgency for the DHS to take action through codifying major-related exemptions to explicitly detail which international student-athletes can profit off of NIL. Such codification is especially necessary considering that most international student-athletes are on the F-1 visa, which places heavy restrictions on students seeking off-campus employment such as NIL activities.

### III. VISAS FOR INTERNATIONAL STUDENT-ATHLETES

#### *a. Standard student visa options for international student-athletes*

Each international student is generally required to obtain a student nonimmigrant visa, either an F-1 or an M-1 visa, before entering the United States to matriculate into an American university.<sup>31</sup> The vast majority of international student-athletes are on F-1 visas, given that M-1 visas are typically reserved for vocational programs as opposed to educational institutions that are under the NCAA.<sup>32</sup> Under the F-1 visa, an international nonimmigrant must enroll as a full-time student in an educational program at a school approved by the SEVP, which is a division of and is regulated by the Immigration & Customs Enforcement (ICE).<sup>33</sup> The student must also either prove fluency in English or enroll in English proficiency courses, in addition to having sufficient funds for self-support and a permanent residence abroad during the duration of the visa.<sup>34</sup>

During their first year on campus, international students are prohibited by their F-1 visas from working any off-campus job and are only permitted

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<sup>29</sup> *Id.*

<sup>30</sup> Robert Law, *Can Foreign Student Athletes Cash in on Name, Image, and Likeness Deals?*, CENTER FOR IMMIGRATION STUDIES (Mar. 17, 2022), <https://cis.org/Law/Can-Foreign-Student-Athletes-Cash-Name-Image-and-Likeness-Deals>.

<sup>31</sup> *Students and Employment*, *supra* note 5.

<sup>32</sup> *See* Law, *supra* note 30.

<sup>33</sup> *Id.*

<sup>34</sup> *Students and Employment*, *supra* note 5.



to work on-campus, so long as such employment does not exceed 20 hours per week.<sup>35</sup> On-campus employment is restricted to either providing direct student services on the school's premises (i.e., working at a cafeteria or school bookstore) or working at an off-campus location educationally affiliated "with the school's established curriculum or related to contractually funded research projects at the post-graduate level."<sup>36</sup>

In the second year onward, students are permitted to obtain off-campus employment only if it directly relates to their course of study or if severe economic hardship can be proven.<sup>37</sup> For the direct relation requirement to be satisfied, students must utilize skills and knowledge developed through their major area of study in their off-campus job.<sup>38</sup> According to the SEVP, the direct relation requirement "is longstanding and meant to ensure that the employment experience supplements the individual's educational pursuits."<sup>39</sup>

*b. F-1 visa permitted off-campus employment options: CPT and OPT*

There are two main types of permitted off-campus employment: Curricular Practical Training (CPT) and Optional Practical Training (OPT).<sup>40</sup> CPT is a full-time or part-time work-study or internship opportunity for international students currently in school; such training must be both directly related to the student's academic major and "an integral part of the school's established curriculum," meaning that CPT is required as opposed to supplemental training.<sup>41</sup> Students are permitted to work under multiple employers if they obtain CPT authorizations for each specific employer, though students who fulfill one year of full-time CPT lose OPT eligibility for the duration of their F-1 visas.<sup>42</sup> OPT is also temporary employment that directly relates to a student's area of study and can be applied either pre- or post-graduation; however, students are restricted to 12 months of OPT, with a 24-month extension applicable for students studying science, technology, engineering, or mathematics

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<sup>35</sup> La Corte & Vo, *supra* note 26.

<sup>36</sup> 8 C.F.R. § 214.2(f)(9)(i).

<sup>37</sup> 8 C.F.R. § 214.2(f)(9)(ii).

<sup>38</sup> *OPT (Optional Practical Training)*, THE OFFICE OF INTERNATIONAL AFFAIRS | THE UNIVERSITY OF CHICAGO (2022), <https://internationalaffairs.uchicago.edu/page/opt-optional-practical-training>.

<sup>39</sup> *Practical Training - Determining a Direct Relationship Between Employment and a Student's Major Area of Study*, STUDENT AND EXCHANGE VISITOR PROGRAM (Sept. 27, 2019), <https://www.ice.gov/doclib/sevis/pdf/optDirectlyRelatedGuidance.pdf>.

<sup>40</sup> *Students and Employment*, *supra* note 5.

<sup>41</sup> *See F-1 Curricular Practical Training*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2019), <https://studyinthestates.dhs.gov/sevis-help-hub/student-records/fm-student-employment/f-1-curricular-practical-training-cpt>.

<sup>42</sup> *Id.* Part-time CPT does not influence OPT eligibility.

(STEM).<sup>43</sup>

When comparing CPT and OPT, CPT may appear more favorable at first since part-time CPT is not restricted to 12 months, meaning that student-athletes hypothetically could use CPT up until graduation.<sup>44</sup> Yet OPT would be the only possible pathway for international student-athletes seeking NIL opportunities, because unlike CPT, training under OPT does not need to be “an integral part of the school’s established curriculum.”<sup>45</sup> Regardless, ICE does not appear to deem NIL endorsement deals as directly related to an international student-athlete’s major area of study even if the student majored in marketing, sports management, or some other business-related discipline.<sup>46</sup> Thus, the fact that ICE currently does not allow even international student-athletes who major in such fields to partake in NIL opportunities indicates the necessity of the DHS to codify carve-outs for such majors for purposes of pursuing NIL through OPT. As currently constructed, however, neither CPT nor OPT are applicable to international student-athletes seeking NIL opportunities.<sup>47</sup>

*c. Exceptional non-immigrant visas*

There are several categories of temporary visas reserved for those who possess extraordinary athletic abilities, namely the P-1A and O-1A visas.<sup>48</sup> Nonimmigrants can study full-time on P-1A and O-1A visas, meaning that international student-athletes who qualify for such visas can switch over from F-1 to P-1A or O-1A classification without affecting their eligibility to study at American universities.<sup>49</sup>

P-1A nonimmigrant visas are granted to temporary workers who are coming to the United States “solely for the purpose of performing at a specific athletic competition.”<sup>50</sup> Despite concerns that adjudicators would deny student-athletes of P-1A visas because they are not “solely” playing

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<sup>43</sup> *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 14, 2022), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students>.

<sup>44</sup> *F-1 Curricular Practical Training (CPT)*, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> *See generally* Jessop, *supra* note 7, at 321–22 (conceding that NIL generally does not constitute practical training relating to a course of study).

<sup>47</sup> *Id.*

<sup>48</sup> *P-1-A Athlete*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 26, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/p-1-a-athlete>; *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 20, 2022), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement>.

<sup>49</sup> *See Nonimmigrants: Who Can Study?*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 2018), <https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf>. While students on F and M visas are only allowed to attend SEVP-certified institutions, those on O and P visas are permitted to attend schools while on such visas. *Id.*

<sup>50</sup> *Id.*

sports if they are also attending college, several NCAA athletes have already been successful in obtaining such visas because they were able to prove exceptional abilities in their respective sports.<sup>51</sup> P-1A visas allow nonimmigrant individual athletes to come to America for five years, which would be enough time to cover an international student-athlete's entire tenure at the college level.<sup>52</sup> P-1A visas can also be renewed once to extend the duration to 10 years if holders were to continue their athletic careers at the professional level, with such visas being common at the professional level for team sports such as hockey, basketball, baseball, football, and soccer.<sup>53</sup>

To prove eligibility, athletes must be internationally recognized, which can be demonstrated by “a high level of achievement in a [sport] 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.”<sup>54</sup> Such a requirement appears to be a very difficult burden for entering student-athletes to meet. Additionally, the “level of viewership, attendance, revenue, and major media coverage of the events” are factors that may be dispositive of international recognition.<sup>55</sup>

P-1A applicants must submit two of the following pieces of documentation to successfully obtain such visas:

- (i) Evidence of having participated to a significant extent in a prior season with a major United States sports league;
- (ii) Evidence of having participated in international competition with a national team;
- (iii) Evidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition;
- (iv) A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized;
- (v) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is

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<sup>51</sup> Haneman & Weber, *supra* note 10, at 22.

<sup>52</sup> *The P-1A Visa: 5 Things Athletes Need to Know*, GALSTYAN LAW FIRM, <http://www.galstyanlaw.com/insights/the-p-1a-visa-5-things-athletes-need-to-know/>.

<sup>53</sup> *P1 Visa – Athletes & Artists*, IMMIGRATION ATTORNEY SAN ANTONIO, <https://www.immigrationattorney.us.com/visa-usa/other-visas/p1-visa-athletes-artists/>; *U.S. Visa Options for an Athlete*, IMMIGRATION & NATIONALITY LAW ATTORNEYS | LEIBL AND KIRKWOOD PC, <https://usimmigrationlaw.net/athletes-2/>.

<sup>54</sup> Special requirements for admission, extension, and maintenance of status, 8 C.F.R. § 214.2(p)(3).

<sup>55</sup> 2 U.S. Citizenship & Immigr. Servs., USCIS Policy Manual pt. N, ch. 2 (2022), <https://www.uscis.gov/policy-manual/volume-2-part-n-chapter-2>.

internationally recognized;

(vi) Evidence that the individual or team is ranked if the sport has international rankings; or

(vii) Evidence that the alien or team has received a significant honor or award in the sport.<sup>56</sup>

Given these requirements, the P-1A visa could have potential applicability for some international student-athletes entering their sophomore year and above, as they would have participated for their respective sports teams during their freshman year. However, it may be difficult for many international student-athletes to find an additional document required to qualify for P-1A visas. Furthermore, incoming international student-athletes would find the process even more cumbersome relative to returning student-athletes because the first documentation option would not be available to them.

O-1A visas are another option for nonimmigrants, specifically those who display “extraordinary ability in the sciences, education, business, or athletics.”<sup>57</sup> The O-1A visa has stricter eligibility requirements compared to the P-1A visa, given that applicants must “demonstrate extraordinary ability by sustained national or international acclaim,” with such ability “indicating that [applicants] are one of the small percentage who have arisen to the very top of the field.”<sup>58</sup> Applicants must provide supporting documentation to prove such ability, which can be evinced through receiving a major internationally recognized award.<sup>59</sup> In the absence of an award, applicants must provide at least three forms of documentation listed below:

(1) Documentation of the alien’s receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien’s work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

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<sup>56</sup> 8 C.F.R. § 214.2(p)(4)(ii)(B)(2).

<sup>57</sup> *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, *supra* note 48.

<sup>58</sup> *Id.*

<sup>59</sup> 2 U.S. Citizenship & Immigr. Servs., USCIS Policy Manual pt. M, ch. 4 (2022), <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#S-C>.

- (4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
- (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
- (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
- (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; and
- (8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.<sup>60</sup>

Fulfilling the requirements for O-1A visas would be even more difficult for international student-athletes than qualifying for P-1A visas due to the emphasis on proving extraordinary ability as opposed to mere international acclaim, which is evinced by the greater quality and quantity of supporting documentation required.<sup>61</sup> Furthermore, the high salary requirement would also be difficult to satisfy given that athletes are not allowed to earn salaries under current NCAA rules.<sup>62</sup>

Yet for the select few international student-athletes who display extraordinary ability in their respective sports, the O-1A visa could be viable. Former University of Kentucky men's basketball forward Oscar Tshiebwe, originally from the Democratic Republic of Congo, applied for an O-1A visa in advance of his senior season, though it was not disclosed at the time whether his application was successful.<sup>63</sup> It is possible that Tshiebwe provided supporting evidence to satisfy the first and second prongs since he was the reigning Naismith Player of the Year, awarded to the best NCAA basketball player in a given season.<sup>64</sup> Regarding the final prong of commanding a high salary, Tshiebwe chose to return to Kentucky rather than enter the NBA Draft as a projected second-round selection, making him the first Naismith award winner to play another season in

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<sup>60</sup> 8 C.F.R. § 214.2(o)(3)(iii)(B).

<sup>61</sup> See *U.S. Visa Options for an Athlete*, *supra* note 53 (commenting that Wayne Gretzky, Ronaldo, and Annika Sorenstam would be appropriate examples of athletes eligible for O-1A visas).

<sup>62</sup> King, *supra* note 14.

<sup>63</sup> See Madison Williams, *Kentucky Star Oscar Tshiebwe to Make \$500,000 in NIL Deals on Weeklong Bahamas Trip, per Report*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/oscar-tshiebwe-bahamas-nil-deals> (commenting that Tshiebwe awaited approval on his O-1 visa application).

<sup>64</sup> *Id.*

college since 2008.<sup>65</sup> However, even though this draft projection may be an indication that Tshiebwe may someday earn a high salary, this evidence may be considered speculative and insufficient to make up for his lack of a salary while playing collegiate basketball.

Hansel Enmanuel, a guard for the Northwestern State University men's basketball team who hails from the Dominican Republic, was successful in his application for an O-1A visa, likely making him the first athlete to qualify for such a visa at the NCAA level.<sup>66</sup> Enmanuel was a three-star recruit (out of a maximum of five stars) coming out of high school, which normally would not signal extraordinary athletic ability in basketball required for an O-1A visa; however, Enmanuel overcame having his left arm amputated after a childhood accident to make it to the collegiate level, thus likely satisfying prong five.<sup>67</sup> Furthermore, as the subject of an ESPN documentary and various other broadcasting outlets' news stories, Enmanuel proved that he received major media coverage, thus satisfying prong three.<sup>68</sup> Finally, Amy Maldonado, Enmanuel's attorney, was able to show that Enmanuel commanded a high salary, thus satisfying prong eight, through submitting contractual evidence in the form of "an NIL deal that he had from a very big name" that she did not disclose at the time of the application.<sup>69</sup> Maldonado also asserted that she used an "article about [Enmanuel's] valuation to support the fact that he would command a high salary": at the time, Enmanuel's NIL valuation was approximately \$1.4 million, which ranked in the top ten of athletes at the high school and college levels; however, it is unlikely that this valuation number alone would have been sufficient for Enmanuel's application.<sup>70</sup> This valuation

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<sup>65</sup> Kevin Sweeney, *Oscar Tshiebwe, Reigning National Player of the Year, Returning to Kentucky*, SPORTS ILLUSTRATED (Apr. 20, 2022), <https://www.si.com/college/2022/04/20/oscar-tshiebwe-kentucky-basketball-return-nba-draft>; *NBA Draft Scouting Report: Oscar Tshiebwe*, SPORTS ILLUSTRATED (Dec. 3, 2022), [https://www.si.com/nba/draft/prospect-profiles/nba-draft-scouting-report-oscar-tshiebwe#gid=ci02b1db5230002605&pid=usatsi\\_19527711](https://www.si.com/nba/draft/prospect-profiles/nba-draft-scouting-report-oscar-tshiebwe#gid=ci02b1db5230002605&pid=usatsi_19527711).

<sup>66</sup> Steven McAvoy, *Hansel Enmanuel obtains historic O-1 visa for NIL-related opportunities*, THE NIL DEAL (Oct. 21, 2022), Hansel Enmanuel obtains historic O-1 visa | The NIL Deal (nildealnow.com). Enmanuel's attorney, Amy Maldonado, is unaware of the outcome of Oscar Tshiebwe's O-1A application and hence believes that her client is the first NCAA international student-athlete to obtain an O-1A visa specifically for purposes of NIL ventures.

<sup>67</sup> ZK Goh, *The inspirational story of Hansel Enmanuel, the one-armed D1 college basketball player*, OLYMPICS (Mar. 31, 2023, 8:45 AM), <https://olympics.com/en/news/hansel-enmanuel-d1-college-basketball>.

<sup>68</sup> McAvoy, *supra* note 66.

<sup>69</sup> See NCAA, *The Wild World of College NIL Deals: Who is what and how much did they get?*, MARCA, *The Wild World of College NIL Deals: Who is what and how much did they get?* | Marca. Since qualifying for his O-1A visa, Enmanuel has since inked NIL deals with T-Mobile and Adidas, with one of these deals likely being the corroborating evidence that Maldonado used to show that Enmanuel has earned a high salary.

<sup>70</sup> *Id.*

number is determined algorithmically by amassing data points through three main categories: (1) on-field performance, (2) social media, and (3) overall exposure, which takes into account in-game performances, media exposure, and market size of NIL Collectives, among other factors.<sup>71</sup>

It should be noted that Enmanuel's circumstances were unique compared to those of nearly all other international student-athletes, who therefore would likely be unable to replicate Enmanuel's success in obtaining O-1A visas. Furthermore, granting O-1A visas to many international student-athletes would dilute the meaning of extraordinary ability.

P-1A and O-1A visas cannot feasibly serve as a blanket solution for international student-athletes because of their high barriers to entry; hence, the need for codification of major-related carve-outs to allow for international student-athletes to pursue NIL-related ventures under OPT is even more evident. This necessity is highlighted by the fact that current workaround options for international student-athletes are very limited in scope and applicability.

#### IV. CURRENT WORKAROUNDS FOR INTERNATIONAL STUDENT-ATHLETES: LIMITED AND INCONVENIENT

With the federal government serving as the ultimate arbiter determining whether NIL activities undertaken by international student-athletes are grounds for deportation, schools have differing policies and interpretations. Some universities, such as Drexel University and West Virginia University, initially recommended for their international student-athletes to not pursue any NIL opportunities due to fear of jeopardizing their F-1 visa statuses.<sup>72</sup> Yet many other schools have permitted their international students to partake in NIL so long as they do so in their home countries.<sup>73</sup> For example, the University of Florida affirms that international student-athletes can receive monetary compensation for services performed for an American company while they are at home during an academic break; however, Florida mandates documentation of students' physical locations through an "I-94 with Travel History, flight itinerary, and port of entry stamp showing abroad."<sup>74</sup> International student-athletes should have no issue pursuing NIL in their home countries, given that employment

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<sup>71</sup> Shannon Terry, *About On3 NIL Valuation, Brand Value, Roster Value*, ON3 NIL (July 29, 2022), <https://www.on3.com/nil/news/about-on3-nil-valuation-per-post-value/>.

<sup>72</sup> See Ken Maguire, *'It's all legal': Foreign college athletes cash in at home*, AP NEWS (May 30, 2022, 12:35 AM), <https://apnews.com/article/college-football-sports-nebraska-cornhuskers-7bfc7f0e983ca10b22e3078ac212bf08>.

<sup>73</sup> *Id.*

<sup>74</sup> *International Student Athletes and NCAA "Name, Image, & Likeness" (NIL) Legislation*, INT'L CENTER UNIV. OF FLA., <https://internationalcenter.ufl.edu/f-1-student/f-1-status-requirements/employment/international-student-athletes-and-ncaa-nil-legislation>.

authorization regulations focus on labor based in the United States.<sup>75</sup>

Yet policies that only allow NIL in home countries under strict protocols are very cumbersome for international student-athletes on F-1 visas.<sup>76</sup> For instance, University of Miami football punter Lou Hedley flew nearly 13,000 miles from South Florida to his hometown in Western Australia to sign an NIL deal with and film promotional content for healthcare company LifeWallet for around \$50,000, mirroring the amounts his domestic teammates received.<sup>77</sup> University of Nebraska women's basketball players Jaz Shelley and Isabelle Bourne also made similar trips back home to Australia to sign NIL deals and perform services.<sup>78</sup> Even Enmanuel flew to Mexico to film an advertisement for Gatorade prior to receiving approval for an O-1A visa because his F-1 visa permitted him to perform such services in Mexico but not in the United States.<sup>79</sup>

However, given that many international student-athletes may not even have the luxury to travel outside the United States just for NIL opportunities, it is apparent that the current approach is not a sustainable model. Thus, the DHS codifying carve-outs of majors related to sports and business would be the ideal method to allow for more international student-athletes to pursue NIL opportunities under OPT. However, one should also consider whether P-1A and O-1A visas are viable solutions.

## V. SOLUTIONS: FINE-TUNING NONIMMIGRANT VISAS

### *a. Amendments to Part 214 of the CFR: Loosening OPT restrictions for international student-athletes*

The optimal solution would be for the DHS to codify carve-outs in Part 214 of the CFR to allow students who major in fields relating to sports or business to utilize OPT to pursue off-campus NIL employment opportunities.<sup>80</sup> Such a resolution would directly allow many international student-athletes on F-1 visas to reap the same NIL benefits that their domestic teammates currently enjoy.

Since Congress restricted F-1 visa usage for elementary and secondary school applicants in 1996, F-1 visa regulations have largely been unamended, indicating that such guidelines are esoteric regarding NIL

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<sup>75</sup> See, e.g., 8 U.S.C. § 1324a(a) (declaring that hiring an unauthorized individual to work in the United States is unlawful).

<sup>76</sup> See Maguire, *supra* note 72.

<sup>77</sup> Dan Morrison, *Miami punter Lou Hedley flies to Australia to complete NIL deal*, ON3 NIL (May 30, 2022), <https://www.on3.com/nil/news/lou-hedley-australia-life-wallet-punter-nil-name-image-likeness-miami-hurricanes-football/>.

<sup>78</sup> See Maguire, *supra* note 72.

<sup>79</sup> 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>.

<sup>80</sup> *Optional Practical Training (OPT) for F-1 Students*, *supra* note 43.



considerations and related topics such as social media and remote work.<sup>81</sup> However, there has been considerable development for F-1 visa holders seeking off-campus employment who study STEM disciplines: the DHS, seeking to retain international talent in STEM fields, introduced the STEM extension for OPT in 2008, which was codified in Section 214 of the CFR and allowed for international students holding STEM degrees to extend their stay in the United States from 12 months to 29 months to satisfy their post-completion OPT.<sup>82</sup> The DHS increased this 17-month extension to 24 months in 2016 and provided additional protections and training opportunities for STEM scholars.<sup>83</sup> Finally, in early 2022, the DHS enacted numerous policy changes, such as provisionally approving 22 new fields of study to be permitted under the STEM OPT program, to further aid STEM scholars who wished to remain in the United States after graduation, as the U.S. sought to keep international STEM talent within its borders.<sup>84</sup>

As evinced by the development and codification of the STEM extension, the DHS possesses an ability to codify amendments to OPT, which suggests that expanding OPT to cover NIL for international student-athletes studying sports or business appears to be within the DHS's purview as a practical solution. Just as the STEM extension complies with the OPT requirement of direct relation to a course of study, there would appear to be a direct relation between NIL ventures and those majoring in sports- or business-related fields.<sup>85</sup>

Furthermore, even performing artists such as musicians can benefit from OPT so long as the type of work they seek is directly related to music, which would have to be their course of study.<sup>86</sup> Musicians can work with multiple short-term employers or have multiple "gigs" (music performances) so long as they keep a running list of all their employers, the

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<sup>81</sup> *Id.* See also *F-1 Visa*, SEROTTE REICH, LLP, <https://srwlawyers.com/f-1-visa/> (commenting that elementary school applicants cannot obtain F-1 visas, while high school applicants can only obtain F-1 visas for a maximum of one aggregate year, contingent on students reimbursing schools for all unsubsidized costs).

<sup>82</sup> Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18944 (Apr. 8, 2008) (to be codified at 8 C.F.R. pt. 214).

<sup>83</sup> Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13039 (Mar. 11, 2016) (to be codified at 8 C.F.R. pt. 214).

<sup>84</sup> Press Release, White House, FACT SHEET: Biden-Harris Administration Actions to Attract STEM Talent and Strengthen our Economy and Competitiveness (Jan. 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/21/fact-sheet-biden-harris-administration-actions-to-attract-stem-talent-and-strengthen-our-economy-and-competitiveness/>.

<sup>85</sup> 8 C.F.R. § 214.2(f)(10)(ii) (2023).

<sup>86</sup> See *Optional Practical Training (OPT) FAQ's*, S.F. CONSERVATORY OF MUSIC (May 26, 2018), [https://sfcu.edu/sites/default/files/StudentResources-OptionalPracticalTraining\\_FAQ.pdf](https://sfcu.edu/sites/default/files/StudentResources-OptionalPracticalTraining_FAQ.pdf).

duration worked for each employer, and the number of gigs performed on behalf of each employer.<sup>87</sup> Athletics and performing arts share commonalities in terms of the hours necessary to perfect one's craft, with the main differentiator being that there is no universal "sports" major at the college level, even if some schools have sports management programs. Yet international student-athletes should not be deprived of NIL opportunities if they choose majors relating to sports or business; hence, the DHS should rectify this issue through a carve-out provision for OPT relating to such majors.

There are admittedly several imperfections with the proposed codification. One is that limiting carve-outs to certain majors would still bar international student-athletes majoring in other fields from pursuing NIL opportunities; however, a blanket carve-out for all international student-athletes, regardless of major, would ignore the OPT requirement of direct relation altogether, which would likely be too radical a change to have a good chance of going through. The other is the lingering 12-month maximum period for OPT for international student-athletes; however, this issue is beyond the scope of this Comment.

*b. Rise of the P-1A/O-1A visas?*

If the DHS does not codify the necessary policy changes to allow international student-athletes on F-1 visas to benefit from NIL, efforts may instead be increased to transition international student-athletes to P-1A and, in exceptional cases, O-1A visas. As previously discussed, P-1A and O-1A visas allow nonimmigrants to study full-time.

However, the ease of obtaining a P-1A or O-1A visa may be affected by the immigration policies of a given presidential administration. During Donald Trump's presidency, applicants for P and O visas were 20% more likely to receive requests for additional evidence to prove their athletic abilities.<sup>88</sup> Applicants for "extraordinary ability" green cards also experienced lower approval rates and increased requests for evidence during the Trump administration, though it should be noted that the qualifications necessary for permanent residence are likely more stringent than those for a temporary nonimmigrant visa.<sup>89</sup> Still, the relative lack of

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<sup>87</sup> *Id.*

<sup>88</sup> Louise Radnofsky, *Athletes Seeking Green Cards Find Proving They're Exceptional Has Gotten Tougher Under Trump*, WALL ST. J. (Dec. 11, 2019, 5:30 AM), <https://www.wsj.com/articles/elite-athletes-seeking-visas-face-heightened-scrutiny-by-the-trump-administration-11576060200>. The 20% increase was calculated between the end of the 2016 and 2019 fiscal years.

<sup>89</sup> *Id.* The overall acceptance rate for extraordinary ability green cards over a recent five-year period at the end of each fiscal year (FY) was: 81.7% (FY 2015); 82.1% (FY 2016); 81.1% (FY 2017); 69.4% (FY 2018); and 56.3% (FY 2019). The acceptance rate after a request for evidence saw a similar pattern: 48.1% (FY 2015); 47.8% (FY 2016); 42.9% (FY 2017); 37.3% (FY 2018); and 34.4% (FY 2019).

success for such applicants may be concerning for the viability of P-1A and O-1A visas for international student-athletes due to the extremely high bar for what constitutes extraordinary ability, a stance held by advocates of immigration restriction since it prevents the “watering down of ‘extraordinary.’”<sup>90</sup> However, as evidenced by President Joe Biden’s administration recently spearheading efforts to retain international STEM professionals in part through expansion of the O-1 visa, it is possible that obtaining P-1A and O-1A visas could return closer to levels preceding the Trump administration, which may provide a potential avenue for select few international student-athletes to pursue NIL ventures.<sup>91</sup>

Regardless, the fact that P-1A and O-1A visas will not be able to cover a substantial portion of the international student-athlete population further indicates that codification of major-related carve-outs pertaining to sports and business is the preferable option. However, one must also consider whether international student-athletes can currently pursue NIL ventures under the guise of passive income.

## VI. NIL: ACTIVE OR PASSIVE INCOME?

Thus far, this Comment has focused on discussions of current visa options for international student-athletes and proposals to amend visas to allow these students to benefit from NIL. This Comment will also analyze whether international student-athletes can participate in NIL ventures without violating current F-1 work restrictions, which could be viable if such opportunities constitute passive as opposed to active income.<sup>92</sup>

### a. *Defining passive income*

The DHS has not provided any guidelines as to what NIL activities constitute employment in determining immigration status.<sup>93</sup> Yet one can rely on the Internal Revenue Service (IRS) to infer what constitutes active

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<sup>90</sup> See *id.* International athletes whose extraordinary ability green card applications were denied include: a Japanese men’s national team gymnast; a swimmer who had wins at the NCAA level and placed in the top ten at European championship meets; and an ice skater who won the U.S. junior ice championship and earned a silver medal at the world junior championship in 2018.

<sup>91</sup> See Michelle Hackman, *Biden Administration Makes Visa Changes to Retain Foreign STEM Students*, WALL ST. J. (Jan. 21, 2022, 5:27 PM), <https://www.wsj.com/articles/biden-administration-makes-visa-tweaks-to-retain-foreign-stem-students-11642770006> (commenting that the Biden administration is offering new guidelines to assist STEM professionals in applying for O-1 visas).

<sup>92</sup> Leigh P. Cole & Adam R. Maldonado, *International Student-Athlete Visas Potentially At Risk Due To New NCAA NIL Rules*, HIRSCHFELD KRAEMER LLP (Sept. 1, 2021), <https://www.hkemploymentlaw.com/international-student-athlete-visas-potentially-at-risk-due-to-new-ncaa-nil-rules/>.

<sup>93</sup> Miranda Martinez, *Name, Image, and Likeness: The Dilemma for International Student-Athletes*, ARIZ. ST. L.J. (Feb. 15, 2022), <https://arizonastatelawjournal.org/2022/02/15/name-image-and-likeness-the-dilemma-for-international-student-athletes/>.

income, which the F-1 visa regulations forbid, by determining if there was active participation: such factors include “making decisions involving the operation or management of the activity, performing services for the activity, and hiring and discharging employees.”<sup>94</sup>

There is no current case law directly pertaining to NIL and its relation to federal immigration law, but one can look to case law to determine the level of active engagement by a foreign national sufficient to constitute unauthorized employment.<sup>95</sup> In *Bhakta v. Immigration & Naturalization Service*, the Ninth Circuit Court held that a foreign national merely earning profits via ownership of a motel did not rise to the level of unauthorized employment pursuant to U.S.C.A. § 1255(c) because such activity was passive investment akin to that of a business investor and thus did not “adversely affect employment opportunities for legitimate aspirants in the labor pool.”<sup>96</sup> Conversely, in *Wettasinghe v. U.S. Dept. of Justice, I.N.S.*, the Sixth Circuit Court held that a different foreign national, who bought and leased ice cream trucks, purchased and stocked ice cream for the trucks, and received a commission of the ice cream sales in addition to accruing rental fees, violated his student visa’s unauthorized employment condition, making him subject to deportation.<sup>97</sup>

In attempting to analogize either *Bhakta* or *Wettasinghe* to present-day NIL agreements, such transactions appear to resemble *Wettasinghe* more closely: signing sponsorships or endorsement deals appear to constitute activities beyond that of an investor-manager like the foreign national in *Bhakta*.<sup>98</sup> For example, if a student-athlete makes sponsored posts on social media platforms while in the United States, any income generated would be deemed active income, thus violating F-1 visa work restrictions.<sup>99</sup> Moreover, the concern articulated in *Bhakta* that unauthorized employment of alien immigrant workers could potentially decrease job openings for American citizens may be invoked through certain NIL avenues.<sup>100</sup> While some companies have the capacity to sign as many student-athletes as they wish, other companies may be limited in their number of endorsement openings, meaning that signing an international student-athlete could deprive American student-athletes of that specific opportunity.<sup>101</sup> There are

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<sup>94</sup> I.R.S. PUB. 925 (Feb. 2022), <https://www.irs.gov/pub/irs-pdf/p925.pdf>.

<sup>95</sup> See Nigel D. James, *Moving the Goalposts: Name, Image, and Likeness Compensation for Foreign Student Athletes*, KLASKO IMMIGRATION LAW PARTNERS, LLP (July 2, 2021), <https://www.klaskolaw.com/news-politics/foreign-student-athletes-name-image-and-likeness-compensation/>.

<sup>96</sup> *Bhakta v. Immigration & Naturalization Service*, 667 F.2d 771, 773 (9th Cir. 1981).

<sup>97</sup> *Wettasinghe v. U.S. Dept. of Justice, I.N.S.*, 702 F.2d 641, 642 (6th Cir. 1983).

<sup>98</sup> *Wettasinghe*, 702 F.2d at 642; *Bhakta*, 667 F.2d at 773.

<sup>99</sup> Haneman & Weber, *supra* note 10, at 37-38.

<sup>100</sup> *Bhakta*, 667 F.2d at 773.

<sup>101</sup> See generally Maguire, *supra* note 72 (reporting that attorney John Ruiz had been active in signing University of Miami football players to NIL deals for his healthcare

other forms of NIL, such as selling one's own apparel, that would circumvent the *Bhakta* issue yet would also violate F-1 restrictions for constituting active income.<sup>102</sup>

*b. Group licensing*

One type of NIL opportunity for international student-athletes that would likely be categorized as passive income and not invoke the concern in *Bhakta* is group licensing.<sup>103</sup> Under group licensing, multiple student-athletes “pool” their NIL rights to create a communal license to be advertised and sold, with colleges also having the option of allowing their intellectual property, such as logos and color schemes, to be incorporated with such licenses.<sup>104</sup>

For example, the University of Alabama football program recently partnered with sports apparel retailer Fanatics to open its first-ever team store, which will sell NIL merchandise such as “customized Nike player jerseys, customized name and number t-shirts, and headwear.”<sup>105</sup> Additionally, Alabama football players are encouraged to pursue NIL-related activities at the store: they can “sell autographed memorabilia, conduct fan meet and greets, and conduct social media marketing to support sales of their NIL merchandise.”<sup>106</sup> It is unspecified as to whether the two international student-athletes on the 2022 Alabama football roster, punter James Burnip from Australia and defensive lineman Isaiah Hastings from Canada, currently participate in the group licensing venture. However, it is unlikely that they can pursue in-store NIL-related activities given that such actions would rise beyond the scope of passive income.<sup>107</sup> Furthermore, it should be clarified that even though Alabama's football stadium is on-campus, in-store NIL-related activities would likely not constitute on-campus employment because a team merchandise store would not provide

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company and was able to coordinate an international-student athlete signing an NIL deal as well, albeit in his home country).

<sup>102</sup> See James, *supra* note 95.

<sup>103</sup> See Jeremy Crabtree, *Penn State collective Success With Honor launches NIL ad in a foreign language*, ON3 NIL (Oct. 24, 2022), <https://www.on3.com/nil/news/penn-state-nittany-lion-collective-success-with-honor-launches-nil-ad-in-a-foreign-language/> (commenting that many attorneys and collegiate athletic department employees believe that income generated from group licensing could be categorized as passive income).

<sup>104</sup> Zachary A. Flagel & Gregory A. Marino, *Collegiate group licensing: A new frontier in the NIL wild west*, FOLEY & LARDNER LLP (Aug. 29, 2022), <https://www.foley.com/en/insights/publications/2022/08/collegiate-group-licensing-new-frontier-nil>.

<sup>105</sup> Nikki Chavanelle, *Alabama announces unique NIL merchandise partnership*, ON3 NIL (July 25, 2022), <https://www.on3.com/college/alabama-crimson-tide/news/alabama-announces-unique-nil-activation-merchandise-partnership-bryant-denny-stadium-nike-fanatics-tops/>.

<sup>106</sup> *Id.*

<sup>107</sup> *2022 Football Roster*, UNIVERSITY OF ALABAMA ATHLETICS, <https://rolltide.com/sports/football/roster/2022>.

“direct student services.”<sup>108</sup>

NIL collectives are beginning to explore group licensing opportunities for international student-athletes, although they mostly operate abroad as part of a cautious approach to protect international student-athletes. Success With Honor, a collective for Penn State University student-athletes, recently launched a billboard advertising campaign in Canada highlighting four Canadian student-athletes on the school’s football team, making history as the first NIL advertisement in a non-English language.<sup>109</sup>

Despite the emergence of group licensing as a potential form of passive income for student-athletes to maximize their earnings, many universities conservatively advise their international student-athletes not to pursue such ventures to avoid triggering visa violations.<sup>110</sup> Mason Fletcher, a punter from Australia for the University of Cincinnati football team, donated proceeds from all sales of his replica gear towards a scholarship fund for his walk-on teammates. This act of generosity stemmed from Cincinnati’s policy, where international student-athletes were permitted to have such income sent directly to a third-party charity or organization.<sup>111</sup> Yet Fletcher could likely qualify for passive income under group licensing, given that all he likely had to do was sign a form consenting to the sale of replica jerseys bearing his name.<sup>112</sup>

Group licensing has the potential to pass muster under the scope of passive income; however, nearly every other type of NIL venture will constitute active income, thus necessitating the codification proposed in the previous section. With the preferred solution involving loosening restrictions on F-1 visa holders, one must also consider whether loosening such restrictions could potentially impact national security and human trafficking.

## VII. POTENTIAL IMPLICATIONS OF LOOSENING VISA RESTRICTIONS

### *a. National security*

Though F-1 visa regulations have not been substantively revised since

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<sup>108</sup> 8 C.F.R. § 214.2(f)(9)(i).

<sup>109</sup> See Pete Nakos, *What are NIL Collectives and how do they operate?*, ON3 NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>. NIL Collectives are enterprises operating independently from the universities of the student-athletes they support. Collectives assist in facilitating NIL deals for and promoting the brands of student-athletes, usually relying on funds from boosters, other influential alumni, and businesses. See Crabtree, *supra* note 103.

<sup>110</sup> See Andy Wittry, *Cincinnati’s Mason Fletcher to donate NIL earnings. Does he have to?*, ON3 NIL (Sept. 21, 2022), <https://www.on3.com/nil/news/cincinnati-bearcats-college-football-mason-fletcher-punter-nil-donate-money-teammates/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

1996, the DHS “imposed stricter deadlines, limitations, and compliance requirements on both educational institutions and foreign students” for prospective F-1 visa holders following the terrorist attacks on September 11, 2001.<sup>113</sup> Yet such fears are largely unfounded and disproportionate in the context of international student-athletes pursuing NIL. Only one of the 19 hijackers during the 9/11 attacks used a nonimmigrant student visa to enter the United States.<sup>114</sup> With 9/11 constituting an isolated incident, it can reasonably be concluded that F-1 visas are unlikely to be abused by bad actors in the context of NIL. Furthermore, the current rationale for F-1 students not being allowed to work off-campus is to protect domestic workers, not to prevent terrorism.<sup>115</sup> Thus, national security concerns should not impede the proposed DHS memorandum regarding OPT.

*b. Human trafficking*

Another issue to consider is whether proposing a carve-out to OPT for NIL purposes will lead to bad actors abusing the F-1 visa system for human trafficking purposes. In the past decade, there have been multiple instances of high school athletes who sought college athletic scholarships being brought to the United States, only for human traffickers to profit off their arrival by securing travel and education expense fees from the victims’ families and by coercing the victims to sign contracts entitling the traffickers to high royalties of the athletes’ future earnings.<sup>116</sup> Despite the horrific injustices these athletes have faced, these bait-and-switch tactics of bringing athletes to America only to use them for profits appear to be more of an issue at the high school level than at the collegiate level.<sup>117</sup> International student-athletes should not be precluded from the benefits that an OPT carve-out would provide just because of a small minority of bad actors using athletics as a vehicle to propagate human trafficking for their own tainted financial gain.

Overall, it is evident that such concerns about national security and human trafficking are minimal and should not prevent the DHS from codifying OPT carve-outs for international student-athletes majoring in fields relating to sports or business.

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<sup>113</sup> *F-1 Visa*, *supra* note 81.

<sup>114</sup> M. Allison Witt, *Closed Borders and Closed Minds: Immigration Policy Changes after 9/11 and U.S. Higher Education*, 3 J. EDUC. CONTROVERSY 1, 4 (2008).

<sup>115</sup> *Bhakta*, 667 F.2d at 773.

<sup>116</sup> See Jessop, *supra* note 7 at 324–26. Human trafficking violations at the high school athletic level include: Paterson (NJ) Eastside High School, where members of the boys’ and girls’ basketball teams were trafficked from 2013 to 2017; a private high school in Charlotte, North Carolina, where 75 student-athletes were trafficked; and NBA player Tacko Fall, whose F-1 student visa was voided by the Texas high school he was originally supposed to attend after he was switched to another school upon his arrival to the United States. *Id.* at 324–25.

<sup>117</sup> *Id.*

## VIII. CONCLUSION

Select few international student-athletes can benefit from NIL by switching their student visas to P-1A or O-1A visas. Other international student-athletes may opt for more creative solutions, such as returning to their home countries to pursue NIL ventures. In general, all international student-athletes can at least earn passive income from group licensing opportunities, which likely would not violate their F-1 visas.

However, regulatory changes are still necessary to benefit those whose circumstances or lack of prominence would not allow them to explore NIL opportunities in their home countries or successfully apply for other temporary nonimmigrant visas. Amending the F-1 visa through codification to allow international student-athletes majoring in sports or business to pursue any NIL opportunity is ultimately the only viable blanket solution, and the resulting promotion of financial equity would outweigh concerns about national security and human trafficking with respect to international students.