

## Criminal charges relating to work permits

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The blooming of global investment has been shrinking the world and blurring national borders. In our region, the Asean Economic Community (AEC) blueprint is designed to establish Asean as a single market and production base. It is hoped that Asean will become more dynamic and competitive, with new ways to expedite existing economic initiatives.

The AEC is paving the way for a freer flow of skilled labour across borders, especially in eight professions: medical doctors, dentists, nurses, engineers, architects, accountants, surveyors and tourism professionals.

Of course, it is an exaggeration to say there will be a totally free flow of expertise across borders. Work permits will still be required, although the AEC will attempt to facilitate visas, harmonise the procedures for obtaining work permits and standardise various professional qualifications. Some skilled professionals may also be required to complete licence requirements for working within the region.

Beneath the various policies and frameworks, Thailand's domestic laws remain restrictive. For example, the Alien Working Act still imposes work permit requirements that wholly exclude foreigners from 39 occupations reserved for Thai nationals.

Types of work open to aliens, work areas and the period of work are prescribed by ministerial regulations related to national security, occupational opportunity for Thais and the demand for foreign labour to the extent necessary for a developing country.

Under the Act, "work" is defined to include all engagement in work by exerting energy or using knowledge regardless of whether it is in exchange for compensation in the form of wages or benefits. This broad definition includes every working activity from operating a business to attending a seminar \_ or even volunteering for a day or two.

When a work permit is granted, the permit holder can only engage in the category of work specified in the work permit, and with the employer and at the location specified in the work permit. A person who wants to change or add a work category, employer or work location must apply for an amended work permit.

The penalties for an alien who engages in work without a work permit, or a permit holder who violates the restrictions in his or her permit, are severe and include up to five years in prison and/or a fine of up to 100,000 baht. Imprisonment is not often imposed, but an alien who is convicted of working without a work permit is normally deported and blacklisted from returning to Thailand for five years.

Employees who work without a permit are not the only ones who can be convicted of a crime and deported. Their employer also faces criminal liability under the Act for engaging an alien to work without a permit. If the employer is found guilty, he or she will normally be fined up to 100,000 baht per employee. And if the employer is a foreigner, he or she will normally be deported and blacklisted for five years.

If the employer is a company or other juristic person, its officers and directors are normally charged as co-defendants. In the past, the public prosecutor was often able to convict those individuals without proving their intent or their actual participation in the hiring process. Instead, it was usually enough to prove the juristic person committed the offence and that the individual officers or directors were generally responsible for the employer's overall operations.

At least to some extent the burden was shifted to the individual managers to prove they did not intentionally hire an illegal worker or were not involved in the hiring process. The company was considered innocent until proven guilty, but the individual managers were treated as if they were guilty until proven innocent, and their constitutional rights were thereby overlooked.

Article 39 of the constitution is aimed at protecting the rights of the alleged offender by providing that a suspect in a criminal case is presumed innocent. Last year, the Constitution Court rendered Decision 12/2555, which stipulated it is a violation of Article 39 for an offender to be presumed guilty based on that person's legal status.

It is also a violation of the constitution to presume the facts that constitute a criminal offence just because the defendant has a certain legal status. This Constitution Court decision is welcome news to officers and directors of Thai companies who may be blamed for their company's crimes merely because they hold management positions.

Under the Constitution Court's interpretation, an officer or director of a company that employs aliens without work permits can be convicted only if the public prosecutor proves the individual manager knowingly hired aliens without work permits. The accused manager or other person responsible for company operations can successfully defend the charges by asserting he or she did not know the alien lacked a work permit or that he or she did not participate in the hiring process.