

More Than a Violation: International Student Athletes Risk Visa Status Due to Vague NIL Guidelines



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Introduction

There are more than 20,000 international student-athletes currently enrolled and active in the National Collegiate Athletic Association (“NCAA”).¹ All international student-athletes are considered “nonimmigrants” by the Department of Homeland Security (“DHS”) and its various agency branches, such as Citizenship and Immigration Services (“USCIS”).² For these agencies to permit noncitizen entry and enrollment to colleges and universities in the United States, all international students must apply for and successfully be issued a student visa.³

¹ See Anayat Durrani, *3 Things International Student-Athletes Should Know*, U.S. News & World Report (Feb. 15, 2022), <https://www.ncaa.org/sports/2018/3/21/international-student-athlete-participation.aspx> know#:~:text=There%20are%20more%20than%2020%2C000,regulates%20and%20administers%20intercollegiate%20athletics (discussing overview of the number of international student-athletes in the U.S. and the top things they should know before and after their arrival to the U.S.).

² See *Operational and Support Component*, Department of Homeland Security (Aug. 9, 2022), <https://www.dhs.gov/operational-and-support-components> (“A listing of all Operational and Support Components that currently make up the Department of Homeland Security”).

³ See *Student Visa: Overview*, Travel.State.Gov (2022), <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html> (providing overview of all visa requirements for interested foreign students applying to a school in the United States).

International Student Visas and Maintaining Status

There are two types of student visas in the United States: F-1 and M-1.⁴ M-1 visas are limited to “vocational or other recognized nonacademic institution[s]” and are relatively uncommon, so the majority of international students apply for and receive F-1 student visas prior to their arrival in the United States.⁵ As is the case for all types of immigration visas issued by the United States, there are restrictions and rules that international students must adhere to in order to “maintain” their status as F-1 or M-1 students.⁶

First, to maintain status, all F-1 students must attend all classes, sustain normal academic progress, and complete a full course of study for each term.⁷ Secondly, international students must obey strict employment limitations. The DHS states, “An F student may only work when authorized by either a DSO [designated school official] or the USCIS. If [F-1 students] choose to work without authorization, [they] will be forced to leave the United States immediately, and . . . may not be able to re-enter the United States at a later date.”⁸ The limited work exceptions for F-1 students include: working in an on-campus role, curricular practical training (“CPT”), or optional practical training (“OPT”).⁹

If working on-campus, F-1 students must have the approval of a designated school official or USCIS prior to beginning the role, can only work in roles that “provide direct services to students,” and are limited to working a maximum of 20 hours per week when school is in session.¹⁰ Next, USCIS defines CPT as “any alternative work/study, internship, cooperative education, or other type of required internship or practicum offered by sponsoring employers through cooperative agreements with the school.”¹¹ Finally, OPT employment “provides a practical training experience that directly relates to an F-1 student’s major area of study,” and is also limited to 20 working hours per week during the school year, but students can earn full-time wages when school is not in session.¹²

If a F-1 student works in the United States outside of these three designated employment roles, or without prior authorization from their institution or approval from the relevant DHS agency, they effectively breach their F-1 visa status and are subject to immediate removal from the United States.¹³

⁴ See *id.* (providing information regarding differences between F-1 and M-1 visas).

⁵ See *id.*

⁶ See *Study in the States*, Department of Homeland Security (2022), <https://studyinthestates.dhs.gov/students/maintaining-status> (discussing maintaining status requirements for F and M students studying in the United States).

⁷ See *id.*

⁸ See *id.*

⁹ See *Foreign Academic Students*, U.S. Citizenship and Immigration Services (2022), <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-1-employee-information-and-attestation/foreign-academic-students> (discussing work authorization, I-9 process, and employment options for nonimmigrant students in the United States currently on F or M visas).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *supra* note 6 (discussing immediate removal requirement if F or M student found to violate employment regulations permitted by their visa).

NCAA Eligibility and NIL

In addition to maintaining visa status, international student-athletes, like all student-athletes, must also meet eligibility requirements for the NCAA to be eligible to practice and compete.¹⁴ Like the F-1 visa's full-time enrollment provision, "[t]o be eligible for competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies leading to a baccalaureate or equivalent degree, which shall not be less than 12 semester or quarter hours."¹⁵

Prior to July 1, 2021, the NCAA's stance on employment for all of its "amateur" student-athletes was also relatively stringent, strictly limiting the ways college athletes could earn income without risking their eligibility.¹⁶ Receiving income from sources outside of the permitted employment regulations in Bylaw 12.4 could result in a student-athlete being deemed "ineligible" by the NCAA.¹⁷ Ineligibility withholds student-athletes from competing in all intercollegiate competition.¹⁸

However, on June 21, 2021, the Supreme Court of the United States released its groundbreaking unanimous *NCAA v. Alston* decision.¹⁹ The opinion removed the NCAA's right to place caps on educational benefits provided to student-athletes based on the concept of maintaining "amateurism" status, and effectively launched the NCAA and its athletes into the brave new world of name, image and likeness ("NIL") opportunities and legislation.²⁰ Shortly after the *Alston* decision, the NCAA responded and released its interim NIL policy on July 1, 2021.²¹ The policy permits student-athletes "the opportunity to benefit from their name, image and likeness" in accordance with the laws in the state where their school is located without compromising their amateur eligibility.²²

¹⁴ See NCAA, *Student-Athlete Eligibility* (2022), <https://www.ncaa.org/sports/2013/12/11/student-athlete-eligibility.aspx> (noting eligibility standards for incoming and current NCAA student-athletes).

¹⁵ See NCAA, *2021-22 Division I Manual*, at 171 (Aug 1, 2021), <https://www.ncaapublications.com/productdownloads/D122.pdf> (reviewing Bylaw 14.2.2 Requirement for Competition regarding full-time enrollment requirement for student-athletes).

¹⁶ See *supra* note 14 at 73-74 (reviewing Bylaws 12.4.2 and 12.4.3 Employment guidelines for student-athletes which were relevant prior to NIL approval by the NCAA).

¹⁷ See *supra* note 14 at 93 (reviewing Bylaw 12.11 regarding Ineligibility of student-athletes).

¹⁸ See *id.*

¹⁹ See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2144 (2021) (Supreme Court decision affirming district court and Ninth Circuit, holding that the right balance was struck "in crafting a remedy that both prevents anti-competitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports"). *Alston* is regarded as the starting point

²⁰ See Gregory Marino, *NCAA v. Alston: The Beginning of the End of the Beginning?* (Aug. 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/> (discussing *Alston* decision generally and its impact on college athletics NIL landscape as a whole).

²¹ See NCAA, *NCAA adopts interim name, image and likeness policy* (June 31, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> ("NCAA college athletes will have the opportunity to benefit from their name, image and likeness beginning Thursday. Governance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports").

²² See NCAA, *Name, Image and Likeness*, (2022), <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx#policy> [hereinafter *NIL Policy*] ("NCAA college athletes now have the opportunity to benefit from their name, image and likeness. All three divisions have adopted a uniform, interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports").

F-1 Visas and NIL: Lack of Clarity Could Mean Serious Consequences

Now in the second year following NIL approval, the NCAA landscape is often referred to as the “Wild West” by industry professionals and interested parties, who see the obvious complications resulting from differing NIL legislation, rules, and interpretations which vary greatly from state to state, and institution to institution.²³ Since its release on July 1, 2021, the NCAA’s vague and brief interim NIL policy has remained almost entirely the same, with only a reinforcement update regarding NIL and recruiting being published in May 2022.²⁴ Though NIL opportunities have been lucrative for many, the “Wild West” landscape is still generally confusing for a large number of student-athletes.²⁵ But, for international student-athletes on F-1 visas, this confusion can potentially lead to severe consequences.

For the 20,000 international student-athletes, there is no clarity from the NCAA nor DHS regarding what they can or cannot do from an NIL perspective.²⁶ Based on the strict employment limitations for on-campus, CPT, and OPT employment discussed previously, it seems unlikely that income derived from NIL deals would fall into any of these approved employment categories for F-1 visa holders. Therefore, accepting NIL opportunities and income could result in an international student-athlete breaching F-1 status, and could be grounds for immediate removal from the United States.

Moreover, while the NCAA provides resources online for prospective and current international student-athletes, it fails to offer any specific information regarding NIL legislation and its potential impact on F-1 visa status.²⁷ In response to this obvious lack of guidance from the NCAA, many member schools recommend “that international athletes don’t receive any sort of NIL income while in the U.S. out of precaution.”²⁸

²³ See Tim Tucker, *‘The Wild West’: College sports’ NIL era brings upheaval*, (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/the-wild-west-college-sports-nil-era-brings-upheaval/YORTVG5VAZCMPBLMVK42QMA63E/> (discussing dramatic changes to NCAA industry and its athletes based on the new NIL legislation and how its lack of uniformity leads to it being dubbed the “Wild West”).

²⁴ See NIL Policy, *supra* note 21 (discussing timeline of NIL).

²⁵ See *supra* note 22 (noting the “Wild West” nickname created from the lack of uniformity within the NCAA regarding NIL and its regulations).

²⁶ See Kristi Dosh, *Revisiting NIL for International Student Athletes*, (May 19, 2022), <https://businessofcollegesports.com/podcast/revisiting-nil-for-international-student-athletes/> (podcast transcription “[b]reaking down attempts by international student athletes to participate in NIL”).

²⁷ See NCAA, *Become an International Student-Athlete*, (2022), <https://www.ncaa.org/sports/2017/6/14/international-student-athletes.aspx#:~:text=There%20are%20over%202021%2C000%20international.and%20competing%20at%20NCAA%20schools> (discussing application, academic, and documentation requirements for prospective and current international student-athletes in the NCAA).

²⁸ See Andy Wittry, *Cincinnati’s Mason Fletcher to donate NIL earnings. Does he have to?* (Sep. 21, 2022), <https://www.on3.com/nl/news/cincinnati-bearcats-college-football-mason-fletcher-punter-nil-donate-money-teammates/> (discussing University of Cincinnati’s International Services office’s recommendation that “international athletes don’t receive any sort of NIL income while in the U.S. out of precaution. Potential visa violations could impact an athlete’s ability to get a job in the country in the future”).

The Future is Murky for NIL and F-1 Visas

One potential solution to clear up NIL confusion would result by Congress passing legislation permitting international student-athletes to engage in NIL opportunities without breaching visa status.²⁹ Additionally, President Biden has removed several barriers to the immigration system since his inauguration in 2021, which could potentially encourage the DHS to provide more clarity on outstanding issues like NIL and F-1 visas.³⁰

Lastly, Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, discharge, pay ... and other aspects of employment, on the basis of race, color or national origin.³¹ If unequal treatment of international student-athletes in the NIL landscape continues based on unclear F-1 and NIL guidance, there could potentially be cause for legal action.³² An international student-athlete could argue that based on their F-1 immigrant status, they were unfairly discriminated against and prevented from obtaining NIL opportunities, a disadvantage an athlete with citizenship in the United States does not share.

Legal action for discrimination based on national origin could result in a decision from the Equal Employment Opportunity Commission (“EEOC”), yet another governmental agency that could join the muddled mix of regulatory bodies that impact and control NIL opportunities and F-1 students.³³ With absence of guidance from the NCAA and various Immigration agencies in the United States, perhaps an EEOC decision could provide the necessary clarity for the 20,000 current international student-athletes and beyond.

²⁹ Robert Law, *Can Foreign Student Athletes Cash in on Name, Image, and Likeness Deals? DHS guidance lacking almost a year after NCAA policy change*, (Mar. 17, 2022), <https://cis.org/Law/Can-Foreign-Student-Athletes-Cash-Name-Image-and-Likeness-Deals#:~:text=A%20foreign%20student%20athlete's%20eligibility,visa%20held%20by%20a%20parent> (“Until the Department of Homeland Security defines NIL deals, it is unclear if foreign students are outright barred from benefiting from NILs or if they are permissible after a regulatory or sub-regulatory policy change. Alternatively, Congress could pass a law that expressly permits foreign student athletes to engage in NIL deals if the current framework prohibits it and lawmakers decide to make the exception”).

³⁰ See Sarah Libowsky and Krista Oehlke, *President Biden’s Immigration Executive Actions: A Recap* (Mar. 3, 2021), <https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap> (discussing overview of President Biden’s executive order actions regarding immigration policy in his first few weeks in office as President of the United States).

³¹ See 42 U.S.C.S. § 2000e (LexisNexis, Lexis Advance through Public Law 117-185, approved October 4, 2022, with a gap of Public Law 117-180).

³² See *id.*

³³ See U.S. Department of Labor, *Immigration* (2022), <https://www.dol.gov/general/topic/discrimination/immdisc> (discussing Title VII of the Civil Rights Act of 1964, its enforcement by the Equal Employment Opportunity Commission, and other orders and acts which regulate employer behavior from being discriminatory towards noncitizen immigrants).