

**COMMENTS ON THE DRAFT DECREE IMPLEMENTING THE 2012 LABOR CODE
REGARDING FOREIGN WORKERS**

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No.	2012 draft Decree pertaining to foreign workers	Comments
		<p>It is suggested that the drafters reconsider the soundness of the requirement that workers who are foreign nationals have to present a work permit when it comes to procedures pertaining to exit and entry of the country, and before they enter Vietnam in case foreign workers, following their probationary periods, fail to meet the expected standards of the job.</p>
		<p>The current Decree only provides implementing details for provisions of Article 171.2, Article 172.9 and Article 175, Labor Code. Is it correct to understand that all other requirements will apply the same as Vietnamese workers, including probation, rights and obligations, participation in the trade union, severance, and so on.</p>
		<p>It is suggested that a provision rendering the labor contract void for lack of a work permit or provision of false information to enter Vietnam as a worker.</p>
		<p>The draft specifies that a work permit should not have a term longer than 24 months while the prevailing law allows every work contract to be signed for a maximum term of 36 months. Should that be understood as a foreign worker's contract should have a term no longer than 24 months?</p> <p>What about termed work contracts that have signed twice and are going to be renewed? Can an indefinite-term contract be used here? If an indefinite-term contract is allowed, how will the 24-month limit of the work permit apply?</p> <p>Or is it possible to understand that the term of the work permit and term of the employment contract apply separately? Meaning that a 36-</p>

month work contract can be signed even if the work permit is only valid for no longer than 24 months, and the 24-month validity may be extended when due? And will it be extended for another 12 months or 24 months?			
There is no specific regulation if the foreign workers changing their company or work for the second company.			
1		<p>Pursuant to the Law on Government organization of Dec. 25, 2001;</p> <p>Pursuant to the Labor Code of June 18, 2012;</p>	The Investment Law should be named here as a source of reference for the provisions of Article 3 of the draft.
2	Article 1. Scope of regulation	This Decree details the implementation of paragraph 2 of Article 171 of the Labor Code concerning foreigners who working in Vietnam without a work permit will be expelled from the territory of Vietnam; Paragraph 9 of Article 172 of the Labor Code specifying the cases which work permits are not required; Article 175 of the Labor Code specifies the conditions for the grant, renewal, revocation of work permits for foreign workers who are foreign citizens coming to Vietnam to work (laborers who are foreign citizens coming to work in Vietnam hereinafter referred to as foreign workers).	This paragraph can be rephrased in a more generic and concise way based on Article 175 and other provisions it makes reference to. Attention should also be paid to the scope of Decree 34 and Decree 46, expected to be replaced by this decree.
3	Article 2. Objects of Regulation	1. Foreign workers coming to work in Vietnam in the following forms:	<p>- There should be a clear definition of the term “foreign workers” right in this decree or a circular (is it inclusive of Vietnamese residing overseas, foreigners working for an offshore subsidiary of a Vietnamese enterprise, among others?).</p> <p>- The term “<i>coming to work</i>” may be changed to “on termed residence or intending to do so in Vietnam for working purposes in one of the following ways:”</p>

		<p>1. Foreign workers coming to work in Vietnam in the following forms:</p> <p>b) Intra corporate Transfer within an enterprise which has commercial presence in Vietnam.</p> <p>Intra-corporate transferees are Managers, executives and specialists of a foreign enterprise which has established a commercial presence in the territory of Viet Nam, temporarily moving as intra-corporate transferees to that commercial presence and who have been previously employed by the foreign enterprise for at least 12 months</p> <p>Commercial presence is understood as a service provider who is citizen of a country moving to another country to set up a legal entity and provide services in that country.</p>	<p>The definition of “commercial presence” should be reconsidered to be more consistent with the existing normative system and international practices.</p> <p>Existing rules, e.g. Decree No. 34/2008/ND-CP, specify that: Foreign workers on intra-corporate transfer: These include managers, executives and specialists mentioned above of a foreign enterprise that has established its commercial presence on the territory of Vietnam, those on temporary internal transfer to make commercial presence on the territory of Vietnam and who have been employed by the foreign enterprise for at least 12 months. We think that this provision should be removed to allow a foreign enterprise to freely appoint someone they see fit to a position in their facility in Vietnam, regardless of whether the person has been employed for at least 12 months.</p>
		<p>1. Foreign workers coming to work in Vietnam in the following forms:</p> <p>d) Contractual Service Providers Contractual Service Providers can be interpreted as foreign workers who are employees of a foreign enterprise having no commercial presence in Viet. These people should be working for the foreign companies having no commercial presence in Vietnam is at least 02 (two) years and have to meet the conditions for "experts" in accordance with the paragraph 2 of this Article.</p>	<p>Changes are needed to maintain consistency (paragraph 2 of this Article has no reference to “experts”)</p> <p>The requirement that a contractual service provider should be someone having worked for a foreign enterprise having no commercial presence in Vietnam for at least 2 years should be removed.</p> <p>The WTO service commitment schedule (“WTO commitments”) requires that a service provision bidder must not stay in Vietnam for longer than 90 days. The draft Decree has no response to this issue. This may create confusion that there is no time limit for service provision bidders.</p>

			The exact text of the WTO commitment on service provision bidders should be used here.
		1. Foreign workers coming to work in Vietnam in the following forms: e) Foreign laborers working for foreign non-governmental organizations , international organizations which are allowed to operate under the provisions of Vietnamese law;	Is a timeline necessary? Is a written labor contract needed?
		1. Foreign workers coming to work in Vietnam in the following forms: g) Volunteers Volunteers are those working in Vietnam in the form of voluntary and receive no remuneration to implement international treaties that the Socialist Republic of Vietnam has signed or participated.	Clearer definitions are needed (What type of employer? What international cooperation agreements? and so on).
4	Article 3. Cases of foreign workers who are not subject to work permits		Changes of “not subject to” to “exempted from” are recommended to avoid confusion with non-qualified individuals in accordance with Article 169, Labor Code.
			The regulation should be supplemented with some following objects whom should not be required to obtain a work permit to maintain consistency between the Enterprise Law, Investment Law and Labor Code. 1. Shareholder: someone contributing capital in a joint stock company; 2. Member of the Board of members for liability limited

			<p>companies; 3. Directors of branches of foreign companies without a legal entity in Vietnam.</p>
		<p>2. Intra-corporate transfer, within the scope of services committed by Vietnam under the World Trade Organization which include 11 service sectors: business services; information services; construction services, distribution services; education services; environmental services; financial services; health care services; tourism and travel related services; Recreational, Cultural And Sporting Services and transportation services.</p> <p>Ministry of Industry and Trade is responsible for guiding the criteria, procedures to identify foreigner who are intra-corporate transferees under the 11 above-mentioned services.</p>	<p>11 lines of services have been explicitly described in Vietnam’s WTO Commitment Schedule. Further detailed guidelines by the Ministry of Industry and Trade to determine what fall under these 11 lines of service are, therefore, unnecessary. All corporate internal transfers that fall within the scope of the mentioned 11 lines of service should be exempted from work permits. The decree may regulate on how notification should be made in these cases.</p>
		<p>6. Volunteers</p> <p>Foreign diplomatic representative offices in Vietnam is responsible for certifying foreign laborers working in Vietnam in the form of volunteers.</p>	<p>Addition of “within international agreements entered into by Vietnam’s relevant authorities and foreign parties” is recommended.</p>
		<p>7. Other cases approved by the Prime Minister upon the request of the Ministry of Labour, Invalids and Social Affairs.</p>	<p>This provision needs to be reconsidered since implementing documents to the Labor Code are under the jurisdiction of the Government (Article 172.9 and Article 242, Labor Code), and not the Prime Minister.</p>
<p>5</p>	<p>Article 4. Conditions for granting work</p>		<p>As a principle, foreign workers must met concurrently two requirements for a working individual (Article 169, Labor Code) and employment recruitment conditions (Article 170, Labor Code). Article 4 of the draft, however,</p>

	permits for foreign workers		does not provide any specific guidelines or clear explanations on specific requirements to meet these criteria.
		1. Having full civil behavioral capability in accordance with Vietnamese law;	Civil behavioral capacity may be ruled differently in different countries. How should this be addressed? Or to be specific, what will happen in the case of countries having an agreement or international treaty with Vietnam?
		5. Obtained written approval from competent State agencies permitting the use of foreign workers.	Please be specific about the official title of this written approval (decision, notice, abstract etc.).
6	Article 5. Demand for foreign workers		The title of the Article can be changed to “Registration of the need for foreign workers” or “Planning for use of foreign workers” to remain consistent with the provisions of Article 5 of the draft. This is basically a new procedure that may directly affect business operation and management (human resources planning).
			<p>This provision is in place to clarify Article 170.2, Labor Code. We have no problem with the rationality of the provision.</p> <p>But the following should be made clear: (i) timing for employers filing in their annual declaration of need for workers and narrative statements; (ii) timeline for the Department of Labor-Invalids-Social Affairs to answer yes or no to the applicants’ need for foreign workers. If it is a no, the Department of Labor-Invalids-Social Affairs’ reply should clearly tell why.</p>

			<p>Employers' right to provide further information or appeal the Department of Labor-Invalids-Social Affairs' denial should be elaborated upon.</p>
			<p>We think that this is a kind of labour quota and this article might break the Law on Enterprises. According to the rights of the Enterprise regulated in Item 5, Article 8 of the Law on Enterprises: "To recruit, employ and use labour in accordance with business requirements".</p>
		<p>1. Every year, employers are responsible for estimating their demand for foreign workers for each position in accordance with the guidance of the Ministry of Labor, Invalids and Social Affairs, which defines each position that Vietnamese workers are unable to fulfill and need to recruit foreign workers; written reports should be sent to Departments of Labor, Invalids and Social Affairs in provinces and cities directly under the central government, where the employers locate their headquarters.</p>	<ul style="list-style-type: none"> - This is a normal human resources planning activity of businesses and any entities and organizations in need of employees. - This is a requirement on fulfillment of employment-related procedures. The format and content of the written report should be made clear for employers to adhere to.
		<p>2. Departments of Labor, Invalids and Social Affairs are responsible for compiling demands for foreign workers for each position locally and report to the chairman of the People's Committees of provinces and cities directly under the Central governments to consider and make decision on positions that require recruitment of foreign workers.</p>	<p>This is interference of the regulator in the business affairs of employing businesses, entities and organizations.</p>
		<p>3. Departments of Labor, Invalids and Social Affairs approved in writing the demand for foreign workers for each employers and each position in accordance with the decision of Chairmen of the People's Committee of</p>	<p>The authority of the Department of Labor-Invalids-Social Affairs and Chairs of municipal PCs, and specific administrative behaviors of each agency relating to approval of the plan to use foreign workers of</p>

		<p>provinces and cities directly under the central government.</p>	<p>businesses, entities and organizations should be made clear.</p>
		<p>4. If there are any changes in demand for foreign worker recruitment employers must submit additional reports in writing to the Department of Labor, Invalids and Social Affairs in provinces and cities under central government where the employers locate their headquarters in accordance with the provisions of paragraph 2 and paragraph 3 of this Article.</p>	<p>This is interference of the regulator in the business affairs of employing businesses, entities and organizations.</p> <p>The requirement of obtaining approval by the People's Committee and Department of Labor-Invalids-Social Affairs under Articles 5.2, 5.3 and 5.4 seems to be impractical and will double the procedures that both employers and regulators have to go through. This provision should be removed.</p>
		<p>5. Departments of Labor, Invalids and Social Affairs shall report to the Ministry of Labor, Invalids and Social Affairs on demand for foreign workers; the status of approving demands for foreign workers and the situation of foreign workers working in businesses and organizations in their management areas.</p>	<p>This is a normal activity of the regulator.</p>
<p>7</p>	<p>Article 6. Work permit dossier</p>	<p>2. Health certificate issued abroad or health certificate issued in Viet Nam as prescribed by the Ministry of Health.</p>	<p>Health certificates issued in Vietnam under the Ministry of Health's standards only if a foreign worker is allowed to enter Vietnam after having obtained a work permit. The Item 2 of Article 6 should be reconsidered.</p>
		<p>3. ... Legal background record/Judicial certificates should be valid for 6 months from the date of submission for work permit.</p>	<p>What the underlying criteria to determine this time line?</p> <p>In practice, many foreign workers may have a different nationality than the country he/she lives and works in before coming to Vietnam. The country the person lives in before coming to Vietnam may not maintain the rule</p>

			<p>of issuing legal background records for foreign nationals (e.g. Singapore announced that it stopped issuing crime-free records for foreigners from Oct. 18, 2010) and some foreign workers may not be staying in Vietnam long enough as required to be granted legal background records. In this case, foreign workers should be allowed to submit legal background records issued by his/her country of nationality.</p>
		<p>4. Certification of professional and technical qualifications of foreign workers in accordance with the paragraph 3 of Article 4 of this Decree.</p> <p>For some occupations, jobs, certification of professional of foreign workers will be replaced by one of the following documents:</p> <p>...</p> <ul style="list-style-type: none"> - Confirmations or labor certificates or labor contracts certifying that he or she has at least (05) five years' experience in an occupation or trade, in operating production or in managerial work and suitable with the occupation positions that foreigner plans to take. Above confirmations with at least (05) five years' experience are certified by enterprises, agencies and organizations where foreigners have worked. <p>...</p> <ul style="list-style-type: none"> - Other cases under the Prime Minister's regulations. 	<p>Who certifies this?</p> <p>In practice, the DOLISA only accepts the confirmation from overseas. If the foreign employee has worked for a Vietnamese company, in this case they will not be accepted. This new regulation is not clear whether the confirmation of a Vietnamese employer could be OK? If possible, this point should be regulated in details.</p> <p>Please clarify whether the authority rests with the government or the Prime Minister.</p>
		<p>5. Written approval of Departments of Labor, Invalids and Social Affairs to allow the use of foreign workers;</p>	<p>Please clarify the format and content of this form to avoid discretion.</p>

		<p>6. ... The documents specified in paragraph 2, paragraph 3 and 4 of this article which are original or duplicated copies in foreign languages must have consular authentication then translated to Vietnamese and notarized or certified in accordance with the law of Vietnam.</p>	<p>Article 6.7 on papers associated with foreign workers does not address legalization and translation of documents in foreign languages. Clearer regulations on whether the documents should be legitimately authenticated or only notarized translation is needed to avoid discretion in practice.</p>
8	<p>Article 7. Duration of the work permit</p>	<p>The duration of work permits depends on the terms of the labor contract expected to be signed or the duration that the foreign will assign the foreign workers to work in Vietnam or the terms of the contracts signed between Vietnamese partners and their foreign parties or the terms that service providers assign the foreign workers to Vietnam for negotiation of service provision or duration specified in the certificate of non-governmental organizations, international organizations permitted to operate under the provisions of Vietnamese law. ...</p>	<p>A work permit should not have a term longer than 2 years while the work contract can be as long as 36 months. Is there any inconsistency in this provision?</p> <p>Are indefinite-term work contracts for termed visas and work permits viable?</p> <p>The government favors training and use of Vietnamese workers in place of foreign workers. Extension of work permits is only possible if there is no equivalent supply of Vietnamese workers. Are indefinite-term work contracts with foreign workers, therefore, advisable?</p>
9	<p>Article 8. Procedures of granting a work permit</p>	<p>1. prior to at least 20 (twenty) days from the date the foreign worker is expected to begin working at enterprises, agencies and organizations in Vietnam, the employers shall submit directly or send by mail application dossiers for work permits to the Department of Labor, Invalids and Social Affairs where foreign workers will work full time for the employers in a province or city under the central government management. ...</p>	<p>In practice, acquiring a work permit for foreign workers in a province or city where the employer does not have a principal office is quite difficult. The Department of Labor-Invalids-Social Affairs of the municipality where the foreign worker want to practice may refuse accepting an application for work permit. There should be clear regulations on the liability to accept applications of the Department of Labor-Invalids-Social Affairs where the employer does not have a principal office.</p>
10	<p>Article 9. Cases for Renewal of</p>	<p>1. Work permit is lost, damaged or changes in passport numbers, working locations indicated on the work permit</p>	<p>Is the old permit withdrawn?</p>

	work permit		
11	Article 10. Application dossier for work permit renewal		There is no paragraph 3, only paragraphs 1, 2 and 4.
12	Article 10.4.(b); Article 12.3	<p>Article 10.4.b</p> <p>b) For the case of labor license renewal as specified in Article 9.2 and Article 9.3 of this Decree health certificates issued in Vietnam are required; documents of employers appointing the foreign laborers to work in Vietnam or copies of contracts signed between Vietnam and foreign parties or documents proving the foreign workers continue to work on negotiation for service provision in Vietnam or valid registration document of the non-governmental organizations, international organizations in Vietnam and a copy of agreements between the non-governmental organizations, international organizations and the foreign workers proving that the foreign workers continue working in those non-governmental organizations.</p> <p>Article 12.3. The duration of renewed work permit for cases specified in Article 9.3 of this Decree shall be the same duration as the term of the labour contract set out in the decision of the foreign party on appointment to come to work in Vietnam, or the same duration as the term of the contract between the Vietnamese party and the foreign party or the same duration as the term specified in the certificate proving that the foreign non-Governmental organization is permitted to operate in accordance with the</p>	These provisions refer to Article 9.3, but the draft Decree has no Article 9.3.

		law of Vietnam. The duration of the work permit specified in Paragraph 1,2,3 of this Article shall not exceed 24 months.	
13	Article 12. The duration of renewed work permits	3. The duration of renewed work permit for cases specified in Article 9.3 of this Decree ...	There is no paragraph 3 in Article 9.
14	Article 13. Withdrawal of work permit	1. Cases that work permit will be withdrawn b) The work permit expires.	In other cases of re-issuance under Article 9.1, is the old permit withdrawn?
15	Article 14. Forced departure or deportation of foreign workers	1. Foreign workers working in Vietnam without work permits,...	On what grounds will this take place? (spot check records, audit records, permit withdrawal decision etc.). The authority to issue such background documents should be clarified (by the Dep. of Labor-Invalids-Social Affairs, Labor inspectors, district level PC Chairs).
		2. Departments of Labor, Invalids and Social Affairs of provinces and cities directly under Central Government shall request the police to impose forced departure measures or deportations on cases specified in Paragraph 1 of this Article.	The authority to propose and enforce coerced exit or deportation should be made clear.
16	Article 15. Effectiveness	2. This decree replaces Decree No. 34/2008/NĐ-CP ...	The authority to supersede or rescind related decrees that exist before this draft decree should be considered.