# INTERNATIONAL INTERCOLLEGIATE ATHLETES: A LEGAL PATHWAY TO BENEFIT FROM THEIR NAME, IMAGE, AND LIKENESS IN THE UNITED STATES

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ABSTRACT

*This article is the first to develop a United States visa structure for international intercollegiate athletes to profit off their name, image, and likeness (NIL). Examining United States immigration law, the NCAA bylaws, and the rise of human trafficking of international intercollegiate athletes to the United States, the article argues for the creation of a new visa classification to best promote and protect the NIL interests of international intercollegiate athletes. Section I overviews the legal processes that secured the ability of intercollegiate athletes to profit off their NIL. Section II outlines the growth of international student participation in NCAA athletics, provides an overview of the F-1 student visa, and explains how F-1 student visa regulations prevent international NCAA athletes from benefiting from their NIL in the United States. Section III defines human trafficking, discusses the global pervasiveness of human trafficking, and explains how the sports industry*

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*presents a ripe dynamic for human trafficking. The section also explores how the F-1 student visa has been misused by bad actors to traffic international students to the United States to compete in sports. Section IV argues against amending F-1 student visa regulations to allow international college athletes to profit from their NIL. Section V explores the H-1B, P-1A, and O-1 temporary worker visa programs to identify how to allow international intercollegiate athletes to benefit from their NIL. Lastly, Section VI argues in favor of the adoption of a new visa classification, O-1A, largely modeled after the H-1B3 visa certification, which would allow international intercollegiate athletes to benefit from their NIL and create a safeguard against human trafficking.*

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## INTRODUCTION

In July 2021, following a decade of litigation and enactment of a patchwork of state legislation, the National Collegiate Athletic Association (NCAA) eradicated its ban on intercollegiate athletes profiting off of their name, image, and likeness (NIL).[1] In turn, intercollegiate athletes of both genders and across all sports began securing endorsement deals and business opportunities.[2] However, one group has been left out of securing NIL deals due to F-1 student visa regulations: international intercollegiate athletes.

In recent years, participation in NCAA athletics by international intercollegiate athletes has become more prevalent. Data show that between 2013 and 2018, the percentage of international NCAA Division I college athletes rose from 9.5% to 12.1%, with the number of international first-year college athletes rising from 2,442 to 3,325 in the same period.[3] Thus, despite the significant progress made in securing intercollegiate athletes' rights, the reach of the right is not optimal, as over

1. *See* O'Bannon v. NCAA, 802 F.3d 1049 (2015); NCAA v. Alston, 141 S. Ct. 2141 (2021); Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State,* BUSINESS OF COLLEGE SPORTS, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ (last updated Mar. 12, 2022) (documenting the various NIL laws enacted by individual states); Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx (discussing the implementation of an interim policy by the NCAA on July 1, 2021, which allows NCAA athletes to benefit from their NIL).

2. *See Individual NIL Deals*, BUSINESS OF COLLEGE SPORTS, https://businessofcollegesports.com/tag/nil-individual/ (last visited Feb. 5, 2022) (tracking the range of NIL deals male and female athletes across all sports and conferences are securing); Kristi Dosh, *Cavinder Twins Flex Their Muscles As Entrepreneurs With Their Latest NIL Deal,* FORBES (Jan. 18, 2022), https://www.forbes.com/sites/kristidosh/2022/01/18/cavinder-twins-flex-their-muscles-as-entrepreneurs-with-their-latest-nil-deal/?sh=250c6fad17fa (noting that NCAA Division I women's basketball players, Haley and Hanna Cavinder, are not only securing endorsement deals, but business opportunities through their NIL).

3. NCAA, TRENDS IN THE PARTICIPATION OF INTERNATIONAL STUDENT-ATHLETES IN NCAA DIVISIONS I AND II (2019), https://ncaaorg.s3.amazonaws.com/research/demographics/2019RES_ISATrendsDivSprt.pdf [hereinafter NCAA RESEARCH]. These numbers continue to rise. From 2015 to 2020, the percentage rose from 10.3% to 12.9%. NCAA, TRENDS IN THE PARTICIPATION OF INTERNATIONAL STUDENT-ATHLETES IN NCAA DIVISIONS I AND II (2021), https://ncaaorg.s3.amazonaws.com/research/demographics/2021RES_ISATrendsDivSprt.pdf.

twelve percent of Division I's NCAA athletes do not have a definite way to legally profit off their NIL in the United States.[4]

In a period when globalization is increasingly the norm, it is unsurprising that the rate of participation by international intercollegiate athletes in NCAA athletics is rising. In some instances, however, the way international college athletes reach the NCAA is concerning. Over the last decade, stories have emerged of international students being trafficked to the United States to compete in athletics. Oftentimes, they are trafficked under promises that they will gain scholarships at NCAA institutions, further their education, and escape the poverty experienced in their home countries.[5] Most of these stories involve foreign students brought to the United States under F-1 student visas.[6] Sometimes, though, the reality of the situation in the United States contradicts these promises. Reports illustrate instances of international athletes being trafficked to the United States under F-1 student visas and left in squalid conditions, without supervision or access to the bright educational and athletic futures promised to them.[7]

4. *See* 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/ (explaining that 12.4% of Division I NCAA athletes and over 20,000 of all NCAA athletes are international students, and because of F-1 student visa regulations, these individuals cannot secure NIL deals in the U.S.).

5. *See Charlotte Private School Owner Is Sentenced To Prison For Scheme Involving Student Visas*, U.S. DEPT. OF JUST. (Nov. 12, 2019), https://www.justice.gov/usao-wdnc/pr/charlotte-private-school-owner-sentenced-prison-scheme-involving-student-visas [hereinafter *Charlotte Private School*] (outlining the federal prosecution and sentencing of a former private school operator who conspired with basketball coaches to illegally utilize the F-1 student visa to traffic foreign basketball players to the United States); Richard Lapchick, *The state of human trafficking and sports*, ESPN (Jan. 29, 2019), https://www.espn.com/espn/story/_/id/25876477/the-rise-exposure-human-trafficking-sports-world (discussing instances of human trafficking arising amongst individuals lured to the United States under the auspices that they would receive athletic scholarships).

6. *See*, *e.g.*, *Charlotte Private School*, *supra* note 5.

7. *See* Alexandra Starr, *Trafficked to Play, Then Forgotten*, WNYC (Mar. 17, 2015), https://www.wnyc.org/story/basketball-trafficker/ (detailing the trafficking of a number of Nigerian youth to Mississippi under the auspices that they would receive education and athletic training preparing them to obtain college basketball scholarships).

It is amidst this growing rate of international athlete participation in NCAA athletics and realization that F-1 student visas can be used to traffic international athletes, that federal regulations for international students to access NIL benefits within the United States must be addressed. This paper is the first to address the necessary amendments to the United States temporary worker visas to create opportunities for international intercollegiate athletes to legally profit off their NIL, while protecting them against human trafficking and exploitation.

Section I of this paper provides an overview of NIL and relevant litigation and legislation that led to American NCAA athletes securing the right to benefit from their NIL. Section II outlines the growth of international student participation in NCAA athletics, provides an overview of the F-1 student visa, and explains how F-1 student visa regulations prevent international NCAA athletes from benefiting from their NIL in the United States. Section III defines human trafficking and discusses the global pervasiveness of human trafficking. It explains how the sport industry presents a ripe dynamic for prospective athletes to be human trafficked. The section then explores how the F-1 student visa has been misused by bad actors to traffic international students to the United States to compete in sports at the high school and intercollegiate levels. It also considers how college athletes' newfound ability to profit from their NIL could exacerbate human trafficking. Section IV argues against amending F-1 student visa regulations to allow international college athletes to profit from their NIL to best protect them against trafficking and exploitation. Section V explores the H-1B, P-1A, and O-1 temporary worker visa programs to identify what option presents the best solution to allow international intercollegiate athletes to benefit from their NIL. Lastly, Section VI argues in favor of the adoption of a new visa classification, O-1A, largely molded after the H-1B3 visa certification, which would allow international intercollegiate athletes to benefit from their NIL and create a safeguard against human trafficking.

## I. ELIMINATION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BAN ON ATHLETES PROFITING FROM THEIR NAME, IMAGE, AND LIKENESS

The NCAA is a member-led association comprised of over 1,000 North American member college institutions divided across three divisions of competition—Division I, Division II, and Division III.[8] Each NCAA division has its own set of bylaws regulating the conduct and competition of athletes, member institutions, and associated parties.[9] A central element of the Division I bylaws was the ban on NCAA athletes accepting anything other than an NCAA athletic scholarship for the use of their NIL.[10] This ban was overturned on July 1, 2021, when the NCAA enacted an interim NIL policy.[11]

The NCAA's adoption of the NIL interim policy was a decade-long endeavor spurred by litigation and a patchwork of state legislation. The earliest significant threats to the existence of the NCAA's amateurism standard came in 2009 when former Arizona State University and University of Nebraska quarterback, Samuel Keller, sued the NCAA, Collegiate Licensing Company ("CLC"), and Electronic Arts ("EA"), al-

8. *See Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last visited Feb. 5, 2022).

9. *See*, *e.g.*, NCAA, 2021-22 NCAA DIVISION I MANUAL (2021), https://web3.ncaa.org/lsdbi/reports/getReport/90008; NCAA, 2021-22 NCAA DIVISION II MANUAL (2021), https://web3.ncaa.org/lsdbi/reports/getReport/90010; NCAA, 2021-22 NCAA DIVISION III MANUAL (2021), https://web3.ncaa.org/lsdbi/reports/getReport/90011.

10. *See generally* Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003) (providing a historic overview of the NCAA's amateurism rules); Michelle Brutlag Hosick, *DI Council recommends DI Board adopt name, image and likeness policy*, NCAA (June 28, 2021), https://www.ncaa.org/news/2021/6/28/di-council-recommends-di-board-adopt-name-image-and-likeness-policy.aspx (explaining that the NCAA's interim NIL policy overturned its past amateurism rules); Joseph Salvador, *NCAA Approves Interim NIL Policy, Change Will Take Effect Thursday,* SI.COM (June 30, 2021), https://www.si.com/college/2021/06/30/nil-interim-policy-approved-starting-thursday (discussing the NCAA's adoption of an interim NIL policy that allows college athletes to profit from their NIL).

11. Hosick, *supra* note 1.

leging the inclusion in EA's *NCAA Football* video game of avatars possessing NCAA players' likenesses violated their right of publicity.[12] Months later, former UCLA men's basketball player, Ed O'Bannon, sued the association alleging it violated federal antitrust law when it precluded college athletes from being compensated for the use of their likeness as avatars in EA *NCAA* video games.[13] The cases were consolidated.[14] The NCAA settled the right of publicity claims, but EA defended against them by arguing the First Amendment protected its use of intercollegiate athletes' likenesses.[15] Ultimately, this defense was rejected by the Ninth Circuit Court of Appeals.[16]

Thereafter, CLC and EA settled with the plaintiffs.[17] After this settlement, the cases were deconsolidated and O'Bannon's antitrust claims proceeded to trial.[18] At trial, the district court found for O'Bannon, holding that the NCAA's amateurism standard, which prevented college athletes from benefiting from their NIL, violated Section 1 of the Sherman Antitrust Act.[19] The Ninth Circuit Court of Appeals affirmed the ruling, holding that the NCAA's rules—including the amateurism standard—are subject to antitrust scrutiny.[20] However, the Ninth Circuit ruled that the NCAA could overcome any antitrust violation by allowing NCAA athletes to receive up to full-tuition scholarships.[21] While the *O'Bannon* court's ruling that the NCAA's bylaws are subject to antitrust scrutiny is significant, the impact was limited in the expanded compensation it secured for college athletes. It was amidst this legal

12. Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1271 (9th Cir. 2013).

13. O'Bannon v. NCAA*,* 802 F.3d 1049, 1055 (9th Cir. 2015).

14. *Id.*

15. *See* Martin Rickman, *NCAA announces $20M settlement with Keller plaintiffs over video game claims,* SI.COM (June 9, 2014), https://www.si.com/campus-union/2014/06/09/ncaa-keller-lawsuit-settlement); *Keller*, 724 F.3d at 1284.

16. *Keller*, 724 F.3d at 1284.

17. Jon Solomon, *EA Sports and CLC settle lawsuit by Ed O'Bannon plaintiffs; NCAA remains as lone defendant*, AL.COM (Sept. 26, 2013), https://www.al.com/sports/2013/09/ea_will_not_make_college_footb.html.

18. *O'Bannon*, 802 F.3d at 1056.

19. *Id.*

20. *Id.*

21. *Id.* at 1079.

landscape that the NCAA prevented NCAA athletes from profiting off their NIL for nearly another decade.

It would take a flurry of state legislative activity and a Supreme Court ruling to end the NCAA's limitations on intercollegiate athletes' NIL rights. On September 30, 2019, California made history when its governor signed into law Senate Bill 206, the Fair Pay to Play Act.[22] The Fair Pay to Play Act codified that no association nor school could exercise rules foreclosing college athletes' right of publicity.[23] Initially set to go into effect in 2023, the Fair Pay to Play Act was met with fierce resistance across the NCAA.[24] The NCAA indicated that upon the law's enactment, California schools risked being removed from the association.[25] Additionally, athletic directors outside of California threatened to cancel competitions against the state's teams.[26]

This hostile climate lessened, however, when NCAA member institutions realized that the Fair Pay to Play Act created a recruiting advantage for California teams.[27] Schools like USC, UCLA, and Stanford, would receive "a big edge when they're trying to woo some of Arizona's name players."[28] Subsequently, other states followed suit and enacted their own laws ensuring college athletes' rights to profit from

22. Dan Murphy, *California defies NCAA as Gov. Gavin Newsom signs into law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act.

23. *Id.*

24. *Id.*

25. Colin Kalmbacher, *NCAA Threatens to Leave California Behind If Bill Allowing Student-Athletes to Make Money Becomes Law*, LAW & CRIME (Sept. 11, 2019), https://lawandcrime.com/high-profile/ncaa-threatens-to-leave-california-behind-if-bill-allowing-student-athletes-to-make-money-is-signed-into-law/.

26. *See* Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019), https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players (highlighting Ohio State University's athletic director's threat to boycott scheduling games with California schools amidst the adoption of the Fair Pay to Play Act).

27. Richard Obert, *Recruiting landscape will change with California's 'Fair Pay to Play' law*, AZ CENTRAL (Oct. 13, 2019), https://www.azcentral.com/story/sports/high-school/2019/10/13/recruiting-landscape-change-fair-pay-play-act/3946513002/.

28. *Id*.

their NIL.[29] In turn, the NCAA acquiesced its initial stance, announcing in October 2019 that it would direct all three divisions to consider allowing college athletes to benefit from their NIL.[30] However, the NCAA and its divisions' governance structures were slow to enact policies allowing NCAA athletes to benefit from their NIL.[31]

As states enacted NIL-related bills, a case was working its way through the federal court system that would force the NCAA's hand in allowing intercollegiate athletes to benefit from their NIL, *Alston v. NCAA*.[32] This antitrust law case was filed in 2014 while *O'Bannon v. NCAA* was being litigated.[33] In it, the plaintiffs sought to eliminate the NCAA's restrictions on what compensation college athletes could receive.[34] But their request for relief was limited by the *O'Bannon* ruling, which found that the NCAA could comply with the Sherman Act by requiring Division I member institutions to merely offer college athletes up to full-tuition scholarships.[35] Thus, the issue ultimately considered in *Alston* was whether the NCAA's limitations on non-scholarship, education-related benefits violated antitrust law.[36]

29. *See*, *e.g.*, Ben Pickman, *Colorado Governor Signs Bill Allowing NCAA Athletes to Profit Off Name, Likeness*, SI.COM (Mar. 20, 2020), https://www.si.com/college/2020/03/20/colorado-gov-signs-ncaa-bill-likeness; Dosh, *supra* note 1.

30. *Board of Governors starts process to enhance name, image and likeness opportunities,* NCAA (Oct. 29, 2019), https://www.ncaa.org/news/2019/10/29/board-of-governors-starts-process-to-enhance-name-image-and-likeness-opportunities.aspx.

31. *See*, *e.g.*, The Athletic Staff, *NCAA president Mark Emmert wants new NIL rules in place by July 1: Report*, THE ATHLETIC (May 8, 2021), https://theathletic.com/news/ncaa-president-mark-emmert-wants-new-nil-rules-in-place-by-july-1-report/ (highlighting that despite the NCAA's 2019 directive for its governing bodies to adopt NIL policies, no said policies were in existence as of May 2021).

32. *See*, *e.g.*, Alicia Jessop, *"Looking into the NCAA's model, I saw it was egregious": Athlete compensation has become a bipartisan matter*, THE ATHLETIC (Oct. 1, 2019), https://theathletic.com/1247501/2019/10/01/looking-into-the-ncaas-model-i-saw-it-was-egregious-athlete-compensation-has-become-a-bipartisan-matter/ (demonstrating that even U.S. Congressmen believed the NCAA was slow to amend its bylaws to provide college athletes NIL-related rights).

33. Alston v. NCAA (In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1247 (9th Cir. 2020).

34. *Id.*

35. O'Bannon v. NCAA, 802 F.3d 1049, 1056 (9th Cir. 2015).

36. *Alston*, 958 F.3d at 1247-48.

At trial, the district court held that the NCAA's limits on education-related benefits violated the Sherman Antitrust Act.[37] The NCAA appealed prior to the enactment of California's Fair Pay to Play Act. However, the Ninth Circuit did not issue its ruling until *after* the enactment of California's Fair Pay to Play Act.[38] The Ninth Circuit affirmed the lower court's ruling[39] and the United States Supreme Court granted writ of certiorari.[40] On June 21, 2021, the U.S. Supreme Court in a 9-0 decision affirmed the lower court's ruling, applying the Sherman Antitrust Act to the NCAA's amateurism rules and finding its limits on education-related benefits violated antitrust law.[41]

Although *Alston* did not consider non-education related payments to college athletes, the decision signaled to the NCAA that any antitrust immunity would not come by way of the Court.[42] Thus, ten days after the U.S. Supreme Court's ruling and ahead of the first states' NIL bills' effectuation dates, the NCAA adopted an interim NIL policy.[43] This policy allowed all NCAA athletes—regardless of whether their state of residence adopted an NIL bill—to accept compensation beyond a scholarship for their NIL and remain eligible for NCAA athletics.[44]

In the early stages following the NCAA's interim policy enactment, college athletes across all levels of competition and sports financially benefited from NIL deals. Some entrepreneurial college athletes started their own businesses, while more media-minded college athletes launched and monetized podcasts.[45] Other athletes—including top high

37. In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019).

38. *Alston*, 958 F.3d at 1252.

39. *Id.* at 1265-66.

40. *See* NCAA v. Alston, No. 20-512, 2020 U.S. LEXIS 6102 141 S. Ct. 1231 (U.S. S. Ct. Dec. 16, 2020).

41. NCAA v. Alston*,* 141 S. Ct. 2141, 2166 (2021).

42. *See* Dan Murphy, *Everything you need to know about the NCAA's NIL debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

43. *See* Hosick, *supra* note 1.

44. *See* Tori B. Powell, *College athletes can earn money from their name, image and likeness*, CBS NEWS (July 1, 2021, 12:08 PM), https://www.cbsnews.com/news/ncaa-rules-college-athletes-get-paid-name-image-likeness/.

45. *See* Andrea Adelson, *Florida State's McKenzie Milton, Miami's D'Eriq King join in on NIL platform Dreamfield*, ESPN (June 30, 2021),

school prospects—earned millions from endorsement deals.[46] Restoring the right of publicity to college athletes righted an unfair balance that existed for over a century of the NCAA's existence.[47]

## II. THE F-1 STUDENT VISA NIL BARRIER FOR INTERNATIONAL INTERCOLLEGIATE ATHLETES

The ability of intercollegiate athletes to benefit from their NIL is a significant step toward expanding college athletes' rights. However, one group has largely been withheld from exercising this right: international intercollegiate athletes.[48] This is because most international college athletes are in the United States on F-1 student visas, which prohibit them from obtaining paid work in the United States beyond internships and work in their fields of study.[49] Despite this, recruitment of international athletes by NCAA programs has increased in recent years.[50] In order for the NIL laws and policies regarding college athletes' right of publicity to achieve their purpose, consideration must be

https://www.espn.com/college-football/story/_/id/31742166/florida-state-mckenzie-milton-miami-deriq-king-join-nil-platform-dreamfield (explaining how quarterbacks at rival programs partnered to launch an NIL platform); *Tracker: Student Athlete Podcasts and Paid Guest Series,* BUSINESS OF COLLEGE SPORTS, https://businessofcollegesports.com/tracker-student-athlete-podcasts-and-paid-guest-series/ (last updated Jan. 22, 2022) (outlining podcasts launched by college athletes following their ability to begin profiting from their NIL).

46. *See* Abigail Gentrup, *NIL Earnings Make Some College Athletes Millionaires*, FRONT OFFICE SPORTS (July 27, 2021), https://frontofficesports.com/nil-earnings-make-some-college-athletes-millionaires/ (explaining that Alabama quarterback Bryce Young, for example, had made nearly $1 million off his NIL by July 1, 2022).

47. *See*, *e.g.*, Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. OF LEGAL ASPECTS OF SPORT 253 (2021) (providing an overview of the right of publicity and explaining how NCAA athletes were not allowed to capitalize under it for over a century).

48. *See, e.g.,* Jessop, *supra* note 32 (highlighting perspectives from a variety of college athlete advocates as to why NIL rights must be granted to college athletes to further college athletes' interests).

49. *See* Planos, *supra* note 4 (explaining that most international college athletes enter the U.S. on an F-1 student visa, and because of F-1 student visa regulations, international college athletes cannot secure NIL deals in the U.S.).

50. *See generally* NCAA RESEARCH, *supra* note 3.

given to how international intercollegiate athletes can legally benefit from their NIL.

Research shows that between 2013 and 2018, the percentage of international students competing in NCAA Division I athletics rose from 9.5% to 12.1%.[51] According to the NCAA, in 2019-20, over 20,000 international students competed in NCAA athletics, hailing from all continents but Antarctica.[52] In some sports, over a majority of both male and female NCAA athletes are international students.[53] For example, in Division I men's sports, over twenty-five percent of tennis, ice hockey, and soccer rosters are comprised of international students.[54] In Division I women's sports, over twenty-five percent of tennis, ice hockey, golf, and field hockey rosters are comprised of international students.[55] While these sports have significant international athlete participation, other sports experienced a larger increase of international athlete participation between 2015 and 2020. During that time period, Division I football saw a 203% increase in international student participation, while Division I men's soccer, cross country, basketball, baseball, and golf each experienced over twenty-five percent growth in international student participation.[56] In Division I women's sports, the increase in international student participation has been even more significant. Water polo saw a 106% increase in international student participation, while nine other sports—basketball, tennis, cross country, field hockey, track, rowing, soccer, golf, and ice hockey—experienced an increase in international student participation of over twenty-five percent.[57]

51. *Id.*

52. *Number of Division I Student-Athletes by Country (2019-20*) (map), *in International Student-Athlete Participation*, NCAA (July 2020), https://www.ncaa.org/sports/2018/3/21/international-student-athlete-participation.aspx.

53. *See* NCAA RESEARCH, *supra* note 3, at 6-7 (documenting the percentage of NCAA athletes who are international students).

54. *Id.* at 6.

55. *Id.*

56. *Id.*

57. *Id.*

To enter the United States, an international student must have a visa.[58] Three main student visa classifications exist: the F-1 student visa, J-1 exchange visa, and M-1 student visa.[59] Most international NCAA athletes enter the United States using an F-1 student visa.[60] The F-1 student visa allows international students to study at United States colleges and universities.[61] An international student can obtain an F-1 student visa by enrolling in a full-time academic program at a university approved by the Student and Exchange Visitors Program (SEVP) under the U.S. Immigration and Customs Enforcement agency (ICE).[62] The student must be proficient in English, be able to financially support themself during the entire course of study, and maintain a permanent residence abroad.[63] Notably, students on F-1 student visas cannot obtain off-campus work during their first year of study, but can work on-campus under certain limitations.[64] After their first year of study, students on F-1 student visas can obtain off-campus employment only if it practically relates to their course of study, or if they have severe economic hardship.[65]

Arguably, for some intercollegiate athletes, securing an NIL endorsement or starting a related entrepreneurial or media endeavor is practical training related to their course of study. For instance, a student studying Sport Management or Marketing would utilize skills developed and explored in the classroom to procure an endorsement deal. Similarly, Business and Communication majors could put theory to

58. *See International Student Visas,* U.S. DEPT. OF STATE, https://educationusa.state.gov/foreign-institutions-and-governments/understanding-us-higher-education/international-student (last visited Mar. 7, 2022) (outlining the valid student visas required for admission into the United States).

59. *Id.*

60. *See* Pat Eaton-Robb, *Foreign college athletes left out of rush for NIL windfall,* AP NEWS (Dec. 24, 2021), https://apnews.com/article/entertainment-sports-business-celebrity-endorsements-education-4abf78b5012911f02ebee4ee6d776d7d.

61. *See* Shorelight Team, *F-1 Visas for International Students: Requirements, Rules, Status,* SHORELIGHT, https://shorelight.com/student-stories/student-visa-usa-f1/ (last updated Mar. 8, 2022).

62. Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(f)(6) (2022).

63. *Id.* at § (f)(1).

64. *Id.* at § (f)(9).

65. *Id.* at § 214.2(f)(9)(iii).

practice by starting their own NIL-related businesses and media enterprises. However, it is unlikely that ICE would find that such endeavors meet the F-1 visa requirements.

The parameters that international students must follow to legally secure off-campus "practical training" employment indicate that neither one-off, short-term endorsement deals nor entrepreneurial business and media opportunities are considered valid employment options for international students. This is demonstrated by the regulations setting forth time limits for off-campus work and specifying that international students cannot engage in practical training for more than twenty hours per week during the school year.[66] Additionally, students must complete any off-campus work within fourteen months of completing their studies.[67] The regulations do not appear to consider the possibility of international students profiting from their NIL. Thus, as the law stands, most international intercollegiate athletes cannot access the right to profit from their NIL.

## III. BAD ACTORS USE F-1 STUDENT VISAS TO TRAFFIC INTERNATIONAL ATHLETES

F-1 student visas create a pathway for international students to access education in the United States. International high school and college athletes enter the United States under the belief that they will receive educational opportunities and pathways to advance in athletics. But upon entering the United States, some are met with a starkly different reality when they are forced to live in squalid conditions and unable to access meaningful education.[68] This scenario arises when bad actors manipulate the system and obtain F-1 student visas to traffic international students to the United States. Thus, any amendments made to the F-1 student visa addressing international intercollegiate athletes' inability to profit from their NIL should be balanced against the risk of human trafficking and exploitation of those same athletes.

The sport industry is not immune to the global issue of human trafficking. In 2000, the United Nations General Assembly adopted the United Nations Convention Against Transnational Organized Crime,

66. *Id.* at § (f)(9).
67. *Id.* at § (f)(10)(ii)(3).
68. Starr, *supra* note 7.

better known as the "Palermo Protocols."[69] The Palermo Protocols included, ". . . the first globally legally binding instrument with an agreed definition in trafficking persons."[70] The protocols define human trafficking as:

> . . . the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[71]

Notably, the Palermo Protocols hold that a human trafficking victim cannot consent to any exploitation. Further, "[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. . ." amounts to human trafficking, even if the child is not sexually exploited, forced into labor, enslaved or faced with organ removal.[72]

In 2016, it was estimated that 40.3 million people globally were enslaved, with 24.9 million forced into labor.[73] The sport industry is not immune to human trafficking. In fact, in 2020, the U.S. Department of State highlighted the issue of athletes being trafficked in its annual human trafficking report.[74] The State Department wrote:

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69. G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

70. *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (last visited Mar. 7, 2022).

71. G.A. Res. 55/25, *supra* note 69, art. 3(a).

72. *Id.* at art. 3(c).

73. *See Global Estimates of Modern Slavery: Forced Labour and Forced Marriage,* INT'L LAB. ORG. (Sept. 19, 2017), https://www.ilo.org/global/publications/books/WCMS_575479/lang—en/index.htm (providing data surrounding the rate of human trafficking globally).

74. *See* UNIVERSITY OF NOTTINGHAM RIGHTS LAB, THE PROBLEM OF SPORTS TRAFFICKING: SETTING AN AGENDA FOR FUTURE INVESTIGATION AND ACTION (2021),

> Many people around the world dream of becoming professional athletes, drawn by the fame, multi-million-dollar contracts, lucrative brand sponsorships, and opportunities to travel around the world. The growing number of young players aspiring to become professional athletes and the potential to sign the next greatest deal inevitably draws human traffickers looking to profit from the exploitation of players' dreams.[75]

In recent years, several high-profile cases have been reported of bad actors trafficking international students to the United States under the auspices of obtaining college athletic scholarships. For instance, between 2013 and 2017, reporters tracked an influx of international athletes to Paterson (NJ) Eastside High School, and uncovered allegations that multiple athletes on both the boys' and girls' basketball teams were trafficked from various countries to the United States.[76] Two members of the girls' basketball team who were allegedly trafficked for athletic reasons from Nigeria and Paraguay, respectively, asserted that immigration laws surrounding F-1 student visas were not properly adhered to in their cases.[77] Further, in 2019, the founder of a private school in

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https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/august/the-problem-of-sports-trafficking.pdf (noting that 2020 marked the first year that the U.S. Department of State discussed human trafficking of athletes in its annual report).

75. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Trafficking in Persons Report: 20th Edition 34 (2020) https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf [hereinafter Dep't of State Report] (describing the practice of human trafficking of athletes).

76. *See Paterson Eastside High School Basketball Scandal,* NJ.COM, https://www.nj.com/sports/page/paterson_eastside_basketball_new_jersey.html) (last visited Apr. 10, 2022).

77. *See* Mitch Light, *Unexpected Blessing: Blessing Ejiofor is thankful to be at Vanderbilt after high school recruiting scandal,* VANDERBILT NEWS (Feb. 26, 2018), https://news.vanderbilt.edu/2018/02/26/unexpected-blessing-blessing-ejiofor-is-thankful-to-be-at-vanderbilt-after-high-school-recruiting-scandal/ (including allegations from NCAA women's basketball player, Blessing Ejiofor, that she was trafficked to the United States under promises she would obtain a college scholarship and that her F-1 student visa wasn't properly filed); Mirin Fader, *Andrea Aquino Isn't Hiding From Anyone Anymore*, BLEACHER REPORT (Oct. 19, 2020), https://bleacherreport.com/articles/2913523-andrea-aquino-isnt-hiding-from-anyone-anymore (highlighting former NCAA women's basketball player, Andrea Aquino's allegations that she was trafficked to the United States under promises that

Charlotte, North Carolina, was sentenced to eighteen months in federal prison for her involvement in trafficking seventy-five international students to the United States to compete in athletics. According to the Department of Justice, the school's founder, "conspired with other individuals, many of whom were basketball coaches and recruiters with organizations in the United States and other countries. . . to admit foreign national students without complying with the terms of the F-1 student visa program."[78]

The F-1 student visas of the foreign national students in the Charlotte, North Carolina case indicated they were arriving in the United States to be full-time students. However, the Department of Justice discovered they were really recruited to the United States to compete in basketball.[79] NBA player, Tacko Fall, experienced a similar situation when he departed his home country of Senegal with handlers at the age of sixteen.[80] He obtained an F-1 student visa that specified he would study at a Texas school, but once in the United States, the handlers moved Fall to a different school.[81] The school Fall was originally slated to attend thereafter canceled his I-20 form, voiding his F-1 student visa.[82] Thus, Fall found himself thousands of miles away from home in America as an undocumented immigrant. Reflecting on the experience, Fall said, "There's been many times where I feel like some people have been taken advantage of where they bring them here then that's it. Then they're just left for their own. And if things don't work out, then it's—they—they are pretty much screwed."[83]

Money is the major factor driving the human trafficking of international prospective college athletes to the United States. Across sports,

she would obtain a college scholarship and that her traffickers did not properly obtain an F-1 visa).

78. *Charlotte Private School*, *supra* note 5.

79. *See id.* (setting forth the sentence against the operator of a private school who plead guilty to conspiracy to harbor aliens).

80. *See* Jon Wertheim, *Middlemen luring African basketball players to U.S. with false promises*, CBS NEWS (Mar. 29, 2020), https://www.cbsnews.com/news/african-basketball-nba-ncaa-schemes-60-minutes-2020-03-29/ (discussing the bad actors who facilitated Tacko Fall's move from Senegal to the United States for basketball purposes).

81. *Id.*

82. *Id.*

83. *Id.*

human traffickers profit from the crime in several ways. First, human traffickers secure fees for travel and education expenses from unwitting families who shell out thousands of dollars believing they are sending their children towards a better future.[84] Instead, their children can be met with poor living conditions, forced into labor, or experience unmet educational needs whilst living thousands of miles from their home in countries where their native language is not predominantly spoken.[85] Second, human traffickers in the sport industry profit by ingratiating themselves into the lives of talented young athletes, establishing a role as an agent and thereby demanding high payouts from the athletes' subsequent playing and endorsement earnings.[86] Reports indicate that individuals who traffic international students to the United States for athletic purposes can demand up to forty percent of these students' future playing earnings.[87] Beyond usurping significant portions of a player's future earnings, traffickers can score even earlier paydays, as reports indicate that college programs will pay recruiters to funnel international athletes to them.[88]

It is important to note that limited data exists on the scope and severity of human trafficking in sports, and more specifically, on the use of F-1 visas to traffic international students to the NCAA.[89] However, documented evidence exists showing F-1 visas are improperly utilized to traffic prospective NCAA athletes to the United States, and traffickers abusing the power dynamic in their relationships with athletes to

84. *See* Dep't of State Report, *supra* note 75, at 26.

85. *Id.*

86. *See* Michael Weinreb, *Traffickers lure athletes with dreams of sporting glory only to abandon them far from home*, GLOBAL SPORT MATTERS (Mar. 29, 2019), https://globalsportmatters.com/youth/2019/03/29/traffickers-lure-athletes-with-dreams-of-sporting-glory-only-to-abandon-them-far-from-home/ (documenting the various ways in which recruiters can profit from human trafficking international athletes).

87. L. Jon Wertheim, Oriana Zill De Granados, & Emily Gordon, *For African Players, Chasing Hoop Dreams Is a Risky Proposition*, SPORTS ILLUSTRATED (Mar. 27, 2020), https://www.si.com/nba/2020/03/27/nba-african-players-trafficking.

88. *See* Starr, *supra* note 7 (documenting methods that college programs utilize to pay recruiters for delivering international basketball players to them, such as creating coaching jobs for the recruiters and paying them in cash).

89. *See* UNIVERSITY OF NOTTINGHAM RIGHTS LAB, *supra* note 74 (discussing that as of 2021, few studies have been done on human trafficking in sports, limiting "quantitative and verifiable data" on the scope of the problem).

siphon their earnings.[90] Thus, alternatives to amending the F-1 student visa program must be considered to create a pathway for international intercollegiate athletes to benefit from their NIL.

## IV. NEW VISA CLASSIFICATIONS BEST ADDRESS ATHLETE NIL INTERESTS

The rise in international intercollegiate athlete participation in the United States requires consideration of alternatives to amending the F-1 visa program to allow international intercollegiate athletes to benefit from their NIL. Thus, examination of how commonly issued temporary worker visas, namely, the H-1B visa, O-1 visa, and P-1A visa operate is necessary to best identify a potential solution.

First, a brief overview of the history of the H-1B, O-1, P-1A visa programs is required. Prior to 1990, "nonimmigrants of 'distinguished merit and ability'" could enter the United States under the H1 visa program codified by the Immigration and Nationality Act.[91] However, the Immigration Act of 1990 subsequently separated the H1 visa into three new categories: H-1B, O-1, and P-1.[92]

The H-1B visa allows nonimmigrants to enter the United States for work purposes if they engage in "specialty occupations."[93] A specialty occupation requires individuals to possess a bachelor's degree or higher in their respective fields and "theoretical and practical application of a body of highly specialized knowledge."[94] To obtain an H-1B visa, employers are required to submit a labor certification form to the United States Department of Labor.[95] The total number of H-1B visas that can be issued annually across all categories is 65,000.[96]

Amending the H-1B visa classification requirements does not present the best solution to creating a pathway for international intercollegiate athletes to profit off of their NIL for several reasons. First, H-1B

90. Lapchick, *supra* note 5.

91. Immigration & Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 168; Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 841-42 (2012) (providing a detailed history of the adoption of the H1, P-1, O-1 and H1B visa categories).

92. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5020.

93. *Id.* at § 206 (c)(1).

94. *Id.* at § 206 (c)(2)(A).

95. *Id.* at § 205(c)(1).

96. *Id.* at § 205(a)(1)(a).

visas are currently only obtainable by those who are clearly in the United States for work or employment purposes. Significant debate has raged for years over the employee status of NCAA athletes.[97] To address this debate, United States Senators Chris Murphy and Bernie Sanders proposed federal legislation in 2021 that would legally designate college athletes as employees.[98] Further, the National Labor Relations Board's general counsel issued a memorandum in 2021 highlighting the probability that intercollegiate athletes are employees.[99] While these actions demonstrate the possibility that intercollegiate athletes are or could soon be declared employees under the law, legislation presents an unnecessary roadblock for quickly securing international intercollegiate athletes the ability to benefit from NIL.

Additionally, the cap on the number of H-1B visas issuable presents a likelihood that few NCAA athletes would be able to secure them. In the 2022 fiscal year alone, employers submitted over 300,000 H-1B visa applications, and the vast majority of H-1B visas were issued to tech employees.[100] The paltry success of fashion models in securing H-

97. *See*, *e.g.*, Tom Schad, *Student-athletes or student-employees? Tug-of-war continues in Congressional hearing day after NLRB memo*, USA TODAY (Sept. 30, 2021), https://www.usatoday.com/story/sports/college/2021/09/30/student-athletes-student-employees-tug-war-rages-congress/5928929001/ (highlighting whether the debate over whether college athletes are employees has even reached the floor of Congress).

98. Nick Bromberg, *Senate bill backed by Bernie Sanders would classify college athletes as employees of their schools*, YAHOO! SPORTS (May 27, 2021), https://sports.yahoo.com/senate-bill-backed-by-bernie-sanders-would-classify-college-athletes-as-employees-of-their-schools-155243145.html.

99. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NATIONAL LABOR RELATIONS BOARD (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of.

100. *See*, *e.g.*, Margaret Harding McGill, *Tech firms cheer smoother visa sailing*, AXIOS (Jan. 12, 2022), https://www.axios.com/h1b-visa-approval-rate-tech-biden-immigration-a8f689e8-adae-45c0-a83e-ac8b0c54468b.html (noting that Amazon received the greatest number of H-1B visa approvals for initial employment, followed by Google, IBM and Microsoft).

1B visas signals the unlikelihood of NCAA athletes securing them. Between 2004 and 2010, the number of international fashion models who received H-1B visas declined from 721 to 189.[101]

Given that amending the H-1B visa certification does not present an efficient solution to international intercollegiate athletes benefiting from their NIL, whether amendments to the O-1 and P-1 visa programs present better solutions should be considered. Prior to the Immigration Act of 1990, athletes would enter the United States under an H1 visa. The Immigration Act of 1990 created new visa categories, P-1A and O-1, for athletes to enter the United States and work under.[102]

The requirements to obtain a P-1 visa are more stringent than an H-1B visa, but less stringent than an O-1 visa.[103] P-1A is a particular type of P-1 visa that applies to athletes.[104] To qualify for a P-1A visa, an athlete must perform "at an internationally recognized level of performance."[105] An athlete's performance is "internationally recognized" if they ". . . have a high level of achievement in a sport, demonstrated by a degree of skill and recognition substantially above that ordinarily encountered. [Their] achievement must be renowned, leading, or well-known in more than one country."[106] Notably, professional athletes are deemed to meet this requirement and thus, automatically qualify for P-1A visas.[107] Further, the competitions the athlete competes in ". . . must have a distinguished reputation and be at an internationally recognized

101. *See Beauty and the Geek: A new bill proposes more visas be allocated to fashion models,* THE ECONOMIST (June 21, 2008), https://www.economist.com/united-states/2008/06/19/beauty-and-the-geek (discussing attempts by former U.S. congressman, Anthony Weiner, to amend the H-1B visa certification to create a pathway for more international models to enter the United States for work).

102. *See* Johnson, *supra* note 91, at 841.

103. *See id.* at 858 (describing the P visa as ". . . fill[ing] a place in the regulatory structure between the rare air of O-visa nonpareil and the demand-meeting proletarians brought in under the H1B classification.").

104. *See generally P-1A Athlete*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 26, 2021), https://www.uscis.gov/working-in-the-united-states/temporary-workers/p-1a-athlete.

105. Immigration Act of 1990, *supra* note 92, at § 207(3)(P)(i)(I).

106. *P-1A Athlete*, *Eligibility Criteria*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 26, 2021), https://www.uscis.gov/working-in-the-united-states/temporary-workers/p-1a-athlete.

107. *Id*.

level of performance such that it requires the participation of an internationally recognized athlete."[108] This standard signifies that the purpose of a P-1A visa is for an athlete to enter the United States to compete in a specific sporting event.[109] As such, it is understood that the P-1A visa may not be the best option for athletes to earn income through other opportunities, like NIL deals.[110]

Lastly, whether the O-1 visa classification presents an appropriate method for international intercollegiate athletes to enter the U.S. for athletic competition and benefit from their NIL must be considered. Between the H-1B, P-1A, and O-1 visas, the O-1 visa classification criterion is the most difficult for an athlete to meet. The O-1 visa classification allows an individual with ". . . extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained international acclaim" to enter the United States as a nonimmigrant.[111] To show "extraordinary ability," an athlete must demonstrate ". . . a level of expertise indicating that [they] are one of the small percentage who have risen to the very top of the field."[112]

Although few athletes possess the expertise to compete in NCAA athletics, it is doubtful that making an NCAA roster alone satisfies this requirement. In fact, the elements of "extraordinary ability" and "sustained international acclaim" required make it very difficult for most athletes to attain an O-1 visa.[113] That's because, to prove these elements, an athlete must have either won an Olympic medal, world championship, or athlete of the year award.[114] If none of these have been

108. *Id.*

109. *See* Sherrod Seward, *What Is The Difference Between O Or P Visas For Athletes Coming To The United States?*, SHERROD SPORTS VISAS, https://www.sherrodsportsvisas.com/o1-or-p1-visa (last visited Feb. 17, 2022) (explaining that a P-1A visa limits the activities an athlete can engage in while in the United States).

110. *Id.*

111. Immigration Act of 1990, *supra* note 92, at § 205(A)(3)(i).

112. *O-1 Visa: Individuals with Extraordinary Ability or Achievement,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 21, 2022), https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement.

113. *See*, *e.g.*, Leibl and Kirkwood PC, *Athletes,* LEIBL AND KIRKWOOD PC, https://usimmigrationlaw.net/athletes-2/ (last visited Feb. 17, 2022) (asserting that athletes who could qualify for an O-1 visa rise to the level of "Wayne Gretzky, Ronaldo and Annika Sorenstam.").

114. *See* Seward, *supra* note 109.

achieved, the athlete can obtain an O-1 visa if they can prove at least three of the following: (1) Receipt of national and international awards; (2) extensive, positive letters from experts; (3) unique contributions; (4) membership in a prestigious organization or group; (5) reputable articles highlighting them; or (6) past payment for athletics.[115] For the few athletes meeting the more stringent O-1 visa criterion, greater benefits than those under the P-1A visa await. Most notably, O-1 visa holders can engage in activities other than sport competitions in the United States, and as such, can secure endorsement income.[116]

Amending the O-1 visa program is the most optimal way to allow international intercollegiate athletes to benefit financially from their NIL for several reasons. First, Congress's delineation of two visa types specifically for athletes in the Immigration Act of 1990 signals that the H-1B visa is a classification to be used for non-athlete immigrant temporary workers.[117] Thus, it can be assumed that the entry of international athletes into the United States for work purposes should fall under O-1 or P-1A visas.[118] The limitations of the P-1A visa, especially related to an athlete's ability to secure endorsement income, do not make it an attractive option to carve out a pathway for international intercollegiate athletes to benefit from their NIL. Thus, to create a method by which international intercollegiate athletes can benefit from their NIL, Congress should amend the O-1 visa program and create a new classification, the O-1A visa.

115. *Id.*

116. *Id*.

117. *See* Johnson, *supra* note 91, at 841 (discussing the legislative history of the Immigration Act of 1990 to explain that, "[m]any of the temporary workers previously covered by the H1 visa category were transferred into a new H1B visa category while others found themselves subject to the new O or P visas." Given that the O and P visas cover athletes, it can be assumed that it was Congress' intent for these visa programs to regulate international athletes' entry into the United States).

118. Johnson, *supra* note 91, at 841-45; *see* also Leibl and Kirkwood PC, *supra* note 113 (explaining that some athletes can also enter the United States for competitions using a B visa, so long as they're not being paid).

## V. PROTECTING ATHLETES FROM EXPLOITATION: A NEW 0-1A VISA CLASSIFICATION

Congress should amend the O-1 visa program to create a new O-1A visa classification that would allow international intercollegiate athletes to benefit from their NIL. The O-1A visa would be an alternative to the F-1 student visa, and it would be assumed that most international intercollegiate athletes would continue entering the United States under the F-1 visa classification.[119] Creating the new O-1A visa classification must achieve the following goals: (A) create a clear pathway for international intercollegiate athletes to legally obtain NIL income in the United States; (B) create safeguards against human trafficking and exploitation of international intercollegiate athletes; and (C) ensure that international intercollegiate athletes remain eligible to attend American colleges and universities and have adequate time to complete their degrees.

Past congressional action demonstrates that Congress could enact amendments to the O-1 visa classification to provide international intercollegiate athletes a pathway to profit from their NIL. In 1991, Congress amended the Immigration Act of 1990 to create the H-1B3 visa category for international fashion models.[120] The category was created because the Immigration Act of 1990's amendments to the H1 visa system hindered international fashion models' ability to enter the United States.[121] In doing so, Congress showed a willingness to address unintended consequences of United States immigration law on international laborers. It is unlikely Congress considered the consequences of international intercollegiate athletes' inability to capitalize from their NIL when it enacted the Immigration Act of 1990 because college athletes could not legally profit from their NIL then. Thus, just like it created the H-1B3 visa category for international fashion models, Congress should create a legal pathway for international intercollegiate athletes

119. *See*, *e.g.*, Planos, *supra* note 4 (explaining that most international college athletes enter the U.S. on an F-1 student visa).

120. *See* Johnson, *supra* note 91, at 841-45 (providing an extensive overview of how the category of fashion models received its own H-1B visa category); Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2 (h)(4)(i)(A)(3) (2022).

121. *See* Johnson, *supra* note 91, at 842-45 (noting that fashion models were essentially left out of the new visa structure created by the Immigration Act of 1990).

to profit from their NIL. The following sections explore how the H-1B3 visa and O-1 visa can serve as bases for the crafting of the new O-1A visa category.

### *A. O-1A Visa Eligibility Requirements*

In defining the eligibility criteria for the O-1A visa, it is important that the criteria are not as narrow as those for O-1 visa, wherein only few athletes of very high stature are eligible. It is improbable, however, that Congress would create an O-1A visa program wherein *all* international intercollegiate athletes could profit from their NIL.[122] Regardless, not all international intercollegiate athletes would need to access an O-1A visa, as most American intercollegiate athletes have not signed NIL deals.[123] Additionally, most American college athletes who have signed NIL deals earn insubstantial income.[124] Thus, it is likely that the F-1 student visa would remain the most applicable visa for international intercollegiate athletes. As such, the O-1A student visa criteria should be

122. This is because some Congress members believe that international labor strips job opportunities from Americans. *See* Johnson, *supra* note 91, at 856-57; Alex Vandermaas-Peeler et al., *Partisan Polarization Dominates Trump Era: Findings from the 2018 American Values Survey*, PRRI (Oct. 29, 2018), https://www.prri.org/research/partisan-polarization-dominates-trump-era-findings-from-the-2018-american-values-survey/) (showing that 33% of Americans and 62% of Republicans surveyed believe immigrants take jobs from American citizens). *Contra* Derek Thompson, *Does the hot-button issue of 2018 really split the country? Or just the Republican Party?*, THE ATLANTIC (Feb. 2, 2018), https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/ (demonstrating a divide not only in Americans' belief that immigrants take jobs from American citizens, but amongst members of the Republican party).

123. *See*, *e.g.*, Alex Kirshner, *How College Athletes are Making 'Massive Decisions' in the NIL Era,* GLOBAL SPORTS MATTERS (Dec. 7, 2021), https://globalsportmatters.com/business/2021/12/07/college-athletes-massive-decisions-nil-era/ (highlighting that within the first five months of American college athletes being able to profit off of their NIL, only several hundred had secured deals); Patrick Riley, *Bay Area college athletes, promised Silicon Valley deals, are selling their brands for quilts and coffee*, SF GATE (Jan. 24, 2022), https://www.sfgate.com/collegesports/article/reality-of-bay-area-college-nil-deals-16770276.php (noting that only 10% of University of California at Berkeley college athletes secured NIL deals in the first six months of the policy change).

124. *See* Riley, *supra* note 123 (noting the existence of disparities in what college athletes are earning in NIL deals, with the reported median rate being $51 per deal).

tailored to best promote and protect the interests of those international intercollegiate athletes most likely to secure substantial NIL deals.

The H-1B3 visa for international fashion models presents an eligibility structure to mold the O-1A visa after. Only fashion models of "distinguished merit and ability in the field of fashion modeling" qualify for H-1B3 visas.[125] Under this criteria, demonstrating "distinguished merit and ability" requires showing that the fashion model is ". . . prominent in the field of fashion modeling."[126] To be "prominent," the model must possess ". . . a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling."[127]

To qualify for an O-1A visa, Congress should adopt a similar standard, but tailored to international intercollegiate athletes. Here, only athletes of "distinguished merit and ability in the field of their respective sport" should qualify for O-1A visas. To demonstrate "distinguished merit and ability," an athlete must be "prominent in the field of their respective sport." An athlete will be considered "prominent" if they possess "a high level of achievement in the field of their respective sport evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of their respective sport."

### *B. O-1A Visa Safeguards Against Human Trafficking and Exploitation of International Intercollegiate Athletes*

To create safeguards against human trafficking and exploitation of international intercollegiate athletes, Congress should maintain additional aspects of the H-1B3 visa in creating the O-1A visa. Notably, the H-1B3 visa establishes significant evidentiary requirements to prove that an international fashion model is "prominent."[128] Further, to obtain an H-1B3 visa, the entity seeking to employ the international fashion

125. Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2 (h)(4)(i)(A)(3) (2022).

126. *Id*. at § 214.2 (h)(4)(i)(C).

127. *Id*. at § 214.2 (h)(4)(ii)(2)(6).

128. *Id*.

model must submit a Labor Certification Application to the United States Department of Labor.[129] Maintenance of these requirements, along with specificity of who can submit an O-1A application on behalf of a prospective international intercollegiate athlete, are necessary to safeguard against human trafficking and exploitation.

Under the H-1B3 visa requirement, to demonstrate that an international fashion model is "prominent," the following must be submitted:

> [d]ocumentation, certifications, affidavits, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is a fashion model of distinguished merit and ability. Affidavits submitted by present or former employers or recognized experts certifying to the recognition and distinguished ability of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.[130]

Such evidence must demonstrate that the fashion model has met at least two of the following criteria:

- Achievement of national or international recognition and acclaim for outstanding achievement in their field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;
- Performance or expected performance of services as a fashion model for employers with a distinguished reputation;
- Recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field; or
- Commandment of a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.[131]

The above H-1B3 documentation requirements should be amended for the O-1A visa for international intercollegiate athletes as follows:

129. *Id.*
130. *Id.* at § 214.2 (h)(4)(vii)(A)(1).
131. *Id.* at § 214.2 (h)(4)(vii)(C)(2022).

> International intercollegiate athletes can show "prominence" by providing documentation, certifications, affidavits, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is an athlete in their respective sport of distinguished merit and ability. Affidavits submitted by present or former coaches, trainers, or recognized experts certifying to the recognition and distinguished ability of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

Like for international fashion models, for international intercollegiate athletes to successfully demonstrate "prominence," the above-noted documentation must meet at least two of the following criteria:

- The athlete has achieved national or international recognition and acclaim for outstanding achievement in their respective sport as evidenced by reviews in major newspapers, trade journals, magazines, or other published material, whether such publication is digital- or print-based;
- The athlete has or will compete in intercollegiate athletics in the United States through an intercollegiate athletic association with a distinguished reputation;
- The athlete has received recognition for significant achievements from organizations, the media, sport governing bodies, or other recognized experts in the field; or
- A company lawfully organized in the United States has offered the athlete a written contract of substantial remuneration for the use of the athlete's NIL.

The above proposed strict and extensive evidentiary requirements to prove that an international intercollegiate athlete is "prominent" create a safeguard against exploitation, including human trafficking. As discussed in Part III, above, some bad actors have misused the American visa system to illegally traffic children and teenagers with presumptive athletic talent to the United States.[132] According to the United States Department of State, some of these children and teenagers are trafficked to the United States before their athletic ability is fully known

132. *See supra* Part III; Lapchick, *supra* note 5.

or developed.[133] This is because the runners who traffic these individuals desire to ". . . establish themselves within young athletes' circle of trust and instill a sense of dependency as early as possible."[134]

The purpose of instilling this sense of dependency is for the trafficker to gain control over the athlete's future earnings. However, if an athlete's talents do not pan out, the trafficker ". . . abandons them without means to return home."[135] Requiring significant evidentiary documentation that an international intercollegiate athlete is of distinguished merit and ability to obtain an O-1A visa would disincentivize traffickers from funneling undeveloped international intercollegiate athletes to the United States for purposes of securing NIL-related income.

Along with maintaining the H-1B3 visa's requirement of evidentiary proof that one is "prominent," Congress should also uphold the requirement that a company seeking to hire an international intercollegiate athlete file a Labor Condition Application. The Labor Condition Application under the H-1B3 visa requires an employer or agent to attest that it:

> [W]ill pay the H-1B worker a wage which is no less than the wage paid to similarly qualified workers or, if greater, the prevailing wage for the position in the geographic area in which the H-1B worker will be working. [P]rovide working conditions that will not adversely affect other similarly employed workers. [T]here is no strike or lockout at the place of employment. Notice of the filing of the labor condition application with the DOL has been given to the union bargaining representative or has been posted at the place of employment.[136]

Similarly, the O-1A visa should require any company seeking to enter into an endorsement or NIL-related opportunity with an international intercollegiate athlete to complete the Labor Condition Applica-

133. Dep't of State Report, *supra* note 75.

134. *Id.*

135. *Id.*

136. *See H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, *Petition Filing Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (last visited Feb. 18, 2022) (outlining the process for an employer of an international fashion model to submit a Labor Condition Application to the U.S. Department of Labor).

tion. Requiring this application will create a safeguard against the exploitation of international athletes in endorsement deals or NIL-related activities. The law should specify that under the O-1A visa, Labor Condition Applications are to be completed by agents or NIL-related partners of the international intercollegiate athlete. The Department of Labor's ability to issue sanctions against those who falsify responses on the application should serve as a safeguard against the trafficking and exploitation of international intercollegiate athletes by agents and NIL partners using the O-1A visa.

### *C. The O-1A Visa Must Ensure International Intercollegiate Athletes Have Adequate Time to Complete College*

Presently, if an international fashion model meets all the above qualifications and receives an H-1B3 visa, they may initially enter the United States for up to three years.[137] Thereafter, they can extend their stay for another three years, for a total of six years.[138] In contrast, O-1 visa holders may initially enter the United States for three years and can receive one-year extensions for as long as they ". . . need to accomplish the initial event or activity."[139] In order to ensure that international intercollegiate athletes have adequate time to complete their studies at American colleges and universities, Congress should mirror the O-1A visa's duration specifications more closely to that of the H-1B3 visa. Specifically, the O-1A visa should allow international intercollegiate athletes to initially enter the United States for four years. Thereafter, they can extend their stay for two additional years, for a total of six years.[140]

137. *Id.*

138. Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2 (h)(9)(iii)(A)(3) (2022); *id.* at § 214.2 (h)(15)(ii)(B)(i).

139. *O-1 Visa: Individuals with Extraordinary Ability or Achievement, supra* note 112.

140. *See* Nika Anschuetz, *Breaking the 4-year myth: Why students are taking longer to graduate*, USA TODAY (Dec.16, 2015), https://www.usatoday.com/story/college/2015/12/16/breaking-the-4-year-myth-why-students-are-taking-longer-to-graduate/37409747/ (discussing that undergraduate college degrees were typically completed in four-years, but rising factors have extended that period); Michelle Brutlag Hosick, *DI college athletes reach 90% graduation rate,* NCAA

Notably, both H-1B3 and O-1 visa holders are allowed to complete education in the United States.[141] Thus, in creating the O-1A visa, Congress must specify that O-1A visa holders likewise are allowed to attend American universities and colleges.

## CONCLUSION

Creating a pathway for international intercollegiate athletes to legally benefit from their NIL highlights the complexity of United States immigration law. As the number of international intercollegiate athletes competing in the United States increases, it is crucial that Congress act to afford international intercollegiate athletes a pathway to legally profit of off their NIL. However, this right must exist within the boundaries of current United States immigration policy, and weigh the possibility that bad actors may use the new right to traffic or otherwise exploit international intercollegiate athletes. Thus, the best way to address this confounding situation is for Congress to develop a new O-1A visa classification, whereby prestigious international intercollegiate athletes who can earn substantial NIL income may legally do so in a system with relevant safeguards against potential bad actors.

(Nov. 17, 2020, 1:00 PM), https://www.ncaa.org/news/2020/11/17/di-college-athletes-reach-90-graduation-rate.aspx (highlighting that the NCAA calculates graduation rates using a six-year time period for completion by college athletes).

141. *See* IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), NONIMMIGRANTS: WHO CAN STUDY? (2018, https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf (outlining what visa types make immigrants eligible to study in the United States).