

A CRITICAL ANALYSIS OF NAME, IMAGE, & LIKENESS POLICIES AND THEIR IMPLICATIONS FOR INTERNATIONAL STUDENT-ATHLETES

I. INTRODUCTION

Recent changes allowing U.S. student-athletes to profit from their name, image, and likeness (NIL) represents a major shift in the world of collegiate sports. However, while over 450,000 American student-athletes can now capitalize on endorsement deals and other business ventures, international recruits - making up 12% of NCAA athletes - remain unable.¹

Federal NIL legislation is imperative to provide equitable economic opportunities for international students and move collegiate sports closer to recognizing athletes' economic rights. This paper will argue for the need for nationwide reform to ensure all college athletes can exercise their NIL rights on an equal basis. Ensuring equal opportunities for all athletes reflects the ideals of higher education and advances the NCAA's goal of supporting student-athlete success.

II. INTERNATIONAL NIL

Student-athletes from international backgrounds find themselves navigating uncharted legal territory concerning NIL rights, with hesitancy prevailing among those who fear the potential consequences such as getting a student deported from the US. Notably, in the case of *NCAA v. Alston*, the Supreme Court struck down NCAA restrictions related to education-related benefits for college athletes. Simultaneously, the Department of Homeland Security's Student and Exchange Visitor Program (SEVP) issued a broadcast message, acknowledging its vigilance

¹ Simran Kaur Sethi et al., *U.S. Citizenship Supremacy: How Immigration Laws and NCAA Policies Exclude International College Athletes From Monetizing Their Name, Image, and Likeness*, Sports Innovation J. 81, 82 (2022).

in actively monitoring proposed Federal and State legislation regarding the use of NIL by student-athletes, including those holding F and M nonimmigrant student status.²

International students enter the United States under the F-1 student visa, which outlines precise guidelines for allowable employment within the country.³ The existing regulations, as currently interpreted, do not encompass income generated from NIL activities.⁴ Consequently, this situation may deter foreign athletes from choosing to compete in the United States, especially if they find themselves as the sole members on the team unable to receive compensation for their NIL.⁵ One poignant example is Nyls Korestanje, a dutch swimmer at North Caroline State University, in an interview with Swim-Swam publication stated “with the cost of education being so high, it could open up a lot of opportunities. . . .”⁶ Recognizing the rights of student-athletes means *all* student-athletes. Therefore, in the interest of complete fairness and uniformity, Congress’s future NIL legislation must also touch upon Federal immigration law.⁷

A. F-1 VISA & OTHER OPTIONS

When Congress failed to pass an NIL bill by the deadline of July 1, 2021, it effectively set the stage for State-level NIL statutes to operate without Federal intervention.⁸ One potential avenue for addressing this issue would involve a Federal NIL statute explicitly permitting

² Ed Pagano et al., *NIL considerations for international student athletes*, SPORTS BUSINESS JOURNAL, <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/23-PaganoHigginsHutson.aspx> (Jan. 23, 2023).

³ Haneman & Weber, *supra*, at 1601.

⁴ *Id.*

⁵ *Id.* at 1603.

⁶ Riley Overend, *In The Era Of NIL, Barriers and Loopholes Create Confusion for International Athletes*, SWIM SWAM, <https://swimswam.com/in-the-era-of-nil-barriers-and-loopholes-create-confusion-for-international-athletes/> (Aug. 14, 2023).

⁷ Erber, *supra*, at 122.

⁸ Holden et al., *supra*, at 70.

student visa holders to exercise their NIL rights.⁹ Another approach would entail amending Federal immigration law to incorporate NIL protections.¹⁰

The F-1 visa, a subtype of the nonimmigrant F-Visa, is the predominant choice among college athletes.¹¹ These visas are specifically designed for students and enable athletes to stay in the United States for the duration of their academic programs.¹² However, these visas come with stringent restrictions, primarily pertaining to employment opportunities for visa holders.¹³ International student-athletes can engage in employment in three cases: (1) on-campus jobs, (2) off-campus jobs proving severe economic hardship, or (3) curricular or OPT. However, F-1 visa restrictions severely limit their income opportunities in the U.S.¹⁴

F-1 visa holders can work on-campus up to 20 hours per week during academic term without additional authorization, as long as the employment is within campus premises.¹⁵ It's crucial to emphasize that on-campus employment does not serve as a workaround for athletes to earn income from NIL.¹⁶ This is primarily due to the NCAA's stringent regulations that explicitly prohibit schools from directly compensating athletes for their NIL.¹⁷ To address this limitation, the resolution could potentially lie in permitting NIL activities to be conducted on campus to the same extent as traditional on-campus employment, contingent upon an interpretation provided by U.S. Citizenship and Immigration Services.¹⁸

⁹ *Id.*

¹⁰ *Id.* at 71-72.

¹¹ Haneman & Weber, *supra*, at 1612.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1614.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1614-15.

The second avenue available for international athletes to earn any income in the United States involves off-campus employment in cases of severe economic hardship.¹⁹ A significant barrier lies in proving the existence of severe economic hardship.²⁰ Before obtaining an F-1 Visa, applicants must demonstrate that they possess "sufficient funds to successfully study in the United States without being forced to resort to unauthorized employment," and that they have ample resources to "defray all expenses during the entire period of anticipated study."²¹ Given these requirements, it becomes evident that only a limited number of students would be able to leverage this provision for earning money through their NIL endeavors.²²

Curricular Practical Training (CPT) is a mechanism specifically tailored to incorporate work opportunities within the existing educational curriculum, particularly in the context of internships.²³ To be eligible for CPT, the work must directly align with the student's program of study or, in some cases, the student must earn academic credit for the experiential learning.²⁴ In some instances, certain students have managed to engage in NIL-related activities via CPT, particularly when their internships are closely tied to their field of study.²⁵ For example, a student majoring in communications may have the opportunity to intern in social media-related roles.²⁶ Nevertheless, it's important to underscore that, at present, this avenue is not a viable option for the majority of international student-athletes.²⁷

Optional Practical Training (OPT) offers a more flexible nexus requirement, whereby the work must be "directly related to the student's major area of study," contingent on the existence

¹⁹ *Id.* at 1615.

²⁰ *Id.*

²¹ *Id.* at 1612.

²² *Id.*

²³ *Id.* at 1616.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

of a logical connection between the tasks carried out during the OPT and the student's major.²⁸ For F-1 international student-athletes, OPT presents a potential avenue for them to partially harness their NIL for financial gain.²⁹ Nevertheless, it comes with its own set of risks for both the athlete and the university.³⁰ Firstly, there arises a crucial nexus question that necessitates agreement from both the student and the university. Secondly, OPT eligibility is contingent upon F-1 visa holders having completed a full year of academic study, as stipulated in the regulations.³¹

P-1A Visas, by definition, require that athletes intend to enter the United States temporarily and solely for the purpose of participating in a specific athletic competition.³² The language creates a potential interpretation issue, as it could be argued that a student seeking the visa for NIL activities is not intending to come solely for athletic competition.³³ Furthermore, P visas were primarily designed for athletes who have reached an internationally recognized level of performance, necessitating them to demonstrate a high degree of achievement in their field.³⁴ The reality is that most student-athletes do not meet the criteria of being recognized as leading, renowned, or well-known athletes.³⁵

O Visas and EB-1 Visas present an exceptionally high bar for eligibility, requiring applicants to possess extraordinary ability coupled with sustained national or international acclaim.³⁶ These visas are typically reserved for the select few who have reached the pinnacle of

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1623.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

their respective fields.³⁷ This stringent threshold poses a considerable challenge for college athletes, as they are still in the process of ascending within their professions.³⁸

B. ACTIVE V. PASSIVE INCOMES

For athletes on F-1 visas, the avenue to generate NIL income can be pursued in one of two ways: either by participating in NIL abroad or by earning passive income while in the U.S.³⁹ U.S. immigration law is primarily designed to safeguard the domestic labor market against unchecked international competition.⁴⁰ Raising the question of why some members of a team are permitted to amass substantial earnings, while noncitizens are constrained to earning income characterized as “passive.”⁴¹ In accordance with the U.S. Citizenship and Immigration Services, active income streams are defined as those where individuals consistently invest their time and effort in performing actions for the sake of monetary gain.⁴² Conversely, passive income refers to earnings that do not necessitate direct action on the part of the recipient.⁴³

The core legal question is whether international students must provide services in exchange for compensation, which would be classified as "active income," or if they receive compensation without doing any work, which would be "passive income."⁴⁴ In reality, most NIL activities fall somewhere in between.⁴⁵

³⁷ *Id.*

³⁸ *Id.* at 1626.

³⁹ *Id.* at 1626.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Sethi et al., *supra* at 88-89.

⁴³ *Id.*

⁴⁴ Holt Hackney, *Everything You Need to Know about the NIL and International College Athlete Issue*, SPORTS LAW EXPERT, <https://sportslawexpert.com/2022/05/09/everything-you-need-to-know-about-the-nil-and-international-college-athlete-issue/> (May 9, 2022).

⁴⁵ *Id.*

i. LOOPHOLE OR TRAP?

Athletes who engage in promotional shoots or advertising are actively working, but licensing previously taken photographs or videos is not.⁴⁶ Some athletes have taken a risk hiring content managers to take over all management of their social media accounts while in the U.S., based on the idea that income generated would be characterized as passive, since the student-athletes play no active role.⁴⁷ Another path is international student-athletes licensing the use of their image in their home country, with profits going to parents or third-party, as U.S. immigration law only restricts the students themselves receiving profits.⁴⁸ In this scenario though the student must forfeit immediate economic benefits from such activities — at least until the termination of NCAA eligibility or student visa status — which is the heart of the NIL rights granted to their U.S. teammates.⁴⁹ Entering even *de minimus* NIL deals could jeopardize their current immigration status.⁵⁰ The worry with using social media to generate passive income is that one international student-athlete may become the test case of how our government ultimately sees this.⁵¹

Another loophole is student-athletes going to their home countries for short breaks in order to create and post content without jeopardizing their immigration status. NIL activity engaged exclusively the athlete's home country or another third-country should not violate the terms of their F-1 visa.⁵² For example, Purdue men's basketball star, Zach Edey, was able to

⁴⁶ Haneman & Weber, *supra* at 1634.

⁴⁷ *Id.* at 1635.

⁴⁸ Dearing, *supra*.

⁴⁹ *Id.*

⁵⁰ Haneman & Weber, *supra* at 1634.

⁵¹ Doshi, *supra*.

⁵² Haneman & Weber, *supra* at 1638.

capitalize off his NIL during an away game in Toronto.⁵³ December 2023 Edey teamed up with Daps, an app that allows fans to bid on merchandise during games, on his two-day trip home.⁵⁴

Another example of this travel loophole was done by the company Influxer.⁵⁵ They helped out more than 30 athletes ranging from over 18 different countries.⁵⁶ The brand set up shop at the Battle 4 Atlantis men's and women's basketball tournament in the Bahamas, and Influxer helped athletes create content, hosting photo and video shoots, which companies could then use in brand campaigns.⁵⁷ Once again this sort of arrangement is only available for top tier student-athletes, and while beneficial to them, only widens the gap of those who can profit from NIL, further marginalizing the majority of international student-athletes.

When you compare this to the resources provided to international student-athletes the disparities are ever more evident. Many universities around the country have held NIL summits to help student-athletes learn more about the opportunities they have. Indiana University held their own summit September 18, 2023, in which they invited local businesses and NIL marketing apps such as 'Opendorse' to come and meet with athletes. The summit offered advice from top athletes at IU profiting off their NIL, such as basketball star Sydney Parrish, hoping to help other athletes continue to learn about what they can do with their NIL.

⁵³ Scooby Axson, *How Zach Edey, Purdue Men's Hoops Star, is Overcoming Immigration Law to Benefit from NIL*, USA TODAY, <https://www.usatoday.com/story/sports/ncaab/bigten/2023/12/12/purdue-zach-edey-nil-loophole-immigration-law-rule/71882113007/> (Dec. 12, 2023).

⁵⁴ *Id.*

⁵⁵ Amanda Christovich, *International Athletes Find NIL Loophole at Battle 4 Atlantis*, FRONT OFFICE SPORTS, <https://frontofficesports.com/international-athletes-find-nil-loophole-at-battle-4-atlantis/> (Nov. 30, 2022).

⁵⁶ *Id.*

⁵⁷ *Id.*

V. PROPOSED LEGISLATION

As we enter a new era of NIL rights, in 2023, several pieces of federal legislation were proposed, aimed to provide guidance and oversight to student-athlete NIL. All the bills under consideration take steps to support student-athletes' opportunities to profit from NIL. However, only two remove F-1 Visa immigration barriers to international student-athletes' eligibility for NIL, *'The College Athlete Economic Freedom Act,'* and *'Name, Image, and Likeness for International Collegiate Athletes Act.'*

A. COLLEGE ATHLETE ECONOMIC FREEDOM ACT

The *'College Athlete Economic Freedom Act'* includes new provisions to allow international student-athletes to market their NIL without losing their visa status.⁵⁸ It encourages negotiation between athletes and the colleges for the use of athlete's NIL for promotion and media rights deals.⁵⁹ Ensuring that colleges and collectives do not discriminate on the basis of gender, race, or participating sport in the facilitation of NIL deals.⁶⁰

The *'College Athlete Economic Freedom Act'* amends section 212(a)(5)(A) of Immigration and Nationality Act,⁶¹ adding the following provision. “(v) International College Athletes — [defined as] an alien who seeks admission to the United States to compete in intercollegiate athletics as an international college athlete nonimmigrant . . . shall not be inadmissible for having participated or engaged in activities . . . related to the marketing of the

⁵⁸ Trahan, Murphy Reintroduce Legislation to Codify College Athletes' Unrestricted Right to Their Name, TRAHAN HOUSE, <https://trahan.house.gov/news/documentsingle.aspx?DocumentID=2957#:~:text=Two%20years%20after%20the%20NCAA,between%20athletes%20and%20their%20colleges> (July 26, 2023).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 8 U.S.C. § 1182(a)(5)(A) (LexisNexis 2023).

name, image, or likeness of the alien . . . such activities shall not constitute a violation of or failure to maintain such nonimmigrant status.”⁶²

While the bill begs for additional clarification and definition, the bill’s broad assertion of athletes rights goes well beyond those proposed in other federal NIL bills, as well as the plethora of state bills, and proposals put forward by the NCAA.⁶³ As stated by Representative Trahan “[r]ather than trying to turn back the clock,” the bill “addresses real issues in the current NIL landscape by strengthening athlete’s rights, addressing general disparities in collectives and closing the international athlete loophole.”⁶⁴ Further, that “Congress should look forward for policy solutions that prioritize athletes who have long been denied a voice in a billion-dollar industry built on their talent and hard work.”⁶⁵

B. NAME, IMAGE, AND LIKENESS FOR INTERNATIONAL COLLEGIATE ATHLETES

The *Name, Image, and Likeness for International Collegiate Athletes Act*,’ is a common-sense bill introduced by Senator Ricketts, with hopes to level the playing field ensuring American sports programs don’t lose talented student-athletes because of outdated visa system. Senator Blumenthal added, “[t]hey should have rights to name, image and likeness proceeds — resulting from their diligence, discipline and determination.”⁶⁶ Their blood, sweat, and tears are equally deserving of monetary rewards as other student-athletes.”⁶⁷

Unlike the *College Athlete Economic Freedom Act*,’ the *NIL for International Collegiate Athletes*, is a short three-page bill solely focused on international student-athletes. The

⁶² College Athlete Economic Freedom Act, H.R. ____, 118th Cong. (2023).

⁶³ Zimbalist, *supra*.

⁶⁴ McCann, *supra*.

⁶⁵ Trahan, *Murphy Reinroduce Legislation to Codify College Athletes’ Unrestricted Right to Their Name*, TRAHAN HOUSE, <https://trahan.house.gov/news/documentsingle.aspx?DocumentID=2957#:~:text=Two%20years%20after%20the%20NCAA,between%20athletes%20and%20their%20colleges> (July 26, 2023).

⁶⁶ *Id.*

⁶⁷ *Id.*

bill amends the Immigration and Nationality Act, adding among many things to the Employment authorization section — “(3)(A) A nonimmigrant who obtains the status of a nonimmigrant under clause (iv) of section 101(a)(15)(F) shall be eligible for employment authorization for the purpose of engaging in activities pursuant to an endorsement contract for the commercial use of the nonimmigrant’s name, image, or likeness.”⁶⁸ This bill is one of the narrowest NIL bills filed to date, and because of such, has a good chance of moving forward in comparison to some of the more expansive drafts introduced.⁶⁹

i. LEGISLATION ANALYSIS

Initially, some experts were pessimistic that federal NIL legislation addressing international athletes would gain traction this upcoming legislative session. However, optimism is shifting as momentum grows behind targeted bills like the *‘NIL for International Collegiate Athletes Act.’* Attorney Jayma Meyer, who specializes in collegiate sports law and Title IX, noted that Congress aims to avoid micromanaging complex NCAA issues.⁷⁰ Hence, narrowly tailored proposals clarifying international eligibility may progress efficiently. The Blumenthal bill's sole focus on enabling international athlete rights increases its viability.

Collective Director Tyler Harris, discussed the implementation process stating that “if legislation was impending, NCAA groups would begin working to immediately address implementation concerns pre-passage of a bill.”⁷¹ Harris compared the future NIL bills to what occurred in 2021, with the passage of the NCAA’s interim policy.⁷² Explaining that

⁶⁸ Name, Image, and Likeness for International Collegiate Athletes Act, S. ___, 118th Cong. (2023).

⁶⁹ Pete Nakos, *Sens. Blumenthal, Ricketts Introduce NIL Bill for International Athletes*, ON3NIL, <https://www.on3.com/nil/news/richard-blumenthal-pete-ricketts-senate-nil-legislation-international-athletes/> (Oct. 20, 2023).

⁷⁰ Telephone interview with Jayma Meyer (Oct. 27, 2023).

⁷¹ Telephone interview with Tyler Harris (Oct. 26, 2023).

⁷² *Id.*

HoosiersForGood, the nonprofit collective Harris works for, had only a 10 day notice to structure guardrails surrounding the policy.⁷³ By proactively resolving issues like tax and immigration implications, regulators can smooth the transition process if and when Congress finalizes statutory language.⁷⁴

While no proposal perfectly resolves every complexity, targeted legislation now represents international athletes' best hope, with both the *Trahan* and *Blumenthal* bills extending NIL access. Though additional refinement may occur through regulatory rule-making, congressional action would unequivocally confirm that discriminatory restrictions on foreign athletes have no place in modern college sports.

VI. CONCLUSION

NIL rights empower student-athletes with control over monetizing their fame, yet inequitable policies still exclude international recruits, perpetuating unacceptable discrimination requiring expedited redress. Systemic barriers prohibit international athletes from capitalizing on their NIL, escalating risks without reliable guidance. Unequal compensation deters foreign talent. Pending legislation like *Economic Freedom Act* and *NIL for International Collegiate Athletes* reconciles through equitable NIL access guarantees. Establishing consistent NIL protections regardless of origin remains an urger imperative, reaffirming higher education's equalizing role while enriching competitive balance.

⁷³ *Id.*

⁷⁴ *Id.*