



An Open Letter

Subject Observations and recommendations regarding the Draft Royal Decree on the Management of Foreign Workers B.E.....

ATT: The Prime Minister

CC: Minister of Labour

Dear Sir,

The cabinet has approved in principle the Draft Royal Decree on the Management of Foreign Workers B.E.....on 7 March 2017 as proposed by the Ministry of Labour. Since the MoL has set up the Committee to Reform Laws concerning the Management of Foreign Workers. The Decree, essentially, merges the two existing laws including the Working of Aliens Act B.E. 2551 (2008) and the Royal Decree on the Placement of Aliens for Work with Employers in Thailand B.E. 2559 (2016).

The Migrant Working Group (MWG) deems the Bill is concerned directly with the workers' economic and social rights and has thus organized a seminar and public consultation on the Royal Decree on the Management of Foreign Workers B.E.....on 15 May 2017 with participation from representatives of state and private agencies including representatives of the employers, the employees, Chamber of Industry, academics, labour activists, NGOs, and lawyers. A set of opinions and recommendations has been made to help the MoL achieve its goals, in particular the mitigation of the violation of fundamental labour rights or the trafficking against aliens on the following issues;

The drafting process of the Draft Royal Decree on the Management of Foreign Workers B.E..

The drafting of the Royal Decree has been initiated invoking Section 172 of the 2017 Constitution of the Kingdom of Thailand which provides that “for the purpose of maintaining national or public safety or national economic security, or averting public calamity, the Cabinet may issue an Emergency Decree which shall have force as an Act”. A Royal Decree as such can only be issued under “an emergency situation which is utmost necessary and unavoidable”.

MWG has found the management of foreign labour does not constitute “an emergency situation which is utmost necessary and unavoidable”, and thus a Royal Decree has to be issued. Also, according to the previous Constitutions, the cabinet can only narrowly invoke its power to draft a Royal Decree. Apart from an exemption on a measure to tackle national security threat, other justifications for issuing such Royal Decree must involve public insurrection which might threaten national security, terrorism, unexpected natural calamity, etc., the circumstances of which a law is urgently needed to avert such public disasters.

Recommendation the government should revisit the decision to issue a law as a Royal Decree invoking Section 172 of the 2017 Constitution of the Kingdom of Thailand. In addition, a consultation should be made to comprehensively solicit input from various sectors and to engender academic studies to justify the promulgation of the law. This would make it

comply with the purpose of the state to issue a law for the holistic management of foreign labour and the promotion of decent work and genuine sustainable development.

Chapter 1 General Provision

(a) Regarding the prohibition of foreigner from doing certain jobs and which jobs they can do and in what locations, representatives from the employers deem that the existing law, the Working of Aliens Act B.E. 2551 (2008), can be applied. Therefore, the Minister by the recommendation of the Committee may issue a Notification declaring which types of work alien labour would be allowed to take.

(b) Quota system of foreigner for work or quota by occupation per Sections 12 and 13, MWG deems that there is a risk doing that and it might pave the way for corruption. Therefore, the proposed quota system for foreigner should be abolished.

(c) The Notification regarding areas in which foreign workers are allowed to stay which is subject to the discretion of the Minister of Interior. Even though no penalty is imposed in case of violation, the provision does impose restriction on the right and freedom to choose where one can stay. It may affect how people in a multicultural society live. Therefore, MWG recommends that the provision in Section 15 be rescinded.

(d) The wording in Chapter 1 and Chapter 3, Section 3 on duties and responsibilities is still vague and might entail a problem in enforcement.

MWG deems that even though Section 16 limit the application of the Section to persons belonging to three categories including employers, foreigner and agents authorized to import foreign workers. But with regard to the Royal Decree's provision concerning how it can be used to deal with a legal dispute concerning rights and responsibilities or with labour relations, MWG deems that even though the Draft Royal Decree fails to divide between the duties and responsibilities of employers, employees and the persons authorized to import foreign workers, but Section 16 provides that all the disputes the occur among the three parties with regard to the duties and responsibilities prescribed for by the Royal Decree or about labour relations shall fall under jurisdiction of the Labour Court. This is inappropriate and it is likely that the Section would be subject to over-interpretation to cover criminal liability. This will engender ramification on not just the relations of the three parties, but will also cause damage to the employment regime and the economy in general, i.e., it might lead to the seizure of passports of employees in alleged employment fraud, etc.

Recommendations The content of the Section should be revised to allow the Labour Court to mediate to get involved in solving the dispute to make it most fair for the employers employees and the persons authorized to import foreign workers.

Chapter 2 regarding the Policy and Management of Foreign Workers Committee

MWG deems that the Policy and Management of Foreign Workers Committee lacks representation from the employers' organizations and in terms of labour protection, there is only representation from the Department of Labour Protection and Welfare.

Recommendations Representation in the Committee should be reviewed and one more representative from the employers' organizations should be added since there are already representatives from the Chamber of Commerce and Chamber of Industry, there should be

one more representative from the employees' organizations. One representative from each of the three groups would make it a tripartite committee. This should apply to other agencies working for the protection of employees as well.

Chapter 3 regarding the importation of foreigner to work with employers in Thailand and Section 3 Duties and Responsibilities

(a) Section 50 Reasonable termination of employment, in this regard, MWG deems that the Director General of the Department of Employment should set out a guideline for reasonable termination of employment and should allow the employees to have the right to resign. The employees, according to their own wish, may resign and move to work with a new employer whereas the new employer would be borne with any expense incurred on the previous employer who had made the payment in order to have the employees to work with them. The calculation should be made based on the remaining time in the work permit.

(b) Sections 51 and 53 when an employee wants to work with a new employer, the employee is required to work with a new employer within fifteen days. MWG deems that the requirement does not match the ability of the employee to find a new job. Therefore, grace period of time during which the employee needs to find a new job should be extended to 90 days to ensure that the employee would have access to the benefits as provided for in the 1991 Social Security Act.

(c) Section 54 after seeking a service and paying the agent for importing the foreign worker, the employer may ask to have the fees back within 30 days. MWG recommends that the employer should be able to receive back the fees within 15 days since the date they requests for the fees. And the Director General of the Department of Employment should provide for a standard contract between the agent and the employer.

(d) Section 57 in case a foreigner in inflicted with a damage as a result of the breach of contract by either the employer or the agent. MWG recommends that a second paragraph be added to Section 57 to stipulate that "when a foreigner complains with a rights protection mechanism about having their rights violated, the foreigner should be allowed to stay and find a new job in Thailand until the completion of the review of their complaint."

Chapter 4 regarding working by foreigner

Section 71 MWG recommends a clause be added at the end of the Section that for work that requires high mobility i.e. marine or land transportation, construction, it should be added in the contract of employment for the right to change the location of work or the type of work.

Section 74 requires that an employer has to inform the registrar within seven days after the termination of employment of the foreign work by whatever reasons. MWG recommends that the duration should be changed from seven to fifteen days.

Chapter 5 regarding the fund for the management of the work by foreigner

(a) Section 76 MWG recommends that the fine mentioned in the Draft Royal Decree should be deposited in the fund for the management of the work by foreigner.

(b) Section 78 provides for a committee of the fund for the management of the work by foreigner which shall be composed of representatives from various government offices, but

there is a lack of important composition regarding the employment and work. MWG recommends that representatives from the organizations of employees and employers should be added to the committee of the fund for the management of the work by foreigner.

Chapter 6 regarding administrative measures

Part 1 regarding the suspension or revocation of licenses of the agents

Section 91 MWG recommends that the Court should be vested with power to adjudicate as to which employers or agents should be penalized for violating the Royal Decree.

Chapter 7 regarding competent officials

Section 98 provides for the power of competent officials to carry out a search, but fails to specify the time for the search. MWG deems that the provision should be revised based on the Criminal Procedure Code to specify the possible timing of the search, i.e. that it can be carried out from sunrise to sunset only or from daytime until nighttime, etc.

Chapter 8 regarding punitive clauses

MWG deems that this Draft Law imposes many more punitive measures than the previous laws. That the state initiates to aggravate punishment i.e. by increasing fine or increasing prison term, it may pave the way for more criminal acts to be committed and more corruption among government officials. In addition, there are inconsistencies in terms of punishment levied on the employees and the employers. For example, when an employee works without permit, the person would be punishable by imprisonment or a fine whereas the employer who makes a violation of the law would only be punishable by a fine. This could be deemed as an act of discrimination.

MWG thus proposes that any offence concerning the employment should be dealt with by provisions similar to that of the Working of Aliens Act B.E. 2551 (2008) and all the imprisonment sanctions should be rescinded except for the crime concerning the importation of foreigner to work in Thailand which should be made punishable according to the Draft Royal Decree or the revocation of the right to import worker.

The amount of fee MWG recommends that the same amount specified in the previous law should be applied.

With respect in human rights and human dignity
Migrant Working Group (MWG)

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