

# What to Consider When It Comes to NIL and International Student-Athletes

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When the NCAA announced that student-athletes would be permitted to financially benefit from their name, image, and likeness (NIL), it was welcomed by most student-athletes. However, many international student-athletes were unsure how the NCAA's NIL Policy impacted them, given their nonimmigrant status in the United States. The F-1 visa, used by most international student-athletes, is an academic student visa that allows individuals to enter the United States as full-time students at an accredited college or university. However, international students on F-1 visas are limited in their ability to obtain employment and earn taxable income. This article evaluates how performing NIL income generating activities fit within the F-1 student-visa construct.

## ON-CAMPUS NIL ACTIVITIES

International students are only permitted to work in a very limited number of circumstances without jeopardizing their immigration status and risking deportation. Students on an F-1 visa are permitted to work on-campus. International students employed in on-campus positions are paid directly by the school or an approved, close educational affiliate. Therefore, is one possible avenue for an international student-athlete to earn income through on-campus NIL activities with their home institution? Not likely. Currently, the NCAA prohibits schools from compensating athletes directly for their NIL. Therefore, classifying NIL activity as on-campus employment is not a feasible option for international student-athletes.

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## OFF-CAMPUS NIL ACTIVITIES

Since international student-athletes are not permitted to be paid by their home institutions for NIL activities, let's evaluate off-campus work as a possible avenue for international student-athletes to engage in NIL income generating activities. International students are permitted to work off-campus after their first academic year, but it is limited to four categories:

- Curricular Practical Training (CPT), where the work experience is an integral part of an established curriculum;
- Optional Practical Training (OPT), where the work experience directly relates to the student's major area of study;
- Science, Technology, Engineering, and Mathematics (STEM) Optional Practical Training Extension (OPT); and
- Employment to remedy severe economic hardship caused by unforeseen circumstances beyond the student's control.

While some student-athletes have been able to secure paid internships and positions with companies that are somewhat related to their majors or curriculum, it is a tough hurdle for international student-athletes as it requires

sign off by their home institutions. Institutions will have to consider the risks that come with signing off on an international student-athlete's employment, which generates taxable income for the student. As such, CPT and OPT opportunities are not likely avenues for international student-athletes to capitalize off of NIL deals.

An international student-athlete might be able to use the “severe economic hardship” prong; however, it is a difficult standard to satisfy. The international student-athlete would have to demonstrate that although the student had sufficient funds to study in the United States without employment assistance prior to the F-1 visa issuance, there has been an unforeseen change that has now caused the student-athlete to need employment. While some international student-athletes may be able to meet this burden, it is not likely a broad pathway for F-1 student-athletes to earn income via NIL opportunities.

## NIL ACTIVITY AS HOBBY

It is arguable that international student-athletes can lawfully earn NIL income if the activity is categorized a hobby rather than a business. A hobby is defined as an activity a person pursues because they enjoy it with no intention of making a profit. The Internal Revenue Service will consider several factors when determining if an activity is a hobby, including the time and effort the taxpayer puts into the activity, illustrating an intent to make the activity profitable. Although student-athletes may participate in their sport for recreation rather than to earn a profit, most student-athletes participate in NIL activity to earn income. Therefore, it is unlikely that F-1 employment restrictions can be preempted by classifying income

generating NIL activities as a hobby.

### **NIL ACTIVITY AS PASSIVE OR ACTIVE INCOME**

Classification of income as “active” or “passive” is key in evaluating whether an international student-athlete may be able to participate in income generating NIL opportunities without violating visa employment restrictions. Active income is income received from a taxpayer’s active or material participation in a venture. In other words, active income is considered “work.” Creating a product, media content, materials, or services with the intent to produce active income at a later time is classified as active income. On the other hand, passive income is earned with little effort or active participation in the income-generating activity. Notably, international students’ ability to earn passive income is unrestricted.

Differentiating passive and active income can be difficult. The Internal Revenue Service uses Material Participation Tests (MPTs) to make this distinction. MPTs are a set of IRS criteria that evaluate whether a taxpayer has materially participated in an income-producing activity. A taxpayer materially participates if they pass one of the seven material participation tests. For instance, one of the participation tests evaluates whether the taxpayer has participated in the activity for more than 100 hours during the year and as much as any other individual in excess of 100 hours during the year. Participation is also material if it is regular, continuous, and substantial. While participation is considered immaterial if it not regular, continuous, or substantial.

Theoretically, an international student-athlete may engage in an income generating NIL activity so long as their participation is immaterial. For example, signing an endorsement agreement in which the international student-athlete does not have to make

a set number of regularly scheduled appearances or is limited to only a few hours of work during the year may have too little material participation to be considered active income. However, an endorsement deal that does not require the international student-athlete’s active participation may violate the NCAA “pay for play” restriction. As such, finding the balance between meeting the NCAA’s quid pro quo re-

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quirement and not jeopardizing their F-1 eligibility by earning active income remains a hurdle for some international student-athletes.

### **THE HOMELAND LOOPHOLE**

F-1 visa regulations are only enforceable while a student is on United States’ soil. This rule has created a loophole through the barriers imposed by the NIL policy. International student-athletes have discovered that they can earn NIL income while in their home country, where the NIL agreement is consummated internationally, or where the NIL agreement is made with an international company that pays the athlete in local currency. In fact, some international student-athletes have already taken advantage of this. Lou Hedley, an Australian football player for the University of Miami, and Sam Alajiki, an Irish student who plays basketball for the University of California, both made headlines for

signing profitable NIL agreements.

Hedley worked with John Ruiz, the owner of the American healthcare company Life Wallet, and attorney Alexis Fernandez to form his NIL plan. The athlete flew home to Australia, where he filmed promotional content for the company, hired someone to post social media content from Australia, and used Zoom to complete other tasks remotely. Alajiki entered a four-figure endorsement deal with the college recruitment platform, NextUpRecruitment. According to NextUpRecruitment, the agreement overcame visa employment obstacles because the company is registered to do business in the United Kingdom and agreed to pay Alajiki in pounds from a United Kingdom bank account. However, the deal has received criticism regarding whether a company’s registration to conduct business in an athlete’s home country and paying the athlete in local currency is enough to overcome potential visa violations. Given the uncertainty surrounding this practice, NIL opportunities for international student-athletes remain limited, as their institutions may discourage them from entering such deals.

### **LOOKING FORWARD**

Navigating whether or not international student-athletes are permitted to financially benefit from their NIL remains unclear. This area is still developing and ever-changing. For the time being, international student-athletes, their coaches, and their advisors should evaluate all relevant risks when deciding whether the student should pursue NIL compensation opportunities.