

EVENTS & SEMINARS

Mr. Narit Direkwattanachai Addressed the New Foreign Workers Bill during CEO Breakfast - “Tightening the Screw on Employment of Foreigners in Thailand: New Work Permit and Visa Rules”

BANGKOK, THAILAND, Friday 8, 2007 - Mr. Narit Direkwattanachai was honored to have been invited as the main speaker in business forum, CEO Breakfast – “Tightening the Screw on Employment of Foreigners in Thailand: New Work Permit and Visa Rules”, on Friday, June 8, 2007, Bangkok Club, Sathorn City Tower, Bangkok. Mr. Direkwattanachai’s speech addressed the proposed changes in the Foreign Workers Bill, B.E. ... and their implications to foreign workers and investment climate in Thailand.

On May 1, 2007, The Thai Cabinet approved in principle the Foreign Workers Bill, B.E., and forwarded the Bill to the Council of State for review before the Bill is proposed to the National Legislative Assembly. The Bill, if enacted, will repeal the existing Foreign Workers Act, B.E. 2521 (1978).

While keeping most provisions of the existing Act, the new Bill, if enacted, will reverse the types of works open to foreign workers. Currently, all types of works are open to foreign workers except for the types of expressly prohibited works stipulated by the Royal Decrees. The new Bill stipulates that all types of works are closed to foreign workers except for the types of works expressly stipulated by the Labor Minister in the Notification of Labor Minister. The new Bill also introduces a quota system and requires the employer of a foreign worker to obtain permission, and place security money. Any appeal for a rejected application that is currently directed to Labor Minister, will have to go to the Foreign Worker Appellate Committee.

When it starts to sound very demoralizing for some foreigners, the new Bill does not forget to also include some positive provisions, such as extension of work permit from one year to two years and possibility to apply for renewal of work permit within 30 days after the expiration date. The summary of Mr. Narit’s speech and the unofficial English translation of the Foreign Workers Bill, B.E. ...are enclosed in Appendix I and II, respectively.

The presentation was followed by a round table discussion during which many participants expressed their concerns on the impact of the new Bill to the flexibility of foreign workers in Thailand and the prosper of foreign investment in Thailand. While the impact yet remains to be seen, many believes that foreign companies will have less flexibility in hiring their foreign workers. The quota system and the permission to hire foreign worker will impose additional regulatory burdens for the companies.

The business forum was organized by Dataconsult and attended by business consultants, human resources specialists, foreign lawyers and executives from multinational corporations in Thailand, including Nike, Asia Cement PCL, Corn Products Amardass (Thailand) Ltd., Clariant, Foster Wheeler and Bobst Group.

Mr. Narit Direkwattanachai is the principal at NARIT & Associates, a Bangkok-based international law firm with main areas of practice in corporate & commercial law, M&A, tax planning, real estate & construction, and employment. Prior to establishing NARIT & Associates, he worked with Baker & McKenzie, Bangkok office and Baker & McKenzie, Sydney office, and the Investment Banking Group of DBS Bank, Singapore. Mr. Direkwattanachai earned a bachelor of laws (1st class honor) from Chulalongkorn University, a master of law from the University of Cambridge, UK and an MBA from the Georgia Institute of Technology, USA. He can be reached at narit@naritlaw.com or 08 6 785 0793.

Appendix I

Foreign Workers Bill

By Narit Direkwattanachai

Introduction

- The Thai Cabinet approved in principle the Foreign Workers Bill, B.E. ... on May 1, 2007 and forwarded the Bill to the Council of State for review before the Bill is proposed to the National Legislative Assembly.
- If enacted, this bill will repeal the existing foreigner workers law, the Foreign Workers Act, B.E. 2521(1978).

Comparison between the New Bill and the Existing Law

Issues	Foreign Workers Act, B.E. 2521 (1978)	Foreign Workers Bill, B. E. ...
1. Types of Works/Jobs Open to the Foreign Workers	All types of works are open to the foreign workers except for the types of expressly prohibited works stipulated by the Royal Decrees.	All types of works are closed to the foreign workers except for the types of works expressly stipulated by the Labor Minister in the Notification of Labor Minister.
2. Validity of Worker Permit	Up to one year	Two years
3. Maximum Fee	Baht 10,000	Baht 20,000 (To reflect the longer period of work permit.)
4. Quota	It is not mentioned in the Act, while the quota can be found in some subordinate legislation.	The Bill introduces the quota system.
5. Permission for Employer to Employ a Foreign Worker	Not required.	For the works fall under the quota system, the Bill requires that an employer must obtain the permission to employ a foreign worker.
6. Security Money for Foreign Employee's Transportation Expense out of the Kingdom	It is not mentioned in the Act.	The Bill requires an employer to put the security money for foreign employee's transportation expense out of the Kingdom with the Department of Employment.
7. Appeal - Any foreigner whose application for work permit or renewal is rejected can appeal to:	Labor Minister	The Bill forms the Foreign Worker Appellate Committee and all appeals must go the Foreign Worker Appellate Committee.
8. Apply for Renewal of Worker Permit within 30 days After the Expiration Date.	Not possible. The renewal application must be made prior to the expiration date.	The Bill allows such renewal application to be made, provided that applicant pays the daily fine.

Implications for Foreign Workers in Thailand

- It is important how broadly or narrowly the Labor Minister will include the types of works/jobs open to foreigners in the Notification of Labor Minister. The practical impact on the foreign workers will depend on what are covered in the Notification.
- It is believed that the types of works that are typically engaged by the foreigners in the understanding of the Department of Employment, namely executives and consultants, are likely to be included in the list in the Notification.
- Some types of works will not be covered in the list of types of works open to foreigners in the Notification, especially specific types of works or jobs in special areas.
- The authority may be slow to update this list when there is a need.
- The authority may prefer to exercise more control over types of works open to foreign workers.
- The quota system, if implemented improperly, could make an already inflexible worker permit regime to even more inflexible.

Impacts on Foreign Investment

- The Bill will restrict/limit the types of works that open to the foreign workers. This means the foreign companies will have less flexibility in hiring their foreign workers. It could be bad for the foreign investment.
- The quota system and the permission to hire a foreign worker will be the additionally regulatory burdens for the companies.

What the Bill Fails to Address?

- The Bill largely keeps most provisions of the existing Act with exception of how the types of works are open to the foreign workers.
- The Bill still does not provide the worker permit exemption for the foreigners who are permanent residents of Thailand.

This summary is made for CEO Breakfast on Friday, 8th June 2007, organized by Dataconsult.

Appendix II

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(English Translation)

Notes of Principles and Reasons

of the Foreign Worker Bill

B.E.

Principles

To Revise the Foreign Workers Act, B.E. 2521

Reasons

Since the Foreign Workers Act, B.E. 2521 has certain provisions that are inappropriate for the present circumstance in aspects of security, economy, and society, in order to make the control procedure for the work of the foreigners appropriate for the changed circumstance, it is necessary to revise this Act.

– Bill –

Foreign Workers Act, B.E.

Whereas it is expedient to revise the Foreign Workers Law;

Section 1 This Act is called the “Foreign Workers Act, B.E. ...”.

Section 2 This Act shall come into force as from the day following the date of this publication in the Government Gazette.

Section 3 The following shall be hereby repealed:

- (1) The Foreign Workers Act, B.E. 2521; and
- (2) The Foreign Workers Act (No. 2), B.E. 2524.

Section 4 This Act does not apply to the performance of a specific duty by the foreigners in the Kingdom in the following capacities:

- (1) as members of a diplomatic mission;
- (2) as members of a consular mission;
- (3) as representatives of member countries and officials of the United Nations

Organization and its specialized agencies;

- (4) as personal servants coming from foreign countries to work regularly for persons in (1), (2) or (3);
- (5) as persons who perform duty or mission under an agreement concluded between the government of Thailand and a foreign government or an international organization;
- (6) as persons who perform duty or mission for the benefit of education, culture, art, sport or other activities as may be prescribed by the Royal Decree; and
- (7) as persons admitted by the government of Thailand to enter and perform any duty or mission.

Section 5 In this Act,

“foreigner” means a natural person who is not of Thai nationality;

“work” means to engage in work by exerting energy or using knowledge whether or not in consideration of wages or other benefit;

“permit” means a work permit;

“holder of permit” means a foreigner who has been granted a permit;

“Committee” means the Committee Considering Working of Foreigners;

“Appellate Committee” means the Foreign Worker Appellate Committee;

“Competent Official” means a person appointed by Minister for the execution of this Act;

“Registrar” means a person appointed by the Minister as Foreign Worker Registrar;

“Director-General” means the Director-General of the Department of Employment; and

“Minister” means the Minister having charge and control of the execution of this Act.

Section 6 This Minister of Labor shall have charge and control of the execution of this Act and shall have the power to appoint the Registrar and Competent Officials, issue Ministerial Regulations prescribing fees not in excess of the rates attached hereto, granting exemption of fees and prescribing other activities for the execution for this Act.

Ministerial Regulations shall come into force after their publication in the Government Gazette.

Chapter 1

Working of Foreigners

Part 1

Stipulation of Works and Allocation of Amount of Foreigners for Works

Section 7 A foreigner is prohibited from engaging in any work except the works under Section 8, Section 14 and Section 16.

Section 8 Subject to Section 14 and Section 16, any work that the foreigner is allowed to engage in any locality and at any particular time shall be prescribed by the Minister as published in the Government Gazette.

Section 9 Subject to Section 14, any work that must receive a quota before a foreigner can work, shall be prescribed by the Minister with the approval of the cabinet in such notification of the Minister and the Minister may stipulate any condition as he deems appropriate.

Section 10 A person wishing to employ a foreigner in his business according to Section 9 shall submit an application for permission to employ a foreigner to the Director-General or official entrusted by the Director-General within the time prescribed by the Director-General.

Part 2

Issuance of Work Permit

Section 11 Subject to Section 14, a foreigner may engage in any work that is prescribed by the Minister according to Section 8 only upon receipt of a permit from the Director-General or official entrusted by the Director-General, except a foreigner who is permitted to enter the Kingdom for temporary stay under the law on immigration in order to engage in work which is necessity and urgency for a period not longer than fifteen days, but such foreigner may engage in the work after he has notified the Director-General or official entrusted by the Director-General in writing in the form prescribed by the Director-General.

Section 12 Subject to the law on immigration, any person wishing to employ a foreigner in his business in the Kingdom may submit an application on behalf of the foreigner to the Director-General or official entrusted by the Director-General.

The Director-General or official entrusted by the Director-General may issue a permit to a foreigner under the first paragraph only after the entry into the Kingdom of such foreigner.

Section 13 In granting a permit to a foreigner under Section 11 and Section 12 the Director-General or official entrusted by the Director-General may prescribe any condition therein for the foreigner to comply therewith. In such case, the foreigner is required to give assurances that he will comply with such condition.

Section 14 A foreigner who has been permitted entry to work in the Kingdom under the law on investment promotion or other laws shall submit an application to the Director-General or official entrusted by the Director-General within thirty days from the date of his entry to the Kingdom, but if such foreigner has been the Kingdom, the period of thirty days he shall begin as from the day he is aware that he has been granted permission to work under the law on investment promotion or other laws. Pending the issue of permit, the applicant shall be allowed to engage in such work.

Upon receipt of application, the Director-General or official entrusted by the Director-General shall issue a permit without delay.

Section 15 A foreigner who may apply for a permit under Section 11 must possess the following qualifications:

- (1) having a place of residence in the Kingdom or having been permitted entry into the Kingdom for temporary stay under the law on immigration but not as tourist or in transit; and
- (2) not being disqualified or prohibited under the conditions prescribed by the Minister as published in the Government Gazette.

Section 16 The following foreigners may engage in such works as to be prescribed by the Notification of the Minister in the Government Gazette. In such Notification, the Minister may prescribe any condition as he may deem appropriate:

- (1) foreigners under a deportation order under the law on deportation who have been permitted to engage in occupation at any place in lieu of deportation or while awaiting deportation;
- (2) foreigners whose entries into the Kingdom have not been permitted under the law on immigration and are awaiting deportation;
- (3) foreigners who were born within the Kingdom but have not acquired Thai nationality under the Announcement of the National Executive Council No.337, dated 13 December B.E.2515 under other laws; and
- (4) foreigners whose Thai nationality has been revoked by the Announcement of the National Executive Council No.337, dated 13 December B.E. 2515 or under other laws.

A foreigner may engage in such works as to be prescribed by the Minister under the first paragraph only upon receipt of a permit from the Director-General or official entrusted by the Director-General.

Section 17 In granting the permit to a foreigner under Section 11, Section 12 and Section 16 only for the works prescribed in the Ministerial Regulations, a person employing a foreigner shall place the security money for expenses relating to management of foreigner's transportation out of the Kingdom to the Director-General or officials entrusted by the Director-General according to criteria, procedures, conditions and rates of security money prescribed by the Director-General, but must not exceed the rates stipulated in the Ministerial Regulations.

The storage, use and return of the security money shall be in accordance with the regulations prescribed by the Minister.

In the event that a person employing a foreigner does not claim for security money back according to the first paragraph within five years from the date he arranges for the foreigner to depart the Kingdom or is released from such obligation, such security money shall devolve on the state.

Section 18 Permits issued under this Act shall be valid for two years from the date of issue except for the permit issued to a foreigner under Section 14 shall be valid for a period as long as he has been permitted to work under such laws.

Section 19 In the case where a holder of a permit which is issued under Section 14 has received an extension of the working period under such laws, the holding of a permit shall notify the Registrar within thirty days from the date of receiving extension and the Registrar shall record such extension in the permit.

Section 20 Before a permit is expired and the holder of the permit wishes to continue working, he shall apply for a renewal of the permit to the Registrar prior to the expiration thereof. In such case, the applicant for renewal of the permit may continue working until the Registrar issues an order refusing the renewal of the permit.

Each renewal of permit shall be for two years.

In case the holder of permit does not apply for a renewal of the permit within the time stipulated in the first paragraph and still wishes to continue working, he shall apply for a renewal of the permit within thirty (30) days from the expiration date and pay the daily fine from the expiration date of permit until the date he submit the application according to the rate prescribed by the Minister. In such case, the applicant for renewal of the permit may continue working until the Registrar issues an order refusing the renewal of the permit.

Section 21 The Minister has the power to issue Ministerial Regulations prescribing forms, criteria and procedures in the following cases:

- (1) application for permission and issuance of permission to employ a foreigner under Section 10;
- (2) application for permit and issuance of permit under Section 11, Section 12, Section 14, and Section 16;
- (3) application for renewal of permit and renewal of permit under Section 20;
- (4) application for issuance of substitute permit and issuance of substitute permit under Section 19;
- (5) application for permission and issuance of permission to change work or locality or place of work under Section 25; and
- (6) Issuance of identity card under Section 37.

Section 22 In the case of refusing to issue a permit or not granting permission under Section 11, Section 12, Section 14, Section 16 or refusing to renew the permit under Section 20 or not granting permission to change the work or locality or place of work under Section 25, the applicant has the right to appeal to the Appellate Committee by submitting a written appeal to the Director-General or official entrusted by the Director-General or the Registrar, as the case may be, within thirty days from the date of the knowledge of the order of refusal. Upon receipt of the appeal, the person receives the appeal shall refer to the Appellate Committee within fifteen days and the Appellate Committee shall then complete his consideration of the appeal within thirty days. The decision of the Appellate Committee shall be final.

In the case of an appeal against an order refusing the renewal of a permit under Section 20 as mentioned in the first paragraph, the appellant has the right to continue working until the Appellate Committee decides on the appeal.

Section 23 A holder of permit must keep the permit on himself or at the place of work during working hours in order that it may be readily produced to a competent official or Registrar.

Section 24 If a permit is materially damaged or lost, the holder of the permit shall apply for the substitute permit to the Registrar within fifteen days from the date of the knowledge of such damage or loss.

Section 25 A holder of permit shall not engage in the work other than that which is specified in the permit or change the locality or place of work from that which is specified in the permit unless permission is obtained from the Registrar.

The permission under the first paragraph must be for the work with the same employer only.

Section 26 No person shall employ a foreigner who has no permit nor employ him on the work which is different from that specified in the permit or in the locality or place of work other than that is specified in the permit

Section 27 Any person who employs a foreigner or transfers a foreigner to work in the locality other than that which is specified in the permit, or allows a foreigner to resign from his work, shall notify the Registrar within fifteen days from the date of employments, transfer of resignation.

The notice under the first paragraph shall be in the form prescribed by the Director-General.

Chapter 2

Committee Considering Working of Foreigners

Section 28 There shall be a committee called the Committee Considering Working of Foreigners consisting of the Permanent Secretary of the Ministry of Labor or person entrusted by the Permanent Secretary of the Ministry of Labor as Chairman, the Permanent Secretary of the Ministry of Defense or his representative, the Permanent Secretary of the Ministry of Foreign Affairs or his representative, the Permanent Secretary of the Ministry of Agriculture and Cooperatives or his representative, the Permanent Secretary of the Ministry of Industry or his representative, the Permanent Secretary of the Ministry of Interior or his representative, the Permanent Secretary of the Ministry of Public Health or his representative, the Secretary-General of the National Security Council or his representative, the Secretary-General of the National Economic and Social Development Board or his representative, Director of the National Intelligence Agency or his representative, the representatives of the employers and the representatives of the employees each site consists not more than three persons appointed by the Minister as committee members, the Director-General of the Department of Employment as member and secretary and the Director of the Foreign Worker Administration Office as member and assistant secretary.

Section 29 A member appointed by the Minister holds office for a term of two years and may be reappointed, but may not be appointed exceeding two terms consecutively.

Section 30 A member appointed by the Minister vacates office prior to the end of term upon:

- (1) death;
- (2) resignation; and
- (3) removal by the Minister.

In the case where a members is appointed during the term of members already appointed, not with standing it is a new or replacement appointment, the appointee shall hold office for the remaining term of the members already appointed.

Section 31 The Committee has the duty to consider and give recommendation or advice to the Minister as follows:

- (1) the issuance of Royal Decrees under Section 4(6);
- (2) the issuance of the Ministerial Regulations under Section 6 and Section 21
- (3) the prescription of works which the Minister may publish under Section 8;
- (4) the issuance of the Notification under Section 9;
- (5) the prescription of works that the Minister may publish under Section 16;
- (6) the permission under Section 39; and
- (7) other matters as entrusted by the Minister.

Section 32 In a meeting, the presence of not less than on-half of the total number of the committee members shall constitute a quorum. If Chairman is absent from the meeting or unable to perform his duty, the committee members present shall elect one among themselves to preside over the meeting.

The decision of meeting shall be by majority votes. In casting votes, each committee member shall have one vote and in case of an equality of votes, the person presiding over the meeting shall cast an additional vote as casting vote.

Section 33 The Committee has the power to appoint a subcommittee to carry out any activity or consider any matter within the scope of duty of the Committee.

The provisions of Section 32 shall apply to the meeting of a sub-committee mutatis mutandis.

Chapter 3

Foreign Worker Appellate Committee

Section 34 There shall be a committee called the Foreign Worker Appellate Committee consisting of the Permanent Secretary of the Ministry of Labor or person entrusted by the Permanent Secretary of the Ministry of Labor as Chairman, a representative of the Ministry of Foreign Affairs, a representative of the National Police Office, a representative of the Department of Business Development, a representative of the Office of the Board of Investment, a representative of the Office of the National Economic and Social Development Board, and not more than three other persons appointed by the Minister as committee members and a representative of the Department of Employment as member and secretary.

Section 35 The provisions in Section 29, Section 30, Section 32 and Section 33 shall apply mutatis mutandis.

Chapter 4

Supervision

Section 36 In performing the duties under this Act, the Director-General or official entrusted by Director-General, the Registrar or competent official is empowered to:

(1) issue a written inquiry or summon any person to provide facts as well as to require him to produce any document or evidence; and

(2) enter any premises during the working hours where is a reasonable cause to suspect that a foreigner is working there in order to ensure compliance with this Act. For this purpose, he is empowered to inquire into facts or request production of any document or evidence from the person who is responsible for or connected with it in such place.

In performing the duty under (2), the owner or occupant of such premises for person who is responsible for or connected with it in the said premises shall render appropriate facilities.

Section 37 The Registrar and competent officials must have identity cards.

In the performance of duty, the Registrar and competent officials must produce their identity card upon request of the person concerned.

Section 38 In performing the duties under this Act, the Director-General or official entrusted by the Director-General, the Registrar or competent official shall be official the Penal Code.

For the purpose of arresting and suppression of those commit offences under this Act, the competent officials shall have the powers and duties similar to those of the administrative or police officials under the Criminal Procedure Code.

Section 39 In special case for specific matter, the Minister with the approval of the cabinet may allow a foreigner to come to engage in the work in the Kingdom under any conditions or grating any exemption to the compliance with this Act in any case.

Chapter 5

Penalty

Section 40 Any foreigner who is working in violation of Section 7 or the Notification of the Minister issued under Section 8 shall be liable to imprisonment for a term not exceeding five years or to a fine of two thousand Bath to one hundred thousand Baht or to both.

Section 41 Any foreigner who is working in violation of Section 11 or in violation of the conditions specified under Section 13 or works without a permit or in violation of the conditions prescribed by the Minister under Section 16 or works in violation of Section 20 shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding five thousand Baht or to both.

Section 42 Any foreigner who is working in violation of Section 14, Section 19, Section 23, Section 24, or Section 27 shall be liable to a fine not exceeding one thousand Baht.

Section 43 Any holder of permit who fails to comply with Section 25 shall be liable to imprisonment for a term not exceeding one month or a fine not exceeding two hundred Baht or to both.

Section 44 Any person who employs a foreigner in violation of Section 26 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding sixty thousand Bath or to both.

Section 45 Any person who employs a foreigner in violation of Section 20 shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding five thousand Bath or to both.

Section 46 Any person who fails to comply with a written inquiry or summons or refuses to give facts or furnish document or evidence or fails to render facilities to the Director-General or official entrusted by the Director-General or the Registrar or competent official in the performance of their duties under Section 36 shall be liable to a fine not exceeding three thousand Baht.

Section 47 In respect of all offences under this Act except for offences under Section 40, Section 41 and Section 44, the Director-General or officials entrusted by the Director-General is empowered to impose a fine in settlement of the matter.

In the event of an investigation, if the investigator finds that a person has committed an offence under this Act that can be imposed a fine in settlement and that person consents to be fined, the investigator shall refer the matter to the Director-General or official entrusted by the Director-General within seven days from the date when the person consents to be fined.

When the offender pays a fine in settlement of the matter within the time stipulated, which must not exceed fifteen days, it shall be deemed that the case has been resolved in accordance with the Criminal Procedure Code.

If the offender does not agree to be fined in settlement of the matter, or has agreed to be fined but fails to pay the fine within the period stipulated in third paragraph, the prosecution shall continue to proceed.

Chapter 6

Transitional Provisions

Section 48 Within three years from the date of publication of this Act, the Minister shall prescribe to stipulate the works that a foreigner is allowed to engage under Section 8.

While there is still no Notification according to the first paragraph, the Royal Decrees issued by virtue of Section 6 of the Foreign Workers Act, B.E. 2521 shall remain in force.

Section 49 All the Royal Decrees, Ministerial Regulations and Notifications or Orders of the Minister or Director-General or permits which have been issued or given by virtue of the Foreigner Workers Act, B.E. 2521 in so far as they are not contrary to or inconsistent with this Act shall remain in force and shall be regarded as the Royal Decrees, Ministerial Regulations and Notifications or Orders of the Minister or Director-General, or permits issued under this Act

A permit issued under the Announcement of the National Executive Council No. 322, dated 13th December B.E. 2515 shall continue to be valid as long as it has not expired and the holder of permit continues to engage in the work for which he has been granted the permit.

Countersigned by:

.....
Prime Minister

Rate of Fees

(1) A permit	Baht 20,000
(2) Renewal of a permit or extension of working period	Baht 20,000
(3) Substitute permit	Baht 3,000
(4) Permission to change work	Baht 5,000 per time
(5) Permission to change locality or place of work	Baht 5,000 per time
(6) Permission to employ a foreigner	Baht 10,000 per person
(7) Application fee	Baht 1,000 per application

In issuance of the Ministerial Regulations prescribing the fees, the fees may be stipulated differently taking into consideration of types of occupations of foreigners.